

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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G/kmg

_____AD3d_____

Submitted - May 23, 2008

FRED T. SANTUCCI, J.P.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2006-05469

DECISION & ORDER

The People, etc., respondent,
v Jose Velez, appellant.

(Ind. No. 2963/92)

Lynn W. L. Fahey, New York, N.Y. (Jonathan M. Kratter of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Phyllis Mintz of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Marrus, J.), entered May 12, 2006, which denied, without a hearing, his post-conviction motion, inter alia, pursuant to CPL 440.30(1-a) for DNA testing.

ORDERED that the order is affirmed.

The Supreme Court properly denied that branch of the defendant's post-conviction motion which was pursuant to CPL 440.30(1-a) for DNA testing of certain physical evidence secured in connection with his 1993 trial. Contrary to the defendant's contention, the People met their burden of establishing that no such evidence is available for testing by submitting an official record indicating that the evidence was destroyed in 1994 (*see People v Pitts*, 4 NY3d 303, 311-312). Contrary to the defendant's further contention, there is no basis for imposing sanctions on the People based on the unavailability of the evidence, since he did not request its preservation or make this motion until after his appeals were exhausted (*see People v Barnwell*, 45 AD3d 1321; *People v Hernandez*, 25 AD3d

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566, 567; *People v Watkins*, 189 AD2d 623, 624).

SANTUCCI, J.P., ANGIOLILLO, ENG and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer
Clerk of the Court