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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 28

DWIGHT MOSS,

Appellant.

20 Eagle Street
Albany, New York
February 11, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE TROY K. WEBBER

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Moss.

3 MR. JUERGENS: Good afternoon. May it please the
4 court. Dave Juergens, Monroe County Public Defender's
5 Office for Dwight Moss. Could I reserve three minutes,
6 please?

7 CHIEF JUDGE WILSON: Yes.

8 MR. JEURGENS: A coerced guilty plea is not a
9 reliable indicator of wrongdoing. If a judge tells a
10 defendant, you can take the people's offer of seven years
11 or you can go to trial, let me tell you what happens if you
12 go to trial. If you go to trial, you're either going to be
13 acquitted and you can walk, or you're going to make me
14 happy and I can give you the maximum punishment, which in
15 this case is fifty years, which was erroneous. There was a
16 resentencing proceeding in this case by the Appellate
17 Division. Mr. - - -

18 JUDGE RIVERA: Why - - - why isn't his recourse
19 to argue for a downward departure, which he didn't in this
20 case? Might have gotten him the outcome he wanted, but he
21 didn't in this case. Why isn't that the appropriate
22 procedure?

23 MR. JUERGENS: Because he had - - -

24 JUDGE RIVERA: A conviction is a conviction. You
25 didn't vacate it, but if you wish to argue that that

1 conviction should not lead to a level 3 or even a level 2,
2 make your argument on a downward departure.

3 MR. JUERGENS: Because the coerced guilty plea in
4 this case was presented to the Monroe County court as a
5 reason not to find that the override is applicable, and
6 that's based upon a reasonable interpretation of the
7 guidelines. And I think it's important to emphasize in
8 this case that the board - - - there's no deference here.
9 The board - - -

10 JUDGE RIVERA: Well, it says conviction, right?

11 MR. JEURGENS: Pardon me?

12 JUDGE RIVERA: The guidelines say conviction,
13 correct?

14 MR. JUERGENS: Guidelines say conviction.

15 JUDGE RIVERA: Okay. And it is a conviction?

16 MR. JUERGENS: And it is a conviction,
17 absolutely.

18 JUDGE RIVERA: So - - -

19 MR. JUERGENS: It's - - - it's - - - but it - - -

20 JUDGE RIVERA: So why is it reasonable to now add
21 language into the guidelines?

22 MR. JUERGENS: Because for - - - the guide - - -
23 the board was authorized to come up with procedures and
24 guidelines to accurately assess the risk of a sex offender.
25 The future risk.

1 JUDGE WEBBER: So do not the acts underlying this
2 conviction, would that not assist the board in assessing
3 and determining whether - - - what the risk factor is?

4 MR. JUERGENS: And that would be appropriate
5 should the People seek an upward departure based on the
6 underlying conduct. This override provision just relies on
7 the mere fact of conviction, and Mr. Moss established by
8 substantial evidence, I would say even beyond a reasonable
9 doubt at the resentencing proceeding, that this mere fact
10 of conviction is not a reliable indicator of wrongdoing and
11 that's - - -

12 JUDGE HALLIGAN: But he - - -

13 JUDGE GARCIA: Could he move to vacate the
14 conviction?

15 MR. JEURGENS: Pardon?

16 JUDGE GARCIA: Could he move to vacate the
17 earlier conviction?

18 MR. JUERGENS: Well, Mr. Moss may have had a
19 problem in this case because he did try to - - - his
20 attorney never filed a notice of appeal. He did apply for
21 late - - - filing a late notice that was denied by the
22 Appellate Division, and then under the CPL 440(2)(c) - -

23 JUDGE GARCIA: Did he ever move to try to vacate
24 that conviction?

25 MR. JUERGENS: I - - - to my knowledge, I'm not

1 aware of a 440 motion - - -

2 JUDGE GARCIA: So it seems like all the
3 collateral effects from that conviction go away if we do
4 this, particularly this or a prior felon, but he doesn't
5 have any exposure to jeopardy if the People wanted to retry
6 him for that alleged crime, right?

7 MR. JUERGENS: Well, moving - - - moving to
8 vacate the conviction would be one way to get the relief as
9 far as not having his risk level automatically jumped from
10 1 to 3.

11 JUDGE GARCIA: Okay.

12 MR. JEURGENS: Okay? That also - - - vacating
13 the conviction also involves resurrecting the prosecution.

14 JUDGE RIVERA: But I just want to be clear. Was
15 your answer before that he could not vacate the conviction?
16 There was some procedural bar to it?

17 MR. JUERGENS: I - - - I - - - I believe, because
18 this defect is clear from the face of the record, that that
19 would have been a type of issue that he would have had to
20 have raised on the direct appeal itself.

21 JUDGE CANNATARO: Didn't the sentence - - - the
22 resentencing court tell him he did have an opportunity to
23 vacate the conviction? He just had to go, quote unquote,
24 to a higher court to do it?

25 MR. JUERGENS: The - - - the county court

1 basically said it did not have authority in the context of
2 a resentencing provision.

3 JUDGE CANNATARO: That was not the scope of the
4 remand?

5 MR. JEURGENS: Yeah.

6 JUDGE CANNATARO: Right.

7 MR. JUERGENS: So he - - - he had no authority.
8 If you - - - if you want to try and vacate it, you need to
9 go and do - - -

10 JUDGE RIVERA: And if he had tried and been
11 unsuccessful, let's say maybe he made it all the way up
12 here, and we didn't agree that he could vacate it, wouldn't
13 that have strengthened his position to argue for the
14 downward departure?

15 MR. JUERGENS: Well, if he would have went - - -
16 say he did a direct appeal and he raised the same issue and
17 he lost, well, then we have principles of collateral
18 estoppel that might prevent him from relitigating in the
19 SORA proceeding, you know, whether this was a coerced
20 guilty plea or not.

21 JUDGE WEBBER: Well, I don't understand why.
22 You'd be in the same position that you are in now in terms
23 of whether the conviction should be used for purposes of
24 the board's assessment or not.

25 MR. JUERGENS: I - - - I'm not sure I understand.

1 JUDGE WEBBER: I'm not understanding - - - Judge
2 Rivera stated, if in fact he had moved and he came up here
3 and he lost, you're in the same position in terms of SORA,
4 are you not?

5 MR. JUERGENS: Well, he's in a - - - he - - -
6 he's - - - his position is that he established - - - he
7 proved that this was a coerced guilty plea - - -

8 JUDGE WEBBER: Right, so we're talking about
9 moving to vacate after the county court had made a
10 determination that he wasn't going to be adjudicated a
11 predicate because of the coerciveness of the - - - of the -
12 - - of the plea. So at that point in time, why did he not
13 move to vacate the conviction?

14 MR. JUERGENS: I can't speak on this record as to
15 why he may or may not. You know, he did not, but our
16 position is that's not the only way for him - - -

17 JUDGE HALLIGAN: But was there a procedural
18 barrier to him doing so at that juncture? Without - - -
19 without going beyond the record, was there - - -

20 MR. JUERGENS: I - - - I believe the procedural
21 barrier would have been the fact that this should have been
22 an issue raised on the direct appeal. His attorney never
23 filed a notice of appeal. The Appellate Division denied
24 his request to still file a late appeal, and that would be
25 the procedural barrier, but it's our position that just

1 because - - -

2 JUDGE RIVERA: He didn't have an ineffective
3 assistance of counsel claim on the failure to file the
4 appeal - - -

5 MR. JUERGENS: On this - - -

6 JUDGE RIVERA: - - - given that he was
7 successful?

8 MR. JUERGENS: On - - - on this record, I - - - I
9 - - - I couldn't say. It's unknown, but I guess my - - -
10 my main key point is that just because there might have
11 been a way for him to have avoided this jump from level 1
12 to level 3 by moving to - - - trying - - - trying, if - - -
13 if he could have vacated the conviction on direct appeal -
14 - -

15 JUDGE RIVERA: And let's say he had. Let's say
16 he had for one moment. Could not the People have argued,
17 based on whatever record was created, that nevertheless, he
18 should get a level 3 anyway?

19 MR. JUERGENS: Oh, absolutely. They - - - they
20 had - - - they had - - - this was the presumptive - - - the
21 establishment of the presumptive risk level, and - - -

22 JUDGE RIVERA: Isn't - - - aren't we just back to
23 his - - - his real recourse, given the posture of the case
24 and what - - - what the prosecution - - - People could have
25 done, a request for a downward departure?

1 MR. JUERGENS: I would argue that that's the
2 People's recourse here, because the override should not
3 have been applied because it was an invalid, coerced
4 conviction. The guidelines to be rational should be read
5 like the guidelines expressly say that we are going - - -

6 JUDGE RIVERA: Yes, but even assuming all of that
7 is true, my - - - my point was, could they not have
8 proceeded to request an upward departure based on whatever
9 record is created regarding that particular prosecution?

10 MR. JUERGENS: The People could have moved - - -

11 JUDGE RIVERA: And the defendant then would have
12 sought a downward departure. Or hopefully counsel would
13 have said, I disagree, no, they haven't met their burden,
14 but if they have, I'm requesting a downward departure?

15 MR. JUERGENS: Or - - - or - - - or the defendant
16 could have argued against the People's request for an
17 upward departure.

18 JUDGE RIVERA: No, no. I'm saying they could
19 have done that, and in the alternative, I'm also - - - I
20 mean, we see that all the time, right? They make an
21 argument on the merits of the points and so forth, and then
22 say, but in any event, if the court is not in agreement, we
23 want an upward departure if it's the prosecution. We want
24 a downward departure if it's the defendant.

25 MR. JUERGENS: And all that would be resolved on

1 - - - on a remittal by this court with a - - - with a - - -
2 with a holding that you can't use a coerced guilty plea as
3 a predicate for an upward departure, because you're saying
4 the mere fact of the conviction allows the jump from 1 to
5 3. We're saying that the guidelines can only be
6 interpreted rationally.

7 If you go with what the board said in the
8 guidelines that YO adjudications and convictions can be
9 used, that mere fact, because they are reliable indicators
10 of wrongdoing, and there's a presumption of reliability,
11 and if the defendant does not attack the reliability of the
12 conviction, then the defendant is out of luck. The
13 conviction is used, and the override is applied.

14 JUDGE SINGAS: But that's the way it's written.
15 A conviction is a conviction. There's not a - - - there's
16 not an allowance as there is under an enhanced sentencing
17 provision to make a determination whether that was
18 constitutionally sound, right?

19 MR. JEURGENS: I - - -

20 JUDGE SINGAS: Like, there's different - - -
21 doesn't - - - doesn't that inquiry end there, then?

22 MR. JUERGENS: I - - - I don't disagree with
23 that. What I would say is that there's no deference to be
24 given to the board. The board has never weighed in on this
25 issue. Neither the Correction Law nor the guidelines deal

1 with what do you do if the mere fact of conviction is based
2 upon a coerced guilty - - -

3 JUDGE GARCIA: Don't they weigh in by just using
4 the term, conviction, and not having this language that
5 Judge Singas says? Isn't that weighing in? They made a
6 different choice here.

7 MR. JEURGENS: I - - -

8 JUDGE GARCIA: It's conviction is conviction.

9 JUDGE RIVERA: And that could have depended on
10 the assumption that the defendant could seek to vacate the
11 conviction.

12 JUDGE WEBBER: And also the fact that we're
13 talking about SORA as a civil proceeding and not as a
14 criminal proceeding, right?

15 MR. JUERGENS: Well, I would - - - I would say
16 that if a conviction is invalid and unreliable to enhance a
17 defendant's sentence, which was the situation here, it
18 shouldn't be used to increase the defendant's risk level
19 determination based on the mere fact of the - - -

20 JUDGE WEBBER: But again, we're talking about
21 enhancing a defendant's sentence for purposes of being a
22 predicate or persistent. We're not talking about the
23 sentence - - - and we're not talking about the sentence in
24 terms of the risk factor, in terms of the SORA
25 determination.

1 MR. JUERGENS: That's true.

2 JUDGE WEBBER: But again, don't you see a
3 difference between the fact that we're talking about a
4 civil proceeding as opposed to a criminal proceeding?

5 MR. JUERGENS: No, because we're still - - - SORA
6 is based on reliability. If you have an unreliable
7 conviction as a matter of law - - -

8 JUDGE WEBBER: Okay. So what we're talking about
9 - - - you're saying - - - you stated it's an unreliable
10 conviction. It's a conviction. There's no issue. The - -
11 - my understanding from the record is there's no statement
12 that - - - that - - - of actual innocence, of innocence,
13 that he did not in fact commit the - - - the - - - the
14 crime, right?

15 MR. JEURGENS: I would - - -

16 JUDGE WEBBER: There's no - - - so he's not
17 saying he's innocent. He's just stating that there was a -
18 - - there was coercion in terms of the - - - of the plea
19 and sentence.

20 MR. JEURGENS: I would - - - I would - - -

21 JUDGE WEBBER: We're back to - - - I'm sorry.
22 We're back to a conviction is a conviction.

23 MR. JUERGENS: I would have to push back on that
24 a little bit, because I think there were statements made
25 during the resentencing proceeding which clearly showed

1 that Mr. Moss was maintaining his innocence.

2 JUDGE GARCIA: Well, he could vacate the
3 conviction and go back and litigate that, right?

4 MR. JUERGENS: Well, there's a procedural barrier
5 for if you do that - - -

6 JUDGE GARCIA: And then if he wins and vacates
7 that, if he vacates the conviction, even, there's a
8 mechanism for coming in periodically to get your level
9 reduced, and that would be a changed circumstance, wouldn't
10 it?

11 MR. JUERGENS: I don't believe that vacating the
12 conviction was a viable remedy for Mr. Moss. I would argue
13 that - - -

14 JUDGE GARCIA: Viable because, again, it - - -
15 procedurally, it's barred, or - - -

16 MR. JUERGENS: Procedurally - - - there's a
17 procedural bar. Plus, our key point is the mere fact that
18 that's available as a remedy doesn't mean that he shouldn't
19 be allowed, as a matter of due process and under the
20 statutes, to contest the reliability of the conviction that
21 they're using for the override at the SORA proceeding.
22 That - - - what relief did he ask for? He says, don't make
23 me a level 3 based on a coerced guilty plea. That's what
24 he was - - -

25 JUDGE RIVERA: Sounds like a very strong argument

1 for downward departure, especially if there's a procedural
2 bar.

3 MR. JEURGENS: But - - -

4 JUDGE RIVERA: That - - - that doesn't fall on
5 his shoulders, right? That in part, the procedural bar is
6 because of the attorney's failure to properly file a notice
7 of appeal - - - of failure to file a notice of appeal.

8 MR. JUERGENS: Yes, but our position is that the
9 override should not have applied. The People still have
10 the remedy of moving for an upward departure. Mr. Moss had
11 the ability at that point to argue against it, maybe
12 prevent it from going all the way up to a 3.

13 Maybe it only goes up to a 2, but that's our
14 position, that a - - - a coerced guilty plea, unreliable as
15 a matter of law, should not be used for an automatic
16 override.

17 CHIEF JUDGE WILSON: Thank you. And Counsel,
18 before you start, I forgot when we started the argument to
19 - - - to announce that we are delighted to be joined by our
20 colleague from the First Department, Troy Webber.

21 JUDGE CANNATARO: Still delighted.

22 MR. MCCARTHY: Welcome, Judge Webber.

23 JUDGE WEBBER: Thank you.

24 MR. MCCARTHY: I was going to remind you of that.
25 May it please the court. Marty McCarthy for the

1 People. What we're talking about here is a conviction, so
2 what we're focusing on is whether there is the fact that
3 the conviction exists. The only time we look at
4 reliability of the conviction is, as Judge Webber pointed
5 out, is in sentencing proceedings. You cannot use an - - -
6 a unconstitutionally obtained conviction to enhance a
7 defendant's sentence.

8 JUDGE RIVERA: Well, why - - - why should the
9 People get a benefit off of a coerced plea?

10 MR. MCCARTHY: Why should the defendant get a
11 benefit in this scenario?

12 JUDGE RIVERA: What's the benefit?

13 MR. MCCARTHY: He - - - he - - - he avoids double
14 jeopardy for one, right? So he has all the protections - -
15 -

16 JUDGE RIVERA: But what if he's - - - what if - -
17 - what about this procedural bar? Do you think - - - maybe
18 you disagree. Do you think there is a procedural bar?

19 MR. MCCARTHY: Oh, no, no, no, no. So - - -

20 JUDGE RIVERA: To vacating the - - - the plea?

21 MR. MCCARTHY: No. The focus on due process - -
22 -

23 JUDGE RIVERA: The conviction.

24 MR. MCCARTHY: - - - is whether the processes
25 exist, not whether the defendant has availed himself of

1 them, so the question isn't whether the defendant has the
2 ability now to perfect the appeal. He doesn't. The
3 question is, is did he have the ability to perfect an
4 appeal? Could he have filed a notice of appeal on the 2007
5 conviction? That's what due process requires.

6 JUDGE RIVERA: Okay, but his lawyer failed to do
7 so, so that - - - we've got - - - and then the Appellate
8 Division denied him the opportunity to file a late appeal.

9 MR. MCCARTHY: But that - - - that is not - - -
10 in - - - when you look at due process, you look at whether
11 the remedies are available, so - - - so we're pushing
12 against each other on this concept - - -

13 JUDGE RIVERA: Well, no, let me just - - - do you
14 agree or do you see it differently that there's a
15 procedural bar to the 440? Forget the direct appeal for
16 one moment.

17 MR. MCCARTHY: Okay. So we're - - - so you want
18 - - - and that's where I was going to go.

19 JUDGE RIVERA: Yes.

20 MR. MCCARTHY: There's a 440 avenue, and - - -
21 and the funny thing was.

22 JUDGE RIVERA: No, no, do you - - - so you
23 disagree with counsel?

24 MR. MCCARTHY: I disagree because - - -

25 JUDGE RIVERA: You think there is a path under

1 the 440?

2 MR. MCCARTHY: There is at least one procedural
3 path.

4 JUDGE RIVERA: What is that?

5 MR. MCCARTHY: And it's called the 440 path.

6 JUDGE HALLIGAN: Which could be brought in your
7 view, now?

8 MR. MCCARTHY: Correct.

9 JUDGE GARCIA: That's an ineffective assistance
10 claim.

11 MR. MCCARTHY: And funny we should bring this up,
12 because last argument, you posed a hypothetical, and that
13 hypothetical was a discussion about whether the defendant
14 was actually coerced by the - - - the hypothetical used.
15 It was forty years, the cap was twenty, and they were
16 offering them ten. I mean, that hypothetical kind of fits
17 pretty neatly with what we have here. The judge threatened
18 fifty, the actual maximum was twenty-five, and he was
19 offered seven.

20 CHIEF JUDGE WILSON: Well, the ineffective
21 assistance claim here that might theoretically brought - -
22 - be brought, as I understood it, was the failure to file a
23 notice of appeal.

24 MR. MCCARTHY: Or that whether he was adequately
25 - - - whether he was actually coerced into that - - - into

1 that guilty plea because his attorney didn't tell him about
2 the maximum - - -

3 JUDGE HALLIGAN: Well, either - - - whether - - -
4 whether he proceeded on that basis or not, wouldn't he have
5 an ineffective assistance claim based on the failure to
6 file a direct appeal in any event? Did - - - did - - -
7 would it have to be the additional point?

8 MR. MCCARTHY: So - - - so the question about the
9 ineffectiveness goes to the question of whether - - - and I
10 don't believe this court has addressed this issue. I think
11 the last time you - - - you looked at it was Syville, I
12 believe, which was about a decade ago, about the concept of
13 - - - of a defense attorney's failure to file a notice of
14 appeal timely.

15 And then that year and thirty days, I believe,
16 that - - - that grace period that you have in order to file
17 late notice of appeal, the court would have to re - - -
18 sort of examine that.

19 JUDGE GARCIA: But here, you've got a ruling that
20 says the plea was coerced, and you have a lawyer who didn't
21 file an appeal, was later determined to be - - - seems like
22 something of a claim, right?

23 MR. MCCARTHY: So let's talk about what was
24 found. What was found was a substantial evidence finding,
25 which is standard under second felony offender for

1 challenging the constitutionality of the - - - of the
2 conviction. Substantial evidence is not preponderance of
3 the evidence, which is the standard in a SORA proceeding.
4 It's a lesser standard.

5 So what the - - - what the defense was attempting
6 to do here was basically trying to invoke collateral
7 estoppel and say, hey, guess what? At that proceeding,
8 during the sentencing proceeding, the second felony
9 sentencing proceeding after the remand from the Fourth
10 Department, you found that the - - - the - - - the previous
11 plea was coerced, and the court said, that's not exactly
12 what I found.

13 And what the court was signifying was that was
14 under a substantial evidence standard, and the court
15 actually - - - he - - - the judge in that - - - because the
16 - - - because we do have the transcript, actually said
17 substantial evidence. He said, I find substantial evidence
18 that the plea was coerced, and so the application of a
19 substantial evidence finding to a proceeding where
20 preponderance of the evidence would control, you wouldn't
21 be able to apply collateral estoppel in that scenario.
22 That's, in essence, what the defendant was trying to do,
23 and that's all the proof he put up.

24 JUDGE HALLIGAN: So to be clear, what's your
25 position on whether there's a path for the defendant to

1 seek to vacate the conviction at this point, and if so,
2 what is it?

3 MR. MCCARTHY: Okay. So I'm going to answer your
4 question, but then I'm going to push back on your question
5 because I should answer questions first before I push back.

6 JUDGE HALLIGAN: That would be helpful, yes.

7 MR. MCCARTHY: I understand. And I - - - and I
8 would invoke the example of Judge Garcia when we were - - -
9 when he was discussing - - -

10 JUDGE HALLIGAN: I'm just asking, is there - - -
11 is there, in your view, a path for him to vacate the
12 conviction?

13 MR. MCCARTHY: My attorney - - - the judge
14 misinformed me, and my attorney misinformed me of what my -
15 - - my maximum sentencing exposure would be. Therefore, he
16 was ineffective and my plea was not knowing, intelligent,
17 and voluntary. So the on the record stuff that happens
18 with the judge, together with any off the record stuff that
19 the defendant may be allowed to allege if it were true,
20 would be a path to a 440.

21 JUDGE RIVERA: Well, I - - - I - - - I thought
22 what we were going with on what's procedurally barred is
23 the argument, my attorney was ineffective for not filing a
24 notice of claim, a notice of appeal in a case where I had
25 not only a colorable claim, but a winning claim, as

1 established by the fact that a judge subsequently
2 determined that the plea was coerced.

3 MR. MCCARTHY: No, that's - - - I'm sorry. I - -
4 - I cut you off.

5 JUDGE RIVERA: I think that's - - - that's the
6 argument that we were discussing.

7 MR. JEURGENS: Yeah, now I'm - - -

8 JUDGE RIVERA: Is it your position - - - is it
9 your position that that argument could not be presented in
10 a 440, now?

11 MR. MCCARTHY: Don't think that particular
12 argument can be.

13 JUDGE RIVERA: Why not?

14 MR. MCCARTHY: Under Syville, which is that - - -
15 which is - - - and it's been a while, and I'm sorry. I
16 wish I'd read it before I'd come here. That line of cases
17 that talks about an attorney's ineffectiveness for failing
18 to file a notice of appeal, because - - -

19 JUDGE RIVERA: Right, that's where no one knows
20 the outcome. But here you do, because you've got the
21 decision.

22 MR. MCCARTHY: You do now.

23 JUDGE RIVERA: Yes.

24 MR. MCCARTHY: We didn't know then.

25 JUDGE RIVERA: But that's the point.

1 MR. MCCARTHY: So I don't know. I'm - - - again,
2 I'm pleading ignorance here. My last recollection is that
3 - - - is that particular type of claim can't be made in
4 440, but assume - - - assume I'm wrong and you're right,
5 then his mechanism is a 440. But I don't think I - - -
6 don't know, honestly, and obviously I would trust the fact
7 that you would tell me I was wrong if I was wrong. I don't
8 know.

9 JUDGE CANNATARO: So it's unclear. I just want
10 to get back to Judge Halligan's question. I think your
11 answer to her question that you pushed back on is
12 ultimately, it's not clear whether he has an avenue to
13 vacate the conviction at this point?

14 MR. MCCARTHY: No, I - - - no, actually, I
15 answered her question, and my answer - - -

16 JUDGE HALLIGAN: Okay. So what would he - - -

17 JUDGE CANNATARO: What was - - - what was the
18 answer? I didn't understand.

19 JUDGE HALLIGAN: Yes.

20 MR. MCCARTHY: My answer to her question is, if
21 the defendant can allege that his attorney, as well as the
22 judge, misadvised him of his maximum sentencing - - -
23 sentencing exposure, along the lines of the hypothetical
24 Judge Garcia posed in the last case, if that were the case,
25 if that were true, he can bring this as a 440 claim.

1 So I pled guilty because my attorney misadvised
2 me of the maximum sentencing exposure, and the judge did
3 the same thing.

4 JUDGE RIVERA: So I mean, he would - - - he would
5 relitigate the issue in the 440, right?

6 MR. MCCARTHY: He - - -

7 JUDGE RIVERA: Right, because there's already a
8 determination?

9 MR. MCCARTHY: But again, the other thing - - -

10 JUDGE RIVERA: It's because you say it's a
11 different standard? I'm not - - - I'm not clear.

12 MR. MCCARTHY: The other thing you have to
13 remember is it's - - - it's a different standard.

14 JUDGE RIVERA: Yes.

15 MR. MCCARTHY: It's - - - it's not only a
16 different - -

17 JUDGE RIVERA: That's your argument. It has to
18 be relitigated because it's a different standard?

19 MR. MCCARTHY: No, no, no - - - yes, but - - -
20 but let me finish that thought. It's not only a different
21 standard for sentencing proceedings, it's a different
22 standard as you discussed in the previous case to vacate
23 your plea, right? So - - - so if you were to take a
24 finding - - - if this scenario had been a scenario where he
25 had somehow perfected or filed a notice of appeal and it

1 sat dormant for a decade and a half, that finding in the
2 440, right - - - or I'm sorry, in the - - - in the second
3 felony offender litigation regarding the sex abuse first
4 case.

5 That finding that that statement may have been
6 coerced, that itself would not have been enough to vacate
7 his plea, because you would have had to consider all the
8 other factors, because as you discussed previously, the
9 improper articulation of the - - - of the maximum - - -

10 JUDGE WEBBER: Well, it was - - - but I would
11 just say it was - - - it was more than that. It wasn't
12 only that a misstatement as to what the maximum was, it was
13 that if you don't take the plea, I am going to impose the
14 maximum sentence. That was the coercion here.

15 MR. MCCARTHY: But that's just one fact - - -

16 JUDGE WEBBER: So that's even worse in terms of
17 finding of perhaps ineffective assistance of counsel and
18 not filing a notice of appeal after this is the state - - -
19 this is made known in terms of the - - - the
20 constitutionality and the predicate felony status.

21 MR. MCCARTHY: Coerced or not, it's still one
22 factor, and you would have - - - the court would have to
23 weigh all those factors. That factor may weigh heavily and
24 outweigh the other factors, but the point is, that analysis
25 is more than just whether the statements were coercive.

1 That's my point. Here, all we have is a finding that the
2 statement was coercive. That's the only thing that was
3 found in that second felony offender proceeding.

4 JUDGE RIVERA: Let's say we - - - let's say we
5 agree to this extent with counsel that if - - - if there's
6 a finding by a court that the plea is indeed coerced, we
7 don't want to dishonor that finding. We don't want to give
8 any benefit related to a coerced plea, and so it should not
9 be counted as a conviction for purposes of SORA. Don't you
10 still have the opportunity to request an upward departure?
11 Why isn't that the best approach?

12 MR. MCCARTHY: When we have requested - - - we
13 did request an upward departure at - - -

14 JUDGE RIVERA: But the court didn't need to do
15 that because it went with the override?

16 MR. MCCARTHY: No.

17 JUDGE RIVERA: So I'm just saying if - - - if - -

18 MR. MCCARTHY: But we - - - but we did.

19 JUDGE RIVERA: Okay. I understand. So my point,
20 though, is if you still have that opportunity, should we
21 agree with counsel that this particular - - - the plea,
22 because it's found to be coerced, should not count for
23 purposes of saying the conviction is reliable?

24 MR. MCCARTHY: But you'd have to - - -

25 JUDGE RIVERA: All I'm saying is, why isn't that

1 the proper approach? I mean, this seems to me sui generis.
2 I hope this is not going on in every courtroom in New York.

3 MR. MCCARTHY: I - - - I couldn't tell you.

4 JUDGE RIVERA: There may be pleas coerced, but
5 hopefully they're not - - - the defendants still have an
6 opportunity to seek to vacate the conviction based on any
7 alleged coercion.

8 MR. MCCARTHY: You said opportunity. Again,
9 that's what due process requires. Due process requires,
10 was there an opportunity? The answer was yes. The fact
11 that he didn't avail himself of that is a different
12 problem, but when you focus - - - when you look at due
13 process - - -

14 JUDGE RIVERA: Okay, but let's go back to my
15 question. Why - - - why is it - - -

16 MR. MCCARTHY: Yeah, I was going to, but you
17 distracted me.

18 JUDGE RIVERA: Why - - - why not just allow the
19 People to be able to request an upward departure, make
20 whatever argument they want as to why the court should rely
21 on the allegations and whatever other evidence you're going
22 to present regarding the offense?

23 MR. MCCARTHY: Because if you were to do that,
24 you would in essence saying that people can't use this
25 conviction in the SORA proceeding, and - - -



1 JUDGE RIVERA: Well, yes, that's my point.

2 MR. MCCARTHY: Yeah, but and I was restating your
3 point.

4 JUDGE RIVERA: Okay.

5 MR. MCCARTHY: And I'm going to move on from that
6 and say you've never done that before. You wouldn't - - -
7 you haven't done it in a scenario of special information.
8 You haven't done it in cases where a felony is a disabling
9 feature in a civil context, which is a civil proceeding.
10 So anything where a felony would be a bar to employment,
11 you've never done that before, right?

12 You would be creating due process in a scenario
13 where there was procedures available to the defendant at
14 the time of, and so when you look at whether you should
15 create that process, you have to focus on whether there
16 were existing procedures that the defendant could have
17 availed himself of, and the answer is that - - - and I
18 think I'm beating a dead horse on this, is yes, there were.

19 So when you focus on due process, that's his
20 claim. His claim is due process requires this, and my
21 answer to you is, if due process didn't require that in a
22 special information context, when you decided in People v.
23 Knack, it's - - - it can't - - -

24 JUDGE RIVERA: Well, I thought - - - I thought at
25 least in part, his argument was, if you're interpreting the

1 guidelines, you cannot read this conviction as the
2 conviction that is intended under the guidelines. What's
3 your response to that?

4 MR. MCCARTHY: My response to that is a
5 conviction's a conviction. The - - -

6 JUDGE HALLIGAN: But why is it reliable if - - -
7 if it was - - - if it was not a constitutionally obtained
8 conviction? Usually, we think about those as in - - - in
9 mutually exclusive buckets, it seems to me.

10 MR. MCCARTHY: So when we - - - when we talk
11 about reliability, going back to the second felony
12 offender, persistent felony offender sentencing issues.
13 We're concerned about enhancing a punishment, using
14 something that was - - -

15 JUDGE HALLIGAN: But in what way is the - - - in
16 what way - - - set to the side those provisions - - - in -
17 - - in what common sense way is the conviction reliable if
18 the plea was unconstitutionally obtained?

19 MR. MCCARTHY: Because it still exists.

20 JUDGE HALLIGAN: That's not the question. The
21 question isn't - - - isn't, does it exist? The guidelines
22 say - -

23 MR. MCCARTHY: No - - -

24 JUDGE HALLIGAN: If I can, the guidelines say is
25 it - - - that it's supposed to be a reliable indicator,

1 right?

2 MR. MCCARTHY: Yeah.

3 JUDGE HALLIGAN: So how is it reliable if it's
4 not constitutionally obtained?

5 MR. MCCARTHY: Because he was - - - because - - -
6 because the conviction still exists, because the conduct
7 underlying the conviction was admitted to.

8 JUDGE HALLIGAN: It just seems to me - - - in a
9 plea that was unconstitutionally obtained, so I'm just
10 trying to understand how existence and - - - and - - -
11 reliability are - - - are synonyms.

12 MR. MCCARTHY: Because when we look at the - - -
13 sort of the ultimate indicator of reliability, the
14 defendant did nothing about this conviction. Why didn't he
15 do anything about this conviction? Because he got a really
16 good deal, right? That, to me, is the most reliable
17 indicator that he was guilty of the conduct. That's the
18 focus, and again, when we talk about - - -

19 JUDGE RIVERA: Would you feel differently if he -
20 - - I understand your position, but let's just go with the
21 hypothetical. Would you have a different response if there
22 was absolutely no path to vacate the conviction?

23 MR. MCCARTHY: Okay. So good question. Let's -
24 - - foreign country, right? Maybe - - - maybe the
25 conviction happened in a foreign country, and the foreign

1 country didn't have any of the due process trappings that
2 we have here. Then that might be a different story, right?
3 So and I can't think of one off the top of my head.

4 I can - - - I can point you to the Fourth
5 Department had actually dealt with this particular issue in
6 Thailand, and - - - and they did an analysis of whether the
7 procedures - - - and I can give you the cite. I kind of
8 was sitting in the attorney lounge, really bored, and
9 wanting to find cases that I can cite to you at oral
10 argument. It's a board of sex - - - Board of Examiners of
11 Sex Offenders v. D'Agostino. It's 130 A.D.3d 1449. It
12 actually - - - it actually cites to People v. Knack, and it
13 does this analysis - - - it - - - it first holds that due
14 process didn't require it, but then it goes further to
15 actually do the analysis that you're talking about.

16 Did - - - were there processes in place in
17 Thailand? Were - - - and they - - - and they didn't just
18 focus on his appellate rights. They also focused on the -
19 - - the trial itself. Was the trial fair?

20 JUDGE RIVERA: And what did they decide?

21 MR. MCCARTHY: They ultimately decided in that
22 case that he did have a - - - he did have at least one
23 alternative to - - - to address the conviction, and when
24 they looked at the specific trial issues, they looked at -
25 - - I can't - - - I think it was, like, a confrontation

1 issue and found that it was - - - we had a similar rule in
2 New York, so that the trial itself was not an
3 unconstitutional obtaining of that conviction, but that's
4 just an example of where that did happen.

5 If there was a country where it didn't, then
6 maybe this would be a different story. There would be, he
7 didn't have a right to an appeal, and there were - - - at
8 trial, there was - - - here, you're allowed to use hearsay
9 and there's no confrontation or basically a summary show
10 trial where there's no evidence presented at all.

11 That might be a different story, but that's not
12 what we had here, and maybe if that case came before you,
13 then maybe you'd have to contemplate creating a due process
14 remedy for that particular defendant, but that's not what
15 you have here.

16 JUDGE RIVERA: Thank you.

17 MR. MCCARTHY: Any other questions?

18 CHIEF JUDGE WILSON: Thank you.

19 MR. MCCARTHY: Thank you.

20 MR. JUERGENS: This court doesn't need to create
21 any due process remedies. The - - - the - - - the
22 conviction that was found to be a coerced guilty plea, that
23 ruling should have been applied in the SORA context. When
24 you use a coerced guilty plea for an override, there's
25 three errors. You're violating legislative intent, because

1 the - - - as this court has said over and over again, the
2 intent is to have accurate assessments of an offender's
3 future risk. How can you have an accurate assessment if
4 you're relying upon unreliable evidence?

5 JUDGE SINGAS: So is every SORA defendant that's
6 subject to an override entitled to a hearing to determine
7 the constitutionality of the prior conviction?

8 MR. JUERGENS: If that defendant raises a Diaz
9 claim. This Court in People v. Victor Diaz, said that
10 there's a distinction between accuracy and sufficiency. If
11 you don't raise a challenge to the accuracy of the
12 underlying conviction, it's going to be held sufficient and
13 the override is going to apply, which is going to happen in
14 a vast majority of cases.

15 This is a unique situation. This is a case where
16 Mr. Moss proved it was a coerced guilty plea. It was
17 unreliable as a matter of law. Treat it like you would
18 treat a coerced confession. It's - - - it's - - - it's - -
19 - you can't use it for any purpose.

20 JUDGE SINGAS: Well, you can't use it for an
21 enhanced sentence purpose, and that's explicit in the
22 legislation, but it's not so - - - under the guidelines and
23 under SORA, so what are we to make of that?

24 MR. JUERGENS: We - - - we - - - we have to read
25 the guidelines so that they don't violate legislative

1 intent. We have to read the guidelines so that it doesn't
2 violate due process.

3 JUDGE GARCIA: So could legislative intent
4 override the text of the guidelines or statute?

5 MR. JUERGENS: The guidelines say you can use a
6 conviction which we assume is a reliable - - -

7 JUDGE GARCIA: Does it say that?

8 MR. JEURGENS: Yes, yes.

9 JUDGE GARCIA: It says, we assume it's reliable
10 in the guidelines?

11 MR. JEURGENS: In the guidelines, it says - - -
12 it says the reason you can use a YO adjudication, which is
13 not a conviction, and convictions are because those are
14 reliable indicators of wrongdoing. You can - - - you can -
15 - - from the mere fact of the conviction, you can make a
16 rational conclusion that the defendant committed the
17 underlying acts.

18 JUDGE WEBBER: Well, that was my question before.
19 Why is it, again, that it was coerced, that the plea was
20 coerced or found to be coerced, why does that mean that the
21 underlying acts - - - that the defendant did not, in fact,
22 commit the underlying acts? I mean, I know you stated that
23 - - - at some point, he stated that he did not commit the -
24 - - the crime, or he wasn't guilty, or he was innocent, but
25 I don't see that in the record.

1 MR. JUERGENS: There's - - - there's stuff in the
2 resentencing provision where he - - - where he made claims
3 the DNA test was not a match. There was other things where
4 he said where he was asserting his innocence, but I don't
5 think that's what we need to show here. We need to show
6 that it's an unreliable conviction. They can't use the
7 mere fact of - -

8 JUDGE WEBBER: So how are you defining
9 unreliable, or is there any - - - anywhere in the statute
10 that defines unreliable?

11 MR. JUERGENS: I - - - I have to - - - I have to
12 fall back and - - - and say - - -

13 JUDGE WEBBER: Does unreliable mean because it
14 was coerced?

15 MR. JEURGENS: Yes.

16 JUDGE WEBBER: Or does unreliable means because
17 the actions that he - - - that the individual is stating
18 that he or she did not commit the actions?

19 MR. JUERGENS: It's unreliable because most
20 defendants, if they're threatened by the judge to do the
21 maximum time - - -

22 JUDGE WEBBER: Well, hopefully, most defendants
23 are not threatened by a judge.

24 MR. JUERGENS: I - - - I - - - I would agree with
25 that. Hopefully not, but in that situation, it's - - -

1 there's a substantial risk the defendant's going to admit
2 to conduct that he's not guilty of because he doesn't want
3 to spend fifty years in prison.

4 CHIEF JUDGE WILSON: Counsel?

5 MR. JEURGENS: I see - - - I see my light's on.

6 CHIEF JUDGE WILSON: Thank you.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dwight Moss, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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