

***CONTINUING LEGAL EDUCATION
FALL 2009***

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***Post-Conviction Motions:
§ 330.30 and § 440.10***

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SPONSORED BY:
APPELLATE DIVISION, FIRST AND SECOND JUDICIAL DEPARTMENTS
IN CONJUNCTION WITH THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK

Effective:[See Text Amendments]

McKinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
 [§] Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
 [§] Article 330. Proceedings from Verdict to Sentence (Refs & Annos)
 → § 330.30 Motion to set aside verdict; grounds for

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.
2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or
3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

CREDIT(S)

(L.1970, c. 996, § 1.)

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Derivation

Code Crim.Proc.1881, §§ 465, 466, 467, 469, 481. Section 465 amended L.1894, c. 270. Section 466 amended L.1882, c. 65; L.1887, c. 534. Section 467 amended L.1882, c. 360, § 1.

PRACTICE COMMENTARIES

2005 Main Volume

by Peter Preiser

This section combines two motions that were in the old Code of Criminal Procedure -- motion for a new

Effective:[See Text Amendments]

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Criminal Procedure Law (Refs & Annos)

Chapter 11-A. Of the Consolidated Laws (Refs & Annos)

Part Two. The Principal Proceedings

▣ Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence

▣ Article 330. Proceedings from Verdict to Sentence (Refs & Annos)

→ § 330.40 Motion to set aside verdict; procedure

1. A motion to set aside a verdict based upon a ground specified in subdivision one of section 330.30 need not be in writing, but the people must be given reasonable notice thereof and an opportunity to appear in opposition thereto.

2. A motion to set aside a verdict based upon a ground specified in subdivisions two and three of section 330.30 must be made and determined as follows:
 - (a) The motion must be in writing and upon reasonable notice to the people. The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief;

 - (b) The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers;

 - (c) After all papers of both parties have been filed, the court must consider the same and, if the motion is determinable pursuant to paragraphs (d) or (e), must or may, as therein provided, determine the motion without holding a hearing to resolve questions of fact;

 - (d) The court must grant the motion if:

- (i) The moving papers allege a ground constituting legal basis for the motion; and
 - (ii) Such papers contain sworn allegations of all facts essential to support such ground; and
 - (iii) All the essential facts are conceded by the people to be true.
- (e) The court may deny the motion if:
- (i) The moving papers do not allege any ground constituting legal basis for the motion; or
 - (ii) The moving papers do not contain sworn allegations of all facts essential to support the motion.
- (f) If the court does not determine the motion pursuant to paragraphs (d) or (e), it must conduct a hearing and make findings of fact essential to the determination thereof;
- (g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

CREDIT(S)

(L.1970, c. 996, § 1.)

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Derivation

Code Crim.Proc. 1881, § 469.

Effective:[See Text Amendments]

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Criminal Procedure Law (Refs & Annos)

Chapter 11-A. Of the Consolidated Laws (Refs & Annos)

Part Two. The Principal Proceedings

▣ Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence

▣ Article 330. Proceedings from Verdict to Sentence (Refs & Annos)

→ § 330.50 Motion to set aside verdict; order granting motion

1. Upon setting aside or modifying a verdict or a part thereof upon a ground specified in subdivision one of section 330.30, the court must take the same action as the appropriate appellate court would be required to take upon reversing or modifying a judgment upon the particular ground in issue.
2. Upon setting aside a verdict upon a ground specified in subdivision two of section 330.30, the court must order a new trial.
3. Upon setting aside a verdict upon a ground specified in subdivision three of section 330.30, the court must, except as otherwise provided in this subdivision, order a new trial. If a verdict is set aside upon the ground that had the newly discovered evidence in question been received at the trial the verdict probably would have been more favorable to the defendant in that the conviction probably would have been for a lesser offense than the one contained in the verdict, the court may either (a) set aside such verdict or (b) with the consent of the people modify such verdict by reducing it to one of conviction of such lesser offense.
4. Upon a new trial resulting from an order setting aside a verdict, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except those upon or of which the defendant was acquitted or is deemed to have been acquitted.

CREDIT(S)

(L.1970, c. 996, § 1.)

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 34

PT. 34 FEB 26 2007

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE OF MOTION TO SET
ASIDE OR MODIFY THE VERDICT
PURSUANT TO C.P.L. 330.30

Indictment Number:

Defendant.

-----X

PERSONS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of _____, a
lawyer admitted to the Bar of the State of New York, and the attached memorandum of law and all
prior proceedings had herein, the undersigned will move this Court at PART 34, on the 5th day of
March, or as soon thereafter as counsel can be heard, to set aside or modify the verdict of guilty of
Assault in the Second Degree pursuant to C.P.L. section 330.30.

DATED: NEW YORK, NEW YORK
February 26, 2007

RESPECTFULLY YOURS,

TO: ROBERT MORGENTHAU
District Attorney
New York County
Attn: A.D.A.

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 34

-----X

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION IN SUPPORT
OF MOTION TO SET ASIDE OR
MODIFY VERDICT

-against-

Ind. No.:

Defendant.

-----X

PRELIMINARY STATEMENT

1. hereby moves to set aside or modify the verdict of guilty of one count of Assault in the Second Degree, N.Y. Penal Law § 120.05(3). Under C.P.L. 330.30(1), "At any time after rendition of a verdict of guilty and before sentence, the court may, upon a motion of the defendant, set aside or modify the verdict... upon... any ground appearing in the record which, if raised upon an appeal from at prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law." The jury verdict of guilty on Count Three of the indictment (P.L. § 120.05(3)) occurred on February 9, 2007. Sentencing is scheduled for March 5, 2007.

INTRODUCTION

2. : was arrested for stealing a bicycle from on May 29, 2007. At arraignment, bail was set in the amount of \$10,000 and Mr. remained in custody. On his

180.80 day, Mr. climbed out of the holding pens in the back of Part F and tried to run away from court. A few minutes later, he was tackled and arrested by Detective Clair. Detective Clair sustained some abrasions to his hand and knee as a result of tackling Mr. Mr. was eventually indicted on the charges of Robbery in the Second Degree, Escape in the First Degree, and Assault in the Second Degree.

3. The sole issue at trial was whether Mr. caused "physical injury" to Ms. and Detective Clair. At trial, the prosecution argued that the bruises to Ms. arm and a cut to her shin established physical injury beyond a reasonable doubt. The prosecution also argued that the abrasion and swelling to Detective Clair's hand, as well as the discomfort to his knee, established the element of physical injury.

4. At the close of the prosecution's case, the defense submitted a written Memorandum of Law and orally argued a Motion for a Trial Order of Dismissal of Robbery in the Second Degree and Assault in the Second Degree. Additionally, referencing C.P.L. 300.30, the defense argued that those counts should not be submitted to the jury, and only the lesser included offenses should be submitted. The Court reserved decision on the motions until after the verdict.

5. During its deliberations, the jury sent back two notes requested repeated and more detailed instructions on the element of "physical injury." After a few hours of deliberation, it acquitted Mr. of Robbery in the Second Degree, but convicted on Escape in the First Degree and Assault in the Second Degree.

6. After the verdict, the Court continued to reserve decision on the C.P.L. 190.10/300.30 motions on the issue of whether the prosecution proved the element of physical injury required for the Assault conviction.

7. The testimony regarding the abrasions and bruising to Detective Clair was legally insufficient to establish physical injury. Mr. : respectfully requests that this Court set aside the verdict of guilty of Assault in the Second Degree, N.Y. Penal Law § 120.05(3) and modify the verdict to guilty on the lesser included count of Obstruction of Governmental Administration in the Second Degree, N.Y. Penal Law § 195.05.

STATEMENT OF FACTS

8. On Friday, June 2, 2006, Detective Healy witnessed Mr. climbing down scaffolding adjacent to the courthouse at 100 Centre St. in Manhattan. T. 49. Detective Healy attempted to stop Mr. outside the courthouse, but Mr. ran away from Detective Healy. T. 49. Detective Healy gave chase, twice catching up with Mr. but without succeeding in apprehending him. T. 50-51. Detective Healy was not injured during his encounters with Mr. T. 53.

9. Moments later, Detective Clair and his partner noticed Detective Healy chasing Mr. and asked Healy what was occurring. T. 51. Detective Healy told Detective Clair that Mr. had escaped from jail. T. 51. Detective Clair then chased Mr. Oree in his van. T. 51-52. Once Detective Clair pulled up past Mr. , Detective Clair exited the van with his gun drawn. T. 52. He then “tackled” Mr. with his gun in his hand and they fell to the ground. T. 52, 62. Detective Clair testified that after he landed on the ground, he handed his partner his firearm, and assisted in handcuffing Mr. along with three additional officers who assisted in subduing Mr. T. 65.

10. Detective Clair testified that when he tackled Mr. , he landed on his hand and knee. T. 63. When he hit the ground “it hurt, it hurt a lot.” T. 63-64. He testified that as a result of landing his hand, he had “a large abrasion on the knuckle part” of his middle finger. T. 65.

Detective Clair testified that the cut on his hand “didn’t start bleeding right away,” but eventually the blood “was dripping down and off my elbow.” T. 66. He did not think he needed stitches, but did wear a bandage for “almost a week.” T. 66. The day after the incident, the laceration to his knuckle “hurt” when he moved his hand. T. 69.

11. Additionally, there was swelling and bruising to his thumb that “started feeling better about half a week” and lasted “approximately a week, give or take a day.” T. 70. There was also a small abrasion on Detective Clair’s left knee that bled only a “very little bit” because he had been wearing pants. T. 67. He did not have trouble walking, but his knee “was bothering” him when he got out of bed for “maybe 10 to 12 days.” T. 71.

12. EMS treated Detective Clair at the scene by washing out and bandaging his finger, taping his knee, and providing icepacks for his thumb and knee. T. 68. Detective Clair testified that he did not go to the hospital because he did not think he needed to go. T. 68. In the days following the incident, he put ice on his knee “once in a while,” and took Tylenol and Extra-Strength Tylenol for “the temporary relief of minor aches and pains.” T. 71, 75-76. He testified that he did not seek further medical treatment because he “really didn’t think [he] had to.” T. 71.

13. Although Detective Clair could have taken time off under the line of duty leave policy, he went to work the next day. T. 71-72.

ARGUMENT

14. Viewing all of Detective Clair’s testimony in the light most favorable to the prosecution, the descriptions of the abrasions to his hand and knee are insufficient evidence of “physical injury” within the meaning of Penal Law § 10.00(9). Detective Clair’s ailments boil down to a cut on his

knuckle, bruising to his thumb, and a small abrasion to his knee. While Clair testified that landing on his hand and knee "hurt a lot," the pain was not substantial enough to go to the hospital. Detective Clair's subjective statement is contradicted by the rest of the facts presented. When asked by the prosecutor why he did not go to the hospital, he stated: "I really didn't think I had to go to the hospital. I mean it hurt me when I did it but you know, I didn't think I needed to go to the hospital."

T. 68. Although EMS workers washed out and bandaged Detective Clair's finger, the cut did not require any stitches. The bruising and swelling to his thumb caused an unspecified amount of "pain," which "started feeling better [after] about half a week." T. 70. Detective Clair testified that he did not have trouble walking as a result of the small abrasion to his knee. T. 67, 69. Instead he felt "pain" when he walked up and down stairs and stated that his knee "bothered him" when he got out of bed in the mornings. T. 69, 71. Despite the cut and swelling to his hand, and abrasion to his knee, Detective Clair went to work the very next day. T. 71. No medical reports or photographs regarding Detective Clair's injuries were submitted into evidence.

15. A person is guilty of Penal Law § 120.05(3) when "With intent to prevent a ...police officer...from performing a lawful duty... he causes physical injury...fo such police officer." "Physical injury" is defined as "impairment of physical condition or substantial pain." N.Y. Penal Law § 10.00(9). To prove the element of "physical injury", competent evidence must be presented that the complaining witness either suffered "impairment of physical condition" or "substantial pain." Mr. [redacted] moves this court to set aside or modify the judgment of guilt because the evidence of "physical injury" to complainant Detective Clair is legally insufficient as a matter of law. See N.Y. Penal Law § 70.10 (defining legal sufficiency). A conviction for assault in the second degree premised on physical injury to a complainant without legally sufficient proof of this defining element

is a violation of the constitutional right to due process. U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.

16. Though the question whether substantial pain or physical impairment has been proven is “generally a question for the trier of fact,” Matter of Philip A., 49 N.Y.2d 198, 200 (1980), if the testimony does not establish physical impairment or *substantial* pain, the conviction cannot be sustained. See, e.g., In re Winston W. 29 A.D.3d 473 (1st Dep’t 2006) (contusions, a cut lip, scratch on the back, and a bite mark were insufficient to establish physical injury without testimony relating to the intensity of pain); People v. Winchester, 14 A.D.3d 939 (3d Dep’t 2005) (bite causing break in officer’s skin for which he was given pain medication insufficient as to injury); People v. Estes, 131 A.D. 2d 872 (2d Dep’t 1987) (bite on hand necessitating medical attention and tetanus shot found insufficient); People v. Tabachnik, 131 A.D.2d 611 (2d Dep’t 1987 (groin pain lasting more than two days was insufficient despite the presence of a black and blue mark); People v. Goins, 129 A.D.2d 733 (2d Dep’t 1987) (bruises to eye and wrist, for which complainant received medical attention was insufficient); People v. Contreras, 108 A.D.2d 627 (1st Dep’t 1985) (one-quarter centimeter wound to arm requiring minor medical treatment found insufficient); Matter of Pernell M., 98 A.D.2d 176 (2d Dep’t 1983) (cut lip and pain in chest insufficient); Matter of Edward M., 88 A.D.2d 776 (4th Dep’t 1982) (quarter inch cut in mouth insufficient); Matter of Derrick M., 63 A.D.2d 932 (1st Dep’t 1978) (black and blue ribcage resulting from blow conceded as insufficient).

17. Detective Clair testified that falling to the ground after tackling Mr. felt like “punching a cement wall” and “hurt, hurt a lot.” T. 63. Testimony that the complainant’s ailments hurt “a lot” has been held to be insufficient evidence of physical injury. See, e.g., People v. Colantino, 277 A.D.2d 498 (3d Dep’t 2000) (“very substantial” blow to chest from heavy steel rod

that "hurt a lot" insufficient as to physical injury); People v. Rodriguez, 158 A.D.2d 376 (1st Dep't 1990) (where complainant testified that the blows to her leg by the defendant hurt "a lot"). in People v. Feliciano, the defendant punched the complainant in the mouth and used a two-by-four lumber to strike the complainant in the back during a robbery. 156 A.D.2d 258 (1st Dep't 1989). The complainant testified that he suffered pain at the time of the attack, a swollen and bloody lip and a red mark on his back that "really hurt." Id. The complainant in that case also explained his failure to seek medical treatment because he lacked funds. Id. Finally, Detective Clair also testified that he returned to work the next day. Id. Viewing all of this testimony in the light most favorable to the prosecution, the court concluded that the evidence fell below the objective level required to sustain the conviction of Robbery in the Second Degree. Id. The court held that "under these circumstances, it cannot be said that the level of pain reached beyond an objective level so as to constitute 'substantial pain' within the purview of the statute."

18. The pain to Detective Clair's hand and knee did not prevent him from completing his efforts to apprehend Mr. Oree T. 73-74. See People v. Colantonio, 277 A.D. 2d 498, 500 (3d Dep't 2000) (evidence insufficient where "very substantial" blow to officer "did not interfere with his ability to continue his immediate efforts to apprehend defendant."). Nor did the pain to his hand cause him to release his grip on the firearm he had been holding when he fell to the ground; he was able to maintain his grip on the firearm until he handed it to his partner. T. 65.

19. While the prosecution argued in summation that the cut to Detective Clair's hand was so severe that blood was running down his arm, the First Department has reversed a conviction where the testimony about a bleeding cut was very similar. In People v. Contreras, the complainant testified that when she was pushed against the mailbox by the defendant, she "felt pain in her left

arm and stomach and *saw blood trickling down her arm.*" 108 A.D.2d 627 (1st Dep't 1985) (emphasis added). Although she went to the hospital after the incident, and a doctor cleansed and stitched her wound, the court found that Mrs. Joseph's pain "did not reach the objective level required to be substantial." *Id.* at 628. Especially considering the complainant in Contreras received a stitch to her arm, Clair's abrasion is no more serious than the injury involved in that case.

20. The fact that Detective Clair wore a bandage for almost a week, took Tylenol¹ and iced his knee does not change this calculus. In Matter of Shawnell UU, 240 A.D.2d 947, 948 (3d Dep't 1997), the complainant testified that he received two lacerations on the tips of his two fingers, sought medical attention, and the physician gave him band-aids that he wore for "four or five days". In overturning the conviction, the Court found that "although there was some bleeding, Rowley did not require sutures to close the wounds and admitted that no scarring or disability resulted." See also People v. Green, 145 A.D.2d 929, 931 (4th Dep't 1988) (evidence insufficient where complainant was thrown to the ground during a scuffle and sustained bleeding abrasions to his face and shoulder). In People v. Briggs, 285 A.D.2d 651 (2d Dep't 2001), the evidence showed that the defendant punched the complainant in the right side of his face, and struggled with the complainant for a period of time. Despite testimony that the complainant treated his aches and pains with ice, Tylenol, and iodine, and stayed home from work for three or four days, the Court held that the evidence was insufficient to support the conviction of Robbery in the Second Degree. *Id.* at 652. Detective Clair's abrasions are equivalent to the injuries at issue in Shawnell UU and Briggs. This Court should rule

¹ Detective Clair testified that he continued to take Tylenol because it helped relieve his discomfort. T. 75. His discomfort was therefore less of an impediment than the pain at issue in People v. Stapleton, 2006 NY Slip Op 7574 (1st Dep't 2006) cited by the prosecution. In that

as those appellate courts did, deeming the evidence legally insufficient to establish “physical injury” within the meaning of the statute.

21. Detective Clair’s testified that he experienced an unspecified degree of “pain” from his hand, that his knee bothered him when he got out of bed in the mornings for 10 to 12 days, and that he took Tylenol to relieve the discomfort. At no time did he believe it necessary to go to the hospital. While he had the ability to go to the doctor or hospital, compare People v. Guidice, 83 N.Y.2d 630, 636 (1994) (jury entitled to believe absence of medical intervention may have been due to fact that he had no medical insurance), Detective Clair testified with no uncertainty that the reason he did not visit the hospital was because of the minor nature of the abrasion. He stated “I really didn’t think I had to go to the hospital. I mean it hurt me when I did it, but you know I didn’t think I needed to go.” T. 68. Detective Clair only experienced an unspecified degree of pain due to the abrasions to his hand and knee.

22. This level of “pain,” even if it endures, does not constitute “substantial pain.” For example in People v. Goins, the complainant-officer sustained bruises to his right eye and left wrist after he engaged in a physical altercation with the defendant. 129 A.D.2d 733, 734 (2d Dep’t 1987). The officer received medical attention for the swelling and tenderness to the “traumatized areas.” Id. The swelling and tenderness persistent for “several days,” and the officer experienced headaches for two or three days. Id. Nevertheless the Court ruled that this level of testimony does not constitute substantial pain. Id. In People v. Thomas, 274 A.D.2d 761, 761-62 (3d Dep’t 2000), the complainant received medical attention at the direction of the police after he was struck by the

case the complainant testified that she “continued to suffer pain for a day and a half, despite taking a pain reliever....” Id.

defendant on the neck. He testified that he was in “some” pain during the three to four-day period following the incident. Id. at 761. However, observing that the complainant “lost no time from work and none of his activities were curtailed,” the Court held that the evidence fell below the objective level of proof sufficient to prove physical injury. Finally, in People v. McCummings, 203 A.D.2d 656 (3d Dep’t 1994), the defendant was convicted of Assault in the Second Degree arising out of a fight with a fellow inmate in Broome County Jail. Evidence was presented that the complainant’s attending physician observed some swelling to the complainant’s cheek and an abrasion to his head. Id. 657. The complainant further testified that he “experienced headaches, had a pain in his wrist and that he still had problems with his wrist when the weather gets ‘real cold.’” Id. (emphasis added). The physician advised the complainant to take Tylenol and Advil. Id. In finding the evidence legally insufficient, the Third Department rejected the notion that a wrist that periodically bothers a complainant (even at the time of trial) is sufficient evidence of substantial pain. As established in Goins, Thomas, and McCummings, Detective Clair’s testimony that he experienced “pain” for “about a week” from his hand, and his knee “bothered” him when he got out of bed for 10 to 12 days is insufficient evidence of substantial pain or physical impairment.

23. In determining whether evidence of physical injury has been established beyond a reasonable doubt, courts often look to whether the complainant was able to return to work or school after the incident. See, e.g., Thomas, 274 A.D.3d 761; People v. Velasquez, 202 A.D.2d 1037 (4th Dep’t 1994) (evidence insufficient where officer sought medical attention at hospital for scrape on arm, and experienced headache and stiff neck and “discomfort” but missed no time from work); People v. Marrero, 88 A.D.2d 998 (2d Dep’t 1982) (discussed *infra*); compare People v. Gurley, 28 A.D.3d 347 (1st Dep’t 2006) (evidence was sufficient where complainant-officer was absent from

work for three days as a result of abrasion to his knee, and soreness to his back, knee and wrist). While Clair testified that he very rarely misses work, he has twice taken leave for a line of duty injury. T. 72-73. He declined to take such leave after June 2, 2006. T. 72.

24. In People v. Foster, the Second Department weighed heavily the fact that the complainant-officer was not prevented from working despite the fact that he sustained several cuts, suffered swelling and tenderness, and was given a tetanus shot and prescribed penicillin after the defendant struck his teeth into the police officer's nose. 162 A.D.2d 703, 704. "While the officer stated that the pain 'was more than minor pain' and felt it hampered him in his work, the injury nevertheless did not prevent him from working." Id. Similarly in People v. Marrero, the defendant pushed the complainant-officer into the wall, knocked him down, and then punched him. 88 A.D.2d at 999. The officer was treated at the hospital for back pains. Id. In determining that the evidence was legally insufficient, the court noted that the back pains "were not sufficiently bothersome to keep him out of work." Id. Finally in People v. Windbush, 163 A.D.2d 591 (2d Dep't 1990), the complainant testified that three youths "surrounded him, punched him in the head and ribs, grabbed his arm, and attempted, without success to remove a ring from the middle finger of his right hand." Id. at 592. When undercover officers arrived on the scene they noticed that the complainant's mouth was bleeding. Id. At trial the complainant stated that as a result of the attack, he felt "pain," that his ribs "bothered him" and he could not lift his arm for four or five days after the incident. Id. Viewing the evidence in the light most favorable to the People, the Second Department held that it was legally insufficient to constitute "physical injury" within the meaning of Penal Law section 10.00(9). Id. 592-93. The court observed that the complainant did not miss school and there was "no indication that any of [the complainant's] activities were curtailed...." Id. at 592. As Detective Clair was able

to return to work the next day, and his injuries were no more severe than those in Foster, Marrero, and Windbush, the evidence is insufficient to establish physical injury as a matter of law.

CONCLUSION

25. The testimony by Detective Clair regarding the abrasions and bruising to his hand and knee was legally insufficient to establish the element of physical injury as required for a conviction of N.Y. Penal Law § 120.05(3). In fact, his testimony did not even establish the minimal, objective level of injury required to make this issue an issue of fact for the jury to decide. As a matter of law, Detective Clair's testimony was insufficient as to the issue of physical injury. While he testified that falling on his hand and knee "hurt a lot," Detective Clair did not need to go to the hospital, and he returned to work the very next day. The prosecution's misleading description of the law regarding physical injury, the sole issue contested at trial, in his closing argument compounded the problem. In these circumstances, where the evidence of physical injury is marginal, and where the jury may have been misguided about the amount of evidence required, the Court should set aside the verdict of guilty of Assault in the Second Degree.

Respectfully submitted,

Effective:[See Text Amendments]

McKinney's Consolidated Laws of New York Annotated Currentness
Criminal Procedure Law (Refs & Annos)
Chapter 11-A. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
 ⁶ Title M. Proceedings After Judgment (Refs & Annos)
 ⁶ Article 440. Post-Judgment Motions (Refs & Annos)
 → § 440.10 Motion to vacate judgment

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

Westlaw.

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such

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right; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court upon an appeal from the judgment, or by any court

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upon a previous post-judgment motion.

7. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

CREDIT(S)

(L.1970, c. 996, § 1.)

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Derivation

Code Crim.Proc.1881, §§ 465, 481. Section 465 amended L.1894, c. 270.

SUPPLEMENTARY PRACTICE COMMENTARIES

2009 Electronic Pocket Part Update

by Peter Preiser

Effective:[See Text Amendments]

McKinney's Consolidated Laws of New York Annotated Currentness

Criminal Procedure Law (Refs & Annos)

Chapter 11-A. Of the Consolidated Laws (Refs & Annos)

Part Two. The Principal Proceedings

▣ Title M. Proceedings After Judgment (Refs & Annos)

▣ Article 440. Post-Judgment Motions (Refs & Annos)

→ § 440.20 Motion to set aside sentence; by defendant

1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. Where the judgment includes a sentence of death, the court may also set aside the sentence upon any of the grounds set forth in paragraph (b), (c), (f), (g) or (h) of subdivision one of section 440.10 as applied to a separate sentencing proceeding under section 400.27, provided, however, that to the extent the ground or grounds asserted include one or more of the aforesaid paragraphs of subdivision one of section 440.10, the court must also apply subdivisions two and three of section 440.10, other than paragraph (d) of subdivision two of such section, in determining the motion. In the event the court enters an order granting a motion to set aside a sentence of death under this section, the court must either direct a new sentencing proceeding in accordance with section 400.27 or, to the extent that the defendant cannot be resentenced to death consistent with the laws of this state or the constitution of this state or of the United States, resentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Upon granting the motion upon any of the grounds set forth in the aforesaid paragraphs of subdivision one of section 440.10 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

2. Notwithstanding the provisions of subdivision one, the court must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

3. Notwithstanding the provisions of subdivision one, the court may deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court, unless since the time of such determination there has been a retroactively effective change in the law controlling such issue. Despite such

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determination, however, the court in the interest of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious.

4. An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.

CREDIT(S)

(L.1970, c. 996, § 1; amended L.1995, c. 1, § 21.)

HISTORICAL AND STATUTORY NOTES

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L.1995, c. 1 legislation

Subd. 1. L.1995, c. 1, § 21, added sentences relating to setting aside death sentence.

L.1995, c. 1, § 38, set out as a note under Correction Law § 650, provides that the amendment by L.1995, c. 1, is effective Sept. 1, 1995, and applicable only to offenses committed on or after that date, offenses committed prior to that date to be governed by laws in effect at the time the offense was committed.

Derivation

Code Crim.Proc. 1881, § 764-a, added L.1953, c. 586.

PRACTICE COMMENTARIES

Effective: July 6, 2004

McKinney's Consolidated Laws of New York Annotated Currentness

Criminal Procedure Law (Refs & Annos)

Chapter 11-A. Of the Consolidated Laws (Refs & Annos)

Part Two. The Principal Proceedings

§ Title M. Proceedings After Judgment (Refs & Annos)

§ Article 440. Post-Judgment Motions (Refs & Annos)

→ **§ 440.30 Motion to vacate judgment and to set aside sentence; procedure**

1. A motion to vacate a judgment pursuant to section 440.10 and a motion to set aside a sentence pursuant to section 440.20 must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

1-a. (a) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(b) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the

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last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10 or subdivision two of section 440.20, the court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 or subdivision three of section 440.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.

3. Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if:

- (a) The moving papers allege a ground constituting legal basis for the motion; and
- (b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and
- (c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

- (a) The moving papers do not allege any ground constituting legal basis for the motion; or
- (b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

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(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof;
or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

6. At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

7. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

CREDIT(S)

(L.1970, c. 996, § 1; amended L.1994, c. 737, § 2; L.2004, c. 138, § 2, eff. July 6, 2004.)

HISTORICAL AND STATUTORY NOTES

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L.2004, c. 138 legislation

Subd. 1-a. L.2004, c. 138, § 2, designated the prior text of subd. 1-a as par. (a); in that par. (a) substituted "Where" for "In cases of convictions occurring before January first, nineteen hundred ninety-six, where"; and added par. (b).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 32

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOHN DOE,

Defendant-Appellant.
-----X

AFFIRMATION
Ind. No.

Axxxx Axxxx, ESQ., an attorney duly admitted to practice in the State of New York,
hereby affirms the following under penalties of perjury:

1. I am a staff attorney with the Office of the Appellate Defender which was assigned on July 31, 2003 by the Supreme Court, Appellate Division, First Department, to represent defendant-appellant, John Doe, on his appeal from an April 24, 2003 judgment of conviction of the Supreme Court of the State of New York, New York County, under Indictment Number xxx/02. A copy of the Order assigning this office to represent Mr. Doe is annexed to these documents as Exhibit A, along with all other Exhibits.

2. All statements made in this affirmation are made on personal knowledge or on information and belief. Said information and belief is based on review of the court records, trial and sentencing transcripts of Indictment Number xxx /02, the New York State Office of Court Administration's Criminal Records Information Management System appearance history for Indictment Number 6204/02, and correspondence and telephone conversations with Mr. Doe, James Carter, and Mr. Doe's trial counsel, Txxx Dxxx, Esq.

3. After a jury trial, Mr. Doe was convicted of one count of criminal sale of a controlled substance in the third degree, in violation of Penal Law § 220.39(1) (McKinney 1998), and one count of criminal sale of a controlled substance in or near school grounds, in violation of Penal Law § 220.44(2) (McKinney 1998).

4. On May 8, 2003, Mr. Doe was sentenced to a term of two to six years imprisonment.

5. Mr. Doe's conviction must be vacated because he was denied his constitutional right to the effective assistance of counsel. See U.S. Const. amends. VI, XIV; N.Y. Const. Art. I, § 6. Mr. Doe's attorney failed to be effective and afford Mr. Doe meaningful representation under both federal and state standards. Strickland v. Washington, 466 U.S. 668 (1984); People v. Benevento, 91 N.Y.2d 708 (1998).

The Evidence at Mr. Doe's Trial

6. At Mr. Doe's trial, Police Officer Kevin Burns alleged that he observed a narcotics transaction outside 880 Saint Nicholas Avenue in Manhattan at approximately 9:20 p.m. on August 26, 2002. T. 36-45.¹ Officer Burns explained that he was working as part of an observation team on the date in question, and was assigned to an observation post on a rooftop approximately 75 yards from 880 Saint Nicholas Avenue. T. 36. Burns was equipped with binoculars and a radio. Id.

¹ Citations preceded by "T." refer to the trial conducted on April 22 and 23, 2003. The transcript will be made available upon request

7. Burns stated that he first noticed a man standing outside 880 Saint Nicholas Avenue between 8 and 8:30 p.m. T. 43. At approximately 9:20 p.m., Burns testified, he noticed James Carter approach the man. Id. At this point, it was dark out and there were between 10 and 15 other people on the street. T. 46, 84. Through his binoculars, Burns claimed, he saw Mr. Carter hand the man some money. T. 43. According to Burns, the two men briefly conversed, and the man then entered 880 Saint Nicholas Avenue. T. 44. Between 20 and 30 seconds later, Burns claimed, the man returned to the street and handed Mr. Carter “a small object.” T. 45. Burns conceded that he was unable to identify the object, but believed that he had observed a drug transaction based on his training and experience. Id. Mr. Carter then left the scene, walking west on 154th Street. Id. Burns radioed his field team and told them what he had observed. T. 49. At trial, Burns identified the man as Mr. Doe. T. 40.

8. Sergeant John Blume, who was also a member of the observation team, testified that he received Officer Burns’s transmission while in a van on Amsterdam Avenue and West 154th Street. T. 123-24. After receiving a description of the suspects, he arrested Mr. Carter, the buyer, outside 417 West 154th Street. T. 127. As the officers approached Mr. Carter, he threw a small object on the ground. Id. Upon his arrest, the police officers found a small bag of crack cocaine on the ground, approximately three feet from where Mr. Carter had been. T. 128-29. They also searched Mr. Carter and retrieved two crack pipes. T. 130. In a sworn affidavit supplied to appellate counsel, Mr. Carter confirmed that he threw the drugs to the ground, and that the police found them upon arresting him. See Affidavit of James Carter (“Carter Aff.”), ¶ 3, Exhibit B.

9. Approximately 25 minutes after his initial observations, Officer Burns testified, he was still watching the scene from his observation post. T. 49. He watched the man he believed was the seller cross the street. T. 50. In his testimony, Mr. Doe confirmed that he crossed the street to go to his uncle's apartment building, which is opposite his own. T. 196. Believing that Mr. Doe was the seller and was about to leave the scene, Officer Burns radioed his team and told them to apprehend Mr. Doe.² Id. Soon after this, Sergeant Blume and Police Officer Potkay arrived on the scene and placed Mr. Doe under arrest. T. 131. No drugs were found on Mr. Doe when he was searched, and he had only \$31 in his possession. T. 168, 57. Sergeant Blume searched the area outside 880 Saint Nicholas Avenue, but found no drugs there either. T. 146.

10. Mr. Doe testified in his own defense at trial. T. 183-217. He explained that he has lived at 880 Saint Nicholas Avenue for his whole life. T. 189. Mr. Doe testified that on August 26, 2002, he exited his apartment building at approximately 6:00 p.m. with his eight- and nine-year old nephews, with whom he lived. T. 190-91, 184. Mr. Doe kept an eye on the children, and chatted with friends and neighbors for a few hours. T. 192. Mr. Doe explained that he knows all the adults and children in his building, and that there were at least 15 other people hanging out outside. T. 193. Mr. Doe said that he did not leave the area that whole time, but that he may have entered his building to use the bathroom. T. 194. Mr. Doe crossed the street and was approaching 875 Saint Nicholas Avenue when he was suddenly arrested.

² Given that it was dark, there were a number of other people on the scene, and Officer Burns was making his observations from a rooftop 75 yards from the scene, it is entirely plausible that Burns mistook Mr. Doe for the seller.

T. 196. Mr. Doe explained that he was heading towards 875 Saint Nicholas Avenue because his uncle lives there. Id. Mr. Doe testified that he was grabbed by a police officer, who arrested and searched him. T. 198.

11. Mr. Doe denied selling any drugs to Mr. Carter. T. 189. He explained that he recognizes Mr. Carter from around the neighborhood, but that he did not talk to him on August 26, 2002, nor did he accept money from him. T. 209. Mr. Doe insisted that no-one gave him any money that evening, and that he never handed any objects to anyone either. Id. Mr. Doe testified that he did not notice Mr. Carter on the street that night, but that he did see him at the precinct house subsequent to being arrested. Id.

Defense Counsel's Failure to Contact and Interview James Carter

12. According to defense counsel's independent recollection, as well as her contemporaneous notes, James Carter's wife, Grace Carter, contacted defense counsel on April 17, 2003 – several days before the commencement of trial. See Affirmation of Txxx Dxxx (“Dxxx Aff.”), ¶ 5, Exhibit C. Ms. Carter informed Mr. Doe's defense attorney that James Carter was in custody at Mid-State Correctional Facility. Id. Ms. Carter also informed defense counsel that Mr. Carter had told her that Mr. Doe was not the individual who sold him crack cocaine on August 26, 2002. Id. As documented in defense counsel's contemporaneous notes, Ms. Carter told defense counsel that Mr. Carter would perhaps be willing to testify that Mr. Doe was not the seller in the case, and that the wrong person was on trial. Id.

13. Despite knowing where Mr. Carter was incarcerated, and knowing that he was perhaps willing to testify on Mr. Doe's behalf, neither defense counsel nor any representative thereof made any attempt to contact or visit Mr. Carter at Mid-State Correctional Facility. Dxxx Aff. ¶ 6. Mr. Carter did not testify at Mr. Doe's trial.

14. Mr. Carter has subsequently sworn that he did purchase a small quantity of crack outside 880 Saint Nicholas Avenue on August 26, 2002. See Carter Aff. ¶ 3. Mr. Carter knew Mr. Doe by face from around his neighborhood, and first learned that he had been arrested at the precinct house after being arrested himself. Id. at ¶ 2, 4. Mr. Carter swore that he told a police officer that Mr. Doe was not the person who sold him drugs, and reiterated that Mr. Doe did not sell him any narcotics on August 26, 2002 or at any other time.³ Id. at ¶ 5. Indeed, Mr. Carter swore that he had no interaction with Mr. Doe on that date whatsoever. Id. Mr. Carter also swore that he knows the identity of the real seller, but is unwilling to reveal it for his own safety. Id. at ¶ 6. When he learned that Mr. Doe was arrested for selling him narcotics, Mr. Carter informed his wife, Grace Carter, that Mr. Doe was not involved, and Ms. Carter passed on this information to Ms. Doe's defense attorney. Id. at ¶ 8. However, Mr. Carter was never contacted by Mr. Doe's attorney or any representative thereof. Id.

³ It should also be noted that Mr. Carter did not implicate Mr. Doe as the person who sold him drugs at his plea proceeding on September 30, 2002. The transcript of that proceeding will be made available upon request.

Defense Counsel's Failure to Contact and Interview James Carter Deprived Mr. Doe of His Constitutional Right to the Effective Assistance of Counsel

15. The New York State Constitution grants every criminal defendant the right to "meaningful representation" of counsel. See N.Y. Const. Art. I, § 6; Benevento, 91 N.Y.2d at 712. This standard requires a defendant to demonstrate "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings." Benevento, 91 N.Y.2d at 712, quoting People v. Rivera, 71 N.Y.2d 705, 709 (1988). In Strickland v. Washington, meanwhile, the United States Supreme Court held that a defendant must show both that counsel was deficient and that counsel's deficient performance prejudiced the defense in order to establish ineffective assistance of counsel. 466 U.S. at 687.

16. Defense counsel's failure to contact and interview James Carter, who was able and willing to give crucial exculpatory information establishing Mr. Doe's innocence and controverting Officer Burns's identification of Mr. Doe as the seller in the drug transaction, T. 40, falls below the conduct reasonably expected of a trial attorney conducting pretrial investigation. Had Mr. Carter testified at trial, there is a high likelihood that the jury would have come to a different verdict than it did. As a result, Mr. Doe was deprived of the effective assistance of counsel. Strickland, 466 U.S. at 668; Benevento, 91 N.Y.2d at 708.

WHEREFORE, for the reasons set forth above and in the accompanying Memorandum of Law and exhibits, this Court should issue an order granting the relief requested in the notice of motion and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York

AXXX AXXXX, ESQ.

DEFENSE FUNCTION

PART I.

GENERAL STANDARDS

Standard 4-1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

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Standard 4-1.2 The Function of Defense Counsel

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

PART III.

LAWYER-CLIENT RELATIONSHIP

Standard 4-3.1 Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of charges or incarceration.

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Standard 4-3.2 Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

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Standard 4-3.3 Fees

(a) Defense counsel should not enter into an agreement for, charge, or collect an illegal or unreasonable fee.

(b) In determining the amount of the fee in a criminal case, it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the questions involved, the skill requisite to proper representation, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation, and ability of defense counsel, and the capacity of the client to pay the fee.

(c) Defense counsel should not imply that his or her compensation is for anything other than professional services rendered by defense counsel or by others for defense counsel.

(d) Defense counsel should not divide a fee with a nonlawyer, except as permitted by applicable ethical codes of conflict.

(e) Defense counsel not in the same firm should not divide fees unless the division is in proportion to the services performed by each counsel or, by written agreement with the client, each counsel assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all counsel involved, and the total fee is reasonable.

(f) Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(g) When defense counsel has not regularly represented the client, defense counsel should communicate the basis or rate of the fee to the client, preferably in writing, before or within a reasonable time after commencing the representation.

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Standard 4-3.4 Obtaining Literary or Media Rights from the Accused

Defense counsel, prior to conclusion of all aspects of the matter giving rise to his or her employment, should not enter into any agreement or understanding with a client or a prospective client by which defense counsel acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to the employment or proposed employment.

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Standard 4-3.5 Conflicts of Interest

(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented and, in either case, that:

(i) the several defendants give an informed consent to such multiple representation; and

(ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.

(d) Defense counsel who has formerly represented a defendant should not thereafter use information related to the former representation to the disadvantage of the former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(e) In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

(i) the accused consents after disclosure;

(ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and

(iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality. Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.

(f) Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case.

(g) Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.

(h) Defense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter. Defense counsel who was formerly a prosecutor should not use confidential information about a person acquired when defense counsel was a prosecutor in the representation of a client whose interests are adverse to that person in a matter.

(i) Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such a prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship.

(j) Defense counsel should not act as surety on a bond either for the accused represented by counsel or for any other accused in the same or a related case.

(k) Except as law may otherwise expressly permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney or employee of the government in a matter in which defense counsel is participating personally and substantially.

Standard 4-3.6 Prompt Action to Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

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Standard 4-3.7 Advice and Service on Anticipated Unlawful Conduct

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

(c) Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

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Standard 4-3.8 Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Standard 4-3.9 Obligations of Hybrid and Standby Counsel

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

Standard 4-8.6 Challenges to the Effectiveness of Counsel

(a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.

(b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.

(d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.