

# State of New York Court of Appeals

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## MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 18  
The People &c.,  
Respondent,  
v.  
Joseph Sposito,  
Appellant.

Donna Aldea, for appellant.  
Michael C. Wetmore, for respondent.

### MEMORANDUM:

The order of the Appellate Division, insofar as appealed from, should be affirmed.

Defendant “bears the burden of establishing his claim that counsel’s performance is constitutionally deficient” (People v Nicholson, 26 NY3d 813, 831 [2016]; accord People v Baldi, 54 NY2d 137 [1981]) by “demonstrat[ing] the absence of strategic or other

legitimate explanations for counsel’s alleged failure[s]” (People v Wragg, 26 NY3d 403, 409 [2015]; accord People v Barboni, 21 NY3d 393 [2013]). On this record, defendant fails to meet that burden and his counsel’s alleged out of court statements are “dehors the record and beyond review by this Court on direct appeal” (People v Jackson, 29 NY3d 18, 24 [2017]). As we have stated, “in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10” (People v Brown, 45 NY2d 852, 853-854 [1978]; accord People v Campbell, 30 NY3d 941, 942-943 [2017]). Consequently, his challenge on this direct appeal fails to establish that counsel’s performance was constitutionally deficient (see People v Rivera, 71 NY2d 705, 709 [1988]).

Defendant’s post-verdict motion for DNA testing was also properly denied. He failed to show that “there exists a reasonable probability that the verdict would have been more favorable to defendant” if the requested testing had been carried out and the results admitted at trial (CPL 440.30[1-a]).

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Order, insofar as appealed from, affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Fahey, Garcia, Wilson and Feinman concur. Judge Stein took no part.

Decided February 8, 2018