

**DEFENDANTS' GUIDE  
TO APPEALS,  
REVIEW AND PAROLE  
IN NEW YORK**

**FIRST EDITION**

by

**BRUCE R. BRYAN**

*Adjunct Professor of Law,  
Cornell Law School*

*Attorney at Law  
333 East Onondaga Street  
Syracuse, New York 13202*

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“I was in prison and you came to me. . . .”

### *The Purpose Of This Guide*

This Guide is intended to provide a basic overview of criminal appeals, post-conviction proceedings and parole in New York. It is written in simple language. It is important for you to understand the appellate and parole system so that you may participate and communicate effectively with your attorney to produce the best possible appeal, post-conviction motion, and parole application or parole appeal. Also, if you must represent yourself, this Guide should be an invaluable tool. The Appendix in the back of this book contains important additional information and forms that show how to apply the advice contained in this Guide.

Because the aim of this Guide is to give you a basic understanding, it may omit exceptions that apply to your case. This Guide is only a starting point for understanding your rights and options. You should discuss your case in detail with your attorney regarding your legal issues and any exceptions that may apply. Also, detailed legal research should disclose the rules and exceptions that may apply to your case.

This Guide should also be helpful to lawyers and law students as an introduction to criminal appeals, post-conviction proceedings and parole in New York. Effective representation begins with a basic understanding of the appellate process.

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## CHAPTER 1

### WHAT CAN YOU DO AFTER CONVICTION?

There are three basic ways that you can challenge your conviction or sentence: (1) Appeal; (2) 440 Motions; and (3) Federal Writs of Habeas Corpus. There are also less frequently used forms of relief, such as a Writ of *Coram Nobis* and a State Writ of Habeas Corpus. Finally, when all else fails, you can seek release through parole.

#### *Appeals*

In New York, you have a right to appeal your conviction and/or sentence. In other words, an appellate court must hear the first appeal from your conviction and/or sentence if you choose to appeal. However, a defendant may waive this right as part of a plea agreement or plea bargain. A guilty plea can also waive your ability to raise certain issues in an appeal, such as your innocence of the crime charged.

Appeals are generally categorized in two ways: (1) an appeal “as of right,” and (2) an appeal “by permission.” Under the law of New York, a defendant has an appeal “as of right” to an intermediate appellate court (the first court that hears an appeal). Most criminal appeals are to one of the four Departments of the Appellate Division of the State of New York. (The Appendix in this Guide contains a list of the Departments of the Appellate Division and their addresses. (See A-1 “Locations of New York Appellate Courts.”) Such appeal “as of right” is sometimes referred to as the “direct” appeal.

An appeal “by permission,” is an appeal that need not be heard by an appellate court. In other words, the appellate

court must first grant permission to hear the appeal before you can appeal to that court. For example, when a defendant makes a motion to appeal to the New York Court of Appeals, he or she is asking for permission to appeal to that Court and permission must be granted before the Court will hear the appeal. Likewise, a defendant must obtain permission to appeal the denial of a “440 Motion” before an intermediate appellate court will hear an appeal based on that denial. For a further discussion of appeals, see Chapter 4 of this Guide.

#### *440 Motions*

Sometimes facts that would support an issue on appeal are not contained in the trial court record, or a defendant obtains newly discovered evidence supporting a reversal of his or her conviction or sentence. To bring such facts and legal issues to a trial court’s attention, a defendant may file a “440 Motion” with the trial court. (A “motion” is a legal term that refers to a request to a court for some form of relief, such as dismissal of the charges or a request for a new trial.) The 440 Motion sets forth the supporting facts in an affidavit and argues the legal issues based on those facts in a Memorandum of Law. New York State does not place a time limit on when a 440 Motion may be filed and permits the making of multiple motions on different grounds. A 440 Motion may be made at the same time as a direct appeal or later. For a further discussion of 440 Motions, see Chapter 7 of this Guide.

#### *Federal Writs Of Habeas Corpus*

A defendant convicted of a crime in a New York State Court may also try to obtain relief in Federal Court. This is called petitioning for a “Federal Writ of Habeas Corpus” (also called a “2254 Motion” because it is governed by 28 U.S.C. § 2254). As one condition for obtaining a writ, a defendant must



demonstrate that he or she has “exhausted State remedies.” This simply means that you pursued all remedies available to you on a direct appeal in the New York State system. Typically, you must have first appealed the issue(s) to an intermediate appellate court, and thereafter have asked permission to appeal the issue(s) to the New York Court of Appeals, which is the highest court in New York State. It does not matter if the Court of Appeals denies the request, so long as the application for permission to appeal was made. For a further discussion of Federal Writs of Habeas Corpus, see Chapter 8 of this Guide.

*Parole Applications  
And Parole Appeals*

When all else fails, you can apply for release on parole. The Parole Board need not grant you parole. If denied, you may appeal, first to the Appeals Unit of the Division of Parole in Albany, and then to a court through an “Article 78 Proceeding.” For a further discussion of parole and parole appeals, see Chapter 9 of this Guide.

## CHAPTER 2

### FINDING THE RIGHT ATTORNEY AND YOUR ROLE AS A CLIENT

Obviously, the better your attorney, the better your chances on direct appeal, post-conviction motion or parole. Not all attorneys are the same. They vary in ability, experience and commitment. The following provides some guidance in finding the right attorney.

#### *Your Right To An Attorney On A Direct Appeal*

You have a right to an attorney to represent you on your direct appeal. This means that if you cannot afford an attorney, the court will appoint one for you. In New York, there are several ways in which an attorney may be appointed, depending on where your conviction and sentence occurred. For example, in some counties in New York, private attorneys are “assigned” to represent you on an appeal. In other places, there may be a public defender’s office or a legal aid society that handles appeals for defendants. In general, you do not have the right to choose your attorney if the court appoints one for you.

Some defendants attempt to raise funds through family and friends to retain an appellate attorney of their choice to represent them on their appeal. In addition, some defendants have funds of their own, and therefore a court will not appoint an attorney to represent them on appeal. In such instances, a defendant must retain an appellate attorney and pay for that attorney.

You do not have a right to an assigned attorney on a 440 Motion or on a Federal Writ of Habeas Corpus. Unless a

court orders the appointment of counsel, you must either retain an attorney or file such motion or petition *pro se* (without an attorney).

### *Retaining An Appellate Attorney*

When choosing an appellate attorney, you should examine the attorney's background and experience to determine the likelihood that the attorney will do the best job for you. The best attorney to handle your appeal or motion is one who has excellent analytical and writing skills, and the ability to effectively argue legal issues to the court. In addition, because the work involved is time consuming, the attorney must be capable and willing to devote the time that is necessary to produce the best product.

One measure of an attorney's experience is the number of years that the attorney has been in practice and the number of years that the attorney has been doing criminal appeals. In general, the more experienced the attorney, the more likely he or she will produce the best product. In addition, the law school that the attorney attended may be some measure of the attorney's ability. Becoming a lawyer is a highly competitive process where, in general, the best students go to the best law schools. Furthermore, an attorney's reputation for the quality of his or her appellate work is an important factor.

Of course, the attorney should be familiar with New York law. An appellate attorney need not be located in the place where your case was tried because, with the exception of the oral argument, the work done on the appeal is based on the record. Therefore, most work may be performed elsewhere. The appellate attorney may then travel to the appellate court for the oral argument.

A telephone directory is a starting point for finding an appellate attorney. Attorneys who concentrate in appellate practice usually list themselves as such under a section of the directory devoted to appeals. However, the listing alone does not give you enough information. It does not tell you the quality of their work or the depth of their experience.

A good defense attorney at the trial level may provide some guidance. Likewise, other defendants may be of some help. When contacting a potential appellate attorney, do not be afraid to ask about his or her background and experience. Among other things, you might ask the number of criminal appeals that they have handled and whether his or her practice is exclusively devoted to handling appeals.

### *Communicating With Your Attorney*

Incarceration unfortunately places limits on your ability to communicate with your attorney. Typically, your facility is at a distance from your attorney's office and therefore in-person visits by your attorney may not always be possible. If you retain an attorney, you may pay for the cost of the attorney to visit you. If your attorney is assigned, the court will not pay for him or her to make the visit. Fortunately, an appeal is solely based on the record (see Chapter 4 of this Guide) and therefore the lack of in-person visits should not affect the quality of work on your appeal. This being said, communication is vital to assure that the best job is done. You have every right to know how your appeal is proceeding and whether your attorney is considering your thoughts and legal arguments.

Letters are an effective way to communicate with your attorney. Although somewhat impersonal, letters organize and memorialize your thoughts whereas verbal communications

can be forgotten. A letter may be re-read by an attorney when performing research or writing the brief. Hence, its impact is substantial. The length of a letter is unimportant. It is the quality of the letter that counts. You should avoid wordiness or writing about matters that do not pertain to your appeal (unless there is something on which you need his or her help). Instead, you should focus on the legal issues, facts and case law that advance the arguments on your appeal.

You are entitled to have your attorney respond to your communications, whether in writing or by telephone, with sufficient regularity for you to know that your thoughts and concerns are being considered. Of course, there is no hard and fast rule. Due to an attorney's caseload, he or she may not be able to respond to every letter. In such event, the telephone becomes a useful tool. If your attorney is present in the office and available to take your telephone call, he or she should accept a pre-paid call. Some attorneys will also accept collect calls, provided that the frequency is not extreme.

*Your Role In An Appeal Or  
Post-Conviction Proceeding*

You should discuss with your attorney the basic facts of your case, the legal issues that you think should be raised on your appeal and any research that you have done on those issues. As an appellate attorney, I often encourage my clients to write a letter to me that discusses the legal issues that they think potentially may be raised. (A sample letter is included in the Appendix to this Guide. See A-2 "Letter to Appellate Attorney.") I tell my clients that I will also independently review their case to assess the issues to be raised. In addition, if appropriate, I communicate with trial counsel regarding his or her views on potential issues. By the foregoing process, the best list of potential issues can be developed.

Do not underestimate your ability to conduct legal research. With effort, you can bring to your attorney's attention cases that may be helpful to your appeal, motion or petition. Send a photocopy of each significant case that you find to your attorney with the legal issue to which the case relates written on the top and the helpful language in the case either marked or highlighted. The attorney should then read the case and, if helpful, add it to the brief or memorandum.

Sometimes a defendant decides to represent himself on an appeal. As a general rule, such decision is not advisable because a defendant is usually unfamiliar with the multiple rules applicable to an appeal and the defendant's ability to research and write is not as developed as that of a skilled attorney. However, for those defendants desiring substantial involvement and input with the appellate court, they should discuss the possibility of preparing and filing a supplemental pro se brief in addition to the brief submitted by the appellate attorney on the defendant's behalf. Of course, if you have confidence in your appellate attorney to write an effective brief on your behalf, then such a supplemental pro se brief is not necessary. However, if you should decide that you wish to file a supplemental pro se brief, in general a motion must be made to the appellate court to obtain permission for its filing. You should discuss with your appellate attorney early in the appeal your desire in this regard so that a timely motion for permission to file a supplemental pro se brief may be made and considered by the appellate court. In general, such motions are granted. (A sample motion is included in the Appendix of this Guide. See A-5 "Motion for Permission to File Pro Se Supplemental Brief.")

Finally, it is certainly appropriate for you to keep in touch with your appellate attorney regarding the status of your appeal or motion and to be given rough time frames within which the

appeal or motion might be expected to be completed and heard by the court. You may also request a draft of the brief before its filing so that you may review and comment on it. Whether an attorney can comply with such request will depend on the date, if any, that the brief must be filed and the attorney's ability to complete a draft of the brief in advance of such date.

## CHAPTER 3

### CONDUCTING LEGAL RESEARCH

The only similarity between a law library and an ordinary library is that both have books. In general, case law is not organized by subject and therefore searching for a case can often seem like looking for a needle in a haystack. Nonetheless, legal research is critical to an appeal, motion or petition. Your lawyer should conduct the research but you can also assist. Sometimes you may find a case that your lawyer does not. If you do, you have just increased your chances of success. If you are representing yourself, you must do the research on your own or with the help of another inmate. Don't be discouraged if your efforts at first do not pay off. What you lack in legal knowledge and experience you can make up for with patience and perseverance.

Getting access to the prison law library can sometimes be a problem. In such instances, a letter from you or your lawyer to the warden may be necessary to obtain increased access, particularly when a deadline is involved. Reasonable access to the law library is a constitutional right. The warden knows this.

#### *The Difference Between State And Federal Law*

At the outset, it is important to understand that there are two systems of law in the United States: (1) state law, and (2) federal law. For the most part, you will be dealing with New York State law. In general, an appeal or a 440 Motion to a New York State court will be based on New York State law. A Federal Writ of Habeas Corpus will be based on federal law. Sometimes there is overlap between the two systems of law, such as when a legal issue asserted in state court is based on



the claim that your rights under the United States Constitution were violated.

The distinction between state and federal law is important to keep in mind when you are conducting legal research. Most law books are organized with this distinction in mind. For example, the New York Supplement collects New York State cases only. Likewise, the Federal Reporter collects only federal cases of the United States Circuit Courts of Appeal. In general, treatises on legal subjects are similarly divided, although some discuss both state and federal law (particularly when constitutional issues are involved). Remembering the distinction between state and federal law will keep you out of the wrong law books when conducting research.

### *Basics About Criminal Law*

Prior to conducting legal research, it is helpful to understand certain basics about criminal law. In general, criminal law has three sources: (1) constitutions, (2) statutes and (3) common law.

#### (1) Constitutions

The United States government and the New York State government operate under written constitutions. The United States Constitution and the New York State Constitution each have a Bill of Rights. For example, both Constitutions protect people from unreasonable searches and seizures, guarantee the right to remain silent and require the effective assistance of counsel. Years ago, the Supreme Court of the United States made the rights in the United States Constitution applicable to criminal prosecutions in state courts. Therefore, you may assert your rights under both constitutions in a New

York State criminal prosecution. (The Appendix to this Guide includes provisions of the United States Constitution and New York State Constitution that are applicable to criminal cases. See A-11.)

The Bill of Rights of both constitutions state broad principles but do not explain how these principles are to be applied to a particular case. Instead, courts interpret the constitutions. When a court issues a written opinion interpreting a constitution, the opinion may be printed in a “case reporter” and followed as “precedent” by other courts. (Lower courts are required to follow the opinions of higher courts to which they are bound). Hence, when researching the law on a constitutional issue, you must review opinions of courts that discuss the same issue.

You should rely on both the United States Constitution and the New York State Constitution when applicable. In recent years, the Supreme Court of the United States has issued somewhat restrictive opinions on people’s rights under the United States Constitution. However, the New York Court of Appeals (New York’s highest court) has sometimes interpreted the same rights more broadly under the New York Constitution. Therefore, it is possible that the same conduct may be held to have violated the New York Constitution but not the United States Constitution.

## (2) Statutes

The United States Constitution granted to Congress the power to pass laws (these laws are called “statutes”). The New York Constitution also granted the New York Legislature the power to enact statutes. In a New York State criminal prosecution, the most important statutes are the “Penal Laws” (defining crimes) and the “Criminal Procedure Law” (setting the

rules for criminal cases). Sometimes questions arise regarding whether the police or a prosecutor violated these statutes in a particular case. Again, courts interpret the statutes and render written opinions on such questions. If a question arises in your case, you must research the opinions of courts that have addressed the same question.

### (3) Common Law

“Common Law” is sometimes called “judge-made law.” Questions arise that are not covered by constitutions or statutes. For example, in New York a question can arise regarding whether a missing witness charge should have been given in a trial but the New York Legislature has not enacted an applicable statute. In such events, judges have developed rules that are handed down to other courts in written opinions. In sum, whether constitutions, statutes or the common law apply to your case depends on the particular legal questions raised.

#### *Different Books Have Different Purposes*

On your first visit to the law library, take some time to see how it is physically organized. (The Appendix to this Guide contains a list of the books in a prison library for a New York State maximum security facility. See A-10 “Law Books in a Prison Library.” Lower level facilities have most but not all of these books.) In general, the books in the law library fit into several categories: (1) case reporters, (2) treatises and legal encyclopedias, (3) annotations, (4) digests, and (5) reference books.

#### *Case Reporters*

Case reporters constitute a significant number of the books in the law library. You will recognize them by the

consecutive numbers on their spines. Each set of case reporters collect opinions of various courts chronologically (in the order in which they were decided). The case reporters are not organized by subject or issue. Somewhere in the hundreds of volumes are the legal opinions that will help your case. The trick is finding them. Do not simply pick up a case reporter and start reading. You will never find the cases that you need in this way. You must begin with a basic understanding of how they are organized and which cases they report.

On a direct appeal or a 440 motion to a New York State court, you will be using the New York Supplement (tan in color with red and black stripes on the spines). The New York Supplement is published by the West Publishing Company, and has two series (first and second). The first series contains the oldest cases and the second series has the most recent cases. The library contains most of the books in the second series. It does not contain the first series or the beginning of the second series. Because you should always try to cite the most recent cases to a court, it is unlikely that you will be citing cases from the first series.

The prison library does not have the “official” case reporters for New York State courts. There are three official case reporters: (1) New York Reports (for cases from the New York Court of Appeals); (2) Appellate Division Reports (for cases from the four Departments of the Appellate Division); and (3) Miscellaneous Reports (for cases from trial level courts). As with the New York Supplement, the official case reporters have more than one series. Importantly, the New York Supplement contains all of the cases that are published in the official case reporters (and some cases that are not).

The New York Supplement collects all New York cases into a single case reporter. When conducting legal research,

the New York Supplement has several advantages. At the beginning of each case, the publisher has placed “headnotes” that describe the legal issue(s) in the case. The publisher has also assigned a “key number” to each headnote. Headnotes help the reader to more quickly understand the case and identify the applicable legal issues. Key numbers also help the reader to find other cases that discuss the same legal issue.

The following is an example of a headnote from *People v. Gelman*, 690 N.Y.S.2d 520 (1999) as printed in the New York Supplement 2d :

**[1] Indictment and Information <sup>a</sup> - 16**  
210k16 Most Cited Cases

In limited circumstances, withdrawal of charges after the People have presented evidence to grand jury may be deemed a dismissal by grand jury, for purposes of statute under which charge dismissed by grand jury may only be resubmitted to grand jury once, and with leave of court. McKinney's CPL § 190.75.

In the example above, the key number is “Indictment and Information <sup>a</sup> 16.” The key number may be used to find other cases that deal with the withdrawal of charges after the People have presented evidence to a grand jury.

The prison library also has federal case reporters. These collect the opinions of federal courts as follows:

- United States Supreme Court:
  - Supreme Court Reporter
- United States Circuit Courts of Appeals:

- Federal Reporter 2d  
v. 270-999
- Federal Reporter 3d  
v. 1 - present
- United States District Courts
  - Federal Supplement  
v. 176-999
  - Federal Supplement 2d  
v. 1 - present

Again, the more recent cases are collected in the latest series.

When looking for cases to support a Federal Petition for a Writ of Habeas Corpus, you will be using the federal case reporters. In addition, there may be times that you will cite federal case law in support of a direct appeal or 440 motion. For example, a legal issue may involve a claim that your federal constitutional rights were violated. New York State courts also discuss violations of federal constitutional law.

#### *Treatises And Legal Encyclopedias*

A “treatise” is a book written by a legal expert that explains the law on a particular subject and often cites important cases that support what is said. Most treatises in the library focus on criminal law. Some explain the rules that must be followed on an appeal, motion or petition. Others give advice on legal research and writing. A few provide advice on civil matters, such as small claims, bankruptcy or civil procedure.

A legal encyclopedia is similar to a treatise, with the

exception that it summarizes the law on multiple subjects. As such, treatises and legal encyclopedias are excellent places to begin your legal research. They provide a general understanding of the law on legal issues and cite important cases that may be helpful to you in beginning your research.

One of the best legal encyclopedias is *New York Jurisprudence 2d*. It is updated annually and contains numerous citations to New York cases on each issue and subject. Importantly, it contains a number of volumes on criminal law. This is one of the first places that you should begin your legal research.

Review the Table of Contents in one of the volumes on criminal law. The Table of Contents is long, but the effort is worthwhile. The Table of Contents will help you find sections in the encyclopedia that apply to issues that you have identified and to issues that you may not yet have considered.

The following is an excerpt from the Table of Contents in *New York Jurisprudence 2d* on Criminal Law: (the symbol “§” means “section.”)

**IV. CONFESSIONS; PRIVILEGE AGAINST  
SELF-INCRIMINATION**

**A. IN GENERAL**

**1. OVERVIEW**

- § 533. Generally
- § 534. “Confession” and “admission”  
defined and distinguished
- § 535. Purpose of privilege against  
self-incrimination
- § 536. Requirement of state conduct
- § 537. Requirement that privilege  
be asserted
- § 538. –Exception where privilege is  
penalized.

*New York Jurisprudence 2d*, Vol. 31.

After reading the Table of Contents, read the applicable sections in the bound volume. Make sure that you also read the “pocket part” of the volume (it is the paper supplement in the back of the book). The pocket part contains a discussion of the most recent cases on each legal subject.

Always keep track of your work, listing the sections that you have read and, if possible, photocopying those that apply to your case. This will help prevent you from covering the same ground twice. Do the same with any significant cases that you find in the case reporters.

### *Annotations*

An annotation is a summary of a court’s opinion that interprets a statute. In New York, annotations are collected in two sets of books:

- *McKinney’s Consolidated Laws of New York Annotated*
- *New York Consolidated Law Service (CLS)*

Each set of books is updated annually with a “pocket part” in the back of each volume. *McKinney’s* also contains “commentaries” that discuss some of the more important legal issues involving each statute. The annotations are grouped by subject and indexed. You should review the index for the applicable statute and find the legal issue that applies to your case. Then read the annotations in the bound volume and the pocket part.

The following is an example of an annotation from *McKinney’s Consolidated Laws of New York Annotated*:



### 374. Opinion evidence, generally

To be admissible, opinion evidence must be based on (1) personal knowledge of the facts upon which the opinion rests, or (2) where expert does not have personal knowledge of the facts upon which the opinion rests, upon facts and material in evidence, real or testimonial, or (3) material not in evidence provided it is derived from a witness subject to full cross-examination, or (4) material not in evidence provided it is of the kind accepted in the profession as a basis in forming an opinion and is accompanied by evidence establishing its reliability. *DeLuca v. Ju Liu* (2 Dept. 2002) 297 A.D.2d 307, 746 N.Y.S.2d 183.

### *Digests*

The “digests” are a series of books that collect the “headnotes” published by the West Publishing Company according to legal issue and key number. The prison library typically has three sets of digests:

- New York State cases:
  - New York Digest, 3d and 4<sup>th</sup>
- Federal cases:
  - Federal Practice Digest, 2d, 3d and 4<sup>th</sup>
- Federal and Fifty States combined
  - Corpus Juris Secundum

There are two ways to use the digests to find cases. First, if you know the key number for a legal issue, then you can go directly to the digest and locate the headnotes that discuss the same legal issue by using the key number. Each headnote is followed by the case citation. For example, you

may have found an important case that discusses your legal issue. You can take the key number identified in the case and go to the digest to look for other cases with the same key number.

Second, you can review the Table of Contents for the digest volume(s) on criminal law and look for the legal issue(s) that may apply to your case. Once you have found the legal issue(s), take the key number(s) from the Table of Contents and review the headnotes listed under that key number.

### *Reference Books*

A law library also contains various reference books, such as directories, manuals, law journals and legal dictionaries.

### *Ordering Books That Are Not In The Library*

The sets of case reporters in the library are not complete. They are missing volumes for the older cases. Such volumes must be ordered from the New York State Library, Prisoner Services Project. Other law books such as treatises may be similarly ordered. A form is provided and must be completed to make a request.

### *Shepardizing Cases*

Before you may rely on a case as authoritative, you must “shepardize” the case to see that it is still good law. Shepards is a set of dark red books that list the citations to every case and each subsequent case that has cited it. Shepards also prints symbols that tell the history of a case. For example, if a case was “affirmed,” a citation will be followed by the letter “a.” If reversed, a citation will be followed by the letter “r.”

Shepardizing a case is also a way to find other cases that discuss the same legal issue(s). In addition to a key number, each headnote in a case is assigned a consecutive number (1, 2, 3, 4, etc.). When Shepard's prints the citation to a subsequent case, it usually also prints the consecutive number that identifies the legal issue in that case. Citations having the same consecutive number discuss the same legal issue.

The following is an example from Shepard's showing the case history of a case and the subsequent cases that have cited it. (As you can see, you must check several books to fully shepardize a case):

2003 Bound Volumes (Vol. 18)

-793-  
*People v.*  
*Barney*  
2002  
(295NYAD [1001])  
**De** 752NYS2d6  
2003NYApp  
[Div LX4714  
755NYS2d<sup>3</sup>  
[544

Supplemented with:

2004 Semi-Annual  
Cumulative Supplement Vol. 88 No. 4

-793-  
759 NYS2d282  
768NYS2d<sup>2</sup>51

2004 Cumulative Supplement Vol. 88 No. 5

-793-  
768NYS2d<sup>2</sup>51

### *Computerized Research And Unpublished Opinions*

In recent years, legal research has increasingly been conducted on the computer. There are two major providers of computerized legal research services: (1) Westlaw, and (2) Lexis/Nexis. Unfortunately, New York State prison libraries do not yet have computerized legal research services available. Fortunately, most cases on which you will rely are printed in the case reporters.

A problem arises with “unpublished” opinions (decisions of courts that are not printed in the case reporters but appear on a computer data base). Such opinions have only a “Lexis” or “Westlaw” citation. For example, you will see some Lexis or Westlaw citations in Shepards. (Sometimes the case is too new, and has not yet received a citation to one of the case reporters.) The District Attorney or Attorney General may also cite unpublished opinions in their briefs or memoranda.

You must do your best to work around this problem. The better your legal research on published opinions, the less that you will need unpublished opinions to support your appeal, motion or petition. You can also demand that the District Attorney or Attorney General provide you with copies of any unpublished opinion that they cite. If you have an attorney, you can ask your attorney to provide you with copies of the unpublished opinion(s) (assuming that the attorney has computer access to the data base). Finally, you may be able to ask a court for help. Hopefully in the years to come, prison libraries will be equipped with computer research services.

### *Understanding Precedent*

Not all cases have the same value to a court. Some are more important than others. In general, a court is required to follow the prior legal opinions of its own court and the opinions

of the higher court(s) to which it is bound. When a court is not bound by another court, it may still follow an opinion of that court to the extent that the opinion is well reasoned.

Determining the value of a case that you have found depends on the court to which your appeal, motion or petition is taken. A state court does not generally place much value on federal court opinions (except when a federal court has ruled on a federal constitutional question), and a federal court does not generally place much value on state court opinions. For example, if you are appealing a case to the Appellate Division, Fourth Department, cases will typically have the following precedential value from greatest to least:

- (1) New York Court of Appeals
- (2) Appellate Division, Fourth Department
- (3) Other Departments of the Appellate Division
- (4) United States Supreme Court (if on a question of federal constitutional law)
- (5) Trial level courts of New York
- (6) United States Circuit Courts and District Courts
- (7) Opinions of other state courts.

Alternatively, if you are petitioning a federal district court for a writ of habeas corpus, the federal court will rank the precedential value of cases differently. For example, a petition to the United States District Court for the Southern District of New York will view cases as having the following precedential value from greatest to least:

- (1) United States Supreme Court
- (2) United States Court of Appeals, Second Circuit
- (3) United States District Court, Southern District of New York
- (4) Other United States District Courts in the Second Circuit (particularly the Eastern, Northern and Western Districts of New York)
- (5) Other United States Courts of Appeal
- (6) United States District Courts not in the Second Circuit
- (7) New York Court of Appeals
- (8) Departments of the Appellate Division of New York
- (9) Lower level opinions of New York State Courts
- (10) Opinions of other state courts.

In general, “secondary sources” have little precedential value (secondary sources are treatises, legal encyclopedias, etc.). They are a way to find cases, but generally do not have independent authoritative importance to a court. Therefore, you should avoid citing treatises. (There are a few treatises that are so well recognized that they may be cited as authoritative but these are exceptional). Instead, cite the relevant cases that the treatises discuss.

Understanding the precedential value of cases is important when choosing which case(s) to cite to a court among several cases that discuss the same legal issue. You

should choose the case that has the greater precedential value. Ideally, an opinion from the same court or the higher court(s) to which it is bound has the greatest precedential value. Where you do not have such binding cases, then cases with a lesser precedential value should be cited.

Finally, you should always cite the most recent cases possible. Recent cases confirm to a court that the law on an issue has not changed.

*Understanding The Reason  
That You Are Citing A Case*

Cases are cited to a court for two reasons:

- the case stands for a legal principle that should be followed, and/or
- the case contains facts that compare favorably to your case.

When citing a case for its legal principle, the facts and outcome of the case are irrelevant. When citing a case because it contains facts that compare favorably to your case, you will usually only want to cite cases that had a favorable outcome (i.e., reversal, new trial, etc.). A comparison with a case that had an unfavorable outcome is generally weak and has little persuasive value. (you will spend most of your time distinguishing the facts of that case and explaining why your outcome should be different). The ideal case is one which contains weaker facts than your own, and yet the court still ruled favorably in the outcome.

### Case Citation Form

Cases must be cited to a court in a specific form. When citing a case to a New York court, you should use the official case citation whenever possible (official case citations come from the official case reporters). The following are examples of correct citation forms for New York State cases:

- New York Court of Appeals  
*People v. Gelman*, 93 N.Y.2d 314 (1999)
- Departments of the Appellate Division  
*People v. Harris*, 304 A.D.2d 355 (1<sup>st</sup> Dept. 2003)  
*Hynes v. Tomei*, 238 A.D.2d 591 (2d Dept. 1997)  
*People v. Johnson*, 268 A.D.2d 891 (3d Dept. 2000)  
*People v. Van Duser*, 277 A.D.2d 1034 (4<sup>th</sup> Dept. 2000)
- New York State Supreme Court or County Court  
*People v. Taylor*, 187 M.2d 321 (Sup. Ct., Kings Cty. 2001)  
*People v. DeWitt*, 171 M.2d 622 (Delaware Cty. 1996).

If your typewriter or word processor does not allow you to italicize the name of a case, you may underline the name:

People v. Gelman, 93 N.Y.2d 314 (1999).

When citing a case to a state court in a brief or memorandum, you do not need to also provide the citation to the New York Supplement. The “official” citation to the case (as shown above) is sufficient. You will find the official citation printed at the beginning of each case in the New York



Supplement. Sometimes, a case does not have an official citation. In such instances, use the New York Supplement citation as shown below:

*People v. Gayle*, 655 N.Y.S.2d 513 (1<sup>st</sup> Dept. 1997).

The following are citation forms for federal cases:

- United States Supreme Court

*Apprendi v. New Jersey*, 530 U.S. 466 (2000)

- United States Circuit Courts of Appeal

*United States v. Padilla*, 186 F.3d 136 (2d Cir. 1999)

- United States District Courts

*Schramm v. Irvin*, 2 F. Supp.2d 339 (W.D.N.Y. 1998)

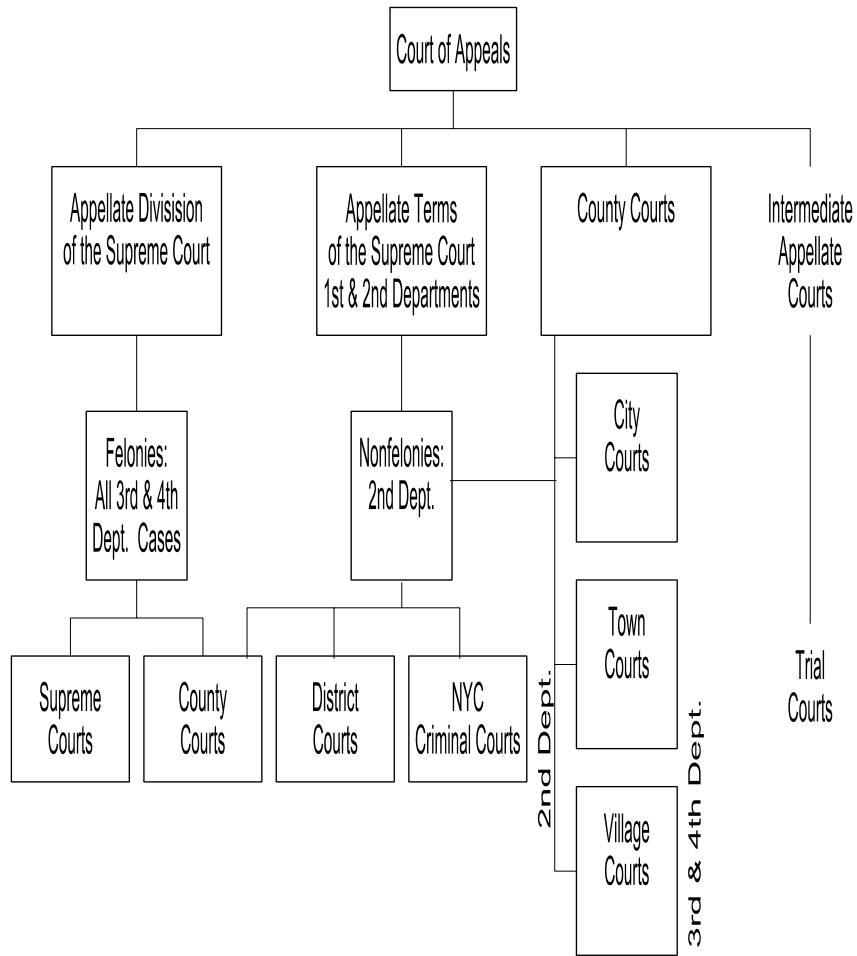
## CHAPTER 4

### WHAT IS INVOLVED IN AN APPEAL?

The more that you know about how an appeal works and what is required, the more that you will be effective in assisting your attorney and prevailing on your appeal. The following discusses the (a) structure of the appellate court system in New York; (b) how an appeal is started; (c) the components of an appeal; (d) the record or appendix; (e) identifying the issues to be raised in your brief; (f) assembling and reading the record; (g) the importance of the brief; (h) understanding appellate judges; (i) the purpose of the brief; (j) common criticisms of briefs; (k) the parts of the brief; (l) the People's Brief; (m) the Reply Brief; (n) oral argument; and (o) the decision.

#### *Understanding The Appellate Court System In New York*

Your first appeal is to an appellate court at the intermediate level. In other words, it is a court that is above the trial court but below the highest court, the New York Court of Appeals. The intermediate appellate court that will hear your appeal will depend on the seriousness of the conviction (felony or misdemeanor), and the place where the court that convicted you is located. The following chart shows the criminal appellate court structure in New York:



As shown above, felony cases are appealed to one of the four Departments of the Appellate Division of the State of New York. To win, you must convince a majority of the judges in your favor. An appeal to the Appellate Division is heard and decided by a panel of five judges. An appeal to the Court of Appeals is heard by seven judges and to win you must convince a majority to rule in your favor.

Each Department of the Appellate Division encompasses the following counties:

*Appellate Division, First Department* - New York, (Manhattan, Bronx)

*Appellate Division, Second Department* - Richmond (Staten Island); Kings (Brooklyn); Westchester; Orange; Putnam; Dutchess; Queens; Nassau; Suffolk

*Appellate Division, Third Department* - Sullivan; Ulster; Greene; Columbia; Schoharie; Albany; Rensselaer; Schenectady; Montgomery; Fulton; Saratoga; Washington; Warren; Hamilton; Essex; St. Lawrence; Franklin; Clinton; Delaware; Otsego; Madison; Chenango; Broome; Cortland; Tioga; Tompkins; Schuyler; Chemung

*Appellate Division, Fourth Department* - Onondaga; Oswego, Oneida; Herkimer; Lewis; Jefferson; Steuben; Livingston; Monroe; Ontario; Wayne; Yates; Seneca; Cayuga; Niagara; Orleans; Erie; Genesee; Wyoming; Chataqua; Cattaraugus; Allegheny

The addresses of the Departments of the Appellate Division and Court of Appeals are set forth in the Appendix of this Guide. (See A-1 "Locations of New York Appellate Courts.")

### *How An Appeal Is Started*

An appeal is started by the filing and service of a notice of appeal. This is something that your trial attorney should do for you. It is usually a one or two-page document that states, among other things, the conviction that you are appealing and the appellate court to which the appeal is to be made. (A sample notice of appeal is set forth in the Appendix to this Guide. See A-4 “Notice of Appeal.”)

The most important thing to keep in mind about the filing and service of a notice of appeal on a New York State conviction is that it must be done within thirty days of the date that the judgment of conviction is entered against you. Ordinarily, the judgment is entered on the date of sentencing. The failure to file and serve a notice of appeal within the required period of time will prevent you from appealing your case. (There are instances in which courts have permitted the late filing of a notice of appeal, but only under extreme and unusual circumstances. Therefore, it is important that the notice of appeal be timely filed and served). The notice of appeal is called a “jurisdictional document.” This means that the appellate court is without jurisdiction to hear your appeal unless the notice of appeal is timely filed and served. The notice of appeal is ordinarily filed with the trial court, not the intermediate appellate court.

### *Components Of An Appeal*

An appeal has the following basic components:

- Record (or Appendix)
- Appellant’s Brief
- People’s Brief
- Reply Brief (optional)
- Oral Argument
- Court’s Decision

The amount of time that it takes for an appeal to be heard and a decision made depends on a number of factors. Stenographers must transcribe the minutes of various proceedings that are to be made part of the record on appeal. Appellate counsel must review the entire record, research potential issues, and draft and revise the appellant's brief.

On appeal, you are called the appellant and the People are called the respondent. Upon the filing of the record (or appendix) and the appellant's brief, the appeal is deemed "perfected" by the court. In other words, the appellant has done all that is required of him or her at that point, and it is the People's turn to then respond. Ordinarily, the People will be required to submit its brief within about one month of the filing of the appellant's brief. Upon receipt of the People's brief, the appellant may decide to file a reply brief, if necessary. A date is then set by the appellate court to hear oral argument. The date set will depend on the number of cases already scheduled to be heard by the court. After oral argument, the appellate court reserves decision, and usually within one or two months issues a written decision.

Delays can occur in the process where, for example, stenographers are overburdened or do not act timely in transcribing the minutes of the record. Moreover, the complexity of the appeal and/or the length of the record may require substantial time to be expended by appellate counsel in reviewing the record and researching issues for the appellant's brief. The People may also ask for extensions of time to file its brief. Finally, depending on the backlog of cases in the appellate court, it may take additional time for the court to schedule the oral argument and to render a decision.

Appellate counsel has some control over the time that it takes to assemble the record and to file the brief. However, other matters are beyond appellate counsel's control, in that some matters are dependent on the actions of the People in

filing its brief and the actions of the appellate court in hearing and deciding the appeal.

### *What Is A Record And An Appendix?*

All appeals must be based on the “record.” The papers and documents that make up the record are defined by statute. (The statute is included in the Appendix to this Guide. See A-6 “New York Rules for Records and Briefs.” You must also consult the local rules for the applicable appellate court.)

Most important are the transcripts of proceedings that occurred in the trial court. When you appeared in court, ordinarily a stenographer was present who took down what was said. On appeal, appellate counsel may order transcripts of the proceedings from the various stenographers. In addition to transcripts, the record includes important documents, such as the indictment, bill of particulars (if any), motion papers, exhibits that were introduced and received into evidence at hearings or trial, the judgment of conviction, and the notice of appeal.

Ordinarily, letters to the court or between the attorneys are not part of the record unless the trial court expressly made them part of the record. In addition, legal memoranda are not ordinarily part of the record unless it is necessary to demonstrate that a particular issue was preserved for appeal.

It is important to understand that an appellate court will only consider facts and legal issues that appear in the record. For example, conversations with trial counsel, even if relevant to an issue that you wish to raise on appeal, are not part of the record unless the stenographer has recorded the conversations in open court. Likewise, witnesses who may have information bearing on issues that you wish to raise on the direct appeal may not be relied upon if their statements were not recorded as testimony or somehow otherwise made

a part of the record in the trial court. Therefore, it is important to understand that the direct appeal is defined by the record, and an appellant may not go beyond the record to argue facts or legal issues that are not contained in the record.

Some appellate courts permit or require the filing of an “appendix.” An appendix is not the full record. An appendix is only that part of the record that relates to the issues that you wish to raise on your appeal. For example, an appendix would include only those pages of the transcript that set forth the facts that support a particular legal issue that you wish to argue to the appellate court. Parts of the transcript that do not relate to an issue sought to be raised to the appellate court are omitted from the appendix. Although the appendix is a portion of the record, it is nonetheless important that the appendix contain enough of the record so that the court can fully understand the legal issue(s) sought to be raised.

You should consult with your appellate attorney regarding whether the appeal will involve the “full record method,” or the “appendix method.” You should also discuss the particular proceedings that should be ordered from the stenographer(s) that are relevant to the issues that you wish to have raised on appeal. It is the obligation of appellate counsel to order the transcripts. The earlier that the transcripts are ordered, the sooner appellate counsel can commence work and write the brief. Delays may occur where appellate counsel fails to immediately order relevant transcripts.

Ordering transcripts can be costly. Stenographers typically charge several dollars a page. If you are indigent and your attorney is assigned, New York State will pay for the cost of the transcripts. If you are not indigent and you have therefore retained an appellate attorney, you must pay for the cost of the transcripts. Often, a defendant is indigent and family members and/or friends have come up with the money to retain an appellate attorney. In such instance, New York



State is required to pay for the cost of the transcripts in that your indigent status remains unchanged. A motion must be made to a court to obtain an order that New York State pay for the transcripts. (A sample motion is included in the Appendix to this Guide. See A-3 “Motion for Payment of Transcripts.”)

*Identifying The Issues To  
Be Raised On Your Appeal*

This is an extremely important part of the appellate process. Your appeal will be based on the claim that certain errors had been made, and that those errors should result in some form of affirmative relief, whether that relief be a reversal and dismissal of the indictment, the granting of a new trial, or a modification of your sentence. As a defendant, you may have some idea of things that were in error at the trial level and should be raised to an appellate court. Your trial counsel may also have some thoughts about issues that may be potentially raised on your appeal. Finally, an independent review by your appellate attorney of the record may disclose errors that should be raised as issues on your appeal. You should communicate with your appellate attorney regarding the issues that you think should be raised. Moreover, if appropriate, your appellate attorney may choose to communicate with your trial attorney to obtain the trial attorney’s thoughts about potential issues.

In general, an appellate court will not consider an issue unless it had been “preserved for review.” In other words, it must appear in the record that an objection was made or that the issue was otherwise raised in the trial court. If an issue appears in the record but was not preserved for review, an appellate court may still hear the issue under a “plain error” standard or under a claim that the appellant had been rendered ineffective assistance of trial counsel by the failure of counsel to object or otherwise raise the issue. The plain error standard and an ineffective assistance of counsel claim place

additional burdens on an appellant to prevail. Therefore, it is better, if possible, to raise issues that have been preserved for review.

In addition, there are special concerns when a plea agreement is involved. Usually, a defendant pleads guilty to obtain a lesser sentence on the same charge or a lesser charge. An appeal which seeks to void or cancel a guilty plea will, if successful, also cancel the benefits that were obtained under the plea agreement. This means that if the defendant then proceeds to trial and is found guilty, the defendant may receive a sentence in excess of that which he or she received under the original plea agreement. Therefore, before raising such an issue on appeal, a defendant should consider the possible consequences.

Once all possible issues are identified, there must be a determination as to which issues are strongest and which are weakest. In general, weak issues should not be raised to the court, in that they may detract from your stronger points. The choice of which issues to raise to an appellate court often depends on a review of the relevant case law to assess the chances of success with each issue.

#### *Assembling And Reading The Record*

Appellate counsel is responsible for ordering, assembling, and reading the record in your case. To read the record properly, the appellate attorney must “index the record.” Indexing the record means that the appellate attorney, as he or she reads, must keep a written summary of facts that are relevant to the issues in your case with a note of where each fact occurs in the record. When in doubt, the list should be inclusive. If appellate counsel fails to index the record as he or she reads the record, it is virtually impossible to find the fact in the record at a later time when writing the Statement of Facts for the brief. Remember, to establish credibility, any fact

set forth in the brief should contain a citation to the record. The failure to keep track of where the facts occur in the record as the attorney reads makes it extremely difficult to find those facts later.

### *The Importance Of The Brief*

The brief is extremely important to an appeal. It sets forth the facts of your case, the legal issues that you wish to raise and the arguments that you make based on applicable case law to obtain a reversal of your case, a new trial, and/or a lesser sentence. The brief is particularly important because it is received by the appellate court early in your case and remains with the court until a decision is made. Contrary to a trial where a jury is told to withhold judgment until the end of the case, appellate judges start to decide the case with the brief. The brief is used by law clerks for the appellate court as a starting point for their own research in assisting the judges in reaching a decision.

Oral argument is important, but not as important as the brief. Oral argument occurs late in the decision-making process and is generally short, with usually ten or fifteen minutes allocated per side. Based on the foregoing, an appellant should not hold anything back for oral argument. If there is something to say on your behalf, it should be said in the brief. It is the best opportunity to influence the court's decision-making on your case.

### *Understanding Appellate Judges*

In general, appellate judges are intelligent, experienced, and accustomed to seeing briefs in a particular format. Most appellate judges are older, having first been trial judges for a number of years. In general, appellate judges have read hundreds of poorly written briefs and are wary of appellants that misrepresent the facts or law of a case. Appellate judges,

like most judges, have to handle heavy caseloads, and there is an extreme demand on their time. To a large extent, they are overworked, and therefore can become impatient if a brief is not clearly written or easily understood. Moreover, appellate judges will begin to make up their minds as they read the brief.

Each of the appellate judges have law clerks who assist them in their job. Law clerks are lawyers who act under the direction of the judges, researching cases and advising the judges as to the substance of their research. Law clerks invariably try to catch a lawyer or appellant in misstatements or mistakes. By so doing, they prove themselves to the judges as being vigilant in the performance of their job.

Based on the foregoing, it is extremely important that the brief be clearly written and easily understood. If a brief cannot be easily understood, the appellant risks that the judges will lose interest, and thereby lose the opportunity to persuade the judges that your appeal has merit.

### *Purpose Of The Brief*

The object of the brief is to persuade the court to rule for you. If what is said is not calculated to persuade, then the brief is ineffective. Therefore, style of writing is subservient to this purpose. Judges are not generally impressed by flowery writing. They are most concerned with those facts and cases that impact upon their decision in a given case.

It is expected that the brief take a position. The brief should view the facts of a case and applicable case law from your perspective. The brief can help persuade the court when it highlights favorable facts and cases and explains or distinguishes harmful facts and cases. Of course, the brief may never misrepresent facts or misstate cases. Rather, it is the position that the appellant takes regarding the facts and the cases that is important.

A brief must gain and keep the attention of the judges. Among other things, this can be accomplished by “leading with strength.” In other words, the appellant should make his or her strongest argument first. The reason is, as previously stated, judges begin to make up their minds as they read the brief. By leading with your strongest argument, you will obtain the best chance to gain and keep the attention of the judges by demonstrating that your case has merit. If you do not lead with your best argument, a judge may begin to decide against you as he or she reads, and by the time the judge gets to an argument that is stronger, the judge may not be favorably inclined toward your case.

Appellate counsel can also gain and keep the judges’ attention by writing a brief that is concise, clear, accurate, and logical. You cannot persuade someone toward your position if they have trouble at the outset understanding your position. The best briefs are not loaded with “legalese,” but rather are set forth in more simple language that is easily understood. Of course, sometimes it is necessary to use legal terms that would not ordinarily be known by most people. But, for the most part, a brief that is clearly written will be more easily understood by the judges, and therefore will enhance your chances of winning on appeal.

It is also important to establish credibility with the court through your brief. Credibility is established in several ways. For example, when a fact is stated, there should be a citation to the record where that fact appears. Not only does such citation make it easier for the judges to find the fact in the record, but it also has the effect of saying to the judges “don’t take my word on it, the fact is in the record.” Citations to the record prove to the court that you are not making up facts, but rather that what is expressed in the brief may be confirmed in the record.

### *Criticisms That Judges Have Of Briefs*

Over the years, appellate judges have expressed a number of criticisms about briefs that they have seen submitted to appellate courts. An understanding of such criticisms will help in the drafting of a brief, so that the brief may avoid such failures. The following are common criticisms of briefs by appellate judges:

- lack of organization, structure, or logic
- inaccurate or contains misrepresentations
- failure to convey what is right or wrong
- failure to deal with adverse facts or law
- cluttered with too many citations
- wordy or repetitive
- irrelevant facts
- failure to cite to the record
- grammar, typing, and spelling

### *Parts Of The Brief*

By statute, there are certain things that must be in the brief. The contents of the brief are governed by CPLR 5528 and the local rules of the particular appellate court to which your appeal is taken. For specific rules, the statute and rules of the appellate court must be consulted. (A sample brief is included in the Appendix of this Guide. See A-7 “Sample Brief to New York Appellate Court.”) A brief typically includes the following parts:

### Table of Contents

The Table of Contents is usually the first page that the judges look at in the brief. It sets forth the various sections of the brief and the page where each section begins. The Table of Contents is important because it provides the judges with an initial look at the structure of the brief. In a sense, the Table of Contents is an outline which will help the judges understand what your appeal is about.

### Table of Authorities

The Table of Authorities lists all of the cases cited in your brief and the page or pages on which each case cited appears. It provides the judges and law clerks with an ease of reference when doing their own research, and permits a comparison of the appellant's brief with the respondent's brief pertaining to a discussion of a particular case. Law clerks will likely review all of the cases that are cited in the Table of Authorities. The Table of Authorities is also one way in which you show the court that the brief is thorough.

### Questions Presented

This section of the brief sets forth the issues that are being raised to the court. Each issue is stated as a question. This section of the brief has importance because it further helps the judges understand your appeal. It is also read earlier in the brief, and therefore has impact. It requires skill to draft questions in a way that assists your appeal.

### Statement of Facts

This section of your brief is extremely important. It takes great skill to draft a Statement of Facts in a way that maximizes your chances of success on appeal. Most appellate judges have a wide understanding of the law, having read thousands of cases. Therefore, the judges will begin to decide your appeal as they read the Statement of Facts. Hopefully, upon reading the Statement of Facts, the judges will be inclined toward the merits of your case. The Statement of Facts should not only discuss the facts that are favorable to you, but also set forth those key facts that are troublesome, and which your attorney has reason to believe will be raised by the People in its responsive brief. Not all adverse facts should be discussed, but only those facts that are important to the People's case against you. Hopefully, the adverse facts can be discussed in a way that helps diminish their impact.

## Argument

This is the part of the brief where the appellant argues the issues that are raised to the appellate court. Each argument is set forth in separately numbered “Points,” with each Point limited to a separate issue. In general, your strongest argument should be the first Point raised in your brief. Importantly, the argument must be logical, concise, and demonstrate that the propositions asserted are supported by legal authority. The argument should progress to a desired result.

## Conclusion

The Conclusion sets forth the relief requested. It may briefly reiterate some of the key aspects of the argument made.

## *People’s Brief*

After your brief is filed and served, the People file a brief in opposition. The People “respond” to the issue(s) raised in your brief. The People’s brief is likewise organized into “Points” that contain the legal arguments in opposition to your issue(s).

## *Reply Brief*

You may “reply” to the People’s arguments in a reply brief. For example, a reply brief may be filed when the People have raised something new that your attorney believes should be addressed. You should not file a reply brief if all that you do is repeat the arguments in your initial brief. In such instance, the appellate court will consider the reply brief to be unnecessary.



### *Oral Argument*

After the appellate court has reviewed the briefs and researched the issues, the attorneys appear before the court to orally argue the case. The court sets a time limit for oral argument. The Appellant goes first and the People second. Some courts permit the appellant to reserve time for rebuttal. Many courts grant oral argument as of right. However, some courts allow oral argument only by permission. An appellate court ordinarily does not render its decision at oral argument. A further discussion regarding effective oral arguments is contained in Chapter 5 of this Guide.

### *Court's Decision*

An appellate court issues a written decision on the appeal. Usually, the court explains its decision, discussing the issues and its reasoning. Rarely, the court simply affirms or reverses, but does not explain its decision. Typically, an appellate court issues a decision within one or two months after the oral argument.

## CHAPTER 5

### EFFECTIVE ORAL ARGUMENTS

If you are represented by counsel, a court typically permits or requires oral argument for an appeal or 440 Motion. Oral argument on a Federal Writ of Habeas Corpus or a motion for permission to appeal is at a court's discretion. If you are incarcerated at the time of oral argument, the court will typically not order that you be present. Your attorney will conduct the argument on your behalf. A skilled attorney understands the dynamics of oral argument to achieve success.

#### *The Object Of Oral Argument*

The sole object of oral argument is to persuade. Therefore, that which tends to persuade is helpful, and that which does not is useless.

#### *Knowing Your Audience: The Judges*

Appellate judges are typically intelligent, experienced, and overworked. Therefore, clarity and credibility are critical. Judges want to hear the key arguments and facts that will decide the case. In preparing for oral argument, an attorney should ask:

- What is most important to making a decision?
- On what does a decision in this case hinge?

#### *A Good Brief Helps*

A good oral argument depends on a good brief. The brief precedes oral argument and focuses the judges on the

key issue(s) in the case. A “hot bench” (a court that is well-prepared) uses the brief as a springboard for questions. There is no substitute for preparation.

### *Outline The Argument*

Attorneys who try to “wing it” without notes invariably forget what they want to say, while others who write out their argument “word for word” almost always lose their place. The solution is an outline containing short phrases that trigger the mind at a glance. In a free-wheeling debate with judges, an outline allows flexibility while reminding the attorney of the key points to make.

### *Familiarizing The Judges*

Judges typically hear multiple oral arguments in a single session. When starting, an attorney should state the issue that he or she intends to discuss, thereby orienting the judges. The attorney should not begin by stating the facts in detail. Otherwise, the judges will likely cut the attorney off, saying: “We know the facts! Get to your argument!” If some facts are critical, the attorney artfully interweaves them into the legal argument.

### *Getting To The Heart Of The Case*

An attorney must quickly get to the core of the client’s case, boiling the argument down to its essence, and driving home the key legal principle(s) and critical fact(s) on which winning depends. By so doing, the attorney focuses the judges’ attention on the strength of the client’s case, creating a catalyst for important questioning and the best opportunity to persuade.

### *Handling Questions From The Bench*

The attorney should welcome questions from the bench. There is nothing worse than the court’s silence, which can

indicate that the judges are unengaged. A question is a window into the mind of a judge. Through the question, the attorney can gain insight into that which is important to the judge. The attorney should deal with the question when asked. The attorney should never say: "I'll get to that," a response that only frustrates the judge. A question, even if adverse, is an opportunity to persuade.

### *The Importance Of Credibility*

Persuasion depends on being believed. Therefore, credibility is extremely important. A skilled attorney knows how to argue without distortion or half-truths. Misrepresentation, once exposed, destroys a case. An advocate must have the courage to deal with adverse law or facts. The court knows them, having been informed by the adversary or by independent research. The oral argument is an opportunity to explain why such adverse law or facts should not affect the outcome. Sometimes an adverse law or fact is so damaging that it cannot be explained. In such instance, the better course may be to concede it, but show that there remains an alternative argument for winning. By so doing, the attorney demonstrates candor, establishes credibility and strengthens the alternative argument.

## CHAPTER 6

### APPLICATION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

As previously stated, there are instances in which you do not have a right to appeal, but rather must ask for permission to appeal. There is no right to appeal to the New York Court of Appeals in a criminal case unless a sentence of death has been imposed in a capital case. You must ask for permission to appeal.

#### *Some Issues Are Not Appealable To The Court Of Appeals*

Some adverse rulings by an intermediate appellate court are not appealable to the Court of Appeals, because the Court of Appeals is without jurisdiction to hear the issues. For example, decisions that resolve “questions of fact” are not appealable to the Court of Appeals. Likewise, whether a verdict is contrary to the weight of the evidence (as distinguished from sufficiency of the evidence), or whether there was consent to search are not appealable to the Court of Appeals. Therefore, it is important to focus on questions of law when asking permission to appeal to the Court of Appeals.

#### *In Which Court Do You Make The Application*

An application for permission to appeal to the Court of Appeals may be made directly to the Court of Appeals or to a justice of the Appellate Division of the Department that heard the appeal. Most applications are made directly to the Court of Appeals. Sometimes, an application to the Appellate Division is preferable if there is a dissenting judge in the opinion who might look favorably on such an application. However, if the application to the Appellate Division is denied, you may not make a second application to the Court of Appeals.

### *The Thirty-Day Time Limit*

An application for permission to appeal to the Court of Appeals is typically made by letter, pursuant to the rules of the Court of Appeals. The application must be made within thirty days from the date of service of the order of the Appellate Division denying the appeal. Within one year, however, a motion for an extension of time to make an application for permission to appeal may be made to the full court, and must allege facts supporting one or more statutory grounds for granting an extension.

### *Motion For Reargument*

Sometimes a defendant wants to reargue the denial of his appeal by the intermediate appellate court. This is done by a Motion for Reargument filed with the court that denied the appeal. (A sample motion is included in the Appendix to this Guide. See A-8 "Motion for Reargument.") Such motions are rare because the defendant cannot simply argue that his appeal was wrongly decided. Rather, he or she must show that the appellate court "overlooked" or "misapprehended" a particular fact or case that was important to the appeal (usually by specific reference to something that the court said in its opinion). A Motion for Reargument must be made within thirty days of service of the order denying the appeal.

Importantly, a Motion for Reargument does not stop the thirty-day time limit within which an application for permission to appeal to the Court of Appeals must be made. In addition, when making an application for permission to appeal to the Court of Appeals, you must state in the application that a Motion for Reargument has been made to the intermediate appellate court and that you will inform the Court of Appeals when a decision is made on the motion. The Court of Appeals will not decide your application for permission to appeal until it hears from you regarding the result of the motion.

### *Contents Of The Application*

The letter application must be addressed to the chief judge and marked to the attention of the clerk of the court, with one copy sent to opposing counsel or the adverse party. The application should state:

- that an application has not been made to a justice of the Appellate Division
- whether oral argument of the application is requested
- whether there are any co-defendants, and, if there are, the status of their appeals
- the issues sought to be raised on appeal to the Court of Appeals, and why such issues are worthy of review

The application must include copies of:

- the briefs filed by both parties in the intermediate appellate court
- the order of the intermediate appellate court sought to be appealed
- the opinion or decision of the intermediate appellate court, and any relevant opinions of other courts in the case
- the record or appendix, if available.

(A form letter application for permission to appeal to the Court of Appeals is included in the Appendix to this Guide. See A-9 “Application for Permission to Appeal to the Court of Appeals.”)

### *Factors That A Judge Considers*

The application is assigned to one of the judges of the Court of Appeals to review. An application is granted or denied in the discretion of the assigned judge. The judge does not simply decide whether the intermediate appellate court's decision was erroneous. The judge also considers several factors, such as:

- issues on which Departments of the Appellate Division have split or are in conflict
- issues presenting questions of statewide impact of first impression
- issues of public importance which are capable of repetition
- issues involving recent United States Supreme Court decisions and how such decisions are to be applied in New York (particularly where New York might adopt a different rule under the New York State Constitution)
- possibly erroneous decisions published by the intermediate appellate court which might mislead other courts, attorneys, or the public; and
- issues involving construction of new statutory schemes

The foregoing is not an exhaustive list, but rather illustrates some of the factors that a judge may consider when granting an application for permission to appeal.

### *Exhausting Your State Remedies*

Although a small percentage of applications are granted by the Court of Appeals, such applications should ordinarily



always be made because the application preserves the ability of a defendant to file a Petition for a Writ of Habeas Corpus in federal court. Too often, a defendant is discouraged by the outcome from an adverse decision of an intermediate appellate court, but later wishes to fight on. Therefore, the filing of the motion for permission to appeal to the Court of Appeals preserves that ability.<sup>1</sup>

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<sup>1</sup> See S. Cohen "Criminal Leave Applications to the Court of Appeals"  
N.Y.S. Bar Journal. Jan. 1990/

## CHAPTER 7

### 440 MOTIONS

A “440 Motion” is made under Section 440 of the Criminal Procedure Law of New York. A 440 Motion is useful because it can raise issues that are outside the record or that are based on newly discovered evidence.

#### *The Eight Grounds*

A 440 Motion to overturn your conviction must be based on one or more of the following eight grounds:

- (1) the trial court lacked jurisdiction of your case;
- (2) duress, misrepresentation, or fraud by the court or prosecutor;
- (3) material evidence known by the prosecutor or court to be false before judgment;
- (4) material evidence obtained contrary to constitutional requirements;
- (5) existence of a mental disease or defect making defendant incapable of understanding proceedings;
- (6) improper and prejudicial conduct outside the record that would be reversible error if part of the record on appeal;
- (7) newly discovered evidence;

- (8) the judgment was obtain in violation of defendant's constitutional rights.

The eight grounds cover the vast majority of issues that arise outside the trial court record. (A copy of Section 440.10 of the Criminal Procedure Law is included as item A-12 in the Appendix of this Guide.) You should review the annotations to cases under Section 440.10 that have applied these eight grounds to see the kinds of issues that have been raised. For example, there are multiple constitutional violations that have been raised in 440 Motions, such as illegal searches and seizures, involuntary confessions and ineffective assistance of counsel. Likewise, 440 Motions have been based on the failure of the prosecutor to turn over exculpatory evidence (*Brady* material) or statements of prosecution witnesses for purposes of cross-examination (*Rosario* material). (When challenging your sentence, and not your conviction, the motion is made under Section 440.20.)

Rarely, an issue does not fall within one of the eight grounds stated above. In such instances, a writ of *coram nobis* or a writ of state habeas corpus may be possible. For example, a writ of *coram nobis* has been used to raise a claim of ineffective assistance of appellate counsel. Likewise, a writ of state habeas corpus has been sometimes used to raise parole and bail issues.

#### *Statutory Limits*

Section 440.10 places certain limits on your ability to make a motion, even if one of the eight grounds apply. The court *must* deny your 440 motion if:

- the issue was raised in your direct appeal and the appellate court denied the issue on the merits (unless the law on the issue has changed after your appeal and the courts have given such change “retroactive effect”);
- you could have raised the issue in your direct appeal but did not (in such instance, a writ of *coram nobis* may be required);
- you have raised, or could raise, the issue in a pending direct appeal;
- you are challenging your sentence and not your conviction (a challenge to a sentence must be made under Section 440.20, not Section 440.10).

A court *may*, but is not required, to deny your 440 Motion if:

- you did not object or otherwise preserve the issue for appeal (but you may still contend that you were rendered ineffective assistance of counsel by your attorney’s failure to preserve the issue. If applicable, you may also contend that the facts supporting the issue could not have been discovered at the time of trial);
- you have made a prior 440 Motion on the same ground (the court will generally deny a motion based on an issue raised in your direct appeal or in a prior 440 Motion);
- you could have raised the issue in a prior 440 Motion but did not do so (you should therefore raise all possible issues in your initial 440 Motion).

### *The Nuts And Bolts Of A 440 Motion*

Although there is no required form for a 440 Motion, typically such a motion has a Notice of Motion, one or more affidavits supporting the motion (with attached documents, if any), and a Memorandum of Law.

A Notice of Motion is a one-page document that states that you are seeking to overturn your conviction on one or more of the eight grounds set forth in Section 440.10 (a sample Notice of Motion is included in the Appendix of this Guide. See A-13 “Notice of Motion”.) There is no required form for a Notice of Motion (although its contents must comply with CPLR 2214(a) and courts are accustomed to seeing it in the form provided).

An affidavit is simply a written statement provided by a person with personal knowledge of the facts who swears to the truth of what is said. Typically, it begins with the word “Affidavit” beside the caption of the case (although the caption is not required), followed by language indicating that the statement is sworn. The body of the affidavit usually has numbered paragraphs in which the facts known to the person are stated. Finally, the affidavit is signed, with the signature notarized. The following illustrates the basic form of an affidavit:

STATE OF NEW YORK  
\_\_\_\_\_ COURT, COUNTY OF \_\_\_\_\_  
\_\_\_\_\_

PEOPLE OF THE STATE OF NEW YORK

AFFIDAVIT  
Index No.

v.

\_\_\_\_\_,  
Defendant.  
\_\_\_\_\_

STATE OF NEW YORK)  
COUNTY OF \_\_\_\_\_) ss.:

\_\_\_\_\_(name)\_\_\_\_\_, being duly sworn, deposes and says:

- 1.
- 2.
3. etc.

( \_\_\_\_\_ signature \_\_\_\_\_ )  
(print name below)

Sworn to before me this  
\_\_\_ day of \_\_\_, 2\_\_\_\_.

\_\_\_\_\_  
Notary Public

Affidavits can vary greatly in what they say, depending on the facts known by the person making the affidavit and the purpose for which it is furnished. Simply repeating the facts from a form is usually not good enough because all cases are different and the facts on the form may not be those needed by you to succeed on your motion. Use a form to see how another person drafted an affidavit for another case but independently think about your case and write down the facts that apply to your case in the affidavit.

To write an affidavit, you must also understand the requirements of the law on the issue that you wish to raise in a 440 Motion. For example, to succeed on a claim of ineffective assistance of counsel, the law requires that you prove two elements: (1) that your attorney's performance was deficient, and (2) that such deficiency prejudiced your case. The affidavit(s) supporting a 440 Motion based on a claim of ineffective assistance of counsel must therefore contain facts proving both elements. Merely stating facts that establish that your attorney's performance was deficient will not be enough. You may submit more than one affidavit in support of your motion, depending on the number of witnesses.

Affidavit(s) should be detailed and based on personal knowledge, not hearsay. Moreover, courts will reject conclusions or opinions without supporting facts. Papers and documents that help your 440 Motion may be submitted as exhibits with an affidavit. They can be helpful if they corroborate what is said in the affidavit.

Importantly, a 440 Motion rests on the facts contained in the affidavit(s). The facts in the affidavit(s) are like the foundation of a house. Without a good foundation, the house will fall. Therefore, you must take care to gather the facts that

you need and then fully state the facts in affidavit(s). A sample of an affidavit in support of a 440 Motion is included in the Appendix of this Guide. (See A-14 “Supporting Affidavit.”)

You should consider providing the following information in an affidavit supporting a 440 motion:

1. The ground(s) for the motion (from C.P.L. § 440.10)
2. The procedural history of your case, such as:
  - the charges in the indictment
  - whether there was a plea or you went to trial
  - the crime(s) of conviction
  - if an appeal was taken, the issue(s) raised
  - whether an application was made for permission to appeal to the Court of Appeals
  - whether any prior 440 Motions were made and, if so, the ground(s) and results.
3. The facts supporting the present 440 Motion, including:
  - how and when the facts were discovered
  - a detailed summary of the facts supporting the motion



- reference to any additional affidavits and/or documents supporting the motion (you should attach them as exhibits to the main affidavit)
- how the facts demonstrate that the ground(s) for the motion have been met.

4. Request for relief:

- request that the conviction be vacated if an evidentiary hearing is needed, request an evidentiary hearing.

Affidavits should not cite cases or make legal arguments. Instead, this is the purpose of a Memorandum of Law. In reality, there is no difference between a “Brief” and a “Memorandum of Law,” with the exception that a “Brief” is submitted to an appellate court and a “Memorandum of Law” is submitted to a trial court. They both discuss the facts and argue the law. Therefore, when writing a Memorandum of Law, follow the advice, principles and form stated in Chapter 4 of this Guide (with the exception that on the cover you call it a “Memorandum of Law” and not a “Brief”).

A 440 Motion must be made to the trial court that heard your case. A copy of the motion must be served on the District Attorney. The District Attorney will ordinarily file and serve an answer in opposition to your motion.

*Filing And Service*

A motion (and any other important document that is sent to a court such as a notice of appeal, brief or petition) must be “filed” and “served.” The term “filed” means that you delivered

or mailed the document to the clerk of the court. The term “served” means that you delivered or mailed the document to your opponent, usually the District Attorney or the Assistant District Attorney assigned to the case. It is important to understand the difference between “filing” and “serving” when the document must be sent by a specific date. A document is “filed” on the date that is *received* by the clerk of the court. A court document is “served” when it is placed in the mail, regardless of when it is later received by your opponent. (If mailing something from prison, you must take into account possible delays by prison personnel in placing letters in the United States mail.) In sum, if a time limit is involved, you must plan ahead and be sure that you act timely. When filing a court document, you must also file an “Affidavit of Service” to prove that you served your opponent. (A form “Affidavit of Service” is included in the Appendix to this Guide. See A-15 “Affidavit of Service.”)

#### *There Is No Time Limit For Filing A 440 Motion*

New York does not have a time limit within which a 440 Motion must be made, but you should not unreasonably delay in making the motion after the facts supporting the motion become reasonably known to you. More than one 440 Motion may be made, provided that the motions are on different grounds than those previously asserted.

#### *Gathering Facts To Support Your 440 Motion*

A 440 Motion must be based on facts that are not in the record of your case. As discussed in Chapter 4 of this Guide, the record includes documents that are filed in the trial court and transcripts of proceedings. (See section in Chapter 4 entitled “What is a Record and an Appendix?”). Therefore, you should obtain a copy of the record of your case so that you are

able to identify facts that are not in the record. When gathering evidence to support your 440 Motion, you should consider the following sources: (1) your prior attorneys, (2) the District Attorney and other government agencies; (3) the clerk of the trial court; and (4) witnesses who have evidence not contained in the record.

### *(1) Your Prior Attorneys*

Your trial attorney likely has both record and non-record documents in his or her file. Therefore, you should request copies of all documents in your attorney's possession.

The record may be found either in a bound document called the Record on Appeal (if you appealed your conviction) or in folders in your trial attorney's files. If for some reason your trial attorney does not have a copy of the Record on Appeal or the documents that make up the record, your attorney should be able to tell you where the record may be found and how to get it.

In addition, your trial attorney likely has copies of non-record documents provided by the District Attorney. Soon after you were charged, the District Attorney had an obligation to provide, upon request, discovery material and exculpatory evidence (evidence that may tend to show that you did not commit the crime). For example, Section 240.20 of the Criminal Procedure Law requires the People to provide written, recorded or oral statements of a defendant or co-defendant, written reports on scientific testing, photographs, records of seized property, and tape recordings. The District Attorney likely had other documents, such as police reports, Grand Jury transcripts and statements of witnesses. Some District Attorneys provide only the documents required by statute. Other District Attorneys have an "open file" policy and provide all documents

in their possession. Still other District Attorneys have policies that are somewhere in between. Regardless of what was provided to your trial attorney, you should get a copy of it.

Your trial attorney may have also conducted an investigation of your case that uncovered non-record facts or documents. For example, your attorney or a private investigator may have interviewed witnesses that gave statements. An expert may have written a report. You should ask your attorney whether he or she knows of any non-record facts that may help you. You should also ask whether he or she knows of possible sources of non-record facts.

Once your case is closed, you have a right to obtain your file from the attorney. It is actually not the attorney's file, it is yours. While the attorney is working on the file, you may request copies, but will likely be charged for the cost of copying. After the file is closed, you can request the actual file. (A sample letter is set forth in the Appendix to this Guide in A-16, "Letter Requesting Your File.") You should not delay in making this request because once the file is closed it is likely sent to storage and will become more difficult to retrieve. After a period of years, the file will be destroyed.

## *(2) The District Attorney And Other Government Agencies*

The District Attorney's Office maintains its own file on your case. Moreover, police and other state agencies may maintain records. There are one or more statutes in New York that permit limited access to records held by state agencies. One such statute is the "Freedom of Information Law", such as the District Attorney's Office. (sometimes called FOIL"). The Freedom of Information Law is contained in the section of New York statutes governing "Public Officers."

*(a) Freedom Of Information Law*

The Freedom of Information Law broadly requires that every state agency, including the District Attorney's Office and police, "make available for public inspection and copying all records." See, Public Officers Law § 87(2). However, this broad requirement has several exceptions.

*(i) Exceptions To Disclosure*

The Freedom of Information Law contains nine exceptions to the disclosure requirement. One of the most important exceptions deals with records "compiled for law enforcement purposes." Under this exception, state agencies need not disclose records that

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures.

In addition, a state agency will not be required to disclose records that "if disclosed could endanger the life or safety of any person." A state agency will also not be required to disclose records that "if disclosed would constitute an unwarranted invasion of personal privacy." Such exception includes "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the

subject party” or “information of a personal nature reported in confidence.” Finally, the Freedom of Information Law does not apply to records held by courts. (A list of the nine exceptions is set forth in the Appendix to this Guide at A-17 “Freedom of Information Law - Relevant Provisions.)

*(ii) Records Access Officer*

Each state agency is required to keep a list of the subjects or categories under which records are filed. It is not a list of every record. Rather, it is a list that merely allows a person to identify the subject or category of records that he or she may be seeking. Each state agency must also appoint a “Records Access Officer” who keeps the list and responds to requests for records.

*(iii) How To Request Records*

You may request records by sending a letter to the state agency. You must “reasonably describe” the records sought. Any detailed information, such as dates, titles, or file designations, if known, should be supplied. In addition, ask for the name and address of the person to which an appeal should be sent in the event that your request is denied. A state agency may charge a fee for making copies. (A sample letter requesting records from a state agency is contained in the Appendix to this Guide in A-18, “Letter Requesting FOIL Records from State Agency”).

*(iv) Agency Reply To Your Request*

The Records Access Officer must reply in writing to your request within five business days of the date that your letter is received by the agency. The reply must say either that (1) the records are available and will be furnished upon the payment of

any applicable copying fee, (2) the request is denied and the reason(s) for the denial; or (3) the request is acknowledged and when the request will be determined.

The Records Access Officer for a District Attorney will often deny requests for records if the person making the request has not first attempted to obtain the same records from their prior attorneys. In fact, a prior attorney may have records in un-redacted form (parts not “blacked out”). The same documents may be redacted by the District Attorney’s Office if sent directly by that office to you.

Therefore, you should only request records from a District Attorney after you have attempted to obtain the same records from your prior attorneys and failed (you should include in your request to the District Attorney’s Office copies of your letters to your prior attorneys in from whom you sought the records). Alternatively, you may request records from a District Attorney when the District Attorney did not initially provide the records to your prior attorneys.

*(v) Appealing The Denial Of A Request*

If the Records Access Officer for the state agency denies your request, you may appeal the denial to the designated Appeals Officer for the state agency. The appeal must be taken by letter within thirty (30) days of the denial. (A sample appeal letter is set forth in the Appendix to this Guide in A-19, “Letter Appealing Denial of Request for Records”). The Appeals Officer must forward a copy of your appeal letter to the New York Committee on Open Government. Within ten (10) days of receipt of your appeal letter, the Appeals Officer must either affirm, modify or deny your request for records.

If the Appeals Officer denies your request, you may bring the matter to court in an “Article 78 Proceeding” (this is a proceeding under Article 78 of the Civil Practice Law and Rules asking a court to review the actions of a state agency). In an Article 78 Proceeding, the agency must demonstrate to the court that the denial was proper because the requested records fell within one of the nine exceptions to disclosure stated in the Freedom of Information Law.

*(b) Personal Privacy Protection Law*

The “Personal Privacy Protection Law” (set forth in Public Officers Law §§ 91-99) provides an additional way to obtain records from state agencies. It is more limited than the Freedom of Information Law, in that it only applies to records that contain your “personal information.” The Personal Privacy Protection Law does not permit you to obtain records held by courts, local governments or the District Attorney’s Office. However, some information may be available through the Personal Privacy Protection Law that would be exempt from disclosure under the Freedom of Information Law. The Personal Privacy Protection Law also provides a way to amend or correct information in state records that are inaccurate, irrelevant, untimely or incomplete.

*(i) Exceptions To Disclosure*

In general, you may obtain copies of records that are personal to you. However, the Personal Privacy Protection Law has several exceptions, including:

- records compiled for “law enforcement purposes.” (this exception is identical to the exception under the Freedom of Information Law);



- patient records about a mental disability or private medical records;
- personal information concerning the incarceration of an inmate at a state correctional facility “which is evaluative in nature or which, if such access is provided, could endanger the life or safety of any person,” unless disclosure is permitted by law or court order;
- attorney work product or material prepared for litigation, and
- “public safety agency records.”

“Public safety agency records” include the records of the department of corrections, the division of youth, the division of parole, the crime victims board, the division of probation and correctional alternatives, the state police and its agencies (if the record involves investigation, law enforcement or confinement to prison) the division of criminal justice services and the department of state. (The statutory sections describing these exceptions to disclosure are set forth in the Appendix to this Guide in A-20, “Personal Privacy Protection Law - Relevant Provisions.”)

*(ii) How To Make Your Request*

Your request by letter must “reasonably describe” the records sought and be directed to the agency’s “Privacy Compliance Officer.” (A sample letter requesting personal records from a state agency is contained in the Appendix to this Guide in A-21, “Letter Requesting Personal Records From State Agency”.) You may request records under the Freedom of Information Law and the Personal Privacy Protection Law in a single letter, if both statutes apply.

The agency must respond within five (5) business days of the date of its receipt of your request, either stating that (1) the requested records will be made available; (2) the request, in whole or in part, is denied with the reason(s) for denial; or (3) the request is acknowledged and will be determined by an approximate date (not to exceed 30 days).

### (iii) Appeal From Denial

An appeal from a denial may be made by letter to the agency head or the designated Appeals Officer for the agency within thirty (30) days of the denial. If the agency failed to respond timely to your request, the request will be considered to have been denied, and an appeal may be taken from that denial. An appeal letter should state the date that the request was made, the date of your receipt of the letter denying your request, a description of the record(s) sought, and your name and return address. (A sample appeal letter is set forth in the Appendix to this Guide in A-22, "Letter Appealing Denial of Request for Personal Records from State Agency.") If your appeal is denied by the agency head or Appeals Officer, you may then take the matter to court in an Article 78 Proceeding.

### (3) *Court Records*

Although courts are exempt from the requirements of the Freedom of Information Law and the Personal Privacy Protection Law, court records are typically open for public inspection and copying (provided that they have not been sealed by the court). You may not only attempt to seek review of public records in your own case, but also records in other cases. For example, the records maintained by the court of a cooperating co-defendant may yield helpful information, particularly if the records differ from the co-defendant's testimony or statements in your case. You must write to the clerk of the court in which you were convicted to ascertain the rules for inspecting and copying.

#### *(4) New Witnesses*

Sometimes, new witnesses come forward with evidence affecting the validity of your conviction. You may learn of such witnesses from friends and family who have heard about such information or statements affecting your case. Importantly, such witnesses must be willing to provide affidavits which attest to their personal knowledge of the relevant facts. Hearsay is insufficient, unless an exception to the hearsay rule applies. If an evidentiary hearing is required, the witnesses must also be prepared to testify.

#### *Alternatives For The Judge*

The judge may grant the motion, deny the motion, or hold a hearing. A hearing is required where there are facts that are in dispute which are key to a determination of the motion. At a hearing, witnesses may be called by both sides, whereupon the judge resolves the factual dispute. Where there are no facts in dispute, the judge will decide the motion on the papers.

#### *Appealing From The Denial Of A 440 Motion*

You do not have a right to appeal the denial of a 440 Motion, but you may ask an appellate court for permission to appeal such denial. This is accomplished by filing and serving a motion for permission to appeal within 30 days of the date that you or your lawyer are served with the order denying your 440 motion. (A sample motion for permission to appeal is included in the Appendix to this Guide. See A-23 "Motion for Permission to Appeal from Denial of 440 Motion.") If the appellate court grants permission, it will issue a certificate stating that you may appeal. Within 15 days of service of the certificate on you or your lawyer, you must file the certificate and a notice of appeal with the trial court and serve copies on the District Attorney.

## CHAPTER 8

### PETITIONS FOR FEDERAL WRITS OF HABEAS CORPUS

If the New York State courts fail to grant you the relief that you are seeking, you may seek relief in federal court by means of a Petition for a Writ of Habeas Corpus. “Habeas corpus” means “you have the body.” A Petition for a Writ of Habeas Corpus tells the warden of your facility that your rights under the United States Constitution, a federal law or a treaty have been violated and that you should therefore be released from prison. Such a petition is governed by 28 U.S.C. § 2254. The petition is sometimes also called a “2254 Motion.” (A copy of 28 U.S.C. § 2254 is included as item A-24 in the Appendix to this Guide.)

#### *One Year Time Limit*

The petition must be filed within one year that your case in the state court becomes “final.” Usually, this means that you must file the petition within one year of the date that the New York Court of Appeals (New York’s highest court) denied your application to appeal to that Court. (The filing date can vary if the New York Court of Appeals grants permission to appeal or if a 440 Motion is filed and thereafter an appeal is sought.)

There are limited exceptions to the one year rule, including the following:

- the United States Supreme Court has announced a new retroactive legal right applicable to your case;
- New York has removed an unconstitutional impediment to your claim; or

- despite “due diligence,” the facts to support your petition were only discovered at a later date.

In general, you may only file one petition and therefore you should include all claims that you have in that petition. Successive petitions are extremely difficult.

### *Petitions Are Governed By Federal Law*

Examples of violations of rights under the United States Constitution, federal laws or treaties are numerous. For example, a petition may allege that a confession or guilty plea was involuntary; a police lineup was suggestive; the prosecutor improperly commented on post-arrest silence; the court violated the right to cross-examination; the prosecutor withheld exculpatory evidence; the defense attorney rendered ineffective assistance of counsel, the evidence supporting conviction was insufficient; or a jury instruction on the elements of the crime was inadequate.

Petitions must be supported by federal case law on each issue. Also, there may be a heightened standard that must be met before a federal court will declare that a violation has occurred. (A form for a petition is included in the Appendix of this Guide. See A-27 “Petition to Federal District Court for Writ of Habeas Corpus.”)

### *You Must Be In Custody And Have Exhausted Your State Remedies*

You must be “in custody” at the time that you file your petition. In other words, you must be in prison, on parole or on probation. You must also have “exhausted all available state remedies” before bringing your claim to federal court. This means that you have not only raised the issue at the trial level in state court, but also appealed or attempted to appeal the issue in the state appellate courts (including the New York

Court of Appeals). It is sufficient that you have asked for permission to appeal your case when you do not have a right to appeal. Even if you are denied, you have nonetheless exhausted your state remedies. In exceptional circumstances, federal courts will hear a claim despite the fact that it was not exhausted. (Such circumstances are rare and governed by federal law.)

### *Preservation Of A Federal Issue*

When presenting an issue in state court, you must be clear that your federal rights have also been violated. For example, a claim that a confession was involuntary must allege that it was obtained in violation of the Fifth Amendment to the United States Constitution. This preserves the issue so that it can later be raised in a Federal Petition for a Writ of Habeas Corpus. (An example of a legal argument to a federal court dealing with a claim by the State that the issues had not been preserved in State Court is included in the Appendix to this Guide. See A-31.)

### *Where Do You File The Petition?*

A Petition for a Federal Writ of Habeas Corpus may be filed either in the federal district court where you are incarcerated or where you were convicted. (A list of the counties in each federal district in New York is included as item A-26 in the Appendix of this Guide.) In New York, there are four federal districts: (1) Southern District; (2) Eastern District; (3) Northern District and (4) Western District. (The main addresses for each of the federal districts in New York are included as item A-25 in the Appendix of this Guide.) If you file the petition in the federal district where you are incarcerated, the court in that federal district will often transfer your petition to the federal district where you were convicted, if different.

### *Alternatives For The Federal Judge*

After filing the petition, the federal judge will either: (1) issue an “order to show cause” to the warden of your facility directing him to answer why a writ of habeas corpus should not issue; (2) dismiss the petition because on its face you are not entitled to the relief requested, or (3) order an evidentiary hearing to determine any facts that were not fully developed in state court.

### *Appealing A Denial To The Second Circuit*

If your petition is ultimately denied by the federal district court, you may ask for permission to appeal to the United States Court of Appeals for the Second Circuit which is located in lower Manhattan. This is done by filing within thirty days an application for a “Certificate of Appealability” together with a notice of appeal in the federal district court. (See A-28 “Application to Federal District Court for Certificate of Appealability” and A-29 “Notice of Appeal to Second Circuit” in the Appendix of this Guide.) If the federal district court judge denies your application, you may then apply a second time to the Second Circuit for a Certificate of Appealability. (See A-30 “Application to Second Circuit for Certificate of Appealability” in the Appendix of this Guide.)

## CHAPTER 9

### PAROLE HEARINGS AND APPEALS

When all else fails, you may seek parole. The first opportunity will occur approximately one month before the expiration of your minimum period of incarceration (occasionally you may seek parole prior to the minimum term such as when you have completed a shock incarceration program).

#### *The Parole Board And Parole Officer*

There are approximately nineteen (19) members of the Parole Board in New York State (including the Chairman) and each is appointed by the Governor. The decision on your parole is made at a parole hearing, where either two or three members of the Parole Board are present.

Each facility has one or more parole officers. They play an important role in the process of deciding whether to grant your parole. Among other things, a parole officer prepares a Report for the Parole Board. The Report is reviewed by the two or three Parole Board members immediately before your hearing. Sometimes the parole officer makes a recommendation to the Board members in the Report regarding whether parole should be granted. A parole officer is also present at your parole hearing.

#### *The Parole Board Is Required To Consider A Number Of Factors Regarding Parole*

Under New York Executive Law, Section 259-i(2)(c), the Parole Board is required to consider the following:

- the institutional record, including program accomplishments and academic achievements;



- vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates;
- performance, if any, as a participant in a temporary release program;
- release plans, including community resources, employment, education and training and support services available to the inmate;
- any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding deportation made by the Commissioner of the Department of Correctional Services. . . ; and
- any statement made to the Board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated.

The Parole Board will also consider the seriousness of the offense of conviction, any recommendations by the trial court, the district attorney and/or your trial attorney, your Pre-Sentence Report (PSR), letters of support, mitigating and aggravating factors, any negative conduct following your arrest but prior to conviction, and your prior criminal record. The vote of the Parole Board must be unanimous for release.

#### *Your Folder*

The Division of Parole has a “one folder system.” This means that everything about you that is relevant to a decision on your parole is kept in a single folder. Typically, your folder is kept at your facility. It contains a number of important

documents, including the Probation Officer's Report, your Institutional Record, your prior criminal record, your Pre-Sentence Report, any certificates that you have earned and documents showing successful completion of programs, a Victim Impact Statement, if any, letters of support, recommendations by the trial court, district attorney and/or your trial attorney and correspondence with staff.

The folder collects and keeps all documents on you from the first day that you are incarcerated until you are finally released. Importantly, the Parole Board members at your hearing review the contents of your folder immediately before you enter the hearing room. Therefore, what your folder says about you has a significant impact on the Board's decision.

### *Improving What Your Folder Says About You*

The more that you can improve what your folder says about you the more that you increase your chances of parole. Obviously, some things cannot be changed, such as your prior criminal record. However, other things can be improved. The following are suggested areas to improve what your folder says about you:

#### Your Institutional Record

Your Institutional Record sets forth, among other things, your achievements while incarcerated, such as academic and vocational training, certificates earned, work assignments completed, therapy and relationships with prison officials and inmates. The more achievements that you earn, the more that you increase your chances of parole.

#### Certificate Of Earned Eligibility

The Department of Correctional Services is required to review your Institutional Record to determine whether you have

complied with your assigned program. If your participation in your program was successful, the Department may, but is not required, to issue a Certificate of Earned Eligibility. (If your minimum term of incarceration is over six years, you are not allowed to receive a Certificate of Earned Eligibility.)

If you have not received a Certificate of Earned Eligibility, you must demonstrate to the Parole Board that (1) you “will live and remain at liberty without violating the law,” (2) parole for you will be consistent with the welfare of society, and (3) you will not make the crime of conviction seem less serious and thereby undermine a respect for the law.

If you have received a Certificate of Earned Eligibility, a less difficult standard is applied. The Parole Board may not consider whether your release will make the crime seem less serious. The Parole Board must also presume that you will likely live in the community without violating the law.

A Certificate of Earned Eligibility does not, as a matter of right, require that parole be granted. Instead, it creates an expectation that parole should be granted. Where a Certificate of Earned Eligibility has been issued, but parole has been denied, you are entitled to know the reason for the denial.

### Letters Of Support

Nothing limits your ability to have people write letters of support for you and to have them added to your folder. The letters should avoid saying that you did not commit the crime of conviction. The Parole Board is not concerned with determining your innocence and will discount such letters. Rather, the Board wants to hear that people believe that you have taken steps to address any problems that led to your incarceration and that you have support in the community once released.

Sometimes you can ask members of the prison staff to

write letters on your behalf. For example, if you have a good relationship with a supervisor, program manager or individual who monitors your daily work assignments, such staff member might be willing to write a letter (unfortunately, some facilities will not permit staff to write letters). Such letters are helpful because they are provided by individuals who are in a position to objectively evaluate your progress while incarcerated.

Similarly, people outside the facility, such as potential employers, family members, friends, and your attorney, can write letters of support. A potential employer can write a letter stating that he or she will give you a job once you are released. Family members or friends can write that they will give you a place to live and will help you get on your feet.

Letters should focus on your positive attributes. For example, letters can discuss the good things that you have done, how you have helped others, hardships that you have overcome and opinions that you will be a contributing member of the community once released. In sum, if there is something good to say about you, it can be written in a letter of support.

#### Memorandum In Support Of Your Release On Parole

You can write or hire an attorney to draft a memorandum in support of your release on parole. The memorandum can, among other things, set forth arguments in favor of your release based on relevant statutory factors, discuss important achievements, and summarize letters of support. The memorandum can also attach documents and letters that favor your release. A memorandum is helpful because it can organize your presentation into a single, comprehensible document. The Board has limited time to review your folder. The memorandum helps to focus the Board on the merits of your case and thereby increases your chance of a favorable decision.

### *Your Parole Or Release Plan*

Prior to the date of your hearing, you will be required to complete a “parole” or “release” plan (“parole plan”). Your plan tells the Board what you will do with yourself after release. The more detailed the plan the better. Among other things, your parole plan should state your proposed employment or educational enrollment once released. Letters of support, such as from a proposed employer, can confirm what you say in your plan. Among other things, the Board wants to know that you will not engage in criminal conduct once released. A detailed parole plan helps the Board evaluate such concern.

### *Prepare Early For Your Parole Hearing*

You should prepare early for your parole hearing. Obviously, improving your Institutional Record takes time. Likewise, getting letters of support does not happen overnight. Also, an attorney may need time to write a memorandum.

If possible, you should have all documents gathered by the date of your pre-hearing interview with a parole officer. You should do this for two reasons. First, you want to make sure that your folder contains all documents that support your contentions that parole should be granted. Bring a copy of all documents to your pre-hearing interview and ask the parole officer to check that a copy of each document is in your folder. If not, ask the parole officer to add the missing documents. Second, the parole officer will prepare a Report to be read by the Board members immediately before your hearing. The parole officer may refer to your favorable documents in the Report.

### *The Pre-Hearing Interview With A Parole Officer*

About two or three months before your parole hearing, you will meet with a probation officer in preparation for your

parole hearing. You should be courteous to the officer, listen to what the officer says, answer all questions and do your best to communicate the facts that support your release on parole.

### *The Parole Officer's Report To The Board*

The Parole Officer's Report is a summary of relevant facts to the decision on parole. The Report sets forth, among other things, your prior criminal history, the facts involving the crime of conviction, and your performance during incarceration. The more that the Report speaks positively about you, the more that your chances of parole are increased.

### *The Parole Hearing*

The Parole Board reviews your folder immediately before your hearing. The Board does not review your folder at an earlier date. A decision regarding parole is made after reviewing your folder and conducting the hearing. One Board member reviews your folder in detail and the other member(s) review copies of the Parole Officer's Report. When the members are ready, they will ask you to enter the hearing room.

Your hearing may be in person or by video conference. The Division of Parole is moving toward conducting parole hearings by video conference because it is more cost effective. Unfortunately, video conferencing is less personal.

The hearing will be attended by the Board members, the Parole Officer and a stenographer. Your attorney is not permitted to be present. Bring with you copies of your documents that support parole. You should be clean and your hair groomed. You should act respectfully toward the Board, sitting upright in your chair and making eye contact. Among other things, the Board will be concerned with the following statutory factors:

- Whether you successfully completed educational courses and/or received vocational training while incarcerated
- Whether you received job training while incarcerated that could help you find employment once released
- Whether you addressed and took responsibility for problems that may have led to your conviction
- Whether you have sufficient ties with your community, such as contacts with family members and/or support groups
- Whether you have formed concrete plans and goals for your life upon release
- A Victim Impact Statement, if any.

In general, you will not know whether the Board received a Victim Impact Statement. Such a statement is submitted at least ten days before the hearing.

Typically, the Board will ask you about the offense of conviction, your prior criminal record, events that led up to your incarceration, your conduct during incarceration and your plans after release. Among other things, the Parole Board will want to know whether you understand what led to the commission of the crime, whether you have remorse, and whether you will change your life in the future. When answering questions, “honesty is everything.” You need to be up-front and not hold anything back.

During the course of the hearing, you should respectfully state those facts that support the granting of parole. Keep in mind that if parole is denied you may wish to appeal. An appeal must be based on the record, as taken down by the stenographer.

The Board members will decide your case after the hearing. To grant parole, their vote must be unanimous.

### *If You Are Denied Parole*

If the Parole Board denies you parole, the Board must give you a written statement explaining its decision. The Board must also set a new hearing date within 24 months.

### *Appeal Of Denial Of Parole To Appeals Unit*

You may appeal a denial of your parole to the Appeals Unit of the Division of Parole, located in Albany, New York. Such appeal must be based on one or more of the following:

- the parole hearing or decision violated proper procedure, was based on an error of law, or was inconsistent with a lawful purpose;
- one or more of the members of the Board relied on incorrect or irrelevant information in making the decision, as demonstrated in the record; or
- the decision was excessive.

To appeal, you must file a notice of appeal within 30 days of receiving notification that your parole was denied. You may retain an attorney to represent you on your appeal to the Appeals Unit. The stenographic minutes of the parole hearing must be obtained to complete the appeal. The brief must be filed within four months from the date that your notice of appeal was filed. (Copies of the form notice of appeal and instruction letters supplied by the Division of Parole are included in the Appendix to this Guide. See forms A-32, A-33 and A-34.)

### *Article 78 Proceeding In Court*

If your appeal to the Appeals Unit is denied and you wish to bring the matter into a court of law, you may do so by filing



an Article 78 petition in State court. The Article 78 petition must be filed and served on the appropriate parties within four months of the date on which the Appeals Unit rendered its decision denying your appeal to the Unit. In an Article 78 proceeding, you must make a “convincing showing” that the Parole Board did not properly consider the statutory factors, that the Board considered incorrect information, or that the Board acted “irrationally bordering on impropriety” when rendering its decision. Courts have also considered such factors as a Parole Board’s penal philosophy or use of suppressed evidence.

**A-1**

**LOCATIONS OF  
NEW YORK APPELLATE COURTS**

*Departments of the Appellate Division:*

Appellate Division, First Department  
27 Madison Avenue (at 25<sup>th</sup> Street)  
New York, New York 10010

Appellate Division, Second Department  
45 Monroe Place  
Brooklyn, New York 11201

Appellate Division, Third Department  
Justice Building  
South Mall  
Albany, New York 12223

Appellate Division, Fourth Department  
50 East Avenue  
Rochester, New York 14604

*New York Court of Appeals:*

Court of Appeals  
Court of Appeals Hall  
20 Eagle Street  
Albany, New York 12207-1095

**A-2**

**LETTER TO APPELLATE ATTORNEY**

Attorney's name  
and address

RE: People v. \_\_\_\_\_

Dear \_\_\_\_\_:

I am writing to provide you with the address where you can contact me and to discuss the issues that I would like you to consider for my appeal. First, I can be contacted at the following address: *(provide name, number and address of facility).*

My trial attorney was \_\_\_\_\_ (name) and he may be contacted at the following address: *(name, address, telephone number, if known).*

I (pled guilty/went to trial) and was convicted of the crime(s) of \_\_\_\_\_. The People claimed that on or about \_\_\_\_\_ (date), I \_\_\_\_\_ *(summarize what you were accused of doing. Provide enough information to give your attorney an understanding of your case. Inform your attorney whether there were any pretrial hearings or proceedings and the issues raised. Make sure that you include facts that you believe are relevant to possible issues.)*

I was sentenced in \_\_\_\_\_ court on \_\_\_\_\_ (date) *(identify the court, the approximate date and length of sentence. Provide any other information that might help your lawyer obtain documents or transcripts for the record .)*

I would like you to consider the following issues on my appeal:

- 1.
- 2.
- 3.

*(Discuss each issue. The more organized your discussion, the better.*

*Provide a sufficient discussion to permit the attorney to understand each issue and its basis in the record.)*

Please keep this letter in my file so that you may refer to it when you work on my brief. *(If you are also doing research on your case, tell your lawyer that you will provide it as it becomes available.)* After you have had an opportunity to review the record, please contact me so that we may discuss your findings and the issues that you believe should be raised on my appeal.

In the meantime, please tell me how I can best assist you. I would like to be kept periodically informed of progress. In this regard, will you accept prepaid or collect telephone calls from me. Please also tell me the anticipated time frames for obtaining the record and submitting the brief. *(If you are considering filing a supplemental pro se brief, inform your lawyer of this and ask whether he/she will submit a motion for permission to file a supplemental pro se brief.)*

Please also keep me informed of any changes in time frames for completion of the work. If possible, please provide me with a draft of your brief before you file it with the appellate court so that I may review it and make comments or suggest changes.

I look forward to working with you throughout this appeal.

Very truly yours,

(Your name)

A-3

MOTION FOR PAYMENT OF TRANSCRIPTS

STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT

\_\_\_\_\_

PEOPLE OF THE STATE OF NEW YORK

NOTICE OF  
MOTION

v.

Ind. No. \_\_\_\_\_

\_\_\_\_\_ ,

Defendant.

\_\_\_\_\_

SIR:

PLEASE TAKE NOTICE that upon the attached affidavit of \_\_\_\_\_, sworn to on the \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, and upon all the papers and proceedings filed in this case, the Defendant, \_\_\_\_\_, will move this Court at a term to be held at the courthouse located at \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_ noon of that day or as soon thereafter as counsel can be heard, for an Order requiring the payment of transcripts relating to the appeal from public funds, and for such other and further relief as this Court may deem just and proper.

DATED: \_\_\_\_\_

Yours, etc.

\_\_\_\_\_  
Attorney for Defendant  
(Address and telephone no.)

STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK

AFFIDAVIT

v.

\_\_\_\_\_ ,

Defendant.

---

STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_) ss.:

\_\_\_\_\_, being duly sworn, deposes and says:

1. I have been retained by *(family members/friends, etc.)* of the above-captioned Defendant, \_\_\_\_\_, to represent him on his appeal to this Court from his conviction for *(describe offense of conviction)*.
2. The Defendant is indigent, as stated in the attached affidavit of indigency executed by the Defendant *(or that the Defendant had been declared indigent at trial and that such indigency has continued through the appeal)*.
3. This affidavit is made in support of the Defendant's request for payment of transcripts from public funds due to the fact that he/she is indigent and that he/she is unable to pay for such transcripts from his own resources.
4. As established in *Fullan v. Commissioner of Corrections of State of New York*, 891 F.2d 1007 (2d Cir. 1989), "[t]he State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the Defendant." Moreover, "a State has no right to dictate how the Defendant's family and friends will spend their money."

5. For the purposes of this issue, family and friends are considered “bystanders.”
6. As a consequence, New York State has a duty under the due process and equal protection clauses of the United States Constitution to furnish a free transcript to an indigent defendant in the circumstance where appellate counsel has been retained by funds provided by a defendant’s relatives, family or friends. *See, People v. Ulloa*, 1 A.D.3d 468 (2d Dept. 2003) (indigent defendant entitled to free copy of transcript where appellate counsel was retained by family and friends; “a defendant’s status as an indigent is not altered merely because his or her family or friends retain private counsel to represent him or her at trial”); *People v. Uyii Cong Yu*, 158 A.D.2d 370 (1<sup>st</sup> Dept. 1990) (same).
7. The attached affidavit from the Defendant attests to his status as an indigent and that he has no control over their funds.
8. I have been paid by the (*family members/friends, etc.*) of the Defendant. I have not been paid by the Defendant.

Based on the foregoing, I respectfully request that this Court order payment for the costs of transcripts from public funds.

\_\_\_\_\_  
*Attorney*

Sworn to before me this  
\_\_ day of \_\_\_\_\_, 2\_\_.

\_\_\_\_\_  
Notary Public

**A-4**

**NOTICE OF APPEAL**

\_\_\_\_\_ Court of the State of New York  
County of \_\_\_\_\_

----- X

The People of the State of :  
New York, :  
 :  
 :  
 :  
\_\_\_\_\_, :  
 :  
Defendant. :

Notice of Appeal:

Indictment No.:

-----X

PLEASE TAKE NOTICE, that defendant, \_\_\_\_\_, hereby  
appeals pursuant to subdivision (1) of CPL § 450.10 to the Appellate  
Division, \_\_\_\_\_ Department, from the \_(order/judgment) on  
\_(date) convicting [him/her] of the crime(s) of \_\_\_\_\_ and that  
this appeal is taken from said judgment and from each and every part  
thereof and every intermediate order made herein.

\_\_\_\_\_  
(attorney name and address)

TO: District Attorney



A-5

MOTION FOR PERMISSION TO FILE  
PRO SE SUPPLEMENTAL BRIEF

STATE OF NEW YORK  
APPELLATE DIVISION - \_\_\_\_\_ DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

v.

\_\_\_\_\_

Appellant.

\_\_\_\_\_

STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss.:

\_\_\_\_\_ ESQ., being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York, and I make this affidavit in support of the Appellant's motion to file a Pro Se Supplemental Brief, in addition to the brief that will be submitted on his behalf by his appellate counsel.

2. The Appellant was convicted of *(describe case with sufficient detail to give the court an understanding of the appeal)* .

3. I have discussed the appeal with the Appellant and informed the Appellant that a motion may be made requesting permission of this Court to file a Pro Se Supplemental Brief, in addition to the brief that will be prepared by Appellant's counsel.

4. The Appellant has stated that he/she wishes to file a Pro Se Supplemental Brief, in addition to counsel's brief, and has requested that I make this motion requesting such permission.

5. I believe that it is in the interests of justice that this motion be granted.

6. Based on the foregoing, I respectfully request that this Court grant the Appellant's motion to file a Pro Se Supplemental Brief, in addition to the brief to be filed on his behalf by counsel.

\_\_\_\_\_  
*(Attorney)*

Sworn to before me this  
\_\_ day of \_\_\_\_\_, 2\_\_.

\_\_\_\_\_  
Notary Public

## A-6

### NEW YORK RULES FOR RECORDS AND BRIEFS

*Note: The Local Rules of the applicable Appellate Court must also be consulted, if applicable.*

#### Civil Practice Law And Rules

#### **Rule 5526. Content and form of record on appeal**

The record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings or a statement pursuant to subdivision (d) of rule 5525 if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case. The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other exhibits upon which the judgment or order was founded and any opinions in the case. All printed or reproduced papers comprising the record on appeal shall be eleven inches by eight and one-half inches. The subject matter of each page of the record shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or re-cross examination shall be stated at the top of each page.

#### **Rule 5528 Contents of briefs and appendices**

**(a) Appellant's brief and appendix.** The brief of the appellant shall contain the following order:

1. a table of contents, which shall include the contents of the appendix, if it is not bound separately, with references to the

initial page of each paper printed and of the direct, cross, and redirect examination of each witness;

2. a concise statement, not exceeding two pages, of the questions involved without names, dates, amounts or particulars, with each question numbered, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

3. a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with supporting references to pages in the appendix;

4. the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed; and

5. an appendix, which may be bound separately, containing only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent; provided, however, that the appellate division in each department may by rule applicable in the department authorize an appellant at his election to proceed upon a record on appeal printed or reproduced in like manner as an appendix, and in the event of such election an appendix shall not be required.

**Rule. 5529 Form of briefs and appendices**

**(a) Form of reproduction; size; paper; binding.**

1. Briefs and appendices shall be reproduced by any method that produces a permanent, legible, black image on white paper. Paper shall be of a quality approved by the chief administrator of the courts.

2. Briefs and appendices shall be on white paper eleven inches along the bound edge by eight and one-half inches.

3. An appellate court may by rule applicable to practice therein prescribe the size of margins and type of briefs and appendices and the line spacing and the length of briefs.

**(b) Numbering.**

Pages of briefs shall be numbered consecutively. Pages of appendices shall be separately numbered consecutively, each number preceded by the letter A.

**(c) Page Headings.**

The subject matter of each page of the appendix shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or re-cross examination shall be stated at the top of each page.

**(d) Quotations.**

Asterisks or other appropriate means shall be used to indicate omissions in quoted excerpts. Reference shall be made to the source of the excerpts quoted. Where an excerpt in the appendix is testimony of a witness

quoted from the record the beginning of each page of the transcript shall be indicated by parenthetical insertion of the transcript page number.

**(e) Questions and answers.**

The answer to a question in the appendix shall not begin a new paragraph.

**A-7**

**SAMPLE BRIEF TO NEW YORK COURT**

*(Note: This sample brief is supplied for purposes of illustration only; any case law cited herein must be independently researched and updated.)*

To be argued by: Bruce R. Bryan, Esq.  
Estimated time: 10 minutes.

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**STATE OF NEW YORK SUPREME COURT**  
APPELLATE DIVISION - \_\_\_\_ DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK

vs.

WOLFIE KARG,

Defendant-Appellant.

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**BRIEF OF DEFENDANT-APPELLANT,**  
**WOLFIE KARG**

---

BRUCE R. BRYAN, ESQ.  
Attorney for Defendant-Appellant  
333 East Onondaga Street  
Syracuse, New York 13202  
(315) 476-1800

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### **QUESTION PRESENTED**

1. Whether the trial court erred in refusing to instruct the jury that Tommy Mongo was an accomplice and that his testimony should be corroborated by independent evidence?

The trial court refused to give an instruction that Tommy Mongo was an accomplice as a matter of law, but rather held that it was a question of fact for the jury to decide whether Tommy Mongo was an accomplice, and if so, whether his testimony was corroborated by independent evidence.

### **STATEMENT OF FACTS**

On September 15, 2002, a motor vehicle accident occurred near Amyville, New York, involving three vehicles (R.271). The front-left tire of the first vehicle blew. (R.55). The truck driver, Tommy Mongo (“Mongo”), denied that he improperly responded by immediately hitting his brakes, although there is no question that he left two parallel sets of skid marks in the road that could only have come from the rear wheels locked by extreme breaking action. (R.\_62). After a certain distance, the dump truck crossed into the opposing lane of traffic, sideswiped a second vehicle, and then collided with a third vehicle more than 700 feet away before coming to a stop. (R.67). The three occupants of the third vehicle died in the accident. (R.69).

The dump truck was one of 20 trucks owned by Kargo Trucking Company. (R.71). Wolfie Karg (“Karg”), the principal owner, was 75 years old and no longer worked full-time in the business. (R.76). Karg’s son, Hercule, and his daughter-in-law, Frisky, ran the day-to-day operation of the business. (R.83). Kargo Trucking also employed a mechanic and several drivers, including Mongo and Matt Daniels (“Daniels”). (R.66). Karg was indicted on three counts of Manslaughter in the Second Degree. Mongo was not charged. At trial, Marisa Monkey, a police officer, testified that after the accident, Karg told her that the truck involved in the accident had been in good shape and that a few weeks before the accident, his son, Hercule, had changed the right-front tire of the truck after Mongo requested that it be changed. (R.277-79). At the time, they also looked at the left-front tire and

“it looked like it was in good shape.” (R.271). The left-front tire had approximately three quarters of the original tread, with between only 10,000 and 15,000 miles on it. (R.302).

Karg was aware that there still was “some wheel hop” on the vehicle after the right-front tire was changed, but thought that it “was just because one of the tires needed to be balanced on the vehicle.” (R.304). Karg also said that when the trucks needed repair, the drivers “leave notes for the mechanic, and the mechanic usually takes care of the problem.” (R.309). During the interview, Karg’s son, Hercule, answered most of the questions regarding repair of the trucks. (R.319). Monkey said that Karg was “candid, frank and open.” (R.66).

Daniels testified that in late June, 2002, he accompanied Mongo on a trip in the truck. (R.718). Daniels noticed a hopping or vibration in the front end. (R.223-24). When he arrived at their destination, Daniels and Mongo looked at the front tires. (R.225). Daniels testified that he “observed that the left one was a good tire by sight. . . .” Id. He also noticed that there was a “little chunk of rubber missing from the right-front tire.” Id. Daniels told Mongo that he should mention it to Karg. (R.227).

Toward the end of August, 2002, Mongo asked Daniels to do him a favor and drive his truck for him one day. (R.227-28). When Daniels drove the truck, he noticed that there was still some vibration in the front end. (R.228). However, Daniels testified that “it wasn’t as bad” as the vibration that they had noticed in June, 2002. (R.229). Daniels also testified that the “truck was operating fine” and there were “no outward problems.” (R.231-32). He described the hop as “just a little vibration.” (R.232). Daniels said that he did not have any idea what could be the cause of the problem. (R.232). The vibration “could have been . . . a tire out-of-balance” or a “tire out-of-round,” or caused by a “whole lot of other problems.” (R.233). At the end of the day, Mongo and Daniels went to the company office and Daniels told Karg that there was still some vibration in the front end of the truck. (R.229-30). Hercule and Frisky were also present. (R.229). Karg said that

he thought that the tire just needed to be balanced. (R.230).

Mongo testified that in June, 2002, he noted that there were some things wrong with the truck and that Karg thereafter told him to “make me a list of everything that’s wrong with it and we’ll take care of it.” (R.285-86). Mongo made the list and left it with the mechanic. (R.286).

Mongo confirmed that in June, 1994, Daniels had accompanied him on a trip. (R.273). During the ride, Mongo testified that they noticed a “hopping in the front end.” (R.275). Mongo described it as “a little bump, just a bump. Just a little. Just enough to notice a bump, you know, not a thrashing or anything.” Id. Mongo testified that he did not know what caused the hopping. Id. Contrary to Daniels’ testimony, Mongo testified that Daniels had told him that one possible cause was a shifting of the steel belts in the tire. Id. Mongo said that he deferred to Daniels’ knowledge on the possible cause. (R.274-80).

When they arrived at their destination, Daniels and Mongo looked at the tires. (R.275). They could see nothing wrong with the left-front tire. (R.276). However, the right-front tire had a “small piece of rubber” missing from the tread. Id. When they returned to the office, Mongo said that he talked to Karg, but did not recall whether anyone else was present. Id. Contrary to Daniels’ testimony, Mongo claimed that he told Karg that there was a hopping in the front end of the truck that could mean that the steel belt in the tire had shifted and the tire could blow. (R.280). Mongo testified that Karg asked him how much tread was on the tire, and Mongo responded that it was of legal depth. Id. (It was not clear from Mongo’s testimony whether he was referring to the front-left tire or the front-right tire.) (R.295).

On August 22, 1994, Mongo felt the truck “slam up and down.” (R.290). He inspected the right-front tire and observed that a 3 or 4 inch section of the tread was missing. (R.291-92). Mongo called the office, described the problem, and asked that the right-front tire be changed. (R.292-93). He drove the truck back to the company whereupon the mechanic changed the tire. (R.295). Contrary to Daniels’ testimony, Mongo

claimed that after the right-front tire was changed, he could still feel “the original bump.” Id. Daniels had testified that the hop was less noticeable after the right-front tire was changed. (R.116).

Within a short time after the right-front tire was changed, Mongo asked Daniels to work a half-a-day for him driving the truck. (R.298). Mongo asked Daniels to say something to Karg about the truck. (R.299). Once more testifying inconsistently with Daniels, Mongo claimed that he then told Karg that he was afraid that the tire might blow and that the truck could then drop down on the side and pull him into the other lane where he then might hit someone. Id. According to Mongo, Karg replied that there was nothing wrong with the tire, and that it only needed to be balanced. (R.300). Mongo testified that there were other occasions when he asked Karg about the tire, and whether it should be changed. (R.294). Importantly, Mongo admitted that he did not know the cause of the problem, questioning whether “it was balancing or . . . another problem.” Id.

On September 13, 2002, Mongo inspected the vehicle. (R.308). He testified that everything seemed . . . “normal with the truck.” Id. Moreover, he “didn’t find anything wrong with the vehicle,” or the left-front tire. (R.328). Mongo said that he still felt the hopping when he drove, but that it was no worse. (R.329). Mongo said that he was traveling at approximately 50 miles per hour along the highway when the left-front tire blew. Id. Mongo admitted that when he heard the sound, he knew that the tire had blown. (R.309-10). Mongo claimed that he did not immediately apply the brakes, saying that he knew that if he applied the brakes with a blown tire, it would cause the truck to lose control and pull the truck into the opposing lane of traffic. (R.310). Mongo claimed that although he did not apply the brakes, the truck crossed into the opposing lane of traffic and that it was then that he “stood on the brake.” Id. He said that he then tried to steer the truck back into his lane of traffic, but could not. Id. After sideswiping one car, Mongo struck the vehicle in which the decedents were located and the truck rolled over and came to a rest on the side of the road. (R.313-14).

On cross-examination, Mongo admitted that he had been told that he should not hit the brakes if a tire blew because it could cause the truck to lose control. (R.325). Mongo also admitted that after the accident, he told an officer that the dump truck “was operating fine” prior to the accident. (R.327). Moreover, Mongo admitted that almost all of the repairs that he had requested of the company had been made to the truck. *Id.* Mongo admitted that his testimony at trial had differed from his prior testimony at the fatality hearing. (R.342). At the fatality hearing, Mongo testified that immediately after the front tire blew, he believed that the truck started to go toward the opposing lane of traffic, and that he then thought that “the best thing to do was to stand on the brakes, and try to slow it down.” (R.338). He also testified at the fatality hearing that he “hit the brakes almost instantly. . . .” (R.339).

The jury returned a verdict of Manslaughter in the Second Degree on the three counts of the indictment. (R.1055). Karg was sentenced to an indeterminate term of one year to six years on each count, to run concurrently. (R.1062).

#### **POINT I**

#### **THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT MONGO WAS AN ACCOMPLICE AND THAT HIS TESTIMONY SHOULD BE CORROBORATED BY INDEPENDENT EVIDENCE**

Defense counsel requested that the jury be instructed that Mongo should be declared an “accomplice” as a matter of law, and therefore that his testimony must be corroborated. The trial court refused to give such instruction, but rather held that it was a question of fact for the jury to determine whether Mongo was an accomplice, and if so, whether his testimony was corroborated by independent evidence.

A. Mongo Was An “Accomplice” As Defined By Law And Therefore His Testimony Had To Be Corroborated

Mongo was an “accomplice” as a matter of law in that he directly participated in the events that led to the deaths in this case. In fact, the vast

majority of cases involving criminal prosecutions are against the drivers of the vehicle, not the owners. Section 60.22 of the Criminal Procedure Law defines an “accomplice” as “a witness in a criminal action who, according to the evidence adduced in such action, may reasonably be considered to have participated in . . . [t]he offense charged . . . or . . . an offense based upon the same or some of the same facts or conduct which constitute the offense charged.” N.Y.C.P.L. § 60.22(2). See, *People v. Besser*, 96 N.Y.2d 136 (2001).

If a witness is an accomplice, as defined by law, his testimony must be corroborated by truly independent evidence. *People v. Glasper*, 52 N.Y.2d 970, 971 (1981); N.Y.C.P.L. § 60.22(1). Section 60.22 prohibits the conviction of a defendant for any offense “upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.” *People v. Adams*, 307 A.D.2d 475 (3d Dept. 2003).

The law has long required stringent proof of corroboration regarding accomplice testimony because such testimony lacks the inherent reliability of a disinterested witness, particularly where the accomplice could have been, but was not, prosecuted for the crime charged. *People v. Duncan*, 46 N.Y.2d 74 (1978). Accomplice testimony must be scrutinized with the utmost caution and circumspection. *Id.* Courts have repeatedly stated that accomplice testimony must be viewed with “a suspicious eye,” because an accomplice often gives such testimony to avoid prosecution himself. *People v. Moses*, 63 N.Y.2d 299 (1984).

Section 60.22 of the Criminal Procedure Law broadly defines the term “accomplice” to include not only persons who could actually have been prosecuted for the offense charged, but also persons who may reasonably be concluded to have “participated in the offense charged.” *People v. Besser*, 96 N.Y.2d 136, 147 (2001); *People v. Adams*, 307 A.D.2d 475, 476 (3d Dept. 2003). A witness need not be actually charged with an offense to be deemed an accomplice under the law. *People v. Berger*, 52 N.Y.2d 214

(1981). A person “so connected with the crime that he could have been convicted as a principal or as an accessory” is an accomplice. *People v. Beaudet*, 32 N.Y.2d 371 (1973).

Moreover, a person does “not avoid accomplice status merely because he was not a principal or an accessory. . . .” *People v. Fielding*, 39 N.Y.2d 607, 610 (1976). Rather, an accomplice is a person who might be “in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial.” *Id.* Stated differently, “to be an accomplice, one would necessarily have to be at least potentially subject to sanctions of a penal character for his participation in the crimes of the defendant on trial.” *Id.*

A person is an accomplice as a matter of law “if the jury could reach no other conclusion than that he or she participated in the offense charged or another offense based on the same facts which constitute that offense.” *People v. Adams*, 307 A.D.2d at 476, citing *People v. Besser*, 96 N.Y.2d at 147. The accomplice “must somehow be criminally implicated and subject to prosecution for the conduct or factual transaction related to the crimes for which the defendant is on trial.” *Id.* *People v. Aleschus*, 81 A.D.2d 696, 697 (3d Dept.), *aff’d* 55 N.Y.2d 775 (1981). To make such determination, the entire enterprise must be examined. *People v. Rugg*, 91 A.D.2d 692 (3d Dept. 1982).

If the witness is an “accomplice” as defined by law, the jury must be so instructed under the statute. *Duncan v. New York*, 442 U.S. 910 (1979). Where the accomplice testifies and admits his own involvement in the crime, the defendant is entitled to an instruction that the individual was an accomplice as a matter of law. *People v. Bell*, 48 N.Y.2d 933 (1979).

For example, in *People v. Diaz*, 19 N.Y.2d 547 (1967), two individuals tried to steal an automobile, with one behind the wheel and defendant pushing the vehicle. When the police arrived, the driver sped off and the defendant ran. At trial, the driver implicated the defendant. The Court of Appeals held that the driver was an accomplice whose testimony

should have been independently corroborated.

Likewise, in *People v. Rugg*, 91 A.D.2d 692 (3d Dept. 1982), a group of individuals staged an automobile “accident” to defraud an insurance company. Charges were dismissed against one of the individuals due to the lack of evidence, but the individual nonetheless testified against the defendant under a grant of immunity. The court held that the individual was an accomplice because he “was involved in the staging of the ‘accident.’” See also, *People v. Daniels*, 37 N.Y.2d 624 (1975) (participant in drug trade with defendant was an accomplice)

Similarly, in *People v. Adams*, 307 A.D.2d 475 (3d Dept. 2003) the court held that a wife of the defendant was an accomplice as a matter of law where the wife testified that she believed that by babysitting the defendant’s children, she had aided the people who intended to commit the crime. In *People v. Berger*, 52 N.Y.2d 214 (1981) a witness was an accomplice as a matter of law where she testified that she had agreed to perjure herself before the grand jury at the request of the defendant.

In this case, Mongo participated in the events that led to the deaths. In fact, he was the driver of the truck that killed the decedents. Mongo knew all of the same facts as Karg, including that the truck was experiencing a hop or vibration. Mongo is not absolved from responsibility because he was an employee. The manner in which Mongo operated the truck was an issue. He could have been charged with having caused the deaths of the decedents for his improperly hitting the brakes. Therefore, Mongo had a strong incentive to give incriminating evidence against Karg, and thereby exculpate himself from any claim of liability. Based upon the foregoing, there is no question that Mongo was an accomplice as a matter of law, and the jury should have been so instructed.

B. Mongo’s Testimony Lacked Corroboration

In addition, Mongo’s testimony lacked corroboration, and therefore should not be considered in determining whether Karg was guilty of the crime charged. An accomplice cannot corroborate his own testimony. *People v.*



*Cona*, 49 N.Y.2d 26 (1979); *People v. Rugg*, 91 A.D.2d 692 (3d Dept. 1982) (“For there to be truly independent corroborative evidence, reliance cannot be had on the testimony of an accomplice for its weight and probative value.”) Corroborative evidence must be truly independent and may not draw its probative value from the accomplice’s testimony. *People v. Glasper*, 52 N.Y.2d 970 (1981). See, *People v. Robinson* 297 A.D.2d 296 (2d Dept. 2002).

The requirement of corroboration was devised to protect a defendant against the risk of motivated fabrication, and to insist on proof that originates from a source other than one who is possibly unreliable and self-interested. *People v. Dory*, 59 N.Y.2d 121 (1983). The corroborative testimony must relate to the allegation against a defendant, and tend to connect the defendant to the issues for which the testimony is offered. See, *People v. Donovan*, 59 N.Y.2d 834 (1983); *People v. Shelby*, 111 A.D.2d 1038 (3d Dept. 1985).

In the case at bar, there was no independent evidence corroborating Mongo’s testimony on a number of alleged facts to which he testified. To the contrary, the testimony of other prosecution witnesses was in conflict with Mongo’s version of events. The prosecution called Daniels, a former truck driver for Karp, who testified to certain events prior to the accident. While Mongo testified that he and Daniels had told Karg on one occasion that it was possible that the steel belts in the tire had separated and that the tire could blow, Daniels never said that such statement was made. Rather, Daniels testified that Karg was only told that there was a bounce, hop, or vibration in the tire. To the extent that Mongo’s testimony was not corroborated, it must be excluded from the evidence against Karg and his conviction must therefore be reversed.

**CONCLUSION**

Based on the foregoing, it is respectfully submitted that Karg's convictions should be reversed and a new trial granted.

Respectfully submitted by

BRUCE R. BRYAN, ESQ.  
Attorney for Defendant-Appellant

**MOTION FOR REARGUMENT**

SUPREME COURT STATE OF NEW YORK  
APPELLATE DIVISION: \_\_\_\_\_ DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

vs.

\_\_\_\_\_

Defendant-Appellant.

\_\_\_\_\_

**MOTION FOR REARGUMENT**

Docket No.

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of \_\_\_\_\_, sworn to on the \_\_\_ day of \_\_\_\_\_, 2\_\_, the Order of the Appellate Division, \_\_\_\_\_ Department, dated \_\_\_\_\_, affirming the Judgment of the County Court of \_\_\_\_\_, (\_\_\_\_\_, J.) rendered \_\_\_\_\_, the record on appeal to this Court and the briefs filed therein, and upon all the papers and proceedings in this case, the undersigned will move this Court at a term to be held at the courthouse thereof located in \_\_\_\_\_, New York on the \_\_\_ day of \_\_\_\_\_, 2\_\_ at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order granting re-argument of the appeal herein, and for such other and further relief as the Court may deem just and proper.

DATED: \_\_\_\_\_

\_\_\_\_\_  
*(Attorney's Name)*

SUPREME COURT STATE OF NEW YORK  
APPELLATE DIVISION: \_\_\_\_\_ DEPARTMENT

---

PEOPLE OF THE STATE OF NEW YORK,

vs.

**AFFIDAVIT**

Docket No. \_\_\_\_

\_\_\_\_\_,

Defendant-Appellant.

---

STATE OF NEW YORK)  
COUNTY OF \_\_\_\_\_) ss.:

\_\_\_\_\_, being duly sworn, deposes and says:

1. I am the attorney for the Appellant, \_\_\_\_\_, and I make this Affidavit in support of the motion for re-argument to the Appellate Division, \_\_\_\_\_ Department, from an Order of this Court, dated \_\_\_\_\_, affirming the Judgment of Conviction and sentence of the \_\_\_\_\_ Court, County of \_\_\_\_\_, (\_\_\_\_\_, J.) rendered on \_\_\_\_\_ for the crimes of \_\_\_\_\_.

2. I represented the Appellant, \_\_\_\_\_, on his appeal to this Court and as such I am familiar with the record on appeal and the questions of law raised to this Court.

3. Attached as Exhibit A is a copy of the Order and Memorandum of this Court unanimously affirming the Judgment of Conviction, which Order and Memorandum was decided and entered on \_\_\_\_\_.

4. Based on the Order and Memorandum, Appellant \_\_\_\_\_, respectfully submits that this Court overlooked [and/or] misapprehended [facts and/or law] and that upon this Court's consideration of such [facts and/or law] the Judgment of Conviction should reverse.

5. *[Describe or quote the parts of the Order and Memorandum that are alleged to demonstrate that the Court overlooked or misapprehended*

*facts in the record or relevant case law. Thereafter, quote the parts of the record that demonstrate that the Court erroneously stated a material fact, or the case law that was erroneously applied or should have been applied.]*

\_\_\_\_\_  
(Attorney's Name)

Sworn to before me this  
\_\_ day of \_\_\_\_, 2\_\_.

\_\_\_\_\_  
Notary Public

A-9

**APPLICATION FOR PERMISSION  
TO APPEAL TO COURT OF APPEALS**

Hon. \_\_\_\_\_  
Chief Judge  
New York State Court of Appeals  
20 Eagle Street  
Albany, New York 12207

ATTN: Hon. \_\_\_\_\_, Clerk

RE: *People v.* \_\_\_\_\_  
Application for Permission to  
Appeal to the Court of Appeals

Dear Mr. \_\_\_\_\_:

Please accept this letter as the Defendant's application for permission to appeal to the Court of Appeals pursuant to Criminal Procedure Law Section 460.20, from an Order of the Supreme Court, Appellate Division, \_\_\_\_\_ Department, dated \_\_\_\_\_, which affirmed the judgment of conviction for \_\_\_\_\_ entered in \_\_\_\_\_ Court (\_\_\_\_,J.) on \_\_\_\_\_. No application for this relief has been made to a justice of the Appellate Division.

I have enclosed copies of the following:

1. The Order and Memorandum of the Appellate Division, \_\_\_\_\_ Department.
2. The Defendant's brief to the Appellate Division.
3. The People's brief to the Appellate Division.
4. The Record on Appeal.

The Defendant asks this Court to review the following issues:

*(State the issues raised in the intermediate appellate court)*

The Defendant submits that this Court should grant permission to appeal because . . .

*(State legal argument for permission to appeal)*

Oral argument is not requested. The defendant has no co-defendants.

Very truly yours,

Bruce R. Bryan

**A-10**

**LAW BOOKS IN A PRISON LIBRARY**

*Note: List may vary from year to year. This is a list of law books likely found in the prison library at a maximum security facility. Lower level facilities do not have all of the books listed below:*

I. NEW YORK STATE

(a) Case Reporter:

*New York Supplement 2d*  
v. 195 - present

(b) Annotations:

*McKinney's Consolidated Laws*  
*Service.* 209 v. & 4 index v.

*New York Consolidated Laws*  
*Services.* [Odd vol. service]

(c) Digest:

*New York Digest 3d.* 53v.

*New York Digest 4<sup>th</sup>.* 87v.

(d) Shepards:

*Shepard's New York Supplemental*  
*Citations.* 11v. and Bound Volume Supps.  
95-97 (2v.) 97-99 (1v.)

*Shepard's New York Statute Citations.*  
5v. and Bound Volume Supps: 95-97 (1v)

(e) Forms

*West's McKinney's Forms. 19 v.*

(f) Rules of Court

*McKinney's New York Rules of  
Court, State and Federal 2001*

(g) Regulations

*New York Codes, Rules and Regulations.  
Titles 7, 9F, 9G, 22C, 22D.*

*The New York State Register*

(h) Session Laws

*New York Sessions Laws  
Bound Volume Service*

*New York Sessions Laws  
Pamphlet Service.*

II. FEDERAL

(a) Case Reporters

(1) United States Supreme Court:

*Supreme Court Reporter  
v.70 - present*



(2) United States Court of Appeal:

*Federal Reporter 2d.*  
v.270-999

*Federal Reporter 3d*  
v.1 - present

(3) United States District Court:

*Federal Supplement*  
v.176-999

*Federal Supplement 2d*  
v.1-present

(b) Annotations

*United States Code Annotated*  
242v.

(c) Digests

*West's Federal Practice Digest 2d*  
106v.

*West's Federal Practice Digest 3d.*  
120 v.

*West Federal Practice Digest 4<sup>th</sup>*  
214v.

(d) Shepards

*Shepard's Federal Citations: Federal Reporter and Federal Supplement.*  
21v. and Bound Volume Supps: 95-96 (2v).  
96-97 (2v); 97-98 (2v).

*Shepards Federal Statute Citations*  
7v. and Bound Volume Supps: 97-01 (4v)  
–and–  
*Shepard's U.S. Citations: Supreme Court*  
*Reporter Edition.* 14v.

(e) Forms

*West's Federal Forms.* 19v.

(f) Federal Code and Rules

(1) Criminal

(2) Civil

*Federal Civil Judicial Procedure and Rules*

(g) Legislative History

*U.S. Code, Congressional and Administrative*  
*News Service.*

(h) Federal Sentencing Guidelines

*Federal Sentencing Guideline Manual.* 2001

III. OTHER STATES

*Corpus Juris Secumdum*  
155v.

IV. TREATISES AND LEGAL ENCYCLOPEDIAS

(a) New York State Legal Encyclopedias  
*New York Jurisprudence.* 2d. ed.

*Carmody-Wait 2d: Criminal Procedure*  
v. 31-36

(b) Criminal Law

*New York Criminal Law Handbook.* 2002

*Gilbert Criminal Law and Procedure.* 2003.

*New York Court of Appeals on Criminal Law,*  
by W. Donnino. 2d ed. 1997.

*Handling a Criminal Case in New York,*  
by G. Muldoon and S. Feverstein

*Criminal Trial Advocacy.* 8<sup>th</sup> ed. 1999

*Cases on Modern Criminal Procedure,*  
by Y. Kamisar, W. La Fave, J. Israel, and  
N. King. 10<sup>th</sup> ed. 2002

*New York State Criminal Jury Instructions.*  
1<sup>st</sup> ed. 4v.; 2d ed. 3v.

*New York Search and Seizure,* by B. Kamins.

*Search and Seizure,* by W. LaFave. 3d ed.  
5v. 1995

*Prosecutorial Misconduct,* by B. Gershman

*Police Misconduct: Law and Litigation,*  
by M. Avery and D. Rudovsky. 3d ed. 1990.

*Cases and Materials on the Law of Sentencing,  
Corrections and Prisoner's Rights,* by L.  
Branham. 6<sup>th</sup> ed. 1991.

*The Law of Sentencing, Corrections and  
Prisoners' Rights in a Nutshell,* by L. Barnham  
and S. Krantz. 1997.

(c) Evidence

*Scientific Evidence*, by P. Gianelli  
and E. Imwinkelreid. 3d ed. 2v. 1999.

*Richardson on Evidence*, by J. Gorelick. 1989

(d) Legal Research and Writing

*Using a Law Library*. 1988.

*New York Legal Research Guide*,  
by E. Gibson. 2d ed. 1998.

*The Legal Research Manual: A Game Plan for  
Research and Legal Analysis*, by C. Wren and J.  
Wren. 2d ed. 1986.

*Legal Research Illustrated: An Abridgement of  
the Fundamentals of Legal Research*, by M.  
Jacobstein and R. Mesky. 7<sup>th</sup> ed. 1998.

*Legal Research: How to Find and Understand the  
Law*, by C. Wren and J. Wren. 2d ed. 1986.

*Effective Legal Writing for Law Students and  
Lawyers*, by G. Block. 5<sup>th</sup> ed. 1999.

*Notary Public Handbook: A Guide for New York*,  
by Al Piombino, 4<sup>th</sup> ed. 2002

*Legal Secretary's Complete Handbook*,  
4<sup>th</sup> ed. 1992.

*Uniform System of Citation (Blue Book)*,  
17<sup>th</sup> ed.

(e) Appellate Practice and Self Help Manuals

*A Jailhouse Lawyer's Manual*, 5<sup>th</sup> ed. and 2002 Supplement

*Prisoners' Self-Help Litigation Manual*,  
by J. Boston and D. Manville. 3d ed. 1995.

*New York Appellate Practice*. 1999.

*Practitioner's Handbook for Appeals to the Court of Appeals*. 2d ed. 1991.

*Handbook of Appellate Advocacy*. 3d ed. 1993.

*Powers of the New York Court of Appeals*,  
by H. Cohen and A. Karger. 3d ed. 1997.

(f) Federal Treatises and Legal Encyclopedias

*Federal Practice and Procedure*, by C. Wright  
and A. Miller. 51v.

*Habeas Corpus Checklists*, by I. Robbins. 2003.

*Immigration Law and Crimes*. National Lawyers  
Guild Immigration Project.

*Federal Immigration and Nationality Laws  
and Regulations*.

(g) Prisoner Rights

*Civil Rights and Liberties Litigation: The Laws of  
Section 1983*, by S. Nahmod. 4<sup>th</sup> ed. 1997.2v.

*Rights of Prisoners*, by M. Mushlin.  
3d ed. 3v. 2002.

*Standards for Adult Correctional Institutions*  
3d ed. 1990.

*Amnesty International Annual Report.* 2002

*The Human Rights Watch Global Report on Prisons.* 1993.

(h) Drug Testing

*Drug Testing Legal Manual* by K. Zeese. 2v.

(i) Mental Disorders

*Diagnostic and Statistical Manual of Mental Disorders.* 4<sup>th</sup> text rev. 2000.

(j) Civil Law And Practice

*Siegel's New York Practice.* by D. Siegel.  
3d ed. 1999.

*New York CPLR Pamphlet*

*Collateral Consequences of Criminal Conduct.*  
1992.

*New York Family Law: The Yellow Book.* 2003

*New York Small Claims Guide.* 20<sup>th</sup> ed. 2001.

*How to File for Chapter 7 Bankruptcy,*  
by S. Elias et al. 9<sup>th</sup> ed. 2001.

*Manual for Complex Litigation.* 3d ed. 1995.

*The Practice of Law in New York State.* 2000.

V. REFERENCE BOOKS, JOURNALS AND DICTIONARIES

(a) Directories

*Prisoners' Assistance Directory*. 13<sup>th</sup> ed. 2001.

*New York Lawyer's Diary*. 2002.

*The Green Book: The Official Directory of the City of New York*. 2002-03.

*National Zip Code and Post Office Directory*. 2v.

*The National Directory of Law Enforcement Administrators and Correctional Agencies*. 38<sup>th</sup> ed. 2002.

*Foreign Consular Offices in the United States*. 2002.

*The Gregg Reference Manual*, by W. Sabin. 9<sup>th</sup> ed. 2000.

(b) Journals

*New York Law Journal*

*National Prison Project Journal*

*National Municipal Gazeteer: NY*. 2002

(c) Dictionaries

*Webster's 3d New International Dictionary*, 1993.

*Black's Law Dictionary: 7<sup>th</sup> ed. 1999.*

*Dahl's Law Dictionary/Diccionario Juridico  
Dahl, H.S. Dahl. 3d ed. 1999.*

*Bieber's Dictionary of Legal Abbreviations,  
by M. Prince. 5<sup>th</sup> ed. 1998.*

*Taber's Cyclopedic Medical Dictionary.  
16<sup>th</sup> ed. 1993.*



**PROVISIONS OF UNITED STATES CONSTITUTION  
AND NEW YORK STATE CONSTITUTION APPLICABLE  
TO CRIMINAL CASES**

**I. UNITED STATES CONSTITUTION**

**AMENDMENT 4**

**[Unreasonable searches and seizures.]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT 5**

**[Criminal actions--Provisions concerning--Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## **AMENDMENT 6**

### **[Rights of the accused.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## **AMENDMENT 8**

### **[Bail–Punishment]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## **AMENDMENT 14**

### **§. 1 [Citizenship–Due process of law–Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## II. NEW YORK STATE CONSTITUTION

### ARTICLE I

#### **§ 2. [Trial by jury; how waived]**

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever. . . . A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

#### **§ 4. [Habeas corpus]**

The privilege of a writ or order of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety requires it.

#### **§ 5. [Bail; fines; punishments; detention of witnesses]**

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

#### **§ 6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]**

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit

larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

**§ 11. [Equal protection of laws; discrimination in civil rights prohibited]**

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

**§ 12. [Security against unreasonable searches, seizures and interceptions]**

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

**NEW YORK CRIMINAL PROCEDURE LAW**

**§ 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 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

- (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 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 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 pre-pleading 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.

**A-13**

**NOTICE OF MOTION FOR 440 MOTION**

STATE OF NEW YORK \_\_\_\_\_ COURT  
COUNTY OF \_\_\_\_\_

---

PEOPLE OF THE STATE OF NEW YORK

Ind. No. \_\_\_\_\_

v.

\_\_\_\_\_ ,

Defendant .

---

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of \_\_\_\_\_, duly sworn on the \_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, the attached documents, the accusatory instrument and all prior proceedings herein, a motion will be made in the \_\_\_\_\_ Court of \_\_\_\_\_ County, Part \_\_\_ thereof, at the Courthouse located at \_\_\_\_\_, on the \_\_\_ day of \_\_\_\_\_ 2\_\_, at \_\_\_\_\_ o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order vacating the judgment entered against the above-named defendant on the \_\_\_ day of \_\_\_\_\_, 2\_ \_; or, in the alternative, for an order for a hearing to determine whether such judgment should be vacated on the following grounds: *[list grounds here. Remember, a defendant "who is in a position to adequately raise more than one ground should raise every such ground upon which he or she intends to challenge the judgment" CPL § 440.30(1)]* and for such other and further relief as the Court may deem just and proper.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney for Defendant  
(Office and P.O. Address)

TO: District Attorney

A-14

**SUPPORTING AFFIDAVIT FOR 440 MOTION**

STATE OF NEW YORK, \_\_\_\_\_ COURT  
COUNTY OF \_\_\_\_\_

PEOPLE OF THE STATE OF NEW YORK,

AFFIDAVIT

v.

Ind. No. \_\_\_\_\_

\_\_\_\_\_ ,

Defendant .

STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss.:

\_\_\_\_\_, being duly sworn, deposes and says:

1. I am the attorney for the above-named defendant and I make this affidavit in support of a motion to vacate the judgment of conviction on the ground(s) that *[state the applicable grounds from CPL Section 440.10]*.

2. The defendant was indicted for the crime of \_\_\_\_\_. A jury trial was held in this Court before Hon. \_\_\_\_\_ commencing on \_\_\_\_\_ (date). After deliberation, the jury rendered a verdict of guilty. Thereafter, on the \_\_\_ day of \_\_\_\_\_, the defendant was sentenced to \_\_\_\_\_.

3. On the \_\_\_ day of \_\_\_\_\_, an appeal was taken to the Appellate Division, \_\_\_\_\_ Department. The Defendant raised the following issues: *[list the issues raised on appeal]*. The Appellate Division affirmed the conviction and a motion for permission to appeal to the New York Court of Appeals on such order was denied.

4. *[Describe facts or circumstances in support of motion to vacate judgment. The following are some simplified examples:]*

The evidence used to convict the defendant was obtained through an illegal search, in that the affidavits and documents attached to this motion which do not appear in the record demonstrate that the police officer who conducted the warrantless search did not have probable cause.

or

Improper conduct occurred during the trial which does not appear in the record. Such conduct, had it appeared on the record, would have required reversal of the judgment under CPL Section 440.10(1)(f). Specifically, the defendant was prejudiced when the prosecutor withheld the fact that the chief prosecution witness had failed to identify him in a pretrial "lineup." The witness nevertheless claimed to identify him in court.

or

The defendant has obtained newly-discovered evidence furnished by a witness which demonstrates that the defendant is innocent of the crime charged. Specifically, the witness admits that another person actually committed the crime.

*[Provide a detailed summary of the facts supporting the ground(s) for the motion. Attach and discuss any supporting documents and affidavits. Discuss how the facts demonstrate that the ground(s) have been met.]*

4. No previous application for the relief sought herein has been made.

WHEREFORE, it is requested that the judgment be vacated and that this Court grant such further relief as this Court deems just and proper.

\_\_\_\_\_  
(Name)

Sworn to before me this  
\_\_ day of \_\_\_\_\_, 2\_\_.

\_\_\_\_\_  
Notary Public

A-15

**AFFIDAVIT OF SERVICE**

STATE OF NEW YORK  
\_\_\_\_\_ COURT \_\_\_\_\_ COUNTY  
\_\_\_\_\_

PEOPLE OF THE STATE  
OF NEW YORK

v.

\_\_\_\_\_,

Defendant.

\_\_\_\_\_

STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss.:

\_\_\_\_\_, being duly sworn, deposes and says:

On the \_\_\_ day of \_\_\_\_\_, I served by first-class mail a copy  
of \_\_\_\_\_ on the following:

*(Name and Address of Opposing Attorney)*

\_\_\_\_\_  
*(Name)*

Sworn to before me this  
\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_  
Notary Public

A-16

**LETTER REQUESTING FILE FROM PRIOR ATTORNEY**

Name of Attorney  
Address  
City, NY. Zip Code

Dear \_\_\_\_\_:

To further research my case, I am writing to request that you send me all files of my case. My request includes, but is not limited to, all documents constituting the record, all documents, photographs and other materials disclosed or provided by the District Attorney's Office, and all information obtained from other sources, including witness interviews, affidavits or independent investigation.

I would also appreciate it if you would tell me of any facts that may be helpful to me as I further investigate my case. For example, if you know of any possible sources of additional information, please let me know.

Please respond within a reasonable time to this request. Also, if you do not have certain records that pertain to my case or know where additional records may be found, please inform me. Furthermore, if any records in my case have been transferred, please inform me of their location and the address of the person to whom I may direct this request.

Very truly yours,

*(Your Name)*

**A-17**

**FREEDOM OF INFORMATION LAW -  
RELEVANT PROVISIONS**

Public Officers Law

§ 87(2)

b. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute.

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article:

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;



- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
  - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (f) if disclosed would endanger the life or safety of any person;
- (g) are inter-agency or intra-agency materials which are not:
- v. statistical or factual tabulations or data;
  - vi. instructions to staff that affect the public;
  - vii. final agency policy or determinations;
  - viii. external audits, including but not limited to audits performed by the comptroller and the federal government; or
- (h) are examination questions or answers which are requested prior to the final administration of such questions.
- A. are computer access codes.
- (j) [Eff. until December 1, 2004, pursuant to L.1988, c. 746 § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

§89. General provisions relating to access to records, certain cases. The provisions of this section apply to access to all records, except as hereinafter specified. . . .

2.(a) The committee on open government may promulgate guidelines regarding deletion of identifying details of withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law.

(c) Unless otherwise provided by this article,

disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

- I. when identifying details are deleted;
- II. when the person to whom a record pertains consents in writing to disclosure;
- III. when upon presenting reasonable proof of identify a person seeks access to records pertaining to him.

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

3. Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described shall make such record available to the person requesting it, deny such request and a statement of the approximate date when such request will be granted or denied, including where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eight-seven and subdivision three of section eighty-eight.

4.(a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal

in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two.

(c) The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed provided that such attorney's fees and litigation costs may be recovered only where the court finds that:

- I. the record involved was, in fact, of clearly significant interest to the general public; and
- II. the agency lacked a reasonable basis in law for withholding the record. . . .

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

**A-18**

**LETTER REQUESTING  
RECORDS FROM STATE AGENCY**

*(suggested form letter by Committee on Open Government)*

Records Access Officer  
Name of Agency  
Address of Agency  
City, NY, ZIP code

Re: Freedom of Information Law Request

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to \_\_\_\_\_ *(attempt to identify the records in which you are interested as clearly as possible)*.

If there are any fees for copying the records requested, please inform me before filing the request (or. . . please supply the records without informing me if the fees are not in excess of \$\_\_\_\_\_).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

Signature  
Name  
Address  
City, State, ZIP code

A-19

**LETTER APPEALING DENIAL  
OF REQUEST FOR RECORDS**

*(suggested form letter by Committee on Open Government)*

Name of Agency  
Address of Agency  
City, NY, ZIP code

Re: Freedom of Information Law Appeal

Dear \_\_\_\_\_,

I hereby appeal the denial of access regarding my request, which was made on \_\_\_\_\_ *(date)* and sent to \_\_\_\_\_ *(enumerate the records that were denied)*.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, 41 State Street, Albany, New York 12231.

Sincerely,

Signature  
Name  
Address  
City, State, ZIP code

**A-20**

**PERSONAL PRIVACY PROTECTION  
LAW - RELEVANT PROVISIONS**

§ 95. Access to records.

(1)(a) Each agency subject to the provisions of this article, within five business days of the receipt of a written request from a data subject for a record reasonably described pertaining to that data subject, shall make such record available to the data subject, deny such request in whole or in part and provide the reasons therefore in writing, or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied, which date shall not exceed thirty days from the date of the acknowledgment.

(b) An agency shall not be required to provide a data subject with access to a record pursuant to this section if:

1. the agency does not have the possession of such record;
2. such record cannot be retrieved by use of the data subject's description thereof, or by use of the name or other identifier of the data subject, without extraordinary search methods being employed by the agency; or
3. Access to such record is not required to be provided pursuant to subdivision five, six or seven of this section.

(c) Upon payment of, or offer to pay, the fee prescribed by section eighty-seven of this chapter, the agency shall provide a copy of the record requested and certify to the correctness of



such copy if so requested. The record shall be made available in printed form without any codes or symbols, unless accompanied by a document fully explaining such codes or symbols. Upon a data subject's voluntary request the agency shall permit a person of the data subject's choosing to accompany the data subject when reviewing and obtaining a copy of a record, provided that the agency may require the data subject to furnish a written statement authorizing discussion of the record in the accompanying person's presence.

(2) Each agency shall, within thirty business days of receipt of a written request from a data subject for correction or amendment of a record or personal information, reasonably described, pertaining to that data subject, which he or she believes is not accurate, relevant, timely or complete, either:

(a) make the correction or amendment in whole or in part, and inform the data subject that upon his or her request such correction or amendment will be provided to any or all persons or governmental units to which the record or personal information has been or is disclosed, pursuant to paragraph (c) of subdivision three of section ninety-four of this article; or

(b) inform the data subject of its refusal to correct or amend the record and its reasons therefor.

(3) Any data subject whose request under subdivision one or two of this section is denied in whole or in part may, within thirty business days, appeal such denial in writing to the head, chief executive or governing body of the agency, or the person designated as the reviewing official by such head, chief executive or governing body. Such official shall within seven business days of the receipt of an appeal concerning denial of access, or within thirty business days of the receipt of an appeal concerning denial of correction or amendment, either provide access to or correction or amendment of the record sought and inform the data subject that, upon his or her request, such

correction or amendment will be provided to any or all persons or governmental units to which the record or personal information has been or is disclosed, pursuant to paragraph (c) of subdivision three of section ninety-four of this article, or fully explain in writing to the data subject the factual and statutory reasons for further denial and inform the data subject of his or her right to thereupon seek judicial review of the agency's determination under section ninety-seven of this article. Each agency shall immediately forward to the committee a copy of such appeal, the determination thereof and the reasons therefor.

(4) If correction or amendment of a record or personal information is denied in whole or in part upon appeal, the agency shall inform the data subject of the right to file with the agency a statement of reasonable length setting forth the reasons for disagreement with the agency's determination and that, upon request, his or her statement of disagreement will be provided to any or all persons or governmental units to which the record has been or is disclosed, pursuant to paragraph (c) of subdivision three of section ninety-four of this article. With respect to any personal information about which a data subject has filed a statement of disagreement, the agency shall clearly note any portions of the record which are disputed, and shall attach the data subject's statement of disagreement as part of the record. When providing the data subject's statement of disagreement to other persons or governmental units pursuant to paragraph (c) of subdivision three of section ninety-four of this article, the agency may, if it deems appropriate, also include in the record a concise statement of the agency's reasons for not making the requested amendment.

(5)(a) Any agency which may not otherwise exempt personal information from the operation of this section may do so, unless access by the data subject is otherwise authorized or required by law, if such information is compiled by law enforcement purposes and would, if disclosed:

- (i) interfere with law enforcement investigations or judicial proceedings;
  - (ii) Deprive a person of a right to a fair trial or impartial adjudication;
  - (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or
  - (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (b) When providing the data subject with access to information described in paragraph (b) of subdivision seven of section ninety-four of this article, an agency may withhold the identify of a source who furnished said information under an express promise that his or her identity would be held in confidence.
- (6) Nothing in this section shall require an agency to provide a data subject with access to:
- (a) personal information to which he or she is specifically prohibited by statute from gaining access;
  - (b) patient records concerning mental disability or medical records where such access is not otherwise required by law.
  - (c) personal information pertaining to the incarceration of an inmate at a state correctional facility which is evaluative in nature or which, if such access was provided, could endanger the life or safety of any person, unless such access is otherwise permitted by law or by court order;

(d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena search warrant or other court ordered disclosure.

(7) This section shall not apply to public safety agency records.

(8) Nothing in this section shall limit, restrict, abrogate or deny any right a person may otherwise have including rights granted pursuant to the state or federal constitution, law or court order.

§ 96. Disclosure of records.

(1) No agency may disclose any record or personal information unless such disclosure is:

(a) pursuant to a written request by or the voluntary written consent of the data subject provided that such request or consent by its terms limits and specifically describes:

- A. the personal information which is requested to be disclosed;
- B. the person or entity to whom such personal information is requested to be disclosed; and
- C. the uses which will be made of such personal information by the person or entity receiving it; or

(b) to those officers and employees of, and to those who contract with, the agency that maintains the record if such disclosure is necessary to the performance of their official

duties pursuant to a purpose of the agency required to be accomplished by statute or executive order or necessary to operate a program specifically authorized by law; or

(c) subject to disclosure under article six of this chapter unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter; or

(d) to officers or employees of another governmental unit if each category of information sought to be disclosed is necessary for the receiving governmental unit to operate a program specifically authorized by statute and if the use for which the information is requested is not relevant to the purpose for which it was collected; or

(e) for a routine use, as defined in subdivision ten of section ninety-two of this article; or

(f) specifically authorized by statute or federal rule or regulation; or

(g) to the bureau of the census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title XIII of the United States Code; or

(h) to a person who has provided the agency with advance written assurance that the record will be used solely for the purpose of statistical research or reporting, but only if it is to be transferred in a form that does not reveal the identity of any data subject; or

(i) pursuant to a showing of compelling circumstances affecting the health or safety of a data subject, if upon such disclosure notification is transmitted to the data subject at his or last known address; or

(j) to the state archives as a record which has sufficient historical or other value to warrant its continued preservation by the state or for evaluation by the state archivist or his or her designee to determine whether the record has such value; or

(k) to any person pursuant to a court ordered subpoena or other compulsory legal process; or

(l) for inclusion in a public safety agency record or to any governmental unit or component thereof which performs as one of its principal functions any activity pertaining to the enforcement of criminal laws, provided that, such record is reasonably described and is requested solely for a law enforcement function; or

(m) pursuant to a search warrant; or

(n) to officers or employees of another agency if the record sought to be disclosed is necessary for the receiving agency to comply with the mandate of an executive order, but only if such records are to be used only for statistical research, evaluation or reporting and are not used in making determination about a data subject.

(2) Nothing in this section shall require disclosure of:

(a) personal information which is otherwise prohibited by law from being disclosed;

(b) patient records concerning mental disability or medical records where such disclosure is not otherwise required by law;

(c) personal information pertaining to the incarceration of an inmate at a state correctional facility which is evaluative in nature or which, if disclosed, could endanger the life or safety of any person, unless such disclosure is otherwise permitted by law;

(d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure.

§ 97. Civil remedies.

(1) Any data subject aggrieved by any action taken under this article may seek judicial review and relief pursuant to article seventy-eight of the civil practice law and rules.

(2) In any proceeding brought under subdivision one of this section, the party defending the action shall bear the burden of proof, and the court may, if the data subject substantially prevails against any agency and if the agency lacked a reasonable basis pursuant to this article for the challenged action, award to the data subject reasonable attorneys' fees and disbursements reasonably incurred.

(3) Nothing in this article shall be construed to limit or abridge the right of any person to obtain judicial review or pecuniary or other relief, in any other form or upon any other basis, otherwise available to a person aggrieved by any agency action under this article.

§ 92(8)

(8) Public safety agency record. The term "public safety agency record" means a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation and correctional alternatives or the division of state police or of any agency or component thereof whose primary

function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five and eight hundred forty-five-a of the executive law and by the department of state pursuant to section ninety-nine of the executive law.



A-21

**LETTER REQUESTING PERSONAL  
RECORDS FROM STATE AGENCY**

*(suggested form letter by Committee on Open Government)*

Name (if known) or Privacy Compliance Officer  
Name of Agency  
Address of Agency  
City, NY, ZIP code

Dear \_\_\_\_\_:

Under the provisions of the Personal Privacy Protection Law, Article 6-A of the Public Officers Law, I hereby request a copy of (or: access to) \_\_\_\_\_  
*(describe as accurately and specifically as possible the record or records you want, and provide all the relevant information you have concerning them).*

If there are any fees for copying the records I am requesting, please inform me before you fill the request. (or: . . . please supply the records without informing me if the fees do not exceed \$\_\_\_\_\_).

If all or any part of this request is denied, please cite the reason(s) which you think justifies your refusal to release the information. As you know, the Personal Privacy Protection Law requires that an agency respond to a request within five business days of its receipt. Also, please inform me of your agency's appeal procedure.

In order to expedite consideration of my request, I am enclosing a copy of \_\_\_\_\_  
*(some document of identification).*

Thank you for your prompt attention to this matter.

Sincerely,

Signature  
Name  
Address  
City, State, ZIP code

**A-22**

**LETTER APPEALING DENIAL OF REQUEST  
FOR PERSONAL RECORDS FROM STATE AGENCY**

*(suggested form letter by Committee on Open Government)*

Agency Head or Appeals Officer  
Name of Agency  
Agency Address  
City, NY, ZIP code

Dear \_\_\_\_\_,

On \_\_\_\_\_ (*date*), I received a letter from \_\_\_\_\_ (*individual's name*) of your agency denying my request for access to \_\_\_\_\_ (*description of information sought*).

As required by the Personal Privacy Protection Law, the head or governing body of the agency, or whomever is designated to determine appeals, is required to respond within seven business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Personal Privacy Protection Law directs that appeals be sent to the Committee on Open Government, NYS Department of State, 41 State Street, Albany, NY 12231.

Thank you for your prompt attention.

Sincerely,

Signature  
Name  
Address  
City, State, ZIP code

A-23

**MOTION FOR PERMISSION TO  
APPEAL FROM DENIAL OF 440 MOTION**

STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK

v.

\_\_\_\_\_

Defendant.

APPLICATION  
FOR  
PERMISSION  
TO APPEAL

Ind. No. \_\_\_\_\_

SIR:

PLEASE TAKE NOTICE that the Defendant, \_\_\_\_\_, will make application to the Hon. \_\_\_\_\_, Justice of the Supreme Court, Appellate Division, \_\_\_\_\_ Department, at his Chambers at \_\_\_\_\_, New York, on the \_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, at \_\_\_ o'clock in the \_\_\_ noon of that date, for a certificate pursuant to Section 460.15 of the Criminal Procedure Law of the State of New York, granting permission to appeal to this Court and certifying that this case involves questions of law and fact which ought to be reviewed by the Appellate Division, \_\_\_\_\_ Department, and allowing an appeal to this Court from the Order of the \_\_\_\_\_ Court, County of \_\_\_\_\_, entered on the \_\_\_ day of \_\_\_\_\_, 2\_\_\_\_, denying the Defendant's motion made pursuant to Section 440.10 of the Criminal Procedure Law, to vacate the Judgment, and from each and every part of said Order.

DATED: \_\_\_\_\_, 2\_\_\_\_

Yours, etc.

\_\_\_\_\_  
(Individual's name or attorney)

TO: DISTRICT ATTORNEY

STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK

v.

AFFIDAVIT  
Ind. No. \_\_\_\_\_

\_\_\_\_\_,  
Defendant.

STATE OF NEW YORK)  
COUNTY OF \_\_\_\_\_) ss.:

\_\_\_\_\_, being duly sworn, deposes and says:

1. I am the defendant in the above-captioned case and I make this affidavit in support of my application for permission to appeal to this Court from the denial of a motion to vacate the judgment of conviction under C.P.L. § 440.10.

2. Attached as Exhibit A is a copy of the Motion under Section 440.10 to vacate the judgment of conviction, with supporting affidavit(s).

3. Attached as Exhibit B is a copy of the Order of the \_\_\_\_\_ Court, County of \_\_\_\_\_, dated \_\_\_\_\_, denying said motion pursuant to Section 440.10.

4. As shown in Exhibit A, I raised the following ground(s) in support of the motion. *[state ground(s) under Section 440.10.]*

5. *[Summarize the factual basis for the 440 Motion.]*

6. *[If the court rendered a written opinion denying the 440 Motion, discuss the opinion and explain why the court was wrong.]*

7. *[Present any additional reasons why the appellate court should hear the case - miscarriage of justice, hardship, public importance of the issues, questions of first impression, conflict on a question among the Appellate Divisions, etc.].*

8. Based on the foregoing, I respectfully request that this Court grant this application for permission to appeal to this Court.

\_\_\_\_\_  
*(Signature)*  
*(print your name)*

Sworn to before me this  
\_\_\_ day of \_\_\_\_\_, 2 \_\_\_.

\_\_\_\_\_  
Notary Public

**A-24**

**28 U.S.C. § 2254**

**“STATE CUSTODY; REMEDIES IN FEDERAL COURTS”**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the

State to raise, by any available procedure, the questions presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as

provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The effectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.



**ADDRESSES OF NEW YORK FEDERAL  
DISTRICT COURTS AND THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

U.S. District Court  
Southern District of New York  
United States Courthouse  
40 Foley Square  
New York, New York 10007-1581

U.S. District Court  
Eastern District of New York  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

United States District Court  
Northern District of New York  
100 South Clinton Street  
P.O. Box 7198  
Syracuse, New York 13261-7198

United States District Court  
Western District of New York  
138 Delaware Avenue  
Buffalo, New York 14202

United States Court of Appeals  
for the Second Circuit  
United States Courthouse  
40 Foley Square, Room 1803  
New York, New York 10007

**COUNTIES WITHIN THE FOUR  
FEDERAL DISTRICTS OF NEW YORK  
(28 U.S.C. § 112)**

New York is divided into four judicial districts to be known as the Northern, Southern, Eastern, and Western Districts of New York.

Northern District

- (a) The Northern District comprises the counties of Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Ulster, Warren and Washington.

Court for the Northern District shall be held at Albany, Auburn, Binghamton, Malone, Syracuse, Utica and Watertown.

Southern District

- (b) The Southern District comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the Eastern District, the waters within the Eastern District.

Court for the Southern District shall be held at New York and White Plains.

#### Eastern District

- (c) The Eastern District comprises the counties of Kings, Nassau, Queens, Richmond, and Suffolk and concurrently with the Southern District, the waters within the counties of Bronx and New York.

Court for the Eastern District shall be held at Brooklyn, Hauppauge, and Hempstead (including the village of Uniondale).

#### Western District

- (d) The Western District comprises the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates.

Court for the Western District shall be held at Buffalo, Canandaigua, Elmira, Jamestown, and Rochester.

28 U.S.C. § 112

**PETITION UNDER 28 USC § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

*[Note: The following pages are not published in a size that is acceptable for filing. Either obtain a petition form that is of a correct size or retype the words of this form on full-size paper.]*

---

**United States District Court**      District  
Name \_\_\_\_\_ Prisoner No. \_\_\_\_\_  
Case No.

Place of Confinement

Name of Petitioner *(include name which convicted)*.

v.

Name of Respondent  
*(authorized person having custody of petitioner)*

---

The Attorney General of the State of:

---

**PETITION**

1. Name and location of court which entered the judgment of conviction under attack
2. Date of judgment of conviction
3. Length of sentence

4. Nature of offense involved (all counts)

5. What was your plea? (Check one)

(a) Not guilty

(b) Guilty

(c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury

(b) Judge only

7. Did you testify at the trial?

Yes  No

8. Did you appeal from the judgment of conviction?

Yes  No

9. If you did appeal, answer the following:

(a) Name of court

(b) Result

(c) Date of result and citation, if known

(d) Grounds raised

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

- (1) Name of court
- (2) Result
- (3) Date of result and citation, if known
- (4) Grounds raised

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

- (1) Name of court
- (2) Result
- (3) Date of result and citation, if known
- (4) Grounds raised

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes  No

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court  
(2) Nature of proceeding  
(3) Grounds raised  
(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes  No

- (5) Result  
(6) Date of result

(b) As to any second petition, application or motion give the same information:

- (1) Name of court  
(2) Name of proceeding  
(3) Grounds raised

- (4) Did you receive an Evidentiary Hearing on your petition?

Yes  No

- (5) Result  
(6) Date of result

- (c) Did you appeal to the highest state court having jurisdiction and the result of action taken on any petition, application or motion?

- (1) First petition, etc. Yes  No   
(2) Second petition, etc Yes  No

- (d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.



- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one:

Supporting FACTS (state *briefly* without citing cases or law)

B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law):

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes  No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing

(b) At arraignment and plea

(c) At trial

(d) At sentencing

(e) On appeal

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes  No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes  No

(a) If so, give name and location of court which imposed sentence to be served in the future:

- (b) Give date and length of the above sentence:
- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
- Yes  No

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
*Signature of Attorney (if any)*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature of Petitioner*

A-28

**APPLICATION TO FEDERAL DISTRICT  
COURT FOR CERTIFICATE OF APPEALABILITY**

UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_  
\_\_\_\_\_

vs.

**APPLICATION FOR  
CERTIFICATE OF  
APPEALABILITY**

\_\_\_\_\_, Warden of  
\_\_\_\_\_ Correctional Facility  
\_\_\_\_\_

Petitioner, \_\_\_\_\_, hereby moves this Court, based on the attached papers, for a Certificate of Appealability to the United States Court of Appeals for the \_\_\_\_\_ Circuit from the Judgment and Order of this Court, entered on the \_\_\_ day of \_\_\_\_\_, denying the Petition for a Writ of Habeas Corpus.

DATED: \_\_\_\_\_

\_\_\_\_\_  
(Petitioner's Name)

*(Attach an affidavit which summarizes the issues that were argued in the petition and the reasons why the issues are so important that an appeal should be permitted. If the district court issued a written order denying the petition, attach a copy of the order.)*

A-29

**NOTICE OF APPEAL TO SECOND CIRCUIT**

UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ ,

Petitioner,

**NOTICE OF  
APPEAL**

vs.

File No. \_\_\_\_\_

\_\_\_\_\_, Warden of  
\_\_\_\_\_ Correctional Facility.

Respondent.  
\_\_\_\_\_

Notice is hereby given that the Petitioner, \_\_\_\_\_, hereby  
appeals to the United States Court of Appeals for the \_\_\_\_\_ Circuit, from the  
Order of the District Court, \_\_\_\_\_ District of \_\_\_\_\_, entered on the \_\_\_ day of  
\_\_\_\_, 2\_\_\_\_, which denied the Petition for a Writ of Habeas Corpus.

DATED: \_\_\_\_\_

\_\_\_\_\_  
*(Petitioner)*

*Address:*

**APPLICATION TO THE SECOND CIRCUIT  
FOR CERTIFICATE OF APPEALABILITY**

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

\_\_\_\_\_

\_\_\_\_\_,

Petitioner,

**APPLICATION FOR  
CERTIFICATE OF  
APPEALABILITY**

vs.

\_\_\_\_\_, Warden of  
\_\_\_\_\_, Correctional Facility,

Respondent.

\_\_\_\_\_

PLEASE TAKE NOTICE that upon the annexed affidavit of \_\_\_\_\_, sworn to on the \_\_\_ day of \_\_\_\_\_, 2\_\_, and upon all the proceedings, the Petitioner, \_\_\_\_\_, hereby moves this Court for a Certificate of Appealability, having first sought such Certificate from the District Court, \_\_\_\_\_ District of New York, and having been denied said request, and for such other and further relief as this Court may deem just and proper.

DATED: \_\_\_\_\_

Yours, etc.

\_\_\_\_\_

*(Signature)*

*(Attach an affidavit which sets forth the reasons why the Second Circuit should grant a Certificate of Appealability. Also attach the Order of the District Court denying your motion for a Certificate of Appealability from that court, as well as any other documents that may be helpful to persuading the Second Circuit to grant the Certificate of Appealability.)*

**SAMPLE POINT IN FEDERAL BRIEF**

*[Note: This sample Point is supplied for purposes of illustration only; any case law cited herein must be independently researched and updated.]*

**POINT I**

**THE PETITIONER IS NOT PROCEDURALLY  
BARRED FROM CHALLENGING THE INSTRUCTION  
ON THE ELEMENT OF INTENT**

Petitioner was granted a certificate of appealability on two grounds: (1) ineffective assistance of counsel in failing to challenge the instruction on the element of intent, and (2) insufficiency of the instruction itself, despite the lack of an objection. Petitioner submits that the district court correctly ruled that the ineffective assistance of counsel claim was not procedurally barred in that such claim was raised in state court on the direct appeal. Moreover, Petitioner submits that he is not barred from challenging the instruction itself on three grounds: (1) cause and prejudice, (2) fundamental constitutional error, and (3) miscarriage of justice.

(a) The Ineffective Assistance Of Counsel Claim Was Raised In State Court

First, in considering Petitioner's contentions, this Court must be mindful that "Congress has expressly authorized the litigation of constitutional claims and defenses in a federal district court after a state has vindicated its interests through trial of the substantive criminal offense in the state courts." *Hawkins v. LeFevre*, 758 F.2d 866 (2d Cir. 1985) (Kaufman, C.J.) See, 28 U.S.C. § 2254. By affording a defendant the right to seek access to the federal courts, "Congress has reinforced the notion that the federal judiciary

is vested with the primary responsibility for preserving federal rights and privileges.” *Id.* As such, this Court will review a district court’s denial of a habeas petition *de novo*. *Sweet v. Bennett*, 353 F.3d 135 (2d Cir. 2003); *Dickson v. Miller*, 293 F.3d 74, 78 (2d Cir. 2002).

It is well settled that a federal court may not grant a state prisoner habeas corpus relief “unless it appears that the applicant has exhausted the remedies available in the courts of the State; or that there is either an absence of available State corrective process; or the existence of circumstances rendered such process ineffective to protect the rights of the prisoner.” *Aparicio v. Artuz*, 269 F.3d 78 (2d Cir. 2001), quoting 28 U.S.C. § 2254(b)(1). To satisfy the exhaustion requirement of Section 2254, “a petitioner must present the substance of ‘the same federal constitutional claim[s] that he now urges upon the federal courts . . . to the highest court in the pertinent state.’” *Id.* quoting *Turner v. Artuz*, 262 F.3d 118, 132-24 (2d Cir. 2001) and *Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir. 1990).

A petitioner must have “fairly presented” each federal claim to the highest state court possible. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Daye v. Attorney Gen. of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (*en banc*), *cert. denied*, 464 U.S. 1048 (1984). To have “fairly presented” a defendant’s federal claim to a state court, the defendant must have informed the state court of the factual and legal premises of the claim asserted in the federal habeas petition. *Daye*, 696 F.2d 186, 191. In *Daye*, this Court described several ways in which a defendant sufficiently alerts a state court as to the constitutional nature of a claim. These include:

- i. reliance on pertinent federal cases employing constitutional analysis,
- ii. reliance on state cases employing constitutional analysis in like-fact situations,
- iii. assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, or



- iv. allegation of a pattern of facts that is well within the main stream of constitutional litigation.

*Daye*, 696 F.2d at 194.

Under New York law, appellate counsel may raise a claim of ineffective assistance of trial counsel based on the failure of trial counsel to object to a jury instruction. *See, Sweet v. Bennett*, 353 F.3d 135 (2d Cir. 2003); *Aparicio*, 269 F.3d at 91; *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997). Petitioner submits that state appellate counsel specifically brought to the attention of the New York appellate court the contention that the Petitioner's right to the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution had been violated by trial counsel's failure to object to the state court's instruction on the intent element of the more serious crimes. State appellate counsel did so through repeated direct references to the Sixth Amendment of the United States Constitution as a ground for granting the relief requested. First, in stating the relevant question presented to the New York appellate court, state appellate counsel framed the question as follows:

Whether Appellant was deprived of his due process right to a fair trial by the court's charge, which failed to provide any meaningful guidance on the concept of intent, the foundation of the defense case. U.S. CONST., **AMENDS VI**, XIV; N.Y. CONST., ART. I, § 6.

(A.19). (*emphasis added*).

Moreover, in the caption to Point II of the argument on the disputed jury instruction, state appellate counsel repeated that the contention of Petitioner was grounded on "U.S. CONST., **AMENDS V AND XIV**; N.Y. CONST., ART. I § 6" (A.18;20) (*emphasis added*). "Such reference to the Sixth Amendment to the United States Constitution was restated at the conclusion of the first paragraph, which summarized Petitioner's argument, and stated the constitutional grounds in support of the challenge. Specifically, appellate counsel stated that "the judgment must be reversed, the convictions vacated, and the matter remanded for a new trial. U.S.

Const. **AMENDS** VI and XIV, N.Y. Const. Art. 1, § 6.” (A.20). (*emphasis added*)

Although the brief did not use the words that Petitioner had been rendered “ineffective assistance of counsel” under the Sixth Amendment, the direct reference to the Sixth Amendment was more than sufficient. *See, Ramos v. Walker*, 744 F.Supp. 422 (E.D.N.Y. 1990) (relied on two federal cases in state court brief that employed some constitutional analysis); *Blazic v. Henderson*, 900 F.2d 534 (2d Cir. 1990) (habeas petitioner sufficiently raised, in state trial court, his accidental discharge theory for justification defense).

Although the Sixth Amendment to the United States Constitution contains other rights, none of them are applicable to the issue raised in Point II of the state appellate brief. Specifically, the Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the Assistance of Counsel for his defense.**

U.S. Const., Amend VI. (*emphasis added*)

The state appellate brief also explicitly addressed trial counsel’s conduct with regard to the disputed question of intent. State appellate counsel discussed the extent to which trial counsel had vigorously fought during the trial on the issue of intent, a “theme” repeated throughout the trial. By discussing what trial counsel had done during the trial, it became obvious in the brief what trial counsel had failed to do - - object to the insufficient instruction on intent.

Specifically, the brief submitted by Petitioner’s appellate counsel informed the court that Appellant’s intent would be the critical issue for it to decide in reaching a verdict. The brief further disclosed that defense counsel had emphasized during summation that there was no evidence to

support the element of intent. Such statements by the Petitioner's appellate counsel in the brief provide further support for the Petitioner's contention that trial counsel was ineffective when it came to the jury instructions. Such statement in the brief supports a conclusion that trial counsel fully understood the importance of the issue, and yet did not request sufficient instructions on the issue. When viewing such discussion in conjunction with the fact that state appellate counsel repeatedly stated that the argument made was based on the Sixth Amendment to the United States Constitution, a sufficient showing exists that an ineffective assistance of counsel claim had been made to the state appellate court with regard to the instruction on intent.

Based on the foregoing, the constitutional ground of ineffective assistance of counsel as protected by the Sixth Amendment of the United States Constitution was sufficiently raised to the state court. The state appellate court failed to recognize that such assertion had been made. Given that the state court did not dispose of the Sixth Amendment claim on the merits, but rather incorrectly ruled that the claim regarding the jury instruction had not been preserved for review, this Court should review the Sixth Amendment claim *de novo* and should not accord the state court disposition any deference. *See, e.g., Aparicio*, 269 F.3d at 93 ("under the [Anti-Terrorism and Effective Death Penalty Act] regime, once a state court has adjudicated a petitioner's claim on the merits, a federal court may not grant a habeas petition on that claim unless said adjudication 'resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.' The necessary predicate to this deferential review is, of course, that petitioner's federal claim has been 'adjudicated on the merits' by the state court. If a state court has not adjudicated the claim 'on the merits,' we apply the pre-AEDPA standards and review *de novo* the state court disposition of the petitioner's federal constitutional claims.").

A. The Procedural Default With Regard To The Jury Instruction Itself Should Be Excused On Several Grounds

Where a petitioner has failed to raise a claim on direct appeal, a subsequent habeas petition may nonetheless be heard when the petitioner demonstrates cause for the failure to raise such claim in state court and prejudice. *Douglas v. United States*, 13 F.3d 43 (2d Cir. 1993); *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992). In addition, a federal court will entertain a habeas petition where the alleged constitutional error is so fundamental that no objection is necessary to preserve such claim. See, *Hawkins v. LeFevre*, 758 F.2d 866, 872-73 (2d Cir. 1985) (under New York law, to adversely comment on the exercise of the privilege against self-incrimination is a constitutional violation so fundamental that no objection is necessary).

In addition, a federal court will entertain a habeas petition, despite a procedural default, where to reject such a petition would result in a fundamental miscarriage of justice. *Sweet v. Bennett*, 353 F.3d 135 (2d Cir. 2003). See, *Schlup v. Delo*, 513 U.S. 298, 321-22 (1995). A fundamental miscarriage of justice occurs when the petitioner demonstrates that he or she is actually innocent. *Id.* “[A]ctual innocence means factual innocence, not mere legal insufficiency.” *Id.* *Bousley v. United States*, 523 U.S. 614, 623 (1998). “To establish actual innocence, [a] petitioner must demonstrate that, ‘in light of all the evidence,’ ‘it is more likely than not that no reasonable juror would have convicted him.’” *Id.* Where actual innocence is shown, a petitioner need not demonstrate cause and prejudice. *Id.*; *Washington v. James*, 996 F.2d 1442 (2d Cir. 1993). See, *Foont vs. United States*, 93 F.3d 76 (2d Cir. 1996) (relief given where circumstances compel review to achieve justice).

Based on the foregoing grounds, Petitioner submits that review of the jury instruction on the intent element is not procedurally barred. The challenge raised to the instruction is grounded in the fact that the state trial court failed to give a fundamental and well-recognized jury instruction on the

issue of intent. Such expanded instruction is clearly set forth in the New York Pattern Jury Instructions. The error in failing to give the key instruction is so fundamental that an objection need not have been made.

New York Criminal Procedure Law, Section 300.10(2), requires a court to instruct the general fundamental legal principles applicable in all criminal cases, as well as those principles applicable to the particular case. The failure to instruct the jury with respect to a fundamental legal principle is error under New York law. *See, e.g., People v. Newman*, 46 N.Y.2d 126 (1978) (preliminary instruction to jury that prosecution had burden of proving every element of crimes charged beyond a reasonable doubt is “no substitute” for failure to give the same charge in final pre-deliberation instructions).

The required Pattern Criminal Jury Instruction on the element of intent under New York law is as follows:

Intent is an essential element of the crime charged in this indictment and therefore, the burden of proof is upon the People to establish to your satisfaction beyond a reasonable doubt that the defendant acted “intentionally.”

Under our law, a person acts intentionally with respect to a result which he causes, or with respect to conduct in which he engages, when his conscious objective is to cause such result or to engage in such conduct.

What a defendant intends is of course an operation on his mind. A jury, even if present at the time of the commission of the crime, cannot examine the invisible operation of a person’s mind.

Therefore, in order to determine what a defendant intended at the time of the commission of the crime, the law permits the jury to consider what were the acts and conduct of the defendant before, during and after the commission of the crime. As jurors, you may therefore consider the nature and the manner of the defendant’s acts and conduct and the result caused by such conduct in order to determine whether or not the defendant acted “intentionally” in committing the crime[s] charged.

In the final analysis, whether or not the People have proved to your satisfaction beyond a reasonable doubt that the defendant acted “intentionally,” is a question of fact for the jury to be decided on the basis of all the evidence in the case.

1 C.J.I. § 9.31, p. 502-03.

The constitutional right to an instruction to the jury on an essential element to the offense is fundamental. *See, United States v. Javino*, 960 F.2d 1137 (2d Cir. 1992). “The failure to instruct on an essential element of the offense generally constitutes plain error, permitting appellate review even if the defendant has failed to object to the instruction at trial.” *See, e.g., United States v. Mazzei*, 700 F.2d 85, 87-88 (2d Cir.) *cert. denied*, 461 U.S. 945 (1983).

The element of intent was so critical to this case that the New York appellate court should have reviewed the issue on a plain error standard. Moreover, it is undisputed that state appellate counsel made an argument that the critical instruction on the element of intent was deficient. Therefore, it cannot be said that Petitioner did not raise the issue to the state appellate court.

Petitioner had a legitimate expectation that a New York State trial court would follow the New York State Pattern Jury Instructions regardless of whether his attorney made a request for such a fundamental charge. In such sense, the error was not only made by his state trial counsel but also by the state court judge in failing to independently give such charge. *See, People v. Williams*, 112 A.D.2d 177 (2d Dept. 1985) (despite failure to preserve objection to instructions, judgment reversed and new trial ordered in the interest of justice where identification was central to the case and therefore the court “had an obligation to provide the jury with more than a bare bones charge on identification.”) *People v. Memminger*, 126 A.D.2d 752 (2d Dept. 1987) (judgment reversed and new trial ordered where trial court, among other things, failed in its identification charge to sufficiently focus the jury on the issue of the accuracy, and veracity of the identification testimony).

Based on the foregoing, the instruction on intent itself is not procedurally barred because (1) there was cause for not raising the claim and the Petitioner was prejudiced, (2) the constitutional error was fundamental, and (3) to do otherwise would result in a miscarriage of justice.

C Alternatively, This Court Should Stay This Petition To Permit The Petitioner To File A Petition For A Writ of *Coram Nobis* In A New York Appellate Court To Review A Claim Of Ineffective Assistance Of Appellate Counsel

In *Aparicio*, the federal district court stayed the habeas petition to permit a state appellate court to review a claim of ineffective assistance of appellate counsel. *Aparicio*, 269 F.3d at 87. By statute under New York law, a defendant may move to vacate his conviction on eight enumerated grounds. See, N.Y. Crim. Proc. Law § 440.10. Ineffective assistance of appellate counsel is not among those grounds. See *Id.* Under New York law, the ancient common law writ of *coram nobis* was largely superseded by the Section 440.10, but nonetheless remains available as a remedy in situations not covered by said statute. *Aparicio*, 269 F.3d at 87. The New York Court of Appeals has recognized that a criminal defendant has the right to challenge the ineffective assistance of appellate counsel through a *coram nobis* petition to an appellate court. *Id.* *People v. Bachert*, 69 N.Y.2d 593, 599 (1987).

If this Court should find that Petitioner's state appellate attorney failed to adequately raise the claim of ineffective assistance of trial counsel, and that Petitioner is otherwise procedurally barred, then it should permit Petitioner to seek redress in a New York appellate court through a petition for a writ of *coram nobis*. The fact that Petitioner erroneously filed a motion pursuant to Section 440.10 of the New York Criminal Procedure Law seeking to challenge the effective assistance of counsel is irrelevant. Petitioner would have simply used the wrong mechanism to challenge the assistance that he received by his state trial counsel. A 440 motion is made to the New York trial court, not to an appellate court. See, N.Y.C.P.L. § 440.10.

Therefore, if this Court should find that the claim of ineffective

assistance of trial counsel was not made in state court, then this Court should remand this case to the district court with instructions that this petition be stayed pending the filing of a petition for *coram nobis* relief to a New York appellate court. If the New York appellate court denies the petition for *coram nobis* relief, then the federal district court may entertain this petition, and such petition would not be procedurally barred.



**A-32**

**DIVISION OF PAROLE**

**NOTICE OF RIGHT OF APPEAL**

You have the right to appeal any final decision of the Board of Parole or an Administrative Law Judge and you have the right to the assistance of counsel in perfecting your appeal.

To appeal a final decision of the Board or an Administrative Law Judge, you must file a Notice of Appeal within 30 days of your receipt of the decision by sending the Notice of Appeal to:

New York State Board of Parole  
Appeals Unit  
97 Central Avenue  
Albany, New York 12206

You have four months from the date your Notice of Appeal is filed to perfect your appeal, unless an extension is granted for good cause upon written request within the four month filing period. Your appeal may be perfected by submitting three copies of your brief on appeal or three copies of a letter which contains the specific grounds of your appeal and the ruling(s) challenged. The brief or letter should contain a section which must include all pertinent documents and the transcript of your hearing if they are necessary to the determination of your appeal. Please only send your brief or letter when it is completed. DO NOT send parts of your appeal at different times. Failure to submit your perfected appeal within four months or any extension thereof after the filing of your Notice of Appeal will result in the dismissal of your appeal with prejudice.

Once your perfected appeal is received, it will be investigated and a statement of findings prepared. You can expect that it will take approximately two to four months to prepare the statement of findings. Once the statement of findings is prepared by the Appeals Unit, it will be submitted to an appellate panel of the Board of Parole for decision. Once a decision is rendered by the Board, a copy of the decision, and the Appeals Unit's findings will be forwarded to you and your attorney, if applicable.

Questions on Appeal:

A. Release Denial, Rescission or Final Revocation Determination:

1. Whether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was otherwise unlawful.
2. Whether the determination relied on erroneous information as shown in the record of the proceeding or relevant information was not available for consideration.
3. Whether the determination was excessive.

B. Final Revocation or Rescission Determination - Additional Ground for Appeal:

Whether the determination was supported by a preponderance of the evidence subject to the limitation that evidentiary rulings will be considered only if a timely objection was made at the hearing.

**A-33**

**STATE OF NEW YORK  
EXECUTIVE DEPARTMENT  
DIVISION OF PAROLE**

**NOTICE OF APPEAL**

I hereby appeal from the decision of the Board of Parole in my case.

Inmate Name \_\_\_\_\_  
NYSID Number \_\_\_\_\_  
Department Identification Number \_\_\_\_\_  
Current Place of Incarceration \_\_\_\_\_  
Place of Hearing \_\_\_\_\_  
Date of Hearing \_\_\_\_\_  
Scheduled Re-consideration Date \_\_\_\_\_

A transcript of the interview or hearing may be requested by an inmate/violator or the attorney for such person by checking the appropriate box below, except that an attorney representing a violator whose final hearing was conducted in New York City must order the transcript directly from Molly's Professional Typing Service, 108-16 72d Avenue, Forest Hills, New York 11375. Transcripts provided by the Appeals Unit will be billed at a rate of twenty-five cents per page. It normally takes between four to eight weeks from the filing of the notice of appeal until the transcript is prepared.

Check the appropriate box:

I request a transcript of the minutes of my hearing as I believe it is necessary for the preparation of my appeal.

I shall not require a transcript of the minutes of my hearing to perfect my appeal. However, I reserve the right to alter this decision at a later date.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature)

**A-34**

**LETTER FROM DIVISION OF  
PAROLE AFTER NOTICE  
OF APPEAL IS FILED**

- (1) Date Notice of Appeal Received:
- (2) Latest Date For Submitting Document Perfecting Appeal: \_\_\_\_\_

Your notice of appeal was received on the date indicated at line (1) above, and the document that perfects the appeal must be received by this office by the date listed on line (2) above, unless an extension of time is requested in writing prior thereto and granted by this office. The appeal is perfected by filing an original and two copies of a document which explains the grounds for your appeal and the specific rulings challenged. If the document perfecting your appeal is not received by the date listed in line (2) above, or a subsequent date granted in writing by the Appeals Unit, the appeal will automatically be dismissed with prejudice.

If a transcript of the underlying proceeding was requested, it has been ordered and you will be advised upon its receipt; except that, for final revocation hearings conducted at the Rikers Island Judicial Center, where the violator is represented by counsel on the appeal, counsel must order the transcript directly from Molly's Professional Typing Service, 108-16 72<sup>nd</sup> Ave., Forest Hills, NY 11375.

The Appeals Unit will begin a review of the appeal as soon as possible after its receipt of the document perfecting the appeal. That review will result in the issuance of a Statement of Appeals Unit Findings, which will contain findings of fact and/or law, and a recommended disposition. The Appeals Unit will attempt to complete its findings within four months of the date of receipt of the document that perfected the appeal. Once the Appeals Unit issues its findings, the matter will be presented to an appellate panel of the Board of Parole for decision. Upon the rendition of a decision, the Statement of Appeals Unit Findings and the Parole Appeal Decision Notice will be sent to the appellant and, when applicable, counsel for appellant.

Any correspondence relating to this administrative appeal should be addressed to the Appeals Unit at the above address. Inmates and parole violators who are represented by counsel should not write directly to the Appeals Unit, but rather should direct any inquiry to their attorney.

Appeals Unit

cc: Facility Parole File; C.O. File;  
Appeals Unit File  
P2005 (Rev. 3/04)

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## BIBLIOGRAPHY

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In addition to the author's experience, as well as his review of applicable statutes and case law, the author acknowledges the following sources for this Guide:

*Appellate Practice Handbook: A Guide To Appellate Procedure And Brief Writing*  
by Edward J. Horowitz; Butterworth Legal Publishers (1982)

*Appellate Advocacy: Principles and Practice*  
by Ursula Bentele; LexisNexis (2004)

*Appellate Practice And Procedures,*  
by Edward A. Zunz, Jr.; Alan E. Kraus.  
St. Paul Minn.: West Group, 1998

*Carmody-Wait Cyclopedia Of New York Practice;*  
Baker, Voorhis & Co.; Lawyers Co-operative Publishing Co., 1952-1956.

*New York Appellate Practice*  
by Newman, Thomas R.  
New York : Mathew Bender, c1985-

*Federal Habeas Corpus*  
by Sokol, Ronald P.  
Charlottesville, VA.: Michie, [1969]

*Prisoner Collateral Attacks : Federal Habeas Corpus And Federal Prisoner Motion Practice;*  
by Potuto, Josephine R.  
New York, NY : Clark Boardman, c1991

*Federal Habeas Corpus Practice And Procedure*

by Liebman, James S.  
Charlottesville, VA. : Michie Co., c1994

*Callaghan's Appellate Advocacy Manual: A Design Approach*

by John W. Cooley; West Group (1989)

*Appellate Advocacy In A Nutshell, Second Edition*

by Alan D. Hornstein; West Publishing Co.; 2d ed. (2000)

*Appellate Litigation*

by Thomas R. Newman; M. Bender (1985)

*Appellate Practice Manual*

by Pricilla Anne Schwab (Editor)  
American Bar Association (1992)

*Winning An Appeal*

by Myron Moskowitz; Michie Butterworth; 3d ed. (1995)

*Jailhouse Lawyer's Manual*

by Columbia Human Rights Law Review;  
William S. Hein and Co. (1981)

*Handling A Criminal Case In New York*

by Gary Muldoon; Lawyers Cooperative Pub. Co. (1994)

*Gould's Criminal Law Handbook of New York;*

Gould Pubns. (2001)