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Reply to:

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Atty. John Doe
3 Woodwind Place
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Re: ***Appeal Memo (People v. Smith – App. No. 0000-00000)***

Dear Atty. Doe:

Per our agreement, I have researched the legal viability of each of the arguments raised in your client's *pro se* Motion to Vacate Judgment of Conviction ("Motion to Vacate") filed pursuant to **CPL Section 440.10**. As you already know, the trial court summarily denied your client's Motion to Vacate. For the reasons set forth below, I believe your client has a single viable appellate argument, *to wit,* that the trial court committed reversible error under **CPL Section 440.30(4)** by failing to hold a hearing prior to ruling upon Defendant's argument that his guilty plea was not made in a knowing, intelligent and voluntary fashion ("voluntariness of plea" claim).

I. CPL Section 440.10

Under New York law, "[c]orum nobis, or 440 motion, is a motion of last resort." **People v. DeBiaso, 795 N.Y.S.2d 880, 880 (N.Y. Co. Crt. 2005).** "It is a failsafe mechanism devised by law to enable a defendant to have (if he can convince a judge that his claim *may* have merit) an opportunity for a review when absolutely no other avenue of review lies or ever laid open to him." **Id. at 880-881**.

II. Trial Court Arguments

a. voluntariness of plea claim

In this case, Defendant sought relief under **CF Section 440.10(1)(e)**, which allows a court to vacate a judgment of conviction if "[d]uring the proceeding resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings." **CFL Section 440.30(4)** further states that "[u]pon considering the merits of the

[Section 440.10] motion, the court may deny it *without conducting a hearing* if:

(a) the moving papers do not allege any ground constituting legal basis for the motion; or

(b) the motion is based upon the existence or occurrence of acts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

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

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

As noted above, I do not believe the trial court should have denied Defendant's "voluntariness of plea" claim without a hearing.

<u>Regarding 440.30(4)(a)</u>: Although Defendant did not challenge the legality of his appeal waiver below, the case law clearly provides that a defendant's appeal waiver does not foreclose him from challenging the voluntariness of his plea. **People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989)**. As such, Defendant's voluntariness of plea claim "constitute[es] [a] legal basis for the motion[.]"

<u>Regarding 440.30(4)(b)</u>: Defendant's moving papers included his sworn affidavit which specifically addresses Defendant's inability to make a knowing, intelligent and voluntary plea due to his severe depression, and his attorney's failure to inform the court. As such, the "moving papers" do in fact contain "sworn allegations substantiating or tending to substantiate all the essential facts."

<u>Regarding 440.30(4)(c)</u>: Under New York law, a defendant's challenge to the voluntariness of a plea is frequently based upon evidence *dehors* (outside of) the record. **See People v. Sanchez, 822 N.Y.S.2d 128, 129 (2nd Dept. 2006)**("[I]nsofar as the defendant may be understood to claim that counsel's alleged deficiencies undermined the voluntariness of his plea, many of is contentions rest on matter *dehors* the record; thus, they are not reviewable on direct appeal"); **People v. Hosgor, 806 N.Y.S.2d 686, 687 (2nd Dept. 2005)**("[t]he defendant's challenge to the voluntariness of the plea is based on matter which is *dehors* the record").

Such is the case in this matter. Defendant produced evidence from his therapist, Dr. Nolan, to the effect that Defendant was suffering from severe depression at the time of Defendant's plea hearing, and Defendant further alleged his attorney received this information from Dr. Nolan but failed to inform the court. Because all of this information is *dehors* (outside of) the record, the State cannot credibly argue that Defendant's allegations are "conclusively refuted by unquestionable documentary proof."

<u>**Regarding 440.30(4)(d),**</u> Although Defendant's voluntariness of plea claim is in fact "contradicted by a court record" (i.e., the plea hearing transcript where Defendant appears to affirm his mental capacity to make the plea), <u>the fact remains that Defendant submitted Dr. Nolan's writings which serve to corroborate the mental health information contained in Defendant's own affidavit</u>. As such, Defendant should assert that the trial court committed reversible error by essentially ruling that, as a matter of law, "there is no reasonable possibility that [defendant's] allegation is true." Stated differently, Defendant should assert that the trial court relied too heavily upon the plea hearing trancript re the voluntariness issue even though he knew there existed substantial contrary evidence *dehors* the record which required an evidentiary hearing to resolve

As such, I believe that Defendant possesses a colorable legal claim that the trial court committed reversible error by failing to hold an evidentiary hearing prior to denying Defendant's "voluntariness of plea" claim.

<u>**b. ineffective assistance of counsel**</u>

Defendant also alleges in his Motion to Vacate that his convictions should be vacated because his legal counsel was legally ineffective, *to wit*, he failed to inform the court of (1) Defendant's prior arrest/detention in Georgia, (2) Defendant's ongoing severe depression/heavily medicated state at the time he entered his guilty plea, and (3) other mitigating arguments in Defendant's favor.

Although Section 440 is an appropriate vehicle for raising an ineffective assistance of counsel claim, **People v. Ramsey, ___ N.Y.S.2d ___, 2001 WL 1875965 (2001)**, Defendant's ineffective assistance claim is legally defective for two reasons.

First, it is well-settled under New York law that an ineffective assistance claim can be summarily denied (w/o a hearing) where the defendant fails to submit an affidavit from his trial attorney in which the attorney affirms and/or explains the alleged deficiencies in his/her performance. **People v. Lopez, ___ N.Y.S.2d ___, 2006 WL 3962056 (N.Y. Sup. 2006**). Defendant's evidentiary proffer did not include an affidavit from his trial attorney, and thus the trial court was justified in rejecting Defendant's ineffective assistance claim w/o a hearing.

Second, it is also well-settled that "[I]n the context of a guilty plea, a defendant has been afforded [effective assistance of counsel] when he or she receives an advantageous plea deal and nothing in the record casts doubt on the apparent effectiveness." **People v. Caldwell, ___ N.Y.S.2d ___, 2004 WL 1977625 (N.Y. Sup. 2004)**. Although Defendant does not view his plea deal as advantageous, the fact remains that Defendant pled guilty to two felonies and received <u>no jail time</u>. In any reviewing court's eyes, this would be deemed an advantageous plea deal. Moreover, the record contains nothing which would "cast doubt on [his attorney's] apparent effectiveness." **People v. Caldwell, supra.** As such, it is my opinion that Defendant does not have a viable ineffective assistance claim.

c. Fifth Amendment/Self-Incrimination Claim

Defendant also alleges that he was interrogated by members of the Attorney General's office without counsel present and without receiving *Miranda* warnings.

In my opinion, this claim is not legally viable. Under New York law, a defendant's waiver of appeal rights precludes that defendant from raising Fifth Amendment self-incrimination claims. **People v. Kuklinski, 789 N.Y.S.2d 164, 164-165 (3rd Dept. 2005)**.

In this case, Defendant waived his right to trial by pleading guilty, and Defendant also waived his right to appeal. While Defendant's legal counsel did challenge the voluntariness of Defendant's guilty plea, he did not raise a separate challenge to Defendant's appeal waiver. **Cf. People v. Keebler, 789 N.Y.S.2d 547, 549 (3rd Dept. 2005)** ("Defendant's claims seeking to avoid the appeal waiver are unpreserved, defendant having failed to raise them in his motion to vacate judgment or to move to withdraw his plea"). As such, Defendant's Fifth Amendment self-incrimination claim is now procedurally barred.

Alternatively, the trial court made a specific factual finding that Defendant's attorney was present during the above-mentioned interrogation. Such factual findings "are entitled to great weight and will not be set aside unless clearly erroneous." **People v. Miller, 666 N.Y.S.2d 281, 282 (3rd Dept. 1997)**. In this case, the trial court's factual findings are supported by the record, and will not be disturbed by the appellate panel.

Finally, even if a reviewing court were to agree that "the prosecution had improperly obtained incriminating information from a defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment, but to suppress the evidence." **State v. Tomao, 467 N.Y.S.2d 491, 493 (N.Y. Sup. 1983)**.

d. Fourth Amendment Claim

Defendant next asserts that his Fourth Amendment rights were violated when his photograph was taken by a state investigator while he was in a holding cell, and that this photograph was later made available to media outlets.

Unfortunately, under New York law, a defendant's waiver of appeal rights also precludes that defendant from raising Fourth Amendment suppression issues. **People v. Hemingway, 760 N.Y.S.2d 367, 368 (3rd Dept. 2005); People v. Scott, 636 N.Y.S.2d 432, 432 (3rd Dept. 1995).** As noted above, Defendant did not challenge the legality of his appeal waiver below, and thus he is procedurally barred from raising Fourth Amendment suppression issues on appeal.

Alternatively, as noted above, Defendant's remedy in this circumstance would be limited to exclusion of the photograph from being admitted into evidence, and not vacation of the conviction. **Cf. State v. Tomao, 467 N.Y.S.2d 491, 493 (N.Y. Sup. 1983)**.

e. Dismissal of Indictment/Humanitarian Grounds

Finally, Defendant argues in his Motion to Vacate that the indictment should be dismissed pursuant to **CPL Section 210.40(1)** based upon Defendant's extraordinarily painful life experiences. While anyone would acknowledge and sympathize with Defendant's catastrophic life experience as a Holocaust survivor, Defendant's argument is procedurally barred under **Section 210.40** because it was not asserted in a timely fashion.

Section 210.40 motions are intended to be pre-trial motions, and thus, absent a showing of good cause for an extension of time, must be made within 45 days of arraignment. **People v. Pittman, 643 N.Y.S.2d 560, 561 (1st Dept. 1996).**

In Defendant's case, his 210.40 motion was not made within 45 days of his arraignment, and the record contains no evidence setting forth good cause for the untimely filing. **Cf. People v. Rahmen, 754 N.Y.S.2d 553, 554 (2nd Dept. 2003)**("the Supreme Court should have summarily denied the defendant's motion pursuant to **CPL Section 210.40(1)** as he failed to show good cause for making the motion more than 45 days after his arraignment"). Accordingly, your client is also procedurally barred from raising this argument on appeal.

Thank you for allowing me to complete this project.

Atty. Michael A. Dibble