

**STATE OF NEW YORK
COUNTY OF RENSSELAER**

COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN F. CARROLL

**AFFIRMATION IN
OPPOSITION TO CPL
SEC. 440.10 MOTION**

Jill P. Swingruber affirms and states, under penalty of perjury, that:

1. I am an Assistant District Attorney with the Rensselaer County District Attorney's Office, and I am duly licensed to practice law in the State of New York.
2. I am familiar with the aforementioned case, and I am aware of all relevant facts relating to the Defendant's motion to vacate his conviction.
3. This affirmation contains both legal argument and factual allegations. To the extent that legal arguments are employed, it is respectfully requested that this Court consider those arguments as a Memorandum of Law.
4. Upon a retrial, the Defendant was convicted by a jury of six counts of sexual abuse in the first degree for conduct against his stepdaughter constituting sexual contact by forcible compulsion or when the child was less than eleven years old pursuant to Penal Law § 130.65 [1] and [3] (see, People v. Carroll, 300 AD2d 911, 911, 753 NYS2d 148, 150 [3rd Dept, 2002] attached hereto and made a part hereof as People's Exhibit "1").
5. Thereafter, the Defendant filed a Notice of Appeal with the Appellate Division, Third Department challenging his judgment of conviction on the grounds that:
 - (a) the trial court erred when it permitted the People to elicit testimony from a medical expert as to whether the victim had been penetrated, thereby causing the Defendant to be convicted based upon evidence of uncharged crimes;

- (b) the trial court erred when it permitted the People to elicit testimony from its expert witness regarding the child sexual abuse accommodation syndrome; and
 - (c) the trial court erred when it permitted law enforcement witnesses to testify about the Defendant's body language and credibility observed during his interrogation (see, People's Exhibit "2").¹
6. On December 26, 2002, the Appellate Division issued a decision. The Court determined that the Defendant's foregoing claims lacked merit and affirmed the judgment of conviction (see, People v. Carroll, *supra*). The Court of Appeals subsequently denied leave to appeal (see, People v. Carroll, 99 NY2d 626, 760 NYS2d 107 [2003], attached hereto as People's Exhibit "3").
7. The Defendant brings the instant motion pursuant to CPL §440.10 on the basis of new law, newly discovered evidence and violations of his rights under the United States and New York State Constitutions. More specifically, the Defendant contends that:
- (a) the People's conduct at his retrial constituted prosecutorial misconduct warranting a reversal;
 - (b) counts "2", "4" and "6" of the indictment are duplicitous and should therefore be stricken;
 - (c) count "4" of the indictment was not supported by sufficient evidence at his retrial;
 - (d) the trial court erred when it permitted the People to introduce evidence of penetration upon the retrial of this matter, contrary to the principle of collateral estoppel;
 - (e) double jeopardy occurred upon the retrial of this matter when he was required to twice stand trial with respect to the sexual abuse counts;
 - (f) he was denied the effective assistance of appellate counsel; and
 - (g) his right to counsel was violated during his interrogation, and that the trial court therefore erred when it permitted the People to introduce evidence of

¹ The Defendant also challenged his sentence, which is addressed separately in the People's *Affirmation in Opposition to CPL §440.20 Motion*.

his body language and non-verbal clues observed by law enforcement during the interrogation.

8. Except where expressly conceded, the People oppose, counter and controvert each and every sworn allegation of fact made by the Defendant in his original motion papers and in his counsel's supplemental motion papers.
9. The People oppose the Defendant's motion and maintain that it should be summarily denied without a hearing.

POINT I

DEFENDANT'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION MUST BE DISMISSED PURSUANT TO CPL § 440.10

10. CPL §440.10(2)(a) provides, in relevant part, that "... the court must deny a motion to vacate a judgment when ... [t]he 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 ..."
11. CPL § 440.10 (2)(c) provides, in relevant part, that "... the court must deny a motion to vacate a judgment when ... [a]lthough 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 ..."
12. It is respectfully submitted that, pursuant to the foregoing authority, the Defendant's instant motion must be denied without a hearing since the issues raised were either previously determined on the merits by the Appellate Division, and/or the instances cited by the Defendant appear on the record and therefore a CPL §440.10 motion is not the appropriate vehicle to review these issues.

13. In its December 26, 2002 decision, the Appellate Division discussed at length the issues of whether the trial court erred when it permitted the People to introduce evidence of penetration and when it permitted the People to introduce evidence of the Defendant's body language and credibility observed by law enforcement during his interrogation (see, People's Exhibit "1").
14. Moreover, *all* of Defendant's claims offered in support of the instant motion sufficiently appear on the record to have permitted adequate appellate review thereof, but for the Defendant's unjustifiable failure to raise the claims in his prior appeal before the Appellate Division.
15. Defendant's counsel dedicates a significant portion of his supporting memorandum to the issue of prosecutorial misconduct, citing various instances that occurred during the retrial to support the Defendant's claim in this regard (see, *Memorandum in Support of Defendant's CPL 440 Motion* at pp 5-18). It cannot be disputed, however, that each instance cited by the Defendant appears on the record of his retrial.
16. In an effort to persuade the Court that it should consider the issue of prosecutorial misconduct at this late date, notwithstanding the fact that each cited instance appears on the record, the Defendant's counsel refers to the recent Appellate Division decision in People v. Levandowski, 8 AD3d 898, 780 NYS2d 384 [3rd Dept, 2004]) and argues that it constitutes "new law."
17. It is respectfully submitted that the Court did not create new law in People v. Levandowski, but rather it applied established principles with respect to the issue of prosecutorial misconduct in arriving at a decision.
18. Nor can it be disputed that sufficient facts appear on the record to have permitted adequate appellate review regarding the Defendant's claims that counts "2", "4" and "6" of the indictment are duplicitous, that count "4" was not supported by sufficient evidence *at his retrial*, and that his retrial of the four counts of sexual abuse constituted double jeopardy.
19. Defendant's contention, based upon CPL §440.10(1)(g), that "[n]ew evidence, not appearing in the record has been established regarding the abridgment of Mr. Carroll's sixth amendment right to counsel" is equally without merit.

20. It is well settled that “[t]o be considered ‘newly-discovered’ so as to support a motion to vacate a judgment of conviction pursuant to CPL 440.10 (subd. 1, par. [g]), the evidence in question must meet the six criteria set out in People v. Salemi, 309 N.Y. 208, 216, 128 N.E.2d 377, citing People v. Priori, 164 N.Y. 459, 472, 58 N.E. 668, specifically: ‘1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence’” (People v. Balan, 107 AD2d 811, 814-815, 484 NYS2d 648, 650).
21. Attached as exhibits to the Defendant’s affidavit in support of the instant motion are the affidavits of his sister and his wife wherein both individuals claim that, at the time of the Defendant’s interrogation, law enforcement officials falsely informed them that counsel was present with the Defendant. The Defendant now contends that the averments of his sister and his wife constitute newly discovered evidence.
22. It is respectfully submitted that the foregoing statements by the Defendant’s sister and wife do not constitute newly discovered evidence in accordance with the foregoing criteria because the statements could have been discovered by the Defendant before his retrial by the exercise of due diligence, and because the statements would probably not change the result of his retrial in any event.
23. In People v. Schulz, 5 AD2d 799, 800, 774 NYS2d 165, 167 [2nd Dept, 2004], the Appellate Division affirmed the trial court’s denial of the defendant’s CPL §440.10 motion without a hearing. The motion therein “was based primarily upon the posttrial identification by one of the eyewitnesses of a third-party as the ‘true’ perpetrator” (Id.). The Court determined that the posttrial identification “did not constitute newly discovered evidence ... reject[ing] the defendant’s claim that this evidence could not have been procured with due diligence at the time of trial, since the eyewitness in question testified at the

trial” (Id., citing People v. Salemi, 309 NY 208, 215-216; People v. Priori, 164 NY 459, 472).

24. In the present matter, the Defendant’s wife testified at his retrial as a witness for the defense. Although she did not testify about the investigator’s statements to her regarding the presence of Defendant’s counsel during his interrogation, this was certainly information that was within her knowledge, as well as the Defendant’s sister’s knowledge, far in advance of the Defendant’s retrial. Nor has the Defendant offered any proof to show that he was unable, with due diligence, to procure his sister’s or his wife’s statements at the time of his retrial.
25. The Defendant also failed to offer any proof to show that, in fact, his counsel was not present at the time of his interrogation, as allegedly reported to his sister and his wife. The witnesses’ affidavits contain only conclusory statements that law enforcement “lied” to them. The Defendant’s supporting affidavit is devoid of any information regarding the presence or absence of counsel during the interrogation. It is respectfully submitted that the Defendant’s proof is patently insufficient to support this aspect of his motion in any event.
26. Additionally, it is unlikely that the statements by the Defendant’s sister and his wife would change the result of his retrial. The Defendant contends that the evidence introduced at his retrial, namely, the investigator’s testimony regarding the Defendant’s body language and non-verbal clues, was acquired during his interrogation after his right to counsel had been violated. The Defendant further contends that, as a result of the Sixth Amendment violation, the foregoing evidence is inadmissible.
27. It is respectfully submitted that even if the evidence of Defendant’s body language and non-verbal clues is considered inadmissible, it is unlikely that the outcome of his retrial would change. As held by the Appellate Division in People v. Carroll, *supra* at 916, “the testimony elicited on direct examination was minimal and concerned the officers’ interpretation of defendant’s body

language as it related to defendant's desire to talk openly, rather than his guilt of the conduct alleged."

28. Nor do the statements by the Defendant's sister and his wife constitute "material evidence" pursuant to CPL §440.10(d) for the same reason previously asserted, namely, because it is unlikely the introduction of his sister's and his wife's statements would change the outcome of the Defendant's retrial.
29. Moreover, the Defendant does not offer sufficient proof to justify his failure to raise the foregoing issues during his prior appeal before the Appellate Division.
30. Finally, "[a] motion to vacate judgment under CPL 440.10(1)(h) does not include the claim of ineffective assistance of appellate counsel" (People v. Bachert, 69 NY2d 593, 597, 516 NYS2d 623, 625 [1987]). Instead, "a defendant who claims to be aggrieved by appellate counsel's failures could proceed by writ of error coram nobis before the appellate court in which the allegedly deficient representation took place" (People v. Stultz, 2 NY3d 277, 281, 778 NYS2d 431, 433 [2004], citing People v. Bachert, *supra*). Accordingly, Defendant's motion to vacate his judgment of conviction before the trial court based upon a claim of ineffective assistance of appellate counsel must necessarily be denied.

POINT II

DEFENDANT'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION IS DEFECTIVE PURSUANT TO CPL §440.30(1)

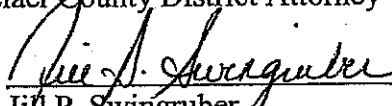
31. CPL §440.30(1) provides, in relevant part, that "if [a motion to vacate a judgment pursuant to section 440.10] is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief."

32. In the instant matter, the Defendant submitted an affidavit in support of his CPL §440.10 motion. In his affidavit, the Defendant sets forth "factual information" in an effort to advance three grounds in support of the motion, namely, a violation of his right to counsel, improper use of a tape recording during the retrial, and improper placement of the victim and staff members in the courtroom during the retrial.
33. Thereafter, the Defendant's attorney submitted a supplemental *Memorandum in Support of Defendant's CPL 440 Motion* advancing the three grounds set forth in the Defendant's affidavit, as well as those additional grounds described in paragraph 7 above.
34. It is respectfully submitted that a review of the Defendant's motion should be limited to those grounds set forth in his affidavit, which is the only supporting documentation offered that conforms to the requirements of CPL §440.30(1) by including sworn allegations of the existence of the occurrence of facts alleged to support the motion (see, People v. Portalatin, 132 AD2d 581, 582, 517 NYS2d 301, 302 [2nd Dept, 1987]).
35. Furthermore, as discussed above, the three grounds advanced by the Defendant in his affidavit are without merit pursuant to CPL §§440.10 (1)(d), (g) and (2)(c).

WHEREFORE, for all of the foregoing reasons, the People respectfully request that this court deny defendant's motion without a hearing.

Respectfully,
PATRICIA A. DEANGELIS
Rensselaer County District Attorney

By:



Jill P. Swingruber
Assistant District Attorney

DATED: January 4, 2005

TO: Hon. Patrick J. McGrath
Rensselaer County Court Judge
Rensselaer County Courthouse
Troy, New York 12180

TO: James Edward Gross, Esq.
Attorney for Defendant
750 Broadway, Suite 3
Albany, New York 12207

**STATE OF NEW YORK
COUNTY OF RENSSELAER****COUNTY COURT**

THE PEOPLE OF THE STATE OF NEW YORK,**-against-****AFFIRMATION IN
OPPOSITION TO CPL
SEC. 440.20 MOTION****JOHN F. CARROLL**

Jill P. Swingruber affirms and states, under penalty of perjury, that:

1. I am an Assistant District Attorney with the Rensselaer County District Attorney's Office, and I am duly licensed to practice law in the State of New York.
2. I am familiar with the aforementioned case, and I am aware of all relevant facts relating to the Defendant's motion to set aside his sentence.
3. This affirmation contains both legal argument and factual allegations. To the extent that legal arguments are employed, it is respectfully requested that this Court consider those arguments as a Memorandum of Law.
4. Upon a retrial, the Defendant was convicted by a jury of six counts of sexual abuse in the first degree for conduct against his stepdaughter constituting sexual contact by forcible compulsion or when the child was less than eleven years old pursuant to Penal Law § 130.65 [1] and [3] (see, People v. Carroll, 300 AD2d 911, 911, 753 NYS2d 148, 150 [3rd Dept, 2002] attached hereto and made a part hereof as People's Exhibit "1").
5. The Defendant was sentenced on or about February 7, 2001. "For the three convictions predating October 1, 1995, County Court sentenced defendant to indeterminate terms of 2 to 6 years on each count, and for the three convictions involving crimes after that date (but before September 1, 1998), defendant received indeterminate terms of 2 to 4 years on each count ...the sentences on all six counts to run consecutively. The aggregate maximum sentence imposed of 12 to 30 years reduced, by operation of law, to 10 to 20

- years ...” (People v. Carroll, supra, at 917)(see also, Transcript of Sentencing Proceeding, attached hereto and made a part hereof as People’s Exhibit “2”).
6. Thereafter, the Defendant filed a Notice of Appeal with the Appellate Division, Third Department challenging, inter alia, his sentence on the grounds that it was unfair, since it was more severe than the sentence imposed at the conclusion of his first trial which involved a greater number of counts and more serious felony counts, and that it was vindictive.
 7. The Defendant now contends, in support of the instant motion, that his sentence should be set aside on the following grounds:
 - (a) he was denied his right to a complete and accurate pre-sentence investigation report (hereinafter referred to as “PSI”) and a pre-sentence memorandum;
 - (b) the sentence was harsh and excessive;
 - (c) the trial court erred when it used the Defendant’s conviction for Grand Larceny in the Fourth Degree to enhance his sentence;
 - (d) the sentence was vindictive; and
 - (e) ineffective assistance of counsel during sentencing.
 8. Except where expressly conceded, the People oppose, counter and controvert each and every sworn allegation of fact made by the Defendant in his motion papers.
 9. The People oppose the Defendant’s motion and maintain that it should be summarily denied without a hearing.

POINT I

DEFENDANT’S MOTION TO VACATE HIS JUDGMENT OF CONVICTION MUST BE DISMISSED PURSUANT TO CPL § 440.20

10. CPL §440.20(2) provides, in relevant part, that “the court must deny [a motion to set aside the sentence] when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment of

sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.”

11. In People v. Carroll, *supra*, the Appellate Division rendered a determination on the merits as to whether the sentence was harsh and excessive or vindictive, and whether the “defendant’s plea to grand larceny in the fourth degree ... was relevant and provide[d] justification for the increased sentence” (*Id.*, at 917).
12. Thus, it is respectfully submitted that, pursuant to CPL §440.20(2), this Court must deny the Defendant’s motion to set aside his sentence based upon the grounds that it was harsh and excessive, vindictive, and that the trial court erred when it considered his conviction for Grand Larceny in the Fourth Degree.
13. Defendant’s remaining contentions – that he was denied his right to a complete and accurate PSI report and PSI memorandum, and that he was denied the effective assistance of counsel during sentencing – are equally without merit.

POINT II

THE UNREVISED PSI REPORT IS NOT A VALID BASIS TO SET ASIDE SENTENCE

14. In People v. Thomas, 2 AD3d 982, 983, 768 NYS2d 519, 520 (3rd Dept, 2003), the defendant claimed that portions of the pre-sentence investigation report should be redacted to remove allegedly unreliable information. The Defendant voiced his challenge to the contents of the report during the sentencing proceeding, and the trial court agreed not to consider those portions objected to in its sentencing determination. The Appellate Division held that “defendant was properly afforded an opportunity to challenge the contents of the presentence report ... and while County Court, in its discretion, opted not to rely on the challenged information in its deliberations, we see no basis for physical redaction of the report” (*Id.*, at 521, citing People

v. Outley, 80 NY2d 702, 713, 594 NYS2d 683, 610 NE2d 356 [1993]; People v. Perry, 36 NY2d 114, 119, 365 NYS2d 518, 324 NE2d 878).

15. In the instant matter, the Defendant was afforded an adequate opportunity to voice his objections to the contents of his PSI report. Like the court in Thomas, *supra*, the trial court herein also opted not to rely on portions of the challenged information in its determination. Thus, it is respectfully submitted that there is no basis for physical redaction of the report and, accordingly, no basis upon which to set aside the sentence for any alleged failure on the part of the trial court to produce a redacted report.
16. The Defendant also contends that he did not receive a copy of the PSI report one day prior to sentencing, in conformity with CPL §390.50(2).
17. It is respectfully submitted that the Defendant's claim in this regard is also without merit since he did not object to the timeliness of his receipt of the report at the time of sentencing (see, People v. Torres, 96 AD2d 609, 464 NYS2d 608 [3rd Dept, 1983]; see also, People's Exhibit "2").

POINT III

DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS SENTENCING

18. The Defendant further contends that he was denied the effective assistance of counsel during sentencing when his attorney failed to request an adjournment for the purpose of submitting a pre-sentence memorandum and conducting a pre-sentence conference pursuant to CPL §§390.40(1) and 400.10.
19. The record reflects that defense counsel provided the Defendant with meaningful representation during sentencing. Defense counsel raised objections to the contents of the PSI report and the trial court agreed to redact and disregard portions of the report (see, People's Exhibit "1" at pp 23-30).
20. As discussed above, since defense counsel voiced objections to the contents of the report at the time of sentencing, thereby resulting in the Court redacting and disregarding portions thereof, the Defendant was not aggrieved (see,

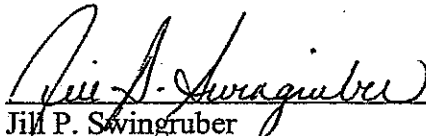
People v. Thomas, 2 AD2d at 983), nor was he denied meaningful representation.

21. It is further submitted that the Defendant failed to raise this issue within the context of his direct appeal as part of his challenge to the legality of the sentence imposed.

WHEREFORE, for all of the foregoing reasons, the People respectfully request that this court deny defendant's motion without a hearing.

Respectfully,
PATRICIA A. DEANGELIS
Rensselaer County District Attorney

By:


Jill P. Swingruber
Assistant District Attorney

DATED: January 4, 2005

Hon. Patrick J. McGrath
Rensselaer County Court Judge
Rensselaer County Courthouse
Troy, New York 12180

James Edward Gross, Esq.
Attorney for Defendant
750 Broadway, Suite 3
Albany, New York 12207