AN INCOMPLETE POST-TRIAL MOTION OUTLINE

• WHAT WE WON'T COVER

"ROCKEFELLER" RESENTENCING CASES (Penal Law § 70.71)
ARTICLE 78 PROCEEDINGS (CPLR §§ 7804, 506)
DECLARATORY JUDGEMENT ACTIONS (CPLR Article 30)
HABEAS CORPUS (CPLR Article 70)

• WHAT WE WILL

CPL ARTICLE 330 MOTIONS
CPL ARTICLE 440 MOTIONS (DNA AND NON-DNA RELATED)
CPL ARTICLE 450 MOTIONS FOR STAY OF EXECUTION OF SENTENCE

CPL ARTICLE 330 MOTIONS

Post-verdict, pre-sentence motions, raising only those grounds that form a legal bar to imposition of a sentence and entry of a judgment of conviction. Sometimes used in an attempt to preserve previously unpreserved error, it is ineffective for this purpose (*see, People v. Hines*, 97 N.Y.2d 56 [2001]; *People v. Laraby*, 92 N.Y.2d 932 [1998]).

• GROUNDS FOR RELIEF

CPL § 330.30:

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

> 1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would **require** a reversal or modification of the judgment as a matter of law by an appellate court.
>
> 2. That during the trial there occurred, out of the presence of the court, **improper conduct by a juror**, or improper conduct by another person in relation to a juror, which may have **affected a substantial right** of the defendant and which was **not known to the defendant prior to the rendition of the verdict**; or

3. That **new evidence** has been discovered since the trial which **could not have been produced** by the defendant at the trial even with **due diligence** on his part and which is of such character as to create a **probability** that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

• STANDARDS OF REVIEW; GENERALLY

§ 330.30(1) motions need not be in writing, however § 330.30(2) and (3) motions must be in writing and contain sworn allegations in supporting the existence of all facts essential to support the motion; all, whether oral or written, must be made on "reasonable notice" (**CPL §§ 330.40[1], [2]**).

The court **must** grant the motion if:

(I) The moving papers allege a ground constituting legal basis for the motion; and

(ii) Such papers contain sworn allegations of all facts essential to support such ground; and

(iii) All the essential facts are conceded by the people to be true (**CPL § 330.40[2][d]**).

The court **may** deny the motion if:

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

(ii) The moving papers do not contain sworn allegations of all facts essential to support the motion (**CPL § 330.40[2][e]**).

If the court does not summarily determine the motion pursuant to standards set forth above, it **must conduct a hearing and make findings of fact** essential to the determination thereof (**CPL § 330.40[2][f]**).

At any such hearing, the defendant has the burden of proving every essential fact in support of the motion by a **preponderance of the evidence** (**CPL § 330.40[2][f]**).

• STANDARDS OF REVIEW; PARTICULAR ISSUES

CPL § 330.30[1]: What errors *require* reversal or modification?

Errors of law only (see, **CPL § 470.15[2], [4]**). Legal insufficiency of the evidence is an error of law (**CPL § 470.15[4][b]**) which may be addressed, while a claim that the verdict is not supported by the weight of evidence is an error of fact (**CPL § 470.15[5]**) which may not be addressed by a CPL § 330.30(1) motion.

Errors of law are preserved by timely objection (**CPL §§ 470.05[2]**, **470.15[4][a]**); unpreserved errors, while addressable on direct appeal in the appellate court's interests of justice jurisdiction (**CPL § 470.15[6][a]**) are not "errors of law" (**CPL § 470.05[2]**) and are therefore not addressable by a CPL § 330.30(1) motion.

Ex.: Erroneous jury instructions, preserved by a timely objection present an error of law (*People v. Marabel*, 186 A.D.2d 53 [1st Dept. 1992]).

Prosecutorial misconduct if preserved, and of a type not addressed by CPL §§ 330.30(2) or (3), may be addressed by a CPL § 330.30(1) motion (*People v. Robinson*, 190 A.D.2d 697 [2nd Dept. 1993]). While ineffective assistance of counsel might be raised if evident from the face of the record, more common is the scenario where it is not evident from the record, and therefore may not be addressed either by a CPL § 330.30 motion or on direct appeal, but instead must be addressed by a CPL § 440.10 motion (*see, People v. Wells*, 265 A.D.2d 589 [2nd Dept. 1999]).

CPL § 330.30[2]: Juror misconduct – what will suffice?

Threshold question: When did defendant learn of the alleged misconduct? Failure to raise the error prior to the verdict waives the issue, if defendant was aware of it. For comparison of preservation, waiver, and forfeiture, compare *People v. Agramonte*, 87 N.Y.2d 765 [1996], *People v. Webb*, 78 N.Y.2d 335 [1991], and *People v. Autry*, 75 N.Y.2d 836, 839 [1990].

Jurors may generally not impeach their verdict after it has been rendered (*People v. Maddox*, 139 A.D.2d 597 [2nd Dept. 1988]), **unless** some outside influence affected jury deliberations (*People v. Arnold*, 96 N.Y.2d 358, 364 [2001]; *see also, Sheppard v. Maxwell*, 384 U.S. 333, 351 [1966]).

Ex.: Reversal is required when jurors obtain information that affects their verdict from the newspaper (*People v. Romano*, 8 A.D.3d 503 [2nd Dept. 2004]) or the internet (*People v. Antonio Jackson*, unreported decision [5/23/06, Sup. Ct. Monroe Co., Cornelius, J.] [jurors conducted internet research concerning the meaning of "reasonable doubt"]).

Ex.: Reversal is required where jurors have been exposed to prejudicial extra-record facts supplied by juror tests or experiments (*People v. Stanley*, 87 N.Y.2d 1000 [1996] or are influenced by unsworn "expert" evidence resulting from the specialized knowledge of a juror (*People v. Maragh*, 94 N.Y.2d 569 [2000]).

Determination of whether such error requires reversal generally requires a hearing at which the jurors are questioned individually about alleged misconduct.

CPL § 330.30(3): What constitutes "new evidence"

This standard is essentially identical to the standard applied to determination of CPL § 440.10(1)(g) motions; see cases and discussion concerning that section.

• WHAT IF LIGHTNING STRIKES?

CPL § 330.30(1):

Upon setting aside or modifying a verdict or a part thereof pursuant to § 330.30 the court must take the same action as the appropriate appellate court would be required to take upon reversing or modifying a judgment upon the particular ground in issue (**CPL § 330.50[1]**).

What might those actions be?

See, **CPL § 470.20** titled, conveniently enough, "Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification:"

The particular corrective action to be taken or directed is governed in part by the following rules:

> 1. Upon a reversal of a judgment after trial for error or defect which resulted in prejudice to the defendant or deprived him of a fair trial, the court must, whether such reversal be on the law or as a matter of discretion in the interest of justice, order a new trial of the accusatory instrument and remit the case to the criminal court for such action.
>
> 2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.
>
> 3. Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defendant was convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment. In such case, it must either reduce the total sentence to that imposed by the criminal court upon the counts with respect to which the judgment is affirmed or remit the case to the criminal court for re-sentence upon such counts . . .
>
> 4. Upon a modification of a judgment after trial which reduces a conviction of a crime to one for a lesser included offense, the court must remit the case to the criminal court with a direction that the latter sentence the defendant accordingly . . .

The applicability of **CPL §§ 470.20(1) and (4)** to **CPL § 330.30(1)** motions is limited to reversals on the law only.

CPL § 330.30(2):

When setting aside a verdict the court **must** order a new trial (**CPL § 330.50[2]**).

CPL § 330.30(3):

Upon setting aside a verdict pursuant to, the court must generally order a new trial, except if a verdict is set aside upon the ground that had the newly discovered evidence in question been received at the trial the verdict probably would have been more favorable to the defendant in that the conviction probably would have been for a lesser offense than the one contained in the

verdict, the court may either (a) set aside such verdict or (b) with the consent of the people modify such verdict by reducing it to one of conviction of such lesser offense (**CPL § 330.50[3]**).

At a new trial following an order setting aside a verdict, the indictment contains all counts and charges all the offenses it originally contained, even if a count was dismissed by the court in the course of such trial, except those counts upon which defendant was acquitted (**CPL § 330.50[4]**).

CPL 440 MOTIONS (BY THE DEFENSE / NON-DNA RELATED)

Post-trial, post-sentence, may also be post-appeal, including allegations of error not evident from the record and therefore not addressable via direct appeal, or challenging the legality of the sentence imposed.

• GROUNDS FOR RELIEF

CPL § 440.10(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
> >
> > © **Material evidence** adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, **known by the prosecutor or by the court to be false**; or
> >
> > (d) **Material evidence** adduced by the people at a trial resulting in the judgment was **procured in violation of the defendant's rights under the constitution of this state or of the United States**; or

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

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

(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**.

Very rarely see motions brought pursuant to sub.s (a) or (e), infrequently see © and (d), more often (b), and most common (f), (g), and (h).

CPL § 440.20: Motion to set aside sentence by defendant

Unlike the motion to set aside sentence by the prosecution (see **CPL § 440.40**, below) which must be made within one year following entry of the judgment, a motion to set aside sentence by the defendant has no time restriction.

• STANDARDS OF REVIEW; GENERALLY

The court *must* summarily grant the motion and vacate the judgment or set aside the sentence, if:

The moving papers allege a ground constituting legal basis for the motion; **and**

Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; **and**

The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof (**CPL § 440.30[3]**).

The court *may* deny motion without a hearing where:

Essential facts are unsupported by either sworn allegations or unrefuted documentary proof (**CPL § 440.30[4][a], [b]**);

Allegations of fact essential to the motion are conclusively refuted by unquestionable documentary proof **(CPL § 440.30 [4][c]**);

Conceded or uncontradicted allegations establish circumstances contrary to defendant's claims (**CPL §§ 440.10[2], 440.20[2], 440.30[2]**);

Essential allegation of fact is (1) contradicted by a court record or other official document or, (2) is made solely by the defendant and unsupported by any other affidavit or evidence and, (3) under all the circumstances of the case, there is no reasonable possibility that defendant's allegations are true (**CPL § 440.30[4][d]**);

Safety-valve: vacatur of conviction is authorized in court's discretion even where court may otherwise deny a § 440.10 motion, in the interest of justice for good cause shown, where motion is otherwise meritorious (**CPL § 440.10[3]**).

The court *must* deny a § 440.10 motion when the issue raised:

(1) was raised and decided on direct appeal, or

(2) may still be raised and decided on direct appeal, or

(3) even though sufficient facts were present in the record for such issue to be raised and decided on direct appeal, it was not,

> due to defendant's failure to raise the issue on appeal or take an appeal (**CPL §§ 440.10[2], 440.20[2], 440.30[2]**).

In any case where the motion is not summarily granted or denied under the standards set forth above, the court is obligated to order a hearing, at which the defendant has a right to be present.

• STANDARDS OF REVIEW; PARTICULAR ISSUES

Applies to *trial* convictions only – or does it?

What about pleas induced by ineffective assistance of counsel for failure to test (unknowingly) exculpatory evidence?

Is there any state or federal constitutional right to challenge conviction by plea resulting from such ineffective assistance, regardless of the statutory limitation?

Perhaps (*see, People v. Blair*, 242 A.D.2d 883 [4th Dept. 1997] [Conviction after guilty plea vacated on appeal from denial of defendant's CPL § 440.10 motion]; *see also, Holmes v. South Carolina*, 126 S.Ct. 1727 [2006]).

Or, perhaps not (*see, People v. Byrdsong*, 2006 WL 2130114 [2nd Dept.]): Defendant who pled guilty barred from seeking post-conviction DNA testing. "Arguments as to whether defendants who plead guilty should be permitted to seek relief pursuant to CPL 440.30(1-a), and if so under what circumstances, should be addressed to the New York State Legislature" (or, more likely, the federal District Court). *Byrdsong* fails to address whether the New York statute impermissibly burdens a federal constitution right.

Newly discovered evidence - perhaps the most common motion

Newly-discovered evidence is that evidence unavailable to defendant prior to the entry of judgment that unquestionably would have had direct bearing on the issues decided by the jury at trial. In such cases, the judgment of conviction may be vacated where:

> The evidence could not have been produced at trial even with due diligence; **and**

The motion is made with due diligence after discovery of the new evidence; **and**

The new evidence is of such character as to create a probability that had it been received at trial, verdict would have been more favorable to the defendant (**CPL § 440.10[1][g]**).

It is defendant's burden to demonstrate that the "new" evidence was not available at the time of trial – in other words, that both the discovery of the evidence and the presentation of it to the court via motion were accomplished with due diligence (*People v. Whitmore*, 12 A.D.3d 845 [3rd Dept. 2004], 4 N.Y.3d 892).

The question of whether defendant has exercised "due diligence" is often a central issue and may, itself, be the subject of a hearing.

What is required to demonstrate the "probability" of a more favorable outcome?

Evidence that would "create a reasonable doubt that did not otherwise exist" (*United States v. Agurs*, 427 U.S. 97 [1976]).

Evidence that *might* have altered the outcome of the trial will not suffice; it must be more likely than not to have changed the result and in this regard, a reasonable probability is "a probability sufficient to undermine confidence in the outcome" (*United States v. Bagley*, 473 U.S. 667 [1985]).

Evidence that when considered together with the trial evidence, "would probably change the verdict" if introduced at a new trial (*People v. Scarincio*, 109 A.D.2d 928 [3rd Dept. 1985]).

Assessment of whether the new evidence creates a probability of a more favorable result requires consideration of the trial evidence either via transcript or at a hearing including introduction of the new evidence.

Exculpatory statements of codefendants as newly discovered evidence

Are such statements "newly discovered?" Yes, if the codefendant previously exercised his 5th Amendment right not to testify or give a statement. See, *People v. Fields*, 66 N.Y.2d 876.

Is a hearing required? Yes, if the statement is not a recantation. See, *People v. Beach*, 186 A.D.2d 935 [3rd Dept, 1992] ["County Court was not permitted

to reject the affidavit as facially incredible; rather, an evidentiary hearing should have been conducted]; *People v. Staton*, 224 A.D.2d 984 [4th Dept. 1996] [Codefendant's statement not "conclusively refuted by unquestionable documentary proof, therefore hearing should have been granted].

Is there a federal constitutional right to make a post-conviction claim of innocence?

Yes. See, *House v. Bell*, 126 S.Ct. 2064 [2006] [federal habeas petitioner satisfied "stringent showing" that no reasonable juror viewing both the trial evidence and new evidence would lack a reasonable doubt; case remanded for habeas review]. Decision below: 386 F.3d 668 [6th Cir. 2004], a fine piece of legal writing. See also, *Schlup v. Delo*, 513 U.S. 298 [1995] [where a habeas petitioner alleges that in spite of actual innocence he was convicted due to a constitutional violation petitioner is entitled to relief if the constitutional violation "probably" resulted in his conviction].

Note: the capital defendant in *House* may still be executed – the legal standard for presenting proof of actual innocence is less than the standard for proof of actual innocence sufficient to bar execution (*see, Herrera v. Collins*, 506 U.S. 390 [1993] [clear and convincing evidence of actual innocence, not simply evidence rendering a guilty verdict improbable, is required before a petitioner's execution is "constitutionally intolerable").

See also, *Eze v. Senkowski*, 321 F.3d 110 [2nd Cir. 2003]; failure to retain appropriate expert or conduct appropriate testing violates a defendant's right to effective assistance of counsel [fingerprint evidence exculpating defendant not tested]; *Gersten v. Senkowski*, 426 F.3d 588 [2nd Cir. 2005] [same].

Generally, on courts' evolving protection of a defendant's constitutional right to present SODDI (Some Other Dude Did It) evidence, see *Holmes v. South Carolina*, 126 S.Ct. 1727 [2006]; *see also, Davis v. Alaska*, 415 U.S. 308 [1974]; *Chambers v. Mississippi*, 410 U.S. 284 [1973]; *Washington v. Texas*, 388 U.S. 14 [1967]; *Pointer v. Texas*, 380 U.S. 400 [1965]; *People v. Hudy*, 73 N.Y.2d 40 [1988]; *People v. Gissendanner*, 48 N.Y.2d 543 [1979]). As then-Justice Titone noted in his dissent in *People v. Washington*, 99 A.D.2d 848 [2nd Dept. 1984],

> . . . as Professor Wigmore cogently observed, "any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent" (5 Wigmore, Evidence [Chadbourn rev], § 1477, p 359; *see also*, McCormick, Evidence [2d ed], § 278, p 674;

dissenting opn of Holmes, J., in *Donnelly v. United States*, 228 U.S. 243, 277-278 [1913]; *People v. Edwards*, 396 Mich. 551 [1976]).

Is there a state constitutional right to make a post-conviction claim of innocence?

Apparently. See, *People v. Cole*, 1 Misc.3d 531 [Sup. Ct. Kings Co. 2003] [the conviction or incarceration of a guiltless individual violates the Due Process Clause of Article I, § 6 and the Cruel and Unusual Punishment Clause of Article I, § 5]; see also, *People v. Martin Tankleff*, Suffolk County Court [3/17/06].

See also, *People v. Cahill*, 2 N.Y.3d 14, 97-98 [2003] [G.B. Smith, concurring]: "Historically, the New York Constitution has at times provided greater guarantees for individuals than those provided by the Federal Constitution" (citing *People v. Scott*, 79 N.Y.2d 474, 491 [1992]; *People v. Bora*, 83 N.Y.2d 531, 535 [1994]; *People v. Harris*, 77 N.Y.2d 434, 437-441 [1991]; *People v. Torres*, 74 N.Y.2d 224, 226 [1989]; *People v. Griminger*, 71 N.Y.2d 635, 637-639 [1988]; *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304 n. 4, [1986], *cert. denied* 479 U.S. 1091) . . . "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is . . . not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States." (*Id*.).

Cole also held that a defendant's post-conviction actual innocence claim is cognizable under **CPL § 440.10(h)**, relating to constitutional violations.

What is the standard of review for such claims?

Cole and *Tankleff* say the standard is clear and convincing evidence of actual innocence, similar to the *Herrera* standard. *Tankleff*, on appeal, argues it should be less - similar to the *House* standard (Cole did not appeal).

But see, **CPL § 440.30**: At a hearing, defendant must prove every essential fact in support of his motion by a **preponderance of the evidence**, a far lower standard.

Defense argument: The State Constitution grants at least those rights conferred by the Federal Constitution, and may not grant less. Consequently, a defendant has a right to raise a claim of actual innocence under the State Constitution, which offers more protection than its federal counterpart. Further, the legislature provided a statutory mechanism to address such constitutional

violations in **CPL § 440.10(1)(h)** and, in **CPL § 440.30(6)**, the evidentiary standard that must be applied to such claims – at a hearing a defendant must prove each of the facts essential to his claim by a preponderance of the evidence.

• **WHAT IF LIGHTNING STRIKES?** (The motion may or must or should be granted)

Whether the motion is granted or denied, the court is required to set forth findings of fact, conclusions of law and the reasons for its determination on the record (**CPL § 440.30[7]**).

A motion court may exercise its discretion to reverse defendant's conviction and dismiss the accusatory instrument (**CPL §§ 440.10[4], [5]**).

Court of Claims Act 8-b: some sections of CPL § 440.10 permit civil recovery vs. state if conviction vacated while others don't.

> Convictions vacated on constitutional grounds having no bearing on a defendant's actual guilt or innocence do not state a claim under Court of Claims Act § 8-b (1984 Report of the N.Y. Law Revision Comm. [Report], 1984 McKinney's Session Laws of N.Y. at 2928-2929).
>
> *Coakley v. State of New York*, 150 Misc.2d 903 [Ct. Cl. 1991]: A conviction vacated based on the improper seizure of evidence – although a constitutional violation – provides no evidence that the defendant was innocent, since the innocent and guilty alike obtain reversals of convictions based on Fourth Amendment violations; defendant not entitled to civil recovery.
>
> *Rosario* violation reversals (addressed by CPL § 440.10[1][f]; *see, People v. Jackson*, 78 N.Y.2d 638 [1991]) don't permit civil recovery under Court of Claims Act § 8-b, since *Rosario* claims constitute technical, procedural violations that do not necessarily bear any relationship to a defendant's culpability for the crimes charged – such violations require *per se* reversal without regard to the significance of any such violation to the determination of guilt or innocence (*People v. Jones*, 70 N.Y.2d 547 [1987]; *People v. Ranghelle*, 69 N.Y.2d 56 [1986]; *People v. Perez*, 65 N.Y.2d 154 [1985]).
>
> *Brady* violation reversals (addressed by CPL § 440.10[1][g]) bear directly on the question of a defendant's guilt or innocence and therefore permit civil recovery, since by definition *Brady* material tends to show a defendant's lack of responsibility for the crime charged (*see, e.g., Kyles v. Whitley*, 514 U.S. 419 [1995]).

CPL 440 MOTIONS (BY THE PROSECUTION / NON-DNA RELATED)

Generally, challenging the lawfulness of a previously imposed sentence

• GROUNDS FOR RELIEF

CPL § 440.40(1):

> At any time **not more than one year** after the entry of a judgment, the court in which it was entered may, upon motion of the people, **set aside the sentence** upon the ground that it was **invalid as a matter of law**.

• STANDARDS OF REVIEW

CPL §§ 440.40(2), (3):

> The court **must** summarily deny the motion when the ground or issue raised thereupon was **previously determined on the merits upon an appeal** from the judgment or sentence, **unless** since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.
>
> The court **may** summarily deny such a motion when the ground or issue raised thereupon was **previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal** from the judgment or sentence, unless since the time of such determination there has been a retroactively effective change in the law controlling such issue.
>
> Even if the motion could lawfully be denied, the court **may, in its discretion**, grant it in the interests of justice and for good cause shown, if it is otherwise meritorious.

• WHAT IF LIGHTNING STRIKES?

> An order setting aside sentence under this section does not affect the underlying conviction (**CPL § 440.40[5]**). Following such order, the court must resentence the defendant to a lawful sentence.
>
> If the resentence is more severe than the original sentence, defendant has 30 days from the date of resentencing to file a new notice of appeal (**CPL §§ 440.40[6], 450.30**).

CPL ARTICLE 440 MOTIONS (DNA RELATED)

Generally, ***People v. Pitts***, 4 N.Y.2d 303 [2005]: Outlining procedures and evidentiary standards for post-conviction motions seeking DNA testing.

● GROUNDS FOR RELIEF

CPL § 440.30(1-a):

> (a) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the **court's determination** that **any evidence** containing deoxyribonucleic acid ("DNA") was secured in connection with **the trial** resulting in the judgment, the court **shall grant** the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a **reasonable probability** that the verdict would have been more favorable to the defendant [emphasis added].
>
> (b) In conjunction with the filing of a motion under this subdivision, **the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence** and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself **shall not** be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, **on motion of the defendant, may also issue a subpoena duces tecum** directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence [emphasis added].

● STANDARDS OF REVIEW; GENERALLY

See Standards of Review for non-DNA § 440.10 motions and, additionally:

Court must determine whether DNA evidence was "secured" in connection with the trial (not necessarily introduced) and whether such evidence still exists and can be located.

Court **may not** draw an adverse inference against the People if evidence has been lost or destroyed. There is no "bad faith" exception to the "no penalty" clause for evidence destruction.

Defendant does not have burden of showing DNA evidence exists in sufficient quantity to be tested rather, "it is the People, as the gatekeeper of the evidence, who must show what evidence exists and whether the evidence is available for testing" (*see, Pitts, supra*).

• STANDARDS OF REVIEW; PARTICULAR ISSUES

Is there a federal constitutional right to post-conviction testing under *Brady*?

Maybe. Generally: *Kyles v. Whitely*, 514 U.S. 419 [1995]; *Wood v. Bartholomew*, 516 U.S. 1 [1995]; *United States v. Agurs*, 427 U.S. 97 [1976]; *Brady v. Maryland*, 373 U.S. 83 [1963].

But see, *United States v. Coppa*, 267 F.3d 132 [2nd Cir. 2001]; prosecution entitled to determine whether information is "material" and therefore, whether it needs to be turned over under *Brady*.

> Can there be a good faith basis to argue that DNA evidence is not exculpatory, absent testing?
>
> § 440.30(1-a) requires that the court presume that any test result will be *favorable* to defendant (*People v. Pugh*, 288 A.D.2d [3rd Dept. 2001]; *People v. Smith*, 245 A.D.2d 79 [1st Dept. 1997]).

This CPL § 440.30(1-a) "probability of more favorable result" test appears to statutorily obviate *Coppa*'s prosecutorial determination of materiality, requiring a *judicial* determination instead.

How favorable a result must be presumed?

Excluding the defendant as suspect? Suggesting the possibility of another's involvement? Undercutting other evidence in the case?

Ex.: *People v. Douglas Warney*: Victim stabbed in his apartment, biological evidence everywhere, murder weapon recovered and the blood on murder weapon tested; blood found was victim's, Warney's, and someone else's (not identified); serological testing only possible at the time of trial. Warney – 68 I.Q., AIDS dementia – gave a demonstrably false confession, no physical evidence connecting him to crime; convicted anyway.

10 years after conviction (technology marches on) Warney moved for post-conviction DNA testing. Motion court held: chance that testing would reveal identity of killer/exonerate Warney "too speculative" to create a reasonable probability of a more favorable result; motion denied.

Warney appealed; while appeal pending DA unilaterally tested evidence. Result: DNA matched man convicted and sentenced for an unrelated murder. Upon questioning killer confessed to committing this murder alone, claimed Warney was not present, and denied knowing Warney. Warney's conviction was reversed, indictment dismissed.

Lesson:

Presuming a favorable test result and the consequences is like requests for jury instructions; evidence should be viewed in the light most favorable to the defendant.

In *Warney*: DNA test results – even if not exonerating defendant – could have undercut the reliability of defendant's confession, the sole direct evidence connecting the defendant to the crime (by identifying a participant to the murder who defendant did not claim was present), thereby creating a reasonable probability of a more favorable result.

Must DNA evidence be "newly discovered?"

No. See, *People v. Pitts, supra*. Why not? First, § 440.30 makes no reference to "newly discovered." This makes sense, since what, in a DNA testing case could ever be "newly discovered?"

> Existence of testable material? Could never meet the test; that evidence was always there (albeit not testable).
>
> New science? Not within parties' control – no jurisdiction over scientists and their diligence, or lack thereof.

Only test *results* could be considered "newly discovered" (*People v. Wise*, 194 Misc.2d 481 [Sup. Ct. N.Y. Co. 2002]; *People v. Tookes*, 167 Misc.2d 601 [Sup. Ct. N.Y. Co. 1996]).

So "newly discovered" test **results** could not be the standard by which a motion **seeking testing** is granted or denied.

Must defendant's motion be brought with "due diligence?"

No. *People v. Pitts, supra*, made clear that there is no due diligence requirement for post-conviction DNA motions. Presumably, a defendant has no incentive to "lay in the weeds" with respect to DNA testing, however the statute permits it.

Prior to *Pitts*: for pre-1996 convictions "due diligence" was always inapplicable (CPL § 440.30[1-a]), while post-1996 convictions were susceptible to "due diligence/newly discovered evidence" requirements of CPL § 440.10(1)(g) (*see, People v. Kellar*, 218 A.D.2d 406 [1996]). *Pitts* obviates the holding in *Kellar*.

Is a "reasonable probability" different than a "probability?"

§ 440.30 requires a "reasonable probability;" § 440.10 requires a "probability" Is there a difference? Apparently not (*see, People v. Burr*, 17 A.D.3d 1131 [4th Dept. 2005] [uses these standards interchangeably]).

Other standards for granting or denying the motion

Each of the essential facts in support of the claims made must be supported by either sworn allegations or unrefuted documentary proof (**CPL § 440.10[4][a], [b]**), there must be no conceded or uncontradicted allegations establishing circumstances that would require summary denial of defendant's motion pursuant to CPL § 440.10(2) or § 440.20(2) (**CPL § 440.30[2]**), and the claims made may not have been, and could not have been, raised on direct appeal (**CPL §§ 440.10[2], 440.20[2]**).

Does the CPL § 440.10(3)© safety-valve section apply to DNA motions?

May the motion be considered in the interest of justice for good cause shown, where the motion is otherwise meritorious as with a CPL § 440.10 motion?

Prosecution Argument: Testing should be rejected to assure "the integrity and reliability of convictions" (*but see*, *Dabbs v. Vergari*, 149 Misc.2d 844, 850 [Sup. Ct. Westchester Co. 1990] [rejecting as "untenable" the claim that convicted person's opportunity to prove his innocence with DNA evidence should be denied simply to ensure finality of conviction]).

Defense Argument: Although there is a presumption of regularity that attaches to convictions, that presumption "exists only until contrary substantial evidence appears" (*People v. Richetti*, 302 N.Y. 290, 298 [1951]; *People v. Lopez*, 97 A.D.2d 5, 6-7 [1st Dept. 1983]); may be impossible to determine whether untested DNA evidence presents such "substantial evidence" absent testing, and no other means available by which to make this determination.

• WHAT IF LIGHTNING DOESN'T STRIKE?

A defendant has an appeal as of right from the denial of a CPL § 440.30(1-a) motion (CPL § 450.10[5]), unlike appeals from the denial of other CPL 440 motions, which are by permission.

MOTIONS FOR STAY OF EXECUTION OF JUDGMENT

• GROUNDS FOR RELIEF

CPL § 460.50(1):

> Upon application of a defendant **who has taken an appeal** to an intermediate appellate court from **a judgment or from a sentence** of a criminal court, a judge designated in subdivision two may issue an order both
>
> > (a) staying or suspending the execution of the judgment pending the determination of the appeal, and
> >
> > (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article five hundred thirty. That phase of the order staying or suspending execution of the judgment does not become effective unless and until the defendant is released, either on his own recognizance or upon the posting of bail.

Who can grant a stay?

Any of the following (pursuant to **CPL § 460.50[2]**):

(a) If the appeal is to the appellate division from a judgment or a sentence of either the supreme court or the New York City criminal court, such order may be issued by

(I) a justice of the appellate division of the department in which the judgment was entered, or

(ii) a justice of the supreme court of the judicial district embracing the county in which the judgment was entered;

(b) If the appeal is to the appellate division from a judgment or a sentence of a county court, such order may be issued by

(I) a justice of such appellate division, or

(ii) a justice of the supreme court of the judicial district embracing the county in which the judgment was entered, or

(iii) a judge of such county court;

(c) If the appeal is to an appellate term of the supreme court from a judgment or sentence of the New York City criminal court, such order may be issued by a justice of the supreme court of the judicial district embracing the county in which the judgment was entered;

(d) With respect to appeals to county courts from judgments or sentences of local criminal courts, and with respect to appeals to appellate terms of the supreme court from judgments or sentences of any criminal courts located outside of New York City, the judges who may issue such orders in any particular situation are determined by rules of the appellate division of the department embracing the appellate court to which the appeal has been taken.

Judge shopping, anyone?

Note that a stay application need **not** be made to the Court before whom the judgment was entered, but rather, can be made to a judge or justice of

coordinate jurisdiction (*People v. Shakur*, 215 A.D.2d 184 [1st Dept. 1995]). But see, **CPL § 460.50[3]** below: Do you feel lucky, punk?

One bite of the apple:

Only one stay application can be made (**CPL § 460.50[3]**), however because an application for stay made prior to the filing of a notice of appeal is a nullity (*see, Morgenthau v. Rosenberger*, 86 N.Y.2d 826 [1995]), such premature application does not count as defendant's "bite."

Time is *not* on our side:

Stays automatically expire in 120 days unless extended by order extending the stay or the time to perfect the appeal (**CPL § 460.50[4]**). If the stay expires, defendant must surrender to the sentencing court to begin serving his sentence.

• STANDARDS OF REVIEW

Standard bail factors are applicable (**CPL Article 510**), however pre-conviction defendants may expect more liberal application of bail considerations than those convicted and seeking appellate reversal (*People v. Holder*, 70 Misc.2d 819 [Sup. Ct. Nassau Co. 1972]).

In addition, to the usual bail factors, there must at minimum be an arguable issue of some merit which should be reviewed on appeal (*People v. Surretsky*, 67 Misc.2d 966 [Sup. Ct. N.Y. Co. 1971]).

Many courts look for more: a probability of success on appeal, or prejudice that could not have been harmless and would require reversal of the conviction.

If there is a probability of success on appeal, will defendant likely serve his sentence before prevailing on appeal, obviating the efficacy of any appeal?

• WHAT IF LIGHTNING STRIKES?

An order granting a stay may apply to any part of the judgment (i.e., payment of a fine) not simply incarceration (see, Prieser, Practice Commentaries, CPL 460.50 [2005]).