SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: I.A.S. TERM PART 35

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

[redacted], :

Defendant-Appellant. :

NOTICE OF MOTION
Bronx County
Indictment Number [redacted]

PLEASE TAKE NOTICE that upon the affirmation of CLAUDIA S. TRUPP, the prior proceedings had herein, and the exhibits attached hereto, the undersigned will move this Court, at a term for motions thereof, to be held on [redacted], at 10:00 a.m. or as soon thereafter as counsel may be heard, at the Courthouse, 851 Grand Concourse, Bronx, New York, 10451, for an order pursuant to C.P.L. §440.10 (1) (c), (f), (g) and (h) vacating the judgment of the Supreme Court Bronx County, rendered on December 23, 1999, convicting [redacted] of sodomy in the first degree (P.L §130.50) and sentencing him to 20 years' to life imprisonment.

Dated: New York, New York
October 22, 2001

Yours, etc.,

ROBERT S. DEAN
Attorney for Defendant-
Appellant
Center for Appellate Litigation
74 Trinity Place
New York, New York 10006

TO: MOTION CLERK
Supreme Court: Bronx County
851 Grand Concourse
Bronx, New York 10451

HON. ROBERT T. JOHNSON
District Attorney
Bronx County
215 East 161st Street
Bronx, New York 10451

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: I.A.S. TERM PART 35

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, : AFFIRMATION IN SUPPORT
Bronx County
Indictment Number 4071/98

-against- :

[redacted], :

Defendant-Appellant. :

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

CLAUDIA S. TRUPP, an attorney admitted to the practice of law before the Courts of this State, affirms under the penalties of perjury:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by an order of the Appellate Division: First Department, to represent appellant on his appeal from a judgment of the Supreme Court, Bronx County, rendered on [redacted], convicting appellant, after a jury trial, of sodomy in the first degree (P.L. §130.50) and sentencing him to 20 years' to life imprisonment.

2. I make this affirmation in support of [redacted]'s motion for an order pursuant to C.P.L. §440.10(c), (f), (g) and (h) vacating the judgment against him due to: 1) the prosecution's suppression of Brady material which violated [redacted]'s state and federal constitutional rights to due process; 2) the discovery of new evidence which would have likely resulted in a more favorable verdict; 3) the introduction of material evidence which was false and which the prosecution should

have known was false; and 4) the obtaining of the judgment in violation of [redacted] state and federal constitutional rights.

THE PRE-TRIAL PROCEEDINGS

3. Mr. [redacted] and his co-defendant [redacted] were accused of participating in a [redacted], sexual assault of [redacted], a fellow inmate on Rikers Island. Mr. [redacted] was represented by Patrick Bruno, Esq. during the pendency of the charges. See Exhibit A (Bruno Affirmation). Discovery was conducted pursuant to the voluntary discovery policy adopted by the Bronx District Attorney's office. See Exhibit A; see also Receipt from Office of The District Attorney, Bronx County Domestic Violence and Sex Crimes Bureau (Exhibit B) and letter from Assistant District Attorney Robert Gonzalez to Pat Bruno dated March 4, 1999 (Exhibit C).

4. The defense believed it was receiving all the reports in the possession of the Department of Corrections and all Brady material to which it was constitutionally entitled. See Exhibit A. The trial court's decision on the omnibus motion reminded the People that their Brady responsibility "is a continuing one, and that the court expects full, proper and timely compliance with all the obligations for disclosure." The Court's decision is being annexed as Exhibit D.

5. While several reports prepared by the Department of Corrections were provided to defense counsel, an Unusual Incident Report prepared on February 25, 1998, was never disclosed to the defense. See Bruno Affirmation, Exhibit A; see also Exhibit B and Exhibit C. A copy of the Unusual Incident Report is being provided as Exhibit E.

6. The Unusual Incident Report contained several pieces of exculpatory information including:

a) an inmate statement submitted by [redacted] reflecting that the

complainant, [redacted], told [redacted] at approximately 8:20 p.m., on the night of the alleged sexual assault, that [redacted] "was upset about him and his partner being found together inside of a cell and was complaining about the other inmates on the northside getting involved in his business . . . [and] that inmate [redacted] told [redacted] that he [redacted] was going to get a transfer for him and his partner by implicating several inmates in a sex scandal." Exhibit E at p. 3(emphasis added).

b) Reports prepared by several corrections officers on duty on the cell block during the alleged incident all of which reflected that [redacted] had never complained of being raped or attacked in any manner on February 8, 1998. These reports included those of:

i. Corrections Officer RENA WAXTER, the "meal relief" officer;

ii. Corrections Officer LOUIS ALMODOVAR, the regularly assigned officer; and

iii. Corrections Officer ROBERT BRIGGS, reflecting that he had never been informed of any type of incidents taking place in the housing area on February 8, or the morning of February 9, 1998.

c) A report prepared by Captain SENA McMILLAN, dated February 22, 1998, which referenced inmate [redacted]'s statement and concluded "it is possibl[e] that [redacted] concocted this accusation in order to be transferred from 6 lower north. . . There is absolutely no evidence medical or otherwise to substantiate the sexual assault or sexual activity of inmate [redacted] on 2-8-98." Exhibit E.

d) the conclusion of the Assistant Deputy Warden investigating the case that "it appears inmate Davis may have wanted a transfer from the area and alleged that he was sexually assaulted. All evidence points to that fact. No staff members witnessed this incident taking place nor did any staff report they were apprized of an incident taking place. It is only after over twelve (12) hours after the alleged occurrence that inmate [redacted] notified any staff of his allegation, and it is highly unlikely that any staff member would have ignored inmate [redacted] allegation." Exhibit E at p. 4.

7. Months before the trial began, the defense sent an investigator to speak with inmates who were housed in C-74, 6 lower north, the cell block where the alleged sexual assault occurred. See Exhibit A. The investigator spoke to inmate [redacted], who did not want to cooperate with the defense investigation because he believed doing so was not in his best interest. See Exhibit A.

8. No defense investigator spoke with [redacted]. He was not housed on the north side but rather on the south side of the cell block. See Exhibit D. The prosecution disclosed statements from 15 inmates, but not [redacted]. See Exhibit B (listing under "voluntary statements" the names of fifteen inmates, but not Shawn Patterson). On information and belief, based upon my discussions with [redacted], and my review of diagrams and pictures of the cell block, inmates lodged on the north side could only speak with those lodged on the south side through the gates.

THE TRIAL PROCEEDINGS

9. On December 2, 1999, the parties appeared before the Honorable David Stadtmauer in Bronx Supreme Court, Trial Term Part 35. See Minutes of December 2, 1999.[1] At that time the Assistant District Attorney, Robert Gonzalez, made several in limine applications, requesting that the scope of the defense's cross-examination of the complainant be limited. Id. at pp. 13-24. First the prosecutor requested that the defense be precluded from questioning [redacted] about his psychiatric hospitalizations and history of mental illness. Id. at p. 16. Justice Stadtmauer denied this application, observing that the defense had to be given "leeway" that might reflect on [redacted] reliability as a witness. Id. The court observed that these were "serious charges" that could result in lengthy prison terms if the defendants were convicted. Id. at p. 18.

10. Next the prosecutor sought to preclude the defense from questioning [redacted] about his homosexual history. Id. at p. 19. Defense counsel informed the court that it was the defense's

---

[1]A complete set of the minutes in this case is being provided to the court and served on the People. Unless otherwise noted, references are to the trial transcript. References preceded by "S." refer to pages of the sentencing minutes dated December 23, 1999.

theory that [redacted]'s accusation may have been made to cover up his being caught "with his pants down" in his cell with another inmate. Id. at p. 221-22. Counsel further explained that the defense believed that [redacted] had made the accusation in order to protect the relationship between himself and [redacted]'s. Id. at p. 23. When counsel asserted that [redacted] was [redacted]'s boyfriend, and that there was "clear reference and acknowledgment of their having a relationship," the prosecutor did not contest this characterization. Id. at pp. 19-20. Ultimately, the court reserved on the issue. Id. at p. 24.

11. During the course of the prosecutor's motion, Mr. Bruno requested the prison infraction records for [redacted] and [redacted]. The prosecutor responded that he would "call up DOC and as soon as they fax it to me, I will hand them over." Id. at p. 25. There was no suggestion that the prosecutor's office was not enjoying the complete cooperation of the Department of Corrections with respect to the investigation of this case.

12. On information and belief, based upon my review of the discovery turned over to Mr. Bruno, the New York City Police Department never investigated this incident. The entire investigation was conducted by members of the Department of Corrections. The People's Witness List mentioned not a single New York City Police Officer, but named numerous members of the Department of Corrections. See "Witness List/Information Sheet" annexed as Exhibit F. Included as potential witnesses were Corrections Officer Waxter, Corrections Officer Almodovar, Corrections Officer Briggs and Captain McMillan. Id.

The Trial Evidence

13. The trial commenced on December 13, 1999, before Justice Stadtmaur (1). Assistant District Attorney Gonzalez informed the jury during his opening statement that the prosecution

would base its "entire case" on the testimony of [redacted] (207). Mr. Bruno informed the jury that the evidence would show that seminal fluid recovered from Mr. Davis could not have come from [redacted] and asked "then who had sex with who where?" (213).

14. [redacted] was the sole witness called on behalf of the prosecution at trial (219). [redacted] had an extensive criminal record dating back 10 years which included felony convictions for forgery, larceny and drug offenses (215-216, 306). In November 1997, [redacted] was arrested for robbery and taken to Rikers Island (216-217). In late January 1998, after being beaten up on a different cell block, [redacted] was transferred to cellblock C-74 (217).

15. [redacted] claimed that he immediately met [redacted] and [redacted] and became friendly with them (219). He consistently denied having any problems whatsoever with [redacted] until February 8, 1998 (219, 259, 260, 262).

16. Between 7:00 and 8:00 p.m. on the night of February 8, 1998, according to [redacted]' trial account, [redacted] called him back to cell 30 (225). This testimony conflicted with both [redacted]' grand jury testimony where he insisted that [redacted] had called him back, and the prosecutor's opening statement which also reflected that [redacted] had called [redacted] back to the cell (209, 274).

17. According to [redacted], [redacted] was propping open his cell with a bucket which blocked the gate and prevented it from closing (226). [redacted] then dragged [redacted] into the cell and [redacted] threw him on the bed (226). [redacted] claimed to have hit his head on the wall with such great force that his forehead was noticeably bruised (227, 255).

18. At the criminal trial, [redacted] repeatedly asserted that there were four men in the cell during the alleged attack (232, 233, 309). Davis insisted that the other two men in the cell were [redacted] and [redacted] (309). He insisted that he had never accused [redacted] of being

present during the attack and that [redacted] was not there (309, 310, 328, 330).

19. [redacted] testified that Mr. [redacted] ordered him to "suck [redacted]'s dick" and [redacted] put a pillow over [redacted]' head when he tried to scream (229). Then, according to [redacted] his sweatpants were pulled down and Mr. [redacted] poured some liquid over [redacted] anus before forcefully penetrating [redacted] anus with his penis (233-234). [redacted] did not wear a condom and [redacted] did not know if [redacted] had ejaculated (257). [redacted] brandished a scalpel during the attack (230).

20. While the attack was going on, and [redacted] was penetrating [redacted] anally, [redacted] allegedly entered the cell and ordered [redacted] to get off of [redacted] (235, 236, 332). [redacted] brandished the scalpel at [redacted] and threatened to kill him (235). According to [redacted], Mr. [redacted] also threatened to kill [redacted] if he interfered with Mr. [redacted]'s "business" (235). While this confrontation was going on, [redacted] jumped off the bed and ran into his own cell, number 13 (237).

21. [redacted]'s cell, which was ordinarily locked, was open at that time because it was "option" on the cell block, meaning that the inmates had the option to go into their cells for a short period of time (237). [redacted] followed [redacted] into the cell to see if he was hurt (237).

22. [redacted] claimed that he was crying and hysterical after the attack when a female corrections officer whose name he did not know found him in the cell (239-240, 282). The officer was not the "steady officer." (239-240). The officer had been told to close cell 13 by [redacted] (239). Although it was a violation of the prison rules to be in a cell with another inmate, the female corrections officer did not write up a ticket, but merely let [redacted] and [redacted] out in the corridor (239-240). According to [redacted] this female corrections officer "came down to [his] cell. [[redacted]] came to the gate of [his] cell, tears on [his] face, and she looked in there and she knew it was more to it than that." (240). Counsel's objection to what the corrections officer surmised, was sustained (240).

[redacted] explained that this corrections officer had seen both [redacted] and [redacted] in the cell, which was dark (240).

23. After [redacted] and [redacted] were removed from the cell, the female corrections officer walked back towards the security bubble, located at the other end of the block (240). In the corridor, [redacted] and [redacted] again encountered [redacted] and appellant (241). Another angry confrontation ensued in which [redacted] again threatened [redacted] life (241-242). [redacted] again took out the scalpel and came towards [redacted] and [redacted] who walked away towards the security bubble (243-244).

24. [redacted] and [redacted] then told [redacted] that [redacted] was cheating on him with [redacted] (244-245). It was [redacted] who [redacted] repeatedly insisted was his romantic interest on the cell block (244, 245, 265, 270).

25. [redacted] adamantly denied that he was in any way romantically involved with or interested in [redacted] (265, 266, 267, 270). Even when confronted by hospital records reflecting that he referred to '[redacted]' as his male companion, Davis insisted that he was in no way romantically involved with [redacted] (265, 266, 269, 270, 271).

26. Following the ugly confrontation in the corridor between [redacted] and Mr. [redacted], [redacted] approached another corrections officer named [redacted] near the security bubble (245-246). [redacted] claimed that he informed [redacted] that "something severe just happened in the back" and asked to immediately speak with a captain (246). But, according to [redacted], Almodovar did not report the incident because [redacted] told Almodovar everything was all right (246). Nonetheless, Almodovar later came back to [redacted]'s cell and told him that a Captain was going to come down to his cell (247). No captain arrived (248).

27. The next morning, [redacted] saw [redacted] and [redacted] in [redacted]' cell threatening him with a scalpel (249). When [redacted] was called out to go to court, [redacted] reported the entire incident "in detail" to Captain Briggs (248, 249). [redacted]s recounted his detailed outcry for the jury as follows "I said, listen, those two inmates so forth and so on and I told him the whole thing that had happened in detail that they tried to rape me back there and what happened in detail" (249).

28. [redacted] repeatedly denied that he first reported the incident at 11:30 a.m. (290). When confronted with a report which listed the time of the report as 11:30 a.m., [redacted] explained that the official report might have been prepared at 11:30 a.m., but insisted that he had first reported the incident to Briggs at 5:30 a.m. and that he had told the other officers about the situation on the night it happened. (298-300). [redacted]s explained "my statement was early that morning" and dismissed the 11:30 a.m. report as a totally "different one" (300).

29. [redacted]s was subsequently taken to receive medical attention at the clinic on Rikers Island (252). Although his entire body was examined, and [redacted] insisted that he had noticeable bruises on his head and back, no medical records from Rikers Island were admitted into evidence by the prosecution (252).

30. [redacted]s also received medical treatment at Bellvue Hospital (253). While there he was subjected to a rape kit test during which his anus, penis and mouth were swabbed (253-255). No medical records were introduced from Bellevue Hospital (253).

31. No D.N.A. evidence substantiated [redacted]s' claim that he was sexually assaulted. The parties stipulated that if a member of the medical examiner's office were called, he would testify that semen found on the penal swab taken from [redacted]s belonged to [redacted]s and could not have come from either defendant (357, 364).

32. The prosecutor concluded his direct examination of [redacted] by eliciting that: 1) [redacted] had never been asked to be transferred off of the cell block; 2) that [redacted] was friendly with the inmates on the block and that nobody there had any problem with him; and 3) that [redacted] was friendly with the guys "across the block" also. [redacted] was specifically asked if up until the time of the incident he had "any problems with him, [redacted]?" and he responded "no I did not" (260).

33. The prosecutor also asked [redacted] whether he had filed a lawsuit against the Department of Corrections: "Did you ever file a lawsuit against the Department of Corrections because whatever happened to you?" [redacted] responded "no I did not. No, I have not" (260)(emphasis added).

The Defense Requests a Missing Witness Charge Relating to [redacted]

34. Before the summations, Mr. Bruno requested a missing witness charge relating to [redacted] (350). Mr. Bruno observed that he had "no doubt whatsoever that [redacted] would not wish to cooperate with the defendants" (350). The court declined to issue the charge observing that [redacted] was incarcerated and could be called by either side (351). According to the court, "there were no grounds to conclude that the witness would not testify on behalf of the defense if called" (351).

Summations

35. The defense argued that [redacted] was a liar with his own agenda, his own plans and his own needs to satisfy (380). Counsel pointed out the numerous inconsistencies in [redacted] account and its inherent incredibility (381, 386). It was not believable, counsel argued, that all of the corrections officers would ignore [redacted]'s complaint (384). The allegation here, counsel submitted, arose because [redacted] was caught in his cell with [redacted] and was angry that Mr. [redacted] had interfered in his relationship with [redacted] and [redacted] (386, 396, 398).

36. The prosecutor acknowledged on summation that this entire case came "down to [redacted]

[redacted]." (399-400). Repeatedly the prosecutor returned to the theme that [redacted] had no motive to lie about being raped:

> I submit it comes down to whether or not [redacted] had a motive to lie, whether or not [redacted] had a reason to come up here and testify and lie about what happened that day. . . I looked for a motive. I said why would this individual come before the jury and lie (400).
>
> * * *
>
> And then I said, well maybe he's got a problem wit[redacted]tly. So what did I do? I asked him, do you have a problem with [redacted]ly? And what was his response? No. No, he doesn't (401).
>
> So I said well, if he doesn't have a problem with these two individuals maybe he's trying to scam the system. So I asked him: "Are you trying to sue the City of New York for this? What was his answer? No. He says no, no, he wasn't trying to scam the city, doesn't have a lawsuit filed. He's not one of those guys trying to make a dime on the citizens of New York, that we know (401).
>
> * * *
>
> He has nothing to gain. . . What possible motive does he have to come in here and lie? Does he want to get moved to another cellblock maybe? Well, I asked him about that. No because if he wanted to get moved out, he would have been moved out. I mean it just doesn't make any sense (404-405)(emphasis added).[2]
>
> * * *
>
> I'm asking you , ladies and gentlemen, think about it. What does he have to gain? He was humiliated on the stand by the defense attorneys. Humiliated. He was humiliated when this happened to him . . . and he was humiliated when he testified before this jury about what happened in that cell.
>
> * * *
>
> If you believe him, I want you to come back here with a verdict of guilty, but if you don't believe him, then come back here and acquit these defendants (409-410).

---

[2]Because the defense did not have access to the [redacted]son statement there was no suggestion by the defense attorneys that [redacted] was seeking a transfer off the block. Rather, the theory of the defense was that [redacted] had been angry because he had been caught in his cell with [redacted].

Deliberations and Verdict

37. The jury asked how many people were in cell #30 whe[redacted]is was called there and the court responded that the parties agreed there were four people in the cell (434). The jury asked to see the reports with whic[redacted]is was confronted, the one reflecting that he had reporte[redacted]d as being a perpetrator and the one reflecting the timing of the initial complaint. But those reports had not been introduced into evidence, and the court responded that they could not be reviewed by the jurors (434, 435). The jury's final note asked at what point [redacted]s entered the cell and the court reporter read the testimony concerning the timing of [redacted]' entry (435). The jury then returned a verdict convicting [redacted]y an[redacted]of sodomy in the first degree (438).

Sentence

38. The parties appeared before the court for sentence on December 23, 1999 (S. 1). Mr. Bruno moved to set aside the verdict because [redacted]' testimony was per se incredible (S. 3). The court observed that issues of credibility were for the jury and denied the motion (S. 3). Mr. [redacted] was adjudicated a persistent violent felony offender based upon two previous attempted second-degree burglary convictions -- class D violent felonies (S. 6). Before the imposition of sentence counsel again stressed the inherently questionable nature o[redacted]s' testimony (S. 9).

39. Mr. [redacted] also addressed the court prior to being sentenced and pleaded innocence (S. 11). Mr. [redacted]y handed up to the court records of his telephone calls which reflected telephone calls made by [redacted]s from Rikers Island to [redacted]'s home number made on Mr. [redacted]'s account (S. 12). [redacted]s had taken money from him, Mr. [redacted] explained, to buy drugs, but had not delivered them as promised (S. 12). The phone records, Mr. [redacted]y asserted, proved that Mr. [redacted]was on the phone at 7:17 p.m. on the evening that the alleged incident occurred (S. 12). (The phone records

and a corresponding page of [redacted]vis's medical records listing his home telephone number are being provided as Exhibit G).

40. Mr. [redacted]y also referenced a note fro[redacted]is to him that read "Yo, [redacted], I respect the again. I am really involved with [redacted]" and blamed Mr. Westly for interfering with his relationship wi[redacted](S. 13) Appellant pleaded that he was innocent and warned that the court would be sentencing two innocent men (S. 14).

41. The court agreed to look over the papers supplied by the defense, but explained that the sentencing was not the trial and that the jury chose to believe[redacted] (S. 16). Since the evidence was available during the trial, it could not be considered after the verdict, the court explained (S. 12-13, 14).

42. The court then imposed the minimum permissible sentence of 20 years to life (S. 17).

THE POST TRIAL INVESTIGATION

[redacted]vis Files A Civil Lawsuit

43. Less than a month after [redacted]y was sentenced, on January 20, 2000, Jon L. Norinsberg, an attorney for [redacted]vis swore out a civil complaint. That complaint, which is being provided as Exhibit H, was filed in the Southern District of New York on January 31, 2000. The complaint named the City of New York and numerous corrections officers as defendants and alleged that [redacted]s had been wrongfully imprisoned and then denied his civil rights when he was raped on Rikers Island on February 8, 1998. See Exhibit H. [redacted] demanded one million dollars ($1,000,000) in compensatory damages and three million dollars ($3,000,000) in punitive damages. On information and belief, based upon my conversations with members of the Corporation Counsel's Office of the City of New York and my review of the file relating to the

federal lawsuit, no notice of claim was filed with the City of New York prior t[redacted] testimony.

44. On information and belief, based on conversations with [redacted]'s civil attorney, [redacted]g conducted on June 26, and June 27, 2001, [redacted]s had consulted with Norinsberg before testifying in the criminal trial. Moreover, Mr. Norinsberg had spoken to Assistant District Attorney Robert Gonzalez about the case before the criminal trial. In fact Assistant District Attorney Gonzalez spoke with Mr. Norinsberg approximately three days before the trial when [redacted] was scheduled for a pre-trial witness preparation meeting but failed to appear. Thus, Assistant District Attorney Robert Gonzalez knew that Davis had consulted a civil attorney concerning the possibility of filing a civil lawsuit relating to this incident on Rikers Island. Because of his ongoing representation of [redacted], Mr. Norinsberg refused to provide me with an affirmation reflecting the substance of our discussions. See Norinsberg affirmation, Exhibit I. Assistant District Attorney Gonzalez did not disclose t[redacted]'s trial attorney that a civil attorney was considering filing a civil lawsuit on behalf of [redacted]is relating to the alleged attack. See Exhibit A.

45. In August 2000, I was designated by my office to handle this case. Although the record was not complete and did not become complete until April of 2001, I rea[redacted]s' testimony and became immediately suspicious of his account. I decided to investigate the case further.

[redacted] Post Trial Statement

46. In April 2001, I located [redacted]s. I met with Mr. [redacted]s to speak about the case and he advised me that [redacted]s's allegations about the attack were entirely false. Thereafter he executed an affidavit explaining that on or about February 9, 1998, he was questioned by members of the Department of Corrections about an alleged attack on [redacted]is. See Exhibit J, Affidavit

of B[redacted]s dated April 18, 2001. [redacted]s, who had been found with [redacted]s in a cell the night before, became concerned that he would be being implicated as [redacted]'s attacker. Id. He gave a statement implicating other inmates, including [redacted]y. Id. [redacted] subsequently informed [redacted]s that they could become rich if [redacted]s would agree to back up his story of being raped by several inmates Id. [redacted] did not agree to do so, but he did not provide information to the defense because he was afraid of being implicated in the attack. Id. Only after learning that [redacted]y and [redacted] had been convicted and sentenced to lengthy prison terms, did [redacted]s agree to come forward with this information. Id.

Forensic Document Evidence

47. Also in April 2001, I contacted a forensic document examiner to ascertain whether the note referenced by Mr. [redacted] during the sentencing proceeding had really been written by [redacted]. I obtained the original of the note which reads:

> [redacted]. Yo. I respect the game. But i am really in love with Bruce. And its your fault that he played with my feelings. Now say fuck him. Let him suffer. Don't buy him shit tomorrow. Don't do shit for him. And when we come out, we will call you wife and my sister and do our power moves. We will try to get you and Dray down tomorrow. Let's keep shit REAL. Me and you. okay. peace. Romeo (emphasis added).

48. I provided the original note and the three- page handwritten "inmate statement" executed by [redacted]s following the alleged incident to Paul A. Osborn, an expert on handwriting analysis. Mr. Osborn confirmed that the note and [redacted]is's inmate statement had been written by the same person. See Report of Paul A. Osborn, which is being provided as Exhibit K.

49. Not only was Mr. Osborn able to confirm that [redacted]is wrote the note acknowledging his romantic involvement with '[redacted]e" and blaming M[redacted]y for the problems

with that relationship, but Mr. Osborn, by using an Electrostatic Detection Apparatus (ESDA) was able to retrieve latent indentations on the original note. These indentations revealed a letter from [redacted] to [redacted]e" stating "I don't understand. First of all our business is not your homeboys. Since its between us." See Exhibit K and the annexed copy of the ESDA test (emphasis added).

Post Trial Statements By [redacted]e and William Reed

50. I also contacted [redacted]e, who executed an affidavit reflecting that the allegations against M[redacted]tly were not true. Mr. [redacted]e recounted that on February 8, 1998, [redacted]s and [redacted] were caught in a cell together having sex. At the time they were caught, [redacted]e believed that he was playing cards with Mr. W[redacted]y, W[redacted]d, [redacted]bury and Ale[redacted]an[3] in the day room or the gallery. The following day, [redacted] was accused of being involved in a sexual assault upon [redacted]s. He never witnessed a sexual assault on [redacted]s. [redacted] did not know that Mr. [redacted] had been convicted of this offense. He never spoke with an attorney for [redacted]y or [redacted]ry. On September 4, 2001, [redacted]e executed an affidavit reflecting his recollections of the incident. That affidavit is being provided as Exhibit L.

51. I also visited and spoke with [redacted]. Like [redacted]s and [redacted]e, [redacted] insisted that there had never been a sexual attack on [redacted]s. Rather [redacted] recounted that on February 8, 1998, [redacted]s and [redacted] were found in a cell having sex. Immediately before the n[redacted] had been playing cards with Alex Zimmerman and [redacted]. [redacted] remembered that Mr. Westly and Michael [redacted]ry had been playing cards outside of M[redacted]y's cell. The following day, [redacted] was accused of raping J[redacted]is and was asked to give a sample of his semen. [redacted] was subsequently

[3]My investigator has been attempting to locate Ale[redacted]an for several months but has been unable to do so.

interviewed by a member of the Bronx District Attorney's office and informed that person that there had never been a sexual assault on [redacted]. [redacted] believed that conversation had been tape recorded. [redacted] had never been involved romantically with [redacted] in any fashion. On June 21, 2001, [redacted] executed an affidavit reflecting his recollection of these incidents. That affidavit is being provided as Exhibit M. On information and belief based on my review of the trial file, no audiotapes were ever disclosed to the defense. See Exhibits B and C.

Discussions with Lawyers from the Department of Corrections and New York City's Office of the Corporation Counsel

53. On April 23, 2001, I visited Rikers Island in an attempt to view the crime scene. I had earlier spoken with members of the Department of Corrections Legal Department who had advised me to arrange the visit with the Assistant Deputy Warden for Security. When I arrived at the facility I was told that the crime scene viewing had been conducted the previous week. Thereafter, I was referred to Rhonda Leita, who works for the Legal Division of the Department of Corrections. Ms. Leita told me about the civil suit [redacted] had filed and advised me that the investigation of the scene had been related to that pending proceeding. Ms. Leita further advised me that both the Department of Corrections and the Corporation Counsel's Office of the City of New York were highly skeptical concerning [redacted]'s account of the incident.

54. On Tuesday May 8, 2001, I met with attorneys from the Corporation Counsel's Office of the City of New York and Ms. Leita who provided me with all of the discovery conducted in the civil lawsuit. This discovery included the depositions of several corrections officers and [redacted] and the Unusual Incident Report. See Defense Exhibit E.

55. Based upon my review of the unusual incident report, I immediately began searching for

[redacted]n, the inmate who had reported that on the night of the incident, at about 8:20 p.m., [redacted] had told him he was going to fabricate a sex scandal in order to get a transfer off the cell block. See Exhibit E. According to Davis's trial account, the alleged attack occurred between 7:00 p.m. and 8:00 p.m. Thus, this conversation occurred after the alleged incident.

56. After the May 8, 2001, meeting I spoke with Patrick Bruno and asked him if he had ever heard of [redacted]on and he told me that he had not. Mr. Bruno also advised me that he had never received any reports prepared by the corrections officers to whom [redacted] claimed he had promptly complained about the attack. See Exhibit A. On May 23, 2001, I met with Mr. Bruno and provided him with a complete copy of the Unusual Incident Report. See Exhibit A. At that time, I also returned Mr. Bruno's trial file, which I had personally reviewed to ascertain whether the documents contained in The Unusual Incident report had ever been disclosed. Mr. Bruno's file did not contain the report. Nor were there any other documents contained therein that mentioned [redacted]. The reports prepared by Corrections officers Waxter, Almodovar and Briggs, were also not in Mr. Bruno's trial file.

Corrections Officer Rena Waxter's Deposition Testimony

57. In her deposition, Rena Waxter testified under oath that she had been the meal relief officer on February 8, 1998 on C-74. See Deposition of Rena Waxter dated April 16, 2001, provided as Exhibit N. Waxter assumed her post that evening to relieve corrections officer Almodovar at approximately 7:00 p.m. Id. at p. 16.

58. Before she could conduct a complete tour of the cell block, an inmate advised her to check a particular cell. Id. at p. 20. Waxter walked down the block to a cell and when the officer controlling the cell doors popped open the cell, more than one inmate came out, including [redacted]

[redacted]. Id. at p. 21. Waxter told [redacted] she should write him up because he knew that he was not supposed to be in his cell with another inmate. Id. at p. 22. According to [redacted]'s trial testimony, he was distraught when the female relief officer discovered him in the cell with [redacted]. But Waxter explained that [redacted] was not distraught; rather, he apologized and "kind of made a joke about it". Id. at p. 23.

59. When [redacted] came out of the cell, Waxter continued to talk to him as she walked back towards the bubble. Id. at p. 36. [redacted] walked down the tier with Waxter; she was still yelling at him. When they reached the pantry area, which was near the security bubble and on information and belief near the "c gates" [redacted] was standing to Waxter's right side. Id. Waxter recalled that [redacted] "was talking to someone in the pantry area and he turned to [her] and said `Ms. Waxter. You so nosy. It's girl talk." After this exchange Waxter and [redacted] "both laughed" and that was the end of the encounter. Id. Waxter did not learn of any allegation of sexual abuse until days later when she was asked by Captain McMillan to issue a report. Id. at p.40. Waxter was certain that she had observed cell 30 during her tour of the block and that "nothing unusual" had occurred there. Id. at p. 28-29.

Corrections Officer Luis Almodovar's Deposition Testimony

60. Corrections Officer Luis Almodovar testified during his deposition that he left his post on C-74 for his meal break at 6:20 p.m. on February 8, 1998. See Almodovar's deposition dated April 16, 2001 which is being provided as Exhibit O. It was Almodovar's practice to conduct walking tours every 20 minutes in order to continuously monitor the block. Id. at p. 13-14. If there were ever seven inmates in one cell, Almodovar would have noticed it. Id. at p. 17. Almodovar inspected every cell while he was on duty, including cell 30 and observed nothing unusual about it.

Id. at p. 17.

61. [redacted] never spoke to Almodovar on February 8, 1998 to complain about an attack. [redacted] never requested that a captain be sent to his cell so that he could report an incident. [redacted] never asked to speak to a Captain on February 8, 1998. Id. at p. 34. If [redacted] had made such a request Almodovar would have noted it in his report and the log book. Id. at p. 35.

[redacted] Deposition Testimony

62. On April 27, 2001 [redacted] was deposed in connection with his civil lawsuit. A copy of [redacted] deposition is being provided as Exhibit P.[4] Despite his earlier claims that he had "no problems" with anybody on the cell block, [redacted] testified at his deposition that before February 8, 1998, [redacted] had asked him to smuggle drugs into the cell block and [redacted] pretended to "go along with the scheme" so that [redacted] would not know that [redacted] was afraid. See Exhibit P, [redacted] I, at p. 68. Finally, after Mr. [redacted] had asked [redacted] a few times, [redacted] refused to smuggle the drugs. Id. at p. 68.

63. [redacted] also claimed during his deposition testimony that Mr. Westly, before February 8, 1998, threatened to "scrape" or rape him on several occasions. Exhibit P, [redacted] II, at p. 14-15. According to [redacted]'s deposition testimony, he began feeling threatened and afraid after a few days on the cell block. Id. at p. 14-15.

64. [redacted] also claimed that [redacted] had been in the cell during the attack and that he had been told about [redacted]'s presence by [redacted] after the incident when [redacted] visited [redacted] on Rikers Island in May 1998, several months before he testified in the criminal trial. Id. at p. 51; [redacted] III at p. 40.

---

[4] [redacted] deposition is composed of three sections and will be referred to as [redacted] I, II, or III.

65. [redacted] continued to insist throughout his deposition that he had no romantic interest in [redacted]. Exhibit P, Davis II at p. 64.

[redacted]son's Post Trial Statement

66. On June 26, 2001, I met with [redacted][5], who recounted to me his conversation with [redacted]vis at approximately 8:20 p.m. on February 8, 1998 – a time after the alleged attack. [redacted]son recounted that [redacted]had been upset – not because he had been attacked – but because other inmates were constantly getting involved with his "business." [redacted] told [redacted]n that he was going to make up a "sex scandal" to gain a transfer off the block for him and his lover. [redacted]n immediately reported this conversation. [redacted]n executed an affidavit which is being provided as Exhibit Q.

67. [redacted]n told me that he was friends with [redacted]vis because, as fellow homosexuals on Rikers Island, they could talk about issues with each other that they could not discuss with the other inmates. But [redacted]n felt that [redacted]'s plans to concoct a sex scandal and implicate other inmates were malicious and [redacted]n reported his conversation with [redacted]s to the Corrections officials because he believed it was the right thing to do.

Other Potentially Exculpatory Evidence

68. I recently visited Mr. [redacted]y at Southport Correctional Facility where he is serving his sentence under 23 hour a day lock down conditions. He has not once wavered in his insistence that he is innocent and never assaulted [redacted]vis in any manner at any time.

69. Based on my discussions with [redacted]y, and Corrections Officers on Rikers Island, Rhonda Leita at the Department of Corrections Legal Department, and attorneys at the Corporation

[5]To avoid confusion, [redacted]vis will be referred to hereafter as [redacted]n.

Counsel's office, I believe that there is other evidence in existence that might further prove [redacted] innocence. [redacted] has a seizure disorder for which he takes Depokate. Inmates from C-74 were taken to medication at approximately 7:15 p.m on February 8, 1998, and did not return until a little before 8:00 p.m. A clinic log is kept documenting which prisoners receive their medication at what time. This log might reveal that [redacted] was in medication at the time of the alleged incident. I have obtained copies of [redacted]'s medical records but they do not reflect the time that he received his medication on February 8, 1998.

70. Based on my discussions with Rhonda Leita and members of the Corporation Counsel's office, I believe that a Suicide Prevention Aid log book is also maintained by the Department of Corrections, which would reflect that a suicide aid was touring the block every fifteen minutes, rendering it further implausible that the attack on [redacted] would have gone undetected.

71. I also believe that pictures of [redacted] were taken on the day of this alleged attack. These photographs, photocopies of which are annexed to the Unusual Incident Report (see Exhibit E) were not disclosed to the defense. See Exhibits B and C (listing photographs of [redacted] and [redacted] as being provided). On information and belief, these photographs would further demonstrate that [redacted] was not injured on that day.

72. I have not yet perfected [redacted]'s criminal appeal.

WHEREFORE, I respectfully request, for the reasons set forth above and in the accompanying memorandum of law, th[redacted]ly's December 23, 1999, judgment convicting him of sodomy in the first degree, be vacated.

Dated: New York, New York
October 22, 2001

CLAUDIA S. TRUPP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: I.A.S. TERM PART 35

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

[redacted]TLY, :

Defendant-Appellant. :

MEMORANDUM OF LAW
IN SUPPORT
Bronx County
Indictment Number 4071/98

PRELIMINARY STATEMENT

This memorandum of law is submitted in support of [redacted]y's motion to set aside his December 23, 1999, Bronx County judgment because: 1) the Bronx District Attorney's Office suppressed Brady material thus violating Mr. [redacted]ly's state and federal Due Process rights under the Fourteenth Amendment; 2) new evidence has been discovered which would have likely resulted in M[redacted]y's acquittal at trial; 3) material false testimony which the prosecution with due diligence could have ascertained was false was introduced at the trial; and 4) the conviction violates M[redacted]'s state and federal constitutional rights.

M[redacted]dy was convicted of first-degree sodomy based entirely upon the uncorroborated testimony of the complainant, J[redacted]vis, a three time felon with a history of mental illness. According to [redacted]'s account, the attack took place on a crowded cell block on Rikers Island, with corrections officers and other inmates nearby. [redacted]s also claimed that his close friend [redacted] had interrupted the attack. Althoug[redacted]s sought medical treatment at two separate hospitals and

had submitted to a rape test kit, no medical evidence was introduced at trial. No D.N.A. evidence supported [redacted]'s allegations. Not a single witness came forward to corroborate [redacted] account.

The reason for the prosecution's failure to introduce a single piece of corroborating evidence is simple. None existed. Appellate counsel's post trial investigation has revealed that every aspect of [redacted]'s account is demonstrably false and that important information reflecting [redacted] numerous motives to fabricate his account was kept from the jury. The verdict, obtained through the complainant's lies, does not comport with fundamental due process principles and is not one in which society can have confidence. Accordingly, the judgment must be vacated pursuant to C.P.L. §440.10.

POINT I

THE PROSECUTION'S FAILURE TO DISCLOSE: A) THE UNUSUAL INCIDENT REPORT; B) ITS AWARENESS THAT THE COMPLAINANT WAS CONSIDERING FILING A CIVIL LAWSUIT BECAUSE HE WAS SEXUALLY ASSAULTED WHILE IN PRISON AND C) A TAPE RECORDED INTERVIEW WITH [redacted] DENYING THAT THE COMPLAINANT WAS EVER SEXUALLY ASSAULTED–EXCULPATORY EVIDENCE MATERIAL TO THE JURY'S DETERMINATION OF GUILT OR INNOCENCE -- VIOLATED MR. [redacted]'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS AND WARRANTS VACATING THE JUDGMENT. U.S. CONST., AMEND. XIV; N.Y. CONST. ART. I, §6; BRADY V. MARYLAND, 373 U.S. 83 (1963); C.P.L. §440.10(1)(f)(h).

The outcome of this case depended entirely upon whether the jury credited the testimony of the complainant, J[redacted]s, concerning his account of being sodomized while incarcerated on Rikers Island on February 8, 1998. No physical evidence was introduced to support [redacted] account. No medical records bolstered his claims. The D.N.A. evidence recovered could not have come from either defendant. The alleged attack, which took place on a crowded cell block, was, according to [redacted] trial testimony, interrupted by [redacted]'s friend [redacted] and immediately reported to three corrections officers. None of these witnesses were called by the prosecution to corroborate [redacted] account. Thus, the prosecution was forced to argue that [redacted] was credible because he had no motive to lie about being sexually assaulted. Yet, while the Assistant District Attorney advanced these claims before the jury, records within his control conclusively refuted their validity. The Unusual Incident Report reflected that [redacted] had told a fellow inmate, [redacted], on the night of the alleged incident that he was going to fabricate a sex scandal to effect a transfer off the cell block for himself and his lover. Reports prepared by the corrections officers on duty that night reflected that [redacted] had never complained about being attacked on February 8, 1998, but waited twelve hours to come forward with his allegations. Moreover, it appears that while the prosecution

elicited that Davis had not "filed" a lawsuit prior to testifying, Assistant District Attorney Robert Gonzalez had had repeated contact with [redacted]'s civil attorney and that Gonzalez was aware that [redacted] was contemplating such a suit. Under these circumstances, the conviction violates state and federal due process standards and must be vacated.

Criminal Procedure Law §440.10(1) provides, in relevant part:

> 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:
>
> (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
>
> (h) the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

The prosecution has an affirmative duty to disclose to the defense evidence in its possession that is favorable to the defense and relevant to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). New York has long recognized this prosecutorial duty and that the failure to disclose Brady material violates a defendant's state and federal constitutional rights to Due Process. People v. Wright, 86 N.Y.2d 591, 595 (1995).

Under federal constitutional standards there are three components to a Brady violation: 1) "the evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching"; 2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and 3) "prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999). Under this standard "favorable evidence is material, and constitutional error results from its suppression if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419,

433 (1995).

New York's rule differs from the federal standard only in that where there has been a specific request for Brady material, that evidence is deemed material if there is a "reasonable possibility" that the outcome would have been more favorable to the accused. See People v. Wright, 86 N.Y.2d at 596, citing People v. Vilardi, 76 N.Y.2d 67 (1990). Where a prosecutor professes to comply with his Brady obligations through an open file, voluntary disclosure policy, the defense may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady and its progeny. Strickler v. Greene, 527 U.S. at 283, fn. 23.

The mandate to disclose material, exculpatory evidence extends beyond an individual prosecutor's actual knowledge and imposes upon him the duty to learn of any favorable evidence known to others acting on the government's behalf during the investigation of the case. Kyles v. Whitley, 514 U.S. 419, 437-438 (1995); People v. Wright, 86 N.Y.2d at 598; see also People v. Simmons, 36 N.Y.2d 126, 132 (1975)("negligent as well as deliberate non-disclosure may deny due process"); People v. Benard, 163 Misc. 2d 176, 183 (Sup. Ct. N.Y. Co. 1994)(where exculpatory material is in the files of the agency involved in the investigation, the prosecution can be charged with its constructive possession).

A. The Unusual Incident Report Constituted **Brady** Material and Its Suppression, Standing Alone, Warrants Vacating the Judgment.

Here, the Bronx District Attorney's office failed to comply with these well-established principles that ensure the accused due process and society the right to a verdict worthy of confidence. That the Unusual Incident Report contained material, exculpatory information cannot be disputed. The suppression of [redacted]'s statement, in and of itself, warrants vacating the judgment.

That statement reflected that at approximately 8:20 p.m. on February 8, 1998, [redacted] told [redacted], a fellow inmate, that he intended to fabricate a sex scandal in order to secure a transfer off the block for himself and his lover. According to [redacted]'s trial account, by 8:20 p.m on February 8, 1998, he had already been sodomized. Thus, if [redacted]'s statement is credited there is simply no way [redacted]'s trial testimony can be true.

Morevoer, this evidence was not merely impeaching, but directly demonstrated that from the outset [redacted] had a motive to fabricate his account of being sexually attacked. As such, the defense would not have been limited to confronting [redacted] with his statement to [redacted], but would have also been permitted to call [redacted] as a witness to offer extrinsic proof of the conversation. See People v. Hudy, 73 N.Y.2d 40, 57 (1988)(in trial for sexual abuse of young boy, defense should have been permitted to offer extrinsic evidence concerning witnesses' motives for fabricating their accounts of abuse). Indeed, a trial court's discretion to preclude such evidence "is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers." Id. citing Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississipi, 410 U.S. 284 (1973).[1]

Nor can there be any doubt that [redacted] would have made a convincing witness as demonstrated by the conclusions of the Assistant Deputy Warden and Captain Sena McMillan, who were responsible for investigating this case. Both officers credited [redacted]'s statement in concluding that [redacted] had made up his allegations. [redacted], unlike [redacted], had no reason to lie.

---

[1] The prosecution's suppression of [redacted]'s statement and information concerning [redacted]'s retention of a civil attorney, both of which established motives to fabricate, adversely impacted upon Mr. [redacted]'s rights to present a defense under the Fifth Amendment of the United States Constitution and to confront his accuser under the Sixth Amendment of the United States Constitution. Thus, the conviction was obtained in violation not only of Mr. [redacted]'s due process rights, but these constitutional rights as well.

But The Unusual Incident Report contained more exculpatory information than [redacted]'s statement, as it also contained exculpatory statements by the correction officers patrolling the block on the evening of the alleged incident. According to [redacted], a female corrections officer observed him almost immediately after the attack distraught and hysterical. But the report prepared by Corrections Officer Rena Waxter and contained in the Unusual Incident Report reflected that she had observed nothing unusual during her tour when she provided meal relief to Corrections Officer Louis Almodovar.

While according to [redacted] he had complained to Almodovar shortly after the incident, Almodovar's report reflected that [redacted] had never approached him to complain of the attack. Similarly, Corrections Officer Briggs' report reflected that he had not heard of the attack when his shift ended at 7:30 a.m., despite [redacted] insistence that he had provided a detailed account of the incident to Briggs at approximately 5:30 a.m.

[redacted] failure to promptly report the incident was also of obvious significance to the defense. Indeed, it was the twelve hour delay in outcry which also prompted the Department of Corrections investigators to discredit [redacted]'s account. In New York State, evidence that a victim of a sexual assault promptly complained about the incident is admissible to corroborate the allegation that the assault occurred. See People v. McDaniel, 81 N.Y.2d 10, 16 (1993). This policy recognizes the likelihood that "some jurors would likely doubt the veracity of a victim who failed to promptly complain of a sexual assault." Id. Indeed, to bolster [redacted]'s account, the prosecutor specifically elicited that [redacted] had promptly complained about the incident to Almodovar and Briggs. But while eliciting this evidence, the prosecution denied the defense access to evidence that could have conclusively rebutted it.

Nor can there be any question that the evidence contained in the Unusual Incident Report was "suppressed" by the prosecution for Brady purposes. See Strickler v. Green, 527 U.S. at 281-282. The defense did not receive the report. It is not listed on the voluntary discovery statements provided by the prosecution. See Exhibits B and C. The voluntary discovery prepared by the prosecution reflected the disclosure of approximately 15 inmate statements, but did not mention one from [redacted]. See Exhibit B. The Unusual Incident Report was not contained in Mr. Bruno's trial file. Mr. Bruno himself provided an affidavit that he did not receive the report. There was no mention of [redacted] during the entire trial. .

That the prosecution had actual or constructive knowledge of the report is also undeniable. The prosecution disclosed numerous reports from the Department of Corrections. That agency was the sole arm of the government investigating this incident. When, during the course of the pre-trial proceedings Assistant District Attorney Gonzalez needed to obtain records, he called the Department of Corrections. The prosecution's witness list reflected that Waxter, Almodovar, Briggs and McMillan were all potential witnesses for the People. See Exhibit D.

As the Bronx District Attorney's office was enjoying the cooperation of the Department of Corrections, the sole investigatory agency involved in this case, it had the obligation to locate and turn over any exculpatory information contained in the Department of Corrections' files. See Kyles v. Whitley, supra.; see also People v. Smith, 63 N.Y.2d 41, 65-68 (1984)(assuming that log book entry maintained by the Department of Corrections was in control of the prosecutor for Brady purposes in prosecution arising out of murder that occurred in a correctional facility). Indeed, the First Department recognized the prosecution's obligation under such circumstances to search investigatory files for exculpatory information even before the Supreme Court decided Kyles v.

Whitley, supra. See People v. Rutter, 202 A.D.2d 123, 131-132 (1st Dept. 1994)(Bronx District Attorney violated his Brady obligations by failing to disclose exculpatory materials within files of the Philadelphia Police Department where those authorities cooperated closely with the New York murder investigation). Under these circumstances, even if by some administrative error the Unusual Incident Report was not in the actual possession of the Bronx District Attorney's office, it was nonetheless suppressed for Brady purposes.

Nonetheless, there is evidence suggesting that the information contained in the report was known to the Assistant District Attorney prosecuting the case. As mentioned above, it is difficult to understand how the prosecution would have had access to numerous voluntary inmate statements but not [redacted]'s. Moreover, the prosecutor specifically argued on summation that [redacted] had no reason to fabricate his account in order to gain a transfer off the cell block. The defense, unfamiliar with the information contained in the Unusual Incident Report, had never alleged that [redacted] was seeking a transfer off the block. The Assistant's District Attorney's desire to address the possibility that [redacted] had fabricated his account in order to gain a transfer from the cell block was, thus, most likely based on his knowledge of the information contained in the Unusual Incident Report.

Regardless of whether the Report was in the actual possession of the prosecutor, the failure to disclose it to the defense prejudiced the defense and undermined the validity of Mr. [redacted] conviction, see infra at pp. 11-14.

B. The Complainant's Intent to File a Civil Lawsuit, Which the Prosecutor Knew About But Did Not Disclose, Before Eliciting That No Such Lawsuit Had Been "Filed" And Then Arguing That The Complainant Was Not Trying To Make Money Due to The Sexual Assault, Denied Mr. Westly Due Process.

J[redacted]is testified during the trial, under direct examination by Assistant District Attorney Robert Gonzalez that he had not "filed" a lawsuit against the Department of Corrections as a result of being sexually assaulted while incarcerated on Rikers Island. The prosecutor then explicitly argued th[redacted] was not trying to scam the city by filing a lawsuit and was not trying to make a "dime on the citizens of New York" (401). While it was technically true that [redacted]is had not "filed" a lawsuit, he had consulted with a civil attorney prior to testifying against [redacted]y. Moreover, that civil attorney spoke with Assistant District Attorney Gonzalez only days before the trial. Thereafter, [redacted]s filed a four million dollar lawsuit against the Department of Corrections and the City of New York based upon the alleged rape. Under these circumstances, the prosecution's failure to disclose th[redacted] was contemplating filing a civil suit and that a civil attorney had entered the case, violated the precepts of Brady v. Maryland.

The First Department's decision in People v. Wallert, 98 A.D.2d 47 (1st Dept. 1983) controls. In Wallert, the complainant testified that the defendant had raped her shortly after they met. Id. at 48. On summation, the prosecutor argued that the complainant had no reason to fabricate the allegations against Wallert or to falsely accuse him of rape. Id. at 50. But two days after Wallert's conviction, the complainant filed an 18 million dollar lawsuit against him for damages arising out of the rape incident. Id. at 47-48. Although the prosecutor knew that the complainant had consulted a civil attorney prior to trial, that fact was not revealed to the defense. Id. at 48. The First

Department reversed Wallert's conviction holding "the failure of the prosecutor to inform defendant of the civil suit was a clear Brady violation `inasmuch as [that fact] had the possibility of assisting the defendant and raising a reasonable doubt.' Plus, the additional wrong of the prosecutor's arguing that which wasn't, denied Wallert a fair trial in violation of his right to due process." Id. at 50-51, quoting People v. Kitt, 86 A.D.2d 465, 467 (1st Dept 1982).

Here, as in Wallert, the jury was left with the impression that [redacted] is had no financial motive to fabricate his allegations about being sexually attacked. The prosecutor carefully elicited that [redacted] had not "filed" a civil lawsuit. On summation, the prosecutor then stressed that [redacted] had no motive to lie, that he was not trying to "scam" anybody or make any money by lodging false accusations. But [redacted] had consulted a civil attorney, Jon Norinsberg, prior to testifying at the criminal trial. Norinsberg had spoken to Assistant District Attorney Gonzalez approximately three days before the trial began. In fact, the prosecutor contacted Norinsberg when [redacted] is failed to appear for a pre-trial preparation session. The civil complaint demanding four million dollars in damages was sworn out less than a month after the judgment was entered. While Mr. Norinsberg would not execute a detailed affirmation because of his ongoing representation of [redacted], appellate counsel's conversations with him detailed in the affirmation in support are sufficient to warrant a hearing into this issue. See People v. Nicholson, 222 A.D.2d 1055 (4th Dept. 1995)(where witness refused to execute an affidavit because doing so would be against her interest, sworn allegations set forth by defense counsel were sufficient to warrant a hearing).

C. The Tape-Recorded Conversation With [redacted]

[redacted] provided a sworn affidavit that he had been interviewed by a member of the Bronx District Attorney's office and that during that interview a tape recorder was operating. According to [redacted]'s sworn statement, he told the Bronx District Attorney's office that there had been no sexual assault on [redacted]. [redacted]'s statement also reflected that he had seen [redacted] and [redacted] having sex in [redacted]'s cell on the night of alleged incident. That this tape recorded conversation was exculpatory and should have been disclosed to the defense is beyond dispute. See generally People v. Nikollaj 155 Misc.2d 642 (Sup. Ct. Bx. County 1992)(Bronx District Attorney's office failure to disclose 16 minute tape recorded interview with a principle eyewitness prejudiced the defense and warranted reversal). But no audiotapes were disclosed to the defense. See Exhibits B and C.

D. The Suppression of the **Brady** Material Prejudiced The Defense Where It Allowed the Prosecution To Mislead The Jury By Arguing That the Complainant Had No Motive To Fabricate His Allegations of Sexual Abuse

The prosecution readily admitted during the trial that the outcome of this case depended entirely upon the jury's assessment of the complainant's credibility, particularly whether [redacted] had any motive to lie about being sodomized. Under these circumstances, regardless of the standard of materiality which is applicable, the judgment must be vacated. While this case should be analyzed under the "reasonable possibility" standard because the defense requested voluntary disclosure and the prosecution represented that it had disclosed all that it was required to, applying the more rigorous "reasonable probability standard" would still mandate vacating the conviction. In determining whether undisclosed evidence is "material," that evidence must be viewed

cumulatively, not item by item. Kyles v. Whitley 514 U.S. at 436.

Here the undisclosed evidence would have impacted upon virtually every aspect of the complainant's testimony. At trial [redacted]s portrayed himself as an innocent victim, with no grudge against the defendants, who, distraught after the brutal assault, was observed crying, then promptly complained to every corrections officer who would listen. The prosecution argued th at [redacted]also lacked any financial motive to fabricate his account as he was not trying to "scam" anybody to make money as a result of the alleged sodomy.

[redacted]s statement demonstrated th at [redacted]on the evening of the attack was upset about being found in his cell with his lover and that [redacted]dmitted that he was going to concoct a sex scandal in order to gain a transfer off the block. Nothing could have been more relevant and helpful to the defense. As Mr. Bruno set forth during the pre-trial proceedings, it was the defense theory that [redacted]had concocted the allegations, at least initially, because he was angry about being found with "his pants down" in his cell with his boyfriend. When the defense sought to confront [redacted]s about his relationship with [redacted]s, he insisted that they were not romantically involved and that he was upset because he was attacked, not because he was discovered in his cell with his lover.

Thus, [redacted]testimony, standing alone, would most likely have changed the outcome of Mr. Westly's trial. See, e.g., People v. Bond 95 N.Y.2d 840 (2000)(single prior undisclosed statement by eyewitness that she did not witness the shooting warranted reversal). Tellingly, the investigators for the Department of Corrections relied upon [redacted]s statement in concluding that the sexual assault had not occurred. Their reliance on [redacted]s statement was understandable. He had no discernible motive to make up this conversation with [redacted]. He reported the conversation immediately to the authorities. Moreover, P [redacted], unlike other inmates who would have known

about the alleged attack, had no fear of being implicated as one of [redacted]'s assailants. [redacted] was not on the same side of the cell block as [redacted].

But the undisclosed report contained numerous other pieces of relevant exculpatory information including reports by the Assistant Deputy Warden concluding that Davis's account was untrue, a conclusion which Captain Sena McMillan also reached. Their conclusions were based, in part, on the reports of Corrections Officers Waxter, Almodovar and Briggs all of which contradicted [redacted] account of the incident. While [redacted] claimed Waxter observed him crying and hysterical, her report reflected that she had observed nothing unusual during her tour. During her deposition Waxter recounted that [redacted] was actually joking when he came out of the cell and accompanied her as she walked down the tier. [redacted] had testified that immediately after he exited his cell there was an angry confrontation between himself, [redacted] and [redacted]. Waxter's report contradicted this representation.

Almodovar's report also undercut [redacted]'s account because it reflected that [redacted] had never approached him to report any attack and never asked to see a captain. Similarly Briggs report reflected that [redacted] had not reported the incident early in the morning of February 9, 1998, as [redacted] insisted he had at trial. Again, the information in the reports, the delay in outcry of twelve hours, was another factor relied upon by the Department of Corrections investigators in concluding that [redacted] was lying about being the victim of a sexual assault.

Still there was more information withheld that called into question [redacted]'s motives for alleging that he was sexually attacked. For while the prosecutor explicitly argued that [redacted] was not trying to make money by filing a lawsuit against the Department of Corrections, by the time of his testimony [redacted] had consulted a civil attorney and was plainly contemplating civil action based on

his imprisonment and alleged victimization on Rikers Island. Indeed, it was suppression of this type of evidence, standing alone, that the First Department ruled mandated reversal in Wallert, supra.

Additionally, the tape recorded conversation with [redacted]Reed would have put the defense on notice that he possessed material information that could undercut [redacted] account. [redacted] became a particularly important witness as the trial proceeded and as [redacted] denied that he was present during the attack, even when confronted with Department of Corrections' Reports reflecting Reed's status as a participant in the alleged attack.

Thus, viewed cumulatively, the suppressed evidence could not have been more material to the defense here. It called into question virtually every aspect of [redacted]'s testimony. Under these circumstances, [redacted]'s conviction must be vacated. In the alternative, in the event that the People's response raises a factual issue, a hearing should be conducted pursuant to C.P.L. §440.30(5).[2]

---

[2]There is no basis upon which the motion can be summarily denied pursuant to C.P.L §§440.10(2) or (3). There is no mention in the appellate record of any of the undisclosed materials which would permit review of these claims in the pending appeal. See C.P.L. §440.10(2)(b). Moreover, the suppressed evidence was omitted from the record as a result of the prosecution's misconduct, not any lack of due diligence by the defense which was entitled to rely upon the prosecution's representations that it had complied with its Brady obligations through its voluntary disclosure policy. See Strickler v. Green, supra.

POINT II

NEWLY DISCOVERED EVIDENCE CONSISTING OF: A) [redacted]'S STATEMENT THAT THE COMPLAINANT TOLD HIM OF HIS PLANS TO CONCOCT A SEX SCANDAL IN ORDER TO EFFECT A TRANSFER OFF THE BLOCK; B) THE COMPLAINANT'S INTENT TO FILE A MULTIMILLION DOLLAR LAWSUIT AS THE RESULT OF THIS ALLEGED INCIDENT; AND C) [redacted]' STATEMENT THAT HE NEVER WITNESSED AN ASSAULT ON THE COMPLAINANT WARRANTS VACATING MR. WESTLY'S FIRST-DEGREE SODOMY CONVICTION. C.P.L. §440.10(1)(G).

After [redacted] was sentenced on December 23, 1999, several new pieces of evidence were uncovered that cast substantial doubt upon [redacted]'s account of being sexually attacked. About a month after [redacted] was sentenced, the complainant filed a multimillion dollar lawsuit against the Department of Corrections alleging that he was falsely imprisoned and raped while on Rikers Island in February 1998. During the course of the civil lawsuit reports were disclosed that reflected that on the night of the alleged incident, the complainant informed a fellow inmate, [redacted], of his intention to concoct a sex scandal to gain a transfer off the cell block. Also as a result of the lawsuit, appellate counsel contacted the complainant's civil attorney, who stated that he had consulted with [redacted] before the criminal trial concerning representing him in a civil lawsuit. Additionally, after [redacted] had been sentenced, [redacted] agreed for the first time to cooperate with the defense and provided a notarized statement reflecting that the complainant had lied when he testified that [redacted] had interrupted the alleged attack. Had this evidence been introduced at trial, there can be little doubt that the outcome would have been more favorable to the defense. Accordingly, [redacted]'s conviction must be vacated pursuant to C.P.L. §440.10(1)(g).

Criminal Procedure Law §440.10 (1)(g) provides that a criminal judgment may be vacated

upon the ground that:

> (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;

In order to prevail under this section, the new evidence must : (1) be such that it will probably change the result of a new trial; (2) have been discovered since the previous trial; (3) not have been discoverable before the trial with the exercise of due diligence; (4) be material to the issue; (5) not be cumulative; and (6) not be merely impeachment evidence. People v. Salemi, 309 N.Y. 208, 215-216 (1955). All of the newly discovered evidence meets these requirements.

A. [redacted]'s Statement

(1) As set forth above, at pp. 13-14, inmate [redacted]'s statement, standing alone, would have probably changed the result of this trial. [redacted]'s statement undercut [redacted]'s trial testimony that he had been the victim of a sexual assault and the prosecution's consistent argument that [redacted] had no motive to lie about his alleged victimization. [redacted] reported that on the night of the alleged incident, [redacted] told him of his plans to concoct a sex scandal in order to gain a transfer off the block for himself and his partner. This evidence was credited by Department of Corrections investigators when they concluded that [redacted] had fabricated his account of the incident. It is easy to understand why [redacted]'s statement was credited. He immediately reported his conversation with [redacted] to the appropriate authorities. He had no motive to lie about this conversation. Moreover, this conversation occurred at approximately 8:20 p.m., at a time, according to [redacted]'s trial testimony, that he had already been the victim of a sexual assault.

No evidence could have been more damaging to the prosecution's sole witness. As [redacted] was the only witness to testify and his account was not corroborated by medical evidence, D.N.A. evidence or prompt outcry evidence, there can be little doubt that the outcome of this case would have been different if Patterson had testified.

(2) [redacted]'s statement was discovered after Mr. [redacted]'s trial by appellate counsel with the cooperation of the office of the Corporation Counsel of the City of New York. It was attorneys at the Corporation Counsel's office that finally disclosed the Unusual Incident Report containing [redacted]'s statement to appellate counsel on May 8, 2001.

(3) [redacted] statement was not discoverable with due diligence before trial. The defense dispatched an investigator to interview inmates who were potential witnesses and who were housed on the same cell block as [redacted]. [redacted] was housed on a separate side of the block and was physically separated from the side of the block in which the alleged attack occurred. Accordingly, there was nothing to put the defense on notice of the information [redacted] possessed as a result of his conversation through the gates with [redacted] on the night of the alleged incident. The report containing [redacted]'s statement was never disclosed to the defense. [redacted] himself never informed [redacted] about the information he had provided to the appropriate authorities. Accordingly, [redacted]'s failure to testify at trial cannot be attributed to any lack of due diligence on the part of the defense.

(4) [redacted]'s statement was highly material to the sole issue at trial of whether [redacted] had been sodomized by [redacted] and [redacted] on February 8, 1998, or whether he was, as the defense claimed, a lying schemer with his own needs and agenda. According to the prosecution, this case came down to whether [redacted] had any motive to lie for any reason. [redacted]'s statement

established that, from the beginning, [redacted] planned to lie about his alleged victimization in order to manipulate the system and gain a transfer for himself and his lover.

(5) P[redacted]'s statement was not cumulative. There was no direct evidence introduced at the trial which proved that [redacted] had a motive to fabricate these allegations. [redacted] consistently denied having any problems with anybody on the block, includin[redacted]y. He denied that [redacted]s was his lover or that he had any reason to want to transfer off the block. The prosecution actually argued that if [redacted]s had wanted to transfer off the block he would have been transferred simply by asking. Thus, [redacted]on's statement was not cumulative.

(6) Nor is the evidence merely impeaching. Evidence which establishes a complainant's motive to fabricate can be proved by extrinsic proof. See People v. Hudy, supra.; Justice v. Hoke, 90 F.3d 43, 48 (2d Cir. 1996); see, e.g., People v. Smith, 6 Misc. 2d 601 (New York Co. Ct. 1957)(judgment vacated due to newly discovered evidence that complainant told witness of his intent to fabricate allegations in order to bribe the defendant). Indeed, where the prosecution's case depends upon the jury's assessment of a single witness, even newly discovered impeaching evidence has been found sufficient to warrant a new trial. See, e.g., People v. Marzed, 161 Misc.2d 309, 316 (Crim. Ct. N.Y. Co. 1993), citing Napue v. Illinois, 360 U.S. 264, 269 (1959)(courts assess impeachment evidence in a much different light where the outcome is dependent on the jury's assessment of a single witness's credibility); People v. Ramos, 132 Misc. 2d 609 (Sup. Ct. Kings Co. 1985)(new evidence relating solely to complainant's criminal history warranted reversal where it established motive to lie).

Finally, this motion was pursued with due diligence only weeks afte[redacted] was located by appellate counsel. See People v. Maynard, 183 A.D.2d 1099, 1103-1104 (3rd Dept. 1992). Thus,

as [redacted]'s statement meets all of the criteria for newly discovered evidence pursuant to C.P.L. §440.10(1)(g), Mr. [redacted]'s conviction should be reversed in light of the discovery of this key witness.

B. The Complainant's Intent To File A Multi-Million Dollar Lawsuit

At trial [redacted] testified that he had not "filed" a lawsuit against the Department of Corrections because of the alleged sodomy. Thereafter, the prosecution argued that [redacted] had no motive to fabricate because he was not "trying to sue the City of New York for this" and was "not one of those guys trying to make a dime on the citizens of New York" (401). But by the time of his criminal trial, [redacted] had already retained a civil attorney in anticipation of filing a multimillion dollar lawsuit against the City of New York. These facts only came to light after [redacted] had filed that lawsuit and appellate counsel had spoken with [redacted]'s civil attorney to ascertain when his representation of [redacted] commenced. [redacted]'s intention to file this lawsuit also constitutes newly discovered evidence under C.P.L. §440.10(1)(g).

(1) The complainant's plan to file a large lawsuit provided him with a strong motive to fabricate his claims. The jury's awareness of this plan and [redacted]'s financial incentive to lie about the sexual assault would have probably changed the outcome of this case. See People v. Wallert, 98 A.D.2d at 50-51, citing Napue v. Illinois, 360 U.S. at 269 (reversing for failure to disclose complainant's intention to file a civil lawsuit based on allegations that the defendant raped her because "it was fundamentally obvious that the complainant's credibility and motive for testifying would be a crucial issue."); People v. Smith, supra, 6 Misc.2d at 602-603 (vacating conviction due to newly discovered evidence reflecting complainant's financial motivation for fabricating allegations of abuse).

(2) the existence of the civil lawsuit, which was filed in federal court in the Southern District of New York in January 2000, was discovered by chance during appellate counsel's attempts to visit the crime scene on Rikers Island on April 23, 2001. The original record suggested that no such lawsuit was being pursued by [redacted]

(3) Nor was [redacted]'s intention to file the lawsuit capable of being discovered before the original trial. The lawsuit had not yet been filed. No notice of claim had been filed against the City of New York to preserve the state civil rights claims. [redacted]'s trial testimony affirmatively suggested that no such lawsuit was being pursued. Thus, the defense had no way to refute [redacted]'s testimony – affirmatively elicited by the prosecution – that he was not pursuing a civil lawsuit. The defense attorneys should not have been required to question [redacted] blindly and risked reinforcing before the jury the impression that [redacted] lacked any financial motive to fabricate his allegations.

(4) [redacted]'s motive to fabricate, his belief that he could become wealthy by lying about being sexually assaulted, was highly material to the outcome of this case. As the prosecutor explicitly argued, the outcome of this entire case came down "to whether or not [redacted] is had a motive to lie, whether or not [redacted] is had a reason to come up here and testify and lie about what happened that day" (400). The prosecutor recognized the relevance of a potential financial motive and affirmatively suggested that [redacted] did not have one (401).

(5) Evidence that [redacted] intended to file a civil lawsuit would not have been cumulative. [redacted] and the prosecution affirmatively misrepresented that [redacted] was not pursuing a lawsuit as a result of the alleged sexual assault. The existence of the lawsuit and the evidence that [redacted] had retained a civil attorney prior to testifying in this criminal case would have undercut the prosecution's repeated arguments that [redacted] had no motive to lie. There was no evidence introduced

suggesting the existence of this financial motivation.

(6) Nor was [redacted] intention to pursue a civil lawsuit merely impeaching evidence, as it affirmatively established his motive to testify falsely about the alleged sexual attack. See, e.g. People v. Smith, supra, 6 Misc. 601 (vacating conviction due to newly discovered evidence that complainant was attempting to bribe the defendant and offered to drop the charges for money).

Finally, the motion to vacate on this ground has been pursued with due diligence b [redacted]. The existence of the civil lawsuit was discovered in April 2001. Appellate counsel spoke with [redacted]'s civil attorney in June 2001 to ascertain when exactly he had been retained by [redacted] The motion is being filed within weeks of the defense obtaining this information.

C. [redacted]rs' Statement

Following [redacted]y's conviction, [redacted]rs for the first time provided information contradicting J[redacted]account of the incident. This evidence is also "newly discovered" and warrants vacating the judgment.

(1) [redacted] testimony that he never saw anybody sexually assault J[redacted] on February 8, 1998, would have probably resulted i[redacted]'s acquittal. According t[redacted] it was [redacted] who interrupted the attack, and witnessed [redacted]ly and [redacted]y in the very act of sodomizi[redacted]. [redacted] also testified that [redacted] was threatened verbally and physically by [redacted]y and [redacted]y on the night of the incident and the next morning.

But [redacted]rs' statement entirely contradicts [redacted] testimony. [redacted] explicitly swore that at no time on the date in question did he see [redacted]s being attacked or harassed in any manner. Not only did [redacted] deny that he witnessed an attack on [redacted], [redacted]' sworn statement reflected that [redacted] informed him that if [redacted] would corroborate [redacted]s account of the attack they could both become rich.

There can be no doubt that this evidence would have fatally undermined the prosecution's case. [redacted] -- who was portrayed as a hero and had no motive to lie in favor of the defendants if [redacted]s account were true -- was a critically important witness. In fact, the jury during the course of its deliberations asked for a read back of the testimony concerning the timing of [redacted]' entry into the cell.

(2) [redacted]s statement was "discovered" since the original trial. While [redacted] testified about [redacted]s' actions on the night of the alleged incident, [redacted] himself agreed to come forward with

exculpatory information only after learning that [redacted] had been convicted of sodomizing [redacted] and sentenced to 20 years to life in prison. See [redacted] statement, Exhibit J, at paragraph 7. Thus, this evidence is considered "newly discovered" within the meaning of C.P.L. §440.10(1)(g) See People v. Stokes, 83 A.D.2d 968 (2nd Dept. 1981), citing People v. Shilitano, 218 N.Y. 161, 170-171 (1916)("it is not that the `witness' is newly discovered, but it is the fact that since the trial, the witness has, for the first time, made statements which makes such evidence newly discovered"); accord People v. Staton, 224 A.D.2d 984 (4th Dept. 1996)("the proffered testimony of the codefendant, who did not testify at trial and now seeks to exculpate defendant, constitutes newly discovered evidence within the meaning of C.P.L §440.10(1)(g)"); People v. Smith, 6 Misc. 2d at 602 (treating as newly discovered evidence information that had not been disclosed to defense investigator during his interview of the witness prior to the original trial because the witness feared the accused would harm her children).

(3) [redacted]' statement was not discoverable during the original trial proceedings, even with the exercise of due diligence. [redacted] was interviewed by an investigator for the defense before the trial. He explicitly told that investigator that he did not want to cooperate with the defense. See Bruno Affirmation, Exhibit A, at par. 9. During the trial, Mr. Bruno stated on the record that he had "no doubt whatsoever" that [redacted] did not want to cooperate with the defense (350). [redacted] was concerned that if he cooperated with the defense, [redacted] would turn on him and accuse him of being part of the assault. See Rivers Statement, Exhibit J, at par. 6.

(4) [redacted] testimony would have been highly material to the issue of what occurred on the cell block on February 8, 1998. [redacted] was uniquely positioned to corroborate or refute [redacted] testimony. [redacted] claimed that it was [redacted] who allegedly interrupted the attack, actually witnessed

the sodomy, was threatened, then followed [redacted] to his cell, before allegedly being confronted again by [redacted] and [redacted] and threatened in the corridor. [redacted] affirms that none of this is true. [redacted] also has independent knowledge that [redacted] believed he could get rich by fabricating charges that he had been sexually abused, information which further undercut the prosecution's argument that [redacted] had no motive to lie about his alleged ordeal.

(5) This evidence would not have been cumulative. Rather it would have provided an entirely different picture of the events about which [redacted] testified. It contradicted every aspect of [redacted]'s account, demonstrating that [redacted] was lying about his alleged ordeal.

(6) [redacted] statement was not merely impeaching. Rather, it was direct evidence of these events which demonstrated that [redacted]'s account was false. The information contained in [redacted] sworn affidavit also reveals an additional motive for [redacted] to fabricate his account of being sodomized, as [redacted] explicitly told [redacted] that they could both become rich if they claimed that [redacted] had been attacked.

Nor is there any question that the defense has pursued this motion to vacate with due diligence after locating [redacted] and discovering that he was willing for the first time to come forward with helpful information. [redacted] provided a sworn affidavit on April 18, 2001 (see Exhibit J) and this motion is being pursued within months of the defense's obtaining that statement.

In sum, there are numerous pieces of newly discovered evidence which standing alone and certainly cumulatively would change the outcome of this case. This evidence is not reflected in the record on appeal and its absence is not due to a lack of due diligence by the defense. Accordingly, summary denial of the motion to vacate the judgment pursuant to C.P.L. §440.10(1)(g) would be erroneous. See C.P.L. §§440.10(2)(b) and (3)(a). As such, [redacted]'s motion to vacate his Bronx

County first-degree sodomy conviction based on newly discovered evidence should be granted. In the alternative, a hearing should be held into these claims pursuant to C.P.L. §440.30(5).

POINT III

THE PROSECUTION'S KNOWING USE OF MATERIAL, FALSE TESTIMONY TO SECURE MR. [redacted]'S CONVICTION DENIED HIM DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE STATE CONSTITUTION AND WARRANTS VACATING THE JUDGMENT. C.P.L. §440.10 (1)(C), (H); U.S. CONST., AMEND. XIV; N.Y. CONST., ART. I, §6.

The sole evidence offered against [redacted] at trial was the uncorroborated testimony of the complainant [redacted]. Although the alleged attack took place on a crowded cell block, was allegedly witnessed by at least three inmates, and was supposedly promptly reported to at least three corrections officers, the prosecution did not call a single witness to corroborate [redacted] story. No medical evidence or D.N.A. evidence corroborated [redacted] allegations of being subjected to a brutal sodomy. The simple explanation for the prosecution's failure to offer any corroboration of [redacted] story is that none existed and that the prosecution's own investigation revealed that none of the corrections officers or the inmate witnesses would have supported [redacted]'s account. As even the most superficial prosecutorial inquiry would have demonstrated the falsity of [redacted] allegations, the use of [redacted]'s false testimony must be deemed "knowing." As such, [redacted]'s conviction does not comport with due process and must be vacated.

Criminal Procedure Law §440.10(1)(c) provides that a criminal judgment may be vacated if:

> (c) 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.

It has long been recognized that the "knowing" use of perjured testimony by the prosecution violates due process. See Pyle v. Kansas, 317 U.S. 213 (1942)(allegations that prosecution knowingly used false testimony to secure conviction sufficiently set forth a due process violation); Mooney v. Holohan, 294 U.S. 103, 112 (1935)(recognizing federal constitutional requirements for due process violated by the state's knowing use of perjured testimony); People v. Savvides, 1 N.Y.2d 554, 556(1956) (reversal due to prosecution's failure to correct witness's false testimony that he had not been promised any consideration for his testimony; use of false testimony, standing alone, warranted reversal regardless of quantum of proof, because trial could not be considered fair).

Moreover, the prosecution must be considered to have known what reasonable inquiry would reveal. See People v. Robertson, 12 N.Y.2d 355 (1963)(prosecution charged with knowledge of false testimony given by investigating detective because the giving of "carelessly false testimony is in its way as much of a fraud on the court as if it were deliberate"); United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997)(government charged with knowledge of falsity of certain records where its ignorance was due to its decision not to fully investigate their authenticity); People v. Attiya, 128 Misc.2d 452, 458 (Sup. Ct. Kings Co. 1985), reversed on other grounds, 126 A.D.2d 733 (2d Dept. 1987); accord People v. Velez, 118 A.D.2d 116, 119 (1st Dept. 1986)(due process violated by prosecution's use of evidence that it knew or "should have known" was false).

Here, from the outset of this trial, the prosecution sought to shield any meaningful probing of [redacted]'s story and knowingly permitted him to misrepresent the facts. Before the trial even began, the prosecutor sought to limit any inquiry of [redacted] concerning his history of mental illness and romantic involvements while in prison. When defense counsel argued that [redacted]'s involvement with [redacted]s was relevant because [redacted]s was [redacted]'s boyfriend and thus had a reason to corroborate

[redacted]'s account, the prosecution did not contest that [redacted] and [redacted]'s were romantically involved. Having failed to dispute the defense's factual allegation concerning the existence of a romantic relationship between [redacted] and [redacted], the People are deemed to have conceded the truthfulness of that allegation. See People v. Wright, 86 N.Y.2d 591, 595-596 (1995)(People deemed to have conceded complainant's status as a police informant where they did not dispute it).

But when [redacted]'s testified, he repeatedly and vehemently denied that he was in any way romantically linked to [redacted]. Even when confronted with medical records reflecting his concern for his "male companion" "[redacted]," [redacted] insisted that he had never been in any way interested in [redacted]'s romantically. That this aspect of [redacted]'s's testimony was false and should have been known by the prosecution to have been so, is plain. The medical records contained references to the romantic involvement of the two men. Inmates named on the prosecution's witness list, such as [redacted]re and [redacted]ed actually saw the two men having sex in [redacted]'s cell on the night of the alleged attack. See Exhibits L, M. Indeed, [redacted]d provided a sworn statement reflecting that he spoke with a member of the District Attorney's office. See Exhibit M. The note written by [redacted] to [redacted] reflected that [redacted] was "really in love with Bruce." See Exhibit K.

While the prosecution actively sought to prevent the jury from learning of the romantic relationship between the two men in the misguided belief that [redacted]'s homosexual relationships while in prison were not relevant, the existence of this relationship was indeed important to the jury's assessment of whether [redacted]s had any motivation to fabricate the allegations. [redacted]'s statement reflected that at least at the outset, it was [redacted]'s desire to get off the block to avoid further interference in his relationship with [redacted] that drove [redacted] to allege that he was raped.

The prosecution's apparent lack of concern with [redacted]'s lies about the nature of his

involvement with [redacted] does not comport with the law which mandates the prosecutor to correct any misrepresentation by a witness. "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." People v. Savvides, 1 N.Y.2d at 556. Here, rather than correct the lie, the prosecutor affirmatively sought to sustain it.

That [redacted] lied when he insisted that he had promptly reported the attack to numerous corrections officers was also plainly false and known by the prosecution to be so. The prosecution's proposed witness list cited Captain McMillan, Corrections Officer Rena Waxter, Corrections Officer Louis Almodovar and Corrections Officer Briggs as potential witnesses. All of these witnesses had prepared reports reflecting that Davis had never complained about being raped on the night of the incident. Unless the Bronx District Attorney's office failed to conduct any investigation into [redacted] allegations, that office knew that none of the corrections officer could corroborate [redacted] account and would in fact undercut it.

According to Waxter's sworn deposition testimony, [redacted] was not distraught on the night of the incident after being discovered in his cell with [redacted]. Rather, he was actually joking and happy, as he accompanied Waxter as she walked back to the security bubble. [redacted] insisted at trial that after he was let out of his cell, he was confronted and threatened by [redacted].

Similarly, the prosecution knew that [redacted] had been accused initially of being present during the attack. The prosecution disclosed reports reflecting [redacted] status as a perpetrator. [redacted] was apparently interviewed by someone in the district attorney's office. But when [redacted] consistently denied [redacted] involvement or presence in the cell, the prosecution objected to the introduction of the report demonstrating [redacted] status as a suspect.

The prosecution's argument that [redacted] had no financial motive to fabricate his allegations was also a knowing prosecutorial misleading of the jury. The prosecutor, having spoken to [redacted] civil attorney days before the trial began, knew that [redacted] was contemplating filing a civil lawsuit based on his imprisonment on Rikers Island and the alleged rape. Thus, the prosecution was not at liberty to represent that [redacted] had no financial motive to fabricate his allegations. See People v. Wallert, 98 A.D.2d 47, 51 (1st Dept. 1983)(prosecution's arguing that complainant had no motive to fabricate allegations although aware of her intention to file a civil lawsuit, served to deny defendant due process).

In sum, virtually every aspect of [redacted]'s account was false and even a limited prosecutorial inquiry would have revealed it to be so. But instead of correcting [redacted]'s misrepresentations, the prosecution actively sought to suppress the truth in this case and actively aided [redacted] in misleading the jury. Such knowing use of false testimony is virtually never excusable and constitutes a per se violation of a defendant's right to a fair trial. See People v. Savvides, 1 N.Y.2d at 555-556.

The appellate record is inadequate to demonstrate that [redacted]'s trial testimony was false and known to be so by the prosecution. Accordingly, this aspect of [redacted]'s motion to vacate cannot be summarily denied pursuant to C.P.L. §440.10(2)(b). Moreover, as set forth in Point I, supra, the defense was hindered in its efforts to reveal [redacted] false testimony by the prosecution's suppression of material exculpatory evidence. Any deficiency in the record is not the result of a failure to exercise due diligence, but the misconduct of the prosecution. Accordingly, denying this aspect of [redacted]'s motion would be improper. See C.P.L. §440.10(3)(a). [redacted] is entitled to a hearing into these claims. See C.P.L §440.30(5).

POINT IV

MR. [redacted]'S CONVICTION, BASED ENTIRELY UPON THE PERJURED TESTIMONY OF [redacted]VIS, DOES NOT COMPORT WITH DUE PROCESS REQUIREMENTS GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTION. U.S. CONST., AMEND. XIV; N.Y. CONST., ART. I, §6; C.P.L. §440.10(H).

"The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system." People v. Ramos, 201 A.D.2d 78, 90 (1st Dept. 1994)(reversing first-degree rape conviction due to Brady violations committed by the Bronx District Attorney's office). Accordingly a due process violation occurs "if a state allows an innocent person to remain incarcerated on the basis of lies." Sanders v. Sullivan, 863 F.2d 218, 224 (2d Cir. 1988). Even if the prosecution did not know of the perjury at the time the witness testified, once it is revealed that the witness's testimony is untrue, the conviction cannot stand. Id.; accord People v. Deblinger, 179 Misc.2d 35, 41 (Sup. Ct. Kings Co. 1998), aff'd, 267 A.D.2d 395 (2d Dept. 1999), lve denied, 94 N.Y.2d 946 (2000)(vacating rape conviction pursuant to C.P.L. §440.10(h) because complainant's testimony authenticating exhibit was, after trial, proven to be false, which called into question the reliability of her entire testimony and "a criminal conviction based upon such suspect evidence violates due process under the New York and United States Constitution," even though prosecution did not know about the testimony's falsity); People v. Figueroa, 167 A.D.2d 101, 104 (1st Dept. 1990)("a conviction which is obtained based on evidence which is known to be false impairs a defendant's due process rights requiring reversal of that conviction").

The facts and holding of People v. Deblinger, supra, are instructive here. In Deblinger, the

defendant was convicted of numerous sex offenses based primarily on the testimony of his infant daughter. 179 Misc.2d at 35. The prosecution introduced the child's report card to raise an inference that her decline in academic performance was a result of the sexual abuse. Id. at 39. Although the defense initially challenged the admission of the report card on authenticity grounds, it ultimately withdrew the objection during trial and the report card was omitted. Id. at p. 35. After trial, through the use of forensic document analysis, it was demonstrated that the report card was a forgery and the court found that the complainant's testimony authenticating it was false. Id. at p. 35, 39. The court also found that the prosecution did not know about the evidence's falsity during the trial. Id. at pp. 38-39.

Nonetheless, the court vacated the conviction pursuant to C.P.L. §440.10(1)(h) finding that the crux of the case was the complainant's credibility because she was the sole witness to the abuse; there was no physical corroboration of the abuse, and the complainant's outcry was delayed. Id. at p. 39. Under these circumstances, the Deblinger court found that in a "single eyewitness case, consisting almost entirely of the uncorroborated testimony of the complainant, a finding that the complainant testified falsely about one aspect of the case calls into question the reliability of her entire testimony." Id. at pp. 40-41.

In this case virtually every aspect of [redacted]'s account of the sodomy has been proven to be false.

1) [redacted] Testified Falsely About Not Having Any Problems With Anybody On The Cell Block (Particularly [redacted]) And Thus No Motive To Lie About The Attack

At trial, [redacted] testified that he was friendly with the entire cell block and had never had any problems with anybody on the block until February 8, 1998. Specifically, [redacted] denied bearing any grudge against [redacted] and explicitly testified that they were friends until the attack.

[redacted]'s testimony is demonstrably false. It is undercut by [redacted]son's statement reflecting that [redacted] was upset after being found in his cell with his lover and was angry about the other prisoners "getting involved in his business." See Exhibit E, Unusual Incident Report at p. 3; Exhibit Q, [redacted] Statement. That [redacted] was upset about other inmates interfering in his "business" prior to lodging his charges, was further demonstrated by the note he sent to [redacted], stating that he [[redacted]] was in love with "[redacted]" and blaming [redacted] for interfering with his relationship with [redacted]. See Exhibit K. Similarly, the latent letter to [redacted] recovered through forensic testing of the original note to [redacted], demonstrates [redacted]'s concern that other "[redacted]boys" were interfering with [redacted]'s and [redacted]'s "business." See Exhibit K. During his civil deposition [redacted] changed his previous testimony, and now claims that [redacted] was pressuring him to smuggle drugs into the cell block and had repeatedly threatened him before February 8, 1998. See Exhibit P, Davis I, at p. 68; Davis II, at pp. 14-15.

2) [redacted] Testified Falsely About the Nature of His Relationship with [redacted], A Material Fact In Light Of The Defense Position that These Allegations Were Made In Retaliation for the Defendants Interfering With that Relationship.

At trial [redacted] repeatedly insisted that he was never romantically interested in [redacted]rs.

[redacted]'s testimony is demonstrably false. In the note he wrote to [redacted], [redacted] admitted that he was "in love" with [redacted] and blamed Mr. [redacted] for interfering in their relationship. See Exhibit K. [redacted] and [redacted] romantic involvement was common knowledge to the inmates on the cell block as demonstrated by [redacted]'s and [redacted]'s affidavits. See Exhibits L and M. The existence of this relationship is further demonstrated by [redacted]son's statement reflecting that [redacted] was upset about "him and his partner being found together inside of a cell" See Exhibit E, and Exhibit Q. There was no dispute at trial that [redacted] was the person found in the cell with [redacted].

Under the facts of this case, where it was the defense theory that the allegations had been falsely made to retaliate for the defendants' interference in [redacted]'s relationship with [redacted], [redacted]'s lies about the nature of that relationship constituted a material misrepresentation.

3) [redacted] Testified Falsely About His Condition at the Time He Was Discovered in His Cell With [redacted] and The Timing Of His Outcry

At trial [redacted] claimed that when he was discovered in his cell with [redacted], he was crying hysterically and visibly distraught. He also claimed that he immediately reported the attack. Waxter's report prepared shortly after February 8, 1998, reflected that nothing unusual had happened during her meal relief tour that day. This aspect of [redacted]'s testimony is further refuted by Waxter's sworn deposition testimony which established that [redacted] "kind of made a joke" of being caught in his cell with a fellow inmate. Exhibit N at p. 23. Also, Waxter testified that [redacted] accompanied her as she walked away from his cell towards the security bubble. Shortly thereafter, she observed [redacted] chatting with another inmate in the pantry area at which time [redacted] accused her of being "nosy" and interfering with his "girl talk." Id. at p. 36. Waxter and [redacted] both laughed at this joke. Id. Of

course, according to [redacted]'s trial testimony, immediately after coming out of the cell he was confronted once again by [redacted] and [redacted] and engaged in an angry argument.

Similarly Corrections Officer Louis Almodovar's report and deposition testimony reflect that [redacted] never complained to him on the evening of the alleged attack, despite [redacted]'s assertions to the contrary. The report prepared by Corrections Officer Briggs also reflects the delay in [redacted]'s outcry as does the Unusual Incident Report. See Exhibit E. The investigators for the Department of Corrections concluded that "it is only after over twelve (12) hours after the alleged occurrence that inmate [redacted] notified any staff of his allegation, and it is highly unlikely that any staff member would have ignored inmate [redacted]'s allegation."See Exhibit E, at p. 4.

4) [redacted] Testified Falsely About Being Confronted by [redacted] and [redacted] After Being Discovered in His Cell With [redacted].

According to [redacted]'s trial testimony, immediately after he was discovered in his cell by the female meal relief corrections officer, he was again confronted and threatened by [redacted] and [redacted]. This aspect of [redacted]'s testimony is belied by the sworn deposition testimony of that corrections officer, Rena Waxter, who remembered that [redacted] accompanied her as she walked down the tier and who observed [redacted] engaging in "girl talk" with a fellow inmate in the pantry area after coming out of his cell. See Exhibit N, at p. 36. At his deposition [redacted] testified that the attack took place shortly after 7:00 p.m. [redacted]'s telephone records reflect that he was speaking on the telephone at 7:17 p.m.. The telephones are located near the security bubble, near the pantry area, a good distance from the place where [redacted] was allegedly confronting [redacted]. See Exhibit G. There is also a clinic log that exists that could potentially demonstrate that [redacted] was not on the cell block for a substantial amount of time between 7:00 p.m. and 8:00 p.m.

5) Davis Testified Falsely About Being the Victim of A Sexual Attack

At trial, not a single witness came forward to corroborate [redacted]'s account. The reason for this utter lack of corroborating evidence is simple. There was no attack. Virtually every single person on the cell block who was in a position to verify [redacted]'s claims, has provided statements refuting them. [redacted] has provided a sworn statement that J[redacted] lied about being attacked. [redacted] has provided a sworn statement that J[redacted] lied about being attacked. [redacted] has also provided such a statement. Sworn statements by Corrections Officers Rena Waxter and Louis Almodovar reflect th[redacted] lied about his condition when he was discovered in his cell wit[redacted] and the timing of his outcry. [redacted] has provided a sworn statement reflecting th[redacted] admitted he was going to "concoct a sex scandal" to gain a transfer off the block. Documentary evidence conclusively demonstrates th[redacted] lied when he denied any romantic interest in [redacted]. That same evidence demonstrates th[redacted] lied when he testified he bore no grudge against [redacted] before he made these allegations.

Thus, this conviction is based on nothing but lies. "It is simply intolerable" for New York state to allow [redacted] to remain incarcerated on the basis of such testimony. See Sanders v. Sullivan, 863 F.2d at 224. The failure of New York's courts to investigate these claims would violate the "fundamental fairness essential to the very concept of justice" which underlies the federal and state constitutional due process guarantees. Id. Under these circumstances, the summary denial of this claim would constitute an abuse of the court's discretion and would not further "the interest of justice". See C.P.L. §440.10(3); accord People v. Deblinger, supra. (although during trial defense withdrew its original objection to the authenticity of the forged report card, trial court conducted hearing into whether its introduction denied the defendant due process).

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, [redacted] DECEMBER 23, 1999, BRONX COUNTY CONVICTION SHOULD BE VACATED PURSUANT TO C.P.L. §440.10(1)(C)(F)(G)AND(H); IN THE ALTERNATIVE, A HEARING SHOULD BE CONDUCTED INTO THESE CLAIMS PURSUANT TO C.P.L. §440.30(5).

Respectfully Submitted,

ROBERT S. DEAN
Attorney for [redacted]

Claudia S. Trupp
Of Counsel
October 22, 2001