SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

[redacted]

Defendant-Appellant.

NOTICE OF MOTION

Ind. No. [redacted]

New York County

PLEASE TAKE NOTICE that upon the annexed affirmation of David J. Klem and the exhibits thereto and the prior proceedings had herein, the undersigned will move a Justice of this Court, at a term for motions thereof, to be held on Monday, August 25, 2003, at the Courthouse, 27 Madison Avenue, New York, New York 10010 at 10:00 a.m., or as soon thereafter as counsel can be heard, for a certificate granting appellant permission, pursuant to C.P.L. § 460.15, to appeal from an order of the Supreme Court, New York County, filed July 25, 2003, denying his motion to vacate judgment under C.P.L. § 440.10; and for such other and further relief as this Court deems just.

Dated: New York, New York
July 31, 2003

ROBERT S. DEAN
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Center for Appellate Litigation
74 Trinity Place
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(212) 577-2523

DAVID J. KLEM
Of Counsel
(212) 577-2523 (ext. 43)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

AFFIRMATION

Respondent, :

Ind. No. [redacted]

-against- :

New York County

[redacted], :

Defendant-Appellant. :

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

DAVID J. KLEM, an attorney duly admitted to practice before the courts of this State, hereby affirms under penalty of perjury, that the following statements are true, except those made upon information and belief, which he believes to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by the Appellate Division, First Department, on June 22, 2000, to represent defendant on appeal from a judgment rendered in this Court, on November 1, 1999, convicting him after a trial of possession of a controlled substance in the first and third degrees and sentencing him, as a first felony offender, to concurrent indeterminate prison terms of 15 years to life and 6 to 18 years, respectively. (The Appellate Division's Order of Assignment is attached hereto as Exhibit A.)

2. I make this affirmation in support of defendant's application, pursuant to C.P.L. §§ 450.15(1), 460.10(4), and 460.15, for permission to appeal from the trial

court's denial of defendant's C.P.L. § 440.10 motion. No prior application for a certificate granting leave to appeal has been made.

Procedural Posture

4. On July 10, 1997, appellant [redacted], and [redacted] were arrested and charged in a criminal court felony complaint with criminal possession of a controlled substance in the first and third degrees after a car in which they were driving was stopped for a traffic violation, searched, and found to contain a kilogram of cocaine in the trunk. They were subsequently jointly charged in New York County Indictment Number 5728/97 with those offenses.

5. On March 31, 1999, [redacted] after jumping bail, bench warranting, and getting re-arrested in Florida for conspiracy to commit murder, pleaded guilty to third-degree possession and was sentenced to one to three years' incarceration.

6. On November 1, 1999, defendant was tried, found guilty, and sentenced to 15 years' to life incarceration for first-degree and third-degree possession.

7. On February 2, 2000, [redacted] pleaded guilty to attempted third-degree possession and received a sentence of probation.

8. Only defendant appealed. On appeal he argued that the search of the vehicle was improper and that his right to be present at jury selection had been violated. On September 13, 2001, the First Department affirmed, over a dissent, his conviction.[1] [redacted]. After granting leave to appeal, on

1. This Court modified the conviction by vacating, as a matter of discretion and in the interest of justice, [redacted]'s conviction for criminal possession of a controlled substance in the third-degree.

November 19, 2002, the Court of Appeals affirmed, again over a dissent, his conviction. [redacted] never argued any conflict of interest issue on appeal.

9. On March 25, 2003, appellant filed a motion, pursuant to C.P.L. §§ 440.10(f), (h), alleging that his original trial attorney had labored under an actual conflict of interest that had an effect upon his representation o [redacted]. [A copy of the notice of motion, affirmation in support of motion, memorandum of law, and the annexed exhibits is attached hereto as Exhibit B.]

10. On June 13, 2003, the People submitted their response to that motion. [A copy of the affirmation in response, the annexed exhibits, and the response memorandum of law is attached hereto as Exhibit C.]

11. On July 3, 2003, appellant submitted a reply memorandum of law. [A copy of that reply memorandum of law is attached hereto as Exhibit D.]

12. In a written decision filed on July 25, 2003, the trial court (Bruce Allen, J.), denied the motion without holding a hearing. [A copy of the court's decision is attached hereto as Exhibit E.]

The Conflict of Interest Claim

13. At the July 11, 1997, criminal court arraignment, defendant (while represented by unconflicted and independent counsel), alone amongst the three codefendants, provided notice of his intention to testify in the grand jury. His case was adjourned for him to testify in the grand jury.

14. Within the next day or two, each of the three defendants retained the same attorney – Osvaldo Gonzalez, Esq. – to represent them. Upon his entry in the case, Mr. Gonzalez told [redacted] that he had worked out a plea arrangement with the prosecutor prior to the grand jury action. The global deal involved [redacted] pleading guilty to third-degree possession and receiving a sentence of two to six years' incarceration. Pursuant to that plea deal, the charges against [redacted] and [redacted] were to be dismissed.

15. According to the prosecutor's response affirmation, after working out that plea deal, "Gonzalez advised [redacted] that inasmuch as the plea agreement . . . was being worked out, he should not testify before the grand jury and [redacted] agreed." Exhibit C (Abrams' aff. at ¶ 13). Therefore, when [redacted] was produced on July 16, 1997, to testify before the grand jury, he followed his attorney's advice and withdrew his notice to testify. In a sworn affidavit, [redacted] maintained that he would have testified in the grand jury absent Gonzalez' assurances that the charges against him were going to be dismissed under the plea deal. Exhibit B (Mundo aff. at ¶ 7).

16. Thereafter, a grand jury returned an indictment against defendant, [redacted], and [redacted], charging them with acting-in-concert to possess a controlled substance in the first and third degrees; Lopez was also charged with reckless driving.

17. [redacted] then retained independent counsel, who advised him against accepting the global plea deal that [redacted] had negotiated whereby [redacted] would "take the fall" for all three defendants.

18. Although Gonzalez continued to represent appellant and Medina until September 29, 1997, he eventually asked to be relieved from representing defendant after finally recognizing the conflict of interest.

19. At no point prior to that date did Gonzalez discuss the conflict of interest with [redacted]. No court ever explored the conflict with [redacted] or asked him to waive that conflict. In fact, neither Gonzalez nor anyone else had ever explained to [redacted] the consequences and risks of Gonzalez' joint representation of the three codefendants.

20. In his moving papers, defendant alleged that Mr. Gonzalez labored under an actual conflict of interest when he jointly represented [redacted] and his two co-defendants in plea negotiations where his clients' interests dramatically diverged. That conflict acted upon his representation of [redacted] when, on the basis of the alleged global plea, Mr. Gonzalez advised [redacted] to waive his right to testify before the grand jury. See Exhibit B (memorandum of law); Exhibit D (reply memorandum of law).

The Trial Court's Decision

21. The trial court ruled that "'[t]o prevail on an ineffective assistance of counsel claim, [first] a defendant must first demonstrate the existence of a potential conflict of interest [and] [t]hen the defendant must show that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation.'" Exhibit C, at 3 (quoting People v. Harris, 99 N.Y.2d 202 (2002)) (other internal quotations and citations omitted).

22. As for the first part of that test, the trial court acknowledged that "[t]he People do not dispute that Mr. Gonzalez's representation of all three defendants constituted a potential conflict of interest." Exhibit C, at 3. The trial court did not rule on defendant's claim that the potential conflict of interest blossomed into an actual conflict of interest due to his clients' divergent interests when Gonzalez attempted to negotiate a plea whereby one of his clients would "take the fall" for his other two clients.

23. The trial court did not rule on whether that conflict operated upon the representation. Acknowledging that the conflict led to Mr. Gonzalez' advice to Mr. [redacted] not to testify in the grand jury, the trial court noted that there are other "tactical reasons why an attorney might advise a defendant not to testify before a grand jury." Exhibit C, at 4. "As set out in the People's affirmation," the Court wrote, "Mr. Gonzalez cited several reasons why he would have advised the defendant in this case not to testify even if the defendant had been his only client." Exhibit C, at 4. Concluding that "[t]hus it is questionable whether there was an actual conflict which operated on the conduct of the defense," the court made no concrete ruling. Exhibit C, at 4.

24. The basis of the trial court's ruling appears not to rest on the two part test that the court detailed, but rather on some sort of alleged procedural default. According to the trial court, defendant was obligated to raise this issue at some "earlier stage" and not "after an unfavorable verdict at trial and denial of his appeal." Exhibit C, at 4. The trial court also concluded that, despite defendant's arguments to the contrary, the claim was governed, not by the standard that the trial court had earlier detailed in its decision, but by the Court of Appeals' decision in People v. Wiggins, 89 N.Y.2d 872 (1996).

Discussion

25. Appellant now seeks permission to appeal from the order denying his motion to vacate the judgment. Contrary to the lower court's ruling, the governing standard is the one initially set forth by the trial court and not the standard set forth in Wiggins. Also, contrary to the trial court, no procedural bar exists to the bringing of such a claim. In any event, all of those issues are important ones that are worthy of this Court's review.

26. The right to effective assistance of counsel "encompasses the right to conflict-free counsel." People v. Ortiz, 76 N.Y.2d 652, 656 (1990), citing People v. McDonald, 68 N.Y.2d 1 (1986). The standard by which conflict cases are evaluated is the two-prong test set forth by the United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), and by the Court of Appeals in People v. Abar, 99 N.Y.2d 406 (2003); People v. Harris, 99 N.Y.2d 202 (2002); People v. Ortiz, 76 N.Y.2d 652, 657 (1990); People v. Alicea, 61 N.Y.2d 23, 31 (1983), among other cases. Those cases require that a defendant establish the existence of a conflict of interest and that the conflict "operated on" the representation. The "operation on" prong is not a prejudice showing (as the People below argued). The United States Supreme Court has clearly stated that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cyler v. Sullivan, 446 U.S. at 349-50. New York's Court of Appeals has agreed with that: "the requirement that a potential conflict have affected or operated on, or borne a substantial relation to the conduct of the defense – three formulations of the same

principle – is not a requirement that defendant show specific prejudice." People v. Ortiz, 76 N.Y.2d at 656 (emphasis added), citing People v. Alicea, 61 N.Y.2d at 30.

27. The trial court was indisputably correct in accepting the People's concession that a conflict of interest existed. Exhibit E, at 3. The People admitted that Gonzalez had worked out a plea agreement wherein the confession of one defendant would result in the dropping of charges against the other two co-defendants. The interests of Mr. Lopez were obviously different from those of [redacted]o and [redacted]na. While, "a possible conflict of interest inheres in almost every instance of multiple representations," where the multiple representation involves defendants with differing and mutually antagonistic defenses, an actual conflict exists. Cuyler v. Sullivan, 446 U.S. at 348; see also Wheat v. United States, 486 U.S. 153, 159 (1988) ("multiple representation of criminal defendants engenders special dangers"), Holloway v. Arkansas, 435 U.S. 475, 489 (1978) ("Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."); see generally People v. Gonzalez, 30 N.Y.2d 28, 34 (1972) (holding that a conflict exists in joint representation when individual defenses "run afoul of each other"). Here, where one defendant was admitting his guilt to the possession of the drugs and exonerating his colleagues, an actual conflict existed. See United States v. Blount, 291 F.3d 201, 211 (2d Cir. 2002) ("An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action.").

28. The trial court erred in not then reaching the second-prong of the conflict test: whether or not the conflict operated upon the representation. Exhibit C, at 4

(finding it "questionable" whether the conflict "operated on the conduct of the defense" but not resolving issue). In fact, the evidence is undisputed that the conflict did operate on the representation. According to the affirmation the prosecutor submitted below, "Gonzalez advised [redacted] that inasmuch as the plea agreement as outlined above was being worked out, he should not testify before the grand jury, and [redacted] agreed." Exhibit C (Abrams' aff. at ¶ 13; see also id. at ¶¶ 10, 12). The trial court's reference to "several reasons why [Gonzalez] would have advised the defendant in this case not to testify even if the defendant had been his only client," Exhibit E, at 4, is unavailing. What counsel might have or even "would have" done in the absence of the conflict does not change what counsel did in fact do because of the conflict. The trial court was wrong to focus solely on the ultimate advice counsel "would have" given (i.e. not to testify before the grand jury) instead of on what counsel in fact told defendant and how defendant reacted to that advice. Defendant's uncontradicted affidavit specifically stated that but for that advice and the concurrent promise by counsel that all the charges against defendant were going to be dismissed, [redacted] "would have testified in the grand jury." Exhibit B (Mundo aff'd, at ¶ 7). The trial court was not free to ignore that sworn allegation or reach a contrary conclusion without holding a hearing.

29. The trial court erred in concluding that the decision in People v. Wiggins, 89 N.Y.2d 872 (1996), is instructive, much less controlling. Wiggins and its progeny involve non-conflict deficient performance of counsel claims. The standard for such claims is markedly different. In contrast to conflict of counsel claims, those types of claims require a defendant to establish harm and prejudice from the deficient performance. See People v. Wiggins, 89 N.Y.2d at 873; see generally Strickland v.

Washington, 466 U.S. 668, 694 (1984); People v. Baldi, 54 N.Y.2d 137, 147 (1981). The trial court confused two completely different types of ineffective assistance of counsel cases and found Wiggins, with its attendant prejudice standard, to govern this claim, despite the United States Supreme Court's holding that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cyler v. Sullivan, 446 U.S. at 349-50; see also People v. Ortiz, 76 N.Y.2d at 656 ("the requirement that a potential conflict have affected or operated on, or borne a substantial relation to the conduct of the defense – three formulations of the same principle – is not a requirement that defendant show specific prejudice") (internal citations omitted). Defendant's claim was never that his "claim of ineffective assistance should not be governed by normal standards," Exhibit E, at 5, but was rather that the claim should be governed by the standards for conflict cases not for non-conflict deficient performance cases.

30. Lastly, the supposed procedural bar tentatively invoked by the trial court does not in fact exist. Notably, although the People cited a bevy of procedural bars in their response brief, see Exhibit C (memorandum of law, at 5-6), none of the cases or the statutory section they cited is applicable, see Exhibit D, at 9-11. Instead, the trial court relied upon a statutory section and a case that was never argued by the People. See Exhibit E, at 4-5 (citing to C.P.L. § 440.10(3)(a) and People v. Ramos, 26 N.Y.2d 272 (1970)). There was a reason the People refused to rely on that supposed procedural bar – by its very language, it does not apply. See C.P.L. § 440.10(3)(a) ("This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such

right"). In any event, the bar is discretionary, and not mandatory and should not be used by the trial court in the absence of such a request by the People and the opportunity to respond by the defense. Similarly, People v. Ramos, a case dealing with the supposed failure of the defendant to understand English, offers no support for the court's apparent invocation of a procedural bar that on its face does not apply to "right to counsel" claims.

31. This Court should grant leave to consider the issue of what standard applies to this type of claim – the Strickland/ Baldi standard as applied in People v. Wiggins or the standard set forth in Cuyler v. Sullivan, People v. Abar, and People v. Harris. Also, this Court should grant leave to consider what, if any, procedural hurdles exist to the bringing of this claim and if such a procedural hurdle exists (which defendant disputes) whether such a discretionary, non-mandatory, bar should have been invoked. For those reasons, and for all the other reasons set forth in the briefs submitted to the trial court, see Exhibit B (memorandum of law); Exhibit D (reply memorandum of law), appellant asks this Court to grant leave to appeal the denied of his C.P.L. § 440.10 motion.

32. If leave to appeal is granted, it is requested that appellant be granted permission to appeal as a poor person and that Robert S. Dean be assigned as counsel. Appellant is incarcerated and there is no reason to believe that his financial circumstances have changed since this Court granted poor person relief on the direct appeal.

WHEREFORE, appellant respectfully requests this Court to: (i) issue a certificate granting him leave to appeal the denial of his C.P.L. § 440.10 motion; (ii) grant him leave

to appeal as a poor person on the original papers and appoint Robert S. Dean as counsel; (iii) grant such other and further relief as this Court deems just and proper.

Dated : New York, New York
July 31, 2003

DAVID J. KLEM, Esq.

Exhibit "F"

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

[redacted]S,

Defendant-Appellant.

NOTICE OF APPEAL
N.Y. Co. Ind. No.
[redacted]

PLEASE TAKE NOTICE, that the above-named defendant-appellant hereby appeals to the Appellate Division: First Department, from the Order of the Supreme Court, New York County, entered on or about April 28, 2003, denying appellant's motion to vacate his judgement pursuant to CPL §440.10.

Dated: New York, New York
July 23, 2003

ROBERT S. DEAN
Attorney for Defendant-Appellant
74 Trinity Place - 11th Floor
New York, New York 10006

By_____

TO: District Attorney
New York County
One Hogan Place
New York, New York 10013

Exhibit "G"

----------X

The People of the State of New York,
Respondent,

-against-

[redacted],
Defendant-Appellant.

----------X

M-2734
Ind. No. 8604/98

CERTIFICATE
GRANTING LEAVE

I, Eugene L. Nardelli, a Justice of the Appellate Division, First Judicial Department, do hereby certify that in the proceedings herein questions of law or fact are involved which ought to be reviewed by the Appellate Division, First Judicial Department, and, pursuant to Section 460.15 of the Criminal Procedure Law, permission is hereby granted to the above-named defendant to appeal to the Appellate Division, First Judicial Department, from the order of the Supreme Court, New York County, entered on or about April 28, 2003.[1]

Dated: New York, New York

ENTERED JUL 10 2003

Hon. Eugene L. Nardelli
Associate Justice

NOTICE: Within 15 days from the date hereon, an appeal must be taken, and this certificate must be filed with the notice of appeal. An appeal is taken by filing, in the Clerk's office of the criminal court in which the order sought to be appealed was rendered, a written notice in duplicate that appellant appeals to the Appellate Division, First Judicial Department (Section 460.10, subd. 4, CPL), together with proof that another copy of the notice of appeal has been served upon opposing counsel. The appeal (or consolidated appeals; see footnote) must be argued within 120 days from the date of the notice of appeal, unless the time to perfect the appeal(s) is enlarged by the court or a justice thereof.

[1]In the event defendant has an existing (direct) appeal from a judgment, such appeal shall be consolidated with the appeal from the aforesaid order; and any poor person relief granted with respect to the appeal from the judgment shall be extended to cover the appeals so consolidated.