SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY MARSHALL
and FRANCIS MORRISSEY,

Defendants.

NOTICE OF MOTION TO VACATE JUDGMENT

Indictment No. 6044/2007

PLEASE TAKE NOTICE that, upon the annexed affirmation John R. Cuti, affirmed February 18, 2010, and upon the affirmations of Thomas P. Puccio, affirmed February 18, 2010 and Dominick Cromartie, affirmed February 17, 2010) and the affidavit of Margaret Clemons (sworn to February 17, 2010), all three of which are incorporated herein, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court on March 4, 2010, at 10 a.m. or as soon thereafter as counsel may be heard, at the Courthouse, located at 100 Centre Street, New York, New York, at a Criminal Term Part 94 thereof, for an order, pursuant to CPL § 440.10(1)(f) and (h), vacating the Judgments of Conviction against both defendants entered on December 21, 2009, ordering a new trial for each defendant and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 22, 2010

Respectfully submitted,

WARNER PARTNERS, P.C
Attorneys for Defendant Marshall

By: _____
Kenneth E. Warner

950 Third Avenue
New York, New York 10022
Tel. (212) 593-8000

DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant Marshall

By: _____
John R. Cuti

1633 Broadway
New York, New York 10019
Tel. (212) 489-8230

To: Office of the District Attorney
Attention: Elizabeth Loewy, Esq.

Thomas Puccio, Esq.
Counsel for Defendant Morrissey

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

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PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY MARSHALL
and FRANCIS MORRISSEY,

Defendants.

----------X

AFFIRMATION IN SUPPORT OF MOTION TO VACATE JUDGMENTS

Indictment No. 6044/2007

JOHN R. CUTI, an attorney duly admitted to practice law in the courts of this State, hereby affirms the following statements to be true, under the penalties of perjury:

1. I am a partner at Davis Wright Tremaine LLP and, together with Kenneth E. Warner, Esq. of Warner Partners, P.C., represent Anthony Marshall in this matter. I submit this affirmation in support of the motion of Mr. Marshall, and of co-defendant Francis Morrissey, pursuant to CPL § 440.10 to vacate the judgments entered against them in this Court on December 21, 2009 convicting them of various felony counts and one misdemeanor and sentencing them thereon.

2. I was present on December 30, 2009 when Ms. DeMarco met with me, Mr. Cromartie and Mr. Puccio; I have reviewed Mr. Cromartie's affirmation (affirmed on February 17, 2010) ("Cromartie Affirmation"), and it accurately describes what Ms. DeMarco told us.

3. Mr. Marshall joins in Mr. Morrissey's motion to vacate the judgments of conviction, for all the reasons stated in the Cromartie Affirmation and in the affirmation of Thomas P. Puccio, affirmed on February 18, 2010 and the affidavit of Margaret Clemons,

sworn to on February 17, 2010, all of which hereby are incorporated herein by this reference. *See* Exhibit A.

WHEREFORE, the Court should grant the motion of Mr. Marshall and of Mr. Morrissey and vacate the judgments or order such other relief as the Court deems just and proper.

John R. Cuti

Affirmed this 18th day of
February 2010.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

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PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY MARSHALL
and FRANCIS MORRISSEY,

Defendants.

----------X

AFFIRMATION OF DOMINICK CROMARTIE

Indictment No. 6044/2007

DOMINICK CROMARTIE, an attorney duly admitted to practice in the State of New York, hereby affirms under the penalty of perjury that the following facts are true:

1. I am an attorney associated with Davis & Gilbert, LLP, a firm engaged by Thomas P. Puccio to assist in his defense of Francis Morrissey, a defendant herein. On December 30, 2009, I met with Judith DeMarco, who was a juror in this case. We met in Mr. Puccio's office; Mr. Puccio was present, as was John R. Cuti, an attorney for Anthony Marshall, also a defendant herein. During this meeting, Ms. DeMarco described her experience during jury deliberations, with particular focus on an intimidating encounter she had with a fellow juror, Yvonne Fernandez. Ms. Demarco told us that she felt deeply ashamed at having "caved in" to the pressure and intimidation and voting to convict the defendants (even though she honestly felt that they should not have been convicted).

2. At the outset of this meeting, the lawyers told Ms. DeMarco that we were going to interview her in detail so that we could draft an affidavit for her to sign. Ms. DeMarco told us that while she was concerned about the publicity that might arise from

her executing such an affidavit, she wanted to do what was right. She told us that she would sign an affidavit because she felt strongly that the defendants had been denied the right to have a fair and impartial jury decide their fate.

3. I have been informed that, subsequent to our meeting, Ms. DeMarco has conveyed to Mr. Puccio that she is no longer willing to sign an affidavit for fear that any resulting publicity would seriously disrupt her life. Therefore, I submit this affirmation to provide the Court with Ms. Demarco's detailed account of her experience in the jury room, including that she felt threatened and genuinely feared for her physical safety as a result of Yvonne Fernandez's menacing behavior, why she caused a note to be sent to the Court requesting her discharge, and how demoralized she was by the Court's refusal to address her complaint specifically or to address in any way at all her request to be discharged.

4. Ms. DeMarco explained that on Monday, October 5, the beginning of the third week of deliberations, the jury was discussing the count charging Mr. Marshall with stealing funds from Mrs. Astor by taking a particular salary increase. Ms. DeMarco had been focusing on the power of attorney that Mr. Marshall had. At one point, Yvonne Fernandez, who was juror number 10, said that she wanted a note to be sent to the judge that Ms. DeMarco was ignoring the Court's instructions regarding the power of attorney. When Ms. DeMarco asked Yvonne what she was talking about, she pointed out some language in the power of attorney that she accused Ms. DeMarco of ignoring. Ms. DeMarco corrected her, told her that her comments took that language into consideration and that she certainly wasn't ignoring it. Another juror, Larry Kagan, in response to Ms. DeMarco asking him said he agreed that she was not ignoring the language Yvonne was

pointing to.

5. At this point, Yvonne, a woman whom Ms. DeMarco described as somewhat larger than she is, smacked her hands on the table in the jury room. She stood up angrily and began gesturing with both of her hands at Ms. DeMarco – holding her arms out in front of her, with the thumb and two or three other fingers of each hand extended, and one or two of the other fingers of each hand tucked underneath toward the palm. As she made this gesture, she took very deliberate strides toward Ms. DeMarco, exuding hostility and screaming things at Ms. DeMarco like "That's fucking bullshit – this is bullshit. You are so full of shit. I know gang members less full of shit."

6. As Ms. Fernandez was screaming she continued to move aggressively toward Ms. DeMarco. Ms. DeMarco said that she was afraid Fernandez was going to attack her. Ms. DeMarco interpreted her screaming, gesturing and hostile approach to be a threat to hurt her, and she reported that she certainly felt threatened and afraid at the time. Ms. DeMarco explained that she thought the hand gestures that Fernandez had made had some sort of gang significance. (Earlier during the trial, Fernandez had told Ms. DeMarco that she had dated a member of the Latin Kings, relating a story about how she had once been abducted or was afraid she was going to be kidnapped and as a result had moved to Puerto Rico for a time.)

7. Ms. DeMarco remained seated as Fernandez, her pace increasing, kept moving toward her. At that point another juror, Phillip Bump (juror number 3), jumped up and grabbed Fernandez and dragged her into one of the bathrooms in the jury room.

8. Soon after this happened, Ms. DeMarco recalled that the jury was told to return to the courtroom because testimony it had requested earlier was ready to be read

back. Ms. DeMarco said she was distraught, intimidated, and crying. She said that because it was almost impossible for her to concentrate given how upset she was, she did not recall the testimony being read back, other than she thought it was from Terry Christensen.

9. Ms. DeMarco explained that, either before the jury went into the courtroom for this readback or just after it returned to the jury room, she pulled the foreperson – Kristina Jezycki – aside and spoke to her in one of the bathrooms. Ms. DeMarco told the foreperson that she was so shaken by Fernandez's hostile threats and outburst that she could no longer in good conscience remain on the jury; Ms. DeMarco told the foreperson that she needed her to send a note to the judge telling him that she was so afraid for her personal safety that she wanted to be dismissed from the jury.

10. The foreperson agreed to send a note to the Court and Ms. DeMarco believes that she gave it to the court officer sometime during the lunch break. Other than the foreperson and herself, Ms. DeMarco does not believe that any of the other jurors knew that this note was being sent.

11. For the next several hours Ms. DeMarco told us she waited in the jury room, not feeling able to participate in deliberations. She stated that she desperately wanted to be dismissed from having to continue serving as a juror.

12. Ms. DeMarco then stated that, at about 4 pm on that day, the jury was called into the courtroom. Ms. DeMarco told us that she had hoped and expected that the judge would address her concerns and dismiss her from jury duty, and that she had wanted that to be done privately, perhaps in the judge's office where jurors on earlier occasions had been questioned individually.

13. Ms. DeMarco described her profound distress at what happened next. She said that when the judge spoke to the jury, she remembered that he had told them that they had been at this a long time, that emotions can run high, but that he knew in his heart that there wasn't really a problem and that the jurors all should be civil to one another and do what we could to reach a verdict. Ms. DeMarco said that these remarks demoralized her because she hadn't complained about a lack of civility but instead had asked to be dismissed because she was too afraid to continue deliberating. Ms. DeMarco said that as the reality began to sink in that the judge was not going to deal with her concerns for her physical safety, she felt she had nowhere to turn for help. She said she began crying out of a feeling of helplessness and vulnerability.

14. When the jury returned to the jury room, Ms. DeMarco immediately told the foreperson that she couldn't deliberate that day and a note was sent to the Court saying that the jury wanted to cease deliberating and go home. Within a few minutes, Ms. DeMarco recalls that the jury was called in again and told to go home.

15. Ms. DeMarco informed us that the remainder of her time on the jury was extremely stressful. She said that she felt tired, resigned and totally alone. She told us that she no longer felt that she could deliberate honestly, that is, to continue to put forward her genuine, conscientiously held views. Ms. DeMarco told us that, at some point – she thinks it was on Tuesday, October 6th – she told Barbara Tomanelli, juror number 7, that she was going to just give up and change her votes to guilty. Ms. DeMarco recounted that Ms. Tomanelli responded by telling her something like, "I understand how you feel, Judi. Don't worry, they can afford an appeal."

16. Ms. DeMarco informed us that she believes it was on the next day, Wednesday, when she told the rest of the jurors that she was changing her votes to guilty.

17. Ms. DeMarco recalls that the verdicts were not announced until Thursday afternoon – even though the final decision had been made once she capitulated on Wednesday – because the foreperson was nervous about standing up and announcing the verdicts in such a high profile case. She said that members of the jury had all agreed to postpone announcement of the verdict, and that many of them dressed up for the occasion.

18. At the time the verdicts were returned, Ms. DeMarco told us that she remembered the clerk asking each of the jurors in court if the verdicts read by the foreperson were their verdicts, and that when it was her turn she said "yes," even though that was not truly the case for her.

19. Ms. DeMarco reiterated that she felt horrible at having acquiesced in guilty verdicts she did not honestly believe were justified. She stressed that she wished she had had the fortitude to stand by her conscientiously held beliefs but that the fear and intimidation she felt were too much for her to bear, particularly after he request for the Court's assistance was ignored.

20. Ms. DeMarco also discussed email messages that members of the jury had sent to one another after the verdict. She said that several members of the jury seemed bent on minimizing the seriousness of Fernandez's outburst and Ms. DeMarco's reaction to it. Ms. DeMarco emphasized that the attempt by members of the jury to characterize the altercation as a minor flare up that was quickly and amicably resolved was not honest; she was adamant that she never "made up" with Fernandez and never got over the fear

she felt. In the end, Ms. Demarco said, she changed her votes to guilty only out of fear and exhaustion, and not because she truly believed that the prosecution had proven that the defendants were guilty.

Dominick Cromartie

Affirmed this 17 day of
February 2010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

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PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY MARSHALL
and FRANCIS MORRISSEY,

Defendants.

----------X

AFFIDAVIT OF MARGARET CLEMONS

Indictment No. 6044/2007

MARGARET CLEMONS, being duly sworn, hereby swears under the penalty of perjury that the following facts are true:

1. I am a licensed private investigator and have been so licensed since the early 80's. Over the course of my career I have interviewed hundreds of jurors involving claims of juror misconduct.

2. In or around October 2009, Thomas Puccio, counsel for Francis Morrissey, retained me to interview the members of the jury in this criminal case. As part of that assignment, I interviewed Judi DeMarco, who was a member of the jury.

3. I first spoke with Ms. DeMarco, by telephone, on December 21, 2009. In response to her questions about who I was and why I was calling, I told her I was an investigator retained by Mr. Puccio and that I had spoken to a few of the other jurors and wanted to speak to her about the verdicts in this case. Ms. DeMarco spoke with me voluntarily; indeed, she told me she had been waiting for a representative of the defendants to contact her.

4. Ms. DeMarco provided me with her contact information, and also provided me with a document containing the text of email messages sent between and among many

of the jurors in this case (including Ms. DeMarco). She shared all of this information with me because, she stated, she wanted to be sure that Mr. Morrissey's counsel could make use of it to overturn the convictions; and she also specifically requested that counsel for Mr. Marshall be made aware the information she was providing. As she said to me when we first spoke, "... if there's a chance of me helping to overturn, I will help you in any way I can. I ... would never lie, but if there's anything I can ever do to make the appeal successful, I will."

5. In addition to my initial telephone call with Ms. DeMarco, I met with her in person on December 23, 2009, in the presence of Mr. Puccio. This affidavit is based upon all of my communications with Ms. DeMarco.

6. In my initial phone call with her, Ms. DeMarco explained that she had been emotionally devastated by the events that culminated with her "caving" in and acquiescing in guilty verdicts she did not think were justified. She explained to me that, on "the night of the decision . . . I was still in shock; afterward I laid in the fetal position for literally two or three days, and then I went to a shrink because I was so traumatized."

7. Ms. DeMarco was traumatized because she "didn't want to find any of them [guilty] the way I did." She also volunteered to me that she "caved" and changed her vote to guilty only because she had been intimidated, felt threatened, and felt that the court was not doing anything to protect her. She told me that she is "just ashamed of how it went down. At the end I'm ashamed I couldn't stand my ground. But I couldn't take it any longer. I couldn't take it."

8. She went on to inform me that "none of the jurors were willing to give either of these defendants a shot in that jury room. I held out as long as I could, and when

I finally felt threatened I had to do what I had to do [and capitulate] because I couldn't take it. . . . I'm not proud of it. I'm not proud of what I did."

9. In our conversation, Ms. DeMarco described one example of what she described as the jury's emotion-driven, unprincipled desire to find the defendants guilty. In describing the jury's decision to return a guilty verdict on the count charging Mr. Morrissey with forgery, Ms. DeMarco stated: "I will tell you this: none of them liked either of the defendants. The way I feel, I can tell you just what happened with Frank and we can talk about [the case when we meet]." When I asked Ms. DeMarco what she meant, she explained to me that "*no one thought it was a forged signature*." When I asked how the jury nonetheless came to vote to convict Mr. Morrissey of forgery, Ms. DeMarco explained that her fellow jurors

> really read into the law ... they over read [it] ... [My focus on the law] made me very unpopular with them because [I kept saying] this is [...] forged signature [charge]. But they... and the way they talked about it was... because [the Third Codicil] wasn't stapled ... the [witnesses] didn't see Mrs. Astor's signature; [so, the jury] thought it was a forged document. . . . They weren't calling it a forged signature; they were calling it a forged document. ... [But n]o one thought it was a forged signature.

10. Ms. DeMarco continued, explaining to me that:

> the truth of the matter is people did not think ... they agreed that ... no one thought that signature was forged .... They were going on the theory that .. . . something like ... the witnesses did not see the signature to verify [...] signing something else, so so so ... The jury believed it was a forged *document* [even though they didn't believe the signature of Mrs. Astor was forged because] 'the witnesses didn't know what they were signing.'

11. Ms. DeMarco told me about an incident in the jury room involving another juror, Yvonne Fernandez, which had caused her to request that she be dismissed from the jury. In explaining the dynamics in the jury room that had led to this menacing incident,

Ms. DeMarco told me that she "had to say the other jurors and I told them that you're bringing emotion into this and I don't think we should be emotional, let's look at the facts. And that was met with hostility." As explained in greater detail below, Ms. DeMarco informed me that Fernandez had "explode[ed]" at her, causing her to fear for her safety and request to be excused from further jury service:

> I was very upset, I was ... I couldn't take any more. I did not want to be on the jury any more because I thought 'my god, this is my friend who's exploding like this and going crazy on me.' And I will show you physically when I see you how she reacted, and no one stuck up for me. And I took the forewoman aside and said I want to ask the judge anonymously to be removed. I don't feel safe. I feel like I've just been threatened, and I want to be excused from this jury. I would like to be removed. I asked for anonymity. I didn't get it. The press brought my name out. My mother in Las Vegas [...]. I was faithful to my vow as a juror and didn't read the papers. My mother called me in Vegas to ask me if I was okay, because she read about it. ... I don't feel like the court protected me at all.

12. During our initial conversation, Ms. DeMarco emphasized that "I felt physically threatened. She got out of her seat. She started coming at me. Philip [Bump] held her back. He took her into the ladies room."

13. When I met with Ms. DeMarco in person she demonstrated for me in greater detail the nature of the incident involving Ms. Fernandez, including the threatening hand gestures that Fernandez made as she was screaming at Ms. DeMarco and advancing menacingly toward her. Ms. DeMarco explained to me that she interpreted these hand gestures as a gang-related threat because, earlier in the trial, Fernandez had told her about her involvement with a member of the Latin Kings gang. (I am informed that, after my initial phone interview and follow-up meeting with Ms. DeMarco, she met separately with counsel for both Mr. Marshall and Mr. Morrissey in order to provide details for use in an

affidavit from her. I respectfully refer the Court to the affirmation of Dominick Cromartie for a detailed description of Ms. DeMarco's account. I have reviewed that affirmation and its contents are consistent with the facts related to me by Ms. DeMarco when I met with her.)

14. In our initial discussion, Ms. DeMarco emphasized that she had insisted that a note be sent to the trial judge because she wanted the trial judge to address her complaint and either dismiss her from the jury or take some other step that addressed her fear and intimidation. Ms. DeMarco told me that she was deeply disappointed in the court's actions:

> [T]he judge wasn't going to protect me ... the judge never even asked me what happened, the judge never even asked what juror is it [who sent the note] .... [T]he judge never did shit and [...] he didn't do shit.

15. In short, Ms. DeMarco repeatedly told me that she was distraught at the potential consequences of her failure to adhere to her honestly held views of the case. As she told me, "I don't want to see anyone innocent go away, but I had to do what I had to do" after the court failed to address her request for help.

16. Prior to speaking with Ms. DeMarco, I had been made aware of a note having been sent by a juror during the third week of deliberations that stated that a juror had felt threatened, feared for her personal safety, and wanted to be dismissed from jury service. I told Ms. DeMarco that I had spoken to two other members of the jury who had played down the seriousness of the altercation in the jury room that apparently had prompted the note.

17. Ms. DeMarco informed me that, after she had capitulated and agreed to change her vote to guilty, other members of the jury suggested that all the jurors agree to

characterize the altercation in the jury room that led to Ms. DeMarco's note as a temporary flare up that quickly resolved itself amicably. As Ms. DeMarco put it "the day before we came to our verdict ... the day before we actually gave it [in court] . . . [other jurors] came up with the excuse ... and lines to feed the press that 'tensions escalated but you know blahblahblah' ... they came up with it."

18. Ms. DeMarco informed me that, after the verdicts were announced, many of the jurors, including Ms. DeMarco, exchanged email. Ms. DeMarco told me that many of these email messages reveal that members of the jury were concerned that Fernandez's violent outburst and Ms. DeMarco's note to the Court about it would give the defendants valid grounds for reversal. A few jurors expressed a desire to coordinate their efforts to make any appeal unsuccessful, Ms. DeMarco said, and the email messages also show a coordinated effort to paper over what had happened on the day Fernandez had threatened her.

19. Attached as Exhibit A is a document containing the text of email messages sent between and among several of the jurors. Ms. DeMarco supplied this document to me. I have not made any alteration to this document; it is in exactly the condition it was in when she provided it to me. Among other statements, the following excerpts from the email confirm Ms. DeMarco's interpretation of these post-verdict events.

20. Ms. DeMarco explained that several jurors had been emailing about making a joint appearance on the "20/20" network television news program. Ms. DeMarco sent an email saying that she did not want to participate. Philip Bump replied to Ms. DeMarco, stating: "I think that, even if you don't speak, it's important for you to be with us on 20/20. The press is going to be looking for any sign of division amongst us,

and I think that having all 12 of us standing together makes an important statement." Ex. A at 1.

20. On the same day, Philip Bump emailed that "[a newspaper] saw my ding on them in the Daily Beast column and called. I gave the 'frustrations rose several times, but we walked out of there united' *rap*." Ex. A at 1 (email dated October 10, 2009) (emphasis added).

21. Also on October 10, 2009 – just two days after the verdict, when there was persistent media interest in the jurors – the foreperson, Kristina Jezycki, wrote the following email about what she had told Meryl Gordon, a writer who had been covering the trial, explaining to her fellow jurors that "Anyhoo, I followed *the script* of 'the frustrations ran high' bit, and that the next day it was if nothing ever happened." Ex. A at 2 (emphasis added).

22. As of October 12, 2009, members of the juror still were pursuing the idea of appearing as a group on 20/20. Philip Bump wrote another email to the jurors, proposing "ground rules" that they should follow if they were interviewed:

> 1. We will answer one question about any conflicts between jurors, but will not make any disagreements a focus of conversation.
> (The idea here is that we get asked and then can use the 'Frustrations rose on occasion, but we always moved past it,' perhaps including the 'everyone kissed and made up after.')
>
> 2. The presence or absence of any jurors reflects nothing more or less than the interest of that juror in sharing his or her story. It is not a reflection of inter-jury relationships, and should not be presented as though it is.
>
> 3. Specifics about deliberative decisions that we made are, understandably, not intended to be public. If a participant inadvertently makes a statement that the group as a whole feels reveals more about the

process than is appropriate, we reserve the right to restrict its inclusion in any broadcast.

Ex. A 10 (email dated October 12, 2009)

23. Ms. DeMarco explained to me that this coordinated effort to suggest what the jury's "rap" should be – *i.e.*, that while emotions ran high, everyone came together in the end and kissed and made up – constituted an after-the-fact effort to conceal the true nature of the incident in which Fernandez had threatened her, an effort made to deflect attention from what these jurors feared was an appellate issue relating to the note that Ms. DeMarco had caused to be sent to the court. Ms. DeMarco made clear to me that this after-the-fact "rap" was false. She told me that she felt terrible about the process, that she never "made up" with the woman who was so threatening, harsh and hostile to her, and that she had changed her votes out of fear and exhaustion, not because she had been persuaded beyond a reasonable doubt of guilt.

Ms. DeMarco is Concerned About the Ramifications of Coming Forward

24. When we first spoke, Ms. DeMarco made clear that she wanted to assist the defendants in bringing the true facts to the attention of the Court.

25. Her actions thereafter were consistent with this intention. Not only did she speak at length to me on December 21st on the phone, but she met with me and Mr. Puccio in person on December 23rd. I am also informed that she then met with Mr. Puccio again on December 28 and met with Messrs. Puccio, Cuti and Cromartie on December 30, 2009.

26. After this meeting, Mr. Puccio attempted to arrange to have Ms. DeMarco sign the affirmation she had discussed with defense counsel on December 30, 2009.

When he had trouble contacting Ms. DeMarco, I reached out to her, using the contact information she had provided to me.

28. On January 8, 2010, Ms. DeMarco responded to my message asking why she had not responded to Mr. Puccio, and she explained that she had had a very busy week and some phone problems, but intended to respond to Mr. Puccio.

29. On January 11, 2010, I am informed that the defendants successfully moved for and were granted bail pending appeal. There was media coverage in the local papers on the following day.

30. Ms. DeMarco apparently read this news coverage and it caused her to fear participating further in this process. As she explained to me in an email on January 19, 2010, while her recollection of the events and feeling that the guilty verdicts were unjust remained, the prospect of a media frenzy had caused her to change her mind about signing an affirmation:

> My apologies for falling off the face of the earth...I was away for a few days a couple of weeks ago and last week, well, last week I plain old panicked. I read an article in the Post about the appeal and it re-hit me like a ton of bricks that the media attention this will get is something I do not think I could withstand. My job, and chances of finding another would be at stake; the things that would be said about me would be crushing; and, my personal life would tremendously suffer. If Mr. Puccio can successfully appeal based on the fact that the Judge didn't look into the situation of my feeling threatened at the time it happened, he should do so. He did say there was case law on that very point. I have wrestled with this since that article last week and feel strongly that if my input isn't 100% necessary, I'd rather not set myself up for what will begin an unnerving series of events for me. I trust you will let Mr Puccio know and hope he will understand.
>
> Thank you for your patience and kindness,
> Judi DeMarco.

31. Since January 19, 2010, Mr. Puccio and I have each attempted repeatedly to contact Ms. DeMarco. She has not responded.

Margaret Clemons

Sworn to before me this 17th day of February 2010.

Notary Public

JOSEPH A. MEDINA
Notary Public, State of New York
No. 01ME5088461
Qualified in New York County
Commission Expires February 1, 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 94

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PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY MARSHALL
and FRANCIS MORRISSEY,

Defendants.

----------X

AFFIRMATION IN SUPPORT OF MOTION TO VACATE JUDGMENTS

Indictment No. 6044/2007

THOMAS P. PUCCIO, an attorney duly admitted to practice law in the courts of this State, hereby affirms the following statements to be true, under the penalties of perjury:

1. I represent Francis Morrissey in this matter. I submit this affirmation in support of the motion of Mr. Morrissey, and of co-defendant Anthony Marshall, pursuant to CPL § 440.10 to vacate the judgments entered against them in this Court on December 21, 2009 convicting them of various felony counts and one misdemeanor and sentencing them thereon. John R. Cuti, an attorney for Mr. Marshall, has reviewed this affirmation and joins in this motion (Mr. Cuti's affirmation to that effect is part of this motion).

2. The judgments of conviction must be vacated because counsel have recently discovered evidence that makes clear that the defendants were deprived of their fundamental constitutional right to trial by an impartial jury. CPL § 440.10(h). This evidence did not appear on the record at trial, but if it had, the judgments could not stand. *See* CPL § 440.10(f).

3. The newly discovered evidence is information from Judi DeMarco, who was juror number 8 in the trial of this matter. That information is contained in the

accompanying affidavit of Margaret Clemons, sworn to on February 17, 2010 ("Clemons Aff.') and the accompanying affirmation of Dominick Cromartie, affirmed on February 17, 2010 ("Cromartie Aff."), each of which is submitted herewith in support of this motion.

4. Ms. DeMarco is the juror who caused the note to be sent to the Court on Monday, October 5, 2009 – three days prior to the date the jury returned verdicts of guilty. As discussed below, that note stated that a juror felt threatened, feared for her personal safety, and wished to be dismissed from the jury. The facts submitted on this motion make clear that the Court's refusal to inquire about the circumstances that prompted that note – despite numerous specific requests from counsel – denied defendants their right to a fair trial before an impartial jury.

5. No amount of diligence by counsel could have discovered this information prior to the jury's return of guilty verdicts. At that stage, only the Court had the power to place upon the record facts which would have made clear that a mistrial was required. Now that Ms. DeMarco has come forward and shared her account of the facts, it is proper to seek to vacate the judgment pursuant to CPL § 440.10.

6. As explained in Ms. Clemons's affidavit, Ms. DeMarco voluntarily shared with defense counsel her first-hand account of the facts, *see* Clemons Aff. ¶ 3 (Ms. DeMarco was eager to assist the defense, and indeed had been waiting to be contacted by representatives of the defense), and Ms. DeMarco met with counsel on December 30, 2009 for the purpose of preparing and signing an affirmation to support this motion. *See id.* ¶ (26); *see also* Cromartie Aff. ¶ 1. As recently as January 8, 2010, Ms. DeMarco

informed Ms. Clemons that she intended to cooperate with counsel in connection with their efforts to vacate the convictions in this case *See* Clemons Aff. ¶ 4.

7. Unfortunately, press coverage of the application for bail pending appeal has caused Ms. DeMarco to fear the consequences of filing an affirmation. *Id.* at ¶ 20. Counsel learned of this development on January 19, 2010. *Id.* Since then, counsel have made repeated efforts to contact Ms. DeMarco but have been unsuccessful. Accordingly, counsel have decided to file this motion now, based on facts that Ms. DeMarco disclosed during several interviews and in a document she provided. Those facts are set forth in the affidavit of Ms. Clemons and the affirmation of Mr. Cromartie.

8. Given the circumstances, this motion is properly before the Court. *Cf. People v. Friedgood*, 58 N.Y.2d 467, 473 (1983) (rejecting CPL 440.10(f) motion premised on improprieties among jurors during deliberations because counsel provided only hearsay accounts of events and, unlike here, provided "no explanation . . . as to why affidavits could not be obtained from jurors"). Here, unlike in *Friedgood*, counsel have provided detailed (often verbatim) accounts from Ms. DeMarco, as well as documentary evidence provided by her. Moreover, again unlike in *Friedgood*, counsel have explained why they are unable to provide an affidavit from the jury herself: Ms. DeMarco has explained, in writing, that she fears the media coverage of this motion may cause her to lose her job.

9. In any event, the prosecution should not be heard to oppose this application. In its lengthy, written submission in opposition to defendants' applications for bail pending appeal (which were granted by Justice Helen E. Freedman on January 11, 2010), the prosecution effectively endorsed the propriety of a motion by defendants

pursuant to CPL 440.10 and sought to make much of its absence at the time. For example, the prosecution argued that if there were a basis to challenge the verdicts based on "juror misconduct or . . . any other alleged error," then the defendants should have "filed a CPL 330.30 or 440.10 motion requesting that the verdict be set aside or the judgment of conviction vacated." Affirmation of Joel Seidemann, dated January 11, 2010 ("Seidemann Aff.") at ¶ 30; *see also id.* ¶ 52 ("Finally, it is worth pausing *again* to note that the defendants did not move to . . . collaterally attack their convictions in a post-judgment CPL 440.10 motion based upon the errors they are expected to raise now.") (emphasis added). And even more specifically, the prosecution challenged any notion that Ms. DeMarco was the source of the note in which a juror sought to be dismissed from the jury, arguing that the "assumption" that "Miss (*sic*) DeMarco may have been the source of the note . . . [is] speculative and generated solely by the defendants themselves." Seidemann Aff. at ¶ 32.

10. The prosecution, therefore, should welcome this motion and the facts supplied by Ms. DeMarco, since it enables the prosecution to correct the many misstatements and inaccuracies it has put on the record about what happened here. Thus, this motion is being properly filed now based on evidence that confirms the identity of the threatened juror and makes clear that the Court's refusal to respond adequately to her plea for assistance requires vacatur of the judgments of conviction against both defendants.

11. Because "a defendant has a right to a trial by a fair and impartial jury[,]" the common-law rule prohibiting impeachment of jury verdicts by post-verdict statements of jurors "should not operate in every case." *People v. DeLucia*, 20 N.Y.2d 275, 278-79 (1967). And this is a case in which that rule should not be controlling. Here, the parties

and the Court received a note from the jury that specifically raised an issue about improper conduct in the jury room *during* deliberations. *See People v. Lavender*, 117 A.D.2d 253, 256 (1st Dep't 1986) (refusing to invoke common law rule where note from jury during trial had described threats). Ms. DeMarco has now revealed the facts that she would have told the Court had it followed the law and conducted the requisite inquiry into the jury note last October. Thus, this case does not involve any of the concerns underlying the common-law prohibition "regarding potential post-trial harassment of jurors (*People v. DeLucia, supra*) or of 'second thoughts' by jurors." *Lavender*, 117 A.D.2d at 256. To the contrary, Ms. DeMarco *welcomed* the fact that the defense had contacted her. Clemons Aff. ¶ 3.

12. For the reasons that follow, the Court should vacate the judgments of conviction against both defendants.

Background

13. During the afternoon of October 5, 2009 – the ninth day of the jury's deliberations – the foreperson sent the following note to the Court:

> Due to heated argument, a juror feels personally threatened by comments made by another juror. With regards to her personal safety, she wishes to be dismissed anonymously.

Tr. at 17,411.

14. Counsel moved for a mistrial, stressing that this note made it clear that there was a juror who could not continue to deliberate:

> If the juror's note was just saying a heated disagreement [took place], that would be one thing. As we all know, jurors often have heated disagreements. But that's not what the note says. This note says that the juror believes that her personal safety has been threatened, and that is quite another

> [situation], and she cannot continue in the deliberations and ask[s] to be excused from the jury. That is [qualitatively] different than a heated disagreement. The essence, when you have a juror who says she cannot continue in the deliberations because of safety reasons, is she feels intimidated. And, I believe the defendant is entitled to a trial by a jury that is fair and impartial and without threats to the personal safety of jurors. I think this eliminates his right to a fair trial.

Tr. 17,414-17,415; *see also* Tr. 17,412-17,414. The Court denied the motion for a mistrial. Tr. 17,415.[1]

15. Instead, the Court expressed its intention to simply instruct the jury to deliberate civilly, stressing how long the trial had taken and how carefully the jury had been selected; in short, the Court refused to address, or even acknowledge, the specific plea for help in the note. Tr. 17,415-17,416.[2] Counsel for Mr. Marshall immediately objected, noting that:

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[1] Defendants renewed their motions for a mistrial in writing, arguing that they had the fundamental "right to be judged by a jury that is dispassionate, objective, and fair." *See* Letter of John R. Cuti, one of Mr. Marshall's trial counsel, submitted on behalf of both defendants on October 6, 2009 ("10-6-09 Ltr.")(attached as Exhibit A). The defendants' argument for mistrial was consistent with settled law:

> If a conscientious member of a jury is so intimidated by the conduct of her peers in the jury room that the she fears for her own physical safety, it is asking too much for that juror to remain true to her oath to decide the case based on her honestly held views. Instead, such a juror is likely (and understandably) to shrink from her duty to vote her conscience and instead simply acquiesce in the views of others in order to terminate the jury service she found sufficiently frightening to bring to the attention of the Court. *See Allen v. United States*, 164 U.S. 492, 501 (1896) (the verdict in a criminal case "must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows[.]").

Id. The Court, nevertheless, denied the motion for a mistrial again. Tr. 17,454.

[2] Indeed, and as discussed *infra*, the instruction given to the jury by the Court made matters worse, because it not only ignored the specific request for help but effectively *discounted* it by blindly, and without the slightest inquiry, actually *praising* the very jurors being complained about by the victimized juror by saying that this was the "best jury" the Court had seen in more than 30 years. So thoroughly did the Court ignore the specific contents of the note that someone listening to the Court's instruction, ostensibly delivered in response to the note, would never know that a plea for help and dismissal from a juror had even been made.

-footnote continued on next page-

> The institutional concerns the Court just cited don't do anything to address the individual concern that has been manifested in this note. There is a juror who is at a minimum deliberating under duress, which is simply not fair to the defendant. You have already denied the motion for the mistrial. We specifically object to simply giving them an instruction about the basics of how to deliberate civilly. We know that that process has broken down. And, your Honor has instructed them numerous times precisely as you just suggested that you are going to instruct them. CPL Section 230.75 requires you to make specific inquiry in the presence of defendants and their counsel as to whether this juror is incapacitated or otherwise unable to serve and simply giving a hortatory instruction about the basics of jury service is plainly inadequate given what this note says. . . . Mr. Marshall is entitled to have twelve people deliberating; not eleven people deliberating and one person afraid for his or her safety. It is simply not fair. And, we object to the Court's proposed instruction.

Tr. 17,417-17,418.[3]

16. Counsel for Mr. Morrissey joined in this objection and amplified the error involved:

> . . . There is a problem identified in specific terms by the juror involving his or her personal safety, and it seems to me that the statute tells the Court what to do in this situation. Section 270.35, paragraph two, tells you what to do; which is to conduct an inquiry. . . . You can do that without asking the jury what they are arguing about or what the vote is

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While the instruction notes that "emotions [can] run high" it never admonished the jury that threats were inappropriate, and it never stated that if a juror was concerned for her personal safety he or she should contact the court or court staff. Instead, the instruction implicitly denied the legitimacy of the sole juror's complaint by stating – emphatically – that the Court was sure that all of the jurors would act civilly toward one another. *See generally* Tr. 17,429-17,435.

[3] *See also* 10-6-09 Ltr. at 1-2 (renewing request for "inquiry regarding this highly unusual and disturbing note – a red flag from the jury stating not only that there was 'heated argument' but that this juror had been threatened and was concerned for her personal safety, a fear sufficiently serious that the juror asked to be relieved from further service and dismissed. This note at a minimum raises a question whether the complaining juror is 'unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service.' CPL §270.35(1).").

> about, but just ascertain what the problem is. Once you know what the problem is, then it can be addressed. And maybe it can be addressed in that manner.... [W]e have a case that has been going on for 20 weeks . . . [;] in the event of a conviction on any charge against any defendant, you have a built in problem here which could possibly be avoided. This is a unique kind of note that doesn't happen very often. I've never seen it before. The whole problem can be avoided by ascertaining what the problem is specifically by inquiring, as the statute allows you to do.[4] Then you can give a charge that is specifically tailored to what the issue is. *The difficulty with the charge as proposed is that it doesn't meet this. It may even be viewed as probably condoning this kind of conduct*, if it took place, as, 'oh, that's what happens during deliberations.' That is dangerous; *the person is sort of being told forget about it.* We really don't know what happened. What if the person said, 'if you don't agree with what I say, I will knife you?' We don't know.

Tr. 17,420-17,421 (emphasis added).

17. Counsel repeatedly advised the Court that a female juror, juror number 8, was crying and visibly upset during proceedings on October 5th. Tr. 17,437-17, 447. Though counsel for both Mr. Marshall and Mr. Morrissey noted that juror 8 was highly upset and visibly crying, the prosecutors attempted to suggest that in fact she was laughing. Tr. 17,439-17,440. Because that characterization was absurd and flew in the face of the juror's obviously distressed condition, counsel asked the prosecutors to swear to their claims regarding this juror's demeanor, but they refused. Tr. 17,447. Indeed, counsel suggested that if there were any doubt about the emotional condition of juror number 8, a hearing should be held. *Id.* No hearing was held; but there was no serious

[4] It was later quickly noted by defense counsel that CPL 270.35 *requires*, and does not merely "allow" the court to inquire. Tr. 17,422.

question that this juror was crying and highly upset when the jury was brought into the courtroom and being instructed by the court.[5]

18. Still, the Court refused to conduct any inquiry of any kind regarding the note from the jury that "a juror feels personally threatened by comments made by another juror. With regards to her personal safety, she wishes to be dismissed anonymously." The Court persisted in its refusal notwithstanding the fact that there was a juror who appeared to be crying and visibly shaken in the courtroom when the jury was brought into the courtroom and was being instructed by the Court. The Court noted that juror number 8 was a lawyer who had once worked for the Attorney General's Office, as if that background somehow obviated the need to make inquiry into why this juror was so plainly distraught. Tr. 17,440-17,441. But counsel for Mr. Morrissey immediately pointed out that it was *especially* troubling that a juror with this pedigree was so upset. Tr. 17,441.

19. Counsel urged the Court that:

> [i]f this is the juror complaining about being threatened, then one must have grave doubts about whether she can continue to follow her own conscience, *or whether she instead will choose her own safety over the rights of the defendants and simply succumb to intimidation and change her views*. If a juror is too afraid to follow her own conscience, her fear incapacitates her from continuing to serve. *See People v. Bradford*, 300 A.D.2d 685, 687-688 (3rd Dep't 2002) (a juror is unfit to serve "'when it becomes obvious that a particular juror possesses a state of mind

[5] As the *New York Times* reported the next day, ". . . during a rereading of testimony Monday morning — and again while the judge implored the jury to keep deliberating later in the afternoon — Juror No. 8, a 39-year-old legal analyst for the Bloomberg L.P., was pallid, with wet and puffy eyes. Her cheeks and nose were red. A male juror sitting next to her handed her a red handkerchief that she used to wipe her eyes." (NYT, 10/6/09, Section A, p. 25). Ms. DeMarco has confirmed that she was upset and crying during the Court's instructions. *See* Cromartie Aff. ¶ 13.

which *could* prevent the rendering of an impartial verdict.'")
(emphasis added; citation omitted).

10-6-09 Ltr. (emphasis added).

20. In addition to requesting an inquiry into juror number 8's capacity to continue to serve on the jury, counsel further noted that there was another reason to make the inquiry demanded by CPL § 270.35: "The law also requires that any juror who is 'grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature' be discharged. CPL §270.35(1). If a juror made improper threats to a fellow juror in order to intimidate her to change her honestly held views, such conduct would constitute substantial misconduct." *Id.*[6]

21. In its papers opposing bail, the prosecution argued that "the jury note did not say that the unidentified juror felt physically threatened, just personally threatened in some sense." Seidemann Aff. ¶ 33. Apart from the fact that the juror's concern about her physical safety was implicit in the note – because in this context "personal" safety and "physical" safety are synonymous – there is no longer any need to debate this point. We now know that Ms. DeMarco *did* feel that she was being threatened physically, and was so afraid that she asked to be dismissed from the jury. *See* Cromartie Aff. ¶ 6 ("As Fernandez was screaming she continued to move aggressively toward Ms. DeMarco. Ms. DeMarco said that she was afraid Fernandez was going to attack her. Ms. DeMarco

[6] *See also* Tr. 14,426-17,427 ("Just finally to complete the record, the reason why not conducting the inquiry is improper is that there could be two jurors, at a minimum here, who are unfit to serve. One is the juror who was so threatened that he or she would not discharge their obligation to weigh the facts and vote consistently with his or her judgment. And, two, there could be a juror making threats. Both of those things would incapacitate the juror from serving. And without making the inquiry required by the statute, we will never know. And the vice of the charge is that it is likely to muzzle or otherwise inhibit the intimidated juror from voting his or her conscience, and that is simply not fair to the defendants.").

interpreted her screaming, gesturing and hostile approach to be a threat to hurt her, and she reported that she certainly felt threatened and afraid at the time. Ms. DeMarco explained that she thought the hand gestures that Fernandez had made had some sort of gang significance"); *id.* ¶ 9 ("Ms. DeMarco told the foreperson that she was so shaken by Fernandez's hostile threats and outburst that she could no longer in good conscience remain on the jury; Ms. DeMarco told the foreperson that she needed her to send a note to the judge telling him that she was so afraid for her personal safety that she wanted to be dismissed from the jury.").

22. The prosecution also suggested in its bail opposition that because the jury sent a note a few minutes after Ms. DeMarco's note which made no reference to that note, it was somehow clear that the first note merely reflected "concerns relating to natural tempers and upset arising from the exchange of words and views." Seidemann Aff. ¶ 33. That speculation too is now clearly exposed as unfounded, because Ms. DeMarco's account makes clear (a) that the other jurors likely *did not know* the specific contents of the note, Cromartie Aff. ¶ 10, and (b) that the note did not reflect concerns about incivility, but instead was sent because Ms. DeMarco had been physically threatened, and was so afraid and intimidated that she no longer felt that she could deliberate and therefore asked to be excused from further jury service. *Id.* ¶ 13.

The Court's Refusal To Make Inquiry Under The Circumstances Present Here Requires That The Judgments Of Conviction Be Vacated

23. CPL Article 270 was enacted as a "procedural safeguard" "to protect th[e] constitutional right" to trial by jury. *Buford*, 69 N.Y.2d at 298. Defendants had a fundamental constitutional right to be judged by a jury that was able to impartially deliberate and reach a unanimous verdict. *People v. Jeanty*, 94 N.Y.2d 507, 517 (2000). By refusing to make inquiry into the troubling note from Ms. DeMarco – a note indicating that (a) one of the jurors felt so threatened that she wanted to be discharged, and (b) one or more other jurors might be "grossly unqualified" to serve because they had threatened a fellow juror – the Court violated defendants' fundamental rights.

24. The refusal to make inquiry under these circumstances was plain error. In a decision on facts remarkably similar to those here, the First Department made clear in *People v. Lavender*, 117 A.D.2d 253 (1st Dep't 1986), that when a "complaining juror . . ., before the verdict was announced, report[s] directly to the court that she had been coerced, harassed, intimidated, and felt herself to be in physical danger" the Court *must* make inquiry. *Id.* at 256. There, as here, a juror complained that she felt threatened and feared for her personal safety, but the trial court refused to make inquiry. In reversing the conviction, the Appellate Division emphasized that trial judges have "a duty to protect those citizens of the State who" serve as jurors. *Id.* Because the trial court had refused to make inquiry, there was no detailed account in the record of the nature of the threat or the depth of the juror's fear. But that did not matter. The defendant was entitled to have this issue explored by the court. "A juror was threatened with assault by another juror,

which threat was communicated to the court but ignored by it. The jury thereupon acquiesced in a conviction. Such a verdict should not be permitted to stand." *Id.* at 257.

25. *Lavender* is just one of many cases that make the obvious point that when a note from the jury suggests that there is a serious issue that might have an impact on the integrity of the deliberations, the trial judge must meaningfully respond. Indeed, where, as here, a juror sends a note to the court during deliberations requesting that she be discharged in circumstances suggesting that she may be unable to continue deliberating impartially, the trial court simply must make inquiry. *People v. Tufano*, 124 A.D.2d 688 (2nd Dep't 1986). In *Tufano*, "[d]uring the jury's deliberations, the forelady transmitted a note to the Trial Judge [stating] 'I think under certain circumstances I don't think I could come to a just decision. I feel, if at all possible, I would like to be excused.'" *Id.* In response, the court decided "merely [to] repeat what [he] had told the jury before they retired for deliberations about considering the evidence and the views of other jurors." *Id.* at 688-689. Defense counsel objected, and urged the court to make inquiry of this juror to determine whether she could continue to deliberate fairly. *Id.* at 689. The court refused. *Id.* The Second Department held that it was reversible error for the trial court to have merely delivered a general instruction about the basics of deliberations in light of the specific issue raised in the note:

> Upon receiving such a note, it was incumbent upon the court to at least address the forelady out of the presence of the other jurors in order to ascertain if the cause of her apprehension in any sense tainted her ability to remain impartial. * * * The court's response to the note was insufficient. There can be no assurance that the court's general instruction, which did not even acknowledge receipt of the note, addressed the specific problem which motivated the forelady's communication. Inquiry into the forelady's undisclosed concern about her ability to reach a just decision may well

> have revealed circumstances materially affecting her impartiality and thus her fitness to further participate in the jury's deliberations.

Id. Here, the error is even more plain than in *Tufano* because the note from Ms. DeMarco specifically tied her request to be excused to her fear for her personal safety. Yet, the Court never addressed the contents of the note directly and never made inquiry. Such plain error requires vacatur of the judgments of conviction. *See id.* ("The trial court's failure to address the juror [makes it impossible to know] whether the [juror's] expression of doubt may have required her discharge and thus whether the defendant's right to a fair trial was prejudiced.")

26. Because a defendant's right to a fair trial is at stake, the law requires a court to make specific inquiry into a note that raises a concern about a juror's ability to continue to deliberate impartially. Thus, in *People v. McClenton*, 213 A.D.2d 1 (1st Dep't 1995), the First Department squarely held that "the trial court erred when it denied defendant's timely request to make a 'probing and tactful' inquiry of a juror who . . . wrote a note which indicated that the juror's discharge *might* be required under CPL 270.35." *Id.* at 2 (emphasis added). The Appellate Division emphasized that "[a]lthough the cases applying *Buford* (*supra*) most frequently arise in the context of a trial court's removal of a juror over defendant's objection, there is no persuasive reason that the same standard should not apply when the court refuses to conduct an inquiry of a juror that defendant believes to be 'grossly unqualified' or to be guilty of 'substantial misconduct.'" *Id.* at 5. As Justice Mazzarelli explained, in circumstances that suggest even a "possibility" that a juror might be unfit or unable to deliberate impartially, "[i]t is important to keep in mind that the issue here is not whether the juror ultimately would or

should have been discharged, but rather, simply whether the trial court should have made inquiry." *Id.* at 7. There, as here, "[t]he failure of the trial court to make the requested inquiry was error which affected the defendant's 'constitutional right to a jury trial and [he] is therefore entitled to a new trial.'" *Id.* (quoting *People v. South*, 177 A.D.2d 607, 608 (1st Dep't 1991)). *Accord People v. Ordenana*, 20 A.D.3d 39 (1st Dep't 2005) (when defense counsel requests inquiry into possibility that juror or jurors might be unfit to serve, CPL 270.35 requires trial court to make inquiry); *see also People v. Fermin*, 235 A.D.2d 328, 329 (1st Dep't 1997) (where note from juror suggested that there was a "real possibility" that she did not decide the case based on the evidence, it was reversible error for the trial judge merely to give a general instruction regarding the basic rules of deliberations; "the court should have made a more specific inquiry. . . .").

27. Because this error "affected the defendant's constitutional right to a jury trial[,]" the remedy is a new trial. *McClenton*, 213 A.D.2d at 7. Moreover, for errors that infringe a defendant's right to be judged by an impartial jury, harmless error analysis is unavailable to the prosecution. *People v. Dotson*, 248 A.D.2d 1004 (4th Dep't 1998) (refusal to make inquiry required under CPL 270.35 requires new trial and is not subject to harmless error analysis; citing *People v. Anderson*, 70 N.Y.2d 729, 730 (1987)).

28. As the supporting affirmation and affidavit make clear, Ms. DeMarco insisted that the October 5, 2009 jury note be sent because of an incident that occurred that morning in the jury room that caused her to fear for her physical safety such that she no longer felt that she could abide by her oath to deliberate.

29. Ms. DeMarco had good reason to feel threatened. On that morning, a fellow juror, Yvonne Fernandez, got out of her seat and walked menacingly toward Ms.

DeMarco. Cromartie Aff. ¶¶ 3-8. She cursed at Ms. Demarco, made what appeared to be gang-related hand gestures, and had to be restrained by a male juror who grabbed Ms. Fernandez and dragged her out of the room. *Id.* Ms. DeMarco had had conversations with Ms. Fernandez earlier during the trial, and knew that Ms. Fernandez had mentioned being involved with a member of the Latin Kings gang. *Id.* ¶ 6. In light of that knowledge, and Ms. Fernandez's aggressive, threatening actions, Ms. DeMarco thought that Fernandez intended to attack her and feared for her own personal safety. *Id.*

30. After being subjected to Ms. Fernandez's violent outburst, Ms. DeMarco was intimidated; she no longer felt that she could continue to deliberate consistently with her oath to adhere to her conscientiously held beliefs. That is why Ms. DeMarco caused the note to be sent to the Court, asking that she be dismissed from the jury. *Id.* ¶ 9; *see also* Clemons Aff. ¶ 9 ("I was very upset, I was ... I couldn't take any more. I did not want to be on the jury any more because I thought 'my god, this is my friend who's exploding like this and going crazy on me.' And I will show you physically when I see you how she reacted, and no one stuck up for me. And I took the forewoman aside and said I want to ask the judge anonymously to be removed. I don't feel safe. I feel like I've just been threatened, and I want to be excused from this jury. I would like to be removed."); Clemons Aff. ¶ 10 ("I felt physically threatened").

31. When the jury entered the courtroom for the first time after this note had been sent, Ms. DeMarco hoped, and expected, that the Court would intervene, ask what had happened, and determine how to address the situation, ideally by dismissing her from the jury as she had requested. Cromartie Aff. ¶ 12.

32. Instead, Ms. DeMarco was crestfallen when she heard the Court's instructions. *Id.* ¶ 13. She felt that the Court had ignored her plea for assistance and her request to be discharged. *Id.* Instead, the Court's remarks that this was a great jury, that he was sure there was no problem, and that the jurors should simply return to the jury room and reach a verdict, caused Ms. DeMarco to feel that the Court had decided, without any inquiry whatsoever, that her complaints were meaningless. *Id.* As Ms. DeMarco has explained: "[T]he judge wasn't going to protect me ... the judge never even asked me what happened, the judge never even asked what juror is it [who sent the note] .... [T]he judge never did shit and [...] he didn't do shit." Clemons Aff. ¶ 12.

33. As a result, when Ms. DeMarco returned to the jury room – feeling totally demoralized, abandoned and alone – she felt unable to continue to stand her ground or to vote her conscience. She was exhausted, fearful, and defeated. In the end, she capitulated to the other jurors' views about the defendants' guilt – views that she did not share – and acquiesced in the decision to return the verdict that was announced on October 8. Cromartie Aff. ¶¶ 15-18; Clemons Aff. ¶ 8 ("none of the jurors were willing to give either of these defendants a shot in that jury room. I held out as long as I could, and when I finally felt threatened I had to do what I had to do [and capitulate] because I couldn't take it. . . . I'm not proud of it. I'm not proud of what I did").

34. The accompanying affidavit and affirmation remove any doubt that the Court committed reversible error in refusing to conduct an inquiry. Rather than taking Ms. DeMarco's complaint seriously enough to conduct an inquiry into the circumstances, as the law requires, the Court publicly dismissed it outright, declaring that the problem that so concerned the threatened juror did not even exist:

> Let the touchstone of your deliberations be respect and civility. *And I'm sure that that is not a problem. As I look at each one of you, I know it is not a problem.* And I'm going to ask you to continue your deliberations.

Tr. 17,434 (emphasis added).

35. As counsel explained in a letter to the Court:

> These instructions not only ignore the note; they deny its legitimacy. The note makes clear that there definitely *is* a problem – a problem for the juror who complained of feeling threatened in her person. There has been no inquiry into what caused this juror to complain of threats. Thus, neither counsel nor the Court knows whether the conduct that caused the juror to feel threatened was egregious and whether the juror's fears are warranted. Yet, the Court's instruction summarily judges that nothing improper happened in the jury room. By simply declaring that "it is not a problem" at all, without making the "thorough" inquiry required by the CPL (or indeed *any* inquiry at all) the Court marginalizes the juror who complained, conveys to her the message that the Court will not take her note seriously and further erodes her confidence and ability to remain true to her own conscience. The instruction entirely ignores the complaint and the request to be discharged, and implicitly condones any misconduct that caused the reaction. Indeed, the Court's comments – "As I look at each one of you, I know it is not a problem" – suggest that it does not believe that any misconduct would even be possible, a view that will only encourage any jurors who have been pressuring the complaining juror to continue their tactics.

10-6-09 Ltr. at 3-4.

36. It is plain that counsel accurately summarized the way in which the juror who had requested to be discharged would respond to the Court's instructions. *See* Cromartie Aff. ¶¶ 15-18. But counsel's letter did not change the Court's mind and thus the Court simply adhered to its prejudicial, objected-to instruction and made matters worse.

37. Had the Court conducted the inquiry required by law, it would have discovered the facts set forth on this motion. Had these facts been known, the Court would either have been able to calm Ms. DeMarco's concerns by speaking appropriately to her and to the other jurors, or it would have concluded that that was impossible and that Ms. DeMarco was no longer able to serve as an impartial juror, resulting in a mistrial. The record makes clear that by refusing even to acknowledge Ms. Demarco's stated fears and request to be dismissed the Court failed to discharge its "duty to protect those citizens of the State who" serve as jurors. *Lavender*, 117 A.D.2d at 256. As a result, the defendants were deprived of their right to fair trial.

38. In its submission to Justice Freedman, the prosecution cited several decisions in which appellate courts have rejected arguments that a trial court should have conducted an inquiry into a note from a juror, and we expect that they will rely on those cases again in opposition to this motion. *See People v. Cabrera*, 305 A.D.2d 263, 263 (1st Dep't 2003); *People v. Wright*, 35 A.D.3d 172 (1st Dep't 2006); *People v. Gathers*, 10 A.D.3d 537 (1st Dep't 2004); *People v. Scott*, 213 A.D.2d 501 (2d Dep't 1995). None of these cases casts any doubt on the vitality of the holding in *Lavender* (indeed, many of these cases cite *Lavender*), and, as shown below, none of these cases involves facts remotely like this one. Finally, the prosecution also cites *People v. Cochran*, 302 A.D.2d 276 (1st Dep't 2003), but as discussed below that case supports defendants' motion.

39. In *Gathers*, there was a note "from a dissenting juror about allegedly belligerent conduct by other jurors, as well as a collective note from the other jurors that disputed the lone juror's claims." 10 A.D.3d at 537. The opinion sheds no light on the content of the notes, and there is no indication that the lone juror complained of being so

fearful for her personal safety that she wanted to be dismissed from jury service. Indeed, the First Department's opinion – which is *dicta* because the alleged error was unpreserved and the court refused to consider it in the interest of justice – noted that "there is no reason to believe that the ultimate unanimous verdict was the result of coercion." *Id.* Here, by contrast, just as in *Lavender*, there is every reason to believe that the verdict *was* the product of coercion. Given the content of the note that Ms. DeMarco requested be sent, her specific request to be dismissed from jury service, the fact that she was crying openly in court, and sworn statements which spell out the fact that she had been subjected to intimidating physical threats, the facts here are entirely different from those in *Gathers.*

40. In *Scott*, a note from the jury stated that a juror "complained of other jurors yelling at him and, further, that '[i]t seems like they want to beat me." 213 A.D.2d at 501. The note stated only that some jurors were yelling in a way that suggested that they were upset enough to want to assault the complaining juror (*not* that anyone had threatened to do so or had physically menaced him or her); and there was no indication that the lone juror was sobbing in court or otherwise exhibiting signs of distress that warranted an inquiry from the trial judge. The facts are far different here. First, the note at issue in this case stated that the lone juror felt "personally threatened" and so feared for her "personal safety [that] she wishe[d] to be dismissed" from the jury. And, second, the fact that juror number 8 was so visibly upset in the courtroom was a red flag crying out for the Court to make inquiry. Moreover, while the trial court in *Scott* stressed in instructions to the jury that it was entirely improper for threats to be made or for deliberations to be conducted "in a climate in which any member of the jury feels physically threatened or intimidated or harassed in any way," *id.*, this Court said nothing of the sort. Instead, it delivered an

instruction that ignored the complaint of threatening behavior – and further isolated the lone juror – by stating, confidently and emphatically, that there plainly was no problem at all and noting only that it was perfectly understandable in deliberations for "emotions to run high." *See* ¶¶ 29-32, *supra*.

41. *People v. Wright* is even further afield. There, a juror briefly locked herself in a bathroom during deliberations, but there is no indication that she did so because she felt threatened. 35 A.D.3d at 172. Nor did that juror ever cause a note to be sent to the court formally requesting that he or she be dismissed from jury service. Nor is there any indication that the juror was so distressed that she was crying in the courtroom. *Wright* thus stands only for the proposition that a court need not make inquiry merely because a juror "was emotionally upset" by "the deliberation phase of jury service." *Id.* It has nothing to do with a case like this one, where a juror complained of feeling threatened, feared for her personal safety and requested to be dismissed and where the trial judge was able to observe the juror's extreme emotional distress in open court. Moreover, it is clear that the Court's instructions did nothing to ameliorate Ms. DeMarco's fear; as soon as she went back to the jury room, she asked the foreperson to send a note asking for deliberations to cease. Cromartie Aff. ¶ 14.

42. In *People v. Cabrera*, 305 A.D.2d 263 (1st Dep't 2003), it does not appear that there was a note from the jury stating that threats had been made. So far as the opinion reveals, the only note stated that a juror was unwilling to deliberate, a situation that quickly resolved itself. *Id.* That is a far cry from this case. Here, the note expressly stated that juror feared for her personal safety, the juror was openly crying in court, and the note specifically stated that she wanted to be dismissed from the jury altogether.

43. Finally, *People v. Cochran*, 302 A.D.2d 276 (1st Dep't 2003), does not help the prosecution at all; in fact, it makes the defendants' point that when circumstances suggest that deliberations *might* be infected by improper threats, the trial judge must intervene to protect the integrity of the process. In *Cochran*, there was

> shouting heard from the jury room and ... a note from a juror who was concerned about another juror, who allegedly was upset by a third juror's temper.

Id. There was no indication that any threats had been made, and no juror had requested to be discharged from jury service. Nevertheless, the "court instructed the jury that deliberations should be conducted politely, rationally and free from any fear, and that each juror should be respectful of each other." *Id.* But that is not all the trial judge did. "The court also instructed the jury that it would inquire further the next day, if necessary." *Id.* Even though on the "following day, the jury sent a note stating that it was prepared to continue with deliberations," *id.*, the trial judge still made further inquiry, asking *each juror* whether he or she was able to continue deliberating. *Id.* ("The court then inquired as to whether the jurors were prepared to continue calmly and rationally, and each juror responded affirmatively."). Given that the trial judge took appropriate steps to ensure the integrity of the proceedings, the First Department held that "the court responded meaningfully to the juror's note and the surrounding circumstances, and no *further* inquiry was needed." *Id.* (emphasis added). Here, by contrast, the Court conducted *no* inquiry into circumstances far more troubling than those in *Cochran*. That failure to act was plainly improper under *People v. Lavender*, a decision cited with approval by the court in *Cochran*. *Id.*

44. Accordingly, for the foregoing reasons, and the facts set forth in Ms. Clemons' affidavit and Mr. Cromartie's affirmation, the Court should grant this motion, vacate the judgments, and order a new trial.[7]

45. No prior application for the relief requested has been made in this or any other court.

WHEREFORE, the Court should grant the motion and vacate the judgments or order such other relief as the Court deems just and proper.

Thomas P. Puccio

Affirmed this 18th day of
February 2010.

[7] If a new trial is ordered, each defendant reserves his right to move to dismiss the Indictment on any proper basis available and, in any event, to move for a severance.

EXHIBIT A

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October 6, 2009

By Email

Hon. A. Kirke Bartley, Jr.
New York Supreme Court, New York County
100 Centre Street
New York, NY 10013

Re: *People v. Anthony Marshall et ano.*; Ind. No. 6044-07

Dear Justice Bartley:

Yesterday, on the ninth day of deliberations, the Court received a note stating that during heated arguments in the jury room, one of the jurors was threatened by another juror such that the threatened juror feared for his or her personal safety and therefore wished to be dismissed from the jury, anonymously.[1]

The Motion for Mistrial

Upon learning of this note, both defendants moved for a mistrial. Any defendant has a right to be judged by a jury that is dispassionate, objective, and fair. If a conscientious member of a jury is so intimidated by the conduct of her peers in the jury room that the she fears for her own physical safety, it is asking too much for that juror to remain true to her oath to decide the case based on her honestly held views. Instead, such a juror is likely (and understandably) to shrink from her duty to vote her conscience and instead simply acquiesce in the views of others in order to terminate the jury service she found sufficiently frightening to bring to the attention of the Court. *See Allen v. United States*, 164 U.S. 492, 501 (1896) (the verdict in a criminal case "must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows[.]"). The Court, however, denied the motions for mistrial.

The Request For An Inquiry

In the alternative, both defendants asked the Court to make inquiry regarding this highly unusual and disturbing note – a red flag from the jury stating not only that there was "heated

[1] Both the note and the portion of the transcript in which the Court read it into the record have been sealed, in an effort to protect jury privacy. Accordingly, not having a copy of the note, we are unable to quote from it or to quote any of the colloquy concerning it in this letter.

argument" but that this juror had been threatened and was concerned for her personal safety, a fear sufficiently serious that the juror asked to be relieved from further service and dismissed. This note at a minimum raises a question whether the complaining juror is "unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service." CPL §270.35(1). We note that female juror number 8 was visibly upset at several times during proceedings yesterday and I told the Court that juror number 9 gave her a handkerchief to wipe tears from her eyes.[2]

If this is the juror complaining about being threatened, then one must have grave doubts about whether she can continue to follow her own conscience, or whether she instead will choose her own safety over the rights of the defendants and simply succumb to intimidation and change her views. If a juror is too afraid to follow her own conscience, her fear incapacitates her from continuing to serve. *See People v. Bradford*, 300 A.D.2d 685, 687-688 (3rd Dep't 2002) (a juror is unfit to serve "'when it becomes obvious that a particular juror possesses a state of mind which *could* prevent the rendering of an impartial verdict.'") (emphasis added; citation omitted). The law also requires that any juror who is "grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature" be discharged. CPL §270.35(1). If a juror made improper threats to a fellow juror in order to intimidate her to change her honestly held views, such conduct would constitute substantial misconduct.

With respect to both possible grounds for discharge, an inquiry is required by law. CPL §270.35(2); *People v. Buford*, 69 N.Y.2d 290, 299 (1987) ("In reaching its conclusion [whether to discharge a juror], the trial court *must* question each allegedly unqualified juror individually in camera in the presence of the attorneys and defendant.") (emphasis added); *see also Bradford*, 300 A.D.2d at 687-689 (when note from jury raises questions about fitness of single juror "[t]he court is to conduct a probing, tactful inquiry into the particular circumstances"). The Court, however, denied defendants' requests for such an inquiry in response to the note.

The Improper Instructions

Instead, the Court determined that it would simply instruct the jury to continue deliberating. *See* Tr. 17411-17416. The instructions delivered by the Court wrongly and unfairly minimize the complaints of the juror who had sought the Court's help and implicitly absolve any member of the jury who in fact might have improperly threatened her. Moreover, the Court's remarks created a serious risk that this jury will now believe that it is required to reach a verdict, no matter what. For the reasons that follow, a clarifying instruction is required.

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[2] Juror number 8's demeanor was apparent, as today's New York Times reports: ". . . during a rereading of testimony Monday morning — and again while the judge implored the jury to keep deliberating later in the afternoon — Juror No. 8, a 39-year-old legal analyst for the Bloomberg L.P., was pallid, with wet and puffy eyes. Her cheeks and nose were red. A male juror sitting next to her handed her a red handkerchief that she used to wipe her eyes." (NYT, 10/6/09, Section A, p. 25).

A juror complained of feeling so personally threatened due to "heated arguments" that s/he requested to be discharged. Rather than taking this complaint seriously enough to conduct an inquiry into the circumstances, *as the law requires*, the Court publicly dismissed it outright, declaring that the problem that so concerned the threatened juror didn't even exist:

> Let the touchstone of your deliberations be respect and civility. *And I'm sure that that is not a problem. As I look at each one of you, I know it is not a problem.* And I'm going to ask you to continue your deliberations.

Tr. 17416 (emphasis added). These instructions not only ignore the note; they deny its legitimacy. The note makes clear that there definitely *is* a problem – a problem for the juror who complained of feeling threatened in her person.[3] There has been no inquiry into what caused this juror to complain of threats. Thus, neither counsel nor the Court knows whether the conduct that caused the juror to feel threatened was egregious and whether the juror's fears are warranted. Yet, the Court's instruction summarily judges that nothing improper happened in the jury room. By simply declaring that "it is not a problem" at all, without making the "thorough" inquiry required by the CPL (or indeed *any* inquiry at all) the Court marginalizes the juror who complained, conveys to her the message that the Court will not take her note seriously and further erodes her confidence and ability to remain true to her own conscience. The instruction entirely ignores the complaint and the request to be discharged, and implicitly condones any misconduct that caused the reaction. Indeed, the Court's comments – "As I look at each one of you, I know it is not a problem" – suggest that it does not believe that any misconduct would even be possible, a view that will only encourage any jurors who have been pressuring the complaining juror to continue their tactics.

Moreover, the Court's instructions improperly direct that the jury *must* reach a verdict. While the Court initially properly instructed that, "I'm not asking any juror to violate his or her conscience or to abandon his or her best judgment," Tr. 17412, the Court subsequently vitiated that statement by improperly and repeatedly suggesting to the jury that its "job" or "charge" in this case is *to render a verdict*:

> And, I believe that if you work together you will be able to accomplish that which is your charge in accordance with your oath. * * * So, I will tell you, as I said a moment earlier, your verdict, *whatever your verdict may be*, has to be unanimous; *all twelve of you have to agree*. I did want to speak extemporaneously for a moment and express my views both individually and collectively that as a jury, that this is a job that I feel in my heart of hearts that you can accomplish. So, I'm going to ask that you return and you continue your deliberations.

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[3] We note, again, that juror number 8 – an accomplished professional woman – was visibly in tears at several junctures in her brief appearance in the courtroom today. That this dignified juror was so upset that she could not maintain her composure in public emphasizes the importance of the problem she was reporting, and highlights the error in not addressing it in the serious manner required by the CPL.

Tr. 17414-17415 (emphasis added). The Court thus has instructed that the jury *must* reach a verdict – the instruction does not say "*if* you reach a verdict"; it says "*whatever* your verdict may be . . . all twelve of you have to agree."[4]

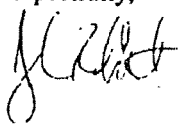
These instructions misstate the law and fatally undermine the defendants' rights to a fair trial. The jury does *not* have to reach a verdict. CPL §260.30 (11) (jury is to retire and deliberate and "*if possible*, render a verdict")(emphasis added). And the law is settled that any verdict in a criminal case "must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows[.]" *Allen*, 164 U.S. at 501. Because the defendants believe the harm cannot be undone, each moves respectfully for mistrial.

In the alternative, defendants request the following curative instruction, to be delivered before the jury commences deliberations this morning:

> Ladies and Gentlemen, I must clarify the instructions I gave you last evening. I want to reiterate that if you reach a verdict on any count, then that verdict must be unanimous. But I hasten to add that the law does *not* require that you reach a verdict. As I said yesterday, I am not asking any juror to violate his or her conscience or to abandon his or her best judgment. Each of you should consider – with respect – the views of your fellow jurors. If you are persuaded by their views, you may decide to change your views. But each one of you has an obligation to consider the evidence, or the lack of evidence, and the law as I have given it to you, in assessing these charges. In the end, you must vote as your conscience and judgment dictate. You should not simply change your position because you may feel pressured or isolated. Again, the Court, all counsel, and the defendants appreciate your diligent service. And I ask you now to continue your deliberations.

We thank the Court for its attention to these matters. Counsel for the defendants, and the defendants will be in Court at 9:30 tomorrow morning. We respectfully request that the jury not commence deliberations until this matter is resolved.

Respectfully,



John R. Cuti

cc: All Counsel (by email)

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[4] The Court also added the weight of its own prestige to the pressure any holdout might feel. After (incorrectly) suggesting that the jury must reach a verdict, Your Honor told the jury that this "job," this "charge" of reaching a verdict is one that Your Honor "feel[s] in [your] heart of hearts that [the jury] can accomplish." This exhortation to reach a verdict eviscerates the earlier instruction that every juror has the right to follow her own conscience and ignores the law that if a juror does not conscientiously agree with their peers, her oath requires that she vote her conscience and not just acquiesce because she is fatigued, pressured, or afraid. *Allen, supra.*