

BUFFALO CITY COURT  
STATE OF NEW YORK : ERIE COUNTY

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THE PEOPLE OF THE STATE OF  
NEW YORK

v.

**SUPPORTING AFFIRMATION**

████████████████████

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████████████████████  
████████████████████

STATE OF NEW YORK )  
COUNTY OF ERIE ) ss.  
CITY OF BUFFALO )

████████████████████ being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York.
2. I am co-counsel for the defendant, ████████████████████, who was convicted of criminal contempt in the second degree (Penal Law § 215.50[3]) following a non-jury trial on June 14, 2022.
3. I make this affidavit in support of my motion to set aside the verdict pursuant to CPL 330.30(1).
4. This affidavit is made upon information and belief, the sources of which are my review of co-counsel's affidavit and the relevant legal authority.
5. I ask that you deem this motion a *de facto* CPL 440.10 motion. Although the courts have given no definitive answer on whether this is authorized, the Court of Appeals left open the possibility as long as the motion is decided "in accordance with the criteria and procedures delineated in CPL 440.30" (*People v. Giles*, 24 NY3d 1066, 1068 [2014]). This motion, which is in writing, on reasonable notice to the prosecution, and based on sworn allegations of fact, satisfies these requirements (CPL 440.30[1][a]).
6. Attached is an affidavit from co-counsel explaining that, although ████████████████████ expressed her desire to testify at trial, he did not call her to the witness stand.

7. “[A] defendant who has accepted the assistance of counsel nevertheless retains authority over certain fundamental decisions regarding the case, including whether to testify in his or her own behalf” (*People v. Hampton*, 64 AD3d 872, 877 [3<sup>rd</sup> Dept. 2009]).
8. Denying a defendant her right to make a fundamental decision regarding the case deprives her of the effective assistance of counsel (*People v. Washington*, 5 Misc3d 957, 963 [NY Co. Ct. 2004]; *cf. People v. Taylor*, 2 AD3d 1306, 1307 [4<sup>th</sup> Dept. 2003]). Although it was an oversight, this is what occurred here.
9. A conviction obtained “in violation of a right of the defendant under the constitution of this state or of the United States” cannot stand (CPL 440.10[1][h]). “The right to the effective assistance of counsel is guaranteed by both the Federal and State Constitutions (US Const, 6<sup>th</sup> Amdt.; NY Const., Art. I, § 6)” (*People v. Baldi*, 54 NY2d 137, 146 [1981]).
10. Treating this as a *de facto* CPL 440.10 motion will prevent sentence from being imposed on a conviction that cannot withstand a post-conviction challenge.

Accordingly, the defendant respectfully requests that the verdict be set aside.

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████████████████████

YOUR HONOR:

Please take notice that on ██████████, at 9:30 a.m. or as soon thereafter as counsel can be heard, the defendant will move this Court to set aside the verdict pursuant to CPL 330.30(1).

Respectfully yours,

████████████████████  
████████████████████  
████████████████████  
████████████████████

DATED: June 30, 2022  
Buffalo, NY

TO:

Hon. ██████████

Erie County District Attorney  
50 Delaware Ave.  
Buffalo, NY 14202