THE EXPANSION OF NEW YORK STATE POST-CONVICTION RELIEF: PEOPLE V. SEEBER AND THE EXTENSION OF CPL 440.10(1)(B) BEYOND BRADY

Karin S. Portlock*

I. INTRODUCTION

The Third Department’s decision in People v. Seeber1 is a seminal opinion on the purpose, meaning, and scope of CPL 440.10(1)(b).2 That provision provides for post-conviction relief where “[t]he judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor.”3 Prior to Seeber, criminal defendants rarely prevailed under this subsection, and section 440.10(1)(b) arguments were frequently paired with claims of constitutional error under subsection (h)—specifically violations of Brady v. Maryland4 and its progeny. In rejecting the defendants’ constitutional contentions, the section 440.10(1)(b) argument was similarly dismissed, often without discussion.5 Seeber is unique in the Third Department’s explicit rejection of the defendant’s Brady claim, while granting relief on the basis of subsection (b) and expounding on its application and significance.6

II. HISTORICAL BACKGROUND

In 1970, section 440.10 of the New York Criminal Procedure Law was enacted in an overhaul of the state’s then-Code of Criminal

---

* Associate, Weil, Gotshal & Manges LLP. I was aided tremendously by the research and drafting assistance of associates Sarah Martin and Gaspard Curioni. Tragically, Katherine Seeber died in June 2013, nearly one year after her release. The opportunity to aid in her defense was an honor and privilege.

2 Id. at 1337, 943 N.Y.S.2d at 284.
3 N.Y. CRIM. PROC. LAW § 440.10(1)(b) (McKinney 2013).
5 See, e.g., infra text and accompanying notes 47–54.
Procedure, which dated back to 1881. The reform simplified motion practice through an “omnibus motion technique” to replace a system in which “many grounds or contentions . . . must be separately raised by different types of motions.”

Section 440.10(1)(b) has not been amended since its adoption.

Section 440.10(1)(b) of the New York Criminal Procedure Law is a partial codification of the writ of error coram nobis, an ancient English common law doctrine that the New York Court of Appeals rejuvenated in 1943 in Matter of Lyons v. Goldstein. The case concerned a defendant who pleaded guilty to burglary in the third degree. Approximately four years after entry of judgment on his plea, the defendant applied to the court of conviction “to open the judgment of conviction, to withdraw his plea of guilty and to enter a plea of not guilty . . . on the ground that his original plea of guilty had been induced by fraud and misrepresentation on the part of a prosecuting official.”

The defendant claimed that “he would not have pleaded guilty in 1936 had he not been ‘promised executive clemency’ by an Assistant District Attorney.” The state sought an order of prohibition from the Special Term of the New York Supreme Court to enjoin the court of conviction from exercising

---


8 See N.Y. CRIM. PROC. LAW § 440.10(1)(b) (McKinney 2013).

9 Richard G. Denzer, Practice Commentary, in N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1971) (“The eight grounds for [a 440.10] motion designated in subdivision 1 appear to cover all contentions which formerly could have been raised upon coram nobis and a motion for a new trial on the ground of newly discovered evidence and all which are still cognizable on state and federal habeas corpus and probably other contentions as well.”) (citations omitted). The current language of section 440.10(1)(b) originates in the Commission’s first draft, released in 1967. See TEMPORARY COMMISSION, supra note 8, at 290.

10 In re Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943). See Peter Preiser, Practice Commentaries, in N.Y. CRIM. PROC. LAW § 440.10, (McKinney 2005) (“In 1943 the Court of Appeals resurrected the ancient writ of coram nobis by which a person convicted of an offense could petition the trial court to exercise its inherent power to set aside the judgment of conviction on the basis of facts not disclosed prior to judgment due to duress, fraud or excusable mistake; which, had they been disclosed to the court, would have prevented entry of the judgment.”).

11 Goldstein, 290 N.Y. at 21, 47 N.E.2d at 427.

12 Id. at 22, 47 N.E.2d at 427.

13 Id. at 28, 47 N.E.2d at 430 (Lewis, J., dissenting).
jurisdiction, which the special term granted and the appellate division upheld. The New York Court of Appeals took the appeal to decide whether a court of conviction could “reopen a judgment of conviction which is based upon fraud and misrepresentation after the judgment has been entered and sentence has been imposed.”

In reversing, the court held that denial of post-conviction relief for judgments of conviction obtained by fraud or misrepresentation “would be repugnant to the due process clauses of the Constitutions of the United States and of the State of New York” and that “[t]he inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted” as it arises from the common law writ of error coram nobis. In addition, the court rejected the argument that executive clemency is a sufficient remedy for criminal defendants seeking post-conviction relief, noting that “[a] pardon proceeds not upon the theory of innocence, but implies guilt.” Thus, the Goldstein court importantly affirmed that the trial court possesses inherent authority to grant relief from convictions obtained through fraud or other improper conduct by the court or prosecutor.

The case sparked a judge-led expansion of post-conviction relief in New York State, which tracked changes in federal procedural due process rights arising from the seminal decisions of the Warren Court. Scholars expounded on coram nobis’s possible impact, noting that since its revival in 1943, “a myriad of applications containing many different allegations of fact have been presented to the trial courts” under the writ.

---

15 See id. at 22, 47 N.E.2d at 427.
16 Id.
17 Id. at 24, 25, 47 N.E.2d at 428, 429.
18 Id. at 27, 47 N.E.2d at 430 (quoting Roberts v. State, 160 N.Y. 217, 221, 54 N.E. 678, 679 (1899)). While this language could be read to suggest that the writ of coram nobis, and its statutory descendant in section 440.10(1)(b) of the New York Criminal Procedure Law, is especially appropriate for claims of actual innocence, nothing in Goldstein limits the remedy to such cases.
19 See Goldstein, 290 N.Y. at 25, 47 N.E.2d at 428.
20 See Preiser, supra note 11, at 247 (“The spark thus ignited rapidly grew to a fire, fueled to some extent by Stanley (later Judge [and Chief Judge] Fuld’s frequently cited article in the New York Law Journal, with the bulk of the cases involving either claims of off-record circumstances that induced improvident guilty pleas or claims of denial of counsel. . . . [A]s Fourteenth Amendment incorporation of federal constitutional rights of defendants rapidly burgeoned in the 1960s, the use of the writ was expanded to include all manner of alleged constitutional errors—whether based upon facts in the record or not—where direct appellate review was foreclosed.”) (citation omitted).
21 Thomas Victor Dadey, Note, The Expanding Scope of Coram Nobis, 13 SYRACUSE L. REV. 116, 117–23 (1961) (listing grounds for invoking coram nobis, including fraud, duress, and
III. THE SEEBER DECISION

Katherine Seeber and her then-boyfriend, Jeffrey Hampshire, were indicted and charged in February 2000 “with three counts of murder in the second degree in connection with the strangulation death of [Seeber]’s [ninety-one]-year-old stepgreat-grandmother.”22 In advance of trial, Seeber was provided

a report prepared by State Police forensic scientist Garry Veeder, wherein Veeder opined that fibers found on the duct tape recovered from the victim’s mouth were “identical in macroscopic and microscopic appearance” and “consistent with having originated from the same material as” a pair of black suede gloves that defendant had worn on the day in question.23

This information, according to Seeber’s counsel, contradicted her version of events and undermined her defense to the felony murder charge.24 “Accordingly, counsel recommended that [Seeber] plead guilty.”25

In January 2001, Seeber pleaded guilty to second degree murder and burglary in the third degree and agreed to testify against Hampshire at his trial.26 Hampshire proceeded to trial and was subsequently acquitted.27 Seeber’s motion to withdraw her plea was denied, and concurrent sentences were imposed, resulting in an aggregate sentence of twenty years to life in prison.28

Several years later, investigations conducted by the State Police and the Office of the Inspector General revealed that coercion, as well as inducement by promise of a lesser sentence and use of perjured testimony; see also Charles H. Umhrecht, Jr., Comment, Availability of the Remedy Coram Nobis in New York, 22 Alb. L. Rev. 125, 131–32 (1958) (listing three situations where fraud was sufficient to vacate a judgment of conviction: (1) perjured testimony knowingly used by the prosecution; (2) withholding of exculpating evidence regardless of the prosecution’s intent; and (3) inducement of guilty plea by the prosecution’s false promise of lenient sentencing); id. at 131 (“Generally speaking, the defendant will not be successful if the means were within his grasp to present the question to the court, or if the court or prosecutor was not guilty of such conscious misconduct that the effect was to deny a fair trial to the defendant.”).

23 Id.
24 See id. at 1335–36, 943 N.Y.S.2d at 283.
25 Id. at 1336, 943 N.Y.S.2d at 283.
27 See Seeber, 94 A.D.3d at 1336, 943 N.Y.S.2d at 283.
2013/2014] Expansion of Post-Conviction Relief 83

Veeder failed to follow laboratory protocols and engaged in conduct that “raise[d] serious questions about [his] competence as a forensic scientist and the quality and integrity of his work”—specifically with respect to various fiber evidence analyses he performed between 1993 and 2008.29

During the course of the investigation, Veeder committed suicide.30

In light of this information, Seeber moved to vacate her plea under CPL 440.10(1)(b) and (h), alleging, inter alia, that “the People obtained her plea through fraud or misrepresentation, [and] that she was deprived of due process of law” under Brady.31 The trial court granted the motion, and the People appealed.32

The Third Department found Seeber’s Brady argument unavailing, since a Brady violation could not have occurred in the absence of “a showing that the People suppressed the evidence at issue.”33 The court noted that

[h]ere, there is no question that defendant was provided with a copy of the relevant fiber analysis report, and the People certainly cannot be said to have “suppressed” Veeder’s procedural shortcomings and professional misconduct when such information did not come to anyone’s attention until nearly a decade after defendant’s plea was obtained.34

However, the court held that Veeder was “an individual acting on behalf of the People within the meaning of CPL 440.10(1)(b),” and accordingly, that “[w]hile the People’s knowledge of the misconduct or misrepresentation at issue indeed is a relevant consideration in determining whether a Brady violation has occurred, such knowledge (or here, the lack thereof) is not dispositive of whether a misrepresentation has occurred within the meaning of CPL 440.10

29 Seeber, 94 A.D.3d at 1336, 943 N.Y.S.2d at 283 (alterations in original).
30 See id. at 1336 n.1, 943 N.Y.S.2d at 283 n.1.
31 Id. at 1336, 943 N.Y.S.2d at 283. Seeber also moved to vacate on grounds of ineffective assistance of counsel under 440.10(1)(b). See id.
32 Id. at 1336, 943 N.Y.S.2d at 283–84.
33 Id. at 1336, 943 N.Y.S.2d at 283.
34 Id. at 1336–37, 943 N.Y.S.2d at 284. Notably, the court did not address Seeber’s argument that a Brady violation may be imputed to certain actors within the “prosecutorial team,” such as Veeder. See, e.g., Kyles v. Whitley, 514 U.S. 419, 437 (1995) (“[T]he prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”); Mastracchio v. Vose, 274 F.3d 590, 600 (1st Cir. 2001) (“When any member of the prosecution team has information in his possession that is favorable to the defense, that information is imputable to the prosecutor.”).
Because “Veeder—as an employee of the State Police—qualifies as a person acting on behalf of the prosecution, and the fiber analysis he performed here was, at the very least, misleading,” the court held that relief was warranted under CPL 440.10(1)(b) “notwithstanding the fact that the People admittedly were unaware of Veeder’s underlying misconduct.”

In so holding, the court explained that the legislature could not have intended knowledge on the part of the prosecutor as a prerequisite to a successful CPL 440.10(1)(b) claim. Instead, such knowledge would pose a potentially insurmountable and unjust bar to relief to defendants whose pleas had been induced by fraud, and would unfairly prevent remedying a miscarriage of justice.

IV. SEEBER’S IMPLICATIONS

Prior to Seeber, there was no case in which an appellate court—reviewing the grant or denial of a motion for post-conviction relief—had rejected the defendant’s Brady argument while granting relief on the ground of CPL 440.10(1)(b). These two frequently-paired

55 See, e.g., People v. Bryce, 88 N.Y.2d 124, 128, 130, 666 N.E.2d 221, 223, 224, 643 N.Y.S.2d 516, 518, 519 (1996) (reversing denial of motion to vacate pursuant to CPL 440.10(1)(b), (g), and (h) based on failure to preserve and deliver Brady material before trial); People v. Blackman, 90 A.D.3d 1304, 1310, 1311, 935 N.Y.S.2d 181, 188–89 (App. Div. 3d Dep’t 2011) (upholding motion to vacate pursuant to CPL 440.10(1)(b) and (c) and for a Brady violation); People v. Ortega, 40 A.D.3d 394, 395, 396, 836 N.Y.S.2d 144, 145–46 (App. Div. 1st Dep’t 2007) (upholding denial of CPL 440.10 motion because CPL 440.10(1)(b) had no applicability and there was no Brady violation); People v. Drossos, 291 A.D.2d 723, 724, 738 N.Y.S.2d 724, 725 (App. Div. 3d Dep’t 2002) (upholding denial of motion to vacate pursuant to CPL 440.10(1)(b), (c), and (h) because People did not withhold Brady evidence); People v. Thibodeau, 267 A.D.2d 952, 952, 955, 700 N.Y.S.2d 621, 623, 626 (App. Div. 4th Dep’t 1999) (upholding denial of motion to vacate pursuant to CPL 440.10(1)(b), (f), (g), and (h) and concluding that defendant had failed to establish a Brady violation); People v. Ramos, 201 A.D.2d 78, 79, 86, 89–90, 614 N.Y.S.2d 977, 978, 982, 984 (App. Div. 1st Dep’t 1994) (upholding the granting of motion to vacate pursuant to CPL 440.10(1)(b), (f), (g), and (h) and failure of the People to deliver relevant Brady material to the defendant); People v. Pilotti, 127 A.D.2d 23, 28–29, 31, 37, 511 N.Y.S.2d 248, 252, 253, 257 (App. Div. 1st Dep’t 1987) (reversing denial of motion to vacate pursuant to CPL 440.10(1)(b) due to failure of the People
bases for relief were rarely distinguished and often discussed with much analytical overlap.\textsuperscript{40}

The United States Supreme Court’s 1963 decision in \textit{Brady v. Maryland} established that prosecutorial suppression of evidence favorable to the defendant “violates due process where [such] evidence is material either to guilt or to punishment.”\textsuperscript{41} In \textit{Giglio v. United States},\textsuperscript{42} the Court extended \textit{Brady}’s mandate to impeachment evidence that could “in any reasonable likelihood have affected the judgment of the jury.”\textsuperscript{43} CPL 440.10(1)(b) allows for a judgment to be vacated where it has been “procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor.”\textsuperscript{44} This formulation emphasizes relief to remedy a flawed judicial process, and unlike constitutional violations, New York courts have not subjected violations of CPL 440.10(1)(b) to harmless error analysis.\textsuperscript{45}

Nevertheless, when these claims are brought together, New York appellate courts have failed to distinguish them or have analyzed the \textit{Brady} claim first under constitutional precedents and then have rejected the statutory basis for relief largely without independent analysis.\textsuperscript{46}

For example, in \textit{People v. Ortega}, the defendant pleaded guilty to criminal possession of a controlled substance following the denial of his suppression motion at a hearing at which two officers testified.\textsuperscript{47} “Meanwhile, the officers who testified at the hearing were implicated in an investigation of corruption involving the 30th Precinct. One officer was convicted of perjury, and the other [was] dismissed from the Police Department for making false statements.”\textsuperscript{48} In light of this evidence, the defendant appealed the
to disclose \textit{Brady} documents).  

\textsuperscript{40} \textit{See infra} note 46 and accompanying text.  
\textsuperscript{41} \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963).  
\textsuperscript{42} \textit{Giglio v. United States}, 405 U.S. 150 (1972).  
\textsuperscript{43} \textit{Id.} at 154.  
\textsuperscript{44} \textit{N.Y. CRIM. PROC. LAW} § 440.10(1)(b) (McKinney 2013).  
\textsuperscript{45} \textit{See, e.g., Banks v. Dretke}, 540 U.S. 668, 691 (2004) (indicating that the elements of a prosecutorial misconduct claim under \textit{Brady} include a showing of prejudice).  
\textsuperscript{47} \textit{See Ortega}, 40 A.D.3d at 394, 836 N.Y.S.2d at 145.  
\textsuperscript{48} \textit{Id.}
denial of his suppression motion and also sought to vacate his conviction under, \textit{inter alia, Brady} and CPL 440.10(1)(b).\textsuperscript{49} The trial court denied the motion.\textsuperscript{50} The First Department rejected the \textit{Brady} claim because the prosecutor lacked knowledge of the officers’ misconduct until after the plea and “[t]he People are not required, pursuant to \textit{Brady} or \textit{Giglio}, to disclose to a defendant exculpatory information to which they have neither actual or imputed possession nor any kind of access.”\textsuperscript{51} The court failed to analyze the statutory argument, noting only in the order’s final sentence that “CPL 440.10(1)(b) has no applicability to this case because there is no evidence that the judgment was procured by fraud.”\textsuperscript{52} While the defendant in \textit{Ortega} is distinguishable from \textit{Seeber} in several respects (notably, the \textit{Ortega} defendant did not contest his guilt),\textsuperscript{53} the court apparently used its \textit{Brady} analysis to reject the defendant’s alternative grounds for relief without explaining how the statutory analysis might differ from its constitutional counterpart.\textsuperscript{54}

\textit{Seeber} is also an apparent departure from the Third Department’s decision in \textit{People v. Drossos},\textsuperscript{55} in which the defendant admitted attaching an explosive device to a police vehicle and pleaded guilty to criminal possession of a weapon in the first degree, “[d]escribing his conduct in detail at the plea allocution.”\textsuperscript{56} Months after his plea, the People informed defense counsel that “[a] former State Police Investigator [had] confessed that a palm print evidencing defendant’s contact with the vehicle was fabricated.”\textsuperscript{57} Six years after this revelation, the defendant sought relief under, \textit{inter alia}, CPL 440.10(1)(b) and \textit{Brady}, arguing that “his conviction was obtained by the use of false evidence and [that] the prosecution knew of the evidence tampering prior to the entry of his plea.”\textsuperscript{58} The trial court denied defendant’s motion and the appellate court

\textsuperscript{49} See \textit{id. at 395, 836 N.Y.S.2d at 145.}
\textsuperscript{50} See \textit{id. at 394, 836 N.Y.S.2d at 145.}
\textsuperscript{51} \textit{Id. at 395, 836 N.Y.S.2d at 145–46. ("[I]t is clear that the District Attorney did not have substantiated evidence regarding any misconduct committed by these officers in unrelated cases until, at the earliest, 1994, which was after defendant’s 1993 plea of guilty and scheduled sentencing.").}
\textsuperscript{52} \textit{Id. at 396, 836 N.Y.S.2d at 146.}
\textsuperscript{53} See \textit{id. at 395, 836 N.Y.S.2d at 146.}
\textsuperscript{54} See \textit{id.}
\textsuperscript{55} \textit{People v. Drossos, 291 A.D.2d 723, 738 N.Y.S.2d 724 (App. Div. 3d Dep’t 2002).}
\textsuperscript{56} \textit{Id. at 723, 738 N.Y.S.2d at 725.}
\textsuperscript{57} \textit{Id. at 723–24, 738 N.Y.S.2d at 725.}
\textsuperscript{58} \textit{Id. at 724, 738 N.Y.S.2d at 725.}
affirmed, finding in pertinent part that the withheld information was not *Brady* evidence since it was “not material [and] does not tend to establish defendant’s innocence.” The court also disagreed with defendant’s contention that the “evidence, if disclosed, would have materially affected [his] decision to plead guilty rather than proceed to trial . . . [since] the remaining evidence of defendant’s guilt was overwhelming.” In rejecting defendant’s CPL 440.10(1)(b) argument, the court then explained that there was “no evidence supporting defendant’s contention that his plea and conviction were obtained by fraud,” since the People did not learn of the falsified palm print until after the plea. 

The *Seeber* court, by contrast, explicitly held that CPL 440.10(1)(b) does not contain a knowledge requirement. *Seeber* clarified *Drossos*’s holding in this regard, confirming that the People’s knowledge of the underlying fraud is not necessary in order to find that a violation of CPL 440.10(1)(b) has occurred—although actual or imputed knowledge is essential to establishing a *Brady* violation. In distinguishing CPL 440.10(1)(b) from *Brady* on this basis, *Seeber* expanded the statutory basis for relief beyond its constitutional counterpart significantly.

Moreover, the court further rejected the People’s invitation to import the *Brady* factors into the statutory analysis. For example, the *Seeber* court did not restrict CPL 440.10(1)(b)’s scope to evidence relating to guilt (or require that such evidence be exculpatory in nature) despite the People’s contention that evidence of Veeder’s misconduct was merely impeachment evidence that could not form the basis for statutory relief. The court’s silence on this point suggests that relief under CPL 440.10(1)(b) may be available to even those defendants who do not claim factual innocence.

---

59 Id.
60 Id. at 72, 738 N.Y.S.2d at 725–26 (citation omitted).
61 Id. at 724, 738 N.Y.S.2d at 726.
63 See id. at 1338 n.4, 943 N.Y.S.2d at 285 n.4 (“*[Drossos did not] hold*[] that the People must be aware of the underlying fraud or misrepresentation in order for a violation of CPL 440.10(1)(b) to occur.”).
64 See id. at 1338, 943 N.Y.S.2d at 285.
65 See id.
66 In its appellate brief, the People argued that the statutory analysis under CPL 440.10(1)(b) necessarily imports the *Brady* factors. See Brief for Appellant at 31, *Seeber*, 94 A.D.3d 1335, 943 N.Y.S.2d 282 (No. 104533) (“CPL 440.10(1)(b) involves disclosures under *Brady*.”).
67 See id. at 29.
V. CONCLUSION

In sum, Seeber is influential in explicitly expanding the scope of CPL 440.10(1)(b) beyond Brady. Seeber may indeed spark a resurgence in CPL 440.10(1)(b) claims now that the criteria for a successful claim under the subsection have been clarified. Undoubtedly, as the Third Department explained, the implications of Seeber’s interpretation of this provision will extend “far beyond the [instant case.]”68