

TO BE ARGUED BY:  
RICHARD HARTZMAN

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NEW YORK SUPREME COURT  
APPELLATE DIVISION--FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

ERIC ARMSTEAD,

Defendant-Appellant.

Indictment No. 1972/84

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BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is a consolidated appeal of a judgment of conviction of second degree robbery rendered on September 11, 1984 before the Honorable Edwin Torres, Justice of the Supreme Court, New York County, and of the denial by Judge Torres on March 26, 1986 of a motion to vacate the judgment, made pursuant to CPL §440.10 (h).

Timely notice of appeal was filed subsequent to the judgment of conviction. In addition, this court granted Appellant's timely motions to appeal the denial of the §440 motion and to consolidate the two appeals.

The decisions of the court below, sentencing the Appellant and denying his §440 motion are appended to this brief (A65, 4-5, 76-77).

## QUESTIONS PRESENTED

1. Did the court below err in denying Appellant's motion to vacate his judgment of conviction on the ground that he did not receive effective assistance of counsel in violation of his Sixth Amendment right to counsel, due to the failure of his trial counsel to investigate, prepare and raise the insanity defense?

## STATEMENT OF THE FACTS

### Proceedings up to §440 Motion to Vacate

This action commenced on March 28, 1984, when the New York County Grand Jury presented and filed an indictment charging the defendant with the commission of the class C felony of second degree robbery (Penal Law §160.10(1)). Defendant was accused of robbing a man of \$20 in Mid-Manhattan on March 19, 1984 in concert with two other individuals who were never apprehended.

Trial of the matter was held from June 29, 1984 to July 5, 1984, before the Hon. Edwin Torres, J.S.C. The jury returned a verdict of guilty of the crime as charged and defendant was sentenced on September 11, 1984 to an indeterminate term of three to six years imprisonment as a second felony offender.

The evidence at trial showed that on March 19, 1984, the victim Mr. Umbrino and his friend Mr. Moynihan were walking

down West 46th Street in Manhattan when they noticed they were being followed by three men. The victims crossed the street and the three men followed them. Umbrino ran into the vestibule of a building and the three men entered after him. They demanded his money and got \$20 from him. Moynihan attracted the attention of the police who saw Mr. Armstead in the street. Mr. Armstead took off and ran a couple of blocks before the police caught him. When he was brought back to the scene the other two perpetrators had disappeared. Umbrino and Moynihan identified Mr. Armstead as being one of the robbers. According to both, Mr. Armstead was not the one who demanded or took the money from Umbrino.

At the trial, defendant's Legal Aid counsel, Steven Zeidman, conducted cross-examination and gave a summation, arguing that the Appellant, while present in the vicinity of the crime, had nothing to do with its commission. He made no opening statement nor did he call any witnesses on behalf of the defendant.

Notice of Appeal was filed on October 4, 1984 (A6), and the Legal Aid Society was assigned as appellate counsel for Mr. Armstead.

Subsequently Mr. Armstead and his family retained the law firm of Gering Gross & Gross to handle the appeal and this court by Order, dated October 24, 1985, permitted substitution of counsel (A7).

On February 28, 1986, appellant filed a notice of motion to vacate his judgement pursuant to CPL §440.10(h) on the

ground that he received ineffective assistance of counsel in violation of his Sixth Amendment right to counsel, due to trial counsel's failure to investigate, prepare and raise the insanity defense (A8).

Failure of Appellant's Trial Counsel to Investigate the  
Insanity Defense

In support of the §440 motion, Richard Hartzman, Esq., of counsel to Gering Gross & Gross, Esqs., filed an affidavit, dated February 20, 1986 (hereinafter "Affidavit"), describing the investigation he conducted into Mr. Armstead's psychiatric background and into the investigation of this history by Mr. Zeidman, Appellant's trial counsel (A10-21).

Mr. Hartzman states in his Affidavit that he was informed by Mr. Zeidman that, although, during pre-trial preparation he was told by Mr. Armstead's family that Mr. Armstead had a history of severe mental problems, he did not pursue the investigation or attempt to ascertain the facts as to Mr. Armstead's psychiatric history. Nor did Mr. Zeidman consider raising the insanity defense as a trial strategy for the defendant. (A11)

A Pre-Pleading Investigation (hereinafter "PPI") and Psychiatric Evaluation were ordered by Judge Rothwax on April 5, 1984 (A33). Mr. Zeidman informed Mr. Hartzman that the reason for the PPI and psychiatric evaluation was to determine if there was a basis for alternative sentencing for Mr. Armstead

in this matter, and that Judge Rothwax was willing to consider alternatives because of the concern shown for Mr. Armstead by his family (A19).

Mr. Hartzman also states in his Affidavit that Mr. Zeidman further informed him that discussion of alternative sentencing was closed when the parties learned of Mr. Armstead's prior conviction for burglary in 1983 in Philadelphia for which he was given four years probation (A19), and that the PPI and Psychiatric evaluation were not related to a determination of Mr. Armstead's fitness to stand trial or his mental competency at the time of the crime (A19).

The Pre-Pleading Investigation (PPI), which was conducted by the New York City Department of Probation prior to trial (A22-30), and which was in Mr. Zeidman's case file (A11), states that:

"His Philadelphia Probation Officer said that they think of him [Mr. Armstead] more as someone with a mental problem than as a criminal. Before his present incarceration, they were considering the possibility of bringing him before a judge and trying to get him committed for additional hospitalization." (A26)

The PPI further states that

"It has been learned from his mother and from his Probation Officer in Philadelphia that he has been hospitalized for psychiatric care in the Fairmount Institute in Philadelphia...Both his mother and his Probation Officer reported that he was not cooperative about taking necessary medication that was prescribed for him, and both said they were sure that he would function much better if he were consistent about taking the medication. His mother reported that he has been diagnosed as manic depressive, and his Probation Officer commented that some of his ideas which do not correspond to reality have a grandiose quality to them" (A29),

and further notes that Mr. Armstead had been placed on a

suicide watch by the Correctional Department (A28).

Although the PPI also states that "His Defense Attorney is endeavoring to secure information from the Fairmount Institute" (A29), Mr. Zeidman indicated in conversation with Mr. Hartzman that he had no recollection of ever seeking or receiving any psychiatric information from the Fairmount Institute regarding the defendant. Nor did Mr. Hartzman find any such information upon inspection of Mr. Zeidman's file for this case (A12).

Prior to trial, Mr. Zeidman received a letter dated June 5, 1984 (A31) from Mr. Armstead's prior counsel in Philadelphia, Harry Rubin. Attached thereto was a 1983 letter from the Eagleville Hospital relating to Mr. Armstead's contact with the institution (A32).

Mr. Hartzman states in his Affidavit that Mr. Zeidman made no attempt to obtain Mr. Armstead's records from that institution, and that he found no records from or other correspondence with the Eagleville Hospital in Mr. Zeidman's case file (A13).

Mr. Hartzman's investigation revealed that Mr. Armstead, while at Eagleville Hospital, suffered a severe psychotic episode (A13).

The pre-trial psychiatric evaluation ordered by Judge Rothwax to be done at the court's psychiatric clinic (A33) was completed in April, 1984, and a written report prepared on April 20, 1984 showed that Mr. Armstead was in a psychotic condition and required strong medication (A34-35).

After trial, a further psychiatric evaluation was

conducted by the court's psychiatric clinic and the report prepared on July 9, 1984 (A36-38).

Mr. Hartzman states in his Affidavit that Mr. Zeidman expressed in conversation with him no recollection of having obtained copies of either of these evaluations, or of having evaluated them. In addition, Mr. Hartzman found no copies or mention of either of them in trial counsel's case file and was told by Ms. Sadie Johnson of the psychiatric clinic that there was no record of any request for the evaluations other than the one which he made (A13).

In defending Mr. Armstead, Mr. Zeidman never served a notice of defense of mental diseases or defect pursuant to §250.10 of the Criminal Procedure Law (A14).

#### Appellant's Psychiatric History

Based upon information provided by Mr. Armstead's family, Mr. Hartzman, upon investigation, learned that Mr. Armstead had been a patient at the Montgomery County Emergency Service in Norristown, Pennsylvania (hereinafter "MCES") (A39). Information regarding Mr. Armstead's condition was provided to counsel by MCES (A40-48).

The records from MCES showed, among other things, that:

a. Mr. Armstead was admitted to MCES on March 25, 1983 from the Eagleville Hospital after suffering a severe psychotic episode.

b. Upon admission, Mr. Armstead was diagnosed as suffering

from paranoid schizophrenia.

c. Mr. Armstead had been involved in alcohol and drug abuse in the past, and, as part of a sentence of probation in connection with a conviction, he was required to undergo inpatient treatment at Eagleville Hospital.

d. While at Eagleville, Mr. Armstead suddenly became psychotic, visually hallucinating and hearing voices, feeling he was God, talking in grunts and groans and using sign language.

e. Mr. Armstead was characterized in the MCES Contact Sheet (A42) as "extremely psychotic", and "unable to care" for himself while at Eagleville, and was thus transferred to MCES.

f. The MCES Treatment Plan (A44) indicated that Mr. Armstead was suffering from "bizarre or irrational behavior which if left untreated could prove hazardous to you or others", and was "too agitated", "too confused", "too cognitively impaired", "too paranoid or suspicious", "too out of touch with reality", "too judgmentally impaired", "too delusional", too emotionally labile", and "too frightened".

g. The MCES Discharge Summary (A43) notes that Mr. Armstead was given medication upon admission--Haldol and Cogentin. The Summary states that:

"Soon after admission he had to be placed in seclusion and restraints for extremely agitated behavior where he began posturing, then started to jump up and down, touching the ceiling, and could not stop doing this with verbal command or intervention."

h. The MCES Patient Interview states that Mr. Armstead

"demonstrates no insight, is confused and presents much confused, illogical thinking. He is elusive, circum-

stantial and has much difficulty concentrating or attending to expression of thoughts....

"The consensus of opinion was that this patient was suffering from a schizophrenic disorder of recent onset, i.e., schizophreniform, and that psychotropic medication is the recommended treatment at this time. Efforts to improve reality testing through the use of activities, counseling, adjunctive therapy are all recommended."

i. Further hospitalization was also recommended and Mr. Armstead was discharged to the Fairmount Institute on March 30, 1983 with a final diagnosis of schizophreniform disorder, and prescribed Haldol and Cogentin as discharge medications. (A43)

As indicated in Mr. Hartzman's Affidavit (A16-17), Schizophreniform Disorder is defined in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition, 1980 (hereinafter "DSM"), published by the American Psychiatric Association, (extracts as submitted to the court below at A49-59), as follows:

"In Schizophreniform Disorder, by definition the duration of the illness is less than six months. The cross-sectional symptom picture may be indistinguishable from Schizophrenia, but emotional turmoil and confusion are more likely to occur in Schizophreniform Disorder."  
(A49)

As part of Mr. Hartzman's investigation for this case, he obtained Mr. Armstead's psychiatric records from the Fairmount Institute (A60-64).

The records from Fairmount indicate that Mr. Armstead was admitted to the Institute on March 30, 1983, and was initially diagnosed as suffering from a "Major Affective Disorder, Bipolar, Substance Abuse by History: Code 296.44". (A61)

As indicated in Mr. Hartzman's Affidavit (A17-18), Major Affective Disorder is described in the DSM as follows:

"The essential feature of this group of disorders is a disturbance of mood, accompanied by a full or partial manic or depressive syndrome, that is not due to any other physical or mental disorder. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation." (A52).

Code 296.44 is explained in the DSM as follows:

"296.4x Bipolar Disorder, Manic  
Diagnostic Criteria for Bipolar Disorder, Manic  
Currently (or most recently) in a manic episode (p.  
208)...." (A58)

"Fifth-Digit code numbers and criteria for  
subclassification of manic episode...."

4 - With Psychotic Features

This fifth-digit category should be used when there apparently is gross impairment in reality testing, as when there are delusions or hallucinations or grossly bizarre behavior." (A56)

With regard to manic episodes accompanying major affective disorders, the DSM states that

"The essential feature is a distinct period when the predominant mood is either elevated, expansive, or irritable and when there are associated symptoms of the manic syndrome. These symptoms include hyperactivity, pressure of speech, flight of ideas, inflated self-esteem, decreased need for sleep, distractibility, and excessive involvement in activities that have a high potential for painful consequences, which is not recognized." (A53).

The Psychiatric records obtained from Fairmount further indicated (A60-64):

a. The Discharge Summary (A62-63) shows a history of behavioral, emotional and mental problems, and drug and alcohol abuse going back to when Mr. Armstead was age 8 and becoming more serious in 1981 and again in 1982 when he was involved in a robbery [He was actually convicted of burglary].

b. Mr. Armstead demanded discharge from Fairmount during his second week there, but, with support from his family, he

was legally committed for a further period. (A63)

c. Mr. Armstead gradually improved and was discharged on May 13, 1983.

d. At the time of discharge he was diagnosed as having a "Major Affective Disorder, Bipolar, Manic: Code 296.44." (A61)

e. Continued medication (Lithium Carbonate, 300 mg, four times daily and Colace, 100 mg, at bedtime) was recommended upon discharge. (A64)

f. Continuing family therapy was also recommended upon discharge. (A64)

The psychiatrist, in reporting on the first court ordered psychiatric evaluation done as part of the PPI, stated that Mr. Armstead's "judgement and insight were impaired." He made a diagnosis of "Atypical psychosis", and recommended psychiatric treatment and anti-psychotic medication (A35).

As indicated in Mr. Hartzman's Affidavit (A20), The DSM states as to Atypical Psychosis that it

"is diagnosed when there is a nonaffective psychotic disorder but there is insufficient information to make a diagnosis of Schizophrenia." (A49)

"This is a residual category for cases in which there are psychotic symptoms (delusions, hallucinations, incoherence, loosening of associations, markedly illogical thinking, or behavior that is grossly disorganized or catatonic) that do not meet the criteria for any specific mental disorder.

"Common examples of the category include:  
....(4) Psychoses about which there is inadequate information to make a more specific diagnosis..."  
(A50-51)

The diagnosis of Atypical Psychosis was made within a month after the crime of which Mr. Armstead was accused.

At his sentencing, Judge Torres ordered that Mr. Armstead

be given psychiatric treatment (A65).

In the spring of 1985, while Mr. Armstead was incarcerated at the Clinton Correctional Facility, proceedings were commenced to commit him to a hospital for the mentally ill (Petition and related documents: A66-68).

Mr. Hartzman states in his Affidavit that Mr. Armstead was subsequently committed to the Mental Hygiene Unit at Clinton, then transferred to the Central New York Psychiatric Center in Marcy, and most recently to the Auburn State Correctional Facility (A20).

Mr. Hartzman states in his Affidavit that Mr. Armstead's psychiatrist at Auburn, Dr. Seltzer, informed Mr. Hartzman that Mr. Armstead, as of February 3, 1986, is in the Special Intermediate Health Care Facility at Auburn and is on medication and that Mr. Armstead does well as long as he takes his medication (A20-21).

### The People's Answer to Appellant's Claims

Appellant's motion to vacate was returnable on March 26, 1986 (A8). It was not until the return date, just prior to oral argument that the People served upon Appellant's attorney, in court, their papers in opposition to the motion (A80).

Assistant District Attorney Michael Goldstein stated in his Affirmation in Opposition to Defendant's Motion, dated March 24, 1986 (hereinafter "Affirmation"), that:

"...defense counsel Zeidman informed the Court that he had spoken to defendant's family and determined

that the defendant had a psychiatric history. Mr. Zeidman then requested a Pre-Pleading Investigation and made a separate request for a psychiatric evaluation of defendant, both of which were completed by April 26, 1984. In addition, Mr. Zeidman wrote to defendant's prior attorney and obtained additional information concerning defendant's background... Finally, Mr. Zeidman reviewed a videotape of a statement made by defendant to affirmant less than 12 hours after the incident." (A71)

ADA Goldstein also states his own opinion in his Affirmation that "In that tape, defendant appears completely rational, demonstrates a complete knowledge of what transpired and sets forth a coherent defense." (A72)

At the brief and hurried oral argument held on March 26, 1986 on the motion to vacate, defense counsel was cut off in midsentence by Judge Torres' denying the motion. (A76-77)

## ARGUMENT

- I. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION ON THE GROUND THAT APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL DUE TO THE FAILURE OF HIS TRIAL COUNSEL TO INVESTIGATE, PREPARE AND PRESENT THE INSANITY DEFENSE

- A. The General Test For Effective Assistance Of Counsel Is Reasonable Competency

The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (US Const., 6th Amend.; NY Const. Art. I, §6). People v. Baldi, 54 NY2d 137 (1981). The Court in Baldi, in attempting to define ineffective counsel, stated:

"What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation..."

"Our most critical concern in reviewing claims of ineffective counsel is to avoid confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis. It is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy. But trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met..." 54 N.Y.2d at 146-47.

Although the Court in Baldi did not explicitly choose between the newer standard of "reasonable competence" which requires a lesser showing to establish ineffective assistance and the traditional standard--whether counsel's shortcomings

rendered the "trial a farce and a mockery of justice"--the United States Supreme Court, in Strickland v. Washington, 464 U.S. 810, 104 S.Ct. 2052 (1984) adopted the newer standard:

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." 104 S.Ct. at 2065.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts of omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case..." 104 S.Ct. at 2066.

B. Effective Assistance of Counsel Includes The Duty to Investigate.

As stated in Strickland, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 104 S.Ct. at 2066.

"...[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id.

The duty to investigate includes the duty to explore the insanity defense when the circumstances warrant. In People v. Bennett, 29 N.Y. 2d 462 (1972), a robbery conviction was reversed because of defendant's attorney's "manifest failure to prepare the defense that he was 'insane' at the time the crime

was committed." Id at 465. The Court stated:

"But, at the very least, the right of a defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him upon a trial and ask questions. Moreover, and this is well settled, the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.' [citations omitted] Clearly, then, where, as in the present case, the record unequivocally demonstrates a complete lack of investigation or preparation whatever on the only possible defense available, the lawyer, far from providing the sort of assistance which the Constitution guarantees to the most lowly defendant, has in truth rendered 'the trial a farce and mockery of justice'." [citations omitted] (emphasis added) 29 N.Y. 2d at 466-67.

C. Appellant's counsel failed to meet the minimal standards of effective assistance in failing to investigate, prepare and present the insanity defense, depriving appellant of a fair trial.

In light of the evidence presented by the prosecution, the appellant was left with only one viable defense: the defense of insanity. At trial counsel made no opening statement nor did he call any witnesses on behalf of the defendant. He simply conducted cross-examination and gave a summation, arguing that the appellant, while present in the vicinity of the crime, has nothing to do with its commission. But the evidence was so overwhelming as to leave this defense incredible. The jury deliberated for only a short time.

Appellant's trial attorney, Steven Zeidman, failed to develop the insanity defense as an alternative to his non-viable trial strategy. This was because he was unaware of the fact that there existed an ample basis for the insanity

defense, due to his failure to competently investigate Mr. Armstead's psychiatric history. As a result, defendant was denied effective assistance of counsel under the Sixth Amendment. People v. Bennett, supra; People v. Angellilo, 91 A.D. 2d 666, 457 N.Y.S. 2d 118 (2d Dept. 1982). See also, People v. Cisneros 45 A.D. 2d 510, 359 N.Y.S. 2d 895 (1st Dept. 1974), in which a manslaughter conviction was reversed because the defendant's request for psychiatric assistance was denied.

The facts of the Bennett case, in which the Court of Appeals found that effective assistance of counsel had been denied, are similar to the case at bar. In Bennett there was ample basis for the presentation of an insanity defense. The defendant had tried to commit suicide before and after the crime; he required psychiatric treatment two weeks after the crime; he was found incompetent to stand trial and committed to Matteawan State Hospital for a year; and he spent 15 years in Dannemora State Hospital after his conviction. As in the case at bar, the defendant's only viable defense was insanity.

In Cisneros, the defendant had been in and out of mental hospitals, having been diagnosed as a schizophrenic. After his arrest he was again diagnosed as schizophrenic and found unfit to stand trial. When subsequently found fit, he was tried and convicted, but three months after sentence was admitted to Matteawan State Hospital.

In Angellilo, the defendant had a history of mental illness, had been found incompetent to stand trial and suffered from a psychosis which could only be controlled

through the use of medication.

In the case at bar, as in these other cases, the defendant had a history of mental illness including hospitalization less than a year before the crime. (A41-48, 61-64) He has been diagnosed as suffering from paranoid schizophrenia, and from a major affective disorder, manic type--a psychotic syndrome. (A61) He has a need for strong medication to control his psychotic symptoms. (A21, 29, 64) His family, Philadelphia probation officer and current psychiatrist at Auburn State Correctional Facility all report that the defendant does not function well when he does not take his medication and the first two parties report that he was not cooperative in taking his medication. (A21, 29, 64) Defendant's probation officer in Philadelphia saw him more as having a mental problem than being a criminal and was considering having him committed for additional hospitalization before his arrest for the crime which is the subject of this case. (A26) He was placed on a suicide watch while incarcerated after arrest (A28) and within a month of his arrest was diagnosed in the court's psychiatric clinic as having an atypical psychosis--a diagnostic category used when there is insufficient information to make a more specific diagnosis which could be schizophrenia or another such serious disorder. (A34-35, 49, 50-51) At sentencing the court recommended psychiatric treatment. (A65) And subsequent to his conviction, the defendant has had to be committed to mental health facilities within the correctional system for further treatment and medication.<sup>1</sup> (A20-21, 66-68)

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<sup>1</sup> One difference between the case at bar and Bennett, Angellilo and Cisneros is that the defendant in the case at bar was not found incompetent to stand trial. But this is not an indication that there was not an ample basis for presenting the insanity defense. To the contrary, failure to inquire into defendant's fitness to stand trial constitutes further deprivation of effective assistance of counsel.

Despite defendant's psychotic condition as revealed in the court ordered psychiatric evaluation, defense counsel was unaware of this condition, and defense counsel failed to secure a more complete psychiatric examination pursuant to CPL article 730. The cursory examination ordered as part of the pre-pleading investigation was not substitute for a 730 evaluation. Such a failure was found to be ineffective assistance of counsel in People v. Frazier, N.Y.L.J. Nov. 27, 1985, p. 13, col. 3, (2nd Dept. 1985).

In contrast to this history of major mental problems, ADA Goldstein, in his affirmation in opposition to appellant's §440 motion, cites as evidence of appellant's alleged mental competency a videotape of a statement made by the appellant within 12 hours of the commission of the crime (A71). ADA Goldstein asserted that "In that tape, defendant appears completely rational, demonstrates a complete knowledge of what transpired and sets forth a coherent defense." (A72) In this assertion the ADA is only giving his own personal opinion, missing the point that the tape should have been one piece in a thorough psychiatric evaluation conducted for the purpose of determining appellant's competency at the time of the crime, including interviews and observation, and a review of appellant's psychiatric history, made by mental health professionals.

Did ADA Goldstein know whether Mr. Armstead had taken his medication prior to the occurrence of the crime? Or perhaps after? How might these and other considerations have affected Mr. Armstead's conduct at the time of the crime or during the taped interview and how should this conduct be evaluated in light of his total psychiatric history? It is the utter failure of defendant's counsel to investigate this psychiatric history and request the appropriate psychiatric evaluation which constitutes the ineffective assistance of counsel.

Based on the facts presented in Bennett the Court stated that:

"Unquestionably, such a history justified full and careful preparation of the case for the [insanity] defense." 29 N.Y. 2d at 465.

Since the facts in the instant case present a basis for the insanity defense at least equal to and perhaps surpassing Bennett, it is undeniable that the defense should have been investigated, prepared and presented by defense counsel.

In Bennett, the defense counsel at least attempted to present an insanity defense, although, as the Court noted, it was doomed to failure because of patent lack of preparation. In the case at bar defense counsel presented only the flimsiest of defenses against overwhelming evidence. He did not even consider the defense of insanity.

In the instant case, as in Bennett and Angellilo, there was a blatant lack of preparation on the part of counsel. In Bennett, counsel had not spoken to any of the doctors at the hospitals prior to the time they testified at the trial. In Angellilo, counsel requested an adjournment because he had not looked at the case in months. The request was denied. Thereafter the defense attorney "failed to make an opening statement, failed to raise the defense of insanity, failed to call any witnesses and failed to prepare any defense." 91 A.D. 2d at 667.

But the failure of defense counsel in the instant case is even greater than in Bennett and Angellilo. In those cases counsel was at least aware of the extent of defendant's history of mental illness and the necessity of presenting the insanity defense.<sup>2</sup>

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<sup>2</sup> In Angellilo, counsel's failure to present any defense appears to have been a strategic response to the court's refusal to adjourn--a calculated attempt to get a reversal on appeal.

In the instant case, although defense counsel had indications of defendant's history of mental illness--from defendant's family (A11), from the Pre-Pleading Investigation report (A22-24), and from defendant's prior counsel in Philadelphia (A31-32)--he utterly failed to investigate this history. (A11-13) He told the Probation Department that he would obtain psychiatric records from the Fairmount Institute (A29) but never followed through (A12). Furthermore, he never even bothered to find out the results of the court ordered psychiatric examination. (A12) His total lack of investigation and preparation of the insanity defense is further evidenced by his failure to request a psychiatric examination to determine defendant's mental competency at the time of the crime<sup>3</sup> and his failure to file a notice of intention to present the insanity defense pursuant to CPL article 250. (A14) Defendant's right "to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed", (People v. Bennett, supra at 466), has not been met even minimally.

Clearly, the insanity defense should have been investigated and raised. As the Court noted in Bennett,

"We recognize that, even if the lawyer had been prepared, the jury might have found his client sane and have adjudged him guilty. That is beside the unassailable fact that counsel's failure to prepare the defense was so egregious as to render a verdict

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<sup>3</sup> See, United States v. Fessel, 531 F. 2d 1275 (5th Cir. 1976), in which the court, in reversing a conviction for the illegal importation of marijuana, found that the defendant was denied minimally effective representation because his attorney failed to move for a court-appointed psychiatrist to assist in the preparation of an insanity defense.

point. What is crucial and operative is the of guilt inevitable and thereby deny the appellant a fair trial." 29 N.Y. 2d at 467.

The same conclusion is compelled by the circumstances in the instant case.<sup>4</sup> The failure of counsel is so severe that it rises to the level of being a "farce and mockery of justice", although this older, more stringent standard need not be proven to successfully maintain that defendant has been denied effective assistance of counsel. People v. Bennett, supra; Strickland v. Washington, supra.

This is not a case where counsel has consciously made a tactical decision not to offer an insanity defense after careful analysis of the facts. People v. Angellilo, supra. Rather, counsel's failure to raise the defense flows from his lack of investigation and preparation--a failure to make even a minimal attempt to follow up on information which was at counsel's disposal. Clearly, counsel had sufficient facts before him to compel further investigation. The Supreme Court stated in Strickland v. Washington, supra, that:

"...strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support limitations on investigation." 104 S.Ct. at 2066.

In light of the circumstances of the instant case, counsel's failure to investigate the insanity defense--defendant's only viable defense--was totally unreasonable. Not only was there an absence of careful analysis of the facts; there was no

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<sup>4</sup> It should be noted that the law at the time of trial still required the People to prove sanity beyond a reasonable doubt when a defendant raised the insanity defense.

analysis at all.

As in Bennett, counsel was "so completely unfamiliar with either the facts or the law bearing on his client's case as to doom the defense to failure." 29 N.Y. 2d at 465. Counsel's handling of the case constituted a total failure of professional judgment and does not come near meeting the standard of reasonable competency.

There have been other cases in which counsel left out crucial defenses resulted in denial of effective assistance of counsel. People v. Detling, 73 A.D. 2d 937, 423 N.Y.S. 2d 509 (2nd Dept. 1980); People v. Glenn, 59 A.D. 2d 724, 398 N.Y.S. 2d 365 (2nd Dept. 1977). In People v. Cisneros, supra, the court stated:

"...the proper administration of justice compels us to conclude that the denial of psychiatric assistance to defendant precluded the assertion and establishment of what appears to have been his only possible defense--insanity." 45 A.D. 2d at 513.

The court in Cisneros also said that "it is fundamental that the State cannot, and must provide adequate safeguards to insure that it does not, convict a legally incompetent person of a crime..." 45 A.D. 2d at 512.

Considering all the circumstances of this case it cannot be said that defendant's representation was "adequate or effective in any meaningful sense of the words." People v. Droz, 39 N.Y. 2d 457, 463. The court below clearly erred in denying appellant's motion to vacate. Judge Torres demonstrated a misunderstanding of the issues at stake during the hurried oral argument. In the first place the question was not whether

appellant's psychiatric history was "exploited, as the court put it (A75), but whether it was even investigated in an effective and competent manner. Secondly, the issue to be decided in appellant's motion was not one of determining--on the motion--his sanity in between his psychotic periods, as the court below would have it (A76). Rather, the issue was whether appellant's trial counsel should have investigated his mental competency and placed the matter before the jury for a factual determination. It was through trial counsel's failure that a viable defense was lost. The court's denial of the motion was incorrect and an abuse of discretion as a matter of fact and law.

#### CONCLUSION

It is respectfully submitted that the defendant has been denied effective assistance of counsel in violation of the Federal and State Constitutions; that appellant's motion to vacate should be granted; and that the judgment of conviction should be reversed and a new trial ordered.

August 1, 1986

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

-----x  
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

ERIC ARMSTEAD,

Defendant-Appellant.

Indictment No.  
1972/84

-----x  
STATEMENT PURSUANT TO  
C.P.L.R. RULE 5531

1. The indictment number in the case in the court below is 1972/84.
2. The full names of the original parties are as appear above. There has been no change in the parties.
3. The name, address and telephone number of counsel for Defendant-Appellant, Eric Armstead, is:  
  
GERING, GROSS AND GROSS, Esqs.  
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Elmhurst, N.Y. 11373  
(718) 429-2021
4. The name, address and telephone number of counsel for the People is:  
  
ROBERT MORGENTHAU  
District Attorney  
100 Centre Street  
New York, N.Y. 10007  
(212) 553-9000
5. This criminal proceeding was commenced in the Supreme Court, New York County by indictment issued on March 28, 1984.

6. This appeal is taken from a judgment of conviction rendered on September 11, 1984 in Supreme Court, New York County, and from an order denying a motion to vacate the judgment decided on March 26, 1986.

7. There are no other related actions.

8. The defendant-appellant was found guilty of the class C felony of second degree robbery (Penal Law §160.10(1) on July 5, 1984 and was sentenced by Judge Edwin Torres to three to six years imprisonment as a second felony offender on September 11, 1984.

9. Judge Torres denied a post-conviction motion to vacate the judgment on the ground of ineffective assistance of counsel on March 26, 1986.

10. It is respectfully submitted that (1) the defendant-appellant was denied effective assistance of counsel due to the failure of trial counsel to investigate, prepare and present the insanity defense, and (2) the court below erred in denying defendant-appellant's motion to vacate because of said ineffective assistance of counsel.

11. The full record has been transmitted to the Appellate Division from the Supreme Court and an Appendix accompanies the Brief.

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