

SUPREME COURT OF THE STATE OF NEW YORK  
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,  
Justice.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 3251/96

CHRISTOPHER BURTON,

Motion: To Vacate Judgment of  
Conviction pursuant to CPL § 440.10

Defendant.

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DEFENDANT PRO SE

For the Motion

RICHARD A. BROWN, D.A.

\_\_\_\_\_  
BY: A.D.A. EMIL BRICKER

Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York  
Dated: July 11, 2005

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SEYMOUR ROTKER  
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No.:3251/96

CHRISTOPHER BURTON,

Defendant.

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The following constitutes the opinion, decision and order of the Court.<sup>1</sup>

By motion dated March 15, 2005, and reply affirmation, dated June 7, 2005, defendant seeks an order of the court to vacate his judgment of conviction upon the grounds that his “constitutional right to due process and a fair trial [were violated by the prosecution] by failing to disclose the Criminal History and the prior statements of its main witness, Geovanny Watson, and by failing to correct Watson’s false testimony.”<sup>2</sup>

In response, the People have filed an affirmation in opposition dated May 26, 2005. Their arguments in opposition are outlined within the Court’s decision.

For the reasons stated herein, defendant’s motion is denied.

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<sup>1</sup>This matter has been referred here for decision as a result of the retirement Justice Katz, who presided over the trial in this matter and who addressed a prior CPL § 440 motion by defendant.

<sup>2</sup>In a decision dated June 16, 2000, Justice Katz granted reargument to defendant on his motion for the “rap sheets” of Geovanny Watson and Tracy Johnson when defendant alleged that only part of the information requested was provided by the People. The court held that the prosecutor properly disclosed all the information it was required to provide. See Decision, dated June 16, 2000 (Katz, J.).

## FACTS

On September 25, 1996, a seven-count indictment was filed with the court charging defendant with two counts of Murder in the Second Degree (P.L. § 125.25[1][2]); one count of Attempted Murder in the Second Degree (P.L. § 110/125.25[1]); one count of Reckless Endangerment in the First Degree (P.L. § 120.25); one count of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); and two counts of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[1][4]).

The charges stem from the July 17, 1995 shooting of Richie Myers, by defendant, which resulted in his death and the attempted shooting of Geovanny Watson. This incident occurred in Queens County at the corner of 134<sup>th</sup> Avenue and Guy Brewer Boulevard. The evidence at trial established that defendant, in an attempt to shoot Geovanny Watson, a complainant and witness for the prosecution, shot and killed Richie Myers. Geovanny Watson (Watson) testified at trial on behalf of the People.<sup>3</sup>

Approximately one month after the shooting, on August 15, 1995, Watson was arrested and charged with possession of a weapon during a police organized buy and bust operation. Shortly after his arrest, Watson told the police that he had just purchased the gun. He told other detectives later that evening about defendant's crime and how defendant had shot and killed Myers in his presence.<sup>4</sup>

Tracy Johnson, another prosecution witness, had been with the deceased, Myers, a few storefronts away from the shooting, moments before it occurred. He observed defendant spraying

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<sup>3</sup>Testimony at trial established that a dispute existed between defendant and Watson over drug turf and that they had argued earlier that day and defendant had held a gun to Watson's stomach which misfired when he pulled the trigger.

<sup>4</sup>Thereafter, Watson was convicted in or about February 1996 upon his plea of guilty to Criminal Possession of a Weapon in the Third Degree and was sentenced to a probationary term of five years.

bullets in an arc like fashion in the direction of Watson who was across the street. Johnson told police at the scene that defendant had shot Myers.

Defendant was arrested in August 1996, when it was discovered that he was in Detroit, Michigan, and he was returned to New York by detectives. Upon his return to this jurisdiction, he was identified by Watson in a lineup.

At trial, Detective Joseph Amato, who microscopically tested fifteen nine-millimeter shell casings and two bullets recovered in the vicinity of the shooting, testified that the casings were consistent with the bullets recovered and that the patterns were consistent with an automatic weapon. Nevertheless, even if a weapon was recovered in the shooting, it would not have been possible to definitively link that ballistics evidence to a recovered weapon, if that was the case, because the fragment of bullet removed from the deceased was too small for analytical comparison.

Defendant Burton was convicted after a trial by jury, on April 13, 1999 of: Manslaughter in the Second Degree (P.L. §125.15); Attempted Murder in the Second Degree (P.L. § 125.25); Reckless Endangerment in the First Degree (P.L. § 120.25); and Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03). Defendant was sentenced as a second violent felony offender to concurrent prison terms of seven and a half to fifteen years, twelve and a half to twenty-five years, three and a half to seven years, and seven and a half to fifteen years, respectively (Katz, J.).

### **POST TRIAL PROCEDURAL HISTORY**

Prior to sentencing defendant filed a pro se motion to set aside the verdict. His motion was denied when the court found defendant's arguments meritless. See Decision, dated April 13, 1999 (Katz, J.).<sup>5</sup> Thus, defendant was sentenced on April 13, 1999, after the court's

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<sup>5</sup>Defendant asserted that the guilty verdict should have been set aside because: Geovanny Watson committed perjury; the prosecutor's summation was unduly prejudicial; the evidence of guilt was insufficient; and that his intent was not proven.

decision, as noted above.

Defendant appealed his conviction to the Appellate Division and on September 24, 2001, his conviction was affirmed. See People v. Christopher Burton, 286 A.D.2d 772, 730 N.Y.S.2d 735 (2d Dept. 2001).<sup>6</sup> In its decision, the Appellate Division noted that defense counsel elicited from the prosecution's main witness that he lied to the police in his initial statement, that he lied to the Grand Jury, and that he was a drug dealer and that the trial court's limitation on counsel to further impeach the witness was proper, despite defendant's assertions to the contrary, because the issues raised were too slight, remote or conjectural to have any legitimate impact in deciding that facts in issue. See Burton, supra. Moreover, the defendant's remaining contentions, including his claim of ineffective assistance of counsel, was deemed meritless. Leave to appeal to the Court of Appeals was denied to defendant on December 28, 2001. See People v. Burton, 97 N.Y.2d 679, 738 N.Y.S.2d 294 (2001).

Thereafter, defendant filed a motion to vacate his judgment of conviction pursuant to CPL § 440.10 based upon the following grounds: police reports of Watson interviews and an officer's memo book were not turned over to defendant in violation of People v. Rosario, 9 N.Y.2d 286 (1961); that a police report of a tipster's information was not provided in violation of Brady v. Maryland, 373 U.S. 83 (1963); and a cooperation agreement between Watson and the People was not disclosed. Additionally, in this motion, defendant claimed that an individual by the name of Jason Morrison, had evidence suggesting that Watson may have participated in the shootout and that this was newly discovered evidence. Furthermore, defendant argued that counsel was ineffective for failing to address the disclosure violations and for failing to conduct a proper investigation of the crime.

Defendant's CPL § 440.10 motion was denied in a decision by Justice Katz on

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<sup>6</sup>On appeal, defendant claimed that the trial court violated his right to confront witnesses by precluding certain cross-examination of the People's witness, Watson, regarding his motive to lie, including bias and hostility against defendant. Moreover, defendant himself in a supplemental brief, in addition to the brief filed by assigned counsel on defendant's behalf, argued that trial counsel was ineffective for conducting fruitless cross-examination, that sometimes inculpated defendant.

December 18, 2002. In its decision, the court held that defendant's claim of ineffective assistance of counsel was already determined on the merits by the Appellate Division and was therefore procedurally barred. As to any new ineffective assistance of counsel arguments, the court held that these arguments were also barred pursuant to CPL § 440.10(2)(c). Moreover, the court held that the claim by defendant as to material not disclosed was barred "because the defendant could due diligence have readily made facts in issue appear on the record but unjustifiably failed to do so. CPL § 440.10(3)(a)." See Decision at 2, dated December 18, 2002 (Katz, J.). Defendant's newly discovered evidence claim was also rejected by the court in its decision because counsel was aware of it at the time of trial (CPL § 440.10(1)(g)). Thus, defendant's motion was denied in its entirety. See Decision, dated December 18, 2002 (Katz, J.).<sup>7</sup>

Defendant filed a petition for a federal writ of *habeas corpus*. Thereafter, the District Court granted defendant permission to file an application for a writ of error *coram nobis* with the Second Department. Thus, in his Second Department application, defendant asserted that his appellate counsel was ineffective for failing to assert that trial counsel was ineffective.<sup>8</sup> The Appellate Division held, in a decision dated June 1, 2004, that defendant failed to establish that he was denied effective assistance of appellate counsel. See People v. Burton, 8 A.D.3d 292, 777 N.Y.S.2d 655 (2d Dept. 2004). Leave to appeal to the Court of Appeals was thereafter denied. See People v. Burton, 3 N.Y.3d 671, 784 N.Y.S.2d 10 (2004).

As represented by the People, the District Court for the Eastern District of New York, granted defendant the right to add claims of a Brady violation and of ineffective assistance of counsel to his federal petition. The federal petition was stayed pending the outcome of the state

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<sup>7</sup>Defendant sought leave to appeal denial of this post judgment motion, which request was denied by the Appellate Division on or about September 3, 2002.

<sup>8</sup>The various allegations that defendant raised upon the issue of trial counsel's ineffectiveness, an argument he claims appellate counsel did not raise and was thus, ineffective, are outlined in the People's affirmation in opposition, at 12. Also outlined therein, are the arguments set forth by the People in opposition to defendant's claims.

court proceedings. See People’s affirmation, at 16. Defendant then filed the within motion.

## DECISION

\_\_\_\_\_Initially, defendant claims that he not provided with Rosario material related to the testimony of Geovanny Watson. Specifically, defendant alleges in this claim that the prosecution failed to turn over “the crime report”(annexed to defendant’s motion as Exhibit “6”), and the “complaint report” (annexed to defendant’s motion as Exhibit “4”), related to Watson’s arrest on a gun possession charge, which he subsequently received pursuant to a Freedom of Information (F.O.I.L.) request.

Moreover, defendant asserts that a Brady violation occurred because favorable evidence possessed by the prosecution was not turned over which included an initial statement by Geovanny Watson in which he did not mention witnessing the shooting of Myers or about being the intended victim of the shooting, and, that during his August 15, 1995 arrest, Watson agreed to work as an informant for the police to help them purchase guns.<sup>9</sup>

Furthermore, defendant contends that the prosecution failed to correct Watson when he lied during his trial testimony: when describing his arrest on August 15, 1995; when he testified that he was the intended victim of the shooting and thus, carried the gun he was arrested for possessing because he feared defendant; and when he lied about cooperating with the police [to purchase guns].

In opposition, the People argue that defendant has not demonstrated “due diligence” as required by statute to assert a claim of alleged newly discovered evidence pursuant to his F.O.I.L. request. Additionally, the prosecution claims that no prejudice occurred, even if a Rosario violation is found. Furthermore, the People contend that defendant’s claim of a Brady violation is meritless.

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<sup>9</sup>This alleged information was obtained by defendant in the same documents that form the basis of his Rosario violation claim.

In response to defendant's claim that his conviction should be vacated because information was not turned over to him - that the People's witness, Watson, did not mention defendant's crime to the police at the time of his arrest; and because defendant was not advised that Watson claimed he would work with the police, as an informant, to assist them in purchasing guns at the time he was arrested - the prosecution asserts defendant is incorrect on the law and facts. First, the People claim that a document provided by defendant, which he annexes as an exhibit to his motion, indicates that Watson did report defendant's crime within approximately an hour and a half of his arrest and thus, refutes his allegation. Second, there is no evidence of any cooperation by Watson with the police to act as an informant, thus, no Brady violation occurred. Moreover, any claims that Watson perjured himself are discredited by the reports themselves that defendant now seeks to rely upon to support his claim.

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**Defendant's Claims of Newly Discovered Evidence and/or Rosario or Brady Violations are Meritless.**

**I. Defendant's Newly Discovered Evidence Claim**

Defendant moves to vacate this judgment, claiming that he was not provided with Rosario and Brady material which consisted of what he claims is "newly discovered evidence" consisting of a crime report and complaint report related to the arrest of Geovanny Watson on August 15, 1995.

First addressing defendant's claim of newly discovered evidence, pursuant to CPL § 440.10(1)(g) a defendant may move to vacate a judgment upon the ground that new evidence has been discovered "which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable . . ." The motion itself must also be made with due diligence after the discovery of the claimed new evidence. See CPL 440.10(1)(g).

To be considered “newly discovered evidence” such claimed evidence must meet the following requirements: ““(1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could have not been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and, (6) it must not be merely impeaching or contradicting the former evidence.” See People v. Richards, 266 A.D.2d 714, 698 N.Y.S.2d 785 (3<sup>rd</sup> Dept. 1999), *quoting* People v. Salemi, 309 N.Y. 208, 215-16 (1955), *cert. denied* 350 U.S. 950 (1956), *quoting* People v. Priori, 164 N.Y. 459, 472; *see also* People v. Gurley, 197 A.D.2d 534, 602 N.Y.S.2d 184 (2d Dept. 1993). Applying these standards to the present case, defendant has failed to meet his burden.

Initially, defendant’s argument that the reports are “newly discovered” fail to meet the above requirements. As defendant claims the reports could only have been used as impeachment evidence. See *e.g.* People v. Reyes, 255 A.D.2d 261, 680 N.Y.S.2d 493 (1<sup>st</sup> Dept. 1998). Furthermore, it is unlikely that these reports would have changed the result of the trial. See Reyes, *supra*; Stover, *infra*.<sup>10</sup>

Moreover, defendant has not demonstrated that these reports could not have been discovered before trial with the exercise of due diligence, one of the requirements for them to be considered newly discovered evidence. See People v. Stover, 254 A.D.2d 377, 678 N.Y.S.2d 734 (2d Dept. 1998).

Furthermore, upon a review of the exhibits annexed to the People’s response, defendant’s F.O.I.L. request which related to Watson’s case when he was arrested on August 15, 1995, was dated February 12, 2003. Records provided by the District Attorney’s Office indicate that the request was actually received in September, 2002. Nevertheless, defendant

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<sup>10</sup>Per se error rule for failure to provide Rosario material in CPL 440 motion is inapplicable. See People v. Machado, 90 N.Y.2d 187, 659 N.Y.S.2d 242 (1997); People v. Jackson, 78 N.Y.2d 638, 578 N.Y.S.2d 483 (1991). A defendant is required to show that he was prejudiced by the conduct that is the subject of the motion, which defendant has failed to do here. See *id.*

was convicted on April 13, 1999, almost three and a half years before his request was made. Defendant has not shown due diligence in seeking this information which he now claims was in the possession of the prosecutor's office since Watson's arrest in August, 1995. Therefore, defendant has not exercised due diligence in pursuing this claim as required by statute. See e.g. People v. Friedgood, 58 N.Y.2d 467, 462 N.Y.S.2d 406 (1983)(defendant's three-year delay after conviction to raise claim of newly discovered evidence asserting conviction should be vacated by was of CPL § 440.10 motion showed lack of due diligence on part of defendant and motion properly denied without a hearing).

In any event, as stated above, there is no merit to defendant's claim that had he possessed the information, the result of the trial would have been different. As held by the Appellate Division, defense counsel adequately impeached Watson during cross-examination. Any issue as to whether he told the police about defendant's crime at the time of his own arrest is collateral. Furthermore, the District Attorney's Office has represented that Watson did not cooperate with the police to purchase guns.

The power to vacate a conviction based upon an argument asserting that there exists "newly discovered" evidence rests within the unlimited discretion of the lower court. See People v. Santos, 1 N.Y.3d 548, 775 N.Y.S.2d 770 (2003); People v. Baxley, 84 N.Y.2d 208, 616 N.Y.S.2d 7 (1994).

This Court has reviewed defendant's claims and finds them to be without merit. Defendant has failed to establish that this was newly discovered evidence pursuant to CPL § 440.10(1)(g).

## **II. Defendant's Brady Violation Claim**

Despite this court's rejection of his newly discovered evidence claim, this Court will address the merits of defendant's assertion, pursuant to CPL § 440.10(1)(h), whereby he alleges that his conviction was obtained in violation of his due process right to pretrial disclosure of Brady material, the reports related to Watson's case, as noted above. The duty of a prosecutor

to disclose exculpatory material includes the disclosure of evidence impeaching the credibility of a prosecution witness, whose testimony may be determinative of innocence or guilt. See Baxley, supra at 213, citing other cases.<sup>11</sup> Thus, this Court will first look at the issues and/or documents which defendant claims are Brady material.

First reviewing the crime report from Watson's own arrest, it is this Court's finding that it does not constitute Brady material. The issue defendant raises is that Watson did not tell the police about defendant's crime when he was arrested. This is refuted by the report provided by defendant as Exhibit "7" to his motion, as noted previously.

The report defendant now refers to as Brady material, does not mention defendant. It is not favorable to defendant, not material to guilt or innocence and its disclosure would not likely have any effect on the verdict. Furthermore, the report in defendant's possession, which is annexed to defendant's motion as Exhibit "7", is filled out by Detective O'Sullivan and it indicates that he and Detective O'Connor of the 113<sup>th</sup> Precinct interviewed Watson when he was arrested. Thus, Watson made a statement to them about defendant's crime. The multi-page crime report annexed as defendant's Exhibit "6" was taken by different officers, Detective Delaney of the Queens Narcotics District, the detective who arrested Watson for the gun possession, and his partner, Detective Skinner. Thus, it is of no consequence if Watson did not mention defendant's crime to the arresting detectives. This is not exculpatory information and

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<sup>11</sup>Brady material consists of: material that is favorable to the defendant; that is material to guilt or punishment; is known to the prosecution; and that the defense was unaware of sufficient facts to permit it to obtain the material. See e.g. United States v. Agurs, 427 U.S. 97 (1976); People v. LaValle, 3 N.Y.3d 88, 783 N.Y.S.2d 485 (2004).

Although the Supreme Court in Agurs initially distinguished three factual situations and appeared to define for each a separate standard of materiality, see Agurs, 427 U.S. at 103-107, the Supreme Court in United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) agreed upon a reformulation of the Agurs standards. In Bagley, the Court held that in considering the materiality standard for Brady claims, "the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." See United States v. Campos, 1994 U.S. Dist. LEXIS 15549 (D. Kan. Oct. 20, 1994), quoting Bagley, 473 U.S. at 682.

not Brady material and would not likely have an impact on the verdict.

Defendant's next contention that a Brady violation occurred alleging that Watson had some type of agreement with the police, presumably for his own benefit, to purchase guns for them is equally without merit. There is no evidence that any such agreement existed or that Watson ever purchased guns by working in conjunction with the police department.

### **III. Defendant's Rosario Violation Claim**

A defendant must demonstrate prejudice to succeed upon a Rosario violation claim made by way of a CPL § 440 motion.<sup>12</sup> See People v. Machado, 90 N.Y.2d, 659 N.Y.S.2d 242 (1997); People v. Jackson, 78 N.Y.2d 638, 578 N.Y.S.2d 483 (1991). Here, defendant has failed to show prejudice, that a reasonable possibility that the prosecution's failure to make a Rosario disclosure materially contributed to the verdict. See Machado, *supra* at 188.<sup>13</sup>

Defendant has not demonstrated that prejudice resulted from a failure to turn over the documents he now possesses. First, annexed as Exhibit "7" to defendant's motion, is the complaint report from Watson's arrest of August 15, 1995. In that report it outlines that Watson told the detectives in an interview at approximate 11:45 P.M. on that date, that he had a fight with defendant on the day of the shooting about selling drugs. He then goes on to describe the shooting on July 17, 1995 when he saw defendant shoot Myers. Thus, defendant's claim that Watson did not report defendant's crime when Watson was arrested for the gun possession is refuted in this document and it does not further his argument that Watson did not report it at the

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<sup>12</sup>As stated by the Court of Appeals, the Rosario rule is not of constitutional dimension. See People v. Sorbello, 285 A.D.2d 88, 729 N.Y.S.2d 747 (2d Dept. 2001) citing People v. Johnson, *supra* and other cases.

<sup>13</sup>Even if this Court were to find that the documents defendant now claims are Rosario material, for purposes CPL § 440.10 relief, if a defendant could have, with due diligence, placed facts on the record to support his Rosario violation claim, but did not, the Court may deny his motion pursuant to CPL § 440.10(3)(a).

time of his arrest. Thus, the record amply demonstrates that non disclosure of the report that does not mention defendant, was harmless. See People v. Sorbello, 285 A.D.2d 88, 729 N.Y.S.2d 747 (2d Dept. 2001).

Next, in further support that prejudice has not been demonstrated is the decision rendered by the Appellate Division when it affirmed defendant's conviction. In its decision, the Appellate Division ruled that the trial court's limitation on defense counsel's cross-examination was proper. As stated above, the Appellate Division noted that defense counsel had elicited from Watson that he lied to the police in his initial statement, that he lied to the Grand Jury, and that he was a drug dealer and that the trial court's limitation on counsel to further impeach the witness was proper. The Appellate Division found that the issues raised on cross-examination of Watson were too slight, remote or conjectural to have any legitimate impact in deciding that facts in issue in reaching its holding. See Burton, supra. Thus, defendant cannot now and has not demonstrated prejudice as a result of not having the documents at issue. Thus, even if a Rosario violation occurred, it was harmless error and it has not been demonstrated that the outcome of the trial would have been different. See CPL § 240.75; see also People v. Reyes, 255 A.D.2d 261, 680 N.Y.S.2d 493 (1<sup>st</sup> Dept. 1998).<sup>14</sup>

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<sup>14</sup>Criminal Procedure Law Sections 440.30 (4)(b) and (4)(d)(i) state that the motion may be denied without conducting a hearing even when the court reaches the merits. Under CPL § 440.30(4)(b) no hearing need be conducted when:

The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts . . . ; or (d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Here, defendant has not conformed to the statute as his claims, that Watson had a cooperation agreement or that he did not report defendant's crime when he was arrested himself, are based solely on his own allegations and are unsupported. Defendant has not sustained his burden to create an issue of fact that would entitle him to a hearing.

The Court has reviewed all of defendant's contentions and finds them either procedurally barred or without merit as outlined herein.

Accordingly, defendant's motion is denied in its entirety.

Kew Gardens, New York

Dated: July 11, 2005

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SEYMOUR ROTKER  
JUSTICE SUPREME COURT