

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.: 687-85

MONA GRAVES,

Motion: To Vacate Judgment of
Conviction pursuant to CPL 440.10

Defendant.

-----X

JOHN BRIAN MACREERY, ESQ.
For Defendant on the Motion

RICHARD A. BROWN, D.A.

BY: A.D.A. WILLIAM C. MILACCIO
Opposed

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

Kew Gardens, New York
Dated: April 21, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART K-19

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

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No.: 687-85

MONA GRAVES,

Defendant.

-----X

The following constitutes the opinion, decision and order of the Court.

By motion dated January 3, 2005, defendant seeks an order of the court to vacate her judgment of conviction pursuant to CPL § 440.10.

In her application, defendant claims that her conviction should be vacated for the following reasons: (1) the prosecution failed to provide the defense with exculpatory information; (2) the prosecution failed to turn over prior statements of witnesses; (3) defendant was denied effective assistance of counsel; (4) prosecutorial misconduct occurred; and (5) her guilt was not established beyond a reasonable doubt. Thus, defendant asserts that her conviction should be vacated and the indictment dismissed.

In response, the People have filed an affirmation in opposition dated March 15, 2005, whereby they assert that defendant's motion should be denied in its entirety because her application is procedurally barred, and, in any event, meritless.

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

FACTS

The facts of defendant's underlying conviction are that on or about February 1, 1985 at approximately 8:00 P.M. defendant, acting in concert with Frank Johnston¹, caused the death of Lizette Germano, by running her over with a car. Frank Johnston was the operator of the vehicle and defendant was the passenger. The decedent's father, Charles Germano, observed the incident occur. The evidence presented at trial established that defendant, in words or substance, encouraged the driver to continue going while the decedent was being dragged underneath the vehicle. Additional facts will be discussed, as warranted, in the decision.

PROCEDURAL HISTORY

An indictment was filed with the court charging defendant with acting in concert to commit two counts of Murder in the Second Degree, Reckless Endangerment in the First Degree, Unauthorized Use of a Vehicle in the First Degree, Criminal Possession of Stolen Property in the Second Degree and Leaving the Scene of an Accident without Reporting as a Felony.² The date of the incident which gave rise to the indictment was February 1, 1985.

Upon application of her attorney during the course of the litigation, defendant was granted a hearing to determine the admissibility of receiving a statement and identification into evidence at

¹Frank Johnston was tried separately before a jury, prior to the trial of defendant Mona Graves, who testified at his trial (Graves' testimony is annexed to the People's response as Exhibit 2). He was convicted of murder in the second degree, and related charges, on January 12, 1987. Defendant Johnston was sentenced to a maximum term of from twenty five years to life to run concurrently with the sentences he was given upon his other convictions under the indictment. His conviction was affirmed on appeal and his leave application to the Court of Appeals was denied.

²All counts in the indictment, except the Unauthorized Use of a Vehicle and Criminal Possession of Stolen Property counts, had been dismissed by the lower court upon inspection of the grand jury minutes. See Decision, dated May 6, 1985 (Rotker, J.). However, after an appeal was taken by the People from the decision, the Appellate Division reinstated the dismissed counts. See People v. Graves, 131 A.D.2d 506, 575 N.Y.S.2d 890 (2d Dept. 1987).

While this appeal was pending, defendant made a sworn statement to the District Attorney's Office, which would not be used against her if her indictment was reinstated which is what occurred. A copy of the statement is annexed to the People's response as Exhibit 1.

the trial. After conducting this hearing, the court held that defendant's statement to Detective Hammond was admissible. See Decision, dated March 7, 1988 (Leahy, J.). Furthermore, the court held that an identification of defendant by Charles Germano which occurred in November 1986 in the hallway of the courthouse when he saw and recognized defendant³ and later told this to Detective Hammond, was admissible.⁴ This was not a police arranged procedure. Moreover, the hearing court held that under the totality of circumstances, an independent source existed for the witness' in-court identification of defendant.

On February 26, 1988, after a jury trial, defendant was convicted of Murder in the Second Degree and Reckless Endangerment in the First Degree.⁵ Defendant was sentenced to a term of incarceration of from twenty years to life on March 24, 1988 on the murder count and received a concurrent sentence of two and one third to seven years on the reckless endangerment count.

POST TRIAL PROCEDURAL HISTORY

After her conviction, defendant appealed to the Appellate Division claiming that the evidence was legally insufficient to sustain the conviction. The Appellate Division rejected this claim and also found that the verdict was not against the weight of the evidence. See People v. Graves, 159 A.D.2d 637, 553 N.Y.S.2d 33 (2d Dept. 1990).

Furthermore, the Appellate Division held that testimony admitted at trial concerning a prior conversation between the father of the victim [Charles Germano] and the driver of the car [Frank Johnston] about the return of the victim's engagement ring and about death threats the driver [Johnston] made against the victim were properly admissible. The Appellate Division deemed this

³At the time of the identification, the trial of Frank Johnston was taking place.

⁴Defendant had been displayed to Charles Germano shortly after the incident at the 103rd precinct, but, he was unable to identify her because her head was wrapped in bandages.

⁵The criminal possession of stolen property count and unauthorized use of a vehicle count were dismissed upon application of the People prior to trial. The leaving the scene of an accident count was dismissed upon application of defense counsel prior to jury deliberations.

testimony necessary background information which was properly elicited to enable the jury to understand the nature of the relationship between the driver and the victim. Moreover, the Appellate Division found that this testimony did not prejudice defendant since the trial court repeatedly instructed the jury that it had no relevance to the guilt or innocence of defendant.

The Appellate Division also held that defendant's claim that the trial court erred in failing to give a charge on identification was not preserved since no request was made for such charge and no objection was made at the conclusion of the trial court's charge to the jury. In any event, the Appellate Division determined that review of this issue in the interest of justice was not warranted and that any other claims raised by defendant in her appeal were meritless.⁶ Thus, defendant's conviction was affirmed on appeal on March 19, 1990.⁷

Thereafter, defendant sought to set aside her conviction pursuant to Criminal Procedure Law § 440. Defendant argued that her Constitutional rights were violated in that her guilt was not proven beyond a reasonable doubt and that she was otherwise denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. See Decision, dated February 11, 1992 (Leahy, J.). This motion was denied by the Court.⁸

Defendant next filed a petition for a writ of habeas corpus raising the same claim she filed in her appeal and her initial CPL § 440 motion, that her guilt was not proven beyond a reasonable

⁶On appeal defendant raised the following issues: (1) her statement to the police should have been suppressed because her arrest was not based upon probable cause; (2) the People failed to prove her guilt beyond a reasonable doubt; (3) that testimony about threats made by Frank Johnston to the victim denied her a fair trial; (4) an identification charge should have been given to the jury; (5) the trial court's circumstantial evidence charge was inadequate and confusing; (6) the identification by Mr. Germano was tainted by the identification procedure conducted at the precinct immediately after her arrest; and (7) that there was no independent source for Mr. Germano's in-court identification.

⁷Defendant's application for leave to appeal to the Court of Appeals was denied on June 21, 1990. See People v. Graves, 76 N.Y.2d 789, 559 N.Y.S.2d 994 (1990).

⁸The Court found defendant's claims meritless and held that her guilt was proven beyond a reasonable doubt.

doubt. The writ was denied on December 4, 1996, when the court found that her guilt was proven beyond a reasonable doubt and that the evidence supported the charge of acting in concert, which she was challenging in her application. See Decision, dated December 4, 1996 (Nickerson, J.).

Defendant now files another motion pursuant to CPL § 440 raising the contentions outlined above. Notably, defendant again raises the claim that her guilt was not proven beyond a reasonable doubt.

DECISION

I. DEFENDANT'S CLAIM THAT THE PROSECUTION FAILED TO TURN OVER EXCULPATORY MATERIAL IS MERITLESS SINCE DEFENDANT WAS IN POSSESSION OF THE ALLEGED MATERIAL

The Due Process Clauses of the Federal and State Constitutions guarantee a defendant a right to discover evidence: (1) in the People's possession; (2) favorable to the defendant; and, (3) which is material to either guilt or punishment. See Brady v. Maryland, 373 US 83, 83 S. Ct. 1194 (1963); People v. Bryce, 88 N.Y.2d 124, 643 N.Y.S.2d 516 (1996). In New York, if a general demand is made, evidence is deemed material if a reasonable probability exists that had it been disclosed to the defendant, the result would have been different, meaning that a reasonable probability, sufficient to undermine the court's confidence in the trial outcome exists. People v. Bryce, *supra* at 128 citing People v. Vilardi, 76 N.Y.2d 67, 77, 556 N.Y.S.2d 518 (1990).⁹ Notably, where a defendant knew of, or should reasonably have known of evidence and its exculpatory nature, the Brady doctrine does not require that a prosecutor supply a defendant with such information. See People v. Doshi, 93 N.Y.2d 499, 693 N.Y.S.2d 87 (1999); see also People v. Seavy, __A.D.3d __, 791 N.Y.S.2d 249, 2005 N.Y.App.Div. LEXIS 2862 (4th Dept., March 18, 2005); People v. Ahmed, 244 A.D.2d 415, 664 N.Y.S.2d 317 (2d Dept. 1997); People

⁹Good or bad faith on the part of the People is irrelevant.

v. Barbera, 220 A.D.2d 601, 632 N.Y.S.2d 821 (2d Dept. 1995); cf. People v. Stein, 10 A.D.3d 406, 781 N.Y.S.2d 654 (2d Dept. 2004).

Defendant now moves to vacate the judgment, claiming that she was not provided with Brady material which consisted of testimony by Connie Germano, the decedent's mother, at the trial of Frank Johnston in which Connie Germano stated, in sum and substance, that her husband had a bad temper and her daughter, the victim, left the house because she was afraid her father might hurt "Frankie." Additionally, defendant asserts that Connie Germano testified at the trial of Johnston that she called "Frankie's" father and told him that his son and his brother were trying to kill her daughter. As discussed below, court records annexed to defendant's motion refute her claim.

As the People indicate in their response, defendant was in possession of the trial testimony from Frank Johnston's trial at the time of her trial. See Defense Exhibit 4, at 31. Thus, defendant's claim lacks merit. Defendant was in possession of the alleged exculpatory information and therefore, the Brady doctrine does not require production of the transcript which was known to the defendant and in defendant's possession at the time of her trial.

This Court finds that defendant's claim is procedurally barred and no hearing is warranted.¹⁰ See CPL § 440.30 (4)(d); CPL 440.10(2)(c); CPL 440.10(3)(c).¹¹ In any event,

¹⁰Criminal Procedure Law Section 440.30(4)(d)(I) states that a motion to set aside a judgment may be denied without conducting a hearing if:

- (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.

¹¹The Court must deny a motion to vacate a judgment when a defendant, although having filed an appeal, did not have appellate review or determination upon the issues because of defendant's unjustifiable failure to raise these grounds. See CPL 440.10(2)(c). Since defendant did not raise these issues on appeal, and this Court views these as on the record claims, defendant's motion is also procedurally barred upon this ground.

Furthermore, CPL 440.10(3)(c) provides that the court may deny such motion when: "Upon a previous motion made pursuant to this section, the defendant was in a position

upon reaching the merits, no Brady violation has occurred here since defendant was in possession of the allegedly exculpatory material at the time of her trial as is evidenced by the record.

II. DEFENDANT’S CLAIM THAT THE PROSECUTION FAILED TO TURN OVER ROSARIO MATERIAL RESULTING IN PREJUDICE HAS NOT BEEN ESTABLISHED

Addressing defendant’s allegation of a Rosario violation for failure to turn over a handwritten complaint report by Sergeant Dennis Cesternino, defendant has failed to show that, had she been provided with the Rosario material, there is a reasonable possibility that the jury’s verdict would have been different.¹² Here, defendant was provided with a type written version of the document which indicated that defendant was described as a “white male.”¹³ The People do not contest that defendant was not provided with this document which constitutes Rosario material.

However, in a CPL § 440 motion, the per se reversible error rule for failure to provide Rosario material is inapplicable after a defendant’s direct appeal has been completed, as is the case here. 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). Thus, defendant is required to show that she was prejudiced by the conduct that is the subject of the motion, which defendant has failed to do. See id.

Defendant was at least in possession of the typed police report which indicated that the

adequately to raise the ground or issue underlying the present motion but did not do so.”

¹²Upon a review of the minutes that defendant directs the Court’s attention to in this argument, see Defense Exhibit 4, at 159, defendant is referring to trial exhibit “A”. The document referred to by defendant is annexed as Exhibit “8” to her motion papers. Defendant incorrectly calls the document a DD5, however, the testimony and a review of the exhibit annexed by defendant, reveals that she is referring to a complaint report and not a DD5.

¹³The Court is not making a finding that the type written version is an exact duplicate of the handwritten version prepared by the witness, Sergeant Cesternino.

suspect who was the passenger in the vehicle driven by Frank Johnston was described as a white male.¹⁴ This information was therefore available to defendant to be utilized at trial. Defense counsel did elicit during the trial testimony of Louis Marrero, a witness presented by the People at trial, that Marrero had chased the vehicle that struck the victim and he admitted upon cross-examination that he described the passenger in that vehicle as a “male white.” See Defense Exhibit 4, at 233-34. Thus, this information was used by defendant at trial and a showing of prejudice is lacking. Furthermore, Sergeant Cesternino admitted on cross examination that the passenger in the vehicle had been described as a “white male,” although he could not identify the exact source of the information since he had interviewed at least five witnesses. See Defense Exhibit 4, at 166-70. Thus, since this testimony was elicited at trial and because defendant is required to show prejudice for a failure to turn over this Rosario material, because her appeal has already been determined, her application is denied. Defendant has not demonstrated that had she had the handwritten version of the report that there was a reasonable possibility that the jury’s verdict would have been different.

In any event, the Court must deny a motion to vacate a judgment when a defendant, although having filed an appeal, did not have appellate review or determination upon the issues because of defendant’s unjustifiable failure to raise these grounds (emphasis added). See CPL 440.10(2)(c). Since defendant did not raise this issue on appeal, and this claim is on the record based upon a review of the exhibits provided which include the relevant trial testimony, defendant’s motion is also procedurally barred upon this ground.

Furthermore, CPL 440.10(3)(c) provides that the court may deny such motion when: “Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.”(emphasis added). Here, defendant has already availed herself of CPL § 440.10 to vacate the

¹⁴The exact source of this information was not established. The witness testified that he obtained the information in the complaint report from a number of different witnesses. See Defense Exhibit 4, at 167-70.

judgment and failed to raise this issue. Thus, this Court also finds that defendant's claim is procedurally barred for this reason.

_____ In sum, defendant's application to vacate her conviction based upon a failure of the People to turn over Rosario material is denied as procedurally barred, and, in any event, addressing the merits of defendant's claim, she has not met her burden of proof to be entitled to such relief.

III. DEFENDANT'S CLAIM THAT SHE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT

Again, the Court must deny a motion to vacate a judgment when a defendant, although having filed an appeal, did not have appellate review or determination upon the issues because of defendant's unjustifiable failure to raise these grounds. See CPL 440.10(2)(c). Defendant should have raised her on the record claims on appeal and failed to do so, thus, her claims are now procedurally barred.¹⁵

Nevertheless, this Court now turns to a discussion of the standard for determining effective assistance of counsel claims. Effective assistance of counsel has been defined as follows, "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." See People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893 (1981). Moreover, a defendant must demonstrate the absence of strategic or other legitimate expectations for counsel's failure to pursue a particular course of action. See People v. Garcia, 75 N.Y.2d 973, 556 N.Y.S.2d 505 (1990).

It is well-settled that, in order to establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was so deficient that counsel was not functioning

¹⁵Defendant's claim is also barred pursuant to CPL 440.10(3)(c) because she failed to raise this claim in her prior motion and shows no good cause for the Court to disregard this procedural bar.

within the meaning of the Sixth Amendment to the United States Constitution, and that counsel's deficient performance prejudiced him or her. This is the federal standard known as the two-part Strickland test. See Strickland v. Washington, 466 U.S. 668 (1984). To establish the "prejudice" prong, defendant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the trial would have been different. See id. Defendant has not met this burden. The defendant has failed to demonstrate the absence of strategic or other legitimate explanations for counsel's actions.

Under New York law, the Court of Appeals has reiterated that the standard for determining whether a defendant received effective assistance of counsel as first articulated in People v. Baldi, *supra*. In People v. Benevento, 91 N.Y.2d 708, 674 N.Y.S.2d 629 (1998), the Court found that "effective assistance" varies depending upon the circumstances of the case and that a flexible standard to analyze ineffective assistance of counsel claims must be applied under the New York State Constitution. Specifically, the Benevento Court addressed the term "meaningful representation" and how it is defined. Meaningful representation does not mean a perfect trial and efforts of counsel should not be second-guessed with hindsight. See Benevento, *supra* at 712. Thus, "a reviewing court must avoid confusing 'true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis.'" See Benevento, *supra* at 712, *quoting*, Baldi, *supra*.

A review of the representation defendant received during the course of the litigation reveals that her attorney engaged in appropriate motion practice and was even successful in having the most serious charges against her dismissed by the trial court, although the Appellate Division later reinstated the charges. Counsel, on behalf of his client, was granted a Huntley and Wade hearing by the Court. Counsel actively participated in the hearing, questioning witnesses and raising appropriate objections.¹⁶ To support her claim of ineffective assistance of counsel,

¹⁶During the hearing, Charles Germano, the decedent's father, denied that he told the police that defendant was a male white and Sergeant Cesternino who made out the complaint report stated in testimony that he could not identify the exact source of this description because it was based upon his interview of approximately five witnesses.

defendant asserts that three witnesses: Connie Germano, Charles Germano and Louis Marrero stated that they initially identified the passenger in the vehicle that struck complainant as a white male and that trial counsel did not establish this fact at trial. Therefore, defendant claims that counsel did not effectively cross examine the witnesses.

At trial, Connie Germano, the mother of the deceased testified that she did not see the passenger in the vehicle. She did not witness the incident and she did not identify defendant. Thus, her testimony did not implicate defendant. Therefore, defendant has not demonstrated that her trial attorney did not have a legitimate reason to forego cross examination of the mother, whose daughter had been killed in this incident. Moreover, defendant claims that had trial counsel been in possession of Connie Germano's prior testimony and did not cross examine her with respect to: (1) her phone call to Frank Johnston's father where she indicated that Frank Johnston and his brother were trying to kill her daughter or, (2) that her husband was after Frank Johnston, this constituted ineffective assistance of counsel. Nevertheless, this testimony, even if elicited does not exculpate defendant and only implicates the driver, Frank Johnston. In any event, as indicated previously in this decision, trial counsel was in possession of the trial testimony of the Frank Johnston trial.

Defendant also contends that Charles Germano failed to identify defendant at the precinct five hours after the incident and affirmatively stated that defendant was not the individual he saw in the vehicle when he observed her at the police station. By this claim, defendant is again asserting that her trial attorney failed to adequately cross examine the witness at trial. However, trial counsel specifically questioned the witness about this and elicited from the witness that he could not identify defendant at the precinct shortly after the incident. As is consistent with this Court's review of the hearing testimony, the witness testified that defendant's face was obstructed at that time and he was unable to identify her.¹⁷

¹⁷During cross examination of Charles Germano at the trial, trial counsel established that the actual viewing of defendant by this witness occurred quickly, under stressful circumstances

Louis Marrero was called to testify at defendant's trial. He had engaged in a chase of the vehicle driven by Frank Johnston along with the deceased's father right after the incident occurred. He was cross examined by defense counsel and stated that he did not see who the passenger was and admitted on cross examination that he advised the police that he described the passenger as a white male. See Defense Exhibit 4, at 233-34. He did not offer any identification evidence at trial. Upon a review of the trial testimony, counsel effectively examined this witness.

Furthermore, defendant claims that trial counsel denied her the right to testify at the pre-trial Wade hearing after she advised him that Charles Germano was "coaxed" into identifying her at the courthouse by the Assistant District Attorney. The only evidence that trial counsel, who is now deceased, was allegedly aware of this claim by defendant is defendant's own self-serving affidavit made approximately eighteen years later. Defendant does not claim, and there is no evidence, that she raised this issue with any of her subsequent attorneys, i.e., her appellate counsel, or counsel on her previous CPL § 440 motion. In any event, even if trial counsel was aware of defendant's claim, defendant has not demonstrated that counsel did not have a legitimate strategy in deciding not to call her as a witness at the Wade hearing.¹⁸

At the Wade hearing, Charles Germano testified that he was unable to identify defendant because her face was bandaged vertically and horizontally and based on the portion of her face that was visible he stated that "I couldn't make the identification on that. To say that – they said look at her clearly. But it wasn't the girl I seen in the car. There was – all you could see is this much (indicating). You tell them two eyes and a little piece of a nose." See Defense Exhibit 2, at 15-16. Thus, upon a review of the testimony, the witness could not identify defendant

and it is apparent that he artfully questioned the reliability of the witness' ability to observe.

¹⁸Had defendant testified at the Wade hearing, she would have been subject to cross examination and her credibility would have been weighed appropriately, including her interest in the outcome of the case as an interested witness. Thus, counsel quite conceivably made a logical and intelligent decision, if he was aware of defendant's claim, that her best interests would be served by not testifying at the hearing.

because her face was obstructed, although the witness did recognize her clothing.

Charles Germano testified that he identified defendant in the courthouse when he was with his wife and her psychiatrist. There is no evidence that a prosecutor or police officer was present when he recognized defendant, which he later told to the police. The hearing court found that an independent source existed to permit this witness to make an in court identification of defendant at trial.

Defendant also argues that her trial attorney should have introduced Sergeant Cesternino's [typed] complaint report into evidence as a business record at trial because it contradicted Charles Germano's trial testimony. This claim is meritless because upon a review of the testimony this document would not have been admissible as a business record since a proper foundation could not be laid based upon the record. See People v. Maisonave, 140 A.D.2d 545, 528 N.Y.S.2d 626 (2d Dept. 1988); People v. Johnson, 176 A.D.2d 269, 574 N.Y.S.2d 380 (2d Dept. 1991), *revd on other grounds* 81 N.Y.2d 828 (1993); People v. Torres, 165 A.D.2d 801, 564 N.Y.S.2d 61 (1st Dept. 1990). In any event, the cross examination by trial counsel made the jury aware of the inconsistency of the description provided in the report, that of a "male white" as compared to this female defendant.

Thus, in addition to the procedural bars that exist here, defendant has failed to demonstrate prejudice under the New York State test for ineffective assistance of counsel and has also failed to provide any objective evidence to support her claims under Federal Law. Defendant's assertions are unsupported and unlikely to be true. Thus, having also addressed the merits in addition to addressing the procedural bars, no hearing is necessary and defendant's claim of ineffective assistance of counsel is deemed meritless.¹⁹

IV. DEFENDANT'S CLAIM THAT PROSECUTORIAL MISCONDUCT OCCURRED REQUIRING REVERSAL AND DISMISSAL IS WITHOUT MERIT

¹⁹In reviewing defendant's ineffective assistance of counsel claims, this Court also reviewed the opening and closing statements of trial counsel and found them to be appropriate, logical and cohesive.

_____ Pursuant to Criminal Procedure Law § 440.10(1)(c) a judgment may be vacated upon the ground that: “Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false.”

Defendant has not submitted proof that the Assistant District Attorney knowingly procured false testimony. Notably, not every inconsistency implies that the testimony of a witness is perjurious. See People v. McDaniel, 81 N.Y.2d 10, 595 N.Y.S.2d 364 (1993), citing People v. Davis, 44 N.Y.2d 269, 405 N.Y.S.2d 428 (1978); see also People v. Johnson, 6 A.D.3d 226, 774 N.Y.S.2d 532 (1st Dept. 2004); People v. Nilsen, 182 A.D.2d 715, 582 N.Y.S.2d 482 (2d Dept. 1992)(discrepancy between grand jury testimony by witness and information contained in report by Federal Bureau of Investigation insufficient to prove prosecutor knowingly procured false testimony). Defendant has not demonstrated that any inconsistency that may exist was not the result of an innocent explanation. See e.g. People v. Stern, 226 A.D.2d 238, 641 N.Y.S.2d 248 (1st Dept. 1996). Thus, upon a review of the testimony that defendant directs the Court’s attention to in order to support her claim, this Court determines that defendant has not established that any inconsistency that exists was the result of perjury or any prosecutorial misconduct.

Moreover, defendant’s application raises issues that are not proper grounds for a CPL § 440.10 motion because they fully appeared on the record (CPL § 440.10(2)(b)). Defendant’s claims are also barred pursuant to CPL § 440.10(3)(c) since she failed to raise these issues in her prior CPL § 440 motion. In any event, defendant’s claims are without merit.

_____ Defendant claims that the prosecutor engaged in prosecutorial misconduct based upon the following assertions that she alleges were misrepresented at trial by the prosecutor: (1) that Charles Germano told the police at the precinct after the incident occurred that defendant was not the girl he saw in the car when he viewed her; (2) that, based upon a review of the complaint report, Charles Germano identified defendant as a white male to Sergeant Cestemino; (3) that Connie Germano testified at Frank Johnston’s trial that the passenger in the vehicle was Frank’s

brother and the prosecutor elicited at defendant's trial that the passenger was a woman; and (4) that the prosecutor elicited from Louis Marrero at defendant's trial that the passenger was a "girl" when he had consistently stated that the passenger was a male. Moreover, defendant claims that the prosecutor improperly elicited from Marrero what he claimed the passenger allegedly said when it would have been impossible for the witness to hear what the passenger said and therefore, the witness testimony was incredible.

First, as discussed previously herein, this Court has reviewed all of the relevant testimony and based upon the record, it is clear that the reason Charles Germano did not identify defendant at the precinct was because he was unable to fully observe her face, although he recognized her jacket, because her face was obscured by bandaging at that time. Thus, it is disingenuous to argue that Charles Germano could not identify her at all. He provided a sound explanation of this failure to identify her in his testimony. It cannot be said that prosecutorial misconduct occurred for this reason.

Second, as pointed out by the Court in this decision, Sergeant Cesternino could not identify the exact source of the information in the complaint report because he had obtained the information based on an aggregate gathering of the facts from at least five witnesses.²⁰ Thus, prosecutorial misconduct has not been shown here and the prosecutor properly relied upon the hearing court's determination that an independent source existed for Charles Germano's in court identification of defendant.

Third, Connie Germano testified at Frank Johnston's trial that although she telephoned Frank Johnston's father and said that Frank Johnston and his brother were trying to kill her daughter, Frank's father said to her that it was impossible because his other son was with him at the time. Connie testified at Johnston's trial that she responded to Frank's father, "I says [sic] I

²⁰Notably, Louis Marrero who testified at trial admitted that he provided information to the officer that the passenger was a white male.

don't know who else is in the car." See Defense Exhibit 9, at 285.²¹ Furthermore, at this defendant's trial, Connie Germano never identified defendant and testified as follows: "Q: Did you see anyone in the car with him? A: The passenger ducked, whoever it was there hide [sic]." See Defense Exhibit 4, at 59. Thus, Connie Germano never stated that she knew the identity of the person in the car and did not claim that she saw the person, she merely testified that there was another individual in the car.

The prosecutor did not solicit from Connie Germano that the passenger was a female. Although in one answer the witness used the term "she," this witness consistently stated in her testimony at both trials that she could not identify the passenger. The transcript from Frank Johnston's trial was available to counsel. The prosecutor did not claim that this witness could or did identify defendant as the passenger. Furthermore, although Connie Germano used the word "she" in her response, it was more than likely based upon a conversation she had with her husband where he told his wife that Frank Johnston was in the car with a female. This was elicited in prior testimony. Thus, there is no evidence here that the prosecutor attempted to or did elicit false testimony.

Defendant's fourth claim that the prosecutor elicited false testimony from Louis Marrero because he used the term "her" in one of his responses does not demonstrate that the prosecutor engaged in misconduct. An inconsistent statement by a witness does not demonstrate prosecutorial misconduct. In any event, a review of Marrero's testimony clearly reveals that he could not identify the passenger and he even admitted that he identified the passenger as a white male to the police in front of the jury. Moreover, an objection by defense counsel was sustained regarding this testimony. See Defense Exhibit 4, at 230.

_____ Defendant further alleges that the prosecutor engaged in misconduct by pointing out defendant to Charles Germano in the courthouse resulting in his identification of her. Charles

²¹Based upon this testimony, that the witness said she did not know who the passenger was, it would have been improper for the prosecutor to elicit that the passenger was Frank's brother because the witness said she did not know who was in the car.

Germano testified at a pre-trial Wade hearing as to the circumstances of his identification of defendant, which the court found was not police arranged. According to the hearing testimony, the prosecutor was not present when he observed and recognized defendant in the courthouse. Now, approximately eighteen years later, defendant claims in her affidavit, that she was pointed out to Charles Germano by the prosecutor. This claim is incredible. Defendant has not demonstrated prosecutorial misconduct by the bare assertions she now attempts to raise for the first time in her affidavit. Thus, pursuant to CPL § 440.30(4)(d) her application is denied.²² _____ Moreover, this Court has also addressed the merits of this claim and denies defendant's application as noted herein.

V. DEFENDANT'S CLAIM THAT HER GUILT WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT IS BARRED.

This claim by defendant is procedurally barred. First, a mandatory procedural bar exists pursuant to CPL § 440.10(2)(a) which provides that the court must deny the motion when:

The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

²²CPL 440.30(4)(b) provides that 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 bases her assertions only upon her own allegations without anything further and her allegation lacks credibility. There is no reasonable possibility in this Court's view, that her allegation is true.

The Appellate Division specifically addressed defendant's claim that her guilt was not established beyond a reasonable doubt and denied such application. See Section on Post Trial Procedural History herein.²³

Moreover, defendant's application is subject to a permissive procedural bar pursuant to CPL § 440.10(3)(b) because this issue was raised in both a prior CPL §440.10 motion and was denied. Defendant also raised this same issue in a writ of habeas corpus, which was also denied. Defendant is now raising the same arguments for the fourth time and this Court finds her claims barred.²⁴

Thus, the Court has reviewed all of defendant's claims and finds them to be either procedurally barred, without merit or both, as outlined herein.

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

A copy of this decision forwarded to the District Attorney and Counsel for defendant.²⁵

²³Any claim raised by defendant at this time related to the trial court's jury instructions are also procedurally barred as either unpreserved or subject to the mandatory bar pursuant to CPL § 440.10(2)(a) and (c).

²⁴See also People v. Webb, 3 Misc.3d 1105A, 2004 NY Slip Op 50429U (N.Y. Sup. Ct. 2004).

²⁵*Sua sponte*, after reviewing all of the facts and evidence in this case, this Court notes that defendant's role in this crime was that of the passenger in the vehicle driven by Frank Johnston. It was Johnston who drove the vehicle over the victim resulting in her death. Thus, defendant's conviction is based upon her role as an accomplice based upon the charge that "when one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, encourages or intentionally aids such person to engage in such conduct." See Court Charge at 180, annexed to defendant's motion as Exhibit 4a. Although the evidence was legally sufficient to establish defendant's guilt beyond a reasonable doubt and the verdict was not against the weight of the evidence, as determined by the Appellate Division, (leave denied People v. Graves, 76 N.Y.2d 789, 559 N.Y.S.2d 994 [1990]), it is this Court's opinion that defendant has sufficiently repaid society for the heinous

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crime which occurred in light of the actual role she played in its commission, as determined by a jury. The law holds defendant equally accountable with the driver and although this Court does not deem it appropriate to vacate her conviction in the interest of justice, the Court believes that this is a relevant factor regarding her release date.