

Decided on June 27, 2008

Supreme Court, Queens County

The People of the State of New York

against

Kareem Bellamy, Defendant.

194/94

APPEARANCES OF COUNSEL

Cravath, Swaine & Moore LLP, New York, NY (Darin P. McAtee, Antony L. Ryan, Craig A. Bachelor, Lindsay R. Goldstein, Diane M. Macina, Chelsea W. Teachout, Dashene A. Cooper,^[FN1] James J. Bilsborrow, and Robert A. Miranne,^[FN2] of counsel) and Thomas Hoffman, P.C.,^[FN3] for defendant Kareem Bellamy.

Richard A. Brown, District Attorney, Kew Gardens, NY (Sharon Y. Brodt, Roni C. Piplani, Johnnette Traill, Nicolette J. Caferra, and Brad Leventhal, of counsel), for the People.

Joel L. Blumenfeld, J.

In 1996, CourtTV aired a documentary about *People v Bellamy*, the instant case. The documentary was appropriately entitled "*Anything You Say....*" because it was clear from what the judge and the parties thought, that the defendant was convicted mostly because of what he

said at the time he was picked up for drinking beer in public as opposed to the other evidence in the case. It became clear to this court, after reading the transcripts of the pre-trial hearing and the trial, presiding over the instant 440 hearing in which this court heard from over 25 witnesses, and after going through all of the pleadings, memoranda and exhibits, that their analysis was correct.

***** [*2]

I.

On April 9, 1994, at approximately 9:30am, James Abbott was stabbed to death on the corner of Beach 48th Street and Beach Channel Drive. During the police investigation, Andrew Carter, the sole eyewitness to the stabbing, told the police that he saw two men beating, punching, and kicking the victim. Carter stated that one of the two men stabbed Abbott numerous times in the chest, abdomen, back, leg and arm. Carter stated that he then saw the two flee on foot. As a C-Town supermarket bag containing groceries was found by Abbott's body, the police went into C-Town near the scene of the crime to conduct interviews.

Linda Sanchez, a cashier in C-Town, was present when the police conducted their interviews on April 9, 1994, shortly after the crime. At no time has she ever stated that she saw the crime. On May 13, 1994, she called the police to tell them that the person whom she saw with Abbott just prior to the stabbing was standing outside of 51-32 Beach Channel Drive and gave a description of what he was wearing. That person, the defendant, was picked up for drinking a beer in public. During the ride to the precinct, the defendant stated "this must be a mistake — somebody must have accused me of murdering someone."

On May 14, 1994, after the police were able to locate Carter, the defendant appeared in a lineup and was identified as the murderer of James Abbott by Andrew Carter, and by Linda Sanchez as one of the people she saw follow Abbott just prior to his murder. The defendant was then arrested and charged with various crimes relating to the murder of James Abbott.

After a jury trial before Justice Pearl Corrado, the defendant was found guilty of depraved indifference murder in the second degree (Penal Law § 125.25 [2]) and criminal possession of a weapon in fourth degree (Penal Law § 265.01 [2]). He was acquitted of intentional murder in the second degree (Penal Law § 125.25 [1]).

On January 16, 1996, Justice Charles Thomas ^[FN4] sentenced the defendant to an indeterminate prison term of from twenty-five years to life for the depraved indifference murder count and to a definite prison term of one year for the weapons count. The sentences were to run concurrently with each other.

The conviction was affirmed:

"The testimony of the two eyewitnesses who testified at the combined Wade and Huntley hearing established that there was probable cause to arrest the defendant (*see*, CPL 140.10; *People v Bigelow*, 66 NY2d 417). We therefore reject the defendant's contention that any statements made

by him and/or any identification made subsequent to his being detained by the police should have been suppressed as the product of an unlawful arrest. [*3]

"The defendant also contends that the evidence was legally insufficient. This argument is unpreserved for appellate review (*see*, CPL 470.05 [2]). In any event, viewing the evidence in the light most favorable to the prosecution (*see*, *People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see*, CPL 470.15 [5]).

"The defendant's remaining contention is without merit."

People v Bellamy, 247 AD2d 399 (2d Dept 1998).

Appeal was denied by the Court of Appeals.^[FN5]

Habeas corpus relief was denied in federal court.^[FN6]

The defendant moves to vacate judgment pursuant to CPL 440.10 (1).

The court has conducted what might be viewed as two separate 440 hearings. During the first part of the hearing, held during 2007, the court heard from the following witnesses: Lila Brijmohan, Michelle Abbott, Maria Vega, Veronica Walker, Andrew Carter, John Gillen, Linda Sanchez, Detective Kevin Cashen, Robert Burgos, Judeh, Judeh, Helen Grand, Eric Jefferies, Sergeant Brian McNulty, Kenneth Reiver, Esq. (the defendant's trial counsel), Michael Solomeno (the original lead detective), Detective Darren Lane, Detective John Gillen, Kathleen Hoffman, Diane Macina, Esq., Craig Bachelor, Esq., David Guy, Esq. (trial counsel for the People), Steven Antignani, Esq. and Donald Barclay.

During the second part of the 440 hearing, which was held in early 2008, the court heard from Joseph O'Brien (an investigator for the current defense counsel and former Special Agent from the Federal Bureau of Investigation) and Edward Hensen (another investigator for the current defense counsel and former detective from the 101st Precinct), Michael Mansfield (from the Queens County District Attorney's Office and head of the witness location unit), Daniel Cox (former detective from the Queens County District Attorney's Office who was a part of the witness location unit of that office), Linda Sanchez, a confidential informant and Yolanda Dove (the girlfriend of Levon "Ishmel" Melvin).

Furthermore, one of the exhibits the court viewed was a portion of a television documentary on [*4]this case that appeared as a part of the series "*The System*" on CourtTV ^[FN7]. This documentary, "*Anything You Say...*" broadcasted in 1996, provided an opportunity to see parts of the trial as well as comments both during and after the trial from, *inter alia*, the trial attorneys (Kenneth Reiver and David Guy) and Justice Pearl Corrado.

II.

THE CPL 440 MOTION

The statutory grounds the defendant relies on are found in paragraphs (f), (g) and (h) of subdivision one of CPL 440.10:

"1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

"(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

"(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, 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 to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

"(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

Furthermore, defendant asserts that the motion to vacate should be granted on the ground of "actual innocence" which comes from CPL 440.10 (1) (h) (*see People v Cole*, 1 Misc 3d 531).

The People argue, *inter alia*, that the defense is statutorily prohibited from raising many of these issues. CPL 440.10 (2), as it relates to this case, bars from consideration:

"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...."

CPL 440.10 (2) (a). [*5]

Furthermore, CPL 440.10 (3) (a) provides the court with the option to not consider a ground where:

"Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right."

THE FAILURE TO DISCLOSE *ROSARIO* MATERIAL

It is well-settled that after jury is sworn and before opening statements, People are required to provide statements to the defense made by People's witnesses (so-called *Rosario* material), that are in the People's possession and control, and relate to the subject-matter of witnesses' testimony (CPL 240.50 [1]; *People v Rosario*, 9 NY2d 286). In order to grant a CPL 440 motion for nondisclosure of *Rosario* material, the defendant is required to show that there is a reasonable possibility that the nondisclosure "materially contributed to the result of the trial" (CPL 240.75; *People v Bryant*, 2 AD3d 873 [2d Dept 2003]; see *People v Johnson*, 301 AD2d 462, 463 [1st Dept 2003]; *People v Sorbello*, 285 AD2d 88 [2d Dept 2001]).

THE JUDGMENT WAS OBTAINED IN VIOLATION OF A RIGHT OF THE DEFENDANT UNDER THE CONSTITUTION

The defendant argues that the conviction, leading to the judgment, was due to (1) the ineffective assistance of counsel and (2) the failure of the State to provide *Brady* material.

THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The standard for evaluating claims of ineffective assistance of counsel is whether the defendant was afforded "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Henry*, 95 NY2d 563 [2000]; *People v Benevento*, 91 NY2d 708, 712 [1998]; see *People v Claudio*, 83 NY2d 76, 79-80 [1993]).

In evaluating an ineffective assistance of counsel claims, it is easy to second-guess "with the clarity of hindsight to determine how the defense might have been more effective (see, *People v Satterfield*, 66 NY2d 796, 799)" (see *People v Benevento*, 91 NY2d 708, 712). However,

"[t]he Constitution guarantees the accused a fair trial, not necessarily a perfect one (see, *People v Flores*, 84 NY2d 184, 187; *People v Ford*, 86 NY2d 397, 404 ["The phrase 'meaningful representation' does not mean perfect representation"]; *People v Aiken*, 45 NY2d 394, 398 ["representation ... need not be errorless"]; *People v Modica*, 64 NY2d 828, 829 ["the test being [*6] reasonable competence', not perfect representation"]). That a defendant was convicted may have little to do with counsel's performance, and courts are properly skeptical when "disappointed prisoners try their former lawyers on charges of incompetent representation" (*People v Brown*, 7 NY2d 359, 361)."

People v Benevento, 91 NY2d at 712-713.

When counsel points out flaws in the defense counsel's performance or sort-comings, the burden is on current counsel "to demonstrate the absence of strategic or other legitimate explanations" (*People v Rivera*, 71 NY2d, 705, 709 [1988]).

A failure to conduct an appropriate investigation is ineffective assistance of counsel where there

was no strategic reason for the lack of investigation and such investigation would likely have revealed evidence favorable to the defense that could have been utilized at trial (*People v Green*, 37 AD3d 615 , 618-619 [2d Dept 2007]; *People v Fogle*, 10 AD3d 618 , 618-619 [2d Dept 2004]).

THE FAILURE TO DISCLOSE *BRADY* MATERIAL

The so-called *Brady* rule is "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" (*Brady v Maryland*, 373 US 83, 87 [1963]).

Generally, in a case the defendant will either ask for specific material under *Brady* or make a general, pro-forma request in a demand for discovery. Where, as here, the defense did not specifically request the information, the test of materiality is whether "there is a reasonable probability that had [it] been disclosed to the defense, the result would have been different, that is, a probability sufficient to undermine the court's confidence in the outcome of the trial" (*People v Bryce*, 88 NY2d 124, 128 [1996]).^[FN8]

The evidence at issue

(1) must be favorable to the defendant, either because it is exculpatory, or even if it is merely impeaching;

(2) that evidence must have been suppressed by the State, whether it was done willfully or [*7]inadvertently ^[FN9]; and

(3) that material prejudice must have ensued.

People v LaValle, 3 NY3d 88 , 109-110 (2004), citing *Strickler v Greene*, 527 US 263, 280-282.

NEWLY DISCOVERED EVIDENCE

It is well-settled that in order for evidence to qualify under CPL 440.10 (1) (h) as newly discovered evidence, it must meet the six criteria laid out in 1955 in *People v Salemi*, 309 NY 208, 215-216 (1955). As recently stated in *People v Tankleff*, 49 AD3d 160 , 178-180 (2d Dept 2007):

" Newly-discovered evidence in order to be sufficient must fulfill all 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" (*People v Salemi*, 309 NY 208, 215-216; *cert. denied* 348 US 845, quoting *People v Priori*, 164 NY 459, 472, 58 NE 668; see *People v Richards*, 266 AD2d 714, 715; *People v Reyes*, 255

AD2d 261, 263; *People v Taylor*, 246 AD2d 410, 411; *People v Yoli*, 150 AD2d 741; *People v Lavrick*, 146 AD2d 648; *cert. denied* 493 US 1029; *People v Rivera*, 119 AD2d 517, 518; *People v Latella*, 112 AD2d 321, 322; 34 NY Jur 2d, Criminal Law § 3063, at 862). At a hearing on a motion pursuant to CPL 440.10 (1) (g), the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion (*see* CPL 440.30 [6]; *People v Tucker*, 40 AD3d 1213 , 1214; *lv. denied* 9 NY3d 882."

ACTUAL INNOCENCE

The defendant advances the claim that the motion should be granted under CPL 440.10 (1) (h) on the ground of actual innocence (*People v Cole*, 1 NY3d 531). The People are quite correct that no appellate court has ever recognized "actual innocence" as a ground under CPL 440.10 (1) (h):

"In making our determination, we do not decide the contention, advanced by the defendant, that New York recognizes a free-standing claim of actual innocence that is cognizable by, or which may be addressed within the parameters of CPL 440.10 (1) (h)."

People v Tankleff, 49 AD3d 160 , 182 (2d Dept 2007). [*8]

It is this court's experience that the Queens County District Attorney's Office — to its credit — has investigated claims of actual innocence.^[FN10] As Richard Brown, District Attorney of this county stated, his prosecutors were "always prepared to take a hard look at a case — even post-conviction — to make sure that justice has been done."^[FN11] When they determined that the wrong person was in prison, the People joined the defense application to vacate pursuant to CPL 440.10, and then moved to dismiss the indictment.^[FN12] This court need not resolve the legal issues as this court believes that actual innocence has not been made out factually as explained below.

III.

With the exception of the ineffective assistance of counsel argument, which the court rejects^[FN13], his *Brady, Rosario*, and newly discovered evidence claims only warrant a vacating of the conviction if this evidence would have produced a more favorable verdict than had been received at trial.

Both trial counsel and current counsel view the defendant's trial as a one witness identification case. This court disagrees. The sole eyewitness to the stabbing of James Abbott at the trial could barely give a description of the perpetrators other than two dark-skinned males, was not sure if the stabber was number one or two at the lineup (the defendant was number one), after the lineup he decided it was number one, but at the trial insisted that the perpetrator was number two at the lineup. He did not describe the killer as having braids nor could he describe the clothing worn by the two people fighting with Abbott. The other witness at the trial, Linda Sanchez, testified that she saw the defendant (whom she recognized as had she had seen him numerous occasions [*9]buying beer at C-Town), wait along with one other, for Abbott who caught up with them in the C-Town parking lot near the Kentucky Fried Chicken store just minutes before his death.

(Abbott was found with a C-Town bag containing groceries at the time of his death). She clearly stated that the defendant had braids in his hair and Carter stated that the stabber (the defendant) did not have braids. Given his inability to furnish a meaningful description, his weak identification testimony along with the contradictions between his description of the perpetrator and with Sanchez' description of Bellamy, if this case was just a simple one witness identification case, the verdict would not have been a conviction.

This court's reading of the trial transcript supports the conclusion reached by the commentator for the CourtTV in the *"Anything You Say..."* program that the defendant was convicted by the things he said.^[FN14] This was confirmed by post-conviction conversations several jurors had with Justice Corrado.^[FN15]

This crime happened on April 9, 1994 and the police, finding the C-Town grocery bag, canvassed people in the store to see if they saw the stabbing and Linda Sanchez, did not say that she did. She testified that on April 16, 1994, the defendant walked up to her cash register and told her "you know, you know, you fucking bitch — you're next."^[FN16] This prompted her to call the assigned detective, who was not in. When they finally got back to her, although no one discussed the threat, she gave the following description to Detective Solomeno memorialized in a DD5, typed on April 22, 1994:

"Sanchez saw Abbott in supermarket 9:30am, 2 males got in line behind him as they were waiting to pay for items they had bought. Abbott paid for his items and then stopped to talk to manager of supermarket, JJ. Other two males paid for their items and exited the store and go [*10]through parking lot toward Beach Channel Drive. Halfway through parking lot, two men stopped and looked back at store. Just then Abbott left store and walked in same direction as two males — towards chicken store at corner. Sanchez went out to retrieve some shopping carts and when she walked back, no longer saw Abbott or two males.

"She described the two male blacks as one being 5' 5"-5' 6" wearing green jacket, green hat and having short braided hair and the other as 5' 7"-5' 8"."

Her trial testimony was the same, except that she described the green jacket as army camouflage green and the other male wearing all brown clothing.

On May 13, 1994, she had another encounter with the defendant where she saw him down the street, pointing and yelling at her. Though she could not hear what he was saying, she called the precinct and told Detective Jenkins that one of the males who was with the victim immediately prior to the stabbing was in front of 51-32 Beach Channel Drive, drinking a 40 ounce beer and wearing a yellow sweatshirt, dark pants tucked into brown leather boots with buckles and wearing a hat pulled down over his eyes.

The detectives picked up the defendant who matched that description and told him that he was picked up for an open container of alcohol and was being taken to the precinct. The defendant immediately responded: "This must be a mistake. Somebody must have accused me of murdering somebody."

This spontaneous statement evinced a consciousness of guilt and gave credence to Sanchez' testimony of the prior threat which was not told to the detectives.^[FN17]

As she clearly knew Bellamy and had no apparent motive to frame him ^[FN18], the jury had no reason to question her stated reason for calling the police on May 13, 1994 nor any reason to doubt the police testimony that defendant blurted out that someone must be accusing him of murder even though it was five weeks after Abbott's stabbing. They clearly concluded, as Sanchez testified, he just pointed and yelled at her and had previously told her, among other things, that she was "next." [*11]

In short, this court believes he was not convicted solely for what Carter said, but for the words that came out of his own mouth.^[FN19] Because of that, none of the items which the defense now claims either constitute a violation of *Rosario* and *Brady* or which the defense claims would have been discovered but for the ineffective assistance of counsel would have addressed the consciousness of guilt issue that this court believes was critical to the verdict. All at best might go to the observations of someone in the fight with Abbott possibly wearing a hood or jacket pulled up or walking in a different direction than Carter saw the assailants walk after the stabbing. None of these would have led to a more favorable verdict as they do not address Sanchez' testimony regarding her observations with Abbott just prior to the stabbing, the defendant's threat to her or the defendant's incriminating statements.

Although the defense now claims that she was relocated at the time of the trial and eventually Section 8 Housing worth thousands of dollars was provided to her, this was not the case when she called the police on May 13, 1994. The jury was told that she had been relocated and it was not known to anyone at the time of the trial that she would eventually obtain Section 8 housing. This was not a *Brady* violation and knowledge of it would have still left the trial jury with the unanswered question of why she called the police on that day and why the defendant said what he did. The jury clearly credited her testimony and concluded that through his pointing and shouting at her (words, ironically, she could not hear) he was renewing his April 16, 1994 threat. They also must have believed that she saw him with Abbott just prior to the stabbing, that he made threats to Sanchez and told the police that someone must have accused him of murdering someone when picked up for the open container of beer. To the jury, this had to have been strong circumstantial corroboration for an otherwise weak Carter identification.

The most intriguing evidence that could not have been discovered at the time of the trial is the testimony of the person the defense refers to as John Doe and the People call the Confidential Informant (CI) in their memoranda of law. This person testified under his true name at the CPL 440 hearing.^[FN20]

At the trial, the People chose to prevent any "rush to judgment" argument by the defense, and brought out in their direct case that the police did a thorough investigation, received a phone call from a woman who identified herself as Anna Simmons but who was referred to in the DD5 as a female known to the Department (FKTD). The DD5, which was introduced into evidence at the CPL 440 hearing as part of Exhibit C, was provided to defense counsel, who at the end of the

suppression hearing, asked the suppression court (Fisher, J.) for the assignment of an investigator and for him to order the People to provide him with the name and address of this FKTD so he could conduct an investigation. ADA Guy expressed concern as he did not know if she was a confidential informant and felt a need to protect her identity. He promised to either furnish the [*12]requested information or produce her in his office for the defense counsel to interview. Defense counsel followed up prior to trial and learned that the People could not locate her at either the place of her claimed residence or employment.

The DD5 furnished to counsel reads as follow:

"Investigation:Homicide

"Subject:Telephone call from FKTD

"1.On 4/15/94 the undersigned receive telephone call from a female KTD on 101 Detective phone line [redacted]. The female stated that she had overheard two males, who she is acquainted, bragging about the stabbing' that occurred on B. 48 Street. She stated that the males were saying that they followed the victim from the supermarket. She stated that they had waited for the victim to come out of the supermarket. [T]hey followed him to the c/o the incident and while he was on the phone got out of their car and "snuffed him". She went on to inform the undersigned that she understood "snuffed" to mean kill. The female continued, saying that these two males were part of a gang who call themselves the Regulators. The victim may have been asked to join the gang and had refused. After the incident the two males got back into the car and left. She stated that she is familiar with both males and gave the following description of them:

"1.Rodney Harris M/B 26-27 yoa

"5610 Beach Channel Drive

"Apartment 7g or 7H

"Short possibly 5'2-5'4"

"wears red hoodies

"2.Ishmel

"5449 Alameda Avenue

"m/b 27-29 yoa

"Possibly the head of the Regulators

"She stated that she was coming to the precinct after she got off work at 3:00 p.m.

"This conversation took place at approx 12:30 p.m. [*13]

"2. Investigation continuing....."

The detective determined that "Ishmel" was also known as Levon Melvin, obtained his and Rodney Harris' arrest photos, put them each in a photo array, showed them to Linda Sanchez and Andrew Carter, neither of whom identified either one .

The handwritten notes to this interview of Anna Simmons also contained an ambiguous statement "apparently has told on these kids before." As she was never located, it is not clear if this refers to her or James Abbott.

In the beginning of January, 2008, after the CPL 440 hearing had gone on for over nine months, the defense retained the services of Joseph O'Brien , a retired Federal Bureau of Investigation Special Agent, to visit the area of the crime, to conduct an independent investigation and to try to locate Anna Simmons at the work and residence addresses the defense had eventually obtained once ADA Guy learned that the police couldn't find her. O'Brien's strategy was to visit the neighborhood and create some "chatter" about the Abbott case and the possibility that an innocent man might be in jail. Having no connection to the area, he had no success and decided he needed local assistance. He found Edward Hensen, a retired detective from the 101st precinct who had worked that area for many years. Without mentioning the names provided by Anna Simmons, the two embarked on an independent investigation to try and locate Anna Simmons and to see if these names would surface.

They found two laundromats around Beach 54th Street and a person named Anna Simmons, but not the person whom they believe called the police in this case. While they were talking to people in the project — some of whom Henson had arrested earlier in his career as a member of the police force, John Doe/CI, whom Henson had known from his years on the force, rode up to him on a bicycle and said that they had to talk. The investigators ascertained that he still lived at the address that Henson knew, agreed to meet him at his home. When they met, he told the investigators that "Ishmael Melvin killed that kid." He explained that he knows Melvin for over 40 years and has worked for him and is godfather to both of Melvin's children.

Apparently the chatter strategy worked because Ishmael (Levon Melvin) had been hearing that Rodney Harris (Turk) had been talking to the detectives and was upset that Turk never told him. According to John Doe/CI, Ishmael was worried that Turk might be giving Ishmael up. Ishmael told him that he stabbed the guy about seven times because he wouldn't stop messing with his woman.

Defense counsel asked to reopen the hearing, produced John Doe/CI in the District Attorney's Office and eventually wired him so he could secretly record a conversation with Ishmael. A CD of that February 2, 2008 recorded conversation was introduced into evidence along with the [*14]transcript ^[FN21], which reads as follows:

Informant: Hey man, they made a mistake, man to get . . . Yo, what happened man?

Ishmael: I don't know. I don't know

Informant: What you gonna do? What you gonna do? What you gonna try to get that shit. self defense?

Ishmael: Yeah. try to get that self defense.

Informant: If I have to, I'm gonna say. I'm gonna say I was there.

Ishmael: Yeah, yeah.

Informant: I'm gonna say I was there. What happened though? I mean, what happened?

Ishmael: [inaudible] around, see him in the 40s and all of that, thought he was with my girl, . . he was messing around with my girl. So he started running off at the mouth so I just had to poke him a couple of times.

Informant: You stabbed him?

Ishmael: Yeah, I stabbed him a couple of times.

Informant: I mean ... Listen, if I have to. I'm gonna say, I'm gonna say, I was there. I watch you. I was there ... nigger ... how you gonna' go self-defense when the nigger was messing with YoYo?

Ishmael: Yeah, he was messing with my shorty, my boo right there.

Informant: You mean you told him to leave her alone, and he wouldn't leave her alone.

Ishmael: Yeah, he wouldn't listen to me, so I had to do what I had to do.

Informant: So you stabbed him?

Ishmael: Yeah.

Informant: How many times you stabbed him? [*15]

Ishmael: Stabbed him about seven times or something like that.

Informant: Son, man. Yo, damn, cause you know them niggers there, I say I see Ed, Ed Henson and them niggers in the projects, man.

Ishmael: Yeah, Ed's trying to get me.

Informant: Who? Who? Henson?

Ishmael: Yeah man.

Informant: So you know something's coming down.

Ishmael: Yeah, yeah, yeah.

Informant: Oh shit, man. I don't know, boy. Well, you know if you have to, man, I'll say I was there, man, and watched you, man, and I watched the nigger, the nigger hit you first, you know, the nigger hit you and you had to do what you had to do. You know, word up. You know.

Ishmael: Yeah, yeah.

Informant: . . . listen man, the restaurant closed now, man. I guess you wanna go get something to eat?

Ishmael: Yeah, we could do that.

Informant: You, you, Ish, man, listen man, you gotta, you gotta, you gotta, I'm telling you, I don't know, man. You know, you gotta do what you gotta do, man, for yourself, man. You know?

Ishmael: Yeah.

Informant: So Turk was with you too, right?

Ishmael: Yeah.

Informant: Turk was there?

Ishmael: Yeah.

Informant: Oh, man, man. Man, all these years, man. . . I was with your motherfucker, I'm your kid's godfather. . . believe me, you didn't tell me nothing about this shit, man.

Ishmael: I didn't. [*16]

Informant: Yo, listen man, can you drop me off back at the house? I'm going back to the house man, I'll catch you later on, man.

Ishmael: All right, all right.

As evidence, the People do not argue that it is not newly discovered. Nor do they claim that it was available by the exercise of due diligence at the time of the original trial. As O'Brien testified, he couldn't have obtained this information as he didn't have a relationship with the people in that project that Henson did. So the fact that the trial counsel's investigation did not

obtain this evidence, does not mean that an exercise of due diligence would have.^[FN22]

The People's argument that it is not clear that the stabbing Ishmael is talking about is the Abbott stabbing is belied by the fact that Anna Simmons's DD5 was filed in the Abbott file and that Henson checked the records of the precinct and it was the only stabbing homicide in the Beach 40's for many years.

Although the People argue that it may not be Ishmael's voice on the recording, it was authenticated by John Doe/CI who knew him for many years. Henson testified that the quality of the recording is poor and he now wears a hearing aid but it sounds like Ishmael's voice, but he is no expert and can't swear to it. Most telling, the People called Yolanda Dove (YoYo), the mother of Ishmael's two children, as a witness and chose not to ask her to listen to Ishmael's portion of the recording to determine if it was his voice.

The People also argue that the statement is hearsay and does not qualify as a declaration against penal interest because it is not clear that Ishmael is unavailable or that the statement has additional indicia of reliability. Ishmael made clear that he is unavailable, as soon as he learned that Henson was looking for him, he had his lawyer, Eugene Levy call Henson and tell him not to speak to his client. As for independent indicia of reliability, the People chose to put the Anna Simmons/Ishmael/Rodney Harris story before the jury as part of their direct case. The People argue that at a new trial, they might not choose to repeat this strategy. It is unclear why this matters, as CPL 440.10 (1) (g) states that the standard for newly discovered evidence as being "of such character as to create the possibility that had such evidence been received at the trial the verdict would have been more favorable to the defendant."^[FN23] [*17]

According to the statute, this court must apply that test to the trial that was, not one that might take place in the future. Alternatively, one could apply the *Salemi* test^[FN24] which requires that the new evidence will probably change the result if a new trial is granted. Under either formulation, this court believes that there is independent indicia of reliability to warrant the receipt into evidence of the recording and John Doe/CI's testimony at any trial and once received the outcome would be — or would probably be per *Salemi* — more favorable. In any event, as the court in *Tankleff* (49 AD3d 160, *supra*) pointed out, this court is not the gatekeeper for any future trial. Therefore, the court grants the motion to vacate on these grounds. This court believes this because if the jury believes that Ishmael and Turk killed Abbott and that the defendant made these threats they could conclude that he did so at the behest of them or the Regulators. This would mean that Sanchez was truthful and the defense would not have to call her or the police liars. The defense could explain that he uttered his statement about being accused of murder, because he knew he had just confronted Sanchez and she must have called the police. Since he knew he threatened her, he could argue that she believed that he was the killer as opposed to being an enforcer for the Regulators.^[FN25]

IV.

As the parties made clear during numerous conferences, whatever decision this court was going to render, there will be an appeal of this decision. To assist the reviewing court(s), other issues

will be addressed.

Both Andrew Carter and John Doe/CI received money from current defense counsel. When initially approached by their investigator, Donald Barclay, Andrew Carter initially stood by his trial testimony. Nevertheless, he agreed to go to counsel's office where he negotiated a \$90/hour fee for his "time." As the People noted, he was in a wheelchair from having been shot by the police during a robbery he committed and for which he served a four-to-twelve year sentence, was a drug user (including crack-cocaine) and unemployed for over 20 years and living in a nursing home. After receiving approximately \$1350, he recanted his trial testimony and accused [*18]Detective Gillen of pointing out the defendant during the actual lineup in front of ADA Antignani and the sergeant who was supervising the lineup. At the CPL 440 hearing, he claimed that he immediately identified the defendant notwithstanding his signature on the lineup form which said he was not sure if the person doing the stabbing was number one or two. He also accused Gillen of telling him that the defendant confessed on videotape and changed his appearance prior to the lineup and offered to get Carter and his girlfriend some crack-cocaine and put them up in a motel. This court views Carter as using his so-called "street smarts" to get \$1350 for telling defense counsel what he assumed they wanted to hear and does not credit his recantation testimony at the CPL 440 hearing.^[FN26] As the People remind us, "[t]here is no form of proof so unreliable as recanting testimony" (*People v Shilitano*, 218 NY 161, 170 [1916]; see *People v Citron*, 306 AD2d 151, 152 [1st Dept 2003]; *People v Tucker*, 40 AD3d 1213 [3d Dept 2007]).^[FN27]

John Doe/CI also received money, over \$2000 from defense counsel, but only after he told Henson what Ishmael told him. Some of that money was received prior to being wired and making the recording with Ishmael, but the recording corroborates and does not alter the initial statement to Henson. The bulk of the money was for John Doe/CI's wife to relocate because of fear of retaliation from the Regulators and Ishmael. Yolanda Dove corroborated that she and Ishmael knew John Doe/CI; that Rodney Harris is known as Turk; that Turk was, at the time of the trial and now, a friend of Ishmael's; that Ishmael, Turk and she had been in the Regulators, which became a violent gang during the 1990's. The People never challenged John Doe/CI's testimony that he is the godfather to Ishmael and YoYo's ^[FN28] two children. So notwithstanding the receipt of money, and John Doe/CI's prior involvement with drugs, this court credits his testimony.

It is true that the defense at trial did not receive all the *Brady* and *Rosario* material to which it was legally entitled. This failure does not appear to be intentional by either the police or the prosecutor and as indicated above, collectively would not have altered the outcome of the trial without John Doe/CI's testimony and recording. As explained above, this is so because it went to the accuracy of the identification, but failed to deal with the threats and defendant's seemingly incriminating statement. As for Sanchez' possibly identifying Terrill Lee as the second perpetrator — there is no police report to that effect — she only claimed to have done so thirteen years after the event, at the CPL 440 hearing and is probably due to a faulty memory (as is her recollection at the hearing that the incident took place on a Sunday, when April 9, 1994 was a Saturday). [*19]

The defense at trial called Detective Lane to state that Andrew Carter never told the police anything about seeing the perpetrators wearing Timberland boots which Carter testified to at trial he saw when Abbott was being kicked. Pursuant to a FOIL request, a handwritten note taken of the initial interview of Carter on April 9, 1994 does include the description that he saw the perpetrators wearing Timberland boots. Rather than viewing it as fortunate that no one at the trial knew of the existence of this handwritten note (which gave the defense an impeachment of Carter) they now argue that since all he could describe was the Timberland boots and that the defendant was arrested in brown boots with buckles, he must have been the only one in the lineup with such boots and therefore the lineup was unduly suggestive and the identification should have been suppressed and since it was not, the defendant's constitutional rights were violated requiring this court to vacate the conviction. The problem with this argument is that no one testified that they ever saw the shoes of any of the lineup participants. The photographs of the lineup show all of them seated and do not depict the shoes. Detective Gillen, ADA Antignani, Linda Sanchez and Andrew Carter all testified and no one testified as to what shoes anyone was wearing. The only other person present at the lineup and who could have shed some light on this was the defendant and he never made the claim in his moving papers or during the hearing. Absent any evidentiary foundation for this argument, the court rejects it.

This is not to say that the court condones the failure to turn over these and other documents. It needs to be noted that this is an unusual case in that the lead detective, Solomeno, who under police procedure, as the lead detective, was required to gather all the evidence including the DD5s and to number them sequentially, became ill during the investigation of the Abbot killing. The supervisor had all members of the bureau conduct different parts of the investigation, but no one was named to be the new lead investigator. As a result of this police oversight, the DD5s are not numbered at all which makes it virtually impossible for trial counsel, appellate counsel and 440 counsel, as well as the People to know whether they have all of the DD5s or if the file was ever complete.^[FN29] The current defense team had to make FOIL demands, and had numerous meetings with appellate counsel, trial counsel, the District Attorney's Office, and several detectives in an attempt to reconstruct the file.

This does not excuse the police or prosecutor for their failure to turn over these documents. However, this court believes that even if they had been turned over, they would not have caused a different result without the recording and John Doe/CI's testimony for the reasons explained above.

The People do argue that neither Carter nor Lila Brijmohan (who witnessed part of the fight that led to Abbott's death) saw anyone enter a car, Ishmael's statement about arriving and leaving in a car can't be true. However, the undisclosed *Rosario* and *Brady* material combined with John Doe/CI's testimony and recording, when coupled with Anna Simmons DD5 which does mention [*20] that the perpetrators used a car, makes that question one of fact for a jury. Further, defense exhibit "O" contains handwritten notes dated April 15, 1994:

"Mike,

"Michelle Abbott call and said James older brother had something to due with his murder. [sic]

"Freddie Larson No.3 lives above bar on 95th St. Some man told her that a woman seen a gray auto at scene will get the man's name for us to talk to him.

"Andi"

Additionally, the defense argues that the stabbing of Abbott seven times would justify a conviction for intentional murder — for which the defendant was acquitted — but not for depraved indifference murder which they assert was a jury compromise. They rely on *People v Payne*, 3 NY3d 266 , 270 (2004), but cite no authority for it being applied after the conviction went through the appellate process. Furthermore, there is appellate authority that the new depraved indifference rule announced in *Payne* does not apply retroactively or to CPL 440 applications (*People v Epps*, 38 AD3d 916 [2d Dept 2007]; *People v Stewart*, 36 AD3d 1156 [3d Dept 2007]; *People v Baptiste*, 51 AD3d 184 [3d Dept 2008]).

Finally, Veronica Walker and Andrew Carter's testimony about Detective Gillen allegedly improper conduct were the basis for the court granting a subpoena duces tecum for his personnel file and any CCRB complaints. After appellate litigation,^[FN30] these items were turned over and examined by the court and nothing of value for the defendant was found. The court does not credit their testimony regarding Detective Gillen.

The court has attempted to address all the contentions of the parties raised in their numerous oral arguments and memoranda of law and has now rendered its decision. Proceed accordingly.

IT IS SO ORDERED.

DATE:39625

Kew Gardens, NYJOEL L. BLUMENFELD,

Acting Justice of the Supreme Court

Footnotes

Footnote 1: Not yet admitted to practice law.

Footnote 2: Law student.

Footnote 3: All defense counsel appeared pro bono publico and paid for their investigation.

Footnote 4: Justice Corrado retired at the end of 1995 right after this trial.

Footnote 5: *People v Bellamy*, 91 NY2d 970 (1998).

Footnote 6: *Bellamy v Superintendent of Shawangunk Correctional Facility*, No. 99-CV-1832 (CPS) (EDNY, 1999).

Footnote 7: The court notes that CourtTV is now TruTV.

Footnote 8: "...[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made" (*United States v Agurs*, 427 US 97, 107 [1976]).

Footnote 9: However, if the defendant "knew of, or should reasonably have known of, the evidence and its exculpatory nature" the evidence is not considered suppressed (*People v Doshi*, 93 NY2d 499, 506 [1999]).

Footnote 10: The New York Times reported in 2006, that the Queens District Attorney's Office has an "unofficial unit" that examines claims of "actual innocence" (Dwyer, *In Murder Case, New Evidence but Same Cell*, New York Times, Nov. 16, 2006, [http://www.nytimes.com/2006/11/16/nyregion/16murder.html?partner=rssnyt & emc=rss](http://www.nytimes.com/2006/11/16/nyregion/16murder.html?partner=rssnyt&emc=rss), accessed June 25, 2008).

Footnote 11: Barry, "Evidence in Inmate's Hand, Justice in His Sights", NY Times, February 25, 2007 (<http://www.nytimes.com/2007/02/25/nyregion/25hand.html>)

Footnote 12: *Id.*

Footnote 13: The defense, having examined trial counsel's 18B voucher saw that 11 hours of out of court time was spent in meeting with alibi witnesses and reviewing the scene of the crime measurements with his assigned investigator. What they failed to obtain is the investigator's voucher that would show the actual number of hours spent trying to locate witnesses. Not having produced these records, they failed to meet their burden of showing that his investigative efforts amounted to ineffective assistance of counsel. To the extent that they claim that trial counsel failed to ask certain questions or object, these issues are not properly before this court pursuant to CPL 440.10 (2) (c).

Footnote 14: The Transcript of *The System, "Anything You Say..."*, by Michael Ayala, prepared by the movant states:

"You have the right to remain silent. Anything you say can and will be used against you. We've all heard the phrase. The law requires that every suspect taken into custody be advised of this right. But Kareem Bellamy didn't remain silent, and his words were used against him. Prosecutor David Guy admits that, based on the testimony of his two main witnesses, there was room for the jury to find reasonable doubt. But the defendant's own statements, to police, to witnesses and in court helped the jury find him guilty of murder. For Court TV, I'm Michael Ayala." (At Page 13).

Footnote 15: Michael Nyala states in *"Anything You Say..."*:

"After the verdict, several jurors told Judge Corrado that the defendant's own words helped to convict him. To them, Bellamy's statements to the police and his threat to the cashier were strong evidence of guilt"

Footnote 16: The court notes that at the *Ventimiglia* hearing she testified that he said "*We know you know, you fucking bitch — you're next*" [emphasis added].

Footnote 17: This failure to tell it to the detectives allowed defense counsel to argue that she was not credible. Her testimony was that when she initially called on April 16, 1994, she mentioned it to the lady answering the phone who passed her on the Detective Division. The person in the Detective Division told her that the assigned detective wasn't in and took down her contact information which led to the interview memorialized on the DD5 dated April 22, 1994.

Footnote 18: She was not cross-examined as to any possible motive, which, if one existed, Bellamy apparently did not make known to his attorney, nor was she seeking to be relocated or be given Section 8 Housing on May 13, 1994.

Footnote 19: These words included his unsworn statements called out by him during the suppression hearing which were read into the record at trial as well as his statements interrupting the trial.

Footnote 20: This court will refer to him as "John Doe/CI."

Footnote 21: Transcript was prepared by Cravath, Swaine & Moore LLP. The court has listened to the recording while reading the transcript and finds that it is an accurate transcript.

Footnote 22: It should be noted that Henson was working in that precinct in 1994 and was not available as a private investigator for the defendant.

Footnote 23: This court, as *Tankleff*, 49 AD3d 160, *supra*, points out is not charged with determining the credibility of the recording or John Doe/CI's testimony and therefore does not find that actual innocence (which would dictate dismissal pursuant to *Cole*, 1 Misc 3d 531, *supra*), has been proven. Even with the recording, a jury could conclude that Bellamy alerted Ishmael and Turk to Abbott's whereabouts. Although he cannot be convicted of acting in concert with them as he was acquitted of intentional murder (Penal Law § 125.25 [1]) at his trial, he has not been shown to be actually innocent (as opposed to being probably not guilty).

Footnote 24: 309 NY 208, *supra*.

Footnote 25: It should be noted that prior to their locating John Doe/CI, the defense argued that a previously undisclosed DD5 of an interview of Michelle Abbott stated that he had been packaging marijuana and possessed a bullet-proof vest. They theorized that this could be a drug-related or gang-related killing. Another such DD5 indicated that a canvass of Abbott's neighbors revealed that two of them called Abbott a pervert who stood naked in his window

which children had observed. They argued that counsel's not having that information either showed that he was ineffective or that the lack of those reports constitute *Brady* or *Rosario* violations. For the reasons articulated above, without the ability to explain the threats and his statement, neither piece of evidence would have changed the outcome of the trial.

Footnote 26: Unfortunately, his CPL 440 hearing testimony now renders him pretty useless to the People.

Footnote 27: That is not to say that ALL recantation evidence is unreliable, but rather suspect (see Baker, Outside Counsel, *Newly Discovered Evidence Claims Based on Recantation*, NYLJ, Feb 7, 2007, at 4, col 4).

Footnote 28: Also known as Yolanda Dove.

Footnote 29: The same way trial counsel cannot be blamed for not knowing that he did not have the complete set of DD5s, the trial Assistant District Attorney cannot be faulted for the same. Nevertheless, the state is responsible for complying with their *Rosario* and *Brady* obligations.

Footnote 30: (*In the Matter of Brown v Blumenfeld*, 45 AD3d 836 [2d Dept 2007], *lv dismissed* 9 NY3d 1026 [2008]).