

**SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM - PART K-20 - QUEENS COUNTY  
125-01 QUEENS BOULEVARD – ANNEX  
KEW GARDENS, NY 11415**

**P R E S E N T :**

**HONORABLE ROGER N. ROSENGARTEN  
JUSTICE**

**THE PEOPLE OF THE STATE OF NEW YORK**

	:	Ind. No. 951/2001
		Motion: to Set Aside Verdict
-against-	:	C.P.L. § 330.30 et seq.
	:	Submitted: October 8, 2002
ANTHONY THOMAS	:	Hearing: <u>n/a</u>
and THOMAS BOONE,	:	
Defendants.	:	
	:	

The following papers numbered  
1 to \_\_\_ submitted in this motion.

**BY: Marvyn Kornberg, Esq.  
Scott Brettschneider, Esq.  
For the Motion**

**HON. RICHARD A. BROWN  
District Attorney, Queens County  
For the People**

**BY: Barry Pinto, Esq.  
James A. Dolan, Esq.  
John M. Castellano, Esq.  
Opposed**

**Notice of Motion and Affidavits Annexed  
Answering and Reply Affidavits  
Exhibits  
Minutes**

**Papers Numbered**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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Upon the foregoing papers, and in the opinion of the Court herein, the defendant's motion to set aside the guilty verdict in the above-captioned matter, pursuant to C.P.L. §330.30, is GRANTED to the extent set forth in the accompanying memorandum of this date.

Date: October 8, 2002

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**ROGER N. ROSENGARTEN  
J.S.C.**

**MEMORANDUM**

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THE PEOPLE OF THE STATE OF NEW YORK : BY ROSENGARTEN, J.  
 :  
 -against- : DATE: October 8, 2002  
 :  
 ANTHONY THOMAS, : INDICTMENT NO.: 951/2001  
 and THOMAS BOONE :  
 :  
 Defendants. :  
-----X

The defendants were convicted after a jury trial before this Court of Attempted Murder in the Second Degree and related charges. Upon renewal by the defendants, the Court granted the defendants' mistrial motion, which it had held in abeyance pending the jury's verdict, based upon prosecutorial misconduct occurring during the trial. The Court directed the parties to submit memoranda as to the issue of whether the mistrial should be granted with or without prejudice. During the initial oral argument of the motion, A.D.A. James A. Dolan, Esq. argued for the People that the Court did not have authority to grant a mistrial following a jury verdict, and stated for the record<sup>1</sup> that he would initiate an Article 78 proceeding against this Court were a mistrial granted.

Following oral argument, the Court reviewed the People's procedural arguments, and the applicable case law. The Court's research indicated that the Court of Appeals, while not addressing the issue directly, had faced a similar situation in *People v. Adames*, 83 N.Y.2d 89 [1993], in which the trial court had reserved decision

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MR. DOLAN: For the record, although the Court's intentions are unquestionable, it has no authority to issue a mistrial after verdict and *we would be moving for an Article 78 if the mistrial is granted.*

(See, Transcript of proceedings in Part K-20, dated August 19, 2002 at pp. 5, lines 24-25 and p. 6, lines 1-3)(Emphasis added.)

on defendant's motion for a mistrial based on prosecutorial misconduct. The case proceeded to a jury verdict of guilty, which was subsequently vacated by the trial court.

The Court of Appeals stated that

after the jury rendered its verdict of guilt against both defendants, the Trial Judge acted. The Court vacated the verdict because of the persistent prosecutorial misconduct in the cross-examination of the codefendant relating to post arrest silence and the prosecutor's use of the word 'uncontroverted' in summation.

(*Id.*, at 92). Conspicuous by its absence in that pronouncement by the Court of Appeals, is any criticism or negative treatment by the Court of Appeals of the procedure employed by the trial judge in *Adames*. In light of *Adames*, the Court feels that there is some authority for its original action, which would remove it from the purview of Article 78, notwithstanding Mr. Dolan's comments to the contrary. However, since the appellate courts addressing this issue squarely, albeit of a riper vintage than that of the Court of Appeals decision cited above, have held that the practice of reserving decision upon a mistrial motion until after a verdict was rendered was unauthorized, (see, e.g., *People v. Collins*, 72 A.D.2d 431, 437n [4<sup>th</sup> Dept. 1980], appeal denied, 50 N.Y.2d 1000 [1980]; *People v. Wilson*, 106 A.D.2d 146, 147n [4<sup>th</sup> Dept. 1985]); *People v. Banks*, 130 A.D.2d 498 [2d Dept. 1987]), this Court felt bound by their authority until the issue is directly addressed by the Court of Appeals. Accordingly, on August 20, 2002, the Court rescinded its declaration of a mistrial, and reinstated the verdict. In conformity with appellate guidance, the Court considered the defendant's motion one to set aside the verdict pursuant to C.P.L. § 330.30. (see, *People v. Collins*, *supra* at 437.) In its decision, the parties were given additional time to supplement their submissions based upon the conversion of the mistrial motion to one to vacate the verdict pursuant to C.P.L. § 330.30.

C.P.L. § 330.30 (1) provides that a defendant may move to set aside a verdict

upon a ground which "if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."

As a general rule, isolated instances of prosecutorial misconduct on summation are insufficient to justify reversal in the absence of an "obdurate pattern of inflammatory remarks throughout the prosecutor's summation", or unless the prosecutorial misconduct "is so pervasive, so egregious" and the prosecutor's disregard of the court's rulings and warnings is deliberate and reprehensible. (See, *People v D'Alessandro*, 184 A.D.2d 114, 118-119 [1<sup>st</sup> Dept. 1992]; *People v Ortiz*, 116 A.D.2d 531 [1st Dept. 1986]; *People v Sandy*, 115 AD2d 27 [1<sup>st</sup> Dept. 1986]; *People v. Simms*, 130 A.D.2d 525 [2d Dept. 1987]; *People v. Hodges*, 171 Misc.2d 226 [Sup. Ct. Queens Co. 1997].)

Reversal for prosecutorial misconduct "is properly shunned when the misconduct has not substantially prejudiced a defendant's trial. Reversal is an ill-suited remedy for prosecutorial misconduct; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying an individual who was fairly convicted." ( See, *People v. Roopchand*, 107 A.D.2d 35 [1985]; *People v Galloway*, 54 NY2d 396, 401 [1981]). The essential question to be determined is whether a defendant has been deprived of the "fundamental right to a fair trial". (*People v Galloway, supra* at 396.)

In the case at bar, the Court is constrained to conclude that the conduct of the prosecutor was so egregious, so far removed from his obligation of good-faith and fair-dealing, and so lacking in ethical propriety as to deprive the defendants of their fundamental right to a fair trial. The Court notes at the outset that, in its considered opinion, no curative instructions or other admonitions to the jury would have eliminated the prejudicial impact of the prosecutor's misconduct. A court's instructions to a jury to

disregard matters improperly brought to their attention cannot "always assure elimination of the harm already occasioned." (*People v Carborano*, 301 NY 39, 42-43 [1950]).

Whether defendant received a fair trial in light of any errors necessarily "depend[s] upon the nature of the proof adduced and the type of error committed" (*id.*, at 43). We recognize that every trial will not be conducted free of some error. In this case, however, the prosecutor disregarded the trial court's rulings. Thus, while each instance of prosecutorial misconduct, standing alone, would not necessarily justify reversal, we conclude that the cumulative effect of such conduct substantially prejudiced defendant's rights. Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility--determining facts relevant to guilt or innocence (*People v Alicea*, 37 NY2d 601, 605).

(*See, People v. Calabria*, 94 N.Y.2d 519, 523 [2000].) While the Court feels that the evidence of guilt may have been sufficient to sustain a guilty verdict, it was not so overwhelming as to overcome the prejudicial cumulative effect of the prosecutor's several acts of misconduct, thereby depriving the defendants of a fair trial.

The behavior in question consisted of a serious *Brady* violation which was used by the prosecutor as an instrument to paint the defendants as dangerous types from whom protection was needed by one of the two key prosecution witnesses, and also to circumvent a ruling of the Court as to the introduction of evidence of an uncharged crime, coupled with several extremely prejudicial remarks made in summation, which attempted to inflame the passions of the jury to elicit sympathy for the complainant. This Court concludes that this is a rare instance where the prosecutor was led astray in the zeal of obtaining a verdict. (*See, e.g., People v. Stewart*, 92 A.D.2d 226 [2d Dept. 1983]; *see also, People v. Roopchand*, 107 A.D.2d 35 [2d Dept. 1985]; *People v. Taylor*, 755 N.Y.S.2d 477 [2d Dept. 2002]; *People v. Grice*, 100 A.D.2d 419 [4<sup>th</sup> Dept. 1984]; *People v. Anderson*, 256 A.D.2d 413 [2d Dept. 1998]). Consequently, the Court

is inclined to agree with the dissent in *People v. Alvarez*:

the misconduct of the prosecutor in this case, including his improper questioning of witnesses regarding uncharged crimes in direct contravention of the trial court's repeated directions to refrain from such inquiry, and his numerous prejudicial statements during summation, deprived the defendant of a fair trial.

(98 A.D.2d 776 [2d Dept. 1983, Brown, J., dissenting]).

Moreover, as explained, *infra*, the Court notes that, as outlined by defense counsel, this same prosecutor has been involved in a pattern of such questionable conduct in the past, of such a nature as to make it unlikely that this conduct is coincidental or mere happenstance.

#### The Brady Violation

The prosecutor in the case at bar, a seventeen-year veteran, is no stranger to his obligations under *Brady*. In *People v. Sosa*<sup>2</sup>, he appeared as a witness at a hearing before another court to determine if certain information was *Brady* material, which should be released to the defense. In that case, it was determined that his actions fell "far short of constituting prosecutorial misconduct", although the court was "somewhat critical of the ADA's conduct".

It is fundamental that material evidence which is in the possession of the prosecution and which is exculpatory in nature must be turned over to the defendant in order to give meaning to the constitutional right to a fair trial (*Brady v Maryland*, 373 U.S. 83 [1963]). In *Brady v Maryland*, *supra*, the Supreme Court held that "the prosecution has an affirmative duty to disclose to the defense evidence in its

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<sup>2</sup> N.Y.L.J., 8/7/98, at p. 21 (Sup. Ct. Queens Co., Erlbaum, J.)

possession that is both favorable to the defense and material to guilt or punishment.” New York has long recognized this prosecutorial duty. (see, e.g., *People v Savvides*, 1 N.Y.2d 554 [1956]). The failure to disclose *Brady* material violates a defendant's constitutional right to due process. (*People v. Wright*, 86 N.Y.2d 591 [1995]). This is particularly true when the defense specifically requests such materials, and the Court directs their disclosure, as in the case at bar. Reversal has been mandated in cases in which the prosecution withheld specifically requested *Brady* material from the defense, and the Court of Appeals has found such failure on the prosecution's part to be seldom, if ever, excusable. (See, e.g., *People v. Clausell*, 182 A.D.2d 132 [2d Dept. 1992]).

It is equally true that "[when] the 'reliability of a given witness may well be determinative of guilt or innocence', nondisclosure of evidence affecting credibility falls within this general rule." (*Giglio v United States*, 405 U.S. 150, 154 [1972], quoting *Napue v Illinois*, 360 U.S. 264, 269 [1959].) The existence of an agreement between the prosecution and a witness, made to induce the testimony of the witness, is evidence which must be disclosed under *Brady* principles (*People v. Cwikla*, 46 N.Y.2d 434 [1979]; *Giglio v United States*, *supra*; *Boone v Paderick*, 541 F.2d 447, 450 [1976]). It is not the form of a promise, or any label the parties may affix to it, that triggers the prosecutor's duty of disclosure. (See, *People v Cwikla*, *supra* at 442). Rather, the obligation arises from the fact that the prosecutor and the witness have reached an understanding in which the witness's cooperation has been exchanged for some *quid pro quo* on the part of the prosecutor. Once such an understanding has been reached, it is for the jury to determine how much value to assign it in terms of assessing the witness's credibility. (See, *People v. Novoa*, 70 N.Y.2d 490 [1987]).

Considered within the context of the facts at bar, involving a former drug dealer

for the Crypyt's gang who was allegedly tortured and beaten severely for ostensibly "wanting out" of the business, the Court is of the opinion that a promise of protection to one of two key prosecution witnesses and his family constituted a promise of inducement to the witness to secure his testimony at trial. In fact, the witness, when questioned by the Court outside of the presence of the jury, so indicated:

**THE COURT:** Mr. Battle, I have a couple of questions for you. You said on your direct examination, part of the agreement was that you and your family would be protected. When was that told to you?

**THE WITNESS:** Basically after the fact that - - one of the - - one of the individuals had come to my brother and had asked my brother to give him for to give me three thousand dollars for not to appear in court.

**THE COURT:** When did this happen? When did this occur?

**THE WITNESS:** Like sometime like last week. And I awared Mr. Pinto about it.

**THE COURT:** Then you told Mr. Pinto about it?

**THE WITNESS:** Yes.

**THE COURT:** What did - - what did Mr. Pinto say to you?

**THE WITNESS:** He just told me that - - well, actually I was afraid about my family's safety after that fact because he had told my little brother because before that they didn't know of my little brother. So now all of a sudden they knew of my little brother by being pinpointed by one of the Banks, so I was scared about my family's safety more than I was concerned about my own safety. So Mr. Pinto was like he would give me protection for me and - - for me and my family.

**THE COURT:** Do you remember which day that was said now?

**THE WITNESS:** Not specifically.

**THE COURT:** Did you rely on that promise to protect your family in deciding whether to come here and testify or not?

**THE WITNESS:** Yes, sir.

(Trial Transcript, July 24, 2002 at p. 173, lines 9-25; p. 174, lines 1-21). As such, this promise of inducement constituted potential *Brady* material which should have been disclosed as previously ordered by the Court. Surreptitious efforts to avoid disclosing such materials have been uncategorically denounced in *People v. Steadman*, 82 N.Y.2d 1 [1993], in which the Court of Appeals stated:

Prosecutors occupy a dual role as advocates and as public officers and, as such, they are charged with the duty not only to seek convictions but also to see that justice is done. In their role as public officers, they must deal fairly with the accused and be candid with the courts (*see, People v Pelchat*, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 464 N.E.2d 447; *see also, People v Vilardi*, 76 N.Y.2d 67, 76, 556 N.Y.S.2d 518, 555 N.E.2d 915; *People v Simmons*, 36 N.Y.2d 126, 131-132, 365 N.Y.S.2d 812, 325 N.E.2d 139). This rule of fairness, rooted in the concept of constitutional due process, has been given substance by the *Brady* decision which imposes on the People the duty to disclose to the defense evidence in its possession that is favorable to the accused (*Brady v Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194; *see also, People v Novoa*, 70 N.Y.2d 490, 522 N.Y.S.2d 504, 517 N.E.2d 219, *supra*; *People v Cwikla*, 46 N.Y.2d 434, 414 N.Y.S.2d 102, 386 N.E.2d 1070, *supra*). The prosecutor's duty is not lessened because *Brady* material may affect only the credibility of a government witness. Indeed, we have held explicitly that the duty [<sup>\*\*512</sup>] includes promises of leniency given to the witness in exchange for favorable testimony against an accused (*People v Novoa, supra*; *People v Cwikla, supra*; *People v Savvides, supra*). Moreover, the prosecutor's duty extends to correcting mistakes or falsehoods by a witness whose testimony on the subject is inaccurate (*People v Savvides*, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853, *supra*).

(*Steadman, supra* at 8.)

The key witnesses in this prosecution were the complainant, Horace Jeridore, who was allegedly beaten repeatedly with blows to the head and other parts of his anatomy, and the cooperating witness, Rashawn Battle, who was a co-conspirator, testifying under a cooperation agreement promising him a lenient sentence, as well as the prosecutor's subsequent promise of safety for the witness and his family from the defendants and their fellow gang members, if he testified. The aftermath of the attack left the complainant in a confused and disoriented state; as such, his testimony was

often sketchy as to details of the incident. For that reason, Rashawn Battle, who was not the target of the alleged attack, but a participant therein, became, in this Court's view, the key prosecution witness at trial. Battle's testimony impressed this Court as being forthright and credible. It is for this reason that the Court is especially troubled by the prosecution's failure to adhere to the strictures of *Brady* and *Savvides*. The credibility of Mr. Battle was a pivotal consideration in this case; therefore, the failure to provide *Brady* materials impacting upon that credibility cannot be deemed to be harmless. (See, *People v. Crimmins*, 36 N.Y.2d 230 [1975]; *People v. Steadman*, *supra* at 8).

The promise of protection was elicited by the prosecutor early in the testimony of Mr. Battle:

**Q. Now, have you received any other type of promise from the Queens District Attorney's office regarding your testimony today?**

**A. The only thing I have been promise was the safety of me and my family.**

(Trial Transcript, 7/24/02 at p.10, lines 3-7.) The witness volunteered the same response once again on cross-examination:

**Q. And then you're going to get all of those benefits; isn't that correct?**

**A. The benefits was to do one years.**

**Q. And have time served?**

**A. - - And to have my family safety value - -**

(Trial Transcript, 7/24/02, at p. 42, lines 14-18.)

The unique twist to this case is the fact that the offer of protection was elicited, not by the defense to impeach Mr. Battle, but as a sword by which the People sought to suggest to the jury (a) that the defendants were dangerous individuals against whom

protection was needed; (b) that the defendants might or had already committed another crime, that of attempting to intimidate Mr. Battle or his family; or (c) that Mr. Battle, like the complaining witness, feared for his safety and that of his family on account of the defendants. The Court does not embrace the proposition advanced by the People, that the fact that the People sought to offer evidence of the offer of protection, rather than the defendants, who opposed its introduction, and the fact that the evidence of the offer was more harmful to the defendants than helpful, removes it from within the ambit of the *Brady* rule. The Court views the promise of protection as an offer of inducement to the witness, Rashawn Battle, upon which that witness testified he relied, which was evidence that the defendants could have *potentially* placed before the jury if they saw fit to do so. Moreover, all promises made to Mr. Battle were specifically requested by the defendants, and ordered by the Court to be disclosed. The fact that the People elicited the promise for their own purposes rather than providing it to the defendants for use as impeachment, does not, in this Court's view, transform its essential character as *Brady* material. As the defendants hasten to point out, had they been aware of the existence of the promise, they would have moved *in limine* to preclude its disclosure to the jury, due to its prejudicial impact. This Court would have been inclined to grant the defense application in that regard to avoid potential prejudice to the defendants. By failing to reveal the promise, the prosecutor prevented the defense from making that application.

The prosecutor was aware that the written cooperation agreement described itself as "the entire agreement between the parties":

**MR. KORNBERG: Judge, based upon the conduct of the District Attorney's office, the defense has an application for withdrawal of the jury and a mistrial be declared because of misconduct on part of the District Attorney.**

**THE COURT:           What is that?**

**MR. KORNBERG:** Let me advise the Court what the misconduct is. Pursuant to an order by Judge Thomas, discovery was turned over by the District Attorney's office as well as Rosario material, which the Court is aware of in this particular case.

The District Attorney's office turned over to us the plea agreement between the parties, as well as the plea allocution taken by Mr. Battle before the Court.

I want to read to you and offer as a court exhibit so that we can preserve this record, the plea agreement between the District Attorney's office and the witness, and then I want to read to you the Court allocution of the witness, both of which were turned over by the District Attorney's office to us.

The plea agreement provides as follows:

The foregoing constitutes the complete agreement between the defendant and the office.

Instead, the District Attorney knowing he had an additional agreement, because he is the one who make the agreement, now elicits or sandbags us, gives us two documents that says this is the entire agreement between the District Attorney's office and the witness, and now brings out an additional prejudicial agreement and elicits it from the witness on the witness stand.

(Trial Transcript, 7/24/02, at p. 103, lines 25; p. 104, lines 1-25; p. 105, lines 1-2; p. 106, lines 19-25; p. 107, lines 1-2.)

The prosecutor was or should have been aware that the defense would rely upon the "entire agreement clause". The prosecutor also knew that, after he had been given information regarding alleged witness tampering which occurred just before trial, he had personally made the additional promise of protection to the witness and his family. The prosecutor went to great lengths to bring the alleged tampering incident to the attention of the Court:

**MR. PINTO:** I will make the clarification. The information I received was from the cooperating witness that he did not return to his household because he learns of this information, he learns from his brother, he was very fearful for his family, that there would be more attempts. In fact, he didn't want me to reveal this to the Court for a fear of retaliation to the brother. I informed him that I have to inform the Court. I would inform people in the District Attorney's office and the Police Department about this and that they would further investigate, and I in fact spoke

**with Detective LoPresti and he is going to come in as early as he can. He actually comes in a little bit later this afternoon He is going to come in earlier. He is going to go over there. He is going to speak to the brother specifically and investigate this matter fully, have a UF-61 filed and take it from there, but this is the information that I have received.**

(Trial Transcript, 7/17/02, at p. 14, lines 9-25; p. 15, lines 1-5.) This occasion furnished the prosecutor with the perfect opportunity to disclose that the witness and his family were offered protection. Indeed, the prosecutor claims that he did make the Court and counsel aware of the offer of protection by “implication”.

“The intervention by our office *implied our protection* and defendants were on notice from the moment they learned of the Office’s intervention”

(Affirmation of A.D.A. Barry Pinto, Esq. Dated August 14, 2002, at p. 9, emphasis supplied).

At oral argument of the mistrial motion, Mr. Pinto stated that he *explicitly* advised defense counsel of the offer of protection:

**THE COURT:** Mr. DA, when did you become aware that additional incentive or offer was made to Mr. Battle?

**MR. PINTO:** The exact date was, I believe, earlier this week, perhaps as early as Monday.

**THE COURT:** When you brought up the matter in court?

**MR. PINTO:** When I brought the matter up in court, I believe that was the first time we talked about it. I don’t have an exact recollection of the details, what I placed on the record, but *I informed the Court at that point that the District Attorney’s office, had it’s detectives available and was offering protection and was investigating the matter and that we had people from the - - from the District Attorney’s security unit involved at that point.*

(Trial Transcript, 7/24/02 at p. 109, lines 15-25; p. 110, lines 1-8)

After scouring the record, several times, the Court does not find any instance in which the prosecutor explicitly stated, prior to Mr. Battle’s testimony in which the

promise was elicited, that protection was offered to Mr. Battle and his family. The only thing that Mr. Pinto in fact advised this Court was that:

**MR. PINTO: . . . I in fact spoke with Detective LoPresti and he is going to come in as early as he can. He actually comes in a little bit later this afternoon He is going to come in earlier. He is going to go over there. He is going to speak to the brother specifically and investigate this matter fully, have a UF-61 filed and take it from there, but this is the information that I have received.**

(Trial Transcript, *supra*, 7/17/02 at p. 14, lines 9-25; p. 15, lines 1-5, emphasis added.)

The Court does not find anything implicit in that statement that an additional offer of protection was offered to the witness and his family. That promise should have been clearly, unequivocally and explicitly brought forth at that time. The prosecutor cannot claim ignorance of the additional promise since the prosecutor personally extended said promise. What this record does suggest is that the prosecutor's statements, while clearly alerting the Court to an alleged tampering incident, were carefully couched to avoid disclosing the fact that an offer of protection had been made to the witness and his family. The Court feels that the prosecutor's conduct smacks of bad faith.

In *People v. Littles*, the Second department held:

If the cooperation agreement between Milliner and the People did in fact contain provisions which were not disclosed to the court and the jury, such nondisclosure would require reversal (see *People v. Novoa*, 70 N.Y.2d 490, 496-498, 522 N.Y.S.2d 504, 517 N.E.2d 219). The allegations of undisclosed promises thus warranted a hearing (see *People v. Pons*, 236 A.D.2d 562, 563-564, 654 N.Y.S.2d 634).

(743 N.Y.S.2d 290 [2d Dept. 2002]). A prosecutor has an obligation to disclose the full details of a cooperation agreement so that the defense may allow the jury to properly evaluate the benefits of the promise in evaluating the credibility of the witness. (*People v. Grice*, 188 A.D.2d 397 [2d Dept. 1992]).

The Court also finds it difficult to believe that, when the prosecutor asked Mr. Battle what other promises were extended to him, he was not expecting to elicit the

response given. In over thirty (30) pages of personal affirmations by Mr. Pinto, conspicuous by its absence is any claim that he did not expect, or intentionally seek to elicit, the answer that was forthcoming. (See, *People v. Cavallerio*, 71 A.D.2d 338 [1<sup>st</sup> Dept. 1979]; *But see, People v. Russell*, 199 A.D.2d 345 [2d Dept. 1993]; *People v. Mullen*, 152 A.D.2d 715 [2d Dept. 1989]). Nor did the prosecutor express surprise at the witness' answer at trial. The Court is constrained to conclude that the prosecutor, an experienced trial assistant, who presumably prepared Mr. Battle, (a) knew that an additional promise of protection was given because he personally made such promise, (b) knew that, when asked, the witness would respond as he did, (c) did not bring the promise to the attention of the court and counsel for fear that it would be precluded, and (d) elicited the testimony in order to cast the defendants in a bad light in the eyes of the jury. In *People v. Cavallerio*, 71 A.D.2d 338 [1<sup>st</sup> Dept. 1979], a conviction was reversed and a new trial ordered when an experienced trial assistant deliberately elicited an answer of such a prejudicial character as to fatally undermine the inherent fairness of the trial.

Because the defendants did not wish to use the *Brady* material at trial, due to its prejudicial implications, the People cannot avail themselves of the contention that the *Brady* violation was cured by the People's disclosure at trial and the defendants' meaningful opportunity to use the material at trial. (Cf. *People v. Cortijo*, 70 N.Y.2d 868 [1987]; see, *People v. Jamel Leavey*, 290 A.D.2d 516 [2d Dept. 2002]).

Finally, the Court notes that prior to the testimony of Mr. Battle, the Court had denied the prosecutor's application seeking to use uncharged crimes to establish consciousness of guilt:

**MR. PINTO: Understood.  
There is one other bit of information that is also an uncharged crime which may**

**show consciousness of guilt on the part of the two co-defendants, that approximately a week after the attack, Roshawn Battle was approached by friends of both of these co-defendants, and both of these - - rather, a group of six individuals had approached Roshawn Battle and told him to stick to the story, the story being that the complainant Horace Jeridore was attacked and jumped by a train station and was attacked there and was found bleeding at home.**

(Trial Transcript, 7/17/02, at p. 17, lines 11-23.) The Court denied that application, advising the prosecutor that it preferred to try the matter on the incident alone, rather than bring in extrinsic matters founded upon inadmissible hearsay. It is the Court's considered opinion that the prosecutor's use of Mr. Battle's testimony regarding a promise of protection was an attempt to circumvent the Court's earlier ruling precluding uncharged crimes evidence by providing evidence from which the jury could infer that the witnesses had been approached by the defendants and were in need of protection.

As to the issues of preservation, the Court finds that the defense preserved the issue by objecting and requesting a mistrial, and that earlier objection would have served no meaningful function, since a curative instruction was not requested, and was in fact, objected to by the defense.

**THE COURT:** Well, what I am going to do is, I am going to give a curative instruction. I am going to allow you, if you wish, when you make your summation in this case, to refer to it and to refer to the misconduct of the District Attorney's office in not disclosing this part of the agreement to you.

**MR. KORNBERG:** But, Judge, that is not curing. That is not curing at all and to allow - - and for you to give a curative charge over objection is worse, and I don't think the Court has the right to give a curative charge over objection. You can't give a curative charge, Judge.

**MR. KORNBERG:** Curative charge becomes worse, your Honor, for the record. Curative charge now draws the jury's attention more strongly to the statement about the protection for the family. It makes it worse. So I don't think that a curative charge could ever, ever rectify this situation.

(Trial Transcript, 7/24/02, at p. 176, lines 10-25; p. 175, lines 15-21.)

It is the Court's opinion that no curative instruction to the jury could have ameliorated the prejudice caused by the prosecutor's actions. A curative instruction would only serve to highlight the matter, thereby further enhancing the prejudice to the defendants. Simply stated, it is the Court's opinion that, once rung, there was no way to un-ring this bell, thereby sounding a death knell for the defendants' ability to receive a fair trial of this matter.

### The Prosecutor's Summation

During the pendency of the mistrial motion before this Court, the Court advised the prosecutor that it viewed his conduct in connection with eliciting of the undisclosed promise of protection to be extremely grave. Notwithstanding that admonition, and the standard admonition of this Court prior to summations to the attorneys that they refrain from appealing to sympathy or emotion in their summations, Mr. Pinto insisted on highlighting the issue of the safety of the witnesses in his summation:

**MR. PINTO: If you can conceive of another reason why he has the opportunity to tell the police what has happened, think about it. What is the difference in telling a Crypts that it's the Crypts versus the drug dealers that he knows What does he gain? What does he gain? If anything, he has bestowed upon himself a great deal of problems. I submit to you that he can never go home. His life is in danger.**

(Trial Transcript, 7/25/02, at p. 30, lines 12-20.)

Moreover, the prosecutor's summation was highly inflammatory in other respects, most particularly, in his use of the phrase "rape victim" to describe and evoke sympathy for the complainant, Horace Jeridore:

**You know what Horace Jeridore is like? I submit, he is a rape victim. He is a rape victim. He was raped in his body and in his mind and it was these two that did that to him. I ask that you never lose sight of that.**

(Trial Transcript, 7/25/02, at p. 5, lines 18-25.)

In addition, Mr. Pinto's denigration of defense counsel, referring to Mr. Kornberg to the jury as "marvelous attorney", "marvelous cross-examiner", as demonstrated below, further exemplifies the prosecutorial misconduct in this case. In light of these comments, Mr. Pinto's accusations in his papers of *ad hominem* attacks by the defense become almost comical.

**Mr. Marvin Kornberg, marvelous attorney. Marvelous cross-examiner. I submit anyone of you, myself, anybody here would get on that stand, takes the stand and any witness would be confused. Left would become right, up would become down, Ty would become Tone. Take that fact coupled with the fact that you have a Horace Jeridore who is tortured and being within one inch of his life, essentially a rape victim, who is getting on there, and I submit, doing everything he can to remember as best as he can the sequence of events.**

(Trial Transcript, 7/25/02, at p. 5, lines 23-25; p. 6, lines 1-9.)

Finally, Mr. Pinto's reference to the complainant as a "poor pathetic individual" and "an easy target" was highly inflammatory and in direct derogation of this Court's pre-summation directive against appeals to sympathy and emotion.

**You saw him. Think about it. You saw this poor pathetic individual coming in. Was it really hard to pick on him that day? Was it really hard to attack him without fighting back? I submit to you, yes. He's an easy target.**

(Trial Transcript, 7/25/02 at P. 30, lines 6-11.)

The Court admonishes Mr. Pinto that this highly inflammatory approach to summation turns a blind eye, not only to the Court's explicit instructions, but to his duty to act fairly and see that justice is done. As the Appellate Division, Second Department recently stated:

In her summation, the prosecutor made numerous prejudicial and inflammatory comments. Although prohibited from appealing to the sympathy of the jury (see *People v Andre*, 185 A.D.2d 276, 278, 585 N.Y.S.2d 792), the prosecutor argued improperly that the victim had testified, seeking "a little bit of justice." She

continued to the jury, "you can't make it better. You can't erase it like it never happened. But she can get [\*\*6] the knowledge that what he did to her that night he didn't get away with. He didn't totally get away [\*493] with it." Further, the prosecutor made several improper comments which denigrated both the defense counsel and the defense (see *People v Lombardi*, 20 N.Y.2d 266, 282 N.Y.S.2d 519, 229 N.E.2d 206). *We would remind prosecutors that "they are something more than mere advocates or partisans and that they represent the People and the People's justice in presenting proof"* ( *People v Steinhardt*, 9 N.Y.2d 267, 269, 213 N.Y.S.2d 434, 173 N.E.2d 871).

(*People v. Bhupsingh*, 746 N.Y.S.2d 490 [2d Dept. 2002, emphasis supplied]).

Likewise, the Court reminds Mr. Pinto that he is not only a mere advocate but a representative of the People of the County of Queens and the People's justice in presenting proof.

#### Double Jeopardy

Under the protection of the Double Jeopardy Clauses of the State and Federal Constitutions, a defendant may not be twice put in jeopardy of criminal prosecution for the same offense (see, NY Const, art I, § 6; U.S. Const. 5th Amend).

The defendant has the right, in the event of prosecutorial or judicial error warranting a mistrial, to choose whether to request a new trial before an untainted jury or to continue to defend the case before the already empaneled jury (see, *United States v Dinitz*, 424 U.S. 600, 609 [1976]; *People v Ferguson*, 67 N.Y.2d 383, 388 [1986]).

Because of the importance of the defendant's right to have the case completed before the first jury, the defendant is free to withdraw a motion for a mistrial at any time before the motion is granted and to continue before the already empaneled jury (see, *People v Catten*, 69 N.Y.2d 547, 555 [1987]).

When a mistrial is granted over the defendant's objection or without the defendant's consent, double jeopardy will, as a general rule, bar retrial (see, *People v Ferguson, supra*, at 388). The right to have one's case decided by the first empaneled

jury is not absolute, and a mistrial granted as the product of manifest necessity will not bar a retrial (*see generally, Matter of Enright v Siedlecki*, 59 N.Y.2d 195, 199-200 [1983]; *cf.*, C.P.L. §280.10 [3]).

However, when the defendant requests or consents to a mistrial, double jeopardy typically erects no barrier to a retrial. There is one situation, however, in which retrial will be barred even though the defendant requests, and thereby consents to, a mistrial--when the prosecution deliberately provokes a mistrial. (*see, Oregon v Kennedy*, 456 U.S. 667, 673 [1982].) This occurs when the prosecution fears the case is headed toward acquittal and intentionally causes a mistrial, the calculated result of this prosecutorial misconduct is to deprive the defendant of the right to have the case completed before the first jury. In such a case, a second trial of the defendant would constitute an impermissible second bite at the apple for the prosecution, in direct violation of the letter and spirit of both the State and Federal Double Jeopardy Clauses' prohibitions against repeated prosecution.

In the seminal case of *Davis v. Brown*, 87 N.Y.2d 626 [1996], the Court of Appeals held:

Whenever the court agrees that the prosecution has engaged in prejudicial misconduct deliberately intended to cause a mistrial, then a mistrial should be granted and retrial will be barred (*see, Oregon v Kennedy*, 456 US 667, 673, *supra*). On the other hand, if the court believes the prosecution has acted entirely properly, or simply that the prosecution's conduct, albeit improper, was not intended to provoke a mistrial, the court should deny the defendant's motion for a mistrial with prejudice and the trial will continue apace.

(*Davis, supra* at 631). This Court's research reveals that even egregiously overzealous conduct on the part of the prosecutor, in contravention of the prosecutor's duty of good-faith and fair dealing, will not trigger double jeopardy unless it is clear that such conduct was intended to provoke a mistrial. The key question is whether the prosecution,

motivated by a fear that the case was headed towards an acquittal, acted in a calculated fashion to intentionally goad a mistrial, thereby attempting to deprive the defendant of the right to have the case heard by the first jury. Even where a prosecutor sought to circumvent the court's rulings, absent a showing of a bad-faith intent to provoke the defendant into moving for a mistrial, double jeopardy did not bar a retrial. (See, *People v. Hart*, 216 A.D.2d 486 [2d Dept. 1995]). Similarly, absent bad-faith intent, a prosecutor's act of eliciting both irrelevant and possibly prejudicial evidence did not bar re-prosecution on double-jeopardy grounds. (See, *People v. Boone*, 287 A.D.2d 461 [2d Dept. 2001]). An improper reference to the defendant in an opening, without intent to provoke a mistrial, likewise will not bar re-prosecution. (See, *People v. Mitchell*, 197 A.D.2d 709 [2d Dept. 1993]). Nor will the inadvertent elicitation of a single unresponsive answer in contravention of the court's ruling warrant double jeopardy to attach. (See, *Schoendorf v. Mullen*, 152 A.D.2d 715 [2d Dept. 1989]; *Matter of Person v. Cooperman*, 175 A.D.2d 898 [2d Dept. 1991]; see also, *People v. Russell*, 199 A.D.2d 345 [2d Dept. 1993]; *People v. Bowman*, 215 A.D.2d 398 [2d Dept. 1995]). Likewise, in the case at bar, for the reasons which follow, (see Conclusion, *infra*), this Court finds that the specific intent required to invoke double jeopardy is not present.

Moreover, where the same court entertaining the motion to dismiss an indictment on double-jeopardy grounds is the court that considered the mistrial motion, observed the conduct complained of, and had firsthand knowledge of the facts, as in the instant case, the Appellate Division, Second Department has held that no separate evidentiary hearing is necessary to determine whether the prosecutorial misconduct was deliberate. (See, *People v. King*, 184 A.D.2d 660 [2d Dept. 1992]).

#### The Prosecutor's Bad Faith

In an attempt to demonstrate the bad-faith intent of the prosecutor in arguing in favor of double jeopardy within the context of the conduct complained of herein, the defense has brought to the Court's attention two recent cases prior to the instant matter in which the same prosecutor became embroiled in claims of prosecutorial misconduct in connection with the withholding of both *Brady* and *Rosario* materials, both resulting in mistrials. Contrary to the baseless contention of the prosecutor, this Court does not have a duty to "protect" an experienced prosecutor of seventeen years, from the zealous arguments of his adversaries at bar. Nor does the Court view defense counsel's allegations as *ad hominem* attacks upon the prosecutor's character, but rather, as a legitimate effort to meet their burden of demonstrating, under controlling case law, a bad-faith intent on his part, such that double jeopardy would attach. As such, these allegations pertain to the matter at controversy, are qualified, and will be addressed by the Court. The Court is also constrained to note its shock at the comments raised by the prosecutor in his opposition papers, to wit:

If defendants are permitted to sully the reputations of prosecutors with impunity, there will be even fewer men and women willing to work long hours for little salaries in the pursuit of justice. Accordingly, this Court should admonish defendants and their counsel for the ad hominem attack on me and warn them that this Court will not tolerate such unprofessional behavior.

(Affirmation of A.D.A. Barry Pinto, Esq. at p. 8, paragraph 13.).

The Court finds that this prosecutor has misunderstood both his own function and that of the Court as it pertains to its relationship with the Office of the District Attorney of Queens County. While the Court is quick to acknowledge the fine work of the diligent and resourceful members of that office, and the outstanding record of the District Attorney himself, it is not this Court's place to serve as a vanguard or protector of the members of that office. The Court also wishes to make clear that this opinion

speaks to the actions of but a single individual. The case cited by the prosecutor for this alleged “duty” of the Court to protect its officers, (*Legal Aid Society v. Rothwax*, 69 A.D.2d 801 [1<sup>st</sup> Dept. 1979]), involved a defense attorney who sought to be relieved due to a threat of being physically assaulted by her client. It does not stand for the proposition that the Court must muzzle defense counsel in their written and verbal arguments attempting to establish bad-faith intent on the prosecutor’s part as part of their burden to demonstrate that double jeopardy should attach. The Court finds the prosecutor’s rhetorical comments, cited above, in connection with the “long hours” and “little salaries” encountered by members of the District Attorney’s office, to be misplaced. The prosecutor would be better-served by taking these issues up with his employer, rather than this Court.

The Court has reviewed the records of the mistrials in the cases cited by defense counsel involving the same prosecutor.

In *People v. Humberto Vasquez*, Ind. No. 3513/99, a mistrial was declared on November 7, 2001 in Part L-3 before Justice McDonald.

In *People v. Miguel Garcia*, Ind. No. 3455/00, a mistrial was declared on November 28, 2001 in Part K-7 before Justice Kron. A.D.A. Barry Pinto, Esq. was the prosecutor in both matters.

In *Vasquez*, the prosecutor failed to obtain *Rosario* material, to wit, memo book entries of a police officer, for two years during the pendency of the case. The entries were finally disclosed following summation, triggering a mistrial. The co-defendant did not move for a mistrial and was acquitted of the charges.

In addressing the mistrial motion, the Court in *Vasquez* stated:

**THE COURT: First of all, this Court does find that there was a Rosario violation as to Ricardo’s memobook entry, Gilberto, I think, and Wilson, so there is a Rosario**

**violation here as to the Pico's, and they were not turned over.**

**I don't like the fact that the People have put me in this position of potential reversal over something that is absolutely silly. They have more than two years to put together.**

(*Vasquez* Trial Transcript, 11/07/01, p. 16, lines 9-13, lines 17-20.)

**You had since Halloween night of 1999, and just passed Halloween, two years to get silly notes. I mean, this is such a simple matter.**

**MR. PINTO: I requested until Wednesday, Judge, this could have been resolved always.**

**THE COURT: I know, but two years?**

(*Vasquez* Trial Transcript, 11/07/01, p. 22, lines 4-10.)

**THE COURT: I believe that there could be a reversal in this case unnecessarily.**

**MR. PINTO: There is a balancing of interests.**

**THE COURT: If you read the Court of Appeals decisions, especially under the current chief judge, the Court decisions don't say that I sit here and balance like I do with the Sandoval. Don't say that I can balance like Molineaux. A violation is a violation, and they have been taking a strong view of them in many cases.**

(*Vasquez* Trial Transcript, 11/07/01, p. 23, lines 6-7; 17; p. 24, lines 5-11.)

**THE COURT: Well, I don't disagree with you about the Brady issue here with Jennifer Pico really goes to Celio – that is right – Celio rather than Humberto Vasquez, I don't disagree with you.**

**I will grant the Defendant Humberto Vasquez' motion for a mistrial but without prejudice, not with prejudice.**

(*Vasquez* Trial Transcript, 11/07/01, p. 26, lines 9-16.)

In *Garcia*, the Court granted a mistrial due to a conflict of interest on the part of defense counsel. Several months before trial, Mr. Pinto knew or should have known that his complaining witness had spoken to defense counsel under another name, and had given defense counsel information of an exculpatory nature which would conflict

with her testimony at trial. As a result, defense counsel would likely be called as a witness as to what *Brady* information was elicited at that meeting, a conflict which would bar further representation. Mr. Pinto failed to bring this potential conflict to the attention of the Court and counsel. The conflict was discovered only after the witness appeared at trial and defense counsel recognized her as the individual he had spoken to. In discussing the defense motion for a mistrial, the Court stated:

**THE COURT:** That means a couple of months ago you believed that your witness had spoken to Mr. Santos. Certainly it would be a logical conclusion that your witness spoke to the attorney investigating this matter representing Mr. Garcia for trial.

**MR. PINTO:** Right.

(*Garcia* Trial Transcript, 11/28/01, p. 9, lines 14-19.)

**THE COURT:** Several months ago you had reason, very strong reason to believe that your witness had spoken to Mr. Santos and had told him a story even if the story was that I know nothing about this robbery. I was not present and I have no information about it; that the story, whether the story is I know nothing about it or whether the story is I know everything about it and Mr. Garcia was not one of the four robbers, and would be inconsistent with the testimony she was going to give at trial and thereby - - on an issue going to the very heart and core of the case - - making Mr. Santos a witness in this case in all likelihood. Is that not a fair statement of the situation?

**MR. PINTO:** Yes. At the last part, Judge, up to the last part.

**THE COURT:** Where do you disagree with that process

**MR. PINTO:** That it would be likely that he would be a witness in this case.

**THE COURT:** But it goes to the core of the case, and whatever a jury makes of it a jury makes of it. But the point is, several months ago you were aware or should have been aware that Mr. Santos in all likelihood would have to be a witness in this case and could no longer represent Mr. Garcia because his credibility is going to be an issue as a witness in this case testifying to a prior inconsistent statement from your key witness. That goes to the heart and core of this case.

**MR. PINTO:** But I would argue, Judge, it is purely speculative at this point whether he would put himself forward as a witness in this case.

**THE COURT:** Oh, it hardly seems speculative. It seems dead on.

**THE COURT:** But the statement “I told him I didn’t know anything about it” is in conflict with “I told him his client participated in the robbery.” That goes to the very heart of it, directly in conflict with the statement from the key witness. That goes to the core of the case.

(*Garcia* Trial Transcript, 11/28/01, p. 10, lines 5-25; p. 11, lines 13-25, p. 12, lines 1-2, lines 7-12.)

**THE COURT:** You knew she gave a statement to defense counsel in direct contravention of what you anticipated to be her trial testimony that Mr. Garcia was the one who committed the robbery.

**MR. PINTO:** No, I didn’t know that.

**THE COURT:** What part of that is incorrect?

**MR. PINTO:** That she said that he was not involved in the robbery. How would she know if she’s saying that she was not even a victim at that point.

**THE COURT:** That’s quibbling. She indicated something that was in direct contravention of testimony that Mr. Garcia was there and was someone who participated.

**MR. PINTO:** I argue it doesn’t rise to that level.

**THE COURT:** You could argue all you want, Mr. Santos is ready to go on this record. Are you ready to go on this record or do you want to call witnesses?

(*Garcia* Trial Transcript, 11/28/01, p. 22, lines 17-25; p. 232, lines 1-10.)

The Court finds it impossible to conclude, given this history, that it is mere coincidence that the same prosecutor, without any tergiversatory conduct on his part, has been involved in similar instances of alleged misconduct involving *Brady* and *Rosario* issues, occurring three-weeks apart, and within eight months of the instant matter. Certainly, having to retry cases due to such “lapses”, strains the budgets and precious resources of the both the court system and the prosecutor’s office, and burdens the taxpayers of this county.

## Conclusion

The Court neither condones the prosecutor's conduct, nor his efforts to sanitize it. However, it is clear to the Court that such conduct was motivated by the attitude that "winning isn't everything, it's the only thing"<sup>3</sup>, and "Nice guys. Finish last."<sup>4</sup>. In other words, the prosecution was driven by an overzealous desire for a verdict, rather than any intention on his part to instigate or goad a mistrial out of a belief that there would be an acquittal. Accordingly, this Court finds that, while the prosecutor's conduct was reprehensible, it fell short of the legal standard for imposition of double jeopardy, and directs that a new trial be held in this matter.

The Court realizes that vacature of a verdict based upon prosecutorial misconduct is a drastic remedy to be considered only where the cumulative effect of that misconduct is to impinge detrimentally upon the defendant's right to a fair trial, or where the prejudicial impact of the misconduct cannot be alleviated with prompt, curative instructions to the jury, and forceful admonitions to the prosecutor. However, where the conduct is so egregious as to cast a shadow upon the fundamental fairness of the process, the disregard of the duty of the prosecutor is as deliberate and wilful as that demonstrated here, and the prosecutor has twice before within a short temporal period been involved in situations in which mistrials were triggered, (*see, e.g., People v. Sandy*, 115 A.D.2d 27 [1<sup>st</sup> Dept. 1986]), the only responsible remedy this Court can sanction as guardian of justice and the rights of the People is to grant a new trial in this matter. To encourage such behavior by allowing a verdict to stand which is obtained under such circumstances would, in this Court's view, seriously and detrimentally

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<sup>3</sup> Vincent Thomas "Vince" Lombardi, professional football coach, (1913-1970).

<sup>4</sup> Leo Durocher, professional baseball coach (1906-1991).

undermine public confidence in the criminal justice system.

Accordingly, a new trial is ordered.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this memorandum and order to the attorneys for the defendants and to the District Attorney.

Date: October 8, 2002

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ROGER N. ROSENGARTEN  
J.S.C.