People v Bierenbaum
2005 NY Slip Op 30080(U)
September 6, 2005
Supreme Court, New York County
Docket Number: 0008295/8295
Judge: Ruth Pickholz
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 66
- X

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 8295/99

ROBERT BIERENBAUM,
Defendant. :

- X

RUTH PICKHOLZ, J.:

Defendant moves to vacate his conviction pursuant to CPL 440.10.

The defendant stands convicted of murder in the second degree and is currently serving a term of twenty years to life. His conviction was unanimously affirmed by the Appellate Division (People v. Bierenbaum, 301 AD2d 119). Leave to appeal to the Court of Appeals was denied, as was his petition for a writ of certiorari to the United States Supreme Court. He now moves to vacate his conviction on the ground that he was denied effective representation. As the decision by the Appellate Division discussed the evidence at trial at considerable length, I will only summarize the facts here, except where a more extensive recitation is necessary to fully understand defendant's current claims.[1]

---

[1]Defendant argues that the Appellate Division decision interpreted the evidence against him more harshly than was argued by People on appeal. Without exception, the faults defendant finds in the inferences drawn by the Appellate Division are irrelevant to the issues before me.

[* 2]

Defendant's jury trial took place in the fall of 2000, approximately 15 years after the July 7, 1985 disappearance of his wife, Gail Katz. The proof at trial that linked him to her murder was purely circumstantial. Not only were there no witnesses to the crime, but the body of Ms. Katz was never recovered. The Appellate Division found that, notwithstanding its circumstantial nature, the evidence at trial permitted the jury to conclude beyond a reasonable doubt that defendant had killed his wife and disposed of the body in the manner posited by the People. The People's theory at trial was that, immediately after killing her, the defendant, a surgical resident, folded or disarticulated her body and stuffed into a large canvass duffel bag. He then took the bag out of their East 85th Street apartment and drove to the Essex County Airport in Caldwell, New Jersey. He rented a private plane from MacDan Aviation, put the bag on the plane, and flew the plane over the Atlantic Ocean. After dropping the bag out of the plane he returned and went to a family birthday party at his sister's home in Montclair, New Jersey. At the party he first told the story that he was to repeat many times with minor variation thereafter. The defendant told his father that he and Gail had argued in the morning and that she had left the apartment to go to Central Park. She had not yet returned and he was worried about her.

The police suspected early on that he had killed her. They believed him to be the last person who had seen her alive. Although he expressed concern for her the day she disappeared, it did not appear that he had been in a special hurry to inform the police that she had not returned from the park, as he waited until 9:00 pm the next day

to file a report. The police learned during their early investigation, which began shortly after he reported his wife missing, that he and his wife had an angry and difficult marriage. In 1983 she told several friends and relatives that he had caught her smoking and had choked her to the point of unconsciousness. This was one of several choking incidents. One acquaintance, Lee McCullough, observed bruises around her neck stemming from this incident. Ms. Katz confided in friends that she was afraid of her husband and that he had told her that he would kill her if she ever left him. She told a few people in the months preceding her disappearance that she was about ready to leave him. Investigators also discovered that defendant was a licensed pilot, and that he had flown a plane for an hour-and-45-minute flight on July 7, 1985. Although he discussed his actions on July 7 many times with friends, family and the police, defendant never mentioned this flight. This was far from the only instance in which he appeared to be misdirecting the police, hindering their efforts, diverting suspicion or simply lying about what had happened. He told Detective O'Malley, for example, that he had spoken with Edgar (Rivera) the Doorman who told him that he observed Ms. Katz leave the apartment building after 11:00 a.m. on July 7. When O'Malley later asked him about Rivera's statement, defendant retracted his claim and said that Edgar was not sure about the date. The police interviewed Rivera several days later. He told them that he had seen her on Saturday, July 6. He did not remember seeing her on July 7.

Despite their strong suspicions, the police had no body, no witnesses to the act, and no forensic evidence. Neither the apartment, the cars he had access to nor the

plane he had flown yielded evidence of foul play. In April, 1987, after an extensive review of the investigation, four members of the District Attorney's Office who had been assigned to review the case concluded that the evidence against him would not sustain an indictment. The Office decided not to present the case to the grand jury.

The investigation into the disappearance of defendant's wife was dormant when, in May, 1989,a decomposed female torso washed-up on a Staten Island beach. The police subjected it to extensive testing in order to determine whether it was the body of Gail Katz. Although the experts who examined it did not universally agree, an amended death certificate was issued listing the torso as Gail Katz. The cause of death was listed as homicide. Despite the new evidence, the District Attorney's Office again decided not to present the investigation to the grand jury. More than a year later further testing proved that torso was that of another woman. Aside from this incident, there appears to have been little or no active investigation of the case for about nine years.

In 1996 the New York County District Attorney's Office formed a unit designed to investigate old, unsolved homicides. In 1997 the unit turned its attention to the disappearance of Gail Katz and decided to reopen the case. Investigators re-interviewed witnesses and attempted to develop new leads. One of the 90 people whom the investigators spoke to over the next two and one-half years was Roberta Karnofsky, who had been dating defendant about the time of the original investigation and lived in his apartment for a number of months. Karnofsky had been uncooperative when first

interviewed. She now told them that she and Sharon Alongi, another woman who had lived in the apartment with her and defendant, had come upon defendant's flight log in the apartment. They had examined it and seen that it contained an entry for a July 8, 1985 flight. When they examined the entry more closely they saw that it had been altered, and that the original entry read July 7, 1985. Investigators interviewed Alongi in May, 2000. She confirmed that the log book had been altered. [2]

Among others interviewed during the reopened investigation were four women whom defendant had dated during the 1990's. He had given them inconsistent versions of his wife's disappearance. Three of the four testified in the grand jury and two of them testified at trial as to these conversations. Investigators also interviewed Hillard Wiese and Dr. Michael Stone during this period. Wiese informed them that Gail Katz had spoken to him about the strangulation incident. Although the prosecution team knew of the 1983 incident from their initial investigation, they decided to seek admission of the hearsay statement to Wiese as an excited utterance. [3] Investigators knew prior to 1987 that defendant had spoken in 1983 with Stone , a psychiatrist, concerning the

---

[2] Although the fact that Alongi and Karnofsky would be able to testify that they had seen the altered entry would impact on the decision to prosecute, prosecutors did not subpoena the log from the defendant until after he had been indicted. Consequently, the delay in obtaining an indictment can not be excused by a need to obtain the log itself.

[3] The trial court granted the application to admit the statement on that ground. On appeal, the Appellate Division held that the introduction of the statement as an excited utterance had been harmless error, as the jury learned of the incident from other witnesses (Bierenbaum, 301 AD2d at 149).

strangulation incident and about starting therapy. The therapist had also spoken with Gail Katz about her relationship with her husband. During the first investigation Stone resisted the investigators' efforts to reveal the substance of any of his consultations. He was now willing to provide details of these conversations, as well as a letter he had written to Katz warning her that she was in possible danger from her husband. The discovery of this evidence factored into the decision to seek the indictment underlying the instant conviction.

Defendant claims that his conviction was obtained in violation of his rights under the New York State and United States constitutions. In determining whether an attorney has provided a criminal defendant with effective representation consonant with the requirements of its own constitution, New York applies a higher and more flexible standard than that derived from the Federal Constitution (*see* People v. Benevento, 91 NY2d 708). Under the federal standard set forth in Strickland v. Washington (466 US 668) a defendant must establish both that the attorney's performance was deficient, and, but for counsel's unprofessional errors, there is a "reasonable probability" that the outcome of the proceedings would have been different (*id* at 687, 694). The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome" (*id* at 694).

In contrast, the State standard does not require a defendant to fully satisfy the Strickland prejudice test (*see* People v. Stultz, 2 NY3d 277, 284). Under the State

Constitution the focus is on the fairness of the proceedings as a whole (*see* Benevento, 91 NY2d at 714). The core inquiry is whether the defendant has received "meaningful representation" (*see* People v. Baldi, 54 NY2d 137). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met"(id at 146-147). Trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness (id at 146-147), nor does the failure to make any particular motion (*see* Stultz, 2 NY3d at 287). Under the Baldi, "meaningful representation" standard a defendant must show that there was no "strategic or other legitimate explanation" for defense counsel's allegedly deficient conduct (*see* People v. Rivera, 71 NY2d 705, 709).

Although it is not an indispensable aspect of the Baldi standard, prejudice is still a "significant . . . element in assessing meaningful representation" (Stultz, 2 NY3d at 284). A single error may constitute ineffective assistance under the State standard, but only when it is "sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (People v. Hobot, 84 NY2d 1021, 1022). On the other hand, "even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial" (People v. Caban, 5 NY3d 143).

[* 8]

Defendant raises numerous arguments in support of his contention that his attorneys were ineffective. He argues that the attorneys' [4] lapses began even before trial began when they failed to move to dismiss the indictment on the ground of excessive pre-indictment delay (*see* People v. Singer, 44 NY2d 241). His argument is as follows: The People did not indict him until 1999, more than fourteen years after Gail Katz disappeared. Their delay in bringing an indictment was unjustifiable, as, he contends, they did not have appreciably more evidence against him in 1999 than they had a decade or more earlier. To the extent that they uncovered more evidence during this period, it was either cumulative or of minimal value. If they developed any new evidence of value during this period, it could have been discovered before the initial investigation was abandoned, or it came to light after the defendant was indicted in 1999. Moreover, he continues, he was prejudiced by the passage of so many years. Fourteen years after the event the defense could not easily check the ancient reports upon which the People relied, or cross-examine the dimmed memories of their witnesses. He argues that he was prejudiced because he was unable to cross-examine several other witnesses who no longer remembered what they had said to the police and whose statements to investigators were therefore admitted into evidence as past recollections recorded. Additionally, some of the people who might have contradicted or given doubt to the prosecution's evidence no longer remembered the events of July 1985. Others, such as

---

[4]The defendant was represented by Scott Greenfield, Esq., who was primarily responsible for pre-trial motions, David L. Lewis,Esq., who had responsibility for conducting the trial, and Kathryn Kase, Esq. Mr. Greenfield was also one of two attorneys who represented the defendant upon his direct appeal.

the Bierenbaum's housekeeper and the person who was in the office of MacDan Aviation when defendant rented the plane for his July 7, 1985 flight, were no longer available to testify in 2000. Had they still been available to testify at trial, he urges, they would have remembered specific details that would have been favorable to his case. In view of the People's unjustifiable delay in indicting the case, the great length of the delay and the prejudice suffered by the defense, a motion to dismiss on the ground of pre-indictment delay would have been granted.

The argument that defendant's attorneys were ineffective for failing to move to dismiss on the ground of unjustifiable pre-indictment delay is meritless, as there is no possibility that such a motion would have been granted. It is irrelevant that, as defendant argues, trial counsel "had nothing to lose" by making such a motion. In order to show that his attorney was ineffective, a defendant must show that he had some likelihood of prevailing on the motion that he contends should have been made. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*see* People v. Stultz, 2 NY3d 277, 287; *see* People v. Berry, 15 AD3d 233). There was no chance of success in this case.

An unreasonable delay in prosecuting a defendant may constitute a denial of due process requiring dismissal of the charges against him (*see* People v. Staley, 41 NY2d 789, 791; Singer, 44 NY2d at 253) Five factors must be considered in determining whether a delay amounts to a denial of due process: the seriousness of the offense, the

[* 10]

length of the delay, the reason for the delay, the degree that the defense has been impaired or prejudiced and the length of any pre-trial incarceration (*see*, People v. Taranovich, 37 NY2d 442; People v. Bonsauger, 91 AD2d 1001). In this case only the extreme length of the delay weighs in defendant's favor (cf. People v. Vernace, 96 NY2d 886 [17-year delay]; People v. La Rocca, 172 AD2d 628 [17-year delay]). Contrary to defendant's argument, he was not meaningfully prejudiced by the delay.

For the most part, defendant's specific claims of prejudice accruing from memory decay and the unavailability of witnesses do not withstand analysis. To be sure, the memories of all the witnesses had decayed with time, but that is always the case and does not prove undue prejudice to the defense (*see* People v. Lee, 234 AD2d 140, 143). Moreover, all the witnesses but one were prosecution witnesses. It is the People who bear the burden of proof, and for the most part they, not the defense, are prejudiced when the memories of prosecution witnesses are made hazy by the passage of time because their burden is made more difficult (*see* People v. Varnace, 96 NY2d at 888). Indeed, trial counsel argued this very point when, at the very beginning of the defense summation, he warned the jury that it was dangerous to rely upon "the chancy elements of the temperamental nature" of memories that were fifteen years old.

Many of defendant's arguments are founded upon unwarranted assumptions. There is no reason to assume that, had the trial taken place earlier, either the witnesses who testified for the prosecution or those who were unavailable in 2000

would have recalled facts that were helpful to the defense, rather than facts that were simply more damning. Also unpersuasive is the related argument that, were it not for the passage of so much time, trial counsel could have more easily refuted the testimony of many of the People's witnesses by checking their memories of events against records or documents that surely existed earlier but were no longer extant in 2000. It is mere conjecture that the employment and other records that defendant mentions would have contained information helpful to the defense. Defendant complains, for example, that trial counsel was unable to effectively cross-examine Denise Kastenbaum. Kastenbaum testified that at a July 6 meeting at the hairdresser, Katz told her that she was going to tell her husband that very weekend that she intended to leave him. Defendant contends that Mr. Lewis was stymied in his ability to cross-examine her on this point because after so many years the hairdresser's appointment book and the salon's employee records had been discarded. He suggests that these documents might have shown that the appointment took place on a different day. Alternatively, phone records no longer existed in 1999 which might have shown that the two did not speak on or about June 6 and therefore did not arrange to have their hair done on the same day. These speculations, as well as many others in which defendant engages, are unfounded. A similar analysis applies to the case folder of Detective Dalsass, which was lost in 1991. Dalsass testified that the defendant did not return his phone calls during the early investigation. Defendant argues that, had the trial taken place prior to 1991, he might have been in a

position to test the detective's statement that he failed to return the phone messages. [5] In neither of these cases nor others like them has defendant shown that he suffered actual prejudice.

The contention that prejudice accrued to defendant because of the introduction of a number of statements as past recollections recorded is conjectural. It is impossible to know what witnesses such as Lee McCullough, Edgar Rivera and Ellen Schwartz would have testified had they remembered the interviews that had given to the police. To assume that their testimony would have been more favorable to the defense than the statements that they gave investigators within a week or two of the disappearance , or that they would have contradicted their accounts of years before, is entirely speculative.

Defendant contends that he was severely prejudiced by the testimony of Maryanne DeCesare, who testified that Gail Katz told her that defendant repeatedly warned her that if she left him, he would kill her. According to, DeCesare, Katz once stated that during a television broadcast of a movie about Klaus Von Bulow, defendant told her that "the problem with Klaus Von Bulow is that he had left evidence and that he [defendant] would not leave evidence." Defendant argues that, as the body of his wife was never found, this testimony was especially powerful. In 2001 researchers hired by

[5]Furthermore, defendant could have moved for an adverse inference as to the loss of the book had he believed it in his strategic interest to do so.

defendant's current attorneys concluded after two weeks of exhaustive research that "Reversal of Fortune," was the only movie made about the Von Bulow case and that it was released in 1990, five years after Katz's disappearance.[6] Defendant argues that, had so much time not passed, it would have been possible to rebut Ms. DeCesare about her apparently confabulated and erroneous testimony. The difficulty in meeting such testimony fifteen years after the event, he continues, "where it arises for the first time during the heat of trial, is immense."

Defendant's argument is not compelling. It is unclear why it was any more difficult to meet such testimony in 2000 than it would have been a decade earlier. Assuming for the sake of argument that two weeks of extensive research are required to verify that there was only one movie that was based on the Von Bulow case and to ascertain its release date, those same two weeks would have been needed regardless of the date of the trial. The pressures inherent in meeting testimony in the heat of trial would also have been the same. The defense would therefore have confronted the same difficulty of rebutting Ms. Decasare's testimony no matter when the trial took place.[7]

---

[6] The People assert that, even if that is the case, there were numerous televised news reports about the Von Bulow case that could have triggered defendant's comment to his wife.

[7] It is impossible to assume anything about the substance of Ms. DeCesare's testimony had it given before the movie was released. There is no reason to believe, however, that it would have been any more favorable to the defense.

Defendant claims that he suffered prejudice from the faded memory of Joel Davis, the sole defense witness. Davis testified that he had seen a missing-person poster of Gail Katz shortly after her disappearance and had told the police that he had seen the woman pictured standing in line in a bagel store at 3:00 pm on July 7. The woman was standing near another female who was apparently her friend. Both were carrying beach bags. The police showed him a picture of Katz in late September, 1985. He identified the photograph as one of the two woman he had seen on July 7. Defense investigators interviewed him several months prior to trial, and the details he related to them were inconsistent with what he told the police years earlier and what he related in his direct examination. The People took advantage of these inconsistencies in cross-examination. Davis nevertheless testified that he was certain that the photograph of the woman he was shown in 1985, and which he was shown again at trial, depicted one of the women he had seen on July 7. A reading of his testimony leads to the conclusion that although he was certain in 1985 that he had seen Gail Katz in the bagel store, he no longer remembered enough about the sighting to be sure. Although Davis exhibited some confusion about the events of 1985, the defendant was not substantially prejudiced. Not only was Davis unshaken about his 1985 identification, but it is unlikely that the jury expected any witness to be as certain in 1999 about the events of 1985 as that witness was in the months immediately following the event. They probably found, as does defendant, that "since Davis . . . [testified] completely from memory about a sighting that occurred 15 years before, it [was] not surprising that he was inconsistent on certain

details." If the jury discounted his testimony, it was primarily because it was simply improbable and contrary to established facts.

I find the other instances of prejudice alleged by defendant to be completely meritless. They are premised upon the most speculative of premises (e.g., that Janice Nuhic, a police aide who prepared the 1983 complaint report in which Gail Katz reported that defendant had strangled her to the point of unconsciousness, would have remembered taking the complaint from Ms. Katz had the trial taken place earlier). Even if defendant could have demonstrated that he suffered prejudice from the faded memories of witnesses, however, his dismissal motion would not have been granted.

Dismissal is not warranted where there is good cause for the delay (People v. Lesiuk, 81 NY2d 485, 490-491). The legitimate need of the police to gather sufficient evidence prior to the commencement of an investigation constitutes good cause (Lesiuk, 81 NY2d at 490). "Thus a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense" (Singer, 44 NY2d at 254).

The decision not to seek an indictment in 1987 can not be gainsaid. Not only was the evidence against the defendant purely circumstantial, but no homicide prosecution had ever been attempted in New York County to that time where there was

no *corpus dilecti*. Prosecutors knew that the jury would be instructed that they could only convict if the facts proved excluded, to a moral certainty, every reasonable hypothesis of innocence. It would have been foolhardy for them to proceed in the absence of evidence that did not satisfy this standard. Their 1987 decision not to prosecute was based on objective assessment of the evidence and was therefore made in good faith.

It is irrelevant that there was little or no active investigation of the case for ten years (*see* People v. Vernace, 96 NY2d 886). The People were not obligated to keep the case active during this period, as it would be impossible for them to continually investigate every case. Their determination to reopen the case in a fresh attempt to gather sufficient evidence to obtain a conviction was made in good faith and does not cast their 1987 decision to defer prosecution into doubt. Defendant contends that much of the evidence that the People developed during the reopened investigation was either cumulative of information that was known to them in 1987 or could have been discovered during the initial investigation. I disagree. Even if this were the case, however, it is immaterial. The decision to prosecute, like the determination of what constitutes sufficient evidence to obtain a conviction, is a discretionary and subjective prosecutorial function (*see* People v. Denis, 276 AD2d 237). Indeed, had the People simply indicted defendant in 1999 based on evidence that was substantially the same as the evidence in their possession in 1987, it is far from clear that the delay would have been unjustified in a case as unusual and difficult as this one (*see* People v. Denis, 276 AD2d 237).

Additionally, there is no reason to believe that the prosecution's decision to reopen the case after ten years proceeded from inappropriate motives (*cf.* People v. Juan Rodriguez, _ Misc 2d _, NYLJ 8/9/04). The People's further display of caution in 1997, deferring indictment until they determined that the evidence was strong enough to meet the circumstantial evidence standard, was also warranted.

That they ultimately did not or could not use all of the evidence discovered during the second investigation does not mean that the People unnecessarily delayed bringing an indictment or were not investigating in good faith. They attempted to introduce the testimony of Dr. Stone as well as various psychiatric records at trial, for example, but the defense successfully argued that this evidence was inadmissible. Some of the other evidence that they did not use suggested other leads, confirmed suspicions or other evidence, and factored into their decision to pursue an indictment. In addition, there was delay incurred while the People pursued leads that ultimately proved to be useless. Extensive scientific testing was performed on the torso discovered in Staten Island until it was definitively shown that it could not have belonged to Gail Katz. Accordingly, it is impossible to say that the People did not have good cause for the delay that occurred in this case (*see* People v. Mitchell, 301 AD2d 451).

In sum, although the pre-indictment delay was significant, defendant was not incarcerated at any time prior to trial. If he can be said to have suffered any prejudice from the delay, it was not substantial. Both the seriousness of the charge and

[* 18]

the reason for the delay strongly militate against dismissal. The People proceeded in good faith and did not delay the prosecution in the hope of gaining a tactical advantage. Their caution was justified by the complete lack of direct evidence against the defendant, as well as the absence of direct proof that Gail Katz was dead. For these reasons there is no possibility that a motion to dismiss on the basis of pre-indictment delay would have been granted. Defense counsel cannot be faulted, therefore, for not filing such a motion (*see* People v. Mance, 269 AD2d 188).

Defendant next takes exception to his attorneys' failure to interview and call The Bierenbaum's downstairs neighbor, June Sherman, and failure to call Pablo Alvarez, a building maintenance worker and occasional doorman. The police interviewed Sherman in June and October 1986. At that time the only relevant information that she was able to provide was that the Bierenbaums fought constantly. In 1998, when the case was reopened, an investigator spoke to her again. On this occasion she stated that the Bierenbaums always fought on Sunday and that she frequently heard Ms. Katz screaming and the sound of banging furniture. She usually heard the sound of heels and of furniture being moved. On the Sunday of the disappearance she heard the defendant yelling and his wife screaming. She heard a loud bang, which she assumed was the front door but which could have been any door, and then silence. The lead prosecutor also interviewed her in February 2000, at which time she gave additional details about the incident.

The People provided the defense with the investigator's report of his interview with Ms. Sherman six months prior to trial in response to a request for Brady material. The report was by then two years old. Ms. Sherman had moved to Arizona, but the People gave the attorneys her Arizona address and telephone number. Trial counsel did not attempt to interview her or otherwise act on this information until October 2, 2000,[8] when they applied for an order to secure her attendance at trial pursuant to CPL 640.10. Attempts to serve her with process in Arizona proved unsuccessful and she never testified.

The defendant has appended a July 2004 affidavit from Sherman in support of his current motion. In it she states that she heard Ms. Katz screaming on the day of her disappearance and that she (Sherman) heard the sound of high heels making noises on the floor of the Bierenbaum apartment. She heard the door of the apartment slam followed by silence. Based upon her familiarity with Ms. Katz's voice and footsteps, she believed that Katz left the apartment.

Pablo Alvarez was employed as a maintenance worker in the Bierenbaum's apartment building. Nine days after the disappearance Alvarez told Detective O'Malley that he did not remember seeing Ms. Katz leave the building on Sunday, July 7. He was again interviewed by the prosecution in 1999 and 2000. On both occasions he

---

[8] The trial had commenced by this time. The People opened on October 2 and rested on October 18. Judge Snyder charged the jury on October 23.

remembered neither the day or date that he had last seen her leave the building nor how she was dressed that day. In a July, 2004 affidavit he states that on the Sunday preceding the disappearance he relieved Edgar Rivera, the doorman, at 11:30 a.m. While on duty that day he saw Ms. Katz leave the front entrance of the building wearing shorts and a t-shirt. He did not see her return. He also states that he provided this information to the defense in 2000. [9]

Mr. Lewis and Mr. Greenfield interviewed Alvarez prior to trial but decided not to call him to testify. Both attorneys now state in substance that they would have made the opposite decision had records existed at the time of the trial showing that both Rivera and Alvarez had worked July 7, 1985, and had they known that Ms. Sherman would have testified consonant with the affidavit she provided several years after the trial.

The defendant argues that, had both Sherman and Alvarez testified, he would almost certainly have been acquitted. He contends that Sherman's account would have supported the defense theory that Ms. Katz left the apartment on Sunday afternoon and would have made the testimony of Joel Davis more credible. In his view their combined testimony would have made untenable the prosecution's central theory that

---

[9]Alvarez additionally states that he testified before the grand jury but the People dispute this claim. I conclude that he innocently believed his 1999 interview with several assistant district attorneys to be a grand jury appearance. I reject the People's argument that his misconception casts the remainder of his affidavit into doubt.

the defendant killed his wife in the apartment on July 7 in the course of a violent argument. He also argues that their testimony would have undercut inferences that circumstantially strengthened the People's case. He suggests, for example, that had Alvarez testified, trial counsel might have "put into play" the notion that defendant had confused Alvarez with the doorman Rivera when he told Detective O'Malley that Rivera had seen his wife leave the building on Sunday morning. If so, the prosecution would not have been able to argue that defendant evinced consciousness of guilt in lying to Detective O'Malley about his conversation with Rivera.

Although it would have been prudent to speak with Ms. Sherman at an earlier date, the defense made diligent efforts to secure her attendance as soon as the trial actually began. The People's case lasted more than two weeks, and it would have been reasonable to believe that she would be available in time to be interviewed and, if she proved to be a friendly witness, testify. That the efforts of defense counsel proved unavailing is not an indication of ineffectiveness. People v. Donovan (184 AD2d 654), upon which defendant relies for the contrary proposition, is inapposite. Morever, their decision not to rush to interview her can be explained by the fact that they already knew what she had told the prosecution's investigator, and considered her an unfriendly witness.[10] Whether or not their assessment of her hostility was correct, had she testified, it is as likely that her testimony would have hurt the defense as aided it. Not only was

---

[10]In his affidavit, Mr. Greenfield states that he and Mr. Lewis assumed that Ms. Sherman "was not a friendly witness," as she never made an attempt to contact them.

[* 22]

her account of the click of heels followed by the slam of a door completely inconsistent with defendant's statements to the police that his wife was wearing sandals when she left the apartment, but she told investigators that she only believed that it was the front door that she heard slam and that it could have been any door. If the jury believed that she had heard the sounds of "Gail screaming and Robert yelling", followed by the slam of an interior door and sudden silence, it would have undermined the scenario suggested by the defense and strengthened the prosecution's theory that the defendant had killed her in the apartment. At the very least her report of the Bierenbaum's incessant cat-and-dog fights and her account of the screams and yelling she heard that morning would have been harmful to the defense. I also note that Ms. Sherman's inability to provide investigators with any relevant information about the day of the disappearance immediately after the event but ever-improving recall of detail as the years have would also have presented problems for the defense. Had she testified it would have been especially difficult for Mr. Lewis to employ the argument he made in summation that it was dangerous to rely upon recent memories of ancient events. Trial counsel were therefore not ineffective for failing to obtain her testimony (*see* People v. Llanos, 13 AD3d 76; People v. Brooks, 283 AD2d 367).

Calling Alvarez would also have been problematic as he had repeatedly said that he did not remember seeing Ms. Katz leave the building on Sunday and could not recall what she was wearing that last time he had seen her. Trial counsel made a strategic decision not to call him in the absence of credible evidence buttressing the

claims he had recently made to them to the contrary. If he told the jury that he recalled seeing her leave the building that day wearing shorts and a t-shirt, as he told the defense in 2000, the prosecution would have discredited him with inconsistent statements he made as far back as 1985 and as recently as 2000 . Defendant concedes that Alvarez's recollection was "shaky." He attempts to brush the inconsistencies in his several accounts aside with the claim that calling Alvarez to testify would nevertheless have permitted him to blunt the People's argument in summation that he (defendant) lied to Detective O'Malley about Edgar the doorman's sighting of his wife. According to defendant, had Alvarez testified

> it would have been persuasive evidence that Dr. Bierenbaum had not lied to O'Malley at all, but had truly been mistaken whether it had been Edgar Rivera, Edgar Acosta - - a porter - - or Pablo Alvarez whom he had spoken to and whether that individual, whoever it was, said what he had personally seen and when he saw it or what one of the others had told Alvarez he saw and when.

This argument is based upon a jumble of baseless speculations. Defendant provides no support for the possibility that someone other that Alvarez, "whoever it was," saw defendant's wife leave the building on July 7 and told either Alvarez or defendant what he had seen. Defendant and Rivera never made such a claim. Alvarez clearly states that he personally saw Ms. Katz leave the front of the building wearing shorts and a t-shirt. Defendant provides no affidavit from Acosta, the only remaining possibility. It is highly unlikely that the jury would have accepted defendant's premise had he managed to "put it into play." Furthermore, had the jury indeed accepted the speculation, it would not have altered the outcome of the trial. Not only was defendant's

remark to O'Malley only one of many omissions and misstatements but it pertained solely to consciousness of guilt.

Defendant also contends that he was prejudiced by numerous lapses and errors of judgment on the part of Mr. Lewis during the trial. The People preliminarily argue that the trial record contains sufficient facts to have permitted appellate review of defendant's claims and that he should therefore be precluded from raising them now (CPL 440.10 [2][c]). As I reject their argument I will address the alleged errors on the merits (*see* People v. Brown, 45 NY2d 852; People v. Berry; 15 AD3d 233; People v. Harris,109 AD2d 351).

Defendant alleges that he was prejudiced by the attorney's concession in his opening to the jury that Gail Katz was dead and that she had died on July 7, 1985.[11] He argues that there was nothing to be gained by conceding that she was dead, as one or more jurors might have found that the People had not satisfied their burden of proving this element beyond a reasonable doubt. Conceding that she had died on July 7was even worse, he continues, because it raised the possibility that the attorney knew this information because his client had confided it to him. [12] Defendant also argues that

---

[11]He also stated in his summation that she was dead, but made no mention of her dying on July 7.

[12]In an affidavit appended to defendant's motion, the attorney states that he made a strategic decision to concede these facts because he believed that "this would prevent the People from eliciting testimony from her family and friends in the nature of the impact of the victim's death on her family and friends."

it gained nothing for his attorney to concede during the summation that he had once choked his wife and that he had a bad temper. He contends that the evidence of defendant's bad temper and the choking incident came from statements that Ms. Katz made to acquaintances, and could thus have been exaggerations or even fabrications. He adds that, although there might be reasons not to contest some or all of these issues, there was no reason to actively concede them.

Defendant was not prejudiced by his attorneys' concession that Ms. Katz was dead, as the proof presented permitted no other inference. Had they not made the tactical choice of defusing the issue in this manner they would have been put in the counter-productive and almost ludicrous position of arguing that she had vanished without a trace but was still alive fifteen years later. There was also sufficient proof in the record to have made it impossible for the attorney to have contested the choking incident and defendant's bad temper. The jury heard too many corroborative accounts to have had any doubts as to these facts and conceding them was therefore not prejudicial. Additionally, as is clear from the affidavits of trial counsel, Mr. Lewis made a strategic decision to concede them based on his assessment that they were necessary to show why the Bierenbaums sought counseling. His decision should not be second-guessed with the wisdom of hindsight (*see* People v. Satterfield, 66 NY2d 796,799; People v. Sullivan, 153 AD2d 223,227). Conceding that Ms. Katz died on July 7 was more questionable. Although concessions that are based upon a valid trial strategy cannot form the basis for a determination that an attorney was ineffective (*see* People

v. Lewis, 13 AD3d 1171), the logic underlying trial counsel's explanation for this concession is somewhat tenuous. If the concession was indeed unnecessary, the circumstances surrounding the disappearance of Ms. Katz as well as other evidence in the case nevertheless compel the conclusion that she indeed died on July 7.

Defendant faults Mr. Lewis for stating in his opening to the jury that "the police conducted a forensic examination of the doctor's apartment [as well as the cars he used and the airplane he had flown on July 7] . . . and found no evidence of blood or any other biological determinations" that supported the People's theory of the case. Defendant claims that, but for this remark, he would not have been prejudiced by testimony which permitted the prosecutor to argue that he had prevented the police from uncovering inculpatory evidence. Judge Snyder subsequently ruled that the attorney's statement had opened the door to testimony that defendant had ignored or forestalled several requests from Detective Dalsass to search the apartment. The detective was also permitted to testify that after defendant finally consented to a search conducted in September, 1985, his attorney, Mr. Greenfield, limited it to a search for Ms. Katz's fingerprints, diary and address book. He further testified that crime-scene technicians were prevented from conducting a full search of the apartment and that he [Dalsass] was followed everywhere about the apartment but the bathroom by an investigator hired by the defendant. Judge Snyder also permitted the prosecutor to argue

[* 27]

in his summation that defendant had lied in stating to his girlfriend, Karen Caruana, [13] that the police searched his apartment and found nothing. He then stated:

> [The] cops hadn't searched anything yet. One of the main reasons is because the defendant wouldn't let them search the apartment. The defendant and his attorney stopped the cops from doing a complete forensic search on the apartment. Ladies and gentlemen, eyeballing the bathtub and walking around the apartment are no substitute for a complete forensic search . . . .

In the affirmation appended to the instant motion, Mr. Lewis states that his statement to the jury that the police had searched the apartment but found no blood or biological evidence was based on his "understanding of what occurred during the police investigation of Ms. Bierenbaum's disappearance." Defendant notes, however, that the People had previously informed him that the Mr. Greenfield had prevented the police from police from conducting a full search. In a proceeding that took place two months before the start of the trial, the People unequivocally stated in colloquy that "there were no extensive tests done. Mr. Greenfield wouldn't allow it. The only thing that Mr. Greenfield would allow [was for the police] to come in and dust for prints."

Defendant was not prejudiced by the introduction of the testimony because the People's discussion of the search, when viewed in the context of their entire summation, was of very limited effect. They never argued that the defendant or Mr. Greenfield refused to permit the police to conduct full search because he had something to hide, or because he was guilty. Rather, they utilized the search to show that he had

---

[13]The defendant began a romantic liaison with Caruana within several weeks of his wife's disappearance.

lied to Caruana, as he had lied to her about other things and had lied to many other people, in order "to deceive, to cast suspicion elsewhere, or to remove it if it [was] cast on him." As the lie to Caruana about the search only one of many to which they referred, it did not play a prominent part in their summation. Moreover, the lie was relevant only as to defendant's consciousness of guilt.

Additionally, Mr. Lewis's cross-examination of Detective Dalsass dissipated any prejudice that his client otherwise might have suffered from the introduction of the detective's direct testimony. He first elicited testimony showing that defendant was slow to consent to a search of his apartment because he wanted to consult an attorney. He then elicited from the detective that the defendant consented to the search, and that it was only Mr. Greenfield who imposed limitations on it:

Question: On the 12th did he [defendant] give you verbal permission to search his apartment for forensic evidence?

Answer: Mr. Greenfield did.

Question: Did Dr. Bierenbaum give you permission?

Answer: Yes, he did.

Question: To search the apartment for forensic evidence, right?

Answer: Correct, but there were stipulations made at that time.

Question: This was on the 12th there was a stipulation made, or later?

Answer: On the 30th.

Question: So on the 12th Dr. Bierenbaum gave you permission to search?

Answer: He did.

Question: And it was only later when you went to the apartment, that Mr. Greenfield stopped you from doing the search that you wanted to do, right?

Answer: That is correct.

Question: And despite the fact that, you tried to continue to do it anyway, right, somewhat - -

Answer: As best as I could.

Mr. Lewis thus contrasted defendant's willingness to permit the search with Mr. Greenfield's refusal. In laying the blame for the inability of the police to conduct a full search to an attorney, who could be expected to be an obstructionist under any circumstances, Mr. Lewis dispelled the notion that the defendant felt a consciousness of guilt. Judge Snyder instructed the jury at the close of the case that "the defendant has no legal obligation to allow the police to search his apartment at any point . . . . I want to remind you that every individual has a right to an attorney and you can draw no negative inference from the fact that someone hires an attorney." Mr. Lewis's cross-examination, in conjunction with the court's instruction, ameliorated any remaining prejudice which may have accrued to the defendant from the opening remark.

Defendant next accuses Mr. Lewis of failing to utilize impeachment material which, he claims, would have supported his argument in summation that Ms.

Katz was killed in a drug deal gone awry in Central Park. The genesis of this argument primarily lay in the testimony of Stephanie Youngblood and Anthony Segalas. Youngblood, who lived with the defendant in 1990, testified that he told her that his wife had a drug problem. He expressed his belief to her that his wife had left the apartment to "hang out with her druggie friends" in Central Park, where she had probably been murdered. Segalas carried on an affair with Ms. Katz during the last few years of her marriage. He testified that he and Ms. Katz twice "did cocaine" together. On one of the two occasions she told him that she suspected that she had been cheated by a girlfriend who had supplied her with the drug and asked him to come over to verify that the substance she purchased was cocaine. Segalas also testified that he was a recreational cocaine user but that Ms. Katz was very naive and didn't appear to know anything about the drug.

On the basis of this testimony (and evidence that Ms. Katz had an unconsummated relationship with Kenneth Feiner, a psychologist whom she met on the subway in 1985) Mr. Lewis argued in summation that Ms. Katz was prone to engage in dangerous behavior. He raised the possibility that she was killed by drug dealers in the course of a drug deal in the dangerous Central Park that existed "before-Giuliani." The People scoffed at this argument in their summation and knocked down each of its underpinnings in turn. They argued that the men with whom she sought relationships were not risky types, but a Ph.D. and an investment manager. Far from being someone with a drug problem, Ms. Katz was, according to Segalas, a neophyte, naive when it

came to cocaine. She was supplied not by drug dealers in Central Park, but by her girlfriend. There was only defendant's say-so that she had "druggie friends." They derided his statement to Youngblood as an attempt to cast suspicion elsewhere.

Defendant now argues that Mr. Lewis showed a lapse in professional judgment in failing to cross-examine Segalas with his 1985 statement to Detective Dalsass that he and Ms. Katz "did cocaine on numerous occasions." He contends that, had the attorney cross-examined Segalas with the statement, it would have been more difficult for the prosecution to disparage the possibility that the death of Ms. Katz was related to her drug use. In addition, the statement would have made it more credible that defendant believed that his wife died as a result of her involvement with unsavory acquaintances who were involved with drugs. In his affidavit, Mr. Lewis states that he did not see the necessity of cross-examining Segalas with the inconsistency. I find that there would have been little utility in doing so.

Had the jury credited that Segalas and Ms. Katz took cocaine together on numerous occasions, instead of just twice, it would not have made the theory that her death was somehow related to her drug use significantly more viable. The theory was constructed of gossamer and did not withstand scrutiny. The fact remains, whether it heard that Ms. Katz took cocaine twice or twenty times, the jury was presented with no proof of dangerous drug suppliers in Central Park, but only an apparently innocuous "girlfriend." Ms. Katz did not seem to be the type of person who associated with people

who were the least bit shady. None of the parade of her friends and acquaintances who testified, even the few like Segalas and Feiner who had questionable morals, appeared to be of that ilk. It was hard to believe that she would seek out someone with the potential to do her harm.

Similarly, it is unlikely that confronting Segalas with his inconsistent statement would have countered the inference that defendant was merely attempting to cast suspicion elsewhere with his statement to Youngblood. The problem is not only that there was no proof that the death of Ms. Katz was related to her drug use, but that the defendant expressed so many different theories about her death that it is difficult to credit that he was sincere or had a basis to believe any one of them. As the Appellate Division noted,

> [h]e was inconsistent about his purported knowledge of his wife's post-July 7 whereabouts, alluding to different theories and purported sightings to different people. Defendant variously suggested or stated that his wife was wandering around Central Park in "a fugue state," that she had a drug problem and ran off with drug dealers, that she possibly committed suicide, that she was on a shopping spree at Bloomingdale's, that she left to hang out with "druggie friends," that she might have been killed by drug dealers, and that she had left for the Carribean to be with a boyfriend. In one instance he falsely claimed that a private detective, whom he also claimed he hired to find her, learned she was living in California with financial support from her family. Not a single shred of evidence in this record supports any of these bizarre claims.
>
> Bierenbaum, 301 AD2d at 136

The sheer number and variety of these explanations leads to the inference that they were nothing more than fabrications that defendant devised to allay suspicions about himself. Again, the same conclusion is drawn whether Segalas and Ms. Katz used

cocaine together only twice or numerous times. As the 1985 statement would therefore not have had any impact on the jury's acceptance of the drug theory, or countered the inference that defendant manufactured the theory to remove suspicion from himself, trial counsel's failure to utilize it did not constitute ineffectiveness of counsel (*see* People v. Myers, 283 AD2d 259).

Defendant asserts that trial counsel was ineffective for failing to object to the introduction of three videotapes demonstrating how a single person could load a 110 bag of sand onto a Cessna 172 (the make and model of the plane flown by defendant on July 7), pilot the plane and drop the bag into the ocean. This contention is without merit, as the Appellate Division indicated by way of dictum that the videotapes were properly placed before the jury (*see* People v. Bierenbaum, 301 AD2d 119, 152). As the evidence in question was admissible, the attorney was not ineffective in failing to object to its introduction (*see* People v. Wigfall, 288 AD2d 41; People v. Smith, 278 AD2d 154).

Defendant's many claims about trial counsel's failure to object to various parts of the People's summation are similarly without merit. Mr. Lewis explains in his affidavit that he was wary of objecting during the summation because he was afraid that

if he did, the court would sum up on these points in aid of the prosecution. [14] He instead chose to move for a mistrial on three of these grounds at the end of the summation. Trial counsel's strategic decision not to make contemporaneous objections because they were not worth the risk that they entailed was a legitimate one (*see* People v. Taylor, 1 NY3d 174, 177). Defendant argues that, to the extent that the reason for his attorney's failure to object was based on such a consideration, CPL 470.05, which required him to object in order to preserve an issue for appellate review, conflicts with his state and federal right to effective counsel. Defendant cites no authority which directly supports this proposition and I reject it.

Assuming, for the sake of argument, that trial counsel's concern did not constitute a valid tactical consideration, he was still not ineffective for failing to make timely objections during the prosecutor's summation, as the latter made no comments which would have required reversal of the conviction. Although a few of his comments were marginally objectionable, the summation as whole did not render the trial unfair.

---

[14] When he moved for a mistrial at the close of summations Mr. Lewis gave the trial court a different explanation for his conduct. At that time he explained that he was afraid that if he had objected to during the People's summation, he would have invited additional attention to the prosecutor's arguments. Judge Snyder found his explanation "disingenuous." Although there was likely some truth to counsel's explanation, the primary reason for his reluctance was undoubtedly the fear expressed in Mr. Lewis's affidavit, which could not easily have been stated to the trial court. Whether his decision was based on the first consideration, the second or a combination of the two is immaterial, as both are valid strategic considerations (*see* People v. Taylor, 1 NY3d 174, 177).

As explained below, had trial counsel contemporaneously objected he would only have preserved meritless issues for appeal.

The prosecutor's summation was not inflammatory. His evocation of a strangling was somewhat graphic, but not excessively or gratuitously so. He described what likely transpired in order to explain both how defendant came to kill her and how he could have done so without leaving forensic evidence. Although there was no direct evidence that he had killed her in this manner, the prosecutor's argument that he had strangled her was based on inferences that could reasonably be drawn from the evidence (*see* People v. Yu Dong, 16 AD3d 349). His reference to the 1983 choking incident was also proper. In describing how Ms. Bierenbaum might have met her death at defendant's hands, the prosecutor compared it to the 1983 incident not for the purpose of arguing that the defendant had violent propensities, but to establish his identity as the murderer and his criminal intent. Evidence of the incident was properly admitted at trial pursuant to People v. Molineux (168 NY 264) for these very purposes. The prosecutor's arguments involving the 1983 incident did not stray from any of these permissible areas. I also note that the Appellate Division stated in dictum that "the prosecutor's arguments on the subject [of the 1983 incident] when viewed in the complete context of the closing statements, do not warrant reversal" (Bierenbaum, 301 AD2d at 150).

The defendant next contends that trial counsel should have objected to the prosecutor's comment that he "wouldn't let [the police] search the apartment. The

defendant and his attorney stopped the cops from doing a complete forensic search on the apartment." As noted, the prosecutor made this comment to illustrate his argument that defendant lied to acquaintances in order to divert suspicion. This argument was entirely proper. He never suggested that the jury could draw a negative inference from defendant's (or his attorney's) refusal to permit a search, or from defendant's employment of an attorney. Moreover, after trial counsel moved for a mistrial on this ground, Judge Snyder gave a curative instruction to the jury as to the prosecutor's comments in the course of her charge. It would therefore not have availed defendant had the attorney preserved the issue for appeal.

Trial counsel also moved for a mistrial based on the prosecutor's comments in summation regarding the description that defendant gave to the police of his wife's clothing. The attorney had unsuccessfully attempted to introduce evidence that, eleven or twelve days after the disappearance, defendant filled out a police form indicating that his wife went to Central Park on July 7 wearing a white t-shirt bearing the word "Aparados." The description was not consistent with several other descriptions of the shirt that the defendant orally gave to the police when he first spoke to them. On these occasions he described the shirt only as a white t-shirt. The trial court precluded all reference to the form on the ground that it was unreliable, "self-serving" hearsay. Consequently, the jury heard only that the defendant twice told O'Malley and twice told Dalsass that his wife was wearing a white t-shirt when she left the apartment. The ruling impacted adversely on the defense because Joel Davis testified that the woman he saw

in the bagel store was wearing a multicolored t-shirt with a "distinctive print," "something like a map or an island" with "a foreign name" Davis was 90 percent certain that the foreign name was "Aparados."

In his summation the prosecutor argued that Davis was mistaken and confused when he reported seeing a woman who could have been Gail Katz. He pointed out disparities between Davis's description of the woman he had seen, and known physical characteristics of Katz. He also highlighted the fact that Davis's description of the shirt worn by the woman in the bagel store did not match the defendant's description of his wife's t-shirt:

> The description of the multi-colored t-shirt versus the white t-shirt the defendant sees her leaving with. A map or island covering 80 percent of the t-shirt versus the white shirt. The t-shirt she's wearing with writing on it, with the defendant, said it is a white t-shirt [;] with the description of the writing versus the description of the defendant with a white t-shirt [;] one, two or three words versus the defendant's description of a white t-shirt.

Trial counsel moved for a mistrial on the ground that, as the prosecutor was aware that the defendant had filled out a form indicating that the t-shirt worn by his wife had the word "Aparados" written on it, his comments that there was no evidence supporting Davis's description of the t-shirt ,and that defendant's description of the shirt contradicted that of Davis, were improper. The trial court called trial counsel's argument "misleading" and denied the application.

I find that trial counsel mischaracterized the prosecutor's comment, as does defendant in the instant motion. Contrary to defendant's contention, the prosecutor neither stated nor implied that there was no evidence supporting Davis's description of the t-shirt, or that defendant never reported that there was writing on the shirt. His argument was only that Davis's description contradicted what defendant told the police on four different occasions. As the argument is meritless, it would not have availed defendant for his attorney to have preserved it.

Defendant argues that trial counsel was ineffective for failing to object to two parts of the prosecutor's summation, which, he contends, impermissibly shifted the burden of proof. Neither of these claims has merit. The prosecutor was entitled to argue that defendant was lying when he told Karen Caruana that he hired a private investigator who found evidence that his wife was alive and living in California. He did not shift the burden of proof by suggesting that if defendant's statement were true, "the investigator would be testifying about the evidence from the witness stand." The prosecutor's statement was made only in the context of establishing that defendant had lied to Caruana. It contained no suggestion that defendant was obligated to prove that his wife was still alive. In addition, it would have been meaningless for trial counsel to have objected on that ground. The issue was no longer in the case, as he had conceded at the beginning of the trial that she was dead. Nor did the prosecutor change the burden of proof by rhetorically asking, in regard to defendant's theory that drug dealers had killed his wife, "where's the evidence? . . . where's the proof?" The People may respond in

summation to arguments raised by the defense (*see* People v. Martinez, 302 AD2d 271; People v. Robinson, 298 AD2d 161). Defendant had come forward with the theory that risky behavior on the part of Ms. Katz led to her death, and it was therefore permissible for the prosecutor to respond in summation that there was little or no evidence to corroborate that hypothesis (*see* People v. Overlee, 236 AD2d 133, 143; People v. Gathers, 207 AD2d 751; People v. Tankleff; 84 NY2d 992).

Defendant additionally argues that his attorney should have objected when, he claims, the prosecutor attacked his [trial counsel's] integrity. The statements that "to a large extent during the summation [trial counsel] distorted the record" and "has even . . . gone so as to make some facts up" were arguably excessive. Even so, they fell far short of the type of comment that would have required reversal of the conviction (*see* People v. Long, 81 AD2d 521; People v. Spruill, 5 AD3d 318;People v. LaPorte, 306 AD2d 93; People v. Diaz, 170 AD2d 202, *amended on other grounds* 172 AD2d 341). In addition, to the extent that these comments were objectionable, they were isolated. His summation was not pervaded with flagrant examples of misconduct which would deprive defendant of due process (*see* People v. D'Alessandro, 184 AD2d 114; People v. Cobb, 188 AD2d 308). His comment to the jury that trial counsel "was hoping you will grasp at straws" was made in response to defendant's argument that the death of Ms. Katz was somehow tied to her drug use and was not improper (*see* People v. Salaman, 231 AD2d 464; People v. Torres, 220 AD2d 269). For similar reasons it was not improper for the prosecutor to state, in substance, that several of trial counsel's arguments were far-fetched or not based

on the evidence in the case. These comments did not exceed the "broad bounds of rhetorical comment permissible in closing argument" (*see* People v. Galloway, 54 NY2d 396,399). There was also nothing objectionable about his comment that trial counsel was trying to "disconnect the evidence." The statement, which was made in the context of the prosecutor's argument that each piece of evidence should be viewed as part of the whole and not in a vacuum, did not constitute a personal attack.

Defendant claims that trial counsel did not present evidence that might have countered the prosecution's argument that he had to be prodded to report his wife missing. He argues that Mr. Lewis should have brought certain provisions of the 1985 New York Police Department Patrol Guide to the jury's attention. The Guide provided that, "Missing Persons do not include . . . [p]ersons eighteen years of age or older, who have left home voluntarily because of domestic, financial or similar reasons." Under guidelines in effect at that time Ms. Katz would not have qualified as a missing person until enough time passed to permit the police to infer that she was "absent under circumstances indicating unaccountable or involuntary disappearance." Mr. Lewis states that he was aware of these provisions, but did not consider them relevant.

Trial counsel did not show a lapse of judgment in ignoring the provisions. They were irrelevant to the issues at trial, as there is no proof that defendant was aware of them or that they influenced his conduct. What was important was whether he, not the police, considered his wife missing. The Guide provisions were not germane to the

prosecution's argument that he waited a surprisingly long time before going to the police and that he appeared to dragging his feet despite the repeated urging of his wife's teacher and friend, Dr. Yvette Feis, that he seek their help in finding her. As the Guide was not relevant to his apparent lack of concern, or his motivation in seeking to delay the entry of the police into the case, it seems probable that the trial court would not have permitted trial counsel to introduce the provisions in question on the defense case or cross-examine Detective O'Malley as to the issue defendant now raises. Had the court permitted the jury to learn of the guidelines, it would not have affected the outcome of the trial. Trial counsel's judgment was correct and he was justified in not bringing the Patrol Guide provisions to the jury's attention.

Defendant's attorneys were not ineffective for failing to request that the jury be charged on the issue of territorial jurisdiction. Assuming, for the sake of argument, that there was no tactical reason not to request such a charge, the attorneys were nevertheless not ineffective because the jury could not have found that defendant committed the murder but that New York did not have territorial jurisdiction over the crime.

CPL 20.20 provides in pertinent part that

> a person may be convicted in the criminal courts of this state of an offense defined by the laws of this state, committed . . . by his own conduct. . . when:
> 1. Conduct occurred within this state sufficient to establish:
> (a) An element of such offense. . . .

The State of New York has territorial jurisdiction over a homicide constituting the crime of murder in the second degree if the murderer either formulated

the intent to bring about the death of the victim or caused her death in this state (*see* People v. Tullo, 34 NY2d 712; People v. Guidice, 83 NY2d 630; People v. Seifert, 113 AD2d 80). The People's theory of the case, and the only reasonable version of the murder permitted by the evidence presented, is that he killed her in their Manhattan apartment, folded or disarticulated her body, stuffed it in a duffel bag, smuggled it out of the building and took it to New Jersey. If defendant killed her, therefore, he brought about her death in this jurisdiction.

Defendant contends, without explanation, that it was possible for the jury to have found that, if defendant killed his wife, he did so in New Jersey. The jury was instructed that it was to decide the issue of guilt based solely upon the evidence admitted at trial and was not engage in speculation or guesswork. It is difficult to discern how it might have found the victim was killed in a manner other than that urged by the People and not engage in engage in speculation or guesswork. If the jury had accepted that defendant did not kill his wife until after he left this state, it would have had to find that Ms. Katz was unconscious but still alive after the defendant folded and stuffed her body in a flight bag and drove it the airport.

Even allowing for the possibility that the jury could have accepted such a scenario, it still would have found that New York had jurisdiction over the crime. It was undisputed that defendant and his wife resided in New York. Every incident shedding light on their relationship and his intentions toward his wife occurred in this jurisdiction.

The evidence established that it was in New York that the marriage began to become acrimonious and unravel. It was there that she heard from him that he would harm her if she left him, choked her in 1983, told Edward Doucet that he hated her so much that he could kill her and gave reason to his psychiatrist to send a letter to her to warn her that she was in danger from him. If the issue had been put before the jury, it could only have found that defendant formulated an intent to murder his wife in New York. There was simply no other possibility. For this reason, New York had territorial jurisdiction to prosecute the homicide (*see* People v. Seifert, 113 AD2d 80). As the evidence established that jurisdiction existed pursuant to CPL 20.20 (1)(a), trial counsel were not ineffective in failing to ask that the jury be instructed on the issue (*see* People v. Carvajal, 14 AD3d 165,173).

I reject the argument that defense counsel were ineffective for failing to move for a trial order of dismissal on the ground that there was insufficient evidence of defendant's intent to kill his wife. It would have been pointless to make such a motion, as the record is replete with evidence from which the jury could have inferred, beyond a reasonable doubt, that defendant had the specific intent required by the statute. This evidence, in conjunction with other evidence establishing that he had a motive to kill her, included proof that the defendant and his wife had a turbulent marriage; that he told his friend, Edward Doucet, that he hated his wife so much that he could kill her; that he admitted to Dr. Feis that they had an explosive argument with her the morning of her disappearance; that she had received a letter from his psychiatrist warning her that he had

the potential to do her harm; that he had threatened to kill her if she ever left him and that she intended to tell him the weekend of her disappearance that she was going to leave him; that he had choked her and rendered her unconscious in 1983. Thus, had defendant's trial attorneys moved for a trial order of dismissal on this specific point, they would only have preserved a meritless issue for appellate review. As the Appellate Division noted, "This abundant array of damning circumstantial evidence proves beyond any reasonable doubt that defendant intentionally killed this victim . . . " (Bierenbaum, 301 AD2d at 133).

In a letter dated January 12, 2005, defendant raises an additional claim of ineffectiveness. Conceding that it would have been difficult for trial counsel to have discovered during the trial that the only motion picture made about the Von Bulow case was released in 1990, he nevertheless argues that nothing prevented the attorneys from conducting research on this issue in the five weeks between verdict and sentence. Their failure to do such research, he contends, constituted ineffectiveness of counsel. I find that trial counsel were not ineffective in failing to focus on this relatively minor aspect of the trial in the few weeks between verdict and sentence. It would have been remarkable if the possibility occurred to either of them in those weeks, ten years after the release of the movie, and almost twenty years after the Von Bulow trial, that no movie dealing with the murder was released in 1984 or 1985. [15] Moreover, had trial counsel discovered this fact

[15] Defendant states that appellate counsel conducted two weeks of exhaustive research to confirm this fact. He does not state when it occurred to appellate counsel to investigate the matter.

[* 45]

before sentence, their only option would have been to bring a motion to set aside the verdict pursuant to CPL 330.30, but such a motion would have been denied. Counsel could not have successfully moved under subdivision one of the statute because defendant's claims concerning the movie did not appear on the record (CPL 330.30 [1]). Subdivision one was also foreclosed to them because defendant's contention concerning the movie only cast a portion of Ms. DeCesare's testimony into doubt. It would not have required reversal of the conviction as a matter of law (CPL 330.30 [1]; *see* People v. Carter, 63 NY2d 530, 536; People v. Johnson, 220 AD2d 294). Subdivision two is inapplicable on its face. A motion made pursuant to subdivision three (newly discovered evidence) would also have been denied, as the new evidence merely impeached or contradicted Ms. DeCesare's testimony and would not have changed the outcome of the trial (*see* People v. Salemi, 309 NY 208; People v. Williams, 19 AD3d 228).

Conclusion

I find that the defendant was afforded meaningful representation under the New York State Constitution. The defense was faced with a difficult task. The case against the defendant was not straightforward. As there was no direct proof that defendant murdered his wife, the People relied on many small pieces of circumstantial evidence to prove their case. In building the case against the defendant they wove together the testimony of over thirty witnesses. The combined testimony of these witnesses permitted

the jury to infer that the defendant had a motive and intent to kill his wife, the opportunity to kill her, the capability of doing so, and the means of covering up the crime. The People established that he was the last credible person to have seen her alive. They also established that Ms. Katz was not suicidal that it was not likely that she died at the hands of anyone besides her husband. Lastly, they showed that defendant did not appear to be worried about his wife's disappearance, that he displayed no urgency in finding her and engaged in behavior which seemed designed to hinder the police and allay suspicion. Although the People's evidence was overwhelming as a whole, no one constituent piece of evidence was alone dispositive of guilt. In fact, the opposite was true; no one or two pieces of evidence proved much of anything. It was precisely because the case was so amorphous and built of so many components that it was so difficult to defend.

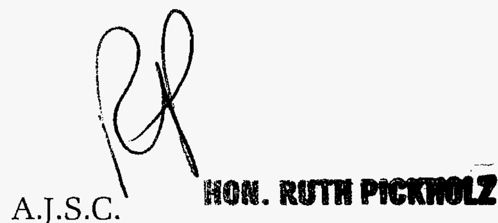
Trial counsel began their defense in advance of trial by moving for discovery and for hearings designed to limit the evidence available to the prosecution at trial. They were at least partially successful in their efforts to preclude such evidence. Trial counsel also effectively represented the defendant during the trial. The defense did not have the option of concentrating on a few key witnesses who formed the lynchpin of the People's case - there were no such witnesses. Instead, Mr. Lewis concentrated on the alternatives open to him. He cross-examined the People's witnesses effectively and attempted to sow doubt in as many places as possible. In his summation he attacked the People's case by concentrating on its individual components, undermining each as best he could. He argued that the memories of the People's witnesses could not be trusted after so many

years and that there was little or no evidence underlying the basic premises upon which the People based their theory of the case. He argued, for example, that there was no evidence underlying their theory that on the weekend in question, events had converged which acted as a flashpoint for the murder. He emphasized that there was no evidence that the defendant was capable of transporting his wife's body from their apartment to an airplane, or that he transported it in fact, loaded it aboard the plane and flew the plane in the direction claimed by the People . He also attempted to divert the jury from the force of the People's over-all case by focusing on individual witnesses and subsidiary issues, in each instance showing how various innocent inferences could be drawn from the evidence. The fact that log book entry for July 7 had been changed proved nothing, he argued; defendant had altered or crossed out many entries in the book. He also utilized the testimony of Joel Davis effectively and argued that just because the prosecutor was able to befuddle Davis on the Witness stand, 15 years after the disappearance, did not mean that he had not seen Ms. Katz in 1985. He was also careful to argue that, even if the jury discounted Davis's testimony, the People's burden did not change. He put forward alternative hypotheses for her disappearance, including the possibility that she was killed by drug dealers in Central Park.

That is not to say that the defense was perfect in every particular. Mistakes were made. But "[t]he Constitution guarantees the accused a fair trial, not necessarily a perfect one. The phrase 'meaningful representation' does not mean 'perfect representation'" (Benevento, 91 NY2d at 712; *internal citations and some internal punctuation omitted*).

The mistakes and misjudgments which trial counsel made were not so egregious and prejudicial that they deprived him of a fair trial (*see* People v. Flores, 84 NY2d 188-189; People v. Hobot, 84 NY2f 1021, 1022).

In view of the fact that the Baldi, "meaningful representation" standard offers a defendant greater protections than the Strickland test, and as I conclude that defendant was afforded meaningful representation under the State Constitution, I find that his attorneys necessarily provided effective representation under the United States Constitution as well (*see* People v. Caban, 5 NY3d 143). Accordingly, defendant's application is denied in its entirety.



A.J.S.C.

Dated: September 6, 2005