SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 9

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY YARBOUGH,

Defendant.

AFFIRMATION IN OPPOSITION TO MOTION TO VACATE THE JUDGMENT

Kings County
Indictment Number
7325/1992

CAMILLE O'HARA GILLESPIE, an attorney admitted to practice in the State of New York and an Assistant District Attorney in the County of Kings, affirms under penalty of perjury that the following is true:

1. I submit this affirmation in response to defendant's motion, dated July 19, 2010, to vacate his judgment of conviction pursuant to Criminal Procedure Law section 440.10. The following statements are made on information and belief, based on the records of the Kings County District Attorney's Office, conversations with Detective Peter McMahon and former Assistant District Attorney Suzanne Mondo, and telephone conversations with employees of the Office of the New York City Medical Examiner and the Property's Clerk's Office of the New York City Police Department.

2. On June 18, 1992, between about 6:30 and 7:00 a.m., defendant and co-defendant Sharrif Wilson returned to the apartment at 2832 West 23rd Street in Brooklyn where defendant lived with his mother, Annie Yarbough, and twelve-year-old

sister, Chavonn Barnes. [1] Defendant and his mother had argued before defendant left the apartment the previous evening. Annie Yarbough awoke when defendant and co-defendant entered the apartment, and she reproached defendant for bringing defendant into the apartment. Annie Yarbough then fell back to sleep. Defendant, aided by co-defendant, repeatedly stabbed Annie Yarbough as she slept in her chair. Defendant and co-defendant then repeatedly stabbed Chavonn Barnes and Chavonn's friend, twelve-year-old Latasha Knox, who had both been asleep in the apartment. After the stabbings, defendant and co-defendant tied cords around the necks of the three victims, strangling them. On the same day, defendant admitted to the police his participation in the slayings. Co-defendant Shariff Wilson also confessed to the police that he had aided in the slayings.

3. For these acts, defendant was charged, under Kings County Indictment Number 7325/92, with Murder in the Second Degree (P.L. 125.25[1]) (three counts).

4. By omnibus motion dated August 21, 1992, defendant's trial counsel, A. Irene Elliott, Esq., sought, inter alia, suppression hearings, preclusion of identification testimony, severance, discovery, and a bill of particulars. See Defendant's Exhibit K.

5. By answer dated September 21, 1992, the prosecutor, former Assistant District Attorney (hereinafter "A.D.A.") Suzanne

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[1] During the course of this case, the Yarbough surname has also been rendered as "Yarborough."

Mondo, responded to defendant's omnibus motion, supplying, inter alia, copies of fourteen DD-5 reports dated June 18, 1992, totaling seventeen pages. See Affirmation of A.D.A. Suzanne Mondo, dated September 21, 1992, appended hereto as People's Exhibit I. Apart from the four-page DD-5 report of Detective DeCarlo, dated June 18, 1992, which was separately mentioned in the People's September 21, 1992 answer, the People's trial files contain fourteen DD-reports dated June 18, 1992, totaling seventeen pages, including the DD-5 report concerning the interview of Major Yarbough. See People's Exhibit II.

6. A joint Dunaway-Huntley-Mapp hearing was conducted on December 17, 1993, and January 7, 1994 (Kreindler, J., at hearing). Detectives Philip Grimaldi and Arthur Williams testified at the hearing. Following the hearing, the cases of defendant and co-defendant were severed for trial.

7. At co-defendant Wilson's trial in January of 1994, the prosecution called as witnesses Clara Knox, Elaine Smith, Major Yarbough, Ron Carrington, Police Officer Ricky Bradford, Detectives Frank Gallipani and Philip Grimaldi, former A.D.A. Peter Gray, and the medical examiner, Dr. Jonathan Arden. Co-defendant presented his mother, Gloria Wilson, as a witness and testified in his own behalf. The prosecution called Dorothy Robinson, an assistant school principal, on rebuttal. On January 19, 1994, the jury found co-defendant guilty of Murder in the

Second Degree (P.L. § 125.25[1]) (three counts) (Kreindler, J., at trial).[2]

8. At defendant's first trial in January of 1994, the prosecution presented as witnesses Clara Knox, Elaine Smith, Major Yarbough, co-defendant Sharrif Wilson, Police Officer Ricky Bradford, Detectives Arthur Williams and Phillip Grimaldi, and the medical examiner, Dr. Jonathan Arden. Defendant presented as witnesses Sandra Vivas, Charnette Loyal, and Dorothy Ferrer, and defendant testified in his own behalf. On January 28, 1994, defendant's first trial ended in a mistrial after the jury was unable to agree on a verdict.[3]

9. At defendant's second trial in February of 1994, the prosecution presented as witnesses Clara Knox, Major Yarbough, Sandra Vivas, Dorothy Ferrer, Elaine Smith, co-defendant Sharif Wilson, Police Officer Richard Bradford, Detective Peter McMahon, Captain James Luongo, and the medical examiner, Dr. Jonathan Arden. Defendant presented Charnette Loyal as a witness, and defendant testified on his own behalf. On February 16, 1994, the

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[2] The transcripts of co-defendant's trial and sentence are available to the Court upon request. The trial evidence is summarized in the People's Appellate Division brief on co-defendant's appeal, appended hereto as People's Exhibit III, at 2-12.

[3] Pages 11 through 613 of the transcript of defendant's mistrial are available to the Court upon request.

jury found defendant guilty of Murder in the Second Degree (P.L. § 125.25[1]) (three counts).[4]

10. On February 23, 1994, co-defendant was sentenced, as a juvenile offender, to three concurrent prison terms of nine years to life (Kreindler, J., at sentence).

11. On March 15, 1994, the court sentenced defendant to three consecutive prison terms of twenty-five years to life for his three murder convictions (Kreindler, J., at trial and sentence).

12. On or about December 29, 1995, defendant perfected his appeal by filing in the Appellate Division, Second Department (hereinafter "Appellate Division"), a brief prepared by his appellate counsel, Joseph A. Zayas, Esq., of the Legal Aid Society. In that brief, defendant raised four claims: (1) that defendant was deprived of his right to a fair trial and his right to confront witnesses against him by the admission, over objection, of co-defendant Wilson's prior consistent videotaped statement, where the defense had not assailed Wilson's testimony as a recent fabrication; (2) that defendant was deprived of his right to be present during a material stage of the trial when, in his absence, the court conducted an extended in-chambers conference regarding the prosecution's application to question a witness about three of defendant's alleged prior bad acts; (3)

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[4] The transcript of defendant's trial is available to the Court upon request. The trial evidence is summarized in the People's Appellate Division brief, appended hereto as People's Exhibit V, at 3-22.

that defendant's right to be present was violated because the record did not reveal that defendant knowingly, intelligently, and voluntarily waived his right to be present at the three bias-related side-bar conferences which were held with prospective jurors during voir dire; and (4) that defendant's sentence to three consecutive prison terms of twenty-five years to life was excessive. See Defendant's Appellate Division Brief, Appellate Division Case No. 94-02676, appended hereto as People's Exhibit IV.

13. On March 25, 1996, the People filed a responding brief in the Appellate Division, answering the claims in defendant's brief. See People's Appellate Division Brief, Appellate Division Case No. 94-02676, appended hereto as People's Exhibit V.

14. On July 29, 1996, by written decision and order, the Appellate Division rejected defendant's claims on appeal, unanimously affirming defendant's judgment of conviction. People v. Yarbough, 229 A.D.2d 605 (2d Dep't 1996).

15. Defendant's application for leave to appeal to the Court of Appeals was denied on December 6, 1996. People v. Yarbough, 89 N.Y.2d 932 (1996) (Smith, J.).

16. On October 5, 1998, by written decision and order, the Appellate Division affirmed co-defendant's judgment of conviction. People v. Wilson, 254 A.D.2d 316 (2d Dep't 1998).

17. In his present motion, defendant contends that his judgment of conviction should be vacated pursuant to Criminal Procedure Law section 440.10(1)(g) because of newly discovered evidence showing that his co-defendant, Sharrif Wilson, recanted

his trial testimony in a letter, dated December 5, 2005, to Sandra Vivas. Although defendant claimed in his motion that he would supply a supporting affidavit from co-defendant Wilson (Defendant's Motion at 29), defendant has not done so. Defendant also contends that his judgment of conviction should be vacated pursuant to Criminal Procedure Law section 440.10(1)(h) because the prosecution withheld from the defense exculpatory documents consisting of three pages of notes that defendant claims are notes made by the medical examiner who went to the scene, Dr. Eckert, and a DD-5 report reflecting an interview of defendant's uncle, Major Yarbough. Defendant further claims that his judgment of conviction should be vacated because his trial counsel was ineffective on various grounds. Defendant also claims that his judgment of conviction should be vacated because defendant is actually innocent. In addition, defendant seeks to have the Court appoint for defendant a private investigator and forensic pathologist. Finally, defendant requests that the Court order DNA testing of all the physical evidence in the case.

18. With respect to his claims of newly discovered evidence, failure to disclose exculpatory evidence, ineffective assistance of trial counsel, and actual innocence, defendant's motion to vacate his judgment of conviction should be denied without a hearing. Defendant's claims are in part procedurally barred and, in any event, unsubstantiated. The People deny defendant's allegations and oppose vacatur of the judgment based on those allegations.

19. With respect to defendant's request for DNA testing of physical evidence, the People oppose defendant's general request for DNA testing of all physical evidence. The People have initiated inquiries of the Office of the New York City Medical Examiner and the Property Clerk's Office of the New York City Police Department as to the availability of ligatures and cloth bindings removed from the bodies of the three victims during the autopsies. These items have not yet been located, and their availability is not known at this time. Should these items become available for possible DNA testing, the People would consent to DNA testing of these items by the Office of the New York City Medical Examiner, unless the Office of the New York City Medical Examiner determines that the age, handling, or condition of these items has rendered them unlikely to provide reliable test results. The People reserve the right to oppose DNA testing of such items if the age, handling, or condition of such items has rendered them unlikely to provide reliable test results. The People oppose DNA testing of any other physical evidence.

WHEREFORE, and for the reasons stated in the accompanying memorandum of law, and except to the extent that the People would consent to testing of certain specified items should they become available, defendant's motion should be denied.

Dated: Brooklyn, New York
November 30, 2010

Camille O'Hara Gillespie
Assistant District Attorney
(718) 250-2490

To: Zachary Margulis-Ohnuma, Esq.
Attorney for Defendant
Law Office of Zachary Margulis-Ohnuma
260 Madison Avenue, 17th Floor
New York, New York 10016

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MEMORANDUM OF LAW

DEFENDANT'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION SHOULD BE SUMMARILY DENIED.

Defendant's claims that his judgment of conviction should be vacated because the prosecution withheld exculpatory evidence, because his trial counsel was ineffective, because of newly discovered evidence that co-defendant Sharrif Wilson recanted his trial testimony implicating defendant, and because defendant is actually innocent of the murders of defendant's mother, his sister, and his sister's friend (Defendant's Motion at 31-54) are in part procedurally barred. In any event, defendant's claims are unsubstantiated or contradicted by the record, and his motion to vacate the judgment should be denied without a hearing.

A. Defendant's Claims That the Prosecution Failed to Disclose Exculpatory Evidence Are Unsubstantiated.

Defendant's claims that the prosecution failed to disclose to the defense three pages of notes contained in a spiral note pad that defendant attributes to the medical investigator at the

scene, Dr. Eckert, and the DD-5 report of a statement made by Major Yarbough to Detective Williams on the date of the crime (Defendant's Motion at 32-36) are completely unsubstantiated.

Under Brady v. Maryland, 373 U.S. 83 (1963), the prosecution must disclose evidence in its possession that is both favorable to the accused and material either to guilt or punishment. Impeachment evidence as well as exculpatory evidence falls within the Brady rule. United States v. Bagley, 473 U.S. 667, 676 (1985); see Giglio v. United States, 405 U.S. 150 (1972). The Brady doctrine does not require prosecutors to supply a defendant with evidence when the defendant knew of, or should reasonably have known of, the evidence and its exculpatory nature. People v. Doshi, 93 N.Y.2d 499, 506 (1999).

Under Criminal Procedure Law section 440.30(4)(b), a court may deny a motion to vacate the judgment without a hearing if:

> [t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all of the essential facts.

See People v. Ozuna, 7 N.Y.3d 913, 915 (2006) (upholding summary denial of C.P.L. § 440.10 claim, where defendant's motion papers did not contain sufficient sworn allegations of fact to substantiate his claim of ineffective assistance of counsel based on failure to investigate or call father as witness); People v. Toal, 260 A.D.2d 512 (2d Dep't 1999); People v. LaPella, 185 A.D.2d 861, 862 (2d Dep't 1992) (upholding summary denial of C.P.L. § 440.10 motion, where supporting affidavit set forth only conclusory and unsubstantiated allegations).

In addition, under Criminal Procedure Law section 440.30(4)(d), a court may deny a motion to vacate the judgment without a hearing if:

> [a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

See People v. Fields, 287 A.D.2d 577 (2d Dep't 2001).

1. The Three Pages of Notes

Here, defendant claims that the three pages of notes appended to his motion as Defendant's Exhibit M are undisclosed notes written by the medical investigator, Dr. Eckert, who examined the bodies of the three victims at the scene (Defendant's Motion at 29-30). The notes bear no signature of Dr. Eckert, and defendant has supplied no affidavit of Dr. Eckert, attesting that these are his notes. Nor has defendant supplied any affirmation from his trial counsel, Irene Elliott, Esq., attesting that she did not receive such notes prior to trial. Defendant's motion merely asserts in conclusory fashion that it was one of two documents that "appear to have been withheld" (Defendant's Motion at 29).

Although defendant's counsel on the present motion claims that he spoke with Ms. Elliott and that she stated that she had destroyed her file in 2000 and had no recollection of receiving such notes (Defendant's Brief at 30), that is not sufficient to show that the notes were not in fact disclosed or to create an issue of fact as to whether the notes were disclosed. It is

hardly surprising that defendant's trial counsel, who no longer had a file to consult, would not recall receiving some notes relating to a trial that took place more than fifteen years earlier. However, defendant offered only the uncorroborated recollection of defendant's trial attorney with respect to those notes. At the same time, defendant concedes in his motion papers that the recollection of defendant's trial counsel was in error with respect to the identity of the medical examiner who testified at defendant's second trial (Defendant's Motion at 31 & n.31), as the transcripts show that the same medical examiner (Dr. Arden) testified at the trial that ended in a mistrial and at the trial that ended with defendant's conviction (Arden: M. 271-371, T. 658-738).[5]

In light of defendant's failure to provide any affirmation from defendant's trial counsel, and in light of the conceded inability of defendant's trial counsel to recall accurately information relating to defendant's trial, defendant's papers on this motion are insufficient to create any issue of fact with respect to disclosure of those notes and absolutely no reliable basis for this Court to conclude that defense counsel did not in fact have a copy of the notes contained in Detective McMahon's

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[5] Numbers in parentheses preceded by "T." refer to pages of the trial transcript, dated February 7, 1994, et seq.; numbers preceded by "H." refer to pages of the suppression hearing transcript, dated December 17, 1993 and January 7, 1994; numbers preceded by "W." refer to pages of the transcript of co-defendant Wilson's trial in January of 1994; numbers preceded by "M." refer to pages of the (incomplete) transcript of defendant's mistrial in January 1994; numbers preceded by "WS." refer to pages of the transcript of co-defendant's sentencing, dated February 23, 1994.

notepad prior to trial. "Mere conclusory allegations of prosecutorial misconduct are alone insufficient to require a trial court to conduct an evidentiary hearing for the purpose of resolving those accusations." People v. Brown, 56 N.Y.2d 242, 246-47 (1982). Indeed, "[t]o hold otherwise and require a hearing to investigate every speculative and unsupported allegation of prosecutorial impropriety would unquestionably impose an undue burden upon both the District Attorney and the judiciary." Id. at 247.

Furthermore, defendant's claim with respect to the notes reflected in Defendant's Exhibit M is meritless. Contrary to defendant's claim (Defendant's Motion at 29-30), the notes in Defendant's Exhibit M were not written by Dr. Eckert. The notes were written by Detective Peter McMahon, who testified at defendant's trial. See Affidavit of Det. Peter McMahon, dated Nov. 5, 2010, appended hereto as People's Exhibit VI.

In addition, the record shows that the notepad notes of Detective McMahon were provided to defendant at trial. First, the trial transcript of February 7, 1994, shows that before defendant's second trial started, the prosecutor stated that she was turning over what she referred to as Detective McMahon's "memo book entry," although she believed that defense counsel "already has it" (T. 15). Second, during Detective McMahon's testimony, defendant's trial counsel specifically asked Detective McMahon about his memo book or notepad, and the notepad itself was provided to defendant's trial counsel for examination (McMahon: T. 529-30). As the attached affidavit of Detective

McMahon shows, the notepad mentioned in the trial transcript is the same notepad shown in People's Exhibit IV as an attachment to Detective McMahon's affidavit. Therefore, defendant's claim that the notes contained in Defendant's Exhibit M were not disclosed to the defense is meritless.

Indeed, after examining Detective McMahon's notepad at trial (T. 529-31), defendant's trial counsel never claimed that she had not received a copy of its contents. Nor did defendant's trial counsel claim that she was unfamiliar with the contents of the notepad. To the contrary, it appears that the purpose of defendant's trial counsel in asking to examine the original notepad was to confirm that she had already received the contents of the notepad.

Furthermore, the defense was well aware before trial that Dr. Eckert had examined the bodies at the scene and recorded his observations. During defendant's first trial that ended in a mistrial, Dr. Arden mentioned that he had in his possession while testifying forms written by "a doctor who serves as one of our investigators," and worked on a "per diem" basis and that one of the forms indicated "the results of his cursory examination of the body at the scene" (Arden: M. 343-44). Defendant's trial counsel then asked, "That would be Dr. Eckert?" and Dr. Arden replied, "Yes" (Arden: M. 343). Defendant's trial counsel then questioned Dr. Arden about whether the body temperatures were taken at the scene, and Dr. Arden replied that "based upon Dr. Eckert's report from the scene, the body temperatures were not taken" (Arden: M. 345). Defendant's trial counsel questioned Dr.

Arden about what Dr. Eckert's report reflected concerning topics such as rigor mortis and livor mortis, eliciting that Dr. Eckert reported for Annie Yarbough that there was "full rigor at the scene" (Arden: M. 345-46), for Chavonn Barnes that there was "complete rigor dash fixed" (Arden: M. 349), and for Latasha Knox that there was "fixed" rigor mortis in the mandible and extremities, which Dr. Arden interpreted as meaning "full rigor" (Arden: M. 349).

Defendant's trial counsel further asked how long it took to attain full rigor, and Dr. Arden answered that rigor mortis would "become evident in a few hours," that it was "likely to become very prominent and very stiff in roughly speaking four or five or six hours," and that it was "likely to reach it's [sic] maximum somewhere between six and 12 hours, possibly as much as 18 hours" (Arden: M. 347). Dr. Arden also noted that "anything that adds heat will to the situation will speed up the process," that "in a hot environment or wearing heavy clothes, rigor mortis may appear in three or four hours" and that for someone "who is cold and laying on a cold tile floor, it may take much, much longer for it to occur" (Arden: M. 348).

At defendant's second trial, Dr. Arden testified again about the condition of the bodies and again referred specifically to Dr. Eckert's reports. Dr. Arden testified that there were three reports generated by Dr. Eckert at the scene, one for each body (Arden: T. 674-75). Dr. Arden had all three of those reports with him while he testified (Arden: T. 675-76). According to Dr. Eckert's report, Dr. Eckert examined the bodies at the scene at

10:25 a.m. (Arden: T. 675). Dr. Eckert made notations concerning the ligatures, the clothing, the position of the bodies, and the condition of the bodies, including rigor mortis (Arden: T. 676). With respect to Annie Yarbough, Dr. Eckert's report described the body as cool to the touch, with rigor mortis fixed in the mandible and extremities (Arden: T. 676). With respect to Chavonn Barnes, Dr. Eckert's report noted there was full, fixed rigor mortis (Arden: T. 676). With respect to Latasha Knox, Dr. Eckert's report indicated full, fixed rigor mortis (Arden: T. 676). Dr. Arden further testified that rigor mortis will generally be well developed "in the neighborhood of three to five hours after death" (Arden: T. 678-79). When asked whether he would expect to find full rigor mortis or complete rigor mortis in accordance with Dr. Eckert's examination of the victims at 10:25 a.m. if the victims met their death between 6:30 and 7:00 a.m. on June 18, 1992, Dr. Arden testified that he "would expect to find well developed rigor mortis, which, depending upon the individual observer, might be described as full or fixed" (Arden: T. 679).

Dr. Arden was also asked on cross-examination whether "based upon the state of rigor, body temperatures, and everything you have noted in these cases, were you able to establish the actual time of death of these victims?" (Arden: T. 680). Dr. Arden responded, "No, it is not possible to establish an actual time of death based on the post-mortem changes. At the very best we may be able to arrive at an estimate of the time of death, but we never ever establish the time of death" (Arden: T. 680).

Defendant's trial counsel had requested before trial that she receive all of the medical examiner materials relating to the autopsies, see Affirmation of A. Irene Elliott (Defendant's Exhibit K) at 10, including the medical examiner's tapes and slides of the autopsies (H. 217-18), which were turned over to defendant's trial counsel during the course of the mistrial and which defendant's trial counsel acknowledged receiving (M. 371, 385). At the hearing, defendant's trial counsel also asked for and received assurances from the court that she would be provided with a copy of the testimony from co-defendant's trial (H. 216), and during defendant's mistrial, defendant's trial counsel indicated that she had the transcript of co-defendant's trial and that she had reviewed the medical examiner's testimony at that trial (M. 243, 376). Her cross-examination of Dr. Arden at the second trial covered topics such as post-mortem changes, including livor mortis, and the timing of the autopsies (Arden: T. 687-90) and whether Dr. Arden recalled speaking with Detective McMahon on the day of Annie Yarbough's autopsy (Arden: T. 686). It is plain that defendant's trial counsel was fully familiar with the reports actually made by Dr. Eckert that Dr. Arden expressly mentioned and examined while testifying on the stand.

Finally, although the notes by Detective McMahon were disclosed to the defense, even if they had not been disclosed, defendant would not have sustained any prejudice from such non-disclosure. Although defendant asserts in his motion that, even without such notes, the defense "could easily have demonstrated that the murders occurred several hours before 6:30 a.m."

(Defendant's Motion at 38) and that if called as a witness, Dr. Eckert "would have testified that the deaths took place before 2:30 a.m." (Defendant's Motion at 39), defendant fails to attach an affidavit from Dr. Eckert supporting these assertions and fails to explain why he has not done so. Nor has defendant provided an affidavit from an expert in forensic pathology to support his assertions or to contradict the testimony of the medical examiner, Dr. Arden, an expert in forensic pathology who had personally performed over two thousand autopsies at the time of trial (Arden: T. 558-59). In light of these omissions, and in light of the trial testimony of Dr. Arden that the time of death could not be determined and that rigor mortis could appear as early as three or four hours after death (Arden: 678-80), defendant has not shown that he was prejudiced by any failure to disclose the detective's notes in Defendant's Exhibit M. See People v. DeOliveira, 223 A.D.2d 766, 768-69 (3d Dep't 1996) (availability of notes of investigator taken during autopsy to impeach pathologist's trial testimony about time of death would not have made any difference in verdict).

2. The DD-5 Report Relating to Major Yarbough

Defendant's claim that the DD-5 report relating to the statement of Major Yarbough, attached to defendant's motion as Defendant's Exhibit D, was not disclosed to the defense (Defendant's Motion at 34-36) is likewise unsubstantiated. Defendant merely asserts in conclusory terms that the prosecution "suppressed" or "held back" this document (Defendant's Motion at 11, 34). Defendant fails to provide any evidence whatsoever to

support his claim that the DD-5 report relating to Major Yarbough was not supplied to the defense before or during trial.

Furthermore, the DD-5 report relating to Major Yarbough was not suppressed by the prosecution. The prosecution's answer, dated September 21, 1992, to defendant's discovery motion, dated August 21, 1992, reflects that the prosecution provided to the defense with that answer numerous police reports, including, inter alia, fourteen DD-5 reports ("Complaint Follow Up reports"), dated June 18, 1992, totaling seventeen pages, in addition to the separately-mentioned four-page DD-5 report of Detective DeCarlo, dated June 18, 1992, and the separately-mentioned Crime Scene Unit Report, also dated June 18, 1992. See Affirmation of Suzanne Mondo, dated September 21, 1992, attached hereto as People's Exhibit I. It is clear from the answer that the DD-5 reports dated June 18, 1992, that were mentioned in the answer were provided to the defense. Not counting the separately-mentioned Crime Scene Unit report, dated June 18, 1992, which is not a DD-5 report, and the separately-mentioned four-page DD-5 report of Detective DeCarlo, there are precisely fourteen DD-5 reports dated June 18, 1992, totaling seventeen pages, in the People's trial files, including the June 18, 1992, DD-5 report relating to the statement of Major Yarbough (People's Exhibit II). Thus, the DD-5 report relating to Major Yarbough must have been provided as one of the DD-5 reports disclosed to defendant during discovery before trial.

In addition, it is clear that the DD-5 reports were available at the joint suppression hearing on January 7, 1994.

While defendant's trial counsel was cross-examining Detective Grimaldi about what Ron Carrington had told him, Detective Grimaldi asked the prosecutor for "a copy of the case folder, copies of the DD-5's," which were then handed to him to read (Grimaldi: H. 69). Later on, Detective Williams, who authored the DD-5 report relating to Major Yarbough's statement (Defendant's Exhibit D), expressly testified in response to questioning by defendant's trial counsel that he had interviewed "Anthony's uncle Sonny" (Williams: H. 119).

Detective Grimaldi also mentioned at defendant's mistrial that Major Yarbough had been interviewed in connection with the case (Grimaldi: M. 227). During the course of defendant's mistrial, defendant's trial counsel remarked, "I have my police reports" (M. 376). In light of this information on the record prior to defendant's second trial, if defendant's trial counsel had not already received Detective Williams's DD-5 report, which is the only record of the interview of Major Yarbough, she would have requested it.

Defendant's argument that the prosecution knowingly made a false argument in summation that defendant "could not account for his whereabouts for the half-hour between 6:30, when Dorothy Ferrer saw him and 7, when he reported the murders" and that "[t]he People knew this argument was false when they made it because they were in possession of the DD-5 that showed, in fact, [defendant] reported the murders 15 minutes after Ms. Ferrer saw him with Sharrif outside the apartment (Defendant's Motion at 35) is completely meritless. There is no proof that the prosecutor

knowingly procured false testimony. See People v. Nilsen, 182 A.D.2d 715 (2d Dep't 1992). Major Yarbough testified at co-defendant's trial that he was waiting with his son at the bus stop a block from the Yarbough apartment at approximately 7:00 a.m. on June 18, 1994, that the bus was late so he went to the corner to find out the time because he did not have a watch, that he was returning to wait at the stop when defendant came and told him that everybody was dead, that they waited for about fifteen minutes for the bus to come, that he walked to defendant's apartment a block away and then went across the hall to call the police (M. Yarbough: W. 163-66, 168-69).

Major Yarbough testified at defendant's mistrial that on June 18, 1992, he took his six-year-old son to the bus stop to wait for the bus, which was due to arrive at 7:00 a.m. (M. Yarbough: M. 254-55). Major Yarbough testified that he would take his son to the bus "a little before seven or seven" and that that morning, while he and his son were waiting for the bus, defendant "came after" (M. Yarbough: M. 255). Major Yarbough testified that it was "about seven" when defendant approached him and told him that everybody was dead, and that defendant waited with him about fifteen minutes at the bus stop (M. Yarbough: M. 256, 262). The bus was late (M. Yarbough: M. 262). After the bus came, Major Yarbough went with defendant to defendant's apartment, about a block away (M. Yarbough: M. 256-57). When Major Yarbough opened the door, he "saw the girl laying on the couch" (M. Yarbough: M. 257, 264). He then went across the hall

to the neighbor's apartment with defendant, where they called the police (M. Yarbough: M. 258-60).

At defendant's subsequent trial, Major Yarbough testified that after defendant approached him at the bus stop and told him that everybody was dead, he had to wait about fifteen minutes for the bus to come for his son, until about 7:15 a.m. (M. Yarbough: T. 317-18). He also testified that he only looked in at the door of the Yarbough apartment before going immediately to the neighbor's apartment to call the police (M. Yarbough: 318, 324).

Thus, defendant's suggestion that the prosecution presented a false argument concerning the opportunity defendant had to commit the murders is baseless. The DD-5 report was not sworn testimony and does not mean that Major Yarbough testified falsely at trial about the time he saw defendant. Major Yarbough's trial testimony about the time he encountered defendant and waited with defendant for the bus to come dovetails with the time (7:20 a.m.) that the first police officer to arrive received a call to respond to the Yarbough apartment (Bradford: T. 202).

Furthermore, Major Yarbough testified at co-defendant's trial and defendant's trial that the school bus was late and that he had just gone to the corner to check the time when he encountered defendant (M. Yarbough: W. 164, T. 323). The school bus was due to arrive at 7:00 a.m. (M. Yarbough: M. 255). If defendant had approached his uncle at 6:45 a.m., it would have been fifteen minutes before the school bus was due, and the bus would not have been late at that time. In addition, if defendant had approached his uncle at 6:45 a.m., defendant would have been

waiting with his uncle for nearly thirty minutes, not for fifteen minutes, as the uncle consistently testified. Moreover, at the mistrial, when defendant was asked if he had run downstairs and run into his uncle by 7:00 a.m., defendant himself conceded that it was "[a]bout that time" (A. Yarbough: T. 567). Thus, the notation in the DD-5 report of the time that defendant approached Major Yarbough as 6:45 a.m. appears to have been in error, and there is no substance to defendant's argument that the prosecutor made knowingly made false arguments at trial about the time of defendant's encounter with his uncle.

Questioning Major Yarbough expressly about the 6:45 a.m. time reported in the DD-5 report prepared by Detective Williams would not likely have led to significant impeachment of his testimony or a more favorable result for defendant at trial. Major Yarbough was not wearing a watch when defendant approached him (M. Yarbough: W. 164, T. 323), and there is no indication that Major Yarbough verified the time stated in the DD-5 report (6:45 a.m.) as the time when defendant first approached him at the bus stop. The statement in the DD-5 report was consistent with Major Yarbough's testimony in so far as it reflected that the bus was supposed to arrive at 7:00 a.m. and that defendant waited with his uncle for a period of about fifteen minutes, and it is easy to understand how a statement about waiting with defendant for the bus for fifteen minutes could result in a misunderstanding or miscalculation by the detective of the time when defendant first encountered his uncle that morning,

particularly as the bus was running late (M. Yarbough: W. 164, T. 323).

In any event, the murders could have taken place between approximately 6:30 and 6:45 a.m., even if defendant approached Major Yarbough before 7:00 a.m. The evidence showed that the victims were attacked while they slept, the stabbings took only a matter of minutes, and that defendant and co-defendant worked together to move the bodies around and make it look like the killings had been committed "like it was a real murder" (S. Wilson: T. 389-92). Co-defendant Wilson testified at defendant's trial that the stabbing of each victim took about a minute and that moving the bodies took "[t]en seconds, the most (S. Wilson: T. 391-92). The cords tied around the victims were cut from appliances that were at hand inside the apartment (S. Wilson: T. 389, 392). Thus, even if defendant had established that the DD-5 report was undisclosed and that he met his uncle at 6:45 a.m., that would not have affected the outcome of the trial, and defendant was not prejudiced by any such non-disclosure.

Under these circumstances, defendant's unsubstantiated claims that the prosecution withheld documents to which defendant was entitled under Brady are completely without merit and should be summarily denied.[6]

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[6] To the extent that defendant suggests that the prosecution failed to disclose a cooperation agreement between co-defendant Wilson and the prosecution after Wilson's conviction (Defendant's Motion at 24 n.7), defendant's claim is likewise unsubstantiated. Defendant's counsel on his present motion merely asserts that "[a]s far as I know this agreement was not disclosed" (Defendant's Motion at 24 n.7) and fails to offer any evidence

B. Defendant's Claim That His Trial Counsel Was Ineffective Is Mostly Procedurally Barred. In Any Event, the Claim Is Meritless.

Criminal Procedure Law section 440.10(2) provides, in pertinent part, that a motion to vacate the judgment must be denied when:

> (c) [a]though sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

The purpose of Criminal Procedure Law section 440.10(2) is to prevent Criminal Procedure Law section 440.10 from being employed as a substitute for direct appeal when a defendant is in a position to raise an issue on appeal. See People v. Cooks, 67 N.Y.2d 100, 103 (1986); People v. Jackson, 266 A.D.2d 163, 163 (1st Dep't 1999) ("A C.P.L. 440.10 motion may not be used as a

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whatsoever in support of that assertion. Co-defendant Wilson testified at defendant's mistrial in January of 1994 that he was testifying pursuant to a cooperation agreement whereby he expected to receive favorable treatment at sentencing on his own three murder convictions (Wilson: M. 99-100, 117), and therefore, the record shows that the defense was aware of the cooperation agreement prior to defendant's trial in February of 1994. The prosecutor likewise stated on the record at co-defendant's sentencing on February 24, 1994, that the verbal agreement was entered into after defendant had been convicted of the triple homicide and that under the agreement, if defendant cooperated and testified truthfully at defendant's trial, she would recommend concurrent prison terms of nine years to life (WS. 3).

device to take a belated appeal on an issue that appears on the face of the record"); People v. Donovon, 107 A.D.2d 433, 443 (2d Dep't 1985).

In his claim that his trial counsel was ineffective (Defendant's Motion at 36-51), virtually all of the grounds on which defendant relies are matters of record.

Any failure of defense counsel to argue at trial that the murders occurred before 6:30 a.m. (Defendant's Motion at 38-39) is a matter of record reflected in the trial transcript. Similarly, defendant's contentions that defense counsel failed to point out inconsistent statements by co-defendant Wilson (Defendant's Motion at 39-42) and failed to object to admission of a statement for which no notice pursuant to Criminal Procedure Law section 710.30 was given (Defendant's Motion at 42-44) are all based on matters of record. Likewise, defendant's claim that defendant's trial counsel failed to object to the prosecutor's questioning of Sandra Vivas (Defendant's Motion at 46-49) and his claim that trial counsel failed to summarize adequately the evidence at trial (Defendant's Motion at 49-51) depend entirely on the trial record.

Because these contentions rest on matters of record, defendant could have raised these grounds in a claim of ineffective trial counsel on appeal. However, defendant did not raise such a claim on appeal. See Defendant's Appellate Division Brief, attached as People's Exhibit IV. Therefore, these grounds are mandatorily barred and cannot serve as a basis for the relief defendant requests. See C.P.L. § 440.10(2)(c); People v.

Cuadrado, 9 N.Y.3d 362 (2007); People v. Satterfield, 66 N.Y.2d 796 (1985); People v. Maldonado, 34 A.D.3d 497, 498 (2d Dep't 2006) (where record presented sufficient facts on which defendant could have raised on appeal claims that defense counsel was ineffective, that court lacked jurisdiction, and that there was prosecutorial misconduct before grand jury, claims were not properly raised in motion to vacate judgment); People v. Broxton, 34 A.D.3d 491 (2d Dep't 2006); People v. Cochrane, 27 A.D.3d 659 (2d Dep't 2006) (where claim of ineffective assistance of counsel was based on matters of record, summary denial of claim was mandated), cert. denied, 127 S. Ct. 436 (2006); People v. Jossiah, 2 A.D.3d 877 (2d Dep't 2003) (same).

"There are obvious good reasons for the Legislature's choice to require that . . . defects that can be raised on direct appeal be raised in that way or not at all." Cuadrado, 9 N.Y.3d at 365. Indeed, "a less restrictive rule would be an invitation to abuse." Id.

Furthermore, the People dispute defendant's allegations of his trial counsel's ineffectiveness, which are meritless and would not warrant a hearing even if they were not mandatorily barred. Defendant has not made a threshold showing that nonrecord facts are material and would entitle him to relief. See Satterfield, 66 N.Y.2d at 799 (emphasis added).

Under Criminal Procedure Law section 440.30(4)(b), a court may deny a motion to vacate the judgment without a hearing if:

> [t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating

> or tending to substantiate all of the essential facts.

See People v. Ozuna, 7 N.Y.3d 913, 915 (2006) (upholding summary denial of C.P.L. § 440.10 claim, where defendant's motion papers did not contain sufficient sworn allegations of fact to substantiate his claim of ineffective assistance of counsel based on failure to investigate or call father as witness); People v. Toal, 260 A.D.2d 512 (2d Dep't 1999); People v. LaPella, 185 A.D.2d 861, 862 (2d Dep't 1992) (upholding summary denial of C.P.L. § 440.10 motion, where supporting affidavit set forth only conclusory and unsubstantiated allegations).

In addition, under Criminal Procedure Law section 440.30(4)(d), a court may deny a motion to vacate the judgment without a hearing if:

> [a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

See People v. Fields, 287 A.D.2d 577 (2d Dep't 2001) (summary denial of C.P.L. § 440.10 motion was proper, notwithstanding affidavit of co-defendant in support of defendant's motion); Toal, 260 A.D.2d at 512; People v. Risalek, 172 A.D.2d 870, 871 (3d Dep't 1992) (motion to vacate judgment properly denied without hearing, where claims of coercion, fraud, and ineffective assistance of counsel were contradicted by record of plea or unsupported by other evidence); see also C.P.L. § 440.30(4)(c)

(motion may be denied, where allegation essential to motion is conclusively refuted by unquestionable documentary proof).

Under the New York State Constitution, a defendant's constitutional right to the effective assistance of counsel is satisfied when, under the totality of the circumstances existing at the time of the representation, counsel provided the defendant with "meaningful representation." People v. Stultz, 2 N.Y.3d 277, 283 (2004); People v. Benevento, 91 N.Y.2d 708, 712 (1998); Satterfield, 66 N.Y.2d at 798-99; People v. Baldi, 54 N.Y.2d 137, 146-47 (1981). The phrase meaningful representation does not mean "perfect representation." People v. Ford, 86 N.Y.2d 397, 404 (1995) (citing People v. Modica, 64 N.Y.2d 828, 829 [1985]).

Similarly, under the Federal Constitution, a defendant is merely entitled to "reasonably effective assistance," which, in light of all the circumstances, does not fall "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 687, 690 (1984).

In the absence of a showing by the defendant that an omission by his counsel lacked any strategic or legitimate explanation, it is presumed that his counsel acted in a competent manner. See Strickland, 466 U.S. at 689-90; People v. Rivera, 71 N.Y.2d 705, 709 (1988). Furthermore, under state and federal constitutional law, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that he was prejudiced by the performance of his counsel. Strickland, 466 U.S. at 694; see Stultz, 2 N.Y.3d at 283-84; Benevento, 91 N.Y.2d at 713. Under the Strickland standard, a defendant must

demonstrate that, but for the allegedly deficient performance of counsel, the outcome of the proceedings would have been different. See People v. Cuesta, 177 A.D.2d 639, 641 (2d Dep't 1991); People v. Sullivan, 153 A.D.2d 223, 229 (2d Dep't 1990); cf. Benevento, 91 N.Y.2d at 713 (under New York Constitution, question is whether attorney's conduct constituted egregious and prejudicial error such that defendant did not receive fair trial).

In reviewing claims of ineffective assistance of counsel, care must be taken to avoid confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis. Satterfield, 66 N.Y.2d at 798; Baldi, 54 N.Y.2d at 146.

Defendant's claim of ineffective trial counsel is both unsubstantiated and contradicted by the record. See C.P.L. § 440.30(4)(b), (d). The record shows that defendant's trial counsel, A. Irene Elliott, Esq., rendered competent, meaningful representation to defendant. By omnibus motion dated August 21, 1992, defendant's trial counsel engaged in pretrial discovery and moved to inspect the grand jury minutes and to suppress evidence. See Affirmation of A. Irene Elliott, dated August 21, 1992 (Defendant's Exhibit K). Defendant was granted a Dunaway-Huntley-Mapp hearing, and at the hearing, defendant's trial counsel thoroughly cross-examined the witnesses, Detectives Grimaldi and Williams, who were also cross-examined by co-defendant's counsel. At the conclusion of the hearing,

defendant's counsel repeatedly pressed arguments for suppression of the evidence (H. 165-67, 204-07, 209-10, 212-14).

The record shows that defendant's trial counsel investigated the case before trial. The testimony of Dorothy Ferrer, who lived in the same building as defendant, indicates that defendant's trial counsel had visited the building where the murders took place and had begun investigating and speaking to potential defense witnesses very early in the case (Ferrer: M. 478-80). Defendant's trial counsel also vigorously pursued materials relating to the medical examiner's testimony, including the autopsy tapes and slides (H. 216-17; M. 371, 385).

At defendant's first trial, defendant's trial counsel made an opening statement, questioned the prosecution witnesses at length, and presented defense witnesses Sandra Vivas, Dorothy Ferrer, and Charnette Loyal. Defendant's trial counsel also presented defendant, who had no prior criminal convictions, as a witness in his own behalf. The efforts of defendant's trial counsel resulted in a hung jury and a mistrial.

During the second trial, defendant's trial counsel gave an opening statement, made cogent objections, and again vigorously cross-examined the prosecution's witnesses. Included among the witnesses that the prosecution called at the second trial were two witnesses, Vivas and Ferrer, whom defendant's trial counsel had presented at the first trial. Defendant's trial counsel again presented Charnette Loyal as a defense witness. Defendant's counsel also presented defendant as a witness in his own behalf. On her summation, trial counsel argued forcefully

that co-defendant Wilson had repeatedly maintained his innocence up until the time of defendant's trial and referred to co-defendant's testimony at his own trial (T. 976, 993). Defense counsel further argued that the accounts of the crime in co-defendant's videotaped statement and in co-defendant's testimony at defendant's trial defied credulity, indicated that the police had suggested details of the crime to co-defendant, and did not jibe with known facts (T. 979-81).

Defense counsel called the jury's attention to the fact that co-defendant had been offered and refused a very favorable plea deal and that even after his conviction, co-defendant had denied involvement in the crimes in an interview for his pre-sentence report (T. 981-82). Defendant's trial counsel argued that defendant's mother was not upset by his homosexuality and his prior relationship with a live-in lover, that her scolding of her teenaged son for not cleaning up was not abnormal, and that her limited prior interaction with co-defendant did not provide a credible motive for the murders (T. 976, 983-85). Defense counsel also emphasized a lack of evidence in the case, noting that there was no blood on the steak knives recovered, that the steak knives were too dull to have cut the wires, that the prosecution did not claim that the recovered steak knives were the weapons used, that the prosecution failed to present key detectives involved in taking the statements, and that the medical examiner could not say when the victims died (T. 986-87, 990, 995-96). Defense counsel reminded the jury that Charnette Loyal had testified about seeing a man with a knife who had

threatened to kill Annie Yarbough and argued that the killings could have been committed by such a person in retaliation for Annie Yarbough's failing to supply him with drugs (T. 989, 1000-02). Defense counsel also emphasized that none of the neighbors or family members who lived around defendant testified that he had a reputation for violence (T. 996-97).

Defendant's claim that his trial counsel was ineffective for failing to argue that the murders occurred before 6:30 a.m. (Defendant's Motion at 38-39) is unfounded. Defendant has not supplied any proof that defense counsel did not consult any investigator or expert in connection with the case, but even more significantly, defendant has adduced no proof whatsoever that the murders in fact took place before 6:30 a.m. Defendant's argument rests on sheer speculation about notes about rigor mortis written by Detective McMahon. See People's Exhibit VI. Although defendant claims that the defense "could easily have demonstrated that the murders occurred several hours before 6:30 a.m." (Defendant's Motion at 38) and that if called as a witness, Dr. Eckert "would have testified that the deaths took place before 2:30 a.m." (Defendant's Motion at 39), defendant fails to attach an affidavit from Dr. Eckert or anyone else supporting defendant's assertions that the murders in fact took place before 6:30 a.m. See People v. Spencer, 226 A.D.2d 160 (1st Dep't 1996) (claim of ineffective assistance of counsel was properly denied, where defendant made no showing, other than speculation, that further interviews with defendant or seeking appointment of investigator would have had any effect on outcome of trial).

The book excerpt about rigor mortis from Gerbeth, Practical Homicide Investigation, (3d ed.), attached to defendant's motion (Defendant's Exhibit F), is not evidence that the murders in this case took place before 6:30 a.m. The book appears to be a practical guide, not a scientific text. Furthermore, while the book excerpt states that rigor mortis "is complete in 8 to 12 hours after death" (Defendant's Exhibit 216), it also cautions that "this factor [rigor mortis] is the poorest of the gauges used in estimating the time of death because of the many variables involved" (Defendant's Exhibit F at 217).

By contrast, the testimony of the medical examiner, Dr. Arden, a court-acknowledged expert in forensic pathology who had performed well over two thousand autopsies in addition to the autopsies in this case, indicated that rigor mortis can become well-developed in as little as three hours or as much as eighteen hours after death, depending on the temperature and other variables (Arden: M. 273-74, 348-50, T. 558-59, 678-79). That range is consistent with the observations of Dr. Eckert concerning rigor mortis in the three bodies at the scene at 10:25 a.m., as reflected in Dr. Eckert's own reports (Arden: T. 675-79). However, Dr. Arden also made clear that the time of death cannot be determined based on post-mortem changes to the body (Arden: M. 369, T. 680).

Because defendant had not shown any evidence that the murders in fact took place before 6:30 a.m., his claim that his trial counsel was ineffective for not producing such evidence should be rejected.

Defendant's procedurally-barred claim that his counsel was ineffective for failing to point out inconsistent statements and omissions by co-defendant Wilson and failing to show that Wilson had maintained his innocence (Defendant's Motion at 39-42) is equally meritless. Defense counsel cross-examined co-defendant Wilson carefully and made use of Wilson's prior statements, including his prior testimony at his own trial, in order to impeach Wilson (Wilson: T. 412-15, 423-24, 424A-D). However, the defense strategy was to show that Wilson, like defendant, was young and inexperienced and had denied participation in the crimes before being intimidated by the police into making admissions to the crime that were not true and, in Wilson's case, lured into a favorable cooperation agreement. Therefore, it would not have been to defendant's advantage to impeach Wilson indiscriminately, and defense counsel reasonably pursued questioning designed to show that co-defendant's account of the crime was so hazy, inaccurate, or unbelievable that the jury would be persuaded that neither co-defendant nor defendant had truthfully confessed to participating in the murders.

Indeed, defendant fails to show that defense counsel omitted any significant line of cross-examination that would have resulted in a more favorable outcome to defendant. See People v. Ennis, 11 N.Y.3d 403, 414 (2008) (rejecting claim that defense counsel was ineffective for failing to raise Brady argument, where undisclosed evidence was inadmissible at trial and thus not material), cert. denied, 129 S. Ct. 2383 (2009).

Contrary to defendant's suggestion (Defendant's Motion at 39-40), that defendant's trial counsel did not question Wilson about Wilson's denial of involvement to a probation officer, contained in Wilson's presentence report, which the court read out to the parties on the record during defendant's trial (T. 354-54), does not mean that defendant's trial counsel was ineffective. By the time that defendant's trial counsel started cross-examination of co-defendant, the prosecution had already elicited on co-defendant's direct examination that co-defendant had denied his involvement in the crime to the probation officer who had interviewed him the week before (S. Wilson: T. 399-400). Thus, the jury was already well aware of that denial, and eliciting further testimony about it presented a risk to the defense of highlighting co-defendant's explanation of the denial rather than the denial.

In any event, Wilson's denial to the probation officer was essentially duplicative or cumulative of similar prior denials that Wilson had made. Defense counsel elicited that Wilson had testified at his own trial that he was forced to make his admissions to the police, that the police had told him about the facts and what happened at the scene of the crime, and that he signed a statement because the police told him he could go home and would not let him sleep (Wilson: T. 413-14). She also elicited that when Wilson was speaking to a detective, he was "denying anything having to do with the case (Wilson: T. 424).

Furthermore, even if defendant's trial counsel did not cross-examine co-defendant Wilson about his denial to the

probation officer, she expressly called attention to his testimony about the denial on summation, arguing, "Even after Mr. Wilson was convicted here in this courtroom, he went for an interview in connection with a pre-sentence report. And does he at that point say, 'Oh, yeah, yeah, I did it'? No. He says he had nothing to do with it. He was at his friend, Shawn's house" (T. 982). Thus, defendant's trial counsel used co-defendant's denial to the probation officer to defendant's advantage at trial.

Defendant's procedurally-barred claim that his attorney was ineffective for not objecting to the admission of a custodial statement for which no Criminal Procedure Law § 710.30 notice was given (Defendant's Motion at 42-44) is also meritless. First, the "unnoticed" exculpatory statement to Detective McMahon (McMahon: T. 510-12) was merely a repetition of the noticed exculpatory statement that defendant had made at 10:45 a.m. the same day to other detectives and that had been elicited at the suppression hearing (Grimaldi: H. 68-69; Williams: H. 96-99; McMahon: T. 511-12, 550-51). In that noticed statement, defendant claimed that he had stayed at a party "until dawn, then went home with Ron and Sharrif in Ron's car" (Williams: H. 98). Thus, if defense counsel had moved to preclude the repetition, mentioned by Detective McMahon, of defendant's earlier statement to detectives, the prosecution could have presented through a different detective the same statement made at an earlier time, and a preclusion motion by the defense would have been to no avail. Defendant's trial counsel cannot be faulted for failing

to undertake a futile endeavor. See Ennis, 11 N.Y.3d at 415 (attorney is not deemed ineffective for failing to pursue argument that had little or no chance of success); Stultz, 2 N.Y.3d at 287; People v. Longshore, 222 A.D.2d 941, 942 (3d Dep't 1995).

Second, even if defense counsel had successfully sought preclusion of that statement to Detective McMahon, such preclusion would only have prevented the prosecution from eliciting the statement on their direct case. Notwithstanding any lack of Criminal Procedure Law § 710.30 notice, the statement could still have been elicited to impeach defendant at trial if he denied making the statement while testifying at trial. See People v. Rigo, 273 A.D.2d 258 (2d Dep't 2000); People v. Rudolph, 134 A.D.2d 539 (2d Dep't 1987) (C.P.L. § 710.30 "does not require that such notice be provided where a statement made by a defendant is being used solely for purposes of impeachment"). Furthermore, a defendant who takes the stand is "obligated to 'testify truthfully or suffer the consequences.'" People v. Manohar, 40 A.D.3d 1123, 1124 (2d Dep't 2007) (quoting United States v. Havens, 446 U.S. 620, 626-27 [1980]). Thus, defendant's suggestion that trial counsel's omission prejudiced defendant because defendant would otherwise have been free to testify without impeachment by a prior inconsistent statement if the statement had been precluded for lack of notice (Defendant's Motion at 44) is completely meritless.

Defendant's claim that his counsel was ineffective because she failed to prepare defense witness Charnette Loyal for her

testimony and failed to introduce her prior consistent statement at trial (Defendant's Motion at 44-46) is also unsubstantiated. First, defendant fails to support with sworn, non-record allegations of fact his claim that defendant's trial counsel did not prepare Loyal for her trial testimony. See C.P.L. § 440.30(1), 440.30(4)(b).

Second, contrary to defendant's contention (Defendant's Motion at 45-46), defendant's trial counsel could not have introduced the notes of Loyal's prior consistent statement to a detective. The notes were inadmissible hearsay, and the prosecution had made no claim of recent fabrication by Loyal. Although defendant asserts that the prosecution made a claim of recent fabrication with respect to Loyal (Defendant's Motion at 45-46)), that is not borne out by the citations to the trial record on which defendant relies. The prosecutor's questioning of Loyal about her initial failure to mention the knife during her trial testimony (Loyal: T. 823) does not mean that the prosecutor was alleging that the knife was a recent fabrication. Instead, the prosecutor's questioning sought to show simply that that Loyal was a witness whose memory was faulty and could not be trusted. After all, Loyal had previously acknowledged that she had been a drug user for seven years (Loyal: M. 392, 410, 413), and she did so again at defendant's second trial in February of 1994 (Loyal: T. 831-32). Loyal also acknowledged uncertainty in her recollection of the evening of July 17, 1992, because she had been "under the influence of drugs" that evening (Loyal: T. 804, 807, 814-15).

Not all inconsistencies developed on cross-examination imply that a witness's testimony is fabricated. People v. Seit, 86 N.Y.2d 92, 96 (1995); see People v. McDaniel, 81 N.Y.2d 10, 18 (1993) (not every inconsistency developed on cross-examination implies that the witness's testimony is perjurious); People v. McLean, 69 N.Y.2d 426, 429 (1987). Here, the prosecutor's cross-examination of Loyal sought to impeach Loyal's memory, to cast doubt on Loyal's credibility because of her drug use and prior convictions, and to show that, as the mother of defendant's brother's children, Loyal had a familial relationship with defendant that might influence her testimony in defendant's favor (Loyal: T. 822-41). However, the prosecutor raised no claim of recent fabrication with respect to Loyal's statement about the knife. Therefore, any attempt by the defense to introduce the notes of Loyal's interview as a prior consistent statement would have been fruitless.

Defendant's procedurally-barred claim that his counsel was ineffective for not objecting to the prosecutor's questioning of defendant's aunt, Sandra Vivas (Defendant's Motion at 46-49), is also meritless. Prior to the questioning cited by defendant, defendant's trial counsel had elicited from Vivas that defendant was known as a peaceable person to his friends and neighbors (Vivas: T. 285). The trial court subsequently requested an offer of proof regarding the prosecutor's further questioning of Vivas, noting that the defense had "opened the door to character testimony concerning the Defendant's peacefulness" (T. 287-88). The prosecutor stated that she wished to question Vivas about

defendant's suspension from school related to carrying a box cutter with him (T. 288), and about information that the prosecutor had received from Elaine Smith, Chavonn Barnes's aunt and a testifying witness, that Barnes was afraid to leave her mother alone overnight because defendant was beating her mother up (T. 288-90). The latter incident had been the subject of the court's Sandoval ruling prior to defendant's mistrial. See People v. Yarbough, 229 A.D.2d 605, 607 (2d Dep't 1996).[7] The prosecutor had raised the incident concerning the box cutter at a reopening of the Sandoval hearing prior to defendant's second trial (T. 3-8).

Although the defense raised objections to the proposed questioning of Vivas (T. 289, 291), the court allowed the questioning, cautioning the prosecutor to be accurate in her questioning about the box-cutter (T. 291-92). The prosecutor then questioned Vivas in accordance with the offer of proof that she had made to the court (T. 293-95). As the Appellate Division observed, "[s]ince the defendant placed his character in the community at issue, the relevant consideration was not the truth or falsity of the particular event involving the defendant but the witness's qualification to speak about the defendant's reputation." Yarbough, 229 A.D.2d at 606. The Appellate Division further observed that "[i]f the witness had heard of a

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[7] Although the pages of the January 21, 1994, Sandoval hearing are now missing from the transcript of defendant's first trial, the Sandoval hearing on that date and the court's ruling are summarized in the People's Appellate Division brief (People's Exhibit IV) at 46-47.

particular event which was likely to injure the defendant's reputation, the credibility of the witness's opinion as to his good reputation might be impaired." Id. (citing People v. Kuss, 32 N.Y.2d 436, 444 [1973], cert. denied, 415 U.S. 913 [1974], and Farrell, Prince, Richardson on Evidence §4-406 [11th ed. 2008]).

Here, the prosecutor properly questioned Vivas about the incidents bearing upon defendant's reputation for peacefulness, as the prosecutor had a good faith basis for her questioning that she demonstrated to the court prior to such questioning. See id. (noting that prosecutor "established a good-faith basis for the questions she proposed to ask the witness"); see also People v. Rivera, 295 A.D.2d 124, 125 (1st Dep't 2002) (where defendant's neighbor testified that defendant was non-violent and enjoyed reputation for peacefulness in community, prosecutor properly asked witness if she had heard of incident in which defendant punched security guard in face); People v. Garrick, 246 A.D.2d 478 (4th Dep't 1998) (prosecutor properly cross-examined defendant's character witnesses concerning whether they had heard of acts of misconduct purportedly committed by defendant while in prison). Vivas's testimony concerning defendant's reputation was first elicited by the defense on cross-examination, thereby making Vivas a character witness for the defense and opening the door to impeachment by the prosecution. See Farrell, Prince, Richardson on Evidence, § 6-427 (11th ed. 2008). The prosecutor properly prefaced almost all of her questions to Vivas on the subject of the prior incidents with "did you learn" or "did you hear" or words to that effect (T. 293-95), and even if the

prosecutor once used the term "know of," echoing Vivas's response, she quickly rephrased her question as "You didn't learn that during your discussions about how peaceful this defendant was?" (T. 293). Thus, any defense objection that the prosecutor's questioning was not proper would have been futile.

Finally, defendant's procedurally-barred claim that his trial counsel was ineffective in her summation (Defendant's Motion at 49-51) is likewise unsubstantiated. Although defendant claims that trial counsel's summation was defective in that it failed to point out that defendant "had a solid alibi defense" (Defendant's Motion at 50), defendant fails to present any evidence of a persuasive alibi. The statements of defendant and co-defendant as well as the testimony of Ferrer and Vivas placed defendant in the vicinity of the crime scene at about 6:30 a.m. Such evidence does not give rise to an inference that defendant could not have committed the murders because he was elsewhere. To the contrary, such evidence shows that defendant had the opportunity to commit the murders before 7:00 a.m., when defendant approached his uncle at the bus stop and said that everybody was dead. The medical examiner did not purport to determine the time of the victims' deaths, and the medical examiner's testimony concerning rigor mortis provides no evidence that the murders must have taken place before 6:30 a.m.

Defendant's contention that trial counsel was ineffective for failing to point out that co-defendant Wilson said that the victims were stabbed to death, when the autopsies showed that they were strangled while still alive (Defendant's Motion at 50),

but this would not have provided a persuasive argument to the jury. It would not have been surprising if the victims had appeared to be dead after the stabbings, before the cords were tied around their necks. After all, the stab wounds penetrated the victims' vital organs, caused significant internal bleeding, and in fact contributed to their deaths (Arden: T. 561-64, 597, 611, 617-22, 659-662, 665). That the autopsies ultimately revealed that the victims were not yet dead when they were strangled by the cords around their necks does not mean that Wilson's testimony "contradicted the physical evidence" (Defendant's Motion at 50), and defense counsel reasonably omitted such an argument, which, in any event, would not have resulted in a favorable verdict for defendant.

Defendant's claim that trial counsel was ineffective for not offering precisely the summation argument that defendant now asserts should have been offered (Defendant's Motion at 50-51) is unfounded. First, defendant's trial counsel did call the jury's attention to Charnette Loyal's testimony that Annie Yarbough had been threatened by a man in the apartment who had not gotten what he had paid for (Loyal: T. 814, 818; T. 989). However, given Loyal's background and the tenor of her testimony, it was reasonable for defendant's trial counsel not to ignore the defects in Loyal's credibility and not to put all of her stock in Loyal's testimony. Instead, trial counsel wove her argument about Loyal's testimony into other points, noting, for example, that Loyal had told Detective Grimaldi about the incident but the prosecution failed to call Detective Grimaldi or Detective

Williams, whom defense counsel accused of slapping defendant (T. 990). Defense counsel also argued there was no proof beyond a reasonable doubt that defendant committed the murders at 6:30 that morning, because the medical examiner could not say when the victims died (T. 996). Thus, defense counsel did not omit the basic points that defendant suggests.

However, defendant's trial counsel was faced with overwhelming evidence against defendant, including defendant's signed statement, admitting participation in the murders, the testimony of co-defendant Wilson, admitting his participation with defendant in the murders, and the testimony of Sandra Vivas, Dorothy Ferrer, and Major Yarbough indicating that defendant was seen in the vicinity of the Yarbough apartment building and had an opportunity to commit the murders. Even Charnette Loyal's testimony showed that there had been a dispute between defendant and his mother on the evening before the murders (Loyal: T. 827-28).

In light of this overwhelming evidence of defendant's guilt, none of the omissions of which defendant now complains would have had an effect on the outcome of the proceedings.

C. Defendant's Claim of Newly Discovered Evidence of Perjury by Sharif Wilson Is Unsubstantiated.

Defendant's claim that his conviction should be vacated because of newly discovered evidence consisting of a letter attributed to co-defendant Wilson (Defendant's Exhibit A) (Defendant's Motion at 51-52), is also unsubstantiated and does not warrant a hearing.

Because a court's power to vacate a conviction on the basis of newly discovered evidence is purely statutory, the requirements of C.P.L. § 440.10(1)(g) must be strictly complied with. People v. Williams, 134 A.D.2d 304, 305 (2d Dep't 1987); People v. Latella, 112 A.D.2d 321, 322 (2d Dep't 1985). Criminal Procedure Law section 440.10(1)(g) provides that a court may vacate a judgment of conviction on the grounds that

> New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

C.P.L. § 440.10(1)(g).

To constitute newly discovered evidence under Criminal Procedure Law section 440.10(1)(g), the information that a defendant claims was newly discovered must be admissible at trial as evidence. See People v. Fields, 66 N.Y.2d 876, 877 (1985) (at hearing to determine if new trial is warranted based on newly discovered evidence, trial court has discretion to admit hearsay only if it is subject to hearsay exception that renders statement admissible); People v. Crimmins, 38 N.Y.2d 407, 418 (1975) (affiant's testimony must be admissible as evidence); People v. Tankleff, 49 A.D.3d 160, 182 (2d Dep't 2007) ("[i]mplicit in th[e] ground for vacating a judgment of conviction is that the newly discovered evidence be admissible" (citation omitted);

People v. Lopez, 104 A.D.2d 904 (2d Dep't 1984) (statement consisting of hearsay was not considered newly discovered evidence).

In addition, case law construing the statute has imposed the following six requirements that must be met in order to establish that evidence is newly discovered within the meaning of Criminal Procedure Law § 440.10(1)(g):

> 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence.

People v. Lavrick, 146 A.D.2d 648, 648-49 (2d Dep't 1989) (internal quotation marks and citations omitted), cert. denied, 493 U.S. 1029 (1990); see People v. Salemi, 309 N.Y. 208, 215-16 (1955), cert. denied, 350 U.S. 950 (1956); Tankleff, 49 A.D.3d at 179; Latella, 112 A.D.2d at 322.

Here, defendant has not made any showing of the due diligence required of him. Criminal Procedure Law section 440.10(1)(g) requires that a motion to vacate the judgment on the ground of newly discovered evidence be made "with due diligence after the discovery of such alleged new evidence." C.P.L. § 440.10(1)(g); see People v. McBean, 32 A.D.3d 549, 553 (3d Dep't 2006); People v. Kandekore, 300 A.D.2d 318 (2d Dep't 2002), cert. denied, 540 U.S. 896 (2003). Defendant filed his motion in July of 2010. The letter on which he bases his claim of newly

discovered evidence is dated December 5, 2005. See Defendant's Exhibit A. The person to whom the letter is addressed, Sandra Vivas, is defendant's aunt, who testified as a defense witness at defendant's mistrial and testified as a prosecution witness at the subsequent trial after being subpoenaed by the prosecution (Vivas: M. 454-68; Vivas: T. 275-97). In her testimony as a defense witness during defendant's mistrial, Vivas acknowledged that she had a particularly close relationship with defendant (Vivas: M. 461), and in her testimony at defendant's subsequent trial, she testified that she loved defendant (Vivas: T. 286). According to the letter, Vivas had been "reaching out to talk to" Wilson (Defendant's Exhibit A), presumably on defendant's behalf, and Vivas obviously shared the letter attributed to Wilson with defendant.

Defendant waited for over four years after December of 2005 before raising his claim of newly discovered evidence. Such protracted and unexplained delay precludes a finding that defendant used due diligence in raising his claim of newly discovered evidence. See Kandekore, 300 A.D.2d at 319; People v. Stuart, 123 A.D.2d 46, 54 (2d Dep't 1986) (denial of C.P.L. 440.10[1][g] claim of newly discovered evidence was proper, where motion was made more than one year after discovery of purported new evidence); see also People v. Friedgood, 58 N.Y.2d 467, 470-71 (1983) (where defendant waited for over three years to bring motion to vacate judgment and counsel offered no explanation for delay other than that he was busy working on defendant's appeal,

defendant failed to show due diligence in adducing facts prior to sentence as required by C.P.L. § 440.10[3][a]).

Although defendant also claimed in his motion papers that he would supply an affidavit from co-defendant Wilson, corroborating defendant's claim that Wilson had recanted his trial testimony at defendant's trial (Defendant's Motion at 3, 29), defendant has months later still not provided any such affidavit, thereby undermining his claim. See People v. Crippen, 196 A.D.2d 548, 549 (2d Dep't 1993); People v. Harris, 131 A.D.2d 144 (3d Dep't 1989).

Moreover, the significance of the letter that defendant attached to his motion (Defendant's Exhibit A) purporting to be a recantation by co-defendant Wilson is negligible. It is not a sworn statement of co-defendant Wilson and is merely hearsay that is not admissible at trial. See People v. Rodriguez, 197 A.D.2d 546 (2d Dep't 1993) (allegedly exculpatory affidavit of witness was not admissible at trial, where it did not qualify for hearsay exception).

To constitute newly discovered evidence, the evidence itself must be credible enough to have probably changed the trial's outcome. See People v. Britton, 49 A.D.3d 893 (2d Dep't 2008) (determination by trial court that newly discovered evidence was not credible was proper ground to deny motion to vacate judgment); People v. Robinson, 211 A.D.2d 733, 734 (2d Dep't 1995) (newly discovered evidence must demonstrate probability, not mere possibility, that, had evidence been admitted at trial, resulting verdict would have been different); People v. Penoyer,

135 A.D.2d 42, 44 (3d Dep't) ("the newly discovered evidence must be such as to probably, not merely possibly, change the result if a retrial is had"), aff'd, 72 N.Y.2d 936 (1988).

As recantation evidence, the letter is inherently unreliable. See People v. Beckingham, 57 A.D.3d 1098 (3d Dep't 2008) (rejecting claim of newly discovered evidence consisting of affidavit of jailhouse informant recanting his trial testimony concerning admissions made by defendant; appellate court observed that "[a]n affidavit which merely impeaches, contradicts, or recants prior testimony or statements is generally considered unreliable and, by itself, insufficient to require a court to set aside a verdict); People v. Davenport, 233 A.D.2d 771, 773 (3d Dep't 1996) (evidence that witness recanted, which was secured by defendant's sister, was "inherently suspect"); see also Robinson, 211 A.D.2d at 734.

Indeed, "[t]here is no form of proof so unreliable as recanting testimony." People v. Shilitano, 218 N.Y. 161, 170 (1916); see People v. McGuire, 44 A.D.3d 968 (2d Dep't 2007); People v. Rodriguez, 201 A.D.2d 683 (2d Dep't 1994).

In addition, the letter is merely cumulative of other evidence, elicited at trial, of statements by Wilson that were inconsistent with or contradictory of his trial testimony implicating defendant. See People v. Tran, 308 A.D.2d 497 (2d Dep't 2003); Latella, 112 A.D.2d at 323. Co-defendant Wilson testified at defendant's trial that he initially denied to the detectives that he had anything to do with the case; that during his own trial, he testified that the police would not let him

sleep, told him how the murders had taken place, and forced him to make a statement; and that after his trial, he denied involvement when he was interviewed by a probation officer (Wilson: T. 394, 399-400, 412-14). The unsworn letter would add little or nothing to co-defendant Wilson's other statements, including prior sworn testimony, that were elicited at trial.

In addition, the letter is not newly discovered evidence because the contents of the letter are merely impeaching or contradicting of Wilson's trial testimony. See People v. Marinaccio, 190 A.D.2d 819 (2d Dep't 1993); People v. Cassels, 260 A.D.2d 392 (2d Dep't 1999) (affirming rejection of C.P.L. § 440.10 claim of newly discovered evidence, where victim's recantation merely impeached or contradicted former testimony); People v. Yoli, 150 A.D.2d 741 (2d Dep't 1989); Lavrick, 146 A.D.2d at 648 (victim's partial recantation, which merely impeached his prior testimony, would not change result if new trial were granted).

Thus, the letter that defendant offers is not evidence "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." C.P.L. § 440.10(1)(g); Cruz, 23 A.D.3d at 577; Latella, 112 A.D.2d at 323.

Finally, the assertions in the letter that defendant and co-defendant did not commit the murders are contradicted by other statements of co-defendant Wilson made before and after the date of the letter. In the transcript of co-defendant Wilson's parole hearing, dated October 5, 2005, Wilson told the parole board that

he went to defendant's apartment with defendant, that defendant and defendant's mother had an argument, and that Wilson held the mother down while defendant stabbed her. See Parole Hearing Transcript, dated Oct. 5, 2005, at 2-4, appended as People's Exhibit VII. In the transcript of co-defendant Wilson's parole hearing on October 10, 2007, Wilson admitted to the parole board that there had been a dispute or argument with defendant's mother, that defendant got the knife from the kitchen and asked co-defendant to hold his mother down, that co-defendant held down defendant's mother, that defendant stabbed her, that defendant gave the knife to Wilson, that the two twelve-year-old children were stabbed in their sleep, and that defendant and co-defendant tried to make it look like a burglary had occurred. See Parole Hearing Transcript, dated Oct. 10, 2005, at 3-4, 6-9, appended as People's Exhibit VIII.

In light of these statements, contradicting the letter that defendant offers, there is no reason to conclude that the letter that defendant relies upon is newly discovered evidence that warrants vacatur of the judgment or a hearing thereon.

D. Defendant's Claim of Actual Innocence Does Not Warrant Vacatur of the Judgment.

Defendant's claim that his conviction should be vacated because of defendant's actual innocence of the three murders of which he was convicted (Defendant's Motion at 52-54) is without any merit and should be rejected.

First, having been convicted after a fair trial, defendant is no longer presumed innocent. "Once a defendant has been afforded a fair trial and convicted of the offense of which he is

charged, the presumption of innocence disappears." Herrera v. Collins, 506 U.S. 390, 399 (1993).

Second, defendant's claim that Criminal Procedure Law section 440.10(1)(h) authorizes the vacatur of his judgment of conviction should be rejected. Whether there is a federal constitutional right to be released upon proof of "actual innocence" is, according to the Supreme Court, an "open question." Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2321 (2009); see also Herrera v. Collins, 506 U.S. at 404 (claim of actual innocence made in federal habeas corpus context is not constitutional claim in itself but gateway through which habeas petitioner must pass to have otherwise-barred constitutional claim considered on merits).

Furthermore, defendant has cited no New York appellate court decision that a judgment of conviction may be vacated pursuant to Criminal Procedure Law section 440.10(1)(h) on the basis of a free-standing claim of actual innocence. See People v. Tankleff, 49 A.D.3d 160, 182 (2d Dep't 2007 (although appellate court concluded that newly discovered evidence warranted new trial, appellate court also concluded that lower court properly denied motion to vacate judgment pursuant to C.P.L. § 440.10(1)(h) on ground of actual innocence, in that defendant did not establish entitlement to such relief; appellate court expressly declined to decide "that New York recognizes a free-standing claim of actual innocence that is cognizable by, or which may be addressed within the parameters of, CPL 440.10(1)(h)").

Defendant's reliance on People v. Bermudez, 25 Misc.3d 1226A, 2009 N.Y. Misc. LEXIS 3099 (Sup. Ct. N.Y. County 2009) and People v. Cole, 1 Misc.3d 531 (Sup. Ct. Kings County 2003) (Defendant's Motion at 52-54) is misplaced. In those cases, the defendants brought forth evidence, not previously before the court, that warranted further consideration of those defendants' claims of actual innocence. By contrast, the evidence set forth by defendant in his motion does not warrant such further consideration. Defendant has supplied no sworn affidavit of co-defendant Wilson to support defendant's claim of a recantation, and his other claims are barred or meritless for the reasons previously set forth in this answer.

Although defendant claims that his confession was "coerced by police and worthless" (Defendant's Motion at 53), defendant has adduced no sworn, non-record proof of that in his motion. Defendant had a Huntley hearing after which the court rejected the claim that defendant's statement was involuntary (H. 214-15). The jury was presented with evidence that after Miranda warnings, defendant confessed voluntarily to the police and signed the written statement after making corrections to it (McMahon: T. 521-29). Although defendant claimed in his trial testimony that he was beaten and coerced into making a false statement (A. Yarbough: T. 922-23), the jury by its verdict rejected that claim.

Defendant's claim that "the onset of rigor mortis in all three bodies in less than four hours is well nigh impossible" (Defendant's Motion at 54) but offers no substantive evidence to

support that claim. The only support that defendant's motion cites is a few pages from a book entitled "Practical Homicide Investigation" (Defendant's Exhibit F). There is no evidence that the author of the book excerpt is an expert in forensic pathology. The excerpt is clearly not a scientific text and contains at least one obviously incorrect statement, that "Rigor 'fixes' the body in the position assumed at death" (Defendant's Exhibit F at 216), for it is plain that a dead body can be shifted into a different position before rigor mortis sets in.

Furthermore, the book excerpt on which defendant relies cautions that "this factor [rigor mortis] is the poorest of the gauges used in estimating the time of death because of the many variables involved" (Defendant's Exhibit F at 217).

Here, the testimony of the medical examiner, an acknowledged expert in forensic pathology who actually performed the autopsies on the bodies of the victims in this case, indicated that rigor mortis can become well-developed in as little as three hours or as much as eighteen hours after death (Arden: M. 348-50, T. 678-80).

Thus, defendant's suggestion that the forensic evidence concerning the condition of the bodies supports defendant's claim of actual innocence is completely unsubstantiated.

Moreover, there is no need to decide in this case whether a free-standing claim of actual innocence would theoretically justify granting relief under Criminal Procedure Law section 440.10 because there was overwhelming evidence of defendant's guilt. The eyewitness testimony of co-defendant Wilson, the

evidence from others that defendant and Wilson were in the vicinity before the crime was reported, and the evidence that the three bodies had been stabbed, strangled, and rearranged just as the statements of defendant and co-defendant described, all confirm defendant's guilt of the three murders of which he was convicted. Defendant has adduced no persuasive evidence that would warrant the conclusion that defendant was in fact innocent of these murders. Thus, defendant's claim of actual innocence should be rejected.

E. Appointment of an Investigator and a Forensic Pathologist at Public Expense Is Unauthorized and Unwarranted.

Defendant's request that the Court appoint a private investigator and a forensic pathologist to assist defendant in investigating and developing defendant's claims that someone else murdered the victims should be denied. Defendant was convicted after a fair trial, and his judgment of conviction was affirmed on appeal. Defendant is now represented on his motion by his private counsel, and defendant or his private counsel is free to retain a private investigator or forensic pathologist to assist defendant with his collateral claims. Defendant has not supplied any authority or persuasive reason for this Court to supply a private investigator or private pathologist for defendant at public expense.

Indeed, discovery in a criminal proceeding is entirely governed by statute. See Hynes v. Cirigliano, 180 A.D.2d 659 (2d Dep't 1992). Discovery which is unavailable pursuant to statute should not be ordered based on principles of due process because there is no general constitutional right to discovery in criminal

cases. Brown v. Blumenfeld, 296 A.D.2d 405, 406 (2d Dep't 2002); Pirro v. LaCava, 230 A.D.2d 909, 910 (2d Dep't 1996). Here, there is no criminal action "pending" against defendant, and there is no statutory provision compelling discovery in connection with defendant's motion.

F. Defendant's Claim That the Court Should Order DNA Testing of All the Physical Evidence Should Be Rejected.

There is no free-standing constitutional right to DNA evidence. See Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2322 (2009); see also McKithen v. Brown, No. 08-4002-pr, 2010 U.S. App. LEXIS 23802 at *25-*30 (2d Cir. Nov. 19, 2010) (rejecting habeas challenge to state court's denial of state prisoner's post-conviction motion for DNA testing). However, Criminal Procedure Law Section 440.30(1-a) provides a mechanism by which defendants can request DNA testing of evidence recovered from a crime scene. A request for DNA testing on specific evidence shall be granted only if a defendant can demonstrate that "if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant." C.P.L. § 440.30(1-a)(a); see People v. Pitts, 4 N.Y.3d 303 (2005) (order denying defendant's motion for DNA testing affirmed because there was no reasonable probability that DNA testing would have resulted in more favorable verdict); People v. Weay, 54 A.D.3d 695 (2d Dep't 2008) (same); People v. Mattocks, 15 A.D.3d 676 (2d Dep't 2005) (same); People v. Shenouda, 307 A.D.2d 938 (2d Dep't 2003) (same); People v. Pugh, 288 A.D.2d 634 (3d Dep't 2001)

(defendant's motion for DNA testing properly denied, where results of any DNA testing would neither exonerate nor tend to exonerate him).

The People oppose defendant's blanket request for testing of all physical evidence collected from the crime scene in this case (Defendant's Motion at 55-57). Most of the physical evidence would not provide any probative evidence if it were subjected to DNA testing. The two knives that were vouchered were originally tested by the Medical Examiner's Office for blood, and no blood was found on them (Arden: W. 533, 555; Grimaldi: M. 218; Arden: T. 681; Stipulation: T. 870-71). Following defendant's present motion, the People have inquired into the whereabouts of the knives, but the knives have not as yet been found. However, even if the knives were available for testing, DNA testing would not provide probative evidence. The knives have been repeatedly handled as evidence introduced at the trial of co-defendant Wilson (W. 442-43, 523-25), at defendant's mistrial (M. 215-17), and at defendant's subsequent trial (T. 871, 972, 986-87).

In light of the fact that the knives were collected and tested for blood more than eighteen years ago and undoubtedly have become contaminated during the course of or following the trials at which they were introduced, the results of any DNA testing of the knives would not be meaningful, even if the knives could be found. Furthermore, at defendant's trial, the prosecution did not introduce the recovered knives into evidence or claim that those knives were used in the stabbings, although defendant introduced them into evidence (T. 871), and they were

the subject of a stipulation that they were recovered from the apartment on June 18, 1992, and tested negatively for the presence of blood (T. 870-71). See People v. Dearstyne, 305 A.D.2d 850, 854 (3d Dep't 2003) (where victim's underwear previously tested negative for seminal fluid, DNA testing could not have resulted in more favorable verdict at trial).

Testing of the hair found in a public garbage can outside the premises (see Crime Scene Unit Report, appended as People's Exhibit IX; see also copy of photographs of garbage can, appended as People's Exhibit X, would not have resulted in a more favorable verdict, had the results been introduced at trial. See People v. Bolling, 65 A.D.3d 1054 (2d Dep't 2009) (C.P.L. § 440.30[1-a] motion to test blood found on pole on public street was properly denied, where blood could have come from other persons not involved in crime); People v. Figueroa, 36 A.D.3d 458 (1st Dep't 2007) (motion for DNA testing of possible blood sample was properly denied; there was no reason to believe that DNA testing could provide support for defendant's theory that alternative perpetrator shot and killed victim or that any blood found on street near victim's body came from claimed alternate assailant).

Other items collected by the police at the crime scene, such as the cigarette butts, hair, and the appliance cords that were not tied on the bodies, would likewise not yield any relevant or meaningful evidence. With respect to items recovered inside the apartment, the record of the trials shows that there were many visitors to the Yarbough apartment and that the apartment was not

clean or free of litter. According to Police Officer Bradford, the apartment was "a mess," although it did not appear to have been ransacked, and there was "garbage scattered all around" the apartment (Bradford: T. 249, 253-54). According to Detective Grimaldi's testimony at the mistrial, the apartment was "dirty or messy" (Grimaldi: M. 235). Photographs of the crime scene, appended as People's Exhibit XI, illustrate that the apartment was not clean or free of litter or trash, and defense counsel acknowledged on summation that the home was not kept clean (T. 983-84). It would not be possible to say when or how items such as the cigarette butts, which apparently were found in the kitchen garbage can (see Crime Scene Unit Report, appended as People's Exhibit IX), or the hair that was apparently found in the back bedroom (see Crime Scene Unit Report [People's Exhibit XI]) came to be in the apartment.

In addition to defendant, co-defendant, and the three victims, all of whom concededly had been present at the Yarbough apartment on the night before the murders, visitors to the apartment that evening alone apparently included Clara Knox, Major Yarbough, Charnette Loyal, defendant's friend Chris, defendant's friend Corey, and others (Knox: M. 40-42, T. 333-37; M. Yarbough: W. 167-68; S. Wilson: W. 602, 630, T. 403; Loyal: M. 392-94, 399-400, 420-22, 426-27, T. 802-07; A. Yarbough: M. 492-94, T. 876). DNA shed by casual visitors to the apartment could have come into contact by chance with any of these items at any time. See People v. Workman, 72 A.D.3d 1640 (4th Dep't 2010) (motion for post-judgment DNA testing properly denied, where

trial evidence established that unidentified hair could have been in hotel room for long period of time and could have been transferred onto murder weapon when it was placed on floor); People v. Brown, 36 A.D.3d 961 (3d Dep't 2007) (although evidence was still available for DNA testing, court properly denied C.P.L. § 440.30(1-a) motion, where it was not probable that defendant would have been acquitted even if DNA testing proved that hair found on victim's sweater did not belong to defendant; hair could have belonged to co-defendant or anyone victim encountered in hours before crime occurred).

The three cigarette butts that were vouchered under Voucher Number E702805 were found in a garbage can in the kitchen of the Yarbough apartment. See People's Exhibit XI. Those cigarette butts were previously submitted to the Medical Examiner's Office for testing, and amylase testing was performed on them in 1992, as noted in the laboratory report issued by the Medical Examiner's Office, appended as People's Exhibit XIII, indicating that body fluid on the cigarette butts could not originated from any of the three victims. According to the laboratory report, "extracts" of the cigarette butts were made and retained at the Medical Examiner's laboratory (People's Exhibit XII), but the cigarette butts are not now contained in Voucher Number E702805 and have not yet been found at the Medical Examiner's Office or any police property storage facilities. In any event, the cigarettes at issue could have been smoked by anyone in the apartment other than the victims and then deposited in the garbage can long before the incident.

The sexual assault samples that were tested at the Medical Examiner's Office, see People's Exhibit XII, showed no evidence of sperm or seminal fluid, and therefore, DNA testing of those samples, even if they become available, would not be warranted. See Dearstyne, 305 A.D.2d at 854.

The appliance cords and hair collected and vouchered by the Crime Scene Unit under Voucher E702805, although available, have been stored, apparently since the time of the trials in early 1994, inside plastic envelopes in an opened plastic voucher envelope marked with the number E702805 in one of the People's trial file boxes. Such items have been at risk of both contamination and degradation during the lengthy period of time that they have been in the trial file box. During that time, the items would have been subjected not only to uncontrolled temperatures but also to periodic shifting and handling by different persons engaged in the storage and retrieval of the boxes or in examination of the contents in connection with the appeals of defendant and co-defendant and defendant's Freedom of Information Law request. Therefore, such items are no longer suitable candidates for DNA testing.

Moreover, defendant has not established that any DNA testing of any of these items would exonerate him or would have rendered the verdict more favorable to him. See C.P.L. § 440.30(1)(a); Workman, 72 A.D.3d at 1641. Thus, the People oppose defendant's request for testing of the items listed on the vouchers attached to defendant's motion as Defendant's Exhibit P.

With respect to the cord ligatures and items of clothing and sheets that were tied on the bodies of the three victims and were collected not by the police but by the medical examiner at the time of the autopsies, the People have initiated inquiries to the Medical Examiner's Office and the Police Department concerning the availability of those ligatures and binding items. Those items have not yet been located, and their condition and suitability for DNA testing is unknown at this time. Should those items become available and be suitable for DNA testing, as determined by the Office of the New York City Medical Examiner, the People would consent to DNA testing of such items by the Office of the New York City Medical Examiner. The People reserve the right to oppose DNA testing of these items, should the handling or condition of these items render them unlikely to yield meaningful or reliable test results. Although the People would consent to DNA testing of certain items, only as described above, the People otherwise oppose defendant's present claim. The People also reserve the right to oppose any claim for vacatur of the judgment based on the results of such testing and the right to challenge any findings that result from any testing of these items.

In sum, defendant's claims are in part procedurally barred. In any event, to the extent that defendant claims that the prosecution failed to disclose notes and a DD-5 police report, that a purported letter of co-defendant to Sandra Vivas recanting his trial testimony constitutes newly discovered evidence, and that his trial counsel was ineffective, defendant's contentions

should be rejected, and defendant's motion to vacate the judgment should be denied without a hearing. To the extent that defendant seeks an order for DNA testing of all physical evidence, the People oppose such a request. However, the People would consent to DNA testing of specified items by the Office of the New York City Medical Examiner's Office, should those items become available and be in a suitable condition for such testing.

CONCLUSION

DEFENDANT'S MOTIONS TO VACATE THE JUDGMENT AND SET ASIDE THE SENTENCE SHOULD BE DENIED.

Dated: Brooklyn, New York
November 30, 2010

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE
CAMILLE O'HARA GILLESPIE
Assistant District Attorneys
of Counsel

APPENDIX