SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-23

THE PEOPLE OF THE STATE OF NEW YORK,	:	Return Date: May 5, 2014
Respondent,	:	AFFIRMATION IN RESPONSE TO DEFENDANT'S
	:	MOTION TO
-against-		VACATE JUDGMENT
	:	
ANTHONY NWOBI	:	Queens County Indictment Number
	:	5721/92
Defendant.		
	:	

JENNIFER HAGAN, an attorney admitted to practice law in the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affidavit in opposition to defendant's motion to vacate his judgment of conviction that was filed, through counsel, in January of 2014. I make the statements in this affidavit upon information and belief, based on my review of the records and files of the Queens County District Attorney's Office, the trial transcript, the court file in this case, my conversations with Marc Resnick and William Kleinfelder, the Queens County District Attorney's Office's correspondence with the New York State Department of Corrections and Community Supervision, and my review of defendant's November, 2009 letter to William Kleinfelder.

Factual and Legal Background

2. On December 27, 1992, defendant and his accomplice, Justin Eze, pushed their way into Gregory Reece's apartment, where Mr. Reece resided with his wife, three-year-old son, and four-day-old baby. Defendant pulled out a gun, attempted to disable the telephone by ripping it out of the wall, and demanded money from Mr. Reece. At this point, Maria Pestano, Mr. Reece's sister-in-law, opened the door to a bedroom in the apartment, and saw defendant brandishing a gun. Ms. Pestano closed the bedroom door and retreated behind it. Defendant then ran to the bedroom and attempted to kick in the door. Mr. Eze and Mr. Reece followed defendant to the back of the apartment, and defendant turned around and fired his gun in Mr. Reece's direction four times. Defendant missed Mr. Reece and, instead, shot Mr. Eze in the head, killing him.

3. For these acts, defendant was charged with Murder in the Second Degree (Penal Law §§ 125.25[1] and [2]); Attempted Murder in the Second Degree (110/125.25[1]); Burglary in the First Degree (Penal Law §140.30[1]); Attempted Robbery in the First Degree (Penal Law §160.15[4]); Attempted Robbery in the Second Degree (Penal Law §160.10[1]); Reckless Endangerment in the First Degree (Penal Law §120.25); Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.01[2]); and Criminal Possession of a Weapon in the Third Degree (Penal Law §265.02(Queens County Indictment Number 2311/03).

4. Thereafter, defendant proceeded to trial before the Honorable Joseph Golia,

Supreme Court, Queens County, and a jury. At trial, the evidence established that, on December 27, 1992, defendant, Anthony Nwobi, and his accomplice, Justin Eze, forced their way into Gregory Reece's apartment. Nwobi pulled out a gun in front of Mr. Reece, his wife, and his then three-year old son, and ordered Mr. Reece to get on the ground (340-41). Defendant ripped the telephone out of the wall, ordered Mr. Reece to give him money, and threatened to shoot Mr. Reece and his wife if Mr. Reece refused to pay defendant (341, 490-92).

5. At this time, Mr. Reece's sister-in-law, Maria Pestano, her boyfriend, Joey Peters, and Mr. Reece's four-day old baby were present in the apartment, in one of the bedrooms located at the rear of the apartment. Ms. Pestano opened the door to the back bedroom of the apartment, saw defendant standing there with a gun, and closed the door again (344-46, 370, 492-93). Defendant then ran to the door, behind which Ms. Pestano had retreated, and began to kick in the door frame. Mr. Eze and Mr. Reece followed defendant to the back of the apartment, and Mr. Reece attempted to jump onto Eze (347, 494). Defendant then turned around and fired his gun at Mr. Reece four times (348, 395). One bullet hit Mr. Eze in the head. Mr. Eze died as a result of the gunshot wound to his head.

6. Meanwhile, Mrs. Reece called 911. Mr. Reece then overpowered and disarmed defendant and instructed Mr. Peters, who had been in the back bedroom, to grab the gun. The police arrived and arrested defendant. On the way to the patrol car, defendant spontaneously stated to Police Officer Shaun Kelly, who had taken defendant into custody,

"I shot my friend. I didn't mean to shoot my friend" (238, 244). Inside of the patrol car, defendant stated, "My friend died over $3000" (239, 242-244). Defendant was then taken to Queens General Hospital and, after he was treated there for a laceration to the lip, he was taken to the police precinct.

7. Hours later, in the early morning of December 28, 1992, Detective Kleinfelder read defendant *Miranda* warnings at the police precinct (428-29). Defendant made a statement to the detective, which the detective reduced to writing, and defendant signed (435-38). In his statement, defendant admitted that he went to Mr. Reece's apartment with a gun, that he pulled out the gun, ordered Reece to the floor, kicked in a bedroom door, and fired the gun several times while he was struggling with Reece (433-35).

8. Defendant claimed during his trial testimony that he went to Mr. Reece's apartment armed with a gun, and that he pulled out the gun after Mr. Reece asked him to leave. Defendant denied that he shot Mr. Eze. Instead, defendant claimed that he went with Mr. Eze to Mr. Reece's house to get "Fatman's" address from Mr. Reece, because defendant had paid "Fatman" for a car that was defective and he wanted his money refunded. Defendant believed that "Fatman" was Mr. Reece's cousin and that Mr. Reece could help defendant retrieve his money. Defendant testified that a struggle broke out in Mr. Reece's apartment, that defendant threw the gun to the floor during the struggle, that Mr. Reece picked up the gun and gained control of it, and that Mr. Reece then began firing the gun while defendant attempted to disarm him. Defendant denied making any oral statements to

the police, and claimed that he had signed the written statement without reading it (613, 615-16, 625).

9. At the conclusion of trial, defendant was convicted of Murder in the Second Degree; Attempted Murder in the Second Degree, Burglary in the First Degree, and Criminal Possession of a Weapon in the Second Degree. He was sentenced to concurrent indeterminate prison terms of twenty-two years to life on the murder conviction, seven to twenty-one years on the attempted murder conviction, ten to twenty years on the burglary conviction, and four and two-thirds to fourteen years on the weapon-possession conviction.[1]

Defendant's Direct Appeal

10. Defendant, through counsel, filed a brief in the Appellate Division, Second Department, and subsequently filed a *pro se* supplemental brief, both of which the People opposed. On October 21, 1996, a four-judge panel unanimously affirmed defendant's judgment of conviction. That panel also reduced the indeterminate sentence of seven to fourteen years that had been imposed on the Criminal Possession of a Weapon in the Second Degree conviction to four and two thirds to fourteen years, which was the maximum sentence for a first time offender. *See People v. Nwobi*, 233 A.D.2d 467 (2nd Dept. 1996).

11. Defendant sought leave to appeal the Appellate Division's decision and,

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[1] The Court originally sentenced defendant to an indeterminate prison term of seven to fourteen years on the weapon-possession count, but the Appellate Division modified this sentence on appeal to make it a legal one.

on February 24, 1997, the Court of Appeals denied leave. *See People v. Nwobi*, 89 N.Y.2d 987 (1997).

Defendant's First Motion to Vacate His Judgment of Conviction

12. In 1998, defendant filed a motion to vacate his judgment of conviction pursuant to section 440.10 of the Criminal Procedure Law. In his motion, defendant claimed that the prosecutor had committed *Rosario* and *Brady* violations when he failed to disclose a property clerk's voucher.

13. The People opposed defendant's motion.

14. In May, 1998, this Court (Golia, J.) denied defendant's motion. The Court held that defendant had raised this claim on direct appeal and, as a result this Court was procedurally barred from reviewing it. The Court additionally found that defendant's claim was meritless.

15. Defendant sought leave to appeal this Court's decision to the Appellate Division but, in July 1998, the Appellate Division denied defendant's motion for leave to appeal.

Defendant's Petition For a Writ of *Habeas Corpus*

16. In August, 1998, defendant filed a petition for a writ of *habeas corpus*. In his petition, defendant claimed that his constitutional rights were violated by: (1) the trial court's refusal to charge the jury on the absence of *Miranda* warnings, defendant's request for counsel, the use of deception in obtaining a *Miranda* waiver, and the need to determine

if the oral statements in this case were actually made; (2) the trial court's refusal to give an interested witness charge; (3) the prosecution's failure to disclose a property clerk's invoice receipt and pieces of paper that were in the decedent's hand; and (4) the trial court's allegedly confusing missing witness charge.

17. The People opposed defendant's petition for a writ of *habeas corpus.*

18. On November 27, 2001, the United States District Court for the Eastern District of New York denied defendant's petition for a writ of *habeas corpus* on the ground that the state court's resolution of defendant's claims was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. *See Nwobi v. Artuz*, 2001 U.S.Dist.LEXIS 22821 (E.D.N.Y. 2001)

Defendant's Current Motion to Vacate His Judgment of Conviction

19. In his current motion, defendant claims that his conviction should be vacated pursuant to section 440.10 of the Criminal Procedure Law, on five separate grounds. Each ground raised by defendant is primarily based on three pieces of paperwork that defendant claims he obtained for the first time through a Freedom of Information Law (F.O.I.L.) request. The first piece of paperwork – a page of Detective Kleinfelder's memo book – contains a notation that "Anth gave 3,000 Maxima/Give me $ or car/To Gary Greg/(Gary) is mechanic/Gary took gun shot Justin." This statement is not attributed to any particular person. The second piece of police paperwork – a Crime Scene Unit Report that was prepared by Detective Feeks of the Crime Scene Unit – states, "I was informed by

Detective Kleinfelder . . . that the deceased had been attempting to rob the occupants of the apartment with one other (also apprehended) when one of the occupants struggled with him and ended up disarming him and shooting him in the head." The third piece of police paperwork – a supplemental report prepared by Craig Angard, an investigator for the Office of the Chief Medical Examiner (OCME) – states, "Decedent (perpetrator) broke into a home to collect money on a car repair. An argument broke out and the gun was wrestled away from the perp who was shot during the struggle."

20. First, defendant claims that his conviction should be vacated pursuant to sections 440.10(1)(f) on the ground that the prosecutor allegedly did not disclose these pieces of paperwork or the information contained in them prior to trial, as required by *People v. Rosario,* 9 N.Y.2d 286 (1961). Second, defendant claims that his conviction should be vacated pursuant to section 440.10(1)(f) and (h) because the prosecutor did not disclose these documents or the information contained in them pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Third, defendant claims that the scenario presented in the paperwork suggesting that Gregory Reece disarmed defendant or Eze and shot Eze is the truth, and the prosecutor's failure to correct Reece's testimony that defendant fired the gun in this case, and his reliance on Reece's trial testimony that defendant was the shooter during his summation, constituted misconduct and violated defendant's right to due process of the law. Fourth, defendant claims that his conviction should be vacated pursuant to section 440.10(1)(h) of the Criminal Procedure Law because these documents and other circumstances that undermine Gregory

Reece's credibility establish that defendant is actually innocent of all of the crimes for which he was convicted. Fifth, assuming that the People did disclose these documents to the defense before trial, defendant claims that his conviction should be vacated pursuant to section 440.10(1)(h), on the ground that his attorney was ineffective for failing to confront the witnesses at trial with these documents.

21. After this motion was filed, I spoke with Marc Resnick, who was the Assistant District Attorney that was assigned to this case when it was tried.[2] Mr. Resnick informed me that he was well-aware of his obligations under *People v. Rosario*, and *Brady v. Maryland*, and that it was his practice to turn over to the defense, prior to trial, any statement of a witness that would testify at trial, as well as any information that tended to exculpate the defendant or undermine the credibility of a witness for the prosecution. Mr. Resnick also informed me that, although he does not specifically recall all of the details of this case at this time, he has reviewed Detective Kleinfelder's memo book and the portion of the memo book upon which defendant relies to support the claims raised in his motion appears to be attributable to defendant, rather than any witness for the prosecution. Mr. Resnick has prepared an affidavit, which is attached as Exhibit A.

22. After this motion was filed, I also spoke with Detective Kleinfelder, who informed me that while defendant was incarcerated for this case, he mailed Detective

[2] Mr. Resnick is now retired from the District Attorney's Office.

Kleinfelder a letter.[3] After Detective Kleinfelder located that letter, he provided it to the District Attorney's Office.[4] Defendant's letter is attached to this motion as Exhibit B.

23. Defendant's eight-page letter is dated November 27, 2009. The manilla envelope in which it was enclosed has a postmark from Green Haven Correctional Facility and indicates that it was posted by Certified Mail at a cost of $6.14.

24. In the letter, defendant states, among other things, "First, I sincerely apologize to you for not being entirely honest and truthful about how the shooting occurred. . . . If I had told you and the court exactly how my friend died, perhaps I would not have to face all these years in prison. The death of my friend was a tragedy. I very much regret that I had a gun with me that night." The letter continues, "May I inform you candidly and exactly what happened that night that my friend died. My friend and I went to Gregory Reece's apartment to obtain an address of a man who had swindled me of some money but I'd a gun [sic]. There came a time while in Gregory Reece's apartment that someone opened one of the bedroom doors. I rushed immediately towards that bedroom to persuade whoever opened that door not to call the police because our mission was not to harm anyone (Before

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[3] Detective Kleinfelder is now retired from the New York City Police Department.

[4] The original letter that defendant sent to Detective Kleinfelder is available for inspection by the Court upon request. Included with this letter is a Christmas card from defendant to Detective Kleinfelder, a copy of Detective Kleinfelder's entire memo book, a redacted copy of a closing DD5 related to defendant's arrest, and a copy of highlighted pages 33-34 of Detective Kleinfelder's May 20, 1993 testimony at defendant's pre-trial suppression hearing. A copy of the letter, the Christmas card, and the envelope, are all included in Exhibit B. Detective Kleinfelder's address has been redacted from the envelope, but the original envelope is available for inspection by the Court upon request.

this time, I had already unplugged a telephone line in the dining room). Gregory later followed me. I wanted to leave at this point, but Gregory blocked me from leaving." Defendant wrote, "I then turned to the hallway wall and fired the first shot, hoping that Gregory will realize that the gun that I had was real and also operable. At this point, Gregory grabbed me at both of my elbow area and a struggle for the gun ensued. I determined then to empty the entire bullets on the wall so that nobody will get hurt from the gun. . . . As I was shooting, Gregory was swinging my arms and one of the bullets accidentally struck my friend who stood few inches away from the entry door and he died."

25. After Detective Kleinfelder provided me with defendant's letter, Julaine Gallo, a paralegal in the Queens County District Attorney's Office, contacted the New York State Department of Corrections. That agency then provided the Queens County District Attorney's Office with a copy of a disbursement form, dated November 27, 2009. This form contains defendant's name and inmate number, and indicates that $6.49 was taken from defendant's account for "postage" for an item sent to "William Kleinfelder," at William Kleinfelder's address. A copy of this form is attached to this motion as Exhibit C.[5]

26. This Court should deny defendant's claims because all of them are meritless. First, this Court should deny defendant's claim that the prosecutor allegedly did not disclose the three pieces of paperwork mentioned above, as required by *People v. Rosario*, and that he first discovered them in a post-conviction request. Indeed, defense

[5] William Kleinfelder's address is redacted from this document.

counsel used both the memo book and Detective Feeks' CSU report at trial in his cross-examination of Detective Kleinfelder, a critical fact defendant now omits entirely from his motion papers. As to these two documents, then, defendant's claim is belied by the record of the trial itself. In addition, consistent with the trial record, Mr. Resnick states in his affirmation that he was well aware of his obligations under *People v. Rosario*, that it was his practice to turn over all *Rosario* material prior to trial, that in this case he prepared a list of the *Rosario* material that he would provide the defense, and that both of these documents appear on the *Rosario* list. In addition, contrary to defendant's assertion, the OCME supplemental report does not constitute *Rosario* material at all. The person who prepared the report did not testify as a witness at trial, nor was the narrative in the report attributed to any particular witness. Thus, this Court should deny defendant's *Rosario* claim.

27. Similarly, this Court should deny defendant's claim that the People did not comply with their obligations under *Brady v. Maryland.* As discussed fully below, the prosecutor did turn over both a copy of Detective Kleinfelder's memo book and a copy of the Crime Scene Unit report before trial. Moreover, as discussed fully below, the record reasonably supports that the statements contained in Detective Kleinfelder's memo book that are relied on by defendant to support his current claims were actually made by defendant himself, and not by any witness on behalf of the prosecution. In addition, even assuming that the OCME supplemental report was not specifically turned over prior to trial, the information contained in it mirrors the information contained in Detective Feek's Crime Scene Unit

report, which was turned over to the defense before trial. Thus, this Court should deny defendant's claim that the People did not comply with their obligations under *Brady v. Maryland.*

28. Likewise, this Court should deny defendant's claim that the People did not correct Gregory Reece's testimony that defendant shot Eze based on Detective Kleinfelder's memo book, which indicated that defendant was disarmed by Mr. Reece and that Mr. Reece shot Eze. Defendant erroneously attributes the statement contained in Detective Kleinfelder's memo book to Mr. Reece. Indeed, the record fully supports that this statement was never made by Mr. Reece but, rather, was made by defendant himself. In addition, the prosecutor was not required to "correct" testimony that was inconsistent with statements contained in police paperwork, because the prosecutor was not in a position to know which aspects of any inconsistency were true and which were false, and he had no reason to believe that Mr. Reece's testimony was not true. Accordingly, this Court should also deny this aspect of defendant's motion.

29. This Court should also deny defendant's claim that his attorney was ineffective for failing to attempt to impeach Mr. Reece with Detective Kleinfelder's memo book, Detective Feeks' Crime Scene Unit Report, and the OCME supplemental report. As discussed above, the statements contained in Detective Kleinfelder's memo book were not made by Gregory Reece and, as such, counsel had no good faith basis to use this memo book entry, and reasonably did not attempt to impeach Mr. Reece with a statement that defendant

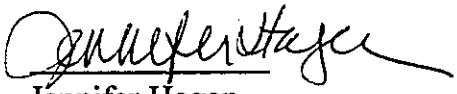
himself had made to the detective. Moreover, the statements contained in Detective Feeks' CSU Report and the OCME report were not attributable to Gregory Reece. In fact, the source of the information in the OCME report is completely unknown. And, while Detective Feeks attributed the statements in the Crime Scene Unit report to Detective Kleinfelder, it is clear that the narrative of the crime contained in Detective Feeks' report – that Eze had a gun and Reece disarmed and shot him – is a mis-transcription. Indeed, no witness, including defendant, has ever adopted the story that the deceased brought a gun to Reece's house or that the gun went off during a struggle with the deceased. Thus, it is clear that Detective Feeks did not accurately record the second or third hand information upon which he based his report. And, like the OCME report, the statements contained in the CSU report were not directly attributed to Mr. Reece and, thus, could not be used to impeach him at trial. Thus, counsel cannot be faulted for failing to use these documents at trial to any greater extent than he did.

30. Finally, this Court should summarily deny defendant's claim that he is actually innocent of the crimes he committed. To begin, defendant has not satisfied his burden of showing that he is entitled to a hearing. In addition, defendant's entire claim is based on impeachment material. Moreover, defendant's own testimony at trial, and his own narrative of the crime contained in the letter he wrote to Detective Kleinfelder establish, without question, that defendant possessed a weapon and intended to commit a crime when he remained in Mr. Reece's apartment with his gun drawn. And, defendant's letter to

Kleinfelder fully corroborates Mr. Reece's trial testimony that defendant was, in fact, the person who pulled the trigger on every gunshot that was fired the night that Justin Eze was killed. Accordingly, defendant has not established that he is innocent at all. In fact, defendant, who shot Justin Eze during a gun-point home-invasion that he orchestrated, is unquestionably guilty of all of the crimes for which he was convicted.

WHEREFORE, defendant's motion to vacate his judgment of conviction should summarily be denied.

Dated: Kew Gardens, New York
May 5, 2014



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SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-23

THE PEOPLE OF THE STATE OF NEW YORK,	:	MEMORANDUM OF LAW
Respondent,	:	
-against-	:	
ANTHONY NWOBI	:	Queens County Indictment Number
	:	5721/92
Defendant.	:	

POINT ONE

THE PROSECUTOR COMPLIED WITH HIS OBLIGATIONS UNDER *PEOPLE V. ROSARIO* (Responding to Point Three of Defendant's Motion).

Before the prosecutor delivered his opening statement, he turned over a copy of Detective Kleinfelder's memo book, and a copy of the CSU report prepared by Detective Feeks, to the defense. Thus, the prosecutor complied with his obligations under *People v. Rosario*, 9 N.Y.2d 286 (1961). Defendant, nevertheless, claims that the prosecution did not disclose these two reports or a third, supplemental report prepared by Craig Angard from OCME, and that he only discovered these documents as a result of post-trial FOIL requests. Defendant is wrong. Both Kleinfelder's memo book and Feeks report were specifically used by defense counsel during his cross-examination of these witnesses at trial, demonstrating

that he had access to them at that time. Thus, the record belies defendant's wholly self-serving, and outright false, claim that these documents were not available to the defense at the time of trial. Nor was the prosecutor required to turn over a copy of the OCME supplemental report under *People v. Rosario,* because the person who prepared the report, Mr. Angard, did not testify for the prosecution at trial, nor were the statements contained in his report attributed to any witness. Under controlling case law, unattributed statements related by a non-testifying witness are not subject to the *Rosario* rule. As such, defendant's claim that a *Rosario* violation occurred in this case is false.

To begin, this Court should summarily deny defendant's claim pursuant to section 440.30(4)(d) of the Criminal Procedure Law. Under this section, upon considering the merits of a motion, a court may deny it when an allegation of fact essential to support the motion is contradicted by a court record or another official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence and, under the circumstances of the case there is no reasonable possibility that defendant's allegations are true.

Here, defendant alleges that the prosecution never disclosed Detective Kleinfelder's memo book or Detective Feeks' CSU report prior to trial and that the defense first became aware of these documents in post-conviction litigation. But this allegation is contradicted by the trial record, and his claim as to these documents should be denied on that ground alone. In fact, defense counsel specifically referenced both Detective Kleinfelder's

memo book and Detective Feeks' CSU report in his cross-examination of Detective Kleinfelder at trial (Kleinfelder: 461, 470).

At trial, Detective Kleinfelder testified that, a few days after he spoke to defendant at the precinct, he returned to Mr. Reece to ask him about the veracity of defendant's story (Kleinfelder: 460). Counsel then asked, "You made scrupulous notes about every conversation, just about, that you had in this case, didn't you?," and an objection to this comment was sustained (Kleinfelder: 460-61). Counsel continued, "You made many notes, didn't you officer? . . . And you made entries in your notebook, isn't that correct?" (Kleinfelder: 461). Counsel then went on to question Detective Kleinfelder about the absence of notes documenting a fifteen-minute conversation that the detective claimed to have had with defendant after he read defendant *Miranda* warnings, but before the detective wrote out defendant's statement.[6] Counsel, therefore, clearly possessed a copy of the detective's memo book as he was aware of both what the book contained and what it did not.

The record also supports that counsel possessed the Crime Scene Unit report. Counsel specifically asked Detective Kleinfelder if the Crime Scene Unit prepared a report and the detective replied that he had a copy of the Crime Scene Report. Detective Kleinfelder then asked to look at the report to refresh his recollection as to what the Crime Scene Unit found on Justin Eze's deceased body (Kleinfelder: 470). If the defense had not

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[6] Counsel referenced one specific conversation with defendant, not to the exclusion of any other conversation that Detective Kleinfelder or another member of the police department had or may have had with defendant.

received the Crime Scene Report or Detective Kleinfelder's memo book, counsel would not have been in a position to use or reference them during the cross-examination. Thus, the record establishes that defendant had both of these reports before trial and completely belies defendant's claim that the first time he received these reports was in a post-conviction FOIL request.

Defendant's factual assertions should also be rejected under the second part of section 440.30(4)(d) because his claim that these documents were not turned over is entirely self-serving, made only by him, and there is no reasonable likelihood that it is true. Apart from the fact that the record specifically belies defendant's claim, the trial prosecutor, Marc Resnick has sworn that, at the time he tried this case, he was well-aware of his obligations under *People v. Rosario,* and that he would have turned over to the defense prior to opening statements any statement of any witness called by the People at trial. In addition, Mr. Resnick took the time and trouble to specifically type up a *Rosario* list, which documented that he was turning over to the defense both Detective Kleinfelder's memo book and the CSU report, and Mr. Resnick has sworn that his practice when he prepared such a list was to turn over all documents that were itemized on the list. Indeed, the only reason that a prosecutor would take the time and energy to prepare a typed *Rosario* list is to document the items that he or she actually turned over to the defense, not to memorialize a consciously flagrant violation of his or her obligations. Thus, defendant's self-serving statement that the prosecutor never disclosed these documents is contradicted both by Mr. Resnick's statements

about his general practice to turn over *Rosario* material, which is supported by the fact that he prepared a *Rosario* list, and by the record of the trial itself.

Moreover, common sense supports that defendant had these reports prior to trial. *Any* defense attorney trying a homicide case would be aware that, in virtually every case, police officers and detectives take notes in a memo book, and that the Crime Scene Unit prepares a report based on its visit to the crime scene. According to the Appellate Division's website, defense counsel in this case had been admitted to practice law in 1956. Counsel, therefore, was a seasoned professional who had been in practice for thirty-five years at the time this case was tried. Significantly, in this case, defendant does not allege that the People failed to disclose obscure pieces of police paperwork, documents unknown to the ADA conducting the trial, or documents that an ordinary defense attorney did not know to exist. Rather, he alleges that the People failed to disclose obvious pieces of paperwork that are prepared in almost all, if not all, criminal cases. Still further, as discussed above, the record demonstrates that defendant's attorney knew these specific documents existed in this case, considering that he referred to these precise reports during the cross-examination of Detective Kleinfelder. It is inconceivable that he referenced and used those documents without having had them. Under these circumstances, there is no possibility, much less a reasonable one, that defendant's claim that he did not have access to the reports is true. For all of these reasons, defendant's claim should be denied under 440.30(4)(d).

This Court should also reject defendant's *Rosario* claim as to the supplemental

report from OCME. Defendant has failed to establish that the OCME supplemental report constitutes *Rosario* material, because, under controlling case law, the People are not require to turn over a document, such as this one, that is prepared by a witness who does not testify for the People and contains only a wholly unattributed factual recitation.

After the jury is sworn and before opening statements, the People are required to provide defense counsel with copies of all statements made by the People's witnesses that are in the People's possession and control and that relate to the subject matter of the witnesses' testimony. C.P.L. § 240.45(1); *People v. Rosario*, 9 N.Y.2d 286, *cert. denied*, 368 U.S. 866 (1961). When the prosecution fails to comply with their obligations under *People v. Rosario*, the defendant is entitled to a reversal of his conviction if there is a possibility that the nondisclosure materially contributed to the result of the trial. *C.P.L.* § 240.75; *People v. Machado*, 90 N.Y.2d 187 (1997).

But for statements to be *Rosario* material, they must be directly attributable to a prosecution witness, and they must have been made to, or heard by, the person recording the statement. *People v. Vacante*, 215 A.D.2d 414, 415 (2d Dept. 1995); *People v. Shaw*, 212 A.D.2d 745 (2d Dept. 1995); *People v. Miller*, 183 A.D.2d 790, 791 (2d Dept. 1992). Statements that are a compilation or synopsis of conversations with many sources, or that contain information relayed second- or third-hand, do not constitute *Rosario* material. *People v. Miller*, 183 A.D.2d at 791; *People v. Williams*, 165 A.D.2d 839, 841 (2d Dept. 1990), *aff'd on other grounds*, 78 N.Y.2d 1087, 1088-89 (1991). Indeed, a recording or

document cannot be *Rosario* material if it is only "'at best a second-hand recording of a statement allegedly attributable to a prosecution witness, fraught with all the risks of inaccuracy and unreliability attendant to the relaying of what is essentially hearsay information.'" *Id.* As a result, the *Rosario* rule does not encompass hearsay, rumor, or gossip that might be attributable to a witness as such material simply cannot be used to impeach the witness. *Matter of Andrew T.*, 182 A.D.2d 630 (2d Dept. 1992).

Applying these rules, in *People v. Miller*, the Appellate Division, Second Department held that a "confidential" memorandum prepared by a police sergeant who did not testify at trial, and that contained a narrative of the crime, was not *Rosario* material. 183 A.D.2d at 791. The Court rejected the defendant's claim that the information "could only have come from prosecution witnesses." It noted that there was nothing in the record, or the memorandum itself, to indicate that the sergeant had obtained the information directly from the prosecution witnesses, and that it could also have come from other police officers. *Id.*

Consistent with these principles, Craig Angard's OCME supplemental report does not constitute *Rosario* material. Mr. Angard did not testify at trial for the prosecution, and his report does not attribute the information contained in it to any witness for the prosecution. Instead, it was a statement made by an unknown person. That statement was very consistent with the second-hand information recorded by Detective Feeks in his CSU report and, quite possibly, came from that report. But, Detective Feeks' account was fraught with all the risks of inaccuracy and unreliability attendant to the relaying of hearsay

information. Specifically, the account in the CSU report indicated that Detective Kleinfelder told Detective Feeks that Mr. Reece disarmed the deceased and shot him in the head. But this account of the crime was never relayed by any witness for the prosecution, nor the defense. Indeed, Mr. and Mrs. Reece both testified that defendant, not Mr. Eze, was armed with the gun, and defendant verified this account in his own statement to the police and in his own trial testimony. Thus, *no* witness reported the account described in Detective Feeks' or Mr. Agnard's inaccurate report, both of which were obviously nothing more than a mistaken understanding of how the crime had occurred. As a result, the People were not required to turn the supplemental OCME report over to defense counsel prior to trial under *People v. Rosario.*

And, as discussed fully above, defendant has failed to establish that the People did not disclose Detective Kleinfelder's memo book or the CSU report prior to trial. This is especially so considering that Mr. Resnick was aware of his obligations under *People v. Rosario* and prepared a list itemizing the documents he was turning over to the defense. Mr. Resnick's practice was to then provide a copy of the items on the *Rosario* list prior to trial. And the record fully supports that defense counsel, who referred to and utilized each of these documents during his cross-examination of Detective Kleinfelder, had these documents in his possession at that time. Thus, this Court should reject defendant's claim that the People failed to provide these documents to him.

In any event, even assuming, *arguendo,* that defendant did not receive any of these reports, there is no reasonable possibility that the verdict in this case would have been different if defendant had received them prior to trial. As discussed above, had defendant questioned Detective Kleinfelder at trial about the statement contained in the end of his memo book, the detective would have explained that that statement came from defendant, or from another police officer who had spoken to defendant, and was not attributable to a witness for the prosecution at all. Under these circumstances, the notation in Detective Kleinfelder's memo book constitutes nothing more than a prior consistent statement of defendant, which could not have been used at trial at all.

Moreover, defendant could not have impeached anybody's credibility with Detective Feeks CSU report because it was based on, at least, double-hearsay. And, because Mr. Angard's report does not attribute the statements contained in it to any particular person, defendant could not have used this document to cross-examine any particular witness. In addition, the contents of the CSU report and Mr. Angard's report – that Mr. Reece had disarmed Mr. Eze and shot him – is not consistent with any statement from *any* witness at trial, including defendant. Thus, it is clear that both the CSU report and Mr. Angard's report was not reliable, was based on inaccurate information, and would have had no value or very limited value if defendant had called Mr. Angard to testify himself, or cross-examined any witness with the CSU report. As a result, any failure to disclose these documents could not have impacted the verdict in this case.

In sum, the prosecutor complied with his obligations under *People v. Rosario,* and any error in the nondisclosure of these reports did not impact the verdict in this case. This Court should accordingly reject defendant's *Rosario* claim.

POINT TWO

DEFENDANT'S *BRADY* CLAIM SHOULD BE SUMMARILY DENIED (Responding to Point Four of Defendant's Motion).

As discussed above in Point One, prior to trial, the People disclosed to the defense a copy of Detective Kleinfelder's memo book and a copy of the CSU report. Nevertheless, defendant claims that the People violated their *Brady* obligations because they failed to disclose both of these documents, and a copy of a supplemental OCME report to the defense. First, as discussed above and below, defendant's contention that he did not receive a copy of the memo book and the CSU report prior to trial is belied by the record. Second, Detective Kleinfelder's memo book did not contain information that tended to exculpate defendant or that bore on the credibility of a witness for the People, because the statements that defendant attempts to attribute to Mr. Reece were actually attributable to defendant. Third, the information contained in the OCME report was the same information contained in Detective Feeks CSU report, which the defendant had in his possession prior to trial. Thus, the People fully complied with their obligations under *Brady v. Maryland* and this Court should reject defendant's claim to the contrary.

This Court should deny defendant's claim that the prosecutor withheld *Brady*

material because he did not disclose the contents of Detective Kleinfelder's memo book, and a CSU report pursuant to section 440.30(4)(d) of the Criminal Procedure Law. Under this section, upon considering the merits of a motion, a court may deny it when an allegation of fact essential to support the motion is contradicted by a court record or another official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence and, under the circumstances of the case there is no reasonable possibility that defendant's allegations are true.

In this case, defendant's claim that a *Brady* violation occurred is belied by the record, and is based on his own self-serving statements, unsupported by any other evidence, and under the circumstances of this case, there is no reasonable probability or possibility that defendant's allegations are true. First, in this case, there is no question that defendant was in receipt of both Detective Kleinfelder's memo book and the CSU report prior to trial. In fact, as discussed above, both of these reports were specifically mentioned on the prosecutor's typed *Rosario* list, and were also specifically used by defense counsel during his cross-examination of Detective Kleinfelder at trial. And defendant cannot establish that the information contained in Craig Angard's OCME supplemental report was not disclosed to the defense prior to trial. In this regard, Mr. Angard's report contained statements that were very similar to the statements contained in the CSU report which, as discussed above, defendant did receive. Under these circumstances, there is no reasonable possibility that defendant's claim that the prosecutor did not turn over the exculpatory or impeachment

material contained in the documents in question is true. Accordingly, this Court should deny defendant's claim pursuant to section 440.30(4)(d).

In addition, the prosecutor in this case submitted a sworn statement in which he indicates that he was aware of his obligation under *Brady v. Maryland* to disclose any information to the defense that tended to exculpate defendant or that impacted the credibility of the witnesses for the prosecution. The prosecutor also stated that it was his practice to turn over all *Brady* material prior to trial.

This Court should also deny defendant's *Brady* claim because he cannot establish that any *Brady* violation occurred in this case. The People are obligated to disclose to a defendant any evidence in their possession that is favorable to the defendant and material to his innocence or guilt. *Brady v. Maryland*, 373 U.S. 83 (1970); *People v. Steadman*, 82 N.Y.2d 1, 7 (1993). Consistent with this principle, the People must also disclose any evidence that they have that might affect the credibility of any of their witnesses. *Giglio v. United States*, 405 U.S. 150, 155 (1972); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994). The duty to disclose by the prosecution is limited to evidence that is: (a) in the prosecution's possession; (b) exculpatory, or favorable, to the defendant; and (c) material either to the defendant's guilt or punishment. *People v. Bryce*, 88 N.Y.2d 124, 128 (1996); *People v. Novoa*, 70 N.Y.2d 490, 496 (1987).

Evidence in the prosecutor's possession does not constitute *Brady* material and need not be disclosed to a defendant if its exculpatory value is speculative. *See California*

v. Trombetta, 467 U.S. 479, 488-89 (1984); *People v. Pannell*, 3 A.D.3d 541, 542 (2d Dept. 2004); *People v. Kaminski*, 156 A.D.2d 471 (2d Dept. 1989); *People v. Scattareggia*, 152 A.D.2d 679 (2d Dept. 1989). And evidence that defendant was aware of, or should have been aware of, need not be disclosed to the defense. *See People v. Doshi*, 93 N.Y.2d 499, 506 (1999).

The disclosure mandate of *Brady v. Maryland* is further limited to evidence that is "material." Whether evidence in the prosecutor's possession is "material" is dependent upon the specificity of the defendant's discovery request for such evidence. *See People v. Vilardi*, 76 N.Y.2d 67, 77 (1990). When a prosecutor was made aware by a specific discovery request that a defendant considers certain evidence exculpatory and materially important to his or her defense, that evidence is considered "material" if there is a "reasonable possibility" that had it been disclosed to the defense, the verdict would have been different. *People v. Scott*, 88 N.Y.2d 888, 890-91 (1996); *People v. Vilardi*, 76 N.Y.2d at 77. But if the defendant has made only a general request for the non-disclosed information, it is "material" if it would have created a "reasonable probability" that the outcome of the proceedings would have been different. *People v. Wright*, 86 N.Y.2d 591, 596 (1995). Because the "materiality" of evidence is ultimately based upon whether such evidence could have changed the outcome of the underlying proceeding had it been disclosed to the defendant, such evidence must necessarily also be admissible to be material. *See People v. Scott*, 88 N.Y.2d at 891; *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir.

1983); *see also People v. Terence McCray*, __ N.Y.3d __, 2014 N.Y.LEXIS 903 (May 1, 2014).

In this case, as discussed fully above in Point One, the record of defendant's trial and Mr. Resnick's affidavit support that defendant was aware of the information contained in all three documents, and actually physically possessed copies of two of the documents in question prior to trial. Thus, defendant cannot establish that any *Brady* violation occurred. *See People v. Doshi*, 93 N.Y.2d 499, 506 (1999); *People v. Bethune*, 65 A.D.3d 749,753 (3rd Dept. 2009); *People v. DeLaRosa*, 48 A.D.3d 1098 (4th Dept. 2008); *U.S. v. LeRoy*, 687 F.2d 610 (2nd Cir. 1982).

Moreover, and significantly, the single page of Detective Kleinfelder's memo book with which defendant takes issue actually does not contain any *Brady* material at all. Although defendant claims that the statements on this page of the detective's memo book must be attributed to Gregory Reece, he is wrong. Indeed, when Detective Kleinfelder's memo book is read in context, it is clear that the statements in question are not attributable to Gregory Reece at all; rather, they are attributable to defendant. This conclusion is supported by several factors.

First, Mr. Reece's on-the-scene statements to Detective Kleinfelder and the anonymously-made statement relied on by defendant are separated by seventeen pages in the detective's memo book, and the later statement contains a story that is completely different than the version of events that Mr. Reece gave to Detective Kleinfelder immediately

following the crime. Detective Kleinfelder's memo book consists of 21 pages of notes, plus one cover page. The first four pages consist of notes that begin with the name "Gregory Reece" and then gives a narrative of the crime, which includes the statement that Reece heard defendant fire three shots, saw Eze fall to the ground, and then grabbed the gun from defendant. Pages five through seven of the memo book consist of notes that begin with the name "Claudette Reece," and then documents her narrative of the crime, including that defendant broke into her house with a gun, pulled the phone out of the wall, and that she saw defendant turn around with the gun and then heard three shots. Pages eight and nine begin with the name "Joey Peters" and continues with Mr. Peters narrative of the crime. Page ten begins with the name "Maria Pestano" and continues with her narrative of the crime. Thus, it is clear that the first ten pages of Detective Kleinfelder's memo book are based on on-the-scene interviews with the witnesses to the crime that testified for the People.

The eleventh page of Detective Kleinfelder's memo book contains a note about the gun. The twelvth and thirteenth pages contains sketches of the crime scene. The fourteenth page contains information on Justin Eze and defendant. The fifteenth page contains telephone numbers and other information. The sixteenth page again references defendant and Mr. Eze. The seventeenth page contains information on Mr. Eze's family. The eighteenth page contains notes that begin with the name "Detective Hoskins." The nineteenth and twentieth page contains notes that begin with the name "P.O. Shawn Kelly."

The twenty-first and final page – the page defendant calls into question in his

motion – contains notations that begin with an arrow pointing at the name "Greg's cousin." That notation appears above the following lines: "Anth gave 3,000 Maxima/Give me $ or car/To Gary Greg/(Gary) is mechanic/Gary took gun shot Justin." The next page of the detective's memo book, which is also copied on the twenty-first page of the memo book that was turned over to the defense as *Rosario* material, has a note, "2350 Guard Prisoner," followed by the name Paul Presta.

It is clear, when read in context, that Detective Kleinfelder documented his interviews of all of the witnesses to the crime – Gregory Reece, Claudette Reece, Joey Peters, and Maria Pestano – in the first part of his memo book. He then turned his attention to the crime scene, the defendant, the deceased, and the other police officer accounts of what had happened. And, in the end, he documented the defendant's story, which is largely consistent with the statement that defendant gave to Detective Kleinfelder that was admitted at trial. Finally, in context, the following page of Detective Kleinfelder's memo book has the notation, "guard prisoner," which must have been a reference to defendant, the only prisoner in this case.

In addition, the notes on the twenty-first page of Detective Kleinfelder's memo book are written in the first person. Specifically, it states, "Give me $ or car," which is what defendant would have stated, not Gregory Reece. Nobody, not even defendant, contends that Gregory Reece wanted money or a car. But defendant has always maintained that he went Reece's house to get money, his car, or Fatman's address so that defendant could exercise

self-help in what he perceived to be a debt owed to him. It therefore would not make sense for Reece to state to Detective Kleinfelder, or to another police officer, "Give me $ or car," while it makes perfect sense for defendant to do so.

In addition, Detective Kleinfelder's notes contain references to Gary, with that name crossed out and replaced by the name Greg. His notes continue to refer to "Gary" being a mechanic and "Gary" taking the gun and shooting Justin. If Detective Kleinfelder had based these notes on a conversation that he had with Gregory Reece, Gregory would have been well-aware of his own name and there would have been no confusion about that in the detective's notes, just as there was no confusion that Detective Kleinfelder was interviewing Gregory Reece in the beginning of his memo book. According to defendant, he knew Justin Eze fairly well, but had only been distantly acquainted with Mr. Reece. It therefore makes sense that defendant would be confused about Gregory Reece's actual name, referring to him as both Greg and Gary.

Moreover, up until defendant filed his current motion, Mr. Reece had maintained that he did not know Fatman at all and that Fatman was not his cousin.[7] The memo book entry, however, refers to defendant giving $3,000 to "Greg's cousin." This story

[7] On or about April 3, 2014, Mr. Reece informed me that, although he had testified at trial that he did not know Fatman, he actually did know Fatman. Reece informed me that he had repaired Fatman's car and believed that Fatman was a drug-dealer. Reece claimed that he was reluctant to tell the truth about his relationship with Fatman at trial because of Fatman's profession, and because he did not want his wife to realize that Mr. Reece knew Fatman at all. On April 8, 2014, I sent a letter to Ms. Dave, documenting this information. On April 16, 2014, I sent a follow-up to my April 8, 2014 letter to Ms. Dave. These two letters are attached to this response as Exhibit D.

had only been advanced by defendant and it therefore follows that it came from him.

This is especially so taken in context. First, this story is not attributed to anyone in particular. Second, it is in direct contradiction to the story in the very beginning of Detective Kleinfelder's memo book that is attributed to Gregory Reece. Third, it is in direct contradiction to every other piece of police paperwork that documents Detective Kleinfelder's understanding of Mr. Reece's version of events, such as the on-line booking sheet, the complaint report, and the DD5s that were prepared in connection with this case. Fourth, the statement in question comes at the very end of the detective's memo book, which corresponds with the end of the evening, which is when Detective Kleinfelder spoke to defendant. Fifth, the statement is followed by the notation "Guard Prisoner." This leads to the conclusion that defendant, not Gregory Reece, is connected to the unattributed statement contained in Detective Kleinfelder's memo book. Accordingly, for all of these reasons, the statement in Detective Kleinfelder's memo book did not constitute *Brady* material at all. Instead, it constituted defendant's own attempt to exculpate himself.

In addition, in this case, defendant did not make a specific request for *Brady* material. Thus, the reasonable probability standard applies in determining the materiality of the undisclosed information.

As discussed above, the statements at issue in Detective Kleinfelder's memo book are attributable to defendant and, therefore, do not contain *Brady* material at all. And even assuming, *arguendo,* that defendant did not receive the detective's memo book, the

CSU report or the OCME report prior to trial, he cannot establish that there is a reasonable probability that the verdict in this case would have been different if he had had those reports prior to trial. Significantly, the CSU report is based on double-hearsay and, therefore, would not be admissible at trial. *See People v. Boatwright*, 297 A.D.2d 603 (1st Dept. 2002); *People v. Laboy*, 251 A.D.2d. 95 (1998). And the statements contained in the OCME report and in Detective Kleinfelder's memo book are not attributed to anybody in particular. Thus, it would have been impossible for defense counsel to make any meaningful use of these reports at trial, or to impeach Mr. Reece's credibility with these reports at trial. Thus, these reports simply would not have had any relevance to Mr. Reece's credibility. *See People v. Scott*, 88 N.Y.2d 888 (1996). Accordingly, defendant cannot establish that the alleged nondisclosure of these inadmissible documents contributed to the verdict.

In sum, defendant cannot establish that the prosecutor failed to comply with his *Brady* obligations. Thus, this Court should reject defendant's *Brady* claim.

POINT THREE

DEFENDANT HAS NOT ESTABLISHED THAT THE PROSECUTOR FAILED TO CORRECT FALSE TESTIMONY IN THIS CASE (Responding to Point Two of Defendant's Motion).

As discussed above, the People disclosed a copy of Detective Kleinfelder's memo book and a copy of the CSU report to the defense prior to trial. The CSU report contained the same information that was contained in an OCME supplemental report. All three of these documents refer to either defendant or Mr. Eze being disarmed, and Mr. Reece

shooting Mr. Eze. But, as discussed above, none of these three documents attribute the statements contained in them to Mr. Reece, or to any specific witness. Nevertheless, defendant claims that the District Attorney's Office failed to correct Mr. Reece's testimony that defendant fired the gun. But because the statements relied upon by defendant are not even fairly attributed to Mr. Reece, he cannot rely on these documents to support his claim that the prosecutor failed to correct Mr. Reece's testimony. In any event, any inconsistency between the police paperwork and Mr. Reece's testimony was not something that the prosecutor was required to correct. Inconsistencies in paperwork are present in almost every case and, unless the prosecutor or the District Attorney's Office has first-hand knowledge of which statements are true and which are false, a prosecutor is not in a position to correct any statement at all; rather, it is appropriate for the defendant to point out those inconsistencies at trial if there is an evidentiary basis to do so. Indeed, under the circumstances of this case, the prosecutor had no reason to believe that Mr. Reece testified falsely at trial and defendant had in his possession all of the documents that he could have attempted to use to impeach Mr. Reece's credibility with the statements he now claims are inconsistent with Mr. Reece's trial testimony.

The prosecution has an obligation to correct false testimony proffered by its witnesses at trial. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *People v. Colon*, 13 N.Y.3d 343 (2009). When a prosecutor is aware that a witnesses has testified inaccurately, and fails to correct the inaccurate testimony, reversal and a new trial are warranted unless there is "no

reasonably possibility that the error contributed to the conviction." *People v. Colon*, 13 N.Y.3d at 349; *People v. Pressley*, 91 N.Y.2d 825, 827 (1997); *People v. Steadman*, 82 N.Y.2d 1, 7 (1993).

In this case, the prosecutor was not required to correct Mr. Reece's testimony that defendant fired the gun. Defendant bases his claim that this testimony needed to be corrected on Detective Kleinfelder's memo book entry, which indicated that Mr. Reece shot Mr. Eze. As discussed above, defendant erroneously attributes the statement contained in Detective Kleinfelder's memo book to Mr. Reece. But, as discussed above, the record fully supports that this statement was never made by Mr. Reece but, rather, was made by defendant himself. Indeed, there is no indication in Detective Kleinfelder's memo book that the statement that Gary took the gun and shot Justin was attributed to Mr. Reece. In fact, Mr. Reece's on-the-scene statements to Detective Kleinfelder and the anonymously-made statement relied on by defendant are separated by seventeen pages in the detective's memo book, and the later statement contains a story that is completely different than the version of events that Mr. Reece gave to Detective Kleinfelder immediately following the crime. As fully discussed above, the latter statement is written in the first person and reflects a statement that can only fairly be attributed to defendant. And, after reviewing the latter statement, Mr. Resnick, who tried this case, states that it appears to be a statement made by defendant, not Mr. Reece. Under these circumstances, the prosecutor properly did not correct Mr. Reece's testimony based on Detective Kleinfelder's report because there was, in fact,

nothing for him to correct.

Similarly, the prosecutor was not required to "correct" Mr. Reece's testimony based on the contents of the CSU report or the OCME report. These reports contained hearsay or double-hearsay statements, Mr. Reece was not identified as the source of these statements, and the statements made in the reports were not reliable at all. In fact, the version of events contained in each of these reports – that Mr. Reece disarmed Mr. Eze and shot him in the head – was not endorsed by Mr. Reece, defendant, or any other witness to testify at trial. Thus, these reports contained obvious errors and, as discussed above, could not have even been used to impeach a witness's credibility, much less to form the basis for the prosecutor to determine that Mr. Reece had testified untruthfully at trial.

In addition, even assuming, *arguendo,* that the statements in the reports had been made by Mr. Reece, these statements, at most, amount to a prior inconsistent statement of Mr. Reece. A prior inconsistent statement may bear on a witness's credibility, but it has never been the case that a prior inconsistent statement must be construed to constitute the truth while the trial testimony constitutes a lie that must be corrected. Accordingly, the prosecutor had no basis to conclude that any of the reports mentioned by the defense contained the truth, and that Mr. Reece's trial testimony was false. *See United States v. Lighten*, 525 Fed. Appx. 44, 47 (2d Cir. 2013) (inconsistent statements do not establish false testimony, or that the prosecution knew the testimony was false). Under these circumstances, defendant's claim that the prosecutor failed to correct Mr. Reece's testimony must fail.

Likewise, defendant's claim that his conviction should be vacated based on the prosecutor's "misleading" summation in which the prosecutor argued that defendant was the shooter, that defendant's claim that Mr. Reece was the shooter was not correct, and that Mr. Reece had no motive to lie, must fail. Contrary to defendant's claim, the prosecutor fairly commented on the evidence presented at trial and, as discussed above, the prosecutor had no reason to believe that any of this evidence was false.

Nevertheless, defendant claims that the fact that statements of undetermined origin exist that were inconsistent with Mr. Reece's trial testimony somehow creates a burden on the prosecutor to correct the trial testimony to match the statements that are inconsistent with it. But, first, defendant ignores that the prior inconsistent statements upon which he relies to support his motion are not attributed to Mr. Reece. Thus, the prosecutor could not use these statements to "correct" Mr. Reece's testimony.

Second, defendant ignores that the existence of a prior inconsistent statement does not lead to the conclusion that trial testimony is necessarily false. In fact, other statements made by Mr. Reece, including the initial statement in Detective Kleinfelder's memo book and Mr. Reece's grand jury testimony, largely mirror Mr. Reece's trial testimony. Thus, even if a prior inconsistent statement existed in this case, prior consistent ones exist as well, making it impossible to determine conclusively the truth or falsity of any statement.[8]

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[8] And, significantly, Mr. Reece's trial testimony that defendant was the shooter was consistent with the other evidence in the case, like defendant's own statement to Detective

The cases that defendant relies on to support his claim that the prosecutor was required to correct testimony in this case are completely distinguishable from this case. In this regard, in the cases relied upon by defendant, the prosecutor knew or should have known that a witness's trial testimony was false because the prosecutor independently knew or should have known the truth of the situation about which the witness was testifying. For example, in *People v. Steadman,* 82 N.Y.2d 1 (1993), the prosecutor failed to disclose to the defense the fact that the District Attorney's Office had agreed to a deal of no jail time in their witness's own criminal case, if that witness testified at trial. Similarly, in *Jenkins v. Artuz,* 294 F.3d 284, 294-96 (2nd Cir. 2002), the prosecutor's redirect examination of the witness left the jury with the mistaken impression that no plea agreement existed between the District Attorney's Office and the witness for the prosecution, when one, in fact, did. Likewise, in *Su v. Fillon*, 335 F.3d 119 (2nd Cir. 2003), the prosecutor failed to disclose to the defense the existence of a cooperation agreement pursuant to which the witness was testifying at trial. And, in *People v. Petros Bedi*, also relied on by the defense, the prosecutor failed to correct testimony that the District Attorney's Office had not paid for a witness's relocation expenses when the office, in fact, did.

But all of these cases are completely distinguishable from this case. In all of the cases cited above and relied upon by defendant, the prosecutor had actual or imputed knowledge about the agreements that the District Attorney's Office made with witnesses.

Kleinfleder, and defendant's spontaneous statement to the first responding officer that he had shot his friend.

Moreover, whether a cooperation agreement existed or not or whether expenses were paid by the District Attorney's Office or not, are black and white issues where a prosecutor can readily determine what is true and what is false.

By contrast, in this case, the prosecutor had three documents before him. One document – Detective Kleinfelder's report – attributes the statement that defendant claims was made by Mr. Reece to no particular party and, as discussed above, appears to have been made by the defendant himself. Another document – the CSU report – contains double-hearsay and an obviously inaccurate statement that the deceased, who was never alleged to have possessed a gun, had been disarmed. And the third document – the OCME report – contains a story, also attributed to nobody in particular, that also was obviously inaccurate because it, too, claimed that the deceased was disarmed, which everybody knew was not the truth in this case. Thus, unlike cases where the prosecutor knew that a witness received a benefit and lied about it, in this case the three statements relied upon by defendant are not attributable to Mr. Reece, and do not conclusively establish the truth of what happened during the crime at all. At most, they constitute a version of events that is inconsistent with the version of events that Mr. Reece testified to in the grand jury and at trial. But because the prosecutor did not know and had no reason to believe that the statements contained in the police paperwork were true and the testimony at trial was false, there was no false testimony for the prosecutor to correct in this case. And, for these same reasons, the prosecutor's appropriate references to the trial evidence during summation were proper.

Finally, in addition to all of the reasons listed above, considering that defendant wrote to Detective Kleinfelder in 2009 and apologized for "not being honest and truthful about how the shooting occurred," it is completely unbelievable that the three documents relied on by defendant contain a version of events that is true. Defendant's letter makes quite clear that, consistent with Gregory Reece's testimony at trial, and in direct contradiction to the paperwork upon which defendant now relies, defendant was never disarmed by Mr. Reece during the home invasion that he orchestrated. Rather, he deliberately discharged every bullet that was fired the night that Justin Eze was killed.

In sum, defendant cannot establish that the statements contained in the paperwork upon which he relies were made by Mr. Reece. He also cannot establish that the statements contained in the paperwork are accurate or true, and that Mr. Reece's trial testimony was false. Accordingly, this Court should deny defendant's claim that the prosecutor failed to correct Mr. Reece's testimony and erroneously relied on Mr. Reece's trial testimony during his summation.

POINT FOUR

DEFENDANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL (Answering Defendant's Motion Point Five).

Defense counsel provided defendant with meaningful assistance throughout his trial. Counsel had a clear trial strategy that centered around convincing the jury that the police investigation into this case was inadequate, and that defendant did not intend to kill anyone or to commit any crimes; rather, the gun was accidentally fired during a struggle at a point in time when Mr. Reece had control of the gun. Nevertheless, defendant argues that he was deprived of the effective assistance of counsel because counsel did not use statements contained in Detective Kleinfelder's memo book, Detective Feeks' CSU report, and Mr. Angard's OCME report, to impeach Mr. Reece's credibility and to argue that Mr. Reece, not defendant, was the gunman. But defendant's claim is meritless, because counsel had a clear strategic basis for electing not to use these documents to challenge Mr. Reece's credibility; namely, that he could not, in good faith, attempt to use these reports to establish that Mr. Reece was incredible, or that he was the shooter. This is so because, as discussed above, the statements contained in Detective Kleinfelder's memo book were made by defendant, not Gregory Reece, and the statements contained in the CSU and OCME reports were unreliable reports that were attributed to no witness in particular. Thus, defendant's judgment should be affirmed.

The right to the effective assistance of counsel is guaranteed under both the

Federal and State Constitutions. *See* U.S. Const., 6th Amend.; N.Y. Const., art. I, § 6. Under the New York rule, what qualifies as effective assistance varies with the unique circumstances of each representation. *People v. Benevento*, 91 N.Y.2d 708, 712 (1998); *People v. Baldi*, 54 N.Y.2d 137 (1981). In order to succeed on a claim that trial counsel was ineffective under the state constitution, a defendant must demonstrate, viewing the totality of the evidence, the law, and the circumstances of that particular case, that counsel failed to provide "meaningful representation." *Benevento*, 91 N.Y.2d at 712 (quoting *People v. Baldi*, 54 N.Y.2d at 147 [1981]); *see also People v. Satterfield*, 66 N.Y.2d 796, 798-799 (1985). Meaningful representation "includes a prejudice component which focuses on the fairness of the process as a whole rather than [any] particular impact on the outcome of the case." *People v. Henry*, 95 N.Y.2d 563,566 (2000)(citing *Benevento*, 91 N.Y.2d at 714).

Courts should apply a "flexible approach" when evaluating ineffective assistance of counsel claims. *Henry*, 95 N.Y.2d at 565(citing *Benevento*, 91 N.Y.2d at 712). The question is whether the attorney committed "egregious and prejudicial" error such that the defendant did not receive a fair trial. *See Benevento*, 91 N.Y.2d at 713 (quoting *People v. Flores*, 84 N.Y.2d 184, 188-189 [1994]). What is guaranteed is a fair trial, "not necessarily a perfect one." *Benevento*, 91 N.Y.2d at 712; *see also Flores*, 84 N.Y.2d at 187. When applying this standard, however, courts must take care not to accord "undue significance" to retrospective analysis. *Benevento*, 91 N.Y.2d at 712; *Baldi*, 54 N.Y.2d at 145. So long as the defendant was afforded "meaningful representation," it is irrelevant

whether a course chosen by a defendant's counsel was the best course to pursue, or even a good one. *Satterfield*, 66 N.Y.2d at 799-800.

In order to establish a claim of ineffectiveness under the Sixth Amendment to the United States Constitution, defendant must satisfy a similar, but somewhat different test. *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must demonstrate, first, that counsel's performance fell below an objective standard of reasonableness and second, that the deficient performance deprived the defendant of a fair result. *See Benevento,* 91 N.Y.2d at 713; *People v. Sullivan*, 153 A.D.2d 223, 226-227 (2d Dept. 1990). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. And it is the defendant's burden not only to overcome the strong presumption of reasonable professional assistance, but also to demonstrate a reasonable probability that, but for the substandard performance, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 689, 694; *Sullivan*, 153 A.D.2d at 226-227. In the instant case, defendant cannot show that he was not provided with meaningful representation, and he cannot show that he was prejudiced by counsel's actions.

In this case, a review of counsel's representation as a whole shows that counsel provided defendant with effective representation throughout the course of the trial. Defense counsel's overall trial strategy centered around convincing the jury that the evidence established that defendant and Mr. Eze were childhood friends, that Mr. Reece's cousin had

swindled defendant out of money, and that he went to Mr. Reece's house with a gun to collect information to help him collect a debt, rather than to harm anybody. Had the jury believed counsel's theory, it would have resulted in greatly diminished criminal exposure for defendant because it would have established that defendant had no criminal intent at all.

Counsel elicited information during the cross-examination of the prosecution's witnesses that supported his theory that, as a result of a remarkably flawed investigation that was bungled from the outset, the People could not sustain their burden and that defendant should continue to enjoy his presumption of innocence. To further this theory, counsel elicited during his cross examination of the medical examiner that a critical piece of evidence – the bullet that had been recovered from Mr. Eze's head – was mishandled, lost, and could not be tested. He also established that when the medical examiner received Mr. Eze's body it had no shoes, two socks on one leg, and no hat, which Mr. Eze had been wearing when he was shot in the head.

Counsel also thoroughly cross-examined police officers at trial, and even confronted Detective Kleinfelder with his memo book, and referred him to the CSU report – two of the three documents defendant now complains that counsel failed to adequately use at trial (Kleinfelder: 470). Counsel relentlessly challenged every police officer witness at trial about the inadequacies in their investigation. For example, he challenged the police about the placement of Mr. Eze's body at the crime scene, and established that the police had, in fact, moved Mr. Eze's body. He also elicited that they were careless with respect to

processing the crime scene and memorializing critical details. For example, counsel elicited that the police did not observe bullet holes in the wall, and did not recover the papers that Mr. Eze held in his hand that would have supported defendant's claim that he went to Mr. Reece's apartment to collect a debt (251, 57, 267-269). Counsel also elicited testimony that the police did not photograph a broken chain on the door, which undermined the People's evidence that this incident began as a push-in home invasion. And counsel established during cross-examination that the Crime Scene Unit's sketch of the apartment was not even accurate and that Detective Feeks drew a wall that did not even exist in Mr. Reece's apartment and omitted a wall that did. Moreover, counsel established through cross-examination that while some witnesses had testified that Mr. Peters had grabbed the gun, others claimed that the gun remained on the floor until CSU came to the apartment (442-43). All of this information undermined the investigation done by the police and challenged the credibility of the People's witnesses, thereby giving counsel the basis to argue that reasonable doubt existed in this case.

Counsel also presented a case on defendant's behalf. He called defendant to testify and explain that he had no criminal intent, that he went to Mr. Reece's apartment to get Fatman's contact information so that he could retrieve money that Fatman owed him, and that Mr. Reece, who defendant claimed knew both himself and Mr. Eze, let defendant into his apartment because they had a relationship. Defendant also testified that Mr. Reece had struggled with defendant over the gun and had gained control over it before shots were fired.

Counsel also called defendant's employer, who testified to defendant's reputation for honesty, and for being a law-abiding citizen.

Counsel also advanced his theory that defendant was innocent throughout his summation. Counsel highlighted the weaknesses in the evidence of the People's case, and skillfully used the evidence at trial to support his own theory of the case. For example, during summation, counsel strenuously argued that defendant did not have any intention to commit any crime. He also argued that the police had done an abysmal investigation into the crime, had lost key pieces of evidence, like the bullet that killed Mr. Eze, and the papers that Mr. Eze held in his hand. Counsel further argued that once Detective Kleinfelder had decided defendant was a suspect he was satisfied and chose to close out this homicide investigation without conducting any real investigation into the case. Counsel also argued that Detective Kleinfelder did not accurately record defendant's statement, and went out of his way to not bother to collect any evidence that would have exculpated defendant. Counsel also emphasized during summation that Mr. Reece was the only witness who could testify about Mr. Eze's death, but that Mr. Reece was not credible at all.

Additionally, counsel's conduct throughout the trial exhibited his competence and knowledge of the law. In this regard, counsel lodged various objections at trial, many of which were sustained. Indeed, throughout the entire trial, counsel zealously advocated for defendant and continuously tried to convince the jury logically and cogently to reject the prosecution's theory that defendant had a criminal state of mind. Had this theory been

successful, it would have resulted in greatly reduced criminal exposure for defendant. Counsel's theory did, in fact, convince the jury to acquit defendant on one very serious charge – Attempted Robbery in the First Degree.

Nevertheless, defendant, with the benefit of hindsight, now argues that he was deprived of the effective assistance of counsel because counsel did not use statements contained in Detective Kleinfelder's memo book, Detective Feeks' CSU report, and Mr. Angard's OCME report, to impeach Mr. Reece's credibility and to argue that Mr. Reece, not defendant, was the gunman.[9] But defendant's claim is meritless. In fact, counsel strategically did not use these documents to impeach Mr. Reece because that strategy would have backfired on counsel. This is so because the statements contained in those three documents were not attributed to Mr. Reece and could not serve to effectively, or in good faith, undermine his credibility.

First, as discussed above, the statements contained in Detective Kleinfelder's memo book were made by defendant, not Gregory Reece. Had counsel asked about this statement at trial, therefore, Mr. Reece would have denied making it, and Detective Kleinfelder would have likely testified that defendant, not Mr. Reece, made the statement about Mr. Reece shooting Justin. Any cross-examination into this area, therefore, would have fallen flat.

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[9] Significantly, defendant received a copy of Detective Kleinfelder's memo book – the main document upon which he bases his current motion – in 2002, two years before his trial attorney passed away. Yet, defendant inexplicably waited twelve years to bring any claim based on this document.

And, as discussed above, the statements contained in the CSU and OCME reports were unreliable reports that contained information that both defendant and the People believed was factually inaccurate. In addition, and perhaps more significantly, the statements contained in these reports were attributed to no witness in particular. Thus, counsel, having no good faith basis, could not have confronted Mr. Reece with these statements.

Counsel undoubtedly had both Detective Kleinfelder's memo book and the CSU report in his possession considering that, as discussed above, he utilized these reports during cross-examination in other, meaningful ways. But he realized that the detective's memo book contained defendant's statement to Detective Kleinfelder, which could not be used to impeach Mr. Reece. Counsel also realized that the CSU report and the OCME report, both of which contained inaccuracies about who possessed the gun, and were either based or likely based on hearsay statements that were in no way connected to Mr. Reece had little to no impeachment value.

Finally, as discussed above, any cross-examination about Detective Kleinfelder's memo book would not have helped the defense, and any cross-examination about the CSU report and the OCME report would have been objectionable and also would not have helped the defense. Thus, defendant cannot establish that he was prejudiced by counsel's decision not to use these documents in a manner any differently than he actually did.

In sum, defense counsel provided defendant with meaningful representation throughout his trial. Moreover, there were strategic or other legitimate reasons behind counsel's cross-examination of the People's witnesses. Finally, counsel's performance did not prejudice defendant.

POINT FIVE

DEFENDANT HAS NOT ESTABLISHED THAT HE IS ACTUALLY INNOCENT OF THE CRIMES OF WHICH HE WAS CONVICTED (Responding to Point One of Defendant's Motion.

After trial, a jury unanimously found defendant guilty of Murder in the Second Degree, Attempted Murder in the Second Degree, Burglary in the First Degree, and Criminal Possession of a Weapon in the Second Degree, beyond a reasonable doubt. Over twenty-one years later, defendant now moves pursuant to section 440.10(1)(h), to vacate his judgment of conviction, based on his own self-serving assertions that he did not commit the crime, and based on three documents that state that Mr. Reece disarmed either defendant or Mr. Eze and then shot Mr. Eze. This Court should reject defendant's actual innocence claim. Defendant, who committed a home invasion where he held a family with a toddler and a newborn at gun point, fired the gun, and killed Justin Eze after a bullet hit Mr. Eze in the head, is unquestionably guilty of Murder in the Second Degree, and the other charges for which he was convicted. Moreover, none of the reports provide reliable, or even admissible, evidence that are sufficient to overcome the jury's unanimous verdict in this case.

A motion to vacate judgment is statutorily based, and can only be granted if defendant establishes that his conviction was tainted by one of the grounds enumerated in the statute. *See* C.P.L. § 440.10(1); *see People v. Reyati*, 254 A.D.2d 199 (1st Dept. 1998); *see also People v. Michael*, 842 N.Y.S.2d 159 (App. Term. 2d Dept. 2007). After defendant filed his motion, the Appellate Division decided *People v. Hamilton*, __ A.D.3d __, 2014 N.Y.App.Div.LEXIS 232 (2nd Dept. Jan. 15, 2014). In that case, for the first time, a New York appellate court found that an actual innocence claim is cognizable in a section 440 motion because the New York State Constitution prohibits the punishment of an actually innocent person. *Id.* at **24.[10] To establish a claim of actual innocence, a defendant must show that there is clear and convincing evidence that he or she is innocent. *Id.* at **26. Put another way, a defendant claiming that he is innocent after a jury has already determined that

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[10] A motion to vacate judgment is statutorily based, and can only be granted if defendant establishes that his conviction was tainted by one of the grounds enumerated in the statute. *See* C.P.L. § 440.10(1); *see People v. Reyati*, 254 A.D.2d 199 (1st Dept. 1998); *see also People v. Michael*, 842 N.Y.S.2d 159 (App. Term. 2d Dept. 2007). Section 440.10 of the Criminal Procedure Law makes only one limited provision for a claim of actual innocence. Under section 440.10(1)(g-1), which went into effect on August 1, 2012, the only circumstance where a defendant's conviction may be vacated on the ground of actual innocence after trial is when a court has determined after post-conviction DNA testing that there is a reasonable probability that the verdict would have been more favorable to the defendant. The section does not authorize vacatur of a conviction on any other allegation of actual innocence after trial.

Indeed, the addition of this section to 440.10 leads to the irrefutable inference that the Legislature intended to exclude all other free-standing claims of actual innocence from the purview of the statute. As the Court of Appeals made clear only recently, when "a statute describes a particular situation in which it is to apply and no qualifying exception has been added, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded." *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 67 (2011). Thus, contrary to the holding in *Hamilton*, no other claim of actual innocence is statutorily recognized except the one specified in 440.10(1)(g-1).

he is guilty must show that in light of the new evidence he presents *no* reasonable juror would have voted to find him guilty beyond a reasonable doubt. *Schlup v. Delo*, 298 U.S. 298, 329 (1995). Mere doubt as to defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt is not enough to satisfy a defendant's burden, "since the defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty." *People v. Hamilton*, __ A.D.3d __, 2014 N.Y.App.Div.LEXIS 232 at **27.

The People concede that this Court is bound by *Hamilton*. Nevertheless, to preserve the issue for further review, we are compelled to set forth in this Court the reasons we believe that *Hamilton* was wrongly decided. The Appellate Division's conclusion in *Hamilton* is in error for several reasons. First, an actually innocent defendant, who, like defendant here, has been convicted after trial, has ample other avenues of relief available to overturn his conviction without creating a new, non-statutory and unauthorized framework. Indeed, New York not only provides for executive clemency for a potentially innocent defendant, *see Executive Law* §19, but defendants are entitled to attack their convictions for any constitutional or statutory defect in the original proceedings and, even when the prior proceedings have been full and fair, present newly discovered evidence that could have affected the verdict. But a defendant should not have a *carte blanche* opportunity to relitigate his or her trial in any post-conviction motion in which he decides to raise a free-standing claim of actual innocence.

Under *Hamilton*, even where the trial is otherwise perfectly proper and the

results sustained by appellate review, and the defendant fails to present newly discovered evidence that undermines the verdict, state courts will be faced with the task of relitigating every criminal trial in a post-conviction motion based on any defendant's claim that the finder of fact reached an incorrect verdict. This litigation is unnecessary because sufficient remedies exist so that any actually innocent defendant can have his conviction overturned due to newly-discovered evidence, prosecutorial misconduct, or ineffective assistance of counsel. Indeed, in all of these situations, defendants need only show a reasonable probability of a different result in order to obtain relief, far less of a showing than the clear-and-convincing evidence standard *Hamilton* applies to actual innocence claims. Moreover, in New York, there is no time limit on these claims, including newly discovered evidence claims, which are frequently time-limited in other jurisdictions. Because an allegedly actually innocent defendant has ample other remedies, the creation of a new one in contravention of section 440.10 is neither constitutionally necessary nor appropriate.

Second, *Hamilton* cites as appellate authority for its revision of the 440 statute federal actual innocence cases, such as *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013); *House v. Bell*, 547 U.S. 518 (2006); and *Herrera v. Collins*, 506 U.S. 390 (1992). But this reliance is misplaced. Those cases hold only that a defendant can avoid a federal procedural bar based on a convincing showing of actual innocence. In order to obtain relief, even actually innocent defendants must show some additional substantive, prejudicial constitutional error. The Appellate Division entirely fails to recognize this distinction, or to explain why actual

innocence in New York should not simply exist to circumvent procedural bars when absolutely necessary.

Nor did the Appellate Division provide a rationale for holding that the New York Constitution provides greater protection than the federal one in this area. Indeed, historically, New York courts have provided merely the traditional – and more than adequate – remedies provided to those numerous defendants who proclaim their actual innocence. Nor did the Court cite to state legislative constitutional history suggesting that the framers of the state constitution believed these remedies to be inadequate. In the absence of any articulated justification for greater protection, the reasoning of the Appellate Division must fail.

Third, a practical effect of permitting a free-standing claim of actual innocence is that defendants can now deliberately hold back evidence at trial that was clearly available to them at that time, with the knowledge that they can then turn around post-conviction and have a cognizable basis to challenge a jury's verdict. The passage of time in any case tends to prejudice the People.

Further, under *Hamilton*, there is no longer any finality to any conviction. *See generally, People v. Kevin W.*, 22 N.Y.3d 287, 296 (2013)(noting importance of finality, and the expectation that parties are prepared for relevant proceedings with their best evidence). Even a perfectly valid conviction, untainted by any error and unaffected by any new evidence, is perpetually subject to challenge on the defendant's say so. This result not only unfairly puts the People in a position where they must re-prove a defendant's guilt

indefinitely, it subjects the victims and victims families to never-ending fear that the offender has not been brought to justice or will be released. *See generally Wainright v. Sykes*, 433 U.S. 72, 90 (1977)(noting state trial should be the "main event" rather than a "tryout on the road" for later collateral attacks on the judgment). Moreover, a system of justice that cannot accept the fact that it may have been correct, even after countless appeals and challenges, fails to command the respect of the citizens it serves, much less the criminals whose behavior it seeks to control.

Fourth, even accepting *Hamilton*'s premise, the case is fundamentally flawed because the appropriate remedy for relief is to order a new trial, rather than dismissing the indictment altogether. Indeed, a finding of "actual innocence" does not actually establish that a defendant is, in fact, innocent. It is a judicial determination, made by a singular judge, that the jury verdict can no longer stand in light of new evidence. That determination will not be infallible. Thus, the People should not be automatically barred from retrying a defendant. At a retrial, a new jury could be empaneled to hear all of the evidence that has been discovered over time. And, of course, if a judge correctly decides an actual innocence claim and support for a defendant's guilt is unquestionably undermined, the People could then determine to dismiss a defendant's indictment in the appropriate case. In any event, in such a case, a new trial would undoubtedly result in acquittal. This remedy is far more equitable than the outright dismissal of an indictment based on one judge's finding that the jury's verdict can no longer stand.

In any event, this Court must consider defendant's claims under *Hamilton.* And, for the reasons stated below, this Court should summarily deny defendant's actual innocence claim.

In order to warrant a hearing on an actual innocence claim under *Hamilton*, a defendant must not only make factual allegations supporting his claim, but must also demonstrate that there is "a sufficient showing of possible merit to warrant a fuller exploration" of his claim by the court. *People v. Hamilton*,_ A.D.3d __, 2014 N.Y.App.Div.LEXIS 232 at **27; *see also People v. Caldavado*, __ A.D.3d __, 2014 N.Y. App. Div. LEXIS 2491 (2nd Dept. April 16, 2014) (rejecting need for hearing on actual innocence claim).

Moreover, any evidence considered as part of a freestanding claim of innocence should be reliable and should meet the standards for admissibility at trial. Indeed, to permit otherwise would afford any defendant two separate opportunities to have his or her guilt determined: one with only reliable and admissible evidence and one that would include unreliable and inadmissible evidence. The second trial would undermine the rules of evidence in their entirety, the integrity of the trial process, and the accuracy of the result. Because virtually all of the rules of evidence promote the truth-seeking function of the guilt-determining process, those rules must be respected in the post-conviction process.

In addition, in determining whether new evidence unquestionably establishes that a defendant is innocent, courts must not make "an independent factual determination

about what likely occurred;" rather, they must assess the likely impact the new evidence would have had on "reasonable jurors." *Schlup v. Delo*, 298 U.S. at 329. In order to have any impact on a reasonable juror, the evidence, by necessity, would have to be admissible, otherwise, obviously, the juror would not be able to consider it.[11]

Here, defendant has failed to make the requisite showing. First, the CSU report would not have had any impact on a reasonable juror. The jury would not have been able to hear the contents of the CSU report, which was based on Detective Feeks' statement that Detective Kleinfelder had told him that the occupant of the apartment had disarmed Justin Eze and shot him in the head. As discussed above, Detective Feeks' statement is based on double-hearsay and would not have been admissible at trial. Moreover, the contents of the report are unreliable because they recount at best a third-hand version of the events that even the defendant concedes is not true. Indeed, no party or eye-witness in this case claims that the statement contained in Detective Feeks report – that an occupant of the apartment disarmed Justin Eze – accurately recounts the events of that evening; defendant himself in his trial testimony testified that he, and not Mr. Eze, exclusively possessed the gun before the alleged struggle with Mr. Reece. Thus, this inaccurate, at best third-hand account, cannot

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[11] *Hamilton* holds that reliable evidence that is not admissible at trial based on a procedural bar – like the affidavits from unnoticed alibi witnesses that were presented in that case – is admissible at a hearing on actual innocence. But it does not hold that unreliable evidence, testimony or exhibits that do not satisfy evidentiary standards for admissibility at trial, would be admissible at an actual innocence hearing. Nor should such a ruling be warranted, as actual innocence hearings would quickly become replete with inadmissible and unreliable testimony and exhibits, such as polygraph results and hearsay contained in affidavits and police reports.

have undermined the jury's verdict, and in no way constitutes clear and convincing evidence that defendant is innocent.

Second, defendant has not established that the jury would have been able to hear the contents of Mr. Agnard's OCME report, or that the account was in any way reliable. Indeed, the narrative of events in the report is wholly unattributed and thus cannot be traced to any reliable source. Moreover, the report is strikingly similar to to the inaccurate version contained in Det. Feeks CSU report, making it likely that the investigator's version came from that report. The report is thus at best inadmissible triple-hearsay, containing a version of events that defendant himself concedes is not true and, therefore, cannot, in good faith, be advanced. Moreover, Mr. Agnard did not testify at trial and thus the report could have absolutely no impeachment value. Thus, defendant cannot establish that this inaccurate report would have undermined the jury's verdict. Similarly, he cannot establish that this document contains clear and convincing evidence that defendant is innocent of the crimes charged.

Third, defendant cannot establish that Detective Kleinfelder's memo book entry would have had any impact on a reasonable juror. In this regard, as discussed above, the statement written in Detective Kleinfelder's memo book came from defendant and contained nothing more than defendant's version of the events of the night that he broke into Mr. Reece's apartment and killed Mr. Eze. To begin, the jury heard defendant's testimony regarding the crime and this statement would have added nothing at all to that. In addition,

this statement, which constitutes a prior consistent statement of defendant, could not have been used at trial in any way. *See People v. Seit*, 86 N.Y.2d 92 (1995). Thus, this statement, too, would not have undermined the jury's verdict and does not establish by clear and convincing evidence that defendant is innocent.

In addition, as discussed above, not only did defendant have all of the documents upon which he bases his actual innocence claim prior to trial, but defendant, by his own admission, obtained a copy of Detective Kleinfelder's memo book in 2002, after he made a FOIL request for that document. While defendant does not have to exercise due diligence as a prerequisite to bringing an actual innocence claim, due diligence is a factor that can be considered in evaluating the credibility of a defendant's claim. *See McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935-36 (2013)(unexplained delay in presenting new affidavits from potential witnesses must be considered in determining whether defendant can satisfy high actual innocence standard). Defendant's twenty-one year delay in bringing his actual innocence claim, or his twelve-year delay in brining his actual innocence claim after his 2002 FOIL request, discredits defendant's claim that he is, in fact, actually innocent.

Fourth, defendant claims that the crime scene photographs that were entered into evidence in this case establish that Mr. Reece's account of the shooting – that he was standing behind Mr. Eze when he was shot – was physically impossible. But the jury did actually see this exact evidence and did not agree with defendant's conclusion. Moreover, the jury's evaluation of the photographs was reasonable. The photographs depict a hallway

with Mr. Eze's deceased body lying down in it. It is completely consistent with Mr. Reece's testimony that defendant was attempting to break down a back bedroom door, Mr. Eze had followed him to back of the apartment, and Mr. Reece followed behind him. Thus, this Court should reject defendant's claim that the photographs establish his innocence.

Fifth, defendant claims that Mr. Reece's grand jury testimony and defendant's arrest report contain inconsistencies with Mr. Reece's trial testimony that establish that defendant is innocent. Specifically, Mr. Reece testified in the grand jury that defendant had fired shots into the bedroom door, and defendant's arrest report states that Mr. Reece "grabbed [the gun] and a struggle ensued several shots were fired." But Mr. Reece's grand jury testimony establishes only that Mr. Reece was confused about whether defendant fired shots at the bedroom door or not; not that he was confused or mistaken over the fact that it was defendant who fired the shots. And defendant's arrest report, which notes that shots were fired during a struggle, establishes that a piece of police paperwork contains a statement that is partially inconsistent with Mr. Reece's trial testimony but a prior inconsistent statement recorded by the police cannot establish that defendant is innocent.

Sixth, defendant claims that Judge Golia found Mr. Reece to be an incredible witness when defendant was sentenced. But, first, Judge Golia's opinion of Mr. Reece's credibility does not establish defendant's guilt or innocence.[12] That job was the jury's and, as Judge Golia noted, the jury chose to accept Mr. Reece's narrative of the crime. And,

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[12] After the pre-trial suppression hearing Judge Golia noted that defendant's testimony was "somewhat incredible" (Hearing: 76).

second, defendant completely overstates Judge Golia's comments. Although Judge Golia credited defendant's statement that he had initially gone to Mr. Reece's house retrieve money that he had paid for a car, Judge Golia stated, "However, he also went there with a weapon" and later stated, "In any rate, counsel, it is clear, though, that [defendant] had the gun. And he is the one that took the gun out." Moreover, ultimately, Judge Golia recognized that the evidence was sufficient to establish all of the counts; he sentenced defendant to twenty-two years to life on the murder conviction – seven years more than the minimum the Court could have imposed if it did not believe that defendant was guilty of murder.

Finally, defendant claims that the evidence he believes establishes his innocence of murder also establishes that he is innocent of criminal possession of a weapon and burglary. But this contention is belied by defendant's own testimony under oath, as well as his other statements. Defendant testified at trial that he deliberately brought a gun to Mr. Reece's apartment, and that, after Mr. Reece asked defendant to leave, defendant pulled out the gun and remained in Mr. Reece's apartment. Accordingly, defendant himself, under oath, has admitted that he possessed the gun and that he remained unlawfully in Mr. Reece's apartment. Defendant also admitted at sentencing that the gun belonged to him. He also admitted in his letter to Detective Kleinfelder years later that he went to Mr. Reece's apartment, ripped the phone out of the wall so that nobody could call the police, pulled out a gun, and got scared that another occupant of the apartment was going to call the police from a telephone in the bedroom. Defendant went on to say that he then "turned to the

hallway wall and fired the first shot, hoping the Gregory will realize that the gun [that defendant] had was real and also operable." Defendant stated that Mr. Reece then grabbed defendant to wrestle the gun away from him and, at that time, defendant "determined then to empty the entire bullets on the wall so that nobody will get hurt from the gun." Accordingly, defendant's letter to Detective Kleinfelder establishes that, not only is defendant guilty of possession of a weapon and burglary, but that he intentionally fired the shot that killed Mr. Eze as well. And this letter is consistent with Mr. and Mrs. Reece's trial testimony, all of which conclusively establishes defendant's guilt.

The evidence at trial overwhelmingly established that defendant killed Mr. Eze after the two men broke into Mr. Reece's apartment, held his family at gunpoint, and defendant unloaded the gun that he had brought with him to the home invasion. This evidence includes Mr. Reece's testimony which is, in large part, corroborated by Mrs. Reece and Mrs. Pestano's trial testimony, defendant's admissions to Detective Kleinfelder, and defendant's spontaneous statement to Police Officer Kelly immediately after the crime that defendant shot his friend.

Moreover, the evidence defendant proffers in support of his actual innocence claim is inadmissible, wholly unreliable, and is completely contradicted by the admission contained in defendant's unsolicited letter, dated November 27, 2009, which was sent to the retired detective who had worked on his case. Thus, defendant cannot establish by clear and convincing evidence that he is innocent of murder, burglary, or criminal possession of a

weapon. *See People v. Lobban*, __ Misc. 3d __, 2014 N.Y. Misc. LEXIS 1272 (Sup. Ct. Kings Co. March 25, 2014) (distinguishing *Hamilton* and rejecting actual innocence claim based on alibi affidavits of defendant's mother and aunt, exculpatory affidavit of another victim, and affidavit concerning alleged exculpatory statement by deceased co-conspirator).

In sum, defend ant has not established that he is actually innocent; to the contrary, the credible evidence in this case, at the time it was tried and adduced since, overwhelmingly supports that defendant shot and killed the victim. Accordingly, this Court should reject defendant's claim.

CONCLUSION

For the reasons set forth above, defendant's motion to vacate his judgment of conviction pursuant to section 440.10 of the Criminal Procedure Law should be summarily denied.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

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May 5, 2014

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY: PART K-23

THE PEOPLE OF THE STATE OF NEW YORK,	:	
	:	
Respondent,	:	AFFIDAVIT
	:	
-against-	:	
ANTHONY NWOBI,	:	Queens County Indictment Number 5721/92
Defendant.	:	
	:	

STATE OF NEW YORK)
) ss.
COUNTY OF QUEENS)

MARC RESNICK, being duly sworn, deposes and states as follows:

1. I began practicing law in 1979. Between 1980 and 1985 I worked for the United States Air Force, and conducted numerous trials during this time. In 1985, I joined the Queens County District Attorney's Office. I began trying felony cases in May of 1987.

2. I was the Assistant District Attorney assigned to the above-captioned case when it proceeded to trial in 1993. At that point in my career, I had done over 50 trials in the D.A.'s office, and *People v. Anthony Nwobi* was my 10th homicide trial.

3. I am well-aware of my obligations under *Brady v. Maryland* and *People v. Rosario,* and I was well-aware of these obligations in 1993 when I tried defendant's case.

4. At that time, it was my practice to copy all *Rosario* material, and to then turn over that material to the defense. Most often, I would also type out a cover sheet that indicated

the specific documents that were being disclosed as *Rosario* material. In accordance with this practice, prior to trial in this case, I prepared a typed list of the *Rosario* material to disclose to defense counsel. Included in that list is a copy of Detective Kleinfelder's notebook, a copy of both the Crime Scene Unit Report and the scratch copy of that report. My practice when I prepared such an itemized list was to disclose all of the documents listed to defense counsel.

5. I have reviewed Detective Kleinfelder's memo book. It appears that the statements contained in the memo book "give me $ or car to Greg. (Gary) is mechanic. Gary took out gun shot Justin" is attributable to defendant.

Dated: East Meadow, New York
May 2, 2014

Marc Resnick, Esq.

STATE OF NEW YORK

COUNTY OF NASSAU

On this 2 day of May, 2014, before me, the undersigned, personally appeared Marc Resnick, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to this affidavit, and acknowledges to me that he executed the same in his capacity, and that by his signature on the affidavit, the individual executed the instrument and acknowledges doing so freely and voluntarily for the uses, purposes, and considerations set forth above.

Notary

DANIEL MARQUARDT
Notary Public - State of New York
NO. 01MA6138398
Qualified in Nassau County
My Commission Expires 5·18·18

EXHIBIT B

Anthony Nwoba (93A9857)
Green Haven Correctional Facility
P. O. Box 4000
Stormville, N.Y. 12582

November 27, 2009

Dear William,

Greetings in the name of Jesus Christ, my Lord and Savior. I hope this letter finds you and your family in good spirit and health.

I respectfully write you with regard to a matter which has been on my mind constantly for the past 16 years and 11 months. I humbly therefore, request that you would carefully read this letter and consider its entire contents.

On December 27-28, 1992, you interviewed me at 105 pct, shortly after the death of my friend, Justin Eze. During the course of the interview, I gathered from you certain information which is still very green in my memory.

(1) You told me that a bundle of a dollar cut-up size papers were

indeed found in the pocket of Justin Ese as I had told you.

2). You informed me that you were told by some of the witnesses that I was shooting at the wall.

3). Lastly, you informed me that you knew exactly how my friend died but you will make sure that I go to prison. You further added, that time will come when I shall be writing you, asking you to help me disclose the truth with regard to the shooting.

First, I Sincerely apologize to you for not being entirely honest and truthful as to how the shooting occurred. I am no longer the man you interviewed nearly 17 years ago. I had a destiny which unfortunately took this course (ie my incaraeration) to unfold. Before I came to this country, I was told that I will get into trouble when I get to the U.S. Several weeks before I was arrested, I was also warned by a lady Pastor that I will be standing before a Judge

with regard to my present plight.

If I had told you and the Court exactly how my friend died, perhaps I may not have to face all these years in prison. The death of my friend was a tragedy. I very much regret the fact that I even had a gun with me that night.

May I inform you candidly and exactly what happened that night that my friend died. My friend and I went to Gregory Reece's apartment to obtain an address of a man who had swindled me of some money, but I'd a gun. There came a time while in Gregory Reece's apt. that someone opened one of the bedroom doors. I rushed immediately towards that bedroom to persuade whoever opened that door not to call the police because our mission was not to harm anyone. (Before this time, I had already unplugged a telephone line in the dining room). Gregory later followed me. I wanted to leave at this point but Gregory

blocked me from leaving. I then turned to the hallway wall and fired the first shot, hoping that Gregory will realize that the gun I had was real and also operable. At this point, Gregory grabbled me at both of my elbow area and a struggle for the gun ensued. I determined then to empty the entire bullets on the wall so that nobody will get hurt from the gun. I sensed that if Gregory succeeded in gaining control of the gun, I would probably be hurt. As I was shooting, Gregory was swinging my arms and one of the bullets accidentally struck my friend who stood few inches away from the entry door and he died.

I may not have written this letter probably, if you had not predicted several years ago that I shall some day do so. I can not satisfactorily enumerated herein to you the things which has befallen me during the course of this incarceration. The death of my father was one of the most devasting of all. But I

can candidly state that I am glad that I came to prison, because I have been redeemed by the Blood of Christ and my time here has helped towards the furtherance of the Gospel of Christ — which simply teaches that: Christ died for our sins, was buried and rose again for our justification.

I have enclosed herein, a copy of your notes (hand written), your own investigative report and a portion of my Huntley hearing where my trial lawyer emphasized your role in my case. None of the witnesses according to your notes, ever stated that I fired my gun towards Gregory Reece. I hope the enclosed papers may help you to refresh your memory as touching this matter.

At this point of my incarceration, I would believe that Gregory Reece may like to make things right by disclosing the truth as to how my friend died. However, I suspect that the fear of getting into trouble with the law may bar him from not coming up

with the truth. The Statue of limitation for perjury as it pertains to this matter has long expired, therefore, by law he cannot be prosecuted for perjury.

I respectfully therefore, write you asking you to please contact Gregory Reece and urge him to disclose the truth with regard to how my friend died. All I require from Gregory Reece is simply to issue an affidavit to me stating TRUTHFULLY, how my friend died. Should he desire to consult a lawyer, I'll be very willing to have my christian family pay for the cost of the consultation. Gregory and his family presently resides at:

89-18 Gettysburg Street
Bellerose, N.Y. 11426-1166

I don't have access to his telephone number. In the past, I tried to have a Private Investigator — Irwin Blye, (718) 793-2005 to interview Gregory Reece but he

was not cooperative.

All I am requesting from you in sum herein, is that you may consider to fulfill your promise. You may choose how you wish to help me. It hurts so bad to sit in a prison cell, knowing fully well that I am not guilty of intentional murder as the People presented to the jury. I would be asking for a reduction of the charge when you offer the help which I seek in this letter. I am asking further that you would find it in your heart to help me. I am not asking you to do anything wrong, illegal or improper but rather that which is in conformity to excellent moral values. Please do not ignore this opportunity to help me: God will indeed bless you. I desire greatly to see my mother in Nigeria and the rest of my sibling.

Finally, I will like you to understand that I was convicted of intentional murder under the theory of transferred intent. In other words

the people presented to the jury that in my effort to shoot and kill Gregory Reece, I ended up killing my friend. That theory of prosecution is wholly untrue. What truly happened was an act of recklessness on my part. Please help. I look forward to hearing from you at your earliest possible convenience (God's willing).

Respectfully yours,

Anthony Nwobi

Anthony Nwoba (93A4857)
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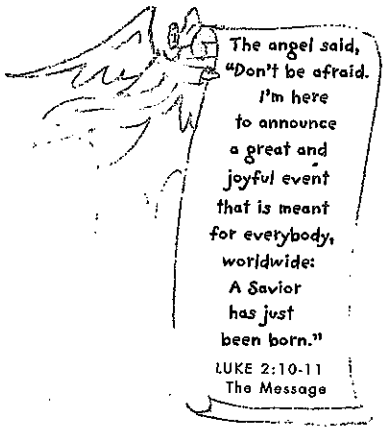
Respectfully yours,

Anthony Nwobi

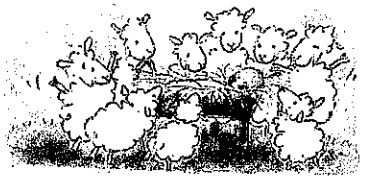
To: William Kleinfelder & Family



May your hearts be filled with the grace of God this season and the days to come.

— Anthony

...the NEW
SHEPHERD
is here!



His heavenly blessings
to you this Christmas!

Anthony Wood [illegible]
Green Haven Correctional Facility
P. O. Box 4000
Stormville N.Y. 12582

GREENHAVEN
CORRECTIONAL FACILITY

UNITED STATES POSTAGE
PITNEY BOWES
02 1A
0004623953 NOV 27 2009
$ 06.49⁰
MAILED FROM ZIP CODE 12582

ENVELOPE TO THE RIGHT
FOLD AT DOTTED LINE
CERTIFIED MAIL™

7008 0500 0001 7375 1453

MR. WILLIAM KLEINFELDER
[redacted]

Legal Mail

EXHIBIT C

STATE OF NEW YORK - DEPARTMENT OF CORRECTIONAL SERVICES

DISBURSEMENT OR REFUND REQUEST

D-6-1L
CELL LOCATION

NAME ANTHONY NWOBI DATE 11-27-20 09

CODE TYPE

INMATE NUMBER 93A9851

"SHORT NAME" ANWO
FIRST INITIAL
FIRST 3 OF LAST NAME

CHECK/ORDER NUMBER
RIGHT ADJUSTED WITH LEADING ZEROS

COMMISSARY PRODUCT GROUP

AMOUNT $ 6.99

SENT TO CODE (SEE TABLE B-6)

ITEM DESCRIPTION POSTAGE

SENT TO OR PURCHASE FROM

LAST NAME	FIRST NAME	MI	SUFF
KLEINFELDER	WILLIAM		

ADDRESS [redacted] APT. NO.

CITY [redacted] STATE [redacted] ZIP CODE

I HEREBY ACKNOWLEDGE EXPENDITURE OF THE AMOUNT TO BE DEDUCTED FROM MY INMATE ACCOUNT.

APPROVED [signature] (SOURCE AREA) DATE 11/27/09

APPROVED [signature] (BUSINESS OFFICE) DATE 11/27/09

[signature] (INMATE SIGNATURE)

FORM 2706 (REV. 8/93)

Original - Business Office Yellow - Approving Office Pink - Inmate

EXHIBIT D

DISTRICT ATTORNEY
QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415-1568
(718) 286-6000

RICHARD A.
BROWN
DISTRICT
ATTORNEY

April 16, 2014

Rita Dave, Esq.
26 Court Street, Suite 1212
Brooklyn, New York 11242

Re: *People v. Anthony Nwobi*
Queens County Indictment No. 5721/92

Dear Ms. Dave,

This letter is written to supplement my April 8, 2014 letter, which was written in response to your March 14, 2014 letter, in which you request the disclosure of *Brady* material known to the People or the New York City Police Department.

Specifically, you have requested any additional information that contradicts Gregory Reece's trial testimony (March 14, 2014 Letter ¶1). That information was disclosed to you in my April 8, 2014 letter.

In addition, you requested any information known to the People prior to defendant's sentencing that Gregory Reece was a drug dealer or had committed any other bad or criminal acts that could have been used to attack Mr. Reece's credibility at trial (March 14, 2014 Letter ¶2). There is a memorandum dated January 29, 1993, from then-Assistant District Attorney Neal Morse to the trial assistant. In that memorandum, Mr. Morse wrote, "There is a claim by Eze's relatives that the real dispute was over a quantity of heroin and that Reece might have kept the proceeds of a sale of heroin belonging to Nwobi. They claim that Eze was the contact between Nwobi and Reese on the heroin deal. I mention this because I do not want you to be surprised by what appears to be a push-in robbery suddenly transformed into some sort of international drug smuggling case. The police have no evidence of anything having to do with drugs relating to this matter."

You also request any witness relocation program documentation concerning Mr. Reece or any other prosecution witness (March 14, 2014 Letter ¶3). To my knowledge, no witness for the prosecution was placed in a relocation program and, as a result, the documents you seek do not exist.

You further request any information that would have provided the defense with a basis to argue that Mr. Reece or any other prosecution witness had a motive to lie, including any benefits provided to witnesses for the prosecution (March 14, 2014 Letter ¶4). To my knowledge, the witnesses for the prosecution were not provided with any benefits. I have already disclosed, in my April 8, 2014 letter, information that bears on the credibility of Mr. Reece.

In addition, you request internal affairs and police personnel records, including any findings that Detective Kleinfelder or Officer Kelly falsified documents, fabricated defendants' statements, caused false arrests, or committed any other acts of misconduct (March 14, 2014 Letter ¶5). The People do not know of the existence of any such records, and your letter does not articulate any factual basis to support that the confidential personnel files sought will contain information that is relevant or material to defendant's case.

Finally, you request any police reports, notes, witness statements, memo book entries, DD5's, or any other documents relating to or generated from the interview of occupants of Reece's home (March 14, 2014 Letter ¶6). These documents are not discoverable. This is so because "discovery is a matter of statute. Where no statutory right of discovery is provided, no substantive discovery exists . . .." *Brown v. Grosso,* 285 A.D.2d 642, 643-644 (2d Dept. 2001). Indeed, there is no statutory authority that provides for a right to discovery for a post-conviction motion. *See* C.P.L. § 240.20. Moreover, to the extent that the documents requested contain *Brady* material, the defense is already aware of the information contained in those documents. Thus, there is nothing further to disclose at this time.

Respectfully,

Jennifer Hagan
Assistant District Attorney
718-286-5902

cc: The Honorable Joel Blumenfeld
Supreme Court of the State of New York
125-01 Queens Boulevard
Kew Gardens, New York 11415

DISTRICT ATTORNEY
QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415-1568
(718) 286-6000

RICHARD A.
BROWN
DISTRICT
ATTORNEY

April 8, 2014

Rita Dave, Esq.
26 Court Street, Suite 1212
Brooklyn, New York 11242

Re: *People v. Anthony Nwobi*
Queens County Indictment No. 5721/92

Dear Ms. Dave,

As you know, on or about April 3, 2014, I met with Mr. Reece and spoke with him about this case. During that discussion, Mr. Reece informed me that he did know "Fatman" at the time of trial, that he had repaired Fatman's car and believed that Fatman was a drug-dealer, and that he did not tell the truth about his relationship with Fatman at trial because he did not want his wife to realize that Mr. Reece knew Fatman.

On April 7, 2014, I met with Justin Eze's sister, Chinwe Okonkwo, and her husband, Charles Okonkwo. Mr. Okonkwo informed me that his brother-in-law, Justin, was involved in the drug business, that he was the middle man in a drug deal between defendant and Gregory Reece, that defendant was angry because Reece had cheated defendant by giving Justin dollar bills mixed in with scrap paper as payment for drugs, and that defendant used Justin to gain access to Mr. Reece's apartment to satisfy the drug-debt.

Respectfully,

Jennifer Hagan
Assistant District Attorney
718-286-5902

cc: The Honorable Joel Blumenfeld
Supreme Court of the State of New York
125-01 Queens Boulevard
Kew Gardens, New York 11415

AFFIDAVIT OF
SERVICE BY MAIL

State of New York)
)ss:
County of Queens)

BARBARA GALLI, being duly sworn, deposes and states as follows:

1. I am over the age of 18 years and not a party to this action.

2. On May 5, 2014, I served the within Affirmation and Memorandum of Law in Response to Defendant's Motion to Vacate Judgment in the case of People v. Anthony Nwobi, on the following attorney:

Rita Dave, Esq.
26 Court Street
Brooklyn, NY 11201

by causing a true and correct copy of the document to be placed in a post-paid wrapper and then deposited in the official depository maintained and controlled by the United States Postal Service located at 125-01 Queens Boulevard, Kew Gardens, NY, 11415.

Barbara Galli
BARBARA GALLI

Sworn to before me this
5th day of May, 2014

Notary Public

NANCY TALCOTT
Notary Public, State of New York
Registration #02TA6295261
Qualified in Nassau County
Commission Expires Dec. 30, 2017