

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Indictment No. 10150-91

-against-

ROSEAN HARGROVE,

Defendant.

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ShawnDya L. Simpson, J.:

Introduction

The defendant brought a motion pursuant to Criminal Procedure Law (C.P.L.) § 440.10 to vacate the judgment for Murder in the Second Degree and Assault in the First Degree, entered on November 24, 1992, after a jury trial. By decision and order, dated September 16, 2014, the defendant's motion to vacate was granted to the extent that a hearing was ordered. On September 16, 2014, the hearing was commenced. At the hearing, in this order, the testimony of Robert Crosson, Aaron Williams, William E. Hellerstein, Edward Boyar, Edward Purce, Louis Scarcella, Robert Massi, Daniel Medwed, and John Mullen were taken. The defense's posture is that the judgment should be vacated because the single identification testimony of Robert Crosson was facilitated by Detectives Louis Scarcella and Steven Chmil¹ and these Detectives have recently been found in other cases to have engage in "corrupt investigative processes."

The defense argues that the revelation of the corrupt practices of these Detectives is newly discovered evidence and that potentially exculpatory evidence was destroyed where there was a duty to preserve. The defendant further asserts a claim of "actual innocence" pursuant to

¹ Neither the People or the defense brought Detective Steven Chmil to testify.

*People v. Hamilton*², 115 A.D.3d. 12 [App. Div., 2nd Dept. 2014]) and ineffective assistance of counsel as a basis to vacate the judgment herein. The People counter that the defense has not demonstrated that there is new evidence concerning the reliability of the identification made by the one witness in this case. For the foregoing reasons, the defendant's motion to vacate the judgment of conviction is granted.

Facts and Findings

On August 13, 1991, two correction officers were shot, one killed, the other injured in the Kingsborough housing projects of Brooklyn. On August 14, 1991, the defendant was arrested without a warrant on the second floor of his family's dwelling. On August 15, 1991, he was identified in a photo array prepared by Detectives Louis Scarcella and Steven Chmil. A pretrial hearing was held in which Detective Scarcella and others testified concerning the arrest and identification of the defendant. On November 24, 1992, the defendant was convicted of Murder in the Second Degree and Assault in the First Degree, after a jury trial, in which the testimony of one eyewitness was taken. The defendant has unsuccessfully appealed his conviction (*see People v. Hardgrove*, 213 A.D. 2d 492 [App. Div. 2nd Dept. 1995]; *People v. Hardgrove*, 87 N.Y. 2d 846 [1995]; *Hardgrove v. Walter Kelly*, 1998 U.S. Dist. Lexis 14577; *Hardgrove v. Walter Kelly*, 1998 U.S. app. Lexis 24484). This is the first motion brought pursuant to C.P.L. 440.10 (g) to vacate his conviction based on newly discovered evidence concerning corrupt police practices. A hearing was conducted on the claim of newly discovered evidence, actual innocence, ineffective assistance of counsel at trial and missing evidence.

The first witness to testify at the hearing was Robert Crosson, one of the victims. The defendant was convicted of Assault in the First Degree for the injuries sustained to Mr. Crosson's

² The Court held in *Hamilton* that a claim of actual innocence requires that a defendant prove by clear and convincing evidence that he was actually innocent of the crimes for which he was convicted. *Hamilton* is one of the cases that Scarcella investigated whose case was remitted to the trial court for a hearing.

hand as a consequence of the shooting. At the time of the shooting, Mr. Crosson was a Probationary Correction Officer. Mr. Crosson testified that on August 13, 1991, at about 4:00 a.m., he was in the passenger seat of a Volvo in which his deceased friend, Correction Officer Ronald Neischer, was in the driver's seat. They were parked outside of the Kingsborough housing projects, where they both lived. Mr. Crosson testified that as they were parked, two young black men approached the vehicle on bicycles with guns. Mr. Crosson testified that the men immediately asked Ronald Neischer to give up the car and shots were then fired. Ronald Neischer was shot by the individual on the driver's side and Mr. Crosson was shot by the individual on his side of the vehicle. After the shooting, the assailants got into the vehicle and drove away. The bicycles were left at the scene with blood splatter.

Mr. Crosson could not recall on the stand the description he gave during the trial and prior of the man who shot him (9/16 Transcript p. 40). Mr. Crosson testified that he had lived in Kingsborough Houses his entire life at the time, he was twenty-nine, except for three years he had been in the military. Mr. Crosson testified that he knew the Hardgrave³ family at the time of the shooting, that they were on speaking terms, and had lived in the same housing with them for over twenty years (9/16 Transcript p. 41). Mr. Crosson testified at trial that the defendant was the person who shot him in the hand.

Mr. Aaron Williams was the second witness called. Mr. Williams testified that on February 14, 2014, he was contacted by the District Attorney's Office by Detective Mulligan and another man who asked him questions about the instant case. Mr. Williams related to the men that on the night of the shooting he was outside of 1351 St. Marks Place, Brooklyn, with the defendant when he heard the shots coming from the Kingsborough Houses. There were allegedly three meetings with Mr. Williams and Detective Mulligan. In the last meeting, he said

³The defendant's surname is Hardgrave, although he is referred to as Hargrove in the case.

he was asked if he recognized anyone from a photo he was shown. Mr. Williams testified that he recognized an individual named Anthony Bookard. Mr. Williams could not recall or give an approximation of when the third meeting took place. He also could not recall the date or the hour of the shooting.

The third witness was Mr. William E. Hellerstein, a retired professor of law at Brooklyn Law School, who in the year 2000 established the Non-DNA Innocence Project at the law school. Mr. Hellerstein testified that he undertook an extensive in-debt examination principally of John Bunn's matter, the co-defendant, but also of the defendant's case. He was given access to the District Attorney's file in the cases and observed a letter that directed the release of evidence in the case. Mr. Hellerstein stated that he was troubled about the case. He was attempting to get the bicycles from the case, but he was told they were unavailable. Mr. Hellerstein believed the letter was unusual because it was issued during the pendency of the defendant's original appeal, around 2001.

The fourth witness to testify was Mr. Edward Boyar, the Assistant District Attorney that was assigned and prosecuted the case of co-defendant John Bunn and the defendant. Mr. Boyar stated that he recalled eliciting testimony from Detective Louis Scarcella in the pretrial hearing and that Detective Scarcella made the defendant's arrest (9/16 Transcript p. 132, 136). Mr. Boyar further testified that at the commencement of the trial he indicated to the court that he was going to start his case about 10:30 am and complete it that same day in the early afternoon (9/16 Transcript p. 107). Mr. Boyar also testified that he did not run any of the prints through the system and they did not match either of the defendants (9/16 Transcript p. 110-112).

According to Mr. Boyar, the case was prepared by another Assistant District Attorney, he stated that he only tried the case (9/16 Transcript p. 110). The prints of neither victim were found on the vehicle which was driven by the assailants (9/16 Transcript p. 110). Mr. Boyar

confirmed that none of the fingerprints on the bicycles or the vehicle were connected to the defendants (9/16 Transcript p. 110-12). Also, Mr. Boyar testified that he did not know whether any blood samples were tested in the case and none was presented at trial (9/16 Transcript p. 127). Mr. Boyar also recalled that Detective Scarcella testified that he had apprehended the defendant because he had gotten an anonymous call, went to a location, and was given the name Hargrave (9/16 Transcript p. 136).

Mr. Edward Purce also testified. Mr. Purce is an Assistant District Attorney in Kings county. Mr. Purce investigated the defendant's case with the office's "Conviction Integrity Review Unit" in or around July 2013, as per his testimony. Mr. Purce confirmed that paperwork requesting tests of blood samples taken from the bicycles were submitted to the Medical Examiner's Office. He also confirmed that numerous fingerprint lifts were recovered from the crime scene taken inside and outside of the vehicle and that the ballistics and serology materials were never tested (9/24 Transcript p. 14). Mr. Purce further testified that neither defendant had injuries indicating abrasions or bullet wounds and that their fingerprints did not match any recovered at the scene.

The next person to take the stand was Mr. Louis Scarcella. He testified in the presence and with the participation of his two attorneys. Mr. Scarcella stated that he was not the assigned Detective, however he testified at the pretrial hearing about the identification procedures. He testified that the defendant's case was not his, that it was his partner's, Detective Steven Chmil (9/24 Transcript p. 46). At the time of the arrest, he was assigned to the Brooklyn North Homicide Unit as a Detective. His partner was Detective Steven Chmil. Mr. Scarcella stated that he and his partner were friends and shared a business card that described some of their hobbies or interest, which he thought were funny (9/24 Transcript p. 51-52). During the investigation of the case, Detective Scarcella and his partner's official N.Y.P.D. business card

listed him and his partner as “adventures, marathoners, regular guys, and mountain climbers” (9/24 Transcript. p. 51).

Mr. Scarcella denied being the Detective assigned to the case, however, while on the stand he read the transcript of his partner Detective Chmil’s statement at the pretrial hearing indicating that Mr. Scarcella was the assigned Detective (9/24 Transcript p. 55). Mr. Scarcella stated that his participation in the case was very limited and he did nothing of substance in the investigation (9/24 Transcript p. 48). After receiving an anonymous tip, Detective Scarcella went to the defendant’s family’s home, apprehended him in the hallway and arrested him without a warrant. Also, Mr. Scarcella along with his partner, Detective Chmil, prepared a photo array from pictures found in a drawer. He did not recall being present at the defendant’s arrest. He did not recall the photo array prepared for the sole eyewitness. He also did not recall testifying at the pretrial hearing (9/24 Transcript p. 48-49). However, a Daily News Article on the homicide, admitted as exhibit “I”, shows Detective Scarcella and the assigned Detective from the 77th precinct, Detective Barber⁴, exiting the 77th precinct escorting both defendants in handcuffs.

When asked if he remembered Robert Crosson being the sole surviving witness, Mr. Scarcella stated “I don’t remember that name” (9/24 Transcript p. 56). However, further in his testimony Mr. Scarcella testified that at his first appearance in this court he did hear his name and knew who Robert Crosson was (9/24 Transcript p. 56). He testified that he did not remember, but Scarcella had in fact spoken admittedly with his former partner, Detective Chmil, around a dozen times about the case prior to his appearance. Mr. Scarcella was asked if he testified in the defendant’s suppression hearing, to which he responded that he had “no recollection of that whatsoever”(9/24 Transcript p. 60). He did not recall testifying under oath in the shooting involving two Correction Officers that got significant publicity and he spent about twelve calls

⁴Detective Barber is deceased.

with his partner, Detective Chmil, in preparation for the hearing (9/24 Transcript p. 61).

Nonetheless, Mr. Scarcella stated that he did not get an arrest warrant to arrest the defendant, that he does not know the defendant and does not remember arresting him (9/24 Transcript p. 71-73).

Additionally, Mr. Scarcella testified that after retiring from the police department he became an investigator with the Department of Education. He admitted that while an investigator with the Office of Special Investigations a report he completed on a cheating scandal, which caused the resignation of an administrator, was subsequently reversed (9/24 Transcript p. 73).

Mr. Robert Massi, a former Public Defender with the Legal Aid Society that worked on the defendant's entire case, testified at the hearing. He recalled the testimony of Detective Chmil at the suppression hearing and that the Detective stated that he picked photos from the files of the "Precinct RIP Unit" for the photo array (9/24 Transcript p. 90). He also recalled, independently, Scarcella testifying that he went to the location, into the elevator, randomly came out on the second floor and found the defendant standing there in a multiple story building (9/24 Transcript p. 93). He said he remembered the testimony because it seemed strange to him (9/24 Transcript p. 93). He also testified that the case was done in a rushed atmosphere in two days (9/24 Transcript p. 98). Mr. Massi recalled asking Detective Barber, now deceased, whether the prints taken from the bicycles matched that of either defendant and the Detective replied that they did not (9/24 Transcript p. 101). He also confirmed, that during the trial, Assistant District Attorney Boyar indicated that none of the blood samples had been tested (9/24 Transcript p. 106-107).

Mr. Daniel Medwed was called to testify to authenticate a letter that the defense sought to admit. He testified that he worked on the defendant and his co-defendant's case primarily. He testified that he worked at Brooklyn Law School at the time with the Second Look Program

clinic and that he spent a great deal of effort trying to locate the physical evidence of blood work and fingerprint lifts (10/14 Transcript p. 11). He recalled that he wrote a letter to an Officer William Flynn at One Police Plaza to confirm if the office had located any of this evidence (10/14 Transcript p. 13). Mr. Medwed identified his signature on the letter and it was admitted into evidence.

The People called one witness, Mr. John Mullen. Mr. Mullen is a Detective employed with the Kings County District Attorney's office. He testified that he was assisting A.D.A. Ed Purce in early 2014 with the defendant's case and that he went with A.D.A. Purce and Detective Investigator Roger Torres to interview Mr. Aaron Williams. He testified that he went with Mr. Aaron Williams a second time on April 18, 2014, and that A.D.A. Purce and Detective Investigator Daniel Laysack were present (10/14 Transcript p. 28).

Discussion

A court may vacate a judgment of conviction pursuant to C.P.L. § 440.10 (g) on the grounds that new evidence has been discovered when that evidence is of such character that it presents the possibility that if such evidence had been introduced the verdict would have been more favorable to the defendant (*see e.g., People v. Tankleff*, 49 A.D.3d 160 [App. Div., 2nd Dept. 2007]). It has been held that the new evidence must meet the following criteria: (1) it must provide the probably that the result would be different if a new trial were held; (2) it has to have surfaced after the defendant's trial; (3) it could not have been discoverable prior to trial with the exercise of due diligence; (4) it has to be germane and relevant to the case; (5) it cannot be simply cumulative; and (6) it cannot simply serve to impeach or contradict evidence given at trial (*People v. Days*, 26 Misc. 3d 1205(A) [Co. Ct., Westchester Co 2009], *citing People v. Tankleff*, 49 A.D.3d 160, 179; *People v. Salemi*, 309 N.Y. 208, 216 [1955], *cert. denied* 350 U.S. 950 [1956]; *People v Taylor*, 246 A.D.2d 410, 411 [App. Div., 1st Dept.], *leave denied* 91 N.Y.2d 978

[1998], citing *People v. Suarez*, 98 A.D.2d 678 [App. Div., 1st Dept. 1983], *leave denied* 61 N.Y.2d 766 [1984]).

The defense asserts that the judgment must be vacated because of new evidence that surfaced concerning the reliability and trustworthiness of the practices of the Detectives Louis Scarcella and Steven Chmil that conducted the arrest and collected evidence in this case. The defense also asserts that possible exculpatory evidence was destroyed in bad faith while there was a duty to preserve. Additionally, the defense argues that the testimony of the sole witness upon whom the conviction is based is “more dubious” given the revelation of the officers’ misconduct. The defense also claims that defense counsel failed to introduce evidence of the sole witness’s criminal practices that are said to have provided a motive for the witness to lie.

In 2007, Detective Louis Scarcella appeared on the Dr. Phil Show, a popular daytime talk show. According to the testimony taken at the hearing, Scarcella stated on the show that there were no rules when it came to prosecuting homicide cases and that he did not play by the rules (6/24/14 Transcript. P. 81). This statement indicates an acknowledgment of a lack of disregard for rules⁵. While an officer investigating the instant case, Detective Scarcella’s official N.Y.P.D. business card listed him and his partner as “adventures, marathoners, regular guys, and mountain climbers” (9/24 Transcript p. 51). Detective Scarcella stated that he used the card in the course of his professional duties and thought the card was funny, indicating a cavalier disposition to the serious obligation of investigating homicides (9/24 Transcript p. 52). Detective Scarcella appears consistent in his attitude of disregarding rules and the seriousness of his work (*see People v. Isaacson*, 44 N.Y.2d 511, 521 [1978] holding that certain types of police action that

⁵ The court notes that Detective Scarcella although directed by the court to not carry a weapon into the courthouse, violated the privilege given to him to entered without being screened and entered the courthouse and room nonetheless with a weapon. After given assurances that he would not bring a weapon into the courthouse, he still brought one in. This indicates a lack of boundaries or no regard to any consequence in violating rules.

manifest a disregard for cherished principles of law and order require reversal of a conviction).

There are five cases for which the judgment of conviction were vacated by the District Attorney's office because of Detective Scarcella's maleficence⁶. In 2013, prosecutors reevaluated the case of David Ranta and sought his release from prison after evidence revealed that the testimony of identity witnesses in the case was false. Similarly, Derrick Hamilton was convicted almost solely on the identification testimony of the girlfriend of the possible shooter who later recanted her story. In other cases, Robert Hill, Alvena Jennette and Darryl Austin, were convicted almost solely by the identification testimony of an informant used by Detective Scarcella in various cases, who had a severe crack addiction and has since been discredited. The judgment of conviction in those cases have also been vacated by the prosecution. It has been established that the cases of David Ranta, Derrick Hamilton, Robert Hill, Alvena Jennette and Darryl Austin were comprised by the intentional acts of Detective Scarcella which lead to the extinguishment of the judgment and sentence in those cases by the decision of the District Attorney's Office. In each of those cases, Detective Scarcella procured identification testimony that was false and was predominantly the basis for their conviction. All the cases the District Attorney's office have vacated involved unreliable or false identification testimony facilitated by Detective Scarcella.

The issue again in this case is the possible unreliability and comprised identification testimony of a witness prepared by Detective Scarcella. The conviction in this case is based solely on the identification of that one witness. The witness's testimony and identification was not definitive as he never identified that his assailant was a neighbor with whom he lived in the same housing complex for more than twenty years. The witness admitted that he knew the defendant's family and that they would greet each other. Moreover, during his trial testimony he

⁶ This court takes judicial notice of the recent outcome in the cases of David Ranta, Derrick Hamilton, Robert Hill, Alvena Jennette and Darryl Austin.

described his assailants as two light skinned black males in their twenties. Mr. Crosson is a black male. None of the defendants may be accurately described as “light skinned” black males. Defendant Bunn was fourteen years old and Defendant Hargrave was seventeen years of age at the time of the arrest. During the instant hearing, Mr. Crosson failed to recall how he initially described his assailants.

The testimony provided at the hearing by Scarcella was false, misleading and non-cooperative. At the hearing, Scarcella refused to acknowledge that he testified in the defendant’s pretrial hearing although he was given the transcript of his testimony to read. He also refused to confirm that he was the Detective assigned to the defendant’s case. He stated that it was his partner’s case and that he did nothing of substance. Specifically, Mr. Scarcella stated that his participation in the case was very limited and he did nothing of substance in the investigation (9/24 Transcript p. 48). Scarcella did not recall being present at the defendant’s arrest or at the photo array prepared for the sole witness or testifying in the pretrial hearing (9/24 Transcript p. 48-49). He stated that he did not remember the case and that nothing could refresh his recollection to contradict that it was not his case (9/24 Transcript p. 53). When asked if he remembered the surviving witness’s name Scarcella stated that he did not, but then said he knew the name because he did hear his name when he first appeared for this matter and he knew who Robert Crosson was (9/24 Transcript. p. 56). Scarcella admitted that he had spoken with his partner around a dozen times in preparation for this hearing. Scarcella was not forth right in his testimony and even in the face of undisputed evidence he refused to acknowledge the truth.

Scarcella testified at the pretrial hearing that the precinct received a phone call and that he and other officers then went to 230 Lott Avenue at about 12:30. He testified that as he got off the elevator on the second floor he observed the defendant sitting in the hallway (11/19, 23-24, 1992 Transcript. p.40). He then stated that the defendant was coming out of apartment 2C and

at that point he was arrested (11/19, 23-24, 1992 Transcript. p. 40). Scarcella testified that he went to a specific apartment although the anonymous call received did not indicate one and stated that he simply got lucky in spotting the defendant (11/19, 23-24, 1992 Transcript. p.43). Scarcella stated on the stand that it was not his decision to arrest the defendant and that the decision to arrest was that of the District Attorney's Office. Scarcella's testimony was convoluted. Scarcella testified that he did not have a warrant to arrest the defendant and that he did not decide whether to arrest the defendant, but he conveniently arrested him when he found the defendant by chance based on an anonymous phone call.

Further, Scarcella's partner, Detective Chmil, testified at the pretrial hearing that Scarcella was the Detective assigned to defendant's case from the homicide squad. A photograph taken from a news article on the investigation and arrest of the defendant, admitted into evidence in this hearing as exhibit "I", shows Detective Scarcella and the assigned officer from the 77th precinct, Detective Barber, exiting the 77th precinct with the defendants in what is referred to as a "perp walk." Detective Chmil testified in the pretrial hearing that the photos presented to the witness were randomly chosen from a drawer (11/19, 23-24, 1992 Transcript. p. 16). According to Detective Chmil's testimony in the pretrial hearing, Scarcella was present when Mr. Crosson looked at the photographs. Detective's Scarcella and Chmil were the only officers present for this process.

The revelation of Detective Scarcella's malfeasance in fabricating false identification evidence gravely undermines the evidence that convicted the defendant in this case. The sole basis for the defendant's conviction is the identification by one witness. The one witness in this case, Robert Crosson, testified at trial that the person who assaulted him was a stranger and the initial description may have been that of two "light skin" males in their twenties (11/19, 23-24, 1992 Transcript p. 144, 148). The witness never recognized or identified that his assailant was a

person known to him or that he had previously seen the defendant. There is no evidence Crosson recognized the defendant at the outset of the crime, although they lived in the same housing for over twenty years and he admitted to knowing the defendant's family with whom the defendant lived. There were also allegations that Mr. Crosson was involved in some illegality that may have compromised his testimony⁷. There was no other evidence available, aside from Mr. Crosson's testimony, to convict the defendant.

The defendant's conviction is based solely on the identification photo array that was prepared by Detective Scarcella and Chmil. Crosson identified the defendant after a line-up organized by Scarcella and his partner, Detective Chmil. The defendant's conviction is based exclusively on this identification by photos taken out of a drawer and placed in a photo array facilitated by Scarcella and his partner Detective Chmil. There were fingerprints taken from the bicycle that did not match either defendant. There were fingerprints taken from inside and outside the vehicle that the assailants drove away in, none of which were the defendant's fingerprints. In twenty-three plus years, the ballistics have not been tested. In twenty-three plus years, the serology materials have not been tested. There is no fingerprint match, biological evidence, or an admission on which to base the conviction other than the one witness's identification. Scarcella was intrinsic to the identification array in this case as he was present, set-up the photo array, line-up and was in part responsible for the outcome as the assigned Detective investigating and processing the case.

This new evidence, of Detective Scarcella's practices, significantly diminishes the value of the evidence used to convict the defendant. The defendant was convicted solely on the identification testimony of the one witness in this case. Therefore, new evidence that demonstrates that the testimony of the Detective who effectuated the arrest and was responsible

⁷ That issue which also concerns the instant claim of ineffective assistance of counsel was raised on appeal and is not decided here.

for the investigation in this case was compromised and unreliable severely undermines the judgment in this case. For twenty-three plus years the ballistics and serology have not been tested. All the fingerprints that were tested on the scene, on the bicycle, inside and outside of the vehicle, were not the defendant's fingerprints. The scant evidence that convicted the defendant makes the new evidence of Detective Scarcella's wrong doing significant.

Further, the result of the test on the blood samples that were recovered from the bicycles used in the homicide were not made available at trial and has not been made available at this juncture. That evidence cannot now be located and may have been destroyed. The destruction of evidence that was material and necessary in the trial, that up to now has not been produced, brings into question the reliability and due process of the proceedings in this case. Rounds were fired, not only by the assailants, but also from the deceased and it is possible that the blood may be other than the victim's. Paperwork requesting DNA analysis was never completed. It was also a two day, two defendant homicide jury trial. It appeared to be a summarily tried case, with missing evidence and a rushed process.

Given the false and misleading testimony provided by former Detective Louis Scarcella at the hearing on the instant motion and the circumstances surrounding the conviction, with missing biological evidence, inconsistent testimony, and bare evidence, this court finds that the newly discovered evidence makes it probable that the result in this case would have been different if a new trial were held (*see* C.P.L. 440.10 (g)). The issue herein is not whether the defendant is innocent, but whether the newly discovered evidence should require a new trial. The findings of this court are that the assigned Detective, Louis Scarcella, was at the time of the investigation engaged in false and misleading practices. The cases of David Ranta, Derrick Hamilton, Robert Hill, Alvena Jennette and Darryl Austin that were investigated by Scarcella and prosecuted contemporaneously with this case in the early nineties demonstrate this pattern

and practice. The pattern and practice of Scarcella's conduct which manifest a disregard for rules, law and the truth undermines our judicial system and gives cause for a new review of the evidence.

Scarcella has been regarded as a legend in the N.Y.P.D. for his number of homicide arrest. There is a saying, when it is too good to be true, it usually is. This new evidence of Detective Scarcella's maleficence requires a new trial (*People v. Tankleff*, 49 A.D.3d 160). This information was clearly not known at the time of the defendant's trial and conviction, nor has it been raised on appeal or in a previous motion. Consequently, the defendant's motion is hereby granted to the extent that his judgment of conviction and sentence is vacated and a new trial is ordered.

Conclusion

Accordingly, the defendant's motion to vacate his judgment of conviction is granted and a new trial is ordered.

The defendant's claims of "actual innocence" pursuant to *People v. Hamilton*⁸, 115 A.D.3d. 12 [App. Div., 2nd Dept. 2014]) and ineffective assistance of counsel are denied without prejudice.

The defendant's motion to compel discovery concerning other potential suspects is denied.

This constitutes the decision, opinion and order of the Court.

The defendant is hereby advised that his right to appeal from the order determining his motion is not automatic except in the single instance where the motion is made under CPL 440.30 (1 -a) for forensic DNA testing of evidence. For all other motions under article 440, the

⁸ The Court held in *Hamilton* that a claim of actual innocence requires that a defendant prove by clear and convincing evidence that he was actually innocent of the crimes for which he was convicted.

defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after the defendant is served by the District Attorney or the court with the court order denying the defendant's motion. The application must contain the defendant's name and address, indictment number, the questions of law or fact which the defendant believes ought to be reviewed and a statement that no prior application for such certificate has been made. The defendant must include a copy of the court order and a copy of any opinion of the court. In addition, the defendant must serve a copy of his application on the District Attorney.

This constitutes the decision, opinion and order of the Court.

Dated: Brooklyn, New York

April 14, 2014

The Honorable ShawnDya L. Simpson
Acting Justice of the Supreme Court