People v DiGuglielmo
2008 NY Slip Op 51938(U) [21 Misc 3d 1103(A)]
Decided on September 17, 2008
Westchester County Ct
Bellantoni, J.
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Decided on September 17, 2008

Westchester County Ct

The People of the State of New York,

against

Richard DiGuglielmo, Defendant.

96-1403

Rory J. Bellantoni, J.

Defendant has moved this Court for an order pursuant to New York Criminal Procedure Law §440.10 vacating his judgment of conviction or, in the alternative, reducing his conviction to Manslaughter in the Second Degree [FN1].

On October 3, 1996, Defendant, an off-duty police officer, fatally shot the victim, Charles Campbell following an altercation between, *inter alia,* Mr. Campbell and Defendant's father in the parking lot of a deli owned by the elder DiGuglielmo . After a jury trial, Defendant was convicted of depraved indifference murder (Penal Law § 125.25(2)); on December 19, 1997, Defendant was sentenced to an indeterminate term of imprisonment of twenty (20) years to life in prison.[FN2]

Pursuant to his conviction, Defendant filed an appeal to the Appellate Division, Second Department. The Second Department, on February 16, 1999 affirmed Defendant's conviction, holding that "the defense of justification was disproved beyond a reasonable doubt" and upon exercising their factual review power, the Appellate Division held that the verdict was not against the weight of the evidence. [FN3] *People v. DiGuglielmo*, 258 AD2d 591, 686 NYS2d 443 (2nd Dep't [*2]1999). Defendant sought leave to appeal his conviction to the Court of Appeals, but such leave was denied. *People v. DiGuglielmo*, 93 NY2d 923, 715 NE2d 510, 693 NYS2d 507 (1999). Subsequently, Defendant filed a writ of habeas corpus in the United States District Court for the Southern District of New York, which was dismissed.[FN4] On June 3, 2002, the United States Court of Appeals, Second Circuit, held that Defendant failed to exhaust his state remedies and dismissed Defendant's petition. *DiGuglielmo v. Senkowski*, 42 Fed.Appx. 492 (2002). On November 4, 2002, Defendant filed a petition for a writ of error coram nobis to vacate his conviction arguing ineffective assistance of appellate counsel; the Appellate Division, Second Department, denied Defendant's application. *People v. DiGuglielmo*, 299 AD2d 365, 749 NYS2d 180 (2nd Dep't 2002). On March 18, 2003, Defendant's application for leave to appeal to the Court of Appeals was denied. *People v. DiGuglielmo*, 99 NY2d 627, 790 NE2d 283, 760 NYS2d 109 (2003).

Defendant then filed a Writ of Habeas Corpus in federal court, but his petition was denied by the Southern District of New York; Defendant again appealed. On April 28, 2004 the United States Court of Appeals, Second Circuit, affirmed the District Court's decision denying Defendant's Writ of Habeus Corpus.On February 9, 2004, Defendant filed a motion to vacate his judgment of conviction pursuant to C.P.L. § 440.10(1)(h). Defendant argued that he was entitled to vacatur of his conviction on several grounds:

(I) that the trial evidence was insufficient to sustain his conviction for depraved indifference murder; and

(II) that his conviction could not be sustained given the newly authored Court of Appeals decisions in *People v. Payne*, 3 NY3d 266, 819 NE2d 634 (2004) and *People v. Gonzalez*, 1 NY3d 464, 807 NE2d 273 (2004) which should be applied retroactively to Defendant's case.

The Hon. Joseph Alessandro denied Defendant's C.P.L. § 440 motion in its entirety finding that a challenge to the sufficiency of evidence presented at trial was not proper under C.P.L. § 440.10; that legal sufficiency questions are only applied retroactively to cases pending on direct appeal and that the new line of cases cited by Defendant did not represent a new rule or legal standard deserving of retroactivity, rather the cases merely "construed the words of the statute."

After lengthy appellate review and post-conviction applications and proceedings, Defendant has now filed a motion pursuant to C.P.L. § 440.10, seeking vacatur of his judgment of conviction, or in the alternative, a reduction of his depraved indifference murder conviction charge to Manslaughter in the

Second Degree.[FN5] Specifically, Defendant seeks vacatur of his conviction alleging that he is entitled to such relief as a matter of law because, as a result of more recent jurisprudence, the Court of Appeals has enunciated a new standard of review (though it has actually clarified the existing standard of review) for depraved indifference convictions, specifically regarding the sufficiency of evidence in such cases.

On November 9, 2006, Defendant filed a supplemental motion with the Court. In his supplemental motion, Defendant sought vacatur of his conviction alleging that in October 2006, [*3]Defendant learned of the existence of newly discovered evidence as defined in C.P.L. §440.10; specifically, that two witnesses claimed that their statements were audiotaped by Dobbs Ferry Police (hereinafter "DFPD"), and that such audiotapes were never turned over to Defendant's counsel. Defendant also learned for the first time that these witnesses claimed that they were subjected to repeated police interrogations as well as other improper efforts by the DFPD in an effort to have them change the initial statements that they had given to the DFPD, in ways that would be unfavorable to Defendant and favorable to the prosecution. Defendant's Notice of Motion, dated November 9, 2006, affirmation by Brian M. Willen, Esq., p. 2. Defendant included as Exhibits 1 and 2, two statements from the two witnesses, Michael Dillon and James White. These witness statements were written by Thomas Duno, an investigator hired by Defendant, but were signed by each witness.

On November 30, 2006, the People filed an Affirmation in Opposition; the People opposed Defendant's motion in its entirety. After several off-the record conferences and communications between defense counsel, the People and the Court, oral arguments were scheduled for July 25, 2007.

On July 25, 2007, after extensive oral arguments, the Court granted a hearing for the limited purpose of determining whether any *Rosario* violations had occurred as alleged by Defendant and to determine what, if any, undue influence was exerted upon Mr. Dillon by the DFPD in connection with statements he gave to said officers, and to what extent such undue and improper influence actually impacted the statements that he gave to law enforcement. The Court however, denied Defendant's request to expand the hearing to address whether there were any errors during jury selection. Initially, the Court also denied Defendant's request to have James White testify at the hearing, as Mr. White did not testify at the original trial.

Defendant seeks vacatur of his judgment of conviction asserting the following [FN6]:

1) that a new standard regarding review of depraved indifference convictions was established by the Court of Appeals decisions in *People v. Suarez*, 6 NY3d 202, 811 NYS2d 267 (2005) and *People v. Feingold*, 7 NY3d 288, 819 NYS2d 691 (2006), and thus, should be applied to Defendant's case, retroactively or otherwise;

2) that Defendant's due process rights were violated under the United States and New York State Constitutions by being convicted on evidence legally insufficient to establish the elements of depraved indifference murder, especially as recently set forth under new Court of Appeals precedent;

3) that a sworn juror was convicted of a crime, however, that information was not disclosed during jury selection and thus, a vacatur of Defendant's judgment of conviction is warranted.

4) that two eyewitnesses alleged that they were subjected to improper and prejudicial conduct on the part of law enforcement and the People and thus, vacatur of Defendant's conviction is warranted pursuant to C.P.L. § 440.10(1)(g); and

5) that the two eyewitnesses claimed that their statements were audiotaped by police and said recordings were never turned over to Defendant warranting vacatur as the People's failure to turn [*4]over these materials violates the dictates of *Rosario* and/or *Brady*.

I. Defendant alleges that a new standard of review was established by the Court of Appeals decisions in *People v. Suarez*, *People v. Feingold*, *et al.* and thus, he was convicted on legally insufficient evidence to establish the elements of depraved indifference murder or, in the alternative, that the new standard should be applied retroactively.

On September 25, 2006, Defendant filed the instant motion seeking to have his judgment of conviction vacated. Defendant argues that he is entitled to the relief sought because the Court of Appeals established a new standard of review with its recent line of decisions rendered in *People v. Hafeez*, 100 NY2d 253, 792 NE2d 1060 (2003), *People v. Gonzalez*, 1 NY3d 464, 807 NE2d 273 (2004), *People v. Payne*, 3 NY3d 266, 819 NE2d 634 (2004), *People v. Suarez*, 6 NY3d 202, 811 NYS2d 267 (2005), *People v. Feingold*,7 NY3d 288, 819 NYS2d 691 (2006) and ultimately *Policano v. Herbert*, 7 NY3d 588, 825 NYS2d 678 (2006) (hereinafter "line of cases"). Defendant alleges that the aforementioned line of cases establishes that he was convicted upon legally insufficient evidence, that is, evidence insufficient to establish the elements of

depraved indifference murder. Defendant contends that since his conviction occurred prior to Court of Appeals' holdings in the new line of cases, any new standards or principles should be applied retroactively to grant him the relief established in the line of cases discussed herein a vacatur of his conviction.

It is Defendant's contention that the aforementioned line of cases decided by the Court of Appeals between 2003 and 2006, specifically *Suarez* and *Feingold*, created a recognizable change in the controlling law, entitling him to relief, retroactive or otherwise. Defendant's request to have the principles of *Suarez* and *Feingold*, (which begin with *Hafeez*, and ultimately end with *Policano*) apply retroactively is misplaced. Retroactivity goes hand-in-hand with a change in the law relative to key issues in a defendant's case; here there was no change in the law relative to Defendant's conviction merely a clarification of existing law.

C.P.L. § 440.10(h) allows for vacatur where the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States. As will be discussed more fully below, *Policano* recognized a clarification in the law as applied to depraved indifference murder and its applicable mens rea; it did not create a new law dictating when a jury may consider intentional as opposed to depraved indifference murder. What the *Hafeez*, *et al.* line of cases held in each instance was that by allowing a jury to consider depraved indifference murder where no evidence of an unintentional killing existed, a conviction for depraved indifference murder was improper; more specifically, such a conviction was unconstitutional.

Where a state's highest court interprets a statute, thereby clarifying or giving new meaning to it, retroactivity is inapplicable. On collateral review, the issue becomes whether or not someone previously convicted had been

convicted contrary to a high court's subsequent ruling. If a defendant is convicted of a crime, the facts of which are later determined not to support said conviction by the state's highest court in an unrelated review of the statute as applied to a separate and distinct defendant, not only is collateral relief warranted in the former case, but it is **mandated**, as allowing the former defendant's conviction to stand, where the latter's conviction was found to have not been supported by the same or substantially the same facts, constitutes a violation of federal due process. *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712 (2001). [*5]

Based on the detailed discussion and analysis below, Defendant's crime, if it was a crime at all, was intentional (although an intentional crime was rejected by the jury). In the case at bar, there was **no** evidence of an **unintentional** killing and thus, based on the *Hafeez*, *et al.* line of cases, which were decided subsequent to Defendant's direct appeals, it is clear that the judgment against the Defendant was obtained in violation of the New York State and United States Constitutions. Each case in the aforementioned line of cases makes clear, including *Policano*, that as far back as 1971, New York recognized that a crime is either intentional or reckless, but cannot be both. **Where no evidence of an unintentional killing exists, the crime can only be said to be intentional.** Without creating a new law, but by clarifying the existing law, the Court of Appeals in case after case vacated depraved indifference murder convictions where there was no evidence of an unintentional killing, because such convictions were unconstitutionally obtained. If it was not clear in 1999, when the Appellate Division, Second Department, affirmed Defendant's conviction (without any mention of depraved indifference murder or any analysis or mention of *People v. Register*, *infra*), the *Hafeez* line of cases, including *Feingold* and *Policano*, make it crystal clear that Defendant's conviction for

depraved indifference murder was unconstitutionally obtained, as there was no evidence presented at the original trial that Defendant's crime, if a crime at all, was unintentional.

In *Policano v. Herbert*, 7 NY3d 588 at 603, 825 NYS2d 678 (2006), the Court of Appeals, in reviewing its recent line of cases, concluded that: "[t]he purpose of our new interpretation of under circumstances evincing a depraved indifference to human life' is to dispel the confusion between intentional and depraved indifference murder, and thus cut off the continuing improper expansion of depraved indifference murder." As such, *Policano* supports the holdings in the cases from *Hafeez* through and including *Payne* - that point blank shootings can almost never be considered depraved indifference murder.The *Hafeez*, *et al.* line of cases clarified the definition of depraved indifference murder for judges and prosecutors who had been misapplying the law and, thus, leaving it up to the jury to guess the defendant's state of mind at the time of the killing. The holding in *Policano*,(the "newly defined law") that judges and juries must consider a defendant's mental state as opposed to the factual circumstances surrounding the killing as held in *People v. Register*, is self-evident. *Every* crime has a mens rea, as codified in the New York Penal Law. Every criminal statute requires the People to prove a particular mental state as an element of a crime. While the *Policano* court avers that they are unwilling to extend this new clarification retroactively because they do not want to open the floodgates, they are really attempting to close the very floodgates opened by *Payne* [FN7], *et al.*, where the court stated that depraved indifference murder may not be charged in the overwhelming majority of New York homicides and that "a one-on-one shooting or knifing can almost never qualify as depraved indifference murder." *Payne* at 272.

Indeed, such Court of Appeals holding in *Payne* was not novel. In *People v. [*6]Wall*, 29 NY2d 863, 278 NE2d 341 (1971), as discussed by Chief Judge Kaye in her dissent in *Policano,* the Court of Appeals noted as far back as 1971, that the record therein established that the defendant was guilty of an intentional murder and no other, where the defendant fired "two bursts of shots, each shot hitting its victim, [such] could not be found to be the result of negligence merely." *Wall* at 171.

A change in the law relating to the mens rea associated with depraved indifference murder was, in fact, pronounced in *People v. Feingold*, 7 NY3d 288, (2006), where the Court of Appeals specifically overturned *People v. Register*, 60 NY2d 270 (1983), finding that depraved indifference to human life is a culpable mental state.[FN8] The Court of Appeals held that in depraved indifference murder cases, the finder(s) of fact must look to the mens rea of the defendant, not the surrounding factual circumstances under which the killing occurred [FN9] to determine whether the defendant exhibited depraved indifference. Quoting the dissent in *People v. Suarez*, 6 NY3d at 298, "depraved indifference is best understood as an utter disregard for the value of human life - a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not."[FN10] In the case at bar, as established at trial, Defendant pointed a .32 caliber handgun at the victim and shot him three times, center mass, consistent with his police training. This type of "point blank" intentional shooting is precisely the type of circumstance that cannot be considered depraved indifference murder and, indeed, as recognized by both the majority and dissent in *Policano*, has *never* been upheld as depraved indifference murder.

As discussed above, the true state of the law with regard to "point blank

shootings" at the time of Defendant's conviction was consistent with the holdings in *Wall*, *Hafeez*, *Gonzalez* and *Payne* that "a one-on-one shooting can almost never qualify as depraved indifference murder." *Payne* at 272. Even if we apply the [*7]principles of *Register* to Defendant's actions, the *Hafeez*, et al. line of cases mandates that the charge of depraved indifference murder should have never gone to the jury, as the circumstances under which the shooting occurred do not support such a conviction.[FN11]The *Policano* court reasoned that historically under the principles of *Register* "where both intentional and depraved indifference murder were charged in one-on-one shootings or knifings, [both crimes] were submitted to the jury for it to sort out the defendant's state of mind, ***unless there was absolutely no evidence whatsoever that the defendant might have acted unintentionally."***[FN12] *Policano* at 601 (emphasis added). In *Policano*, the court doubted that the defendant therein acted with premeditation or sought out the victim in order to exact revenge. Rather, the court found that the shooting therein "erupted spontaneously" when the defendant happened to come across the victim in a chance encounter on the street consistent with the cases applying *Register*, where the focus was on compelling *circumstantial* evidence of intent.

In the present case, however, the trial record contains *direct* evidence of intent. Indeed, by raising the justification defense, as it applied to Mr. Campbell's actions, Defendant concedes that he intentionally pointed a gun at the victim and intentionally shot 3 rounds at the victim based on his police training, in order to stop the victim from beating his father with a baseball bat. Defendant's actions cannot be seen as reckless.

Indeed, it has always been the People's theory in the case at bar that, upon seeing Mr. Campbell beating his father with a baseball bat, Defendant went into

the Venice Deli, retrieved a handgun, returned to the parking lot and shot the victim. This, the People allege, was an act of "revenge", "payback" and "retribution", as laid out more fully in the People's opening and closing statements at trial. It is unquestionable that there is ***no evidence that Defendant DiGuglielmo acted unintentionally.***

As the holdings in *Feingold* and *Policano* make clear, the *Hafeez*, *et al.* line of cases did not overrule *Register*, they overturned convictions and identified a group of offenses, i.e., point blank shootings, that do not fall within *Register* and were not properly charged as *Register*-type depraved indifference murders. In each instance in the *Hafeez*, *et al.* line of cases, the Court of Appeals set aside a depraved indifference murder conviction under *Register*, without overruling *[*8]Register*. The Court of Appeals held that the original convictions in the *Hafeez*, *et al.* line of cases did not fall within the ambit of *Register*, and should have been properly charged as intentional murders (if there were charges at all) had the prosecution and/or the trial judge followed the *Wall* and *Gallagher* holdings, that manifestly intentional killings cannot form the basis of depraved indifference murder. It was not clear where the Court of Appeals was specifically going with its holdings in the *Hafeez*, line of cases until *Feingold* and *Policano* were decided and *Register* was specifically overruled. By specifically overruling *Register* in *Feingold*, the Court of Appeals conceded that it had not overruled *Register* in its earlier decisions the *Hafeez*, *et al.* line of cases.

Hence, the Court of Appeals in the *Hafeez*, *et al.* line of cases, as noted in *Policano*, clarified and reaffirmed long-settled New York law as applied to new facts, rather than created new legal principles; that manifestly and unquestionably intentional killings under *Wall*, *Hafeez*, *et al*. could not properly

be sustained under *Register*. As stated in *Policano*, while strong proof of intent may not preclude a finding of depraved indifference murder, at some point, the proof of intent becomes so great that it must preclude a finding of depraved indifference murder and such proof can only be said to support an intentional murder otherwise, every murder would be both depraved indifference murder and intentional murder. The *Hafeez*, *et al.* line of cases recognized such a principle and drew a proverbial line in the sand observing that, while *strong* proof of intent may support depraved indifference murder, where there is *only* proof of an intentional killing, a depraved indifference murder conviction cannot be sustained.[FN13]

In *People v. Stewart*, 36 AD3d 1156, 828 NYS2d 670 (3d Dep't 2007), the Appellate Division, Third Department, conducted an extensive analysis of the decision in *Policano* and the history of the depraved indifference murder statute, consistent with the analysis discussed herein. The *Stewart* court seemed likely to grant the collateral relief seemingly prohibited by *Policano*, but for the fact that, in that case, "it [could] not be said that there [was] no evidence in the record that defendant acted unintentionally." *Id.* at 1161. In *Stewart*, the defendant wrestled a fireplace poker away from his foster father and struck him with it. The *Stewart* court found that under *Register*, a jury could have found that the defendant's actions were "sudden, spontaneous and not well-designed to cause *imminent* death," quoting *Sanchez* at 377. As the actions of the defendant in *Stewart* fell within the purview of *Register*, the *Hafeez*, *et al.* line of cases previously discussed did not [*9]apply because the facts "presented a close question on the depraved indifference murder charge, which was properly submitted to the jury to decide." *Id.* at 1162. The *Stewart* court intimated that, if the *Hafeez* line of cases had been applicable (if there had been no evidence of an unintentional killing), the defendant's motion to vacate his conviction may

very well have been granted, as the same evidence would preclude a finding of depraved indifference murder if that defendant were to be tried today. *Id.* Unlike the defendant in *Stewart*, however, **there is no evidence in the case at bar that Defendant DiGuglielmo acted unintentionally**.

As noted in their opening statement at trial, the People specifically proclaimed "[t]his is a case about revenge. This is a case about retribution. This is a case about payback." Revenge, retribution, payback for seeing someone beat your father with a baseball bat what else can this describe except an ***intentional*** act? Such circumstances are completely inapposite to those of the defendant in *Policano* who, the court found, fell within the *Register* classification of depraved indifference murder, where that defendant's actions could have been perceived as reckless despite strong evidence of intent.

Remarkably, in the case at bar the People themselves separate Defendant's actions from those of a person who has acted with depraved indifference, as defined by *Register*, in their appellate brief [FN14] to the Appellate Division, Second Department (1999 WL 34801801 (N.Y.A.D. 2nd Dept.)). In arguing to the Appellate Division, Second Department, that the jury properly convicted Defendant in this case of depraved indifference murder, the People conceded that Defendant's act on October 3, 1996 "assured death more than the conduct previously held sufficient [to sustain a conviction for depraved indifference murder]" by the Appellate Division under *Register*, in that Defendant herein did not engage in a game of Russian roulette as in *People v. Roe*, 74 NY2d 20; nor did he "randomly fire a gun at people running away from him" as in *People v. Fenner*; or shoot a gun in the middle of a crowded bar as in *People v. Register*. Indeed, the People have winningly distinguished the Defendant's actions from the "classic" cases of depraved indifference murder. As such, even

viewing Defendant's actions in this case under the principles of *Register*, they cannot and did not constitute depraved indifference murder and should never have been considered by the jury as such. While it may seem at this point that the Court has overstepped its authority to act, to the contrary, the instant analysis is necessary to explain why *Policano*'s "non-retroactivity" rule is inapplicable to the case at bar.

The *Policano* court held that its new law, as pronounced in *Feingold* regarding the newly established "mens rea analysis" for depraved indifference [*10]murder, should not be applied retroactively because "retroactive application would potentially flood the criminal justice system with C.P.L. § 440.10 motions to vacate convictions of culpable intentional murderers who were ***properly*** **charged** (under *Register*) and convicted of depraved indifference murder under the law as it existed at the time of their convictions." *Policano* at 604. (emphasis added). Defendant herein does not, however, fall within this class of people, as **he was not *properly* charged** (under *Register*) at the time of his conviction. As reasoned above, even under the principles of *Register*, as noted in the *Hafeez*, *Gonzalez*, *Payne*, *Suarez* and *Feingold* line of cases and ultimately in *Policano* itself, Defendant should never have been charged with, or convicted of, depraved indifference murder. Every single one of the aforementioned cases recognized and clarified long standing principles, as applied to their new facts, that under certain circumstances, specifically where there exists no evidence of an unintentional killing, depraved indifference murder may not be sustained or even considered by a jury, even under *Register*. These cases recognize the self-evident that there are, and always were, limits to *Register*; without such limits intentional murder and depraved indifference murder would be indistinguishable particularly under *Register*.

Accordingly, as Defendant does not fall within the class of defendants who should not benefit from a retroactive application of the *Policano* ruling, *Policano* does not bar the relief Defendant requests.

Indeed, Chief Judge Kaye artfully articulates the problem with the *Policano* decision in her dissent therein, which warrants inclusion herein. The Chief Judge aptly recognizes that there have been "two distinct threads in our developing depraved indifference murder jurisprudence only one of which effected an actual change' in settled principles."[FN15] *Policano* at 605. In discussing the first line of cases, Judge Kaye stated that "evidence of a manifestly intentional killing cannot sustain a conviction for depraved indifference murder and is based. . .on the well-established rule of *People v. Gallagher*, 69 NY2d 525 (1987) that intentional murder and depraved intent murder are inconsistent crimes" and that such rule was consistently applied in *Hafeez*, *Gonzalez*, *Payne*, *Suarez* and *Policano*. *Id.* In referencing the Court of Appeals holding in *Gallagher*, Judge Kaye wrote that "a person cannot at the same time act both intentionally and recklessly with respect to the same result - that is, death" and that "guilt of one necessarily negates guilt of the other" since an act "is either intended or not intended; it cannot simultaneously be both." *Id. quoting Gallagher* at 529. "The principle that evidence of a plainly intentional killing could not, *as a matter of sufficiency*, support a conviction for unintentional homicide was settled as early as *People v. Wall*," *Id*. [*11]where the court held that "because the record established that defendant was guilty of an intentional shooting or no other' (29 NY2d at 864), a verdict convicting the defendant of criminally negligent homicide could not be sustained." *Id.* "[T]wo bursts of shots, each hitting its victim, could not be found to be the result of negligence merely." *Id. quoting Wall* at 864.

Judge Kaye further concludes in her dissent that "*Hafeez*, *Gonzalez* and their progeny did not change the law" *Id.;* she then goes on to discuss the second thread of depraved indifference murder jurisprudence, which pertains to depravity as a distinct mens rea. Judge Kaye finds that "it is with respect to *this* issue that, in *Feingold*, our Court did indeed change the law [by overruling *Register*]" and its principle that "the element of depraved indifference referred to the objective circumstances in which the risk-creating conduct must occur, not to a culpable mental state." *Id.* at 606. Thus, Judge Kaye actually concurs with the majority in their retroactivity analysis regarding the aforementioned "undisputable change in the law." *Id.* As foretold by the Hon. Ruth Bader Ginsburg, "dissent speaks to a future age."

For the state's highest court to recognize, after clarifying and reestablishing as a matter of law, that it is never permissible to convict a defendant of depraved indifference murder where, if the defendant committed the crime at all, he committed it intentionally, and then to prevent the lower courts, which have already been flooded with C.P.L. § 440 motions based on the *Hafeez*, *et al.* line of cases, from vacating wrongfully obtained convictions, is a concept nearly incomprehensible to this justice. Perhaps this is why the author is a learning justice, rather than a learned justice, as are my colleagues on the Court of Appeals.

Despite presiding over the instant motion for the past 2 years, this Court has yet to fully grasp how the state's highest court can preclude an individual from seeking relief consistent with *Payne*, *et al.,* thereby allowing a currently incarcerated individual to remain incarcerated for the crime of depraved indifference murder which, if committed today, could not even be submitted to

a jury. Indeed, if the exact same case were presented today, the jury would not be allowed to consider the charge of depraved indifference murder, as a matter of law, under the facts of the case at bar. To allow relief to be granted or denied based upon an artificial, arbitrary point in time, when it is clear, despite *Policano*, that there has been no substantive change in the law, quite frankly, is not just unconscionable, it is violative of Due Process under the 14th Amendment; so says not just this justice, but the United States Supreme Court. *Fiore v. White, , supra* . People should not remain in jail, potentially for the rest of their lives, because their lawyer did not get to the Court of Appeals first. There are some who might say that the decision in *Policano* represents all that is wrong with the criminal justice system. Making a blanket statement that retroactivity is inapplicable because "[d]efendants who commit [ ] vicious crimes but who may have been charged and convicted under the wrong section of a statute are not attractive candidates for collateral relief after their convictions have become final," *Policano* at 604, *quoting Suarez* at 217, might be perceived as intellectually dishonest and [*12]unprincipled. The Court of Appeals should have, or could have, at the very least, fashioned guidelines for a case-by-case analysis, rather than assume that everyone and anyone seeking retroactive relief falls into the category of the most undeserving, heinous criminals.

For the court to hold that non-retroactivity poses no risk of a miscarriage of justice is mind boggling. Not to grant relief in this case would not only be unconscionable, it would be unconstitutional. *See*, *Fiore v. White, supra* . Would it not be truly consistent with our system of jurisprudence to allow retroactive application or collateral relief to free even hundreds of guilty criminals if it prevents just one innocent person from remaining incarcerated? "Better that 9 guilty go free than 1 innocent person go to jail" is a foundational

maxim of our criminal justice system, not a "feel good" phrase for law school professors and community activists.[FN16] By finding that defendants who would be seeking collateral relief in these cases are not "attractive candidates" for such relief, although innocent or not guilty of depraved indifference murder, has the Court of Appeals adopted a system of jurisprudence wherein the ends justify the means? Is it now acceptable to remove vicious criminals from the streets with convictions for crimes they did not commit simply because they may have committed others? "The first sign of corruption in a society that is still alive is that the end justifies the means." Georges Bernanos.

United States Supreme Court Justice Felix Frankfurter wisely stated that "[t]he history of liberty has largely been the history of the observance of procedural safeguards." While the Court is aware that there may be many who, in order to be granted collateral relief from depraved indifference murder convictions, will aver, swear or testify that the homicide they committed was intentional, premeditated and the like, and while the mere thought of releasing such individuals may be despicable and deplorable, the Court of Appeals, through its holdings in the *Hafeez*, *et al.* line of cases has presented courts with that once-in-a lifetime moral dilemma where we as justices must decide whether to uphold the fundamental precepts and foundational principles of our criminal justice system no matter how difficult doing so may be, or pay them lip service by creating a bald fiction upon which to rely because upholding the foundational principles of our system of [*13]jurisprudence become too difficult.

Defendant correctly argues that to deny him relief under these circumstances would, in fact, deprive him of Due Process under the Fourteenth Amendment, *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712 (2001). Based on the above

analysis, *Policano*'s rule against retroactivity, if it truly be one, should not bar collateral relief in this case, as this Court has concluded that Defendant was *not* properly convicted under *Register* because there was no evidence of an unintentional killing; and a proper conviction under *Register* is a condition-precedent to the application of *Policano*.[FN17]

In as much as the *Hafeez*, *et al.* line of cases up to and including *Policano* make clear, where there is *no* evidence of an unintentional killing, a depraved indifference murder conviction cannot be sustained under *Register* or otherwise; as these long standing principles have been newly affirmed and further clarified by the Court of Appeals, and as *Policano*'s non-retroactivity rule is thus inapplicable to the facts of the case at bar, Defendant's motion is granted and his conviction for depraved indifference murder is vacated. *See*, C.P.L. 440.10(h). Defendant's conviction is hereby vacated for the additional and independent reasons set forth below.

II. Defendant alleges that his due process rights were violated under the United States and New York Constitutions because he was convicted on evidence legally insufficient to establish the elements of depraved indifference.

C.P.L. § 440.10(3)(b) is clear that the court may deny a motion to vacate a judgment where the grounds or issues raised were previously determined on the merits upon a prior motion or proceeding in a court of this state or proceeding in a federal court. The issues regarding the legal sufficiency of the evidence at the Defendant's original trial while previously raised, have not been determined on their merits in light of the most recent and complete line of Court of Appeals cases addressing depraved indifference murder.

C.P.L. § 440.10(1)(h) states that a judgment of conviction may be vacated if the judgment was obtained in violation of a right of the defendant under the New York and/or United States Constitutions. As stated previously, the seemingly controlling case is *Policano v. Herbert, supra* , where the Court of Appeals explained its interpretation of the legal principles involved with respect to the elements of depraved indifference murder in a dual attempt to clarify the confusion between intentional and depraved indifference murder and to specifically overrule *Register* and establish the mens rea necessary for depraved indifference murder. Therein, the Court of Appeals held that [*14]it did create a new legal standard or law. It also (as pertains to Defendant herein) newly clarified the interpretation of the depraved indifference murder statute.

It is noteworthy that Judge Alessandro, a judge of concurrent jurisdiction, ruled in his Decision and Order dated April 11, 2005, that "defendant's request for vacatur upon ground of legal insufficiency is a matter which is neither de hors the record nor cognizable under C.P.L. § 440.10; Judge Alessandro further opined that such relief was procedurally barred." Decision and Order, J. Alessandro, April 11, 2005, p. 3. Judge Alessandro further opined that since Defendant had previously raised certain issues on his direct appeal, such issue could not subsequently be raised for post conviction relief pursuant to C.P.L. § 440.10. However, subsequent to Judge Alessandro's decision, *Feingold* and *Policano* completed the Court of Appeals' relevant line of cases (*Hafeez*, *et al.)* without specifically overturning or reversing any of them. Thus, subsequent to Judge Alessandro's decision, the Court of Appeals specifically and unequivocally clarified long standing principles of law pertaining to intentional murder and depraved indifference murder that had become blurred, while also creating new legal principles regarding the mens rea to be applied in depraved indifference murder cases; thus, making Defendant's current motion under

C.P.L. § 440 proper. [FN18]

III. Defendant contends that a sworn juror was convicted of a crime, however, that information was not disclosed during jury selection and thus, warrants vacatur of Defendant's judgment of conviction.

On July 12, 2007, Defendant moved again to supplement his motion. In or about May 2007 Defendant learned that during jury selection at his 1997 trial, a juror failed to disclose that he had been convicted of a misdemeanor, Attempted Criminal Possession of a Forged Instrument in the Third Degree, in 1993. Defendant argued that the juror's actions, both his criminal history and his concealment thereof, suggest that he may have harbored bias against Mr. DiGuglielmo as a police officer, thereby causing Mr. DiGuglielmo to suffer prejudice to a substantial right. Affirmation of Andrew Shapiro, p. 3. Defendant's argument is unavailing.

The People argued that the "juror, who answered every question put to him truthfully, stated unequivocally his ability to judge the case in a fair and impartial manner on the evidence. There is nothing in the record that supports the defendant's claim that [the juror] intentionally concealed' his criminal history, trivial as it was, and therefore deprived the defendant of a fair trial." Letter by ADA Robert K. Sauer dated September 26, 2007, p. 4.

The Court was provided with copies of the transcript of the jury selection voir dire which was conducted on September 10, 1997. On September 10, 1997, prior to the commencement of jury selection, the Hon. Peter Leavitt had an extensive colloquy with all counsel regarding juror questionnaires; Defendants' counsel had requested a copy of the juror questionnaires provided by the Commissioner of Jurors. Judge Leavitt's law clerk stated at that same

conference that, after a conversation with the Commissioner of Jurors, "there [were] no questionnaires per se that they had [*15][the prospective jurors] fill out when they report for duty. Questionnaires are left up to the individual judges in the criminal parts." Transcript of September 10, 1997, pgs. 44-45. Defense counsel admitted to having a copy of the "official form for the questionnaire developed by the Chief Administrator of the Courts." Id., p. 45, lines 17-19. Defense counsel further inquired whether the "official form questionnaire" was administered to the jury panel of prospective jurors. The trial court explained that the jurors were not given the questionnaire counsel was referring to, but the trial court had its own questionnaire. All counsel were provided with a copy of the entire juror questionnaire. Voir dire of jurors was conducted and none of the three defendants' counsel inquired or expanded further with respect to this particular juror's criminal history/background.

After submissions from the People and Defendant on this issue, the Court, for the reasons stated on the record, determined that there was insufficient evidence to support Defendant's contention that the juror in question intentionally concealed his misdemeanor conviction and thus, this Court denied that portion of Defendant's motion.

IV. The Court granted a hearing to determine whether improper and/or prejudicial conduct occurred, outside of the trial record, which would warrant reversal of Defendant's conviction pursuant to C.P.L. § 440.10 and to determine whether there was a *Rosario/Brady* violation.

A. *Improper and prejudicial conduct occurred outside of the trial record.*

C.P.L. § 440.10 is a mechanism whereby a defendant may challenge his

judgment of conviction based upon facts not appearing in the record and which undermine the legitimacy of the judgment. *People v. Crimmins*, 38 NY2d 407, 381 NYS2d 1 (1975). To obtain relief pursuant to C.P.L. § 440.10, a defendant must raise and satisfy one of the eight grounds enumerated therein. C.P.L. § 440.10(1)(a-h).

C.P.L. § 440.30(5) states, in pertinent part, that "if the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof." The power to vacate a judgment of conviction, as well as the determination of whether to hold an evidentiary hearing lies within the sole discretion of the hearing court to which the motion is addressed. *See*, *People v. Baxley*, 84 NY2d 208, 639 NE2d 746, 616 NYS2d 7 (1994); *see also*, *People v. Graziosa*, 195 Misc 2d 732, 761 NYS2d 466 (NY County 2003). A hearing should be conducted in connection with a defendant's motion to vacate a judgment of conviction, if the defendant sets forth facts which do not appear in the record on direct appeal from the judgment of conviction. Where these facts, if established, would entitle the defendant to the relief sought, then an evidentiary hearing must be held. *People v. Liggins*, 181 AD2d 916, 582 NYS2d 211 (2nd Dep't 1992). A defendant, however, has the burden of going forward with allegations sufficient to create triable issues of fact; conclusory allegations will not suffice in granting an evidentiary hearing pursuant to C.P.L. § 440. See, *People v. Bacchi*, 186 AD2d 663, 588 NYS2d 619 (2nd Dep't 1992).

Even if a defendant's chances of success in meeting his burden of proof may be slight or remote, that, by itself, does not furnish a basis to deny the

motion without a hearing. *People v. Hughes*, 181 AD2d 912, 581 NYS2d 838 (2nd Dep't 1992).

Initially, the People argue that Defendant's C.P.L. § 440 motion should be dismissed as the statements obtained from the witnesses were not sworn. C.P.L. § 440.30(1) states, in pertinent part, that on a motion to vacate a judgment of conviction, if based upon the existence of facts, "the [*16]motion papers must contain sworn allegations" and such sworn allegations "may be based upon personal knowledge or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers." Despite the People's constant and continued protestation to the contrary, Defendant's moving papers and supplemental submissions comport with the dictates of the statute; the statements contained in the Affidavit of Defendant's Supplemental Notice of Motion were sworn to based upon information and belief by Defendant's counsel, who stated that the source of his information and belief was based on conversations between Defendant's investigators (counsel's agents) and Michael Dillon and James White. The statements, included as Exhibits 1 and 2, were signed by both witnesses. Via letter dated June 21, 2007, in an effort to appease the People, Defendant subsequently provided notarized statements from the witnesses, Mr. Dillon and Mr. White.

Assuming, *arguendo*, that the Court granted a hearing based on unsworn statements, there has been no prejudice to the People by holding such a hearing; Michael Dillon was interviewed by the People on August 11, 2007 at their offices prior to the hearing being conducted, witnesses gave sworn testimony

and the People were afforded ample opportunity to cross-examine all witnesses. Accordingly, that portion of the People's motion is denied.

Pursuant to C.P.L. § 440.10(1)(g), the Court may vacate a conviction based on newly discovered evidence, which could not have been produced by the defendant at trial even with due diligence on his part, and which is of such character as to create a probability that had such evidence been received at trial, the verdict would have been more favorable to the defendant. In assessing due diligence, "the practicalities of the situation must be kept in mind." *People v. Hildebrandt*, 125 AD2d 819, 821, 509 NYS2d 919, 921 (3rd Dep't 1986); *see also* 34 N.Y.Jur. 2d § 3064 ("[T]he due diligence requirement is measured against a defendant's available resources and the practicalities of the particular situation.")

The power to vacate a judgment of conviction upon the ground of newly discovered evidence and concomitantly grant a new trial rests within the discretion of the hearing court. *People v. Tankleff*, 2007 WL 4463753 at 13 (2nd Dep't Dec. 18, 2007); *see also People v. Bryce*, 88 NY2d 124, 128, 666 N.E. 733, 738 (1916). "Great weight should attach to the opinion of the trial judge upon a motion of this character." *People v. Shilitano*, 218 N.Y 161, 176, 112 N.E. 733, 738 (1916).

After extensive motion practice and conferences, the Court granted a hearing pursuant to C.P.L. § 440.10(1)(b), C.P.L. § 440.10(1)(g) and C.P.L. § 440.30(5) to determine whether the allegations made by Defendant that witnesses were subjected to undue influence during interviews with law enforcement are of such character as to create a probability that, had such evidence been received at the trial, the verdict would have been more favorable to Defendant. The

hearing before this Court was commenced on November 19, 2007 and ultimately concluded on December 4, 2007. At the hearing, six (6) witnesses testified; Defendant called three (3) witnesses, Michael Dillon, James White and Stephen R. Lewis, Esq., and the People presented the testimony of three (3) witnesses, ADA Patricia Murphy, Lt. Detective James Guarnieri from the Dobbs Ferry Police Department and Investigator Edward Murphy of the Westchester County District Attorney's Office. [*17]

During the seven-day evidentiary hearing, newly discovered evidence was borne out through the testimony of the Defendant's and the People's witnesses, which could not have been produced by Defendant at trial despite due diligence on his part. Moreover, had this evidence been received at trial, it is probable that the verdict would have been more favorable to Defendant.[FN19]

The hearing testimony, the moving papers and the underlying trial transcript (record in its entirety) revealed that there were three people who were in the best position to witness the shooting in its entirety as it occurred on October 3, 1996, and who gave statements that very night describing what they saw they were Michael Dillon, James White and Kevin O'Donnell.[FN20]On that same date, October 3, 1996, at a moment in time when the events of that fateful evening were the most clear in their minds, each of these eyewitnesses told the police that Mr. Campbell was the initial aggressor in the altercation and that Defendant's actions were justified based upon Mr. Campbell's initial aggression and further escalation of the conflict by striking Defendant's father with a baseball bat while posturing to continue the attack.

In spite of said evidence, Dobbs Ferry Police Chief Longworth, after ADA Murphy arrived at the scene of the shooting, ordered that Defendant, along with

his co-defendants, be arrested that very evening; formal statements had not been finalized and the investigation was just underway. Nevertheless, arrests were made. It appears that after charging Defendant with murder, "the prosecution" embarked on a mission to pressure certain eyewitnesses into changing or conforming their testimony to fit the charge of murder that had been filed, rather than filing charges that fit the facts as revealed in the statements of the eyewitnesses. Indeed, the hearing evidence showed that the Dobbs Ferry Detectives treated certain eyewitnesses more like suspects than like witnesses.

The People seemed to have made the lynchpin of their case the movement of Mr. Campbell [FN21] and the positioning of the bat in his hand when he was shot by [*18]Defendant.[FN22] At trial, the People maintained that when he was shot, Mr. Campbell was in a batter's stance but was "back peddling". Apparently, in order to succeed in their prosecution, the People would have to "convince" Mr. Dillon, Mr. O'Donnell and Mr. White that their initial recollection of the events, which did not indicate that Mr. Campbell had been backing up or retreating, was inaccurate.

In other words, since the witnesses who viewed the shooting in its entirety did not support the People's theory that the shooting was unjustified, these witnesses would have to "remember" things differently.[FN23] As the testimony of Lt. Guarnieri at the hearing revealed, between October 3, 1996 and October 8, 1996, the Dobbs Ferry Police Detective Division re-interviewed *only* those witnesses whose accounts contradicted the People's theory and supported Defendant's claim that Mr. Campbell was actively threatening /advancing upon Defendant's father when Defendant shot him those witnesses being Michael Dillon, James White and Kevin O'Donnell. Indeed, Lt. Guarneiri admitted at

the hearing that the only witnesses that the Dobbs Ferry Police Department re-interviewed were those "who on October 3rd said the bat was swinging." It is more than interesting that after filing criminal charges against Defendant, before all statements were reviewed and collected, rather than re-interview all witnesses to sort out the events, the Dobbs Ferry Police Department "re-interviewed" only those witnesses whose accounts supported Defendant's defense of justification.

At the hearing, Michael Dillon testified that on October 3, 1996 he was employed by TCI Cable and was in the company van, with his supervisor, Kevin O'Donnell, when he witnessed Defendant shoot Charles Campbell in the parking lot of the Venice Deli in Dobbs Ferry, New York. On October 3, 1996, while the events of the shooting were fresh in his mind, Mr. Dillon gave a written statement to the Dobbs Ferry Police that Mr. Campbell had struck Defendant's father with a baseball bat "at least two to three times in the area of his left thigh and left knee. He struck him at full force and very hard." Mr. Dillon stated that at the time Defendant shot Mr. Campbell, Mr. Campbell "was *still swinging the bat* at [the defendant's father]." (emphasis added). Moreover, shortly after the shooting took place and prior to giving his written statement to DFPD, Mr. Dillon gave on-camera interviews to two news agencies, wherein he stated, in sum and substance, that Defendant acted in "self-defense".

Mr. Dillon testified further at the hearing that, after taking his written statement on October 3, 1996, the DFPD again questioned him about the shooting "within a two to three day period afterward" and on "three to four" separate occasions. Lt. Guarnieri testified at the hearing that Mr. Dillon was re-interviewed on October 7, 1996 into October 8,1996 because his statement about Mr. Campbell swinging the bat at the time he was shot differed from "the vast majority of

other [*19]witnesses who saw the actual shooting." However, on cross-examination the lieutenant admitted that Mr. Dillon's first statement was supported by the original statements of both Mr. O'Donnell and Mr. White.[FN24] Lt. Guarnieri even agreed that Mr. O'Donnell's first statement echoed Mr. Dillon's observation that "the bat was swinging" at the time of the shooting.

Shortly after October 3, 1996, multiple officers from the DFPD showed up at Mr. Dillon's place of employment and drove him to police headquarters. In an "interrogation type of room", detectives questioned him for "at least a couple of hours." Mr. Dillon, however, initially maintained the same account that he had given the police in his initial written statement on October 3, 1996. A "day or two later" the police again appeared at Mr. Dillon's place of employment, placed him in a patrol car and drove him to police headquarters, where he was again questioned about the shooting. Nonetheless , Mr. Dillon maintained the same account that he had already given to police on October 3, 1996.

Unrelenting, officers from the DFPD again showed up at Mr. Dillon's place of employment on October 7, 1996. This time, the Chief of Police, along with the entire detective division, showed up unannounced to bring Mr. Dillon to police headquarters. Mr. Dillon testified at the hearing that this created a "[n]ervous, intimidating atmosphere" for the then 20-year-old. Mr. Dillon was once again placed in the back of a patrol car and taken to an interrogation room where the police detectives asked him the same questions that he had answered many times before. The proposition that custodial interrogation, or its fundamental equivalent, is inherently coercive is so well-established in our system of jurisprudence it requires little discussion, but perhaps is worth mentioning.

The court's discussion begins with an analysis of, and analogy to, the 5th Amendment right against self-incrimination which provides that no person shall be compelled to be a witness against himself or herself in a criminal case.

While there is a precept that prevents one from being compelled to incriminate himself, it is to some extent permissible to compel one to incriminate another, for instance, the use of a subpoena. However, such action should not be without limitation. At some point, permissible conduct becomes impermissible. While there is a plethora of case law that stands for the proposition that a police-arranged identification procedure that is impermissibly suggestive, shall preclude an in court identification at trial, *People v. Wade*, 388 U.S.218, 87 S.Ct. 1926 (1967), there is a dearth of case law that discusses the limits placed upon police officers when questioning a witness. However, given that the allegations from this case revolve around police interrogations and tactics, which overbore the will of key eyewitnesses, the Court shall look for guidance to the seminal case on police conduct and interrogation, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 [*20](1966).

As initially noted in *Miranda*, "while the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high on the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition." *Miranda*, at 443.

It is from here that the Supreme Court went on to discuss the dangers and pitfalls of custodial interrogation and the rights of an accused not to incriminate himself, as well as the right of the accused to be provided with notice of his rights. While an accused may have greater protection than a mere witness, in that an accused can assert his or her 5th Amendment right as well as invoke his or her right to counsel, a witness has less protection. While the *Miranda* court concerned itself with the danger of custodial interrogation of an accused in its truest form, the principles, and more specifically, dangers associated with police interrogation of witnesses are equally compelling. The constitutional issue the *Miranda* court initially defined in each of the cases before it was the admissibility of statements obtained by defendants while in custody or otherwise deprived of their freedom of action in any significant way. "In each [case], the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world." *Id.* at 443. Thus, the court began its analysis by focusing on the inherently coercive nature of confinement or separation. The court went on to discuss a document analyzing issues surrounding police interrogation known as the Wickersham Commission Report. The court noted that, ". . . the conclusion of the Wickersham Commission Report, made over 30 years ago is still pertinent:

"To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): It is not admissible to do a great thing by doing a little wrong. . .It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' " *Id.* at 447.

The People in the case at bar go to great lengths to argue that the conduct of the

DFPD was not impermissible and could not be said to have overborne the will of Mr. Dillon in any way as the People allege that there is no evidence that the police were ever physically intimidating or coercive. The People allege that there was no proverbial "smoking gun" pointed at Mr. Dillon as he altered his statement to the Dobbs Ferry Police. To believe that undue influence can only be the result of physical coercion and nothing more, is to ignore 42 years of jurisprudence in the United States and to fail to grasp the basic precepts of one of the most influential decisions of this and the last century. Perhaps the failure to recognize this is a sad acknowledgment that the great attorneys of a prior generation who forged paths into unchartered territory are no longer around to impart the true significance of the foundation of many of the principles of our nation's criminal justice system. Perhaps it is further significant that this current generation of young lawyers are reluctant to read cases with precedential value if said cases are longer than three pages. For how else could one explain the basic failure of prosecutors charged with the administration of justice to understand [*21]principles that form the cornerstone of our system of justice?

As the Supreme Court of the United States stated over 42 years ago, ". . .again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, Since *Chambers v. State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' " *Id.* at 448. "Interrogation still takes place in privacy. Privacy results in secrecy and this, in turn, results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the

past, and which recommend various other effective tactics." *Id.*

The court, in analyzing the aforementioned manuals and texts, noted that, "the officers are told by the manuals that the principal psychological factor contributing to a successful interrogation is privacy being alone with the person under interrogation.' "*Id.* at 445. The efficacy of this tactic has been explained as follows, " if at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. " *Id.* at 449.

The Supreme Court further went on to recognize that "the texts thus stress that the major qualities an interrogator should possess are patience and perseverance." *Id.* at 450. One writer describes the efficacy of these characteristics in this manner: " in the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factors. Where emotional appeals and tricks are employed to no avail, **he must rely on an *oppressive atmosphere of dogged persistence***. (emphasis added). He must interrogate **steadily and without relent** leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours, pausing only for the subject's necessities and acknowledgment of

the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite form the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." *Id.* at 451.

The Supreme Court further noted that, "from these representative samples of interrogation techniques, the setting proscribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. ***He merely confirms the preconceived story the police seek to have him describe.*** (emphasis added). Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must patiently maneuver himself or his quarry into a position from which the desired objective may be attained. When normal procedures fail to produce the needed result, the police [*22]may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights. Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455.

In the cases before the Supreme Court, given the above background, the court concerned itself primarily with the interrogation atmosphere and the evils it can bring. The court went on to find that in the cases before it, it might not have

found the defendants' statements to have been involuntary in traditional terms. Indeed, the court stated, "our concern for adequate safeguards to protect precious 5th Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures . . .To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to ensure that the statements were truly the product of free choice. It is obvious that such an interrogation environment was created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity." *Id.* at 457.

Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments of individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . .by silent approaches and slight deviations from legal modes of procedure. *Id. citing, Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886). The court concluded that without proper safeguards, the process of in custody interrogation of persons suspected or accused of crimes contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. *Id.* Interestingly enough, the court noted that the circumstances surrounding in custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege against self-incrimination by his interrogator. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the 5th Amendment privilege under the system delineated by the court.

The references in *Miranda* to textbook examples of psychological coercion as relates to this case are uncanny. It is as though the Dobbs Ferry Police were operating from the outdated manuals and texts cited by the Supreme Court in 1966. Mr. Dillon and Mr. White were subjected to many of the psychological ploys discussed above, the "dogged persistence" of the officers, interrogation in privacy, in the custodial atmosphere of a police interrogation room, albeit not in the truest sense (although Mr. White's testimony indicates that at times he did not feel that he was free to leave; in fact, he testified that his attempts to leave were thwarted on more than one occasion), separation from anything that might have provided the witnesses with a psychological advantage, such as their homes or places of employment, as well as family and friends, as well as the patience and perseverance of the Dobbs Ferry Police. While Mr. Dillon and Mr. White were subjected to such ploys, they were given none of the safeguards of an accused - seemingly no right to refuse to speak with the police or to leave the station, no right to contact an attorney, etc. [*23]

Indeed, the Dobbs Ferry Police proceeded in a manner similar to the textbook psychological trickery described above; they interrogated Mr. White and Mr. Dillon steadily and, for all intents and purposes, without relent over a period of 4-5 days; the DFPD dominated Mr. Dillon and overwhelmed him with their will; they interrogated him for a spell of hours, stopping only for Mr. Dillon to tend to his necessities. Indeed, they allowed him to leave the police station, but thereafter picked up the interrogations where they left off. The interrogation of Mr. Dillon continued for days, again, with the required intervals for necessary breaks, but with no true respite from the domination.

Over the course of 5 days, the various Dobbs Ferry Detectives were alone with

their subjects, Mr. Dillon and Mr. White, which was essential to prevent distraction and deprive them of any outside support. The detectives' aura of confidence in convincing the witnesses that their statements were incorrect undermined, at the very least, Mr. Dillon's will to resist. As foretold by the manuals and texts cited in *Miranda*, as a result of the overbearing tactics utilized by the detectives, Mr. Dillon confirmed the detectives' " preconceived story" which they sought to have him describe. The only difference between what *Miranda* described and what ADA Murphy in essence testified to at the hearing, was that Mr. Dillon "adopted" the preconceived story, which the detectives sought to have him describe, rather than "confirmed" said preconceived story. The Dobbs Ferry Police patiently maneuvered themselves and their "quarry" into a position from which the desired objective was obtained. The detectives clearly kept Mr. Dillon, an individual observed by this Court to be malleable, anxious, and worrisome, off-balance by trading on his insecurity about himself and his surroundings.

Thus, consistent with the language in *Miranda*, even without employing brutality or the "third degree", the actions of the DFPD combined with the very fact of what certainly amounted to the functional equivalent of custodial interrogation, clearly exacted a heavy toll on Mr. Dillon and traded on his weaknesses. It is obvious, as held by the Supreme Court, that such an interrogation environment was created for no purpose other than to subjugate Mr. Dillon to the will of the Dobbs Ferry Detectives. Such an atmosphere carried its own badge of intimidation; it may not have been physical intimidation, but was equally destructive of Mr. Dillon's human dignity.

The persistent interrogation of Mr. Dillon began shortly after October 3, 1996 and continued through October 7, 1996 and into the early morning hours of

October 8, 1996, coming to an end only when Mr. Dillon finally gave the detectives the statement they were looking for.[FN25] Whereas Mr. Dillon's October 3rd statement avowed that when Defendant shot Mr. Campbell, Mr. Campbell was **"*still swinging the bat*** at the older male", this "new and improved statement" now averred that **Mr. Campbell was not swinging the bat** at the time he was shot, and for the first time, indicated that "the black guy seemed to be back peddling away from the older guy". What is even more incredulous is that the new statement gratuitously [*24]put forth the observation that "this situation did not have to happen as the male black seemed to be defending himself as he had been outnumbered."[FN26] Once the police were successful in "convincing" Mr. Dillon to adopt their version of the events, such that he signed the October 8th statement, they never again stopped in for a visit at his workplace, home or anywhere else. Amazingly, despite the numerous inconsistencies now created by Mr. Dillon's second written statement, there was no need to "re-interview" Mr. Dillon thereafter.

"Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime." *United States v. Wade*, 388 U.S. 218, 256 (1967) (Justice White, concurring and dissenting). It is disturbing that the detectives re-interviewed witnesses who gave unequivocal, consistent statements, but conducted no further interviews once the witnesses gave subsequent statements that conflicted, not only with their original unadulterated statements, but with other witnesses' statements as well. What is even more incredible is the complete lack of concern expressed by the prosecution, whether by ADA Ward or ADA Sauer in their handling of Defendant's motion or during the hearing or, more importantly, ADA Murphy for the fact that Mr. Dillon never gave a

reason or excuse for completely contradicting his initial accounts of the shooting. In fact, the prosecution seemed more concerned with convincing Mr. Dillon to "adopt" the version of events necessary to support its prosecution of Defendant than it did about Mr. Dillon potentially committing perjury before the Grand Jury and/or at trial. Indeed, if Mr. Dillon's statements on October 3rd were true, then his Grand Jury and trial testimony were not. Is it not perjurious to testify falsely?

Indeed, when questioned by this Court as to why she was so confident that the statement given by Mr. Dillon on October 8th was the correct version of the events of October 3, 1996, given that when she interviewed Mr. Dillon she had his October 3rd statement in front of her, ADA Murphy replied, "because he had ***adopted*** the [statement given on the] 8th under oath in front of the Grand Jury".[FN27] (emphasis added) ADA Murphy's testimony not only lacks credibility, it flies in the face of reason and common sense. People "adopt" the statements and beliefs of *others* not their own. In other words, one's own beliefs are *already* theirs it is impossible for someone to "adopt" his or her own statement. Indeed, the [*25]principle that Mr. Dillon adopted a belief that was not his own is borne out during his hearing testimony wherein he himself stated that the October 8th written statement was not in his own words. This reality is further demonstrated by Lt. Guarnieri's testimony that he himself typed Mr. Dillon's October 8th statement, not Mr. Dillon.

What is further troubling is ADA Murphy's lack of concern as to why Mr. Dillon first stated that Defendant acted in self-defense and, days later gave a contradictory statement, particularly since she was the lead and most senior Assistant District Attorney prosecuting the matter. When asked by this Court about what, if any, explanation Mr. Dillon gave to her as to his reason for

completely contradicting his first account, ADA Murphy stated that he seemed "embarrassed" and "sheepish", but that he gave her no explanation. ADA Murphy had no other answer for the Court. Amazingly, ADA Murphy was satisfied with placing Mr. Dillon under oath in the Grand Jury and at trial. When pressed by this Court, ADA Murphy testified that she felt comfortable that Mr. Dillon's second statement was true because it was corroborated by all of the other civilian witnesses at the scene. That assertion, however, is not accurate. Mr. Dillon's second statement was in direct conflict with the initial, and unadulterated, statements of Mr. O'Donnell and Mr. White, not to mention his own original statement, as testified to by Lt. Guarnieri. Perhaps most troublesome is ADA Murphy's complete lack of concern or interest as to why Michael Dillon gave an account of the events that was the *complete opposite* of his own original and *unadulterated* statement on October 3rd. ADA Murphy seemingly attempts to distance herself from the Dobbs Ferry Police Department's undue influence and/or intimidation of Mr. Dillon by turning a blind eye to Mr. Dillon's failure to explain to her why he changed his story. Indeed, ADA Murphy's excuse that she believed Dillon's second statement was true because he seemed "sheepish" and "embarrassed" about having given the first statement damages her credibility. Although Mr. Dillon offered no explanation ADA Murphy never pressed him for one. As a prosecutor, charged with championing the search for the truth in her investigation of the charges against Defendant, it was Ms. Murphy's duty to present reliable, truthful evidence; not just the story most favorable to the prosecution, achieved only after multiple interviews and interrogations of witnesses by police detectives. "Prosecutors are shepherds of justice.' When a Government lawyer, with enormous resources at his or her disposal, abuses power and ignores ethical standards, he or she not only undermines public trust, but inflicts damage beyond calculation to the system of justice. This alone compels the responsible

and ethical exercise of power." *In re Doe*, 801 F.Supp. 478, 480, 61 USLW 2142 (D.N.M. 1992).

The prosecution attacks Mr. Dillon and his credibility, yet it was his testimony that they relied on to obtain their initial conviction. In their papers, the People basically argue that recantation evidence is the most unreliable form of evidence that exists. Mr. Dillon's hearing testimony, however, is not recantation evidence in the classic sense. Classical recantation evidence involves a situation wherein a witness gives one statement at trial and later recants that testimony. A [*26]witness' second statement would normally be considered unreliable and false because it is presumed that said witnesses' trial testimony was true and that the witness is recanting that testimony as a result of pressure or threats placed upon him to do so. In this case, Michael Dillon's original statement is the one he made to the police and two separate news organizations on October 3, 1996. Any "classical recantation" took place in this case on October 8, 1996 at the Dobbs Ferry Police Department, at the Grand Jury and at trial, not subsequent to the trial. Mr. Dillon recanted his initial and reliable statement when he "adopted" the October 8th statement authored by the Dobbs Ferry Police as a result of the undue influence placed upon him. Thus, the unreliable and false version of the shooting ***was actually offered by the People themselves*** during Mr. Dillon's Grand Jury and trial testimony. Where were the People and their extensive knowledge on the unreliability of "recantation" testimony or statements when Mr. Dillon "recanted" on October 8, 1996? If the People believe that recantation evidence is the most unreliable form of evidence, why did they not aggressively investigate Mr. Dillon's original recantation? As a result of this hearing, we now know why.

Incredulously, ADA Ward attacks Mr. Dillon and intimates that he committed

perjury during the within hearing. ADA Ward even questioned Mr. Dillon as to whether or not he was aware that the Statute of Limitations had run on any perjury charges that could result from the 1997 trial. [FN28] Yet, if Mr. Dillon committed perjury at trial, then it was the District Attorney's Office that suborned it.

Mr. Dillon was not the only one personally attacked by the prosecution during this hearing. The prosecution demonstrated that its focus was less on discovering the truth and more on protecting its conviction. This "win at all costs" posture of the District Attorney's Office pertains not only to ADA Murphy, it extends to ADA Ward and ADA Sauer, and was evident not only in this hearing but during the original trial in this matter, as discussed more fully below.

At the hearing, Michael Dillon testified that his initial statements to the news media and the Dobbs Ferry Police that Mr. Campbell was "swinging the bat at the time he was shot" was the true and accurate version of the events as they happened on October 3, 1996, as the statements were "fresh in [his] mind" at the time they were given. During his interrogation by Dobbs Ferry Police detectives on October 7th and into the early morning hours of October 8th, Mr. Dillon began to "feel intimidated and tired", as he testified to during the hearing.

Mr. Dillon further testified that the October 8, 1996 statement was not consistent with wording or language that he would use. For instance, Mr. Dillon's October 8th statement describes Mr. Campbell as "back peddling" away from Defendant's father at the time he was shot Mr. Dillon stated that it was "very unlikely" that he would have used the term "back peddling". Indeed,

as ADA [*27]Ward pointed out on cross-examination, Mr. Dillon did not use the term "back peddling" when he testified before the Grand Jury, but testified that Mr. Campbell was "backing up." Moreover, Mr. Dillon stated that the reason he testified at trial consistent with the October 8th statement was because he "felt locked into the second statement" and was either "convinced" by the police that the second statement was what actually happened or that by this point he was just "stuck" with the altered story.[FN29] This testimony is consistent with the fact that Mr. Dillon's October 8th statement was written *for* him by Lt. Guarnieri, as testified to by Lt. Guarnieri during the hearing.[FN30]

During the course of the seven-day evidentiary hearing in this matter, this Court was in the best position to observe the demeanor and assess the credibility of Michael Dillon, as well as the other witnesses. It is clear to this Court that Mr. Dillon possesses a particularly malleable personality. This characteristic is clear, not only from observing Mr. Dillon as he testified before this Court, but from reviewing the totality of his behavior from October 3, 1996 through and including the duration of the instant hearing.

This Court finds that the most reliable statements made by Mr. Dillon regarding the shooting are those that were made on October 3, 1996 to the Dobbs Ferry Police and the news media - statements that were made before the intimidation, interrogation and will-bending tactics of the police and prosecution were upon him, and at a time when Mr. Dillon had no reason to lie, embellish or otherwise misrepresent the facts. Indeed, throughout their papers, the People concede that Mr. Dillon, to this day, has no motive to lie a fact lamented by the People over and over again. Indeed, evidence adduced both in the form of Mr. Dillon's testimony and an e-mail written by Mr. Dillon before the within hearing, indicate that Mr. Dillon wanted no part of these proceedings. Mr. Dillon is not

a witness who came forward enthusiastically for some personal gain. It was evident throughout the hearing that Mr. Dillon had no agenda but to come to court and tell the truth.

Kevin O'Donnell, who did not testify at the hearing, gave a statement to the Dobbs Ferry Police the night of October 3, 1996. During the hearing, Lt. Guarnieri testified that Mr. O'Donnell's October 3rd statement described a struggle between [*28]Mr. Campbell and two men attempting to wrest a bat away from him. Lt. Guarnieri further testified that Mr. O'Donnell's October 3rd statement included the observation that Mr. Campbell "was able to get free of his grip from that stumble and *took a batter's stance and was about to strike* the second white male who was trying to regain his balance." Lt. Guarnieri's testimony further revealed that in his statement, Mr. O'Donnell stated that the "black male *was about to hit* the second white male when the third white male came out from no where and shot the black male three times." (emphasis added).

Mr. O'Donnell was also re-interviewed by the Dobbs Ferry Police. Like Mr. Dillon, Mr. O'Donnell's second statement to the police was radically different than his first, as he also subsequently "adopted" a story consistent with the People's theory. Indeed, Mr. O'Donnell's second statement averred that Mr. Campbell "was not swinging the bat."[FN31]

This Court found the hearing testimony of James White to be reliable and credible. While Mr. White testified that he knew the elder DiGuglielmo, he had no relationship to speak of with Defendant. Mr. White testified that on October 3, 1996, he witnessed the events that led up to the shooting of Mr. Campbell, as well as the actual shooting itself. Mr. White further testified that on October 3,

1996, he gave a written statement [FN32] to the Dobbs Ferry Police consistent with the following facts. On October 3, 1996, after a physical altercation took place between Mr. Campbell and the DiGuglielmos, Mr. Campbell "went to the trunk of his car and got a baseball bat and was swinging it at the head of [Defendant's father]." Mr. White told the police that Mr. Campbell was "aggressively approaching" Defendant's father and "swinging the baseball bat at his head"[FN33] when Defendant shot Mr. Campbell. Mr. White further told the Dobbs Ferry Police that "there was no question in [his] mind that these shots were fired by a son defending his father's life."

Apparently as dissatisfied with Mr. White's account of the events as they were with Mr. Dillon's and Mr. O'Donnell's, the Dobbs Ferry Police brought James White back to the police station on "three or four" separate occasions, for "several hours" at a time, in an apparent effort to convince him to adopt their version of [*29]the events, as testified to by Mr. White at the hearing . The police told Mr. White that his "statements didn't match what other people had said" and they showed him "different scenarios of what other people had said [happened on October 3rd]." Mr. White testified that each time the police attempted to get him to adopt a new statement, he would reiterate his initial version of the events; the police would then leave the interview room, only to return and show him "other scenarios, people had said this and people had said that and [he] repeatedly told them that he was not interested in what other people said." When questioned at the hearing about the specifics of the scenarios the police were introducing, Mr. White stated that they included "things as if the elder DiGuglielmo was coming forward at the man swinging the bat", but Mr. White insisted that it "just wasn't true." Mr. White further testified that another scenario the police put forth for him to adopt was that Mr. Campbell had "stopped swinging the bat [at the time he was shot] and that was

not true either." "He was swinging the bat and approaching Mr. DiGuglielmo when he was shot," Mr. White testified.

The atmosphere of the interrogation of Mr. White was such that he did not feel free to leave the interrogation room at police headquarters. Mr. White testified that he attempted to leave the police station during these interrogations, but "they repeatedly stopped [him] from leaving." He stated that he "kept asking to leave and they kept saying hold a minute, hold a minute'. . .[t]hey would leave the room and then they would start asking me something else." He further stated that he " felt [that he] was questioned more like a suspect than a witness."[FN34] Mr. White's testimony not only reveals that had defense counsel known about the undue influence placed upon Mr. White, there is a probability that the verdict may have been more favorable to the Defendant; but his testimony also corroborates Mr. Dillon's testimony concerning impermissible police conduct aimed, not at determining what really happened on the night of October 3, 1996, but at getting witnesses to adopt a version of events mover favorable to the People's case.

ADA Ward attacked Mr. White's recollection of the shooting by attempting to portray him as being intoxicated at the time of the shooting. One wonders how impaired Mr. White could have actually been, as the police spent a significant amount of time attempting to mold him into a witness for the prosecution.[FN35] Only [*30]after their failure to do so did the People embark on what seemed to become their usual scorched earth policy of attempting to vilify someone, merely because he did not "go along with their program."

"The [Prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as

compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Hon. George Sutherland, United States Supreme Court Justice. Unfortunately, the prosecution in this case has fallen far short of these lofty goals.

This Court must again address in greater detail the "win at all costs" mind set held by the People during this hearing, as well as the original trial in this matter. As discussed above, the prosecution is charged with a duty to uphold the constitution in its search for the truth, not just to win a conviction and lengthy sentence; such a precept, however seems to have escaped the prosecutors associated with this case. The prosecution was so concerned with preserving its conviction, that it continuously attempted to shift the focus away from the evidence and testimony presented at the hearing by personally attacking everyone in the courtroom with the exception of the court officers. In fact, no one was spared personal attacks by ADAs Ward and Sauer from the Court in the People's meritless Motion to Recuse, to Defendant and defense counsel, to Mr. Dillon, Mr. Dillon's attorney Mr. Warhit, to Mr. White, as well as publically unidentified individuals who reported seeing ADA Ward alone with the court reporter in this matter reviewing the hearing transcripts during the hearing as discussed more fully below.

Indeed, at one of the original conferences in this matter, ADA Sauer set the

tone of this proceeding by describing the Defendant as one of the "most despicable individuals [he] had ever come across". Can Defendant possibly be the *most* despicable individual Mr. Sauer has ever "come across" among *all* of the rapists, brutal murderers and career criminals he has come across in his many years as a prosecutor?

ADA Sauer also attacked James White personally in the People's post-hearing submission, stating that Mr. White was "so biased and so perjurious [*31]that his odious presence in the courtroom made a mockery of the proceedings." This uncalled for, possibly unethical, language not only attacks Mr. White on its face, but is certainly meant as a warning to all those who might come forward to testify unfavorably to the People. Moreover, the statement represents yet another attack on the Court, implying that the Court allowed Defendant to suborn perjury; the Court's decision to allow Mr. White to testify is attacked as well. For an ADA who is sworn to do justice and to uphold the law, to use such strong language to undeservedly malign and disparage a man who is a teacher, whose father was an FBI agent, whose brother is a police officer, and whose other brother is a law clerk to a New York State Court of Claims Judge, is beyond the pale and is not only the true mockery of justice, but a mockery of these proceedings as well. How dare an Assistant District Attorney publicly malign a witness in such a manner. This was just a further attempt by the prosecution to send a message to those who might stand against the office that, if you do so, you risk damage to yourself and your reputation, perhaps even your career. Was Mr. White's presence at this hearing any more odious than the presence of criminals murderers, rapists and the like who the People regularly use to prosecute their cases? And lest Mr. Sauer forget, the Court is the finder of fact, not him. Mr. White's testimony was neither biased nor perjurious. In fact, if the District Attorney's Office is so convinced that Mr. White perjured

himself at the hearing, why has he not been arrested? After all, the People are charged with enforcing the law and ensuring that justice is served. The reason, of course, is the fact that Mr. White's testimony, as the People are well-aware, was truthful and accurate.

Most ironic was the People's daily protest over the granting of a hearing to discover the truth with respect to Defendant's underlying conviction and the People's continued resistance to discovering that truth, despite the presence in the courtroom everyday of Jeffrey Deskovic, a man wrongfully convicted by the Westchester County District Attorney's Office for rape and murder who spent over 15 years in jail before overcoming the District Attorney's aberrant instinct, not to search for the truth but to defend its conviction at all costs; and despite a federal court's recent release of another individual convicted by the Westchester County District Attorney's Office of depraved indifference murder ***based on an egregious Brady violation***, the withholding of over 56 boxes of *Brady* material. In the context of such recent developments, one would expect ADAs like Mr. Sauer and Mr. Ward who were not part of the original prosecution team, though they were part of the office at the time of the trial of this defendant would, consistent with their oath of office, welcome an opportunity to either reaffirm Defendant's rightful conviction or unearth evidence of a wrongful conviction, thereby doing justice and upholding the Constitution, as they are sworn to do. Yet the People's participation in this hearing consisted of launching personal attacks on the hearing participants and calling forth only two of the original participants in the investigation, trial and conviction of Defendant; where was the rest of the Dobbs Ferry Police Detective Division to rebut the credible evidence of the Defendant's witnesses?

ADAs Sauer and Ward, throughout the instant proceeding, engaged in a

[*32]wholesale assault on the judicial system itself. ADA Ward went so far as to attack the credibility of an unidentified witness who saw him alone with Betsy Watson, (the court reporter assigned to take the minutes in this matter), proofreading the hearing transcript with her, ***while the hearing was ongoing***. Incredibly, ADA Ward's contempt for the Court knows no bounds, as he went as far as to outright refuse to answer questions directly put to him by the Court regarding the incident, though he was not placed under oath. When ADA Ward was asked why he spent 30-35 minutes alone with Ms. Watson, seemingly proofreading the hearing transcript, not only did ADA Ward refuse to answer the Court's questions but in some sort of veiled threat, tacitly warned the Court that "[he wasn't] sure that this [was] a path that we all want to go down." Remaining seated while being addressed by the Court and refusing to answer questions, ADA Ward, in his typical fashion, attacked the veracity and integrity of the unidentified witness who saw him alone with Ms. Watson, and went on to state first, that he was not even with Ms. Watson (Tr. p. 834, line 8), and then, that he was never alone with Ms. Watson. (Tr. P. 834, line 19). As a result of ADA Ward's utterly contemptuous conduct, the Court called Ms. Watson to the stand, who stated under oath that the information the Court received from the unidentified witness was, in fact, correct. Ms. Watson stated that ADA Ward was in her office, *after her office mate had left* for lunch, and was, in fact, assisting her with the proofreading and the preparation of the hearing transcript of the within proceeding.

The Court finds such behavior troubling on several levels. Despite being evasive and untruthful with the Court, ADA Ward's actions damaged the integrity of the transcript, if not the proceeding itself, as the Court has noted various irregularities and mistakes throughout the transcript, including places where speakers are referred to as "Speaker 1" or "Speaker 2" and statements

that were made by one person yet attributed to another.

Despite the fact that the instant analysis does not bear directly on the evidence received in this proceeding, it does demonstrate, to some extent, what Defendant is alleging in this case that the People and their agents are seemingly willing to go to whatever lengths necessary to protect their conviction and/or their decisions once they are made.

Indeed, no clearer example exists than ADA Murphy's testimony that she was not concerned with Mr. Dillon's multiple inconsistent statements because she knew that the second statement (the statement of October 8th) was true, since it was typed by the Dobbs Ferry Detectives and she "knows these detectives." This leaves one to conclude that ADA Murphy accepted anything the detectives did at face value, despite their relatively minor experience in investigating homicides and despite their numerous re-interviews of witnesses for no apparent reason. Is one to assume that the well-educated, seasoned ADA Murphy naively turned a blind eye to the detectives' actions? Such is unlikely given her experience. It is more likely that she was intimately involved in their actions every step of the way and is protecting their actions as well as her conviction of Defendant.

Another example of the People's willingness to protect their conviction, at the [*33]expense of discovering the truth, can be seen in Investigator Murphy's testimony. Investigator Murphy interviewed Michael Dillon on Saturday, August 11, 2007 with ADA Ward in order to prepare for the instant hearing.[FN36] Investigator Murphy testified at the hearing that it was not the purpose of this meeting with Mr. Dillon, which took place weeks before the instant hearing and years after the initial trial, to find out why he had changed

his statement. If the People were not concerned with discovering why Mr. Dillon changed his statement, then what was the purpose of the meeting? Was the meeting yet another attempt to intimidate Mr. Dillon?[FN37] Indeed, Investigator Murphy testified that Mr. Dillon was told that the District Attorney's Office was "troubled" with his assertions that his statements were the product of undue influence. In fact, Mr. Dillon testified at the hearing that during this meeting, the prosecution succeeded in making him feel "extremely nervous" and "very, very uncomfortable." Mr. Dillon further testified that the People "reminded" him how back in 1996, this case was a "race issue" and how he would be "back in the middle of this case" and that, after this meeting, he suffered stomach pains, nausea and heart palpitations. Clearly, by rehashing the past, the People sought to instill in Mr. Dillon the same feelings of fear that they did in 1996. If the District Attorney's Office were actually troubled by the existence of multiple, contradictory statements, that is, concerned that there may be truth to Mr. Dillon's allegations of undue influence, it would certainly have asked him why he changed his story and ascertained, once and for all, whether or not his statements were the product of undue influence.By expressing to Mr. Dillon that the District Attorney's Office was troubled by his allegations, without discussing the impetus behind them, one can interpret the People's actions as a further attempt to pressure Mr. Dillon - that is, to let him know that the "omnipotent" Office of the District Attorney was displeased with his actions. While an attempt may have been made to frighten an already frightened witness, Mr. Dillon and other decent citizens like him who come forward to do the right thing must understand, as Dorothy did, that no matter how scary or omnipotent the voice behind the curtain may seem, there is nothing to fear as the voice behind the curtain is impotent and suffers from delusions of grandeur for what the wizards behind the curtain fail to realize is that true power lies not in the creation of an illusion, but in the unwavering and

persistent determination to expose the truth and do justice for all within earshot of the wizards' voice, be they the humblest of munchkins, the most mischievous flying creatures, the most evil of witches or [*34]the most innocent of newcomers to the wizards' domain. All of the hot air in Oz could not propel the wizard's balloon beyond its borders; in the end, faith in humanity returned Dorothy to the order of the real world.

There is a presumption of regularity that attaches to judgments of conviction such that, in order to overcome that presumption, a defendant must set forth allegations sufficient to create an issue of fact as to matters not appearing on the record of the underlying conviction. *People v. Crippen*, 196 AD2d 548, 601 NYS2d 152 (2nd Dep't 1993); *People v. Bacchi*, 186 AD2d 663, 588 NYS2d 619 (2nd Dep't 1992). At such a hearing, Defendant must prove, by a preponderance of the evidence, every fact essential to support the motion. C.P.L. § 440.30(6).

The Court's credibility determinations are generally afforded great deference. *People v. Wong*, 11 AD3d 724, 725 (3rd Dep't 2004), 784 NYS2d 158, 161 *(citing People v. Baxley*, 84 NY2d 208, 212, 604 NYS2d 7 (1994)). Consideration of recantation evidence involves the following factors: (1) the inherent believability of the substance of the recanting testimony; (2) the witness' demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation testimony; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and the defendant as related to a motive to lie. *Id. (citing*, *People v. Shilitano*, 218 NY 161, 170-72, 112 N.E. 733 (1916)). Moreover, numerous other grounds may exist for disbelieving the recantation of a witness,

such as: the fact that other witnesses did not recant, *see, Burgess v. State*, 455 So.2d 488 (Fla.Dist.Ct.App.1st Dist. 1984); the admission that the recantation was produced by fatigue and frustration, *see*, *People v. Ellison*, 89 Ill.App.3rd 1 (5th Dist. 1980); the appearance that the recantation was equivocal, *see*, *State v. Hill*, 312 Minn. 514 (1977); the appearance that the recantation resulted from threats, pressure, or intimidation, *see*, *State v. Tharp*, 372 N.W.2d 280 (Iowa Ct.App. 1985).[FN38]

This Court, which was in the best position to determine the credibility and reliability of the witnesses at the within hearing, found the hearing testimony of Mr. Michael Dillon and Mr. James White to be reliable and credible. Further, the recantation of Mr. Dillon's October 8th statement, his Grand Jury testimony and his trial testimony, is cloaked in an "aura of believability" *Id.* at 726, stemming from his 3 original statements, given just hours after witnessing the shooting and prior to any police influence (that the Defendant acted in self-defense); the original statements of Mr. White and Mr. O'Donnell, which mirror Mr. Dillon's original statement asserting that the Defendant acted in self-defense; and, even more, the trial testimony of the People's own witness, Mr. Lyman that when Mr. [*35]Campbell was shot, "he had the bat up over his shoulder in the *hitting* position." (emphasis added). Moreover, there is no relationship, nor has there ever been any relationship, between Mr. Dillon and the Defendant. The only reason Mr. Dillon changed his story was the undue influence and pressure placed upon him by the police and the prosecution, over and over again. Based upon the testimony given by the witnesses at this hearing, it appears that Mr. Dillon changed his statement as a result of the undue influence placed upon him by the DFPD.

The recantation of an eyewitness to a crime amounts to newly discovered evidence capable of supporting a motion to vacate a conviction. *People v. Fields*, 66 NY2d 876, 498 NYS2d 759 (1985). In order to be considered newly discovered evidence sufficient to warrant granting a new trial, the evidence must:

(1) be such as would probably change the result if a new trial were granted,

(2) have been discovered since the trial

(3) be such as could not have been discovered prior to trial by the exercise of due diligence

(4) be material to the issues

(5) not be cumulative, and

(6) not merely impeach or contradict the former evidence. *People v. Clerkin*, 144 AD2d 684, 535 NYS2d 26 (2nd Dep't 1988)(*citing*, *People v. Salemi*, 309 NY 208, 128 NE2d 377 (1955)).

The evidence discovered during the course of this hearing meets the legal standards established for vacating a conviction in the face of newly discovered evidence. It was "discovered since the trial" and could not have "been discovered before the trial by the exercise of due diligence." *See People v. Salemi*, 309 NY 208, 216, 128 NE2d 377, 381 (1955). While Defendant knew that Mr. Dillon had given one statement on October 3rd and then, on October 8th gave a statement completely opposite of the first, Defendant did not have

knowledge of the multiple interrogations and undue influence endured by Mr. Dillon at the hands of the Dobbs Ferry Police. Nor did Defendant have knowledge of the multiple interrogations of Mr. White by the police in an attempt to convince him, unsuccessfully, to change his statement as well. Moreover, as testified to by Mr. Dillon at the hearing, although defense investigators attempted to speak with him, he refused any contact with the defense.[FN39] Thus, even with due diligence, this evidence was not discovered until Mr. Dillon, years after the trial, finally agreed to speak with investigators for the Defendant.

Further, the evidence discovered at the hearing was such that it would probably change the result of the trial if a new trial were granted. *People v. Salemi, supra* . Michael Dillon was the cornerstone of the People's prosecution of Defendant. Mr. Dillon was in the best position from which to see the shooting as it occurred, which is presumably why such an effort was made to "convince" him to adopt the People's theory of the case. Without his testimony, the People must [*36]rely on the testimony of only two of their original witnesses Kevin O'Donnell and Richard Lyman. As mentioned previously, Mr. O'Donnell was untruthful in his original statement to the police. Further, he was in the driver's seat of the cable truck he shared with Mr. Dillon, thus he had less of a view of the events than Mr. Dillon, who was in the passenger seat and closer to the Venice Deli. The next witness for the People, Richard Lyman, was a great distance away from the Venice Deli when the shooting occurred and his view was occasionally blocked by street traffic.

In this case, the discovery of new evidence - the knowledge that undue influence was exerted upon Mr. Dillon to extract his inaccurate statement of October 8th - which was ultimately used by the People in the Grand Jury and at

trial, would certainly lead to a more favorable verdict at a new trial. Such is the case whether the jury hears Mr. Dillon's testimony, the unaltered and unadulterated version consistent with his statement of October 3, 1996, or even if the jury didn't hear from Mr. Dillon at all. Mr. Dillon was a key eyewitness for the People who had nothing to gain and no motive to lie on the night of October 3, 1996 after observing the incident, and no motive to lie now.[FN40] Mr. Dillon was a key witness for the People, not only because he failed to testify that Defendant was justified in his actions, but by going even further - he testified that Defendant *was, in fact, unjustified*, in the shooting of Mr. Campbell. At the hearing, Mr. Dillon testified several times that the version of events that he gave to police on October 3, 1996 was the true and correct version of what took place that night.

While the standard that the Court must meet in granting a new trial is immutable, it is not lost upon this Court, nor should it be lost upon any court, that at no time, whether during the original proceeding or at a new trial, must Defendant prove his innocence. As in any trial, the People must at all times prove Defendant's guilt beyond a reasonable doubt, as well as every element of murder or a lesser included offense, including lack of justification. Accordingly, in analyzing this case in light of the new evidence, this Court not only can, but it *must* consider the effect of Mr. Dillon's unadulterated statement, which supports the theory of a justified shooting, as well as his lack of any testimony regarding Defendant's actions being unjustified, which would severely weaken the People's case and undoubtedly lead to a different verdict.

Further, the newly discovered evidence is not cumulative and is material to the issues of Defendant's guilt, or rather innocence, based upon the improper conduct on the part of the police. The jury was never allowed to hear testimony

at trial about how, after stating to the police and two news stations on October 3, 1996 that Defendant acted in self-defense, the police showed up at Michael Dillon's [*37]place of employment on multiple occasions, brought him to the police station in the back of a police car surrounded by detectives and questioned him until finally, past midnight on October 8, 1996, he adopted their predetermined version of the events. Nor was the jury able to hear how the police met with James White several times and presented him with multiple scenarios of how the shooting *could have occurred* in an apparent attempt to pressure him into changing his statement as well. More importantly, the jury was only allowed to consider Mr. Dillon's October 8th version of the events that transpired on October 3, 1996 for its truth. Any reference to any earlier statements would have only been allowed for impeachment purposes. Due to police misconduct, the jury was deprived of the opportunity to hear truthful testimony from various witnesses, particularly Mr. Dillon's true unadulterated version of events as they transpired on October 3, 1996.

The hearing in this matter unearthed the existence of newly discovered evidence, which could not have been produced by Defendant at trial even with the exercise of due diligence. Accordingly, this newly discovered evidence creates a probability that, had such evidence been received at trial, the verdict would have been more favorable to Defendant. The Defendant's motion is granted and his conviction is hereby vacated.

B. *By failing to disclose the existence of the "newly discovered" evidence to Defendant before trial, the People have violated their obligations pursuant to Brady v. Maryland.*

C.P.L. § 440.10 allows the Court to vacate a criminal conviction that was

obtained in violation of a right of the defendant under the constitution of this state or of the United States (§440.10(1)(h)) or where improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom. (§ 440.10(1)(f)).

The Hon. Ruth Bader Ginsburg opined that, "when police and prosecutors conceal significant exculpatory or impeaching evidence. . . it is ordinarily incumbent on the state to set the record straight." The evidence produced during the hearing in this matter revealed that the People failed to disclose material information in violation of their obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). In *People v. Vilardi*, 76 NY2d 67, 556 NYS2d 518 (1990) the Court of Appeals adopted a single New York standard for determining whether to vacate a defendant's conviction based on prejudice caused by the failure of the prosecution to turn over specifically requested exculpatory material.[FN41] The question to be asked, which is less rigorous than the federal standard set forth in *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), is whether or not there is a reasonable possibility that the failure to disclose such material contributed to the verdict. [*38]

In this particular case, any statements made by Mr. Dillon and Mr. White to the Dobbs Ferry Police Department, as well as the circumstances under which they were made, as discussed in great detail above, constitute *Brady* material, and thus should have been divulged to Defendant. It is the setting in which these subsequent statements were made that forms the backdrop against which these statements must be viewed, as well as the importance to be ascribed to said statements; such was not known to Defendant at the time of trial. In other words, only when one looks at the totality of the circumstances during which

the exculpatory statements were made the multiple interviews with each witness, the length of the interviews, the multiple scenarios presented to Mr. White, the fact that the police never again interviewed Mr. Dillon, Mr. White or Mr. O'Donnell once they "adopted" the version of the events described by the police can one make the decision as to how much weight to give the statements.

The Second Circuit Court of Appeals has held that the obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form. *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007). The *Brady* obligation is broad enough to require the prosecution to "make the defense aware of material information *potentially* (emphasis added) leading to admissible evidence favorable to the defendant." *Id.* Thus, the People must at least have told Defendant, if not put in writing, the same information that was testified to by both Mr. White and Mr. Dillon at the hearing, i.e., the numerous and repetitive interviews by the police, the fact that the police suggested the answers they wanted the witnesses to adopt, the fact that Mr. Dillon's October 8th statement was, in essence, an adoption of the detectives' version of the events, and so forth, as discussed at length above.

In order for the defense to properly decide how to utilize such exculpatory information, it must be made aware of not only its existence, but the facts and circumstances under which the information was procured by the People. The People failed to disclose the patently exculpatory evidence of multiple exculpatory statements in the face of repeated interrogation. In this case, the People failed to provide Defendant with the nature and substance of the uttered statements, the fact that they were repeated, and the setting in which they were made - specifically, in a custodial-type setting, the purpose of which was to

extract altered statements from the witnesses - consistent not with what they observed, but with the People's theory of the case. Had the defense been made aware of the extent and nature of the exculpatory evidence, their trial strategy indeed the trial itself would very well have been different [FN42]. [*39]

The insightful and learned Dr. Martin Luther King, Jr., aptly stated, "injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."

Based upon the foregoing, Defendant's motion to vacate his conviction is granted. As the principles of double jeopardy have attached to the charge of intentional murder, as well as the other counts in the indictment for which Defendant was found not guilty, Defendant cannot be re-tried for said crimes. Moreover, as the underlying facts of the trial record make clear, as discussed more fully above, the circumstances under which Defendant shot the victim in this case preclude a finding that Defendant acted with depraved indifference, under any theory or precedent, including *Register*.

Accordingly, it is Ordered, that the People are precluded from re-trying Defendant on the charge of depraved indifference murder. It is further Ordered, that Defendant's conviction is hereby vacated and Defendant is to be released forthwith.

It is further Ordered, that there can be no retrial without a new indictment, which requires leave of the court. *People v. Massey*, 112 AD2d 731, 492 NYS2d (4th Dep't 1985). Under the circumstances of this case, the People may not seek leave to re-indict. Based upon the improper conduct of the police and

the People any re-trial in this matter would be irreparably tainted. The People should not benefit from their misconduct.

However, in the event that the People are somehow granted leave to re-present to the Grand Jury, under the doctrine of the fruit-of-the-poisonous-tree, the People are precluded from making any reference to Mr. Dillon's statement of October 8, 1996, his Grand Jury testimony and/or his trial testimony regarding the same.

Moreover, the People are denied leave to re-present charges against Defendant to the Grand Jury, as the People are precluded by the state and federal constitutional principles of double jeopardy from seeking an indictment for intentional manslaughter. *People v. Suarez*, 10 NY3d 523, 860 NYS2d 439 (2008). In *Suarez*, the defendant was acquitted of intentional murder and convicted of depraved indifference murder. The conviction for depraved indifference murder was reversed by the Court of Appeals under the same reasoning set forth in the *Hafeez*, *et al.* line of cases. The court found that the defendant's actions of stabbing his girlfriend in the "throat, chest and abdomen did not, as a matter of law, constitute depraved indifference murder. Whether he intended to kill her or merely to cause her serious injury and either of these findings, supported by sufficient evidence, might have been properly made by the jury [his] actions in no way reflected a depraved indifference." *Id. quoting*, *People v. Suarez*, 6. NY3d 202, 216, 811 NYS2d 267 (2005). [*40]The Court of Appeals ordered that the defendant be given a new trial.[FN43] The People re-indicted the defendant on the charge of intentional manslaughter and the defendant appealed to the Court of Appeals on state constitutional grounds, pursuant to C.P.L.R. § 5601(b)(1). The Court of Appeals found, under the *Blockburger* test, that intentional murder and intentional manslaughter are the

same offense for double jeopardy purposes, thus the double jeopardy clauses of both the federal and state constitutions preclude subsequent prosecution for first degree manslaughter where a defendant has been acquitted of intentional murder. *Suarez* at 536, *citing, People v. Biggs*, 1 NY3d at 227, 229, 771 NYS2d 49).

In the present case, the charge of intentional manslaughter could have been included in the original indictment and/or the charge could have been submitted to the jury at trial, whether at the request of the People or by the trial court , *sua sponte*; however, neither of those options were acted upon. As the People have already had their bite at the apple, they are now precluded from indicting the Defendant for the charge of intentional manslaughter.

"The judiciary must not take on the coloration of whatever may be popular at the moment. We are the guardian of rights, and we have to tell people things they often do not like to hear." Hon. Rose E. Bird. Our oath requires that we make the right decisions, even if difficult and unpopular. It must be stated that this Court, in its above discussions and, ultimately, its decision in this case, certainly does not intend to disrespect the memory of Charles Campbell or the Campbell family. This decision was not made lightly. Indeed, for the past two years, the Court has struggled with, and considered, all of the arguments and positions connected with the issues in this case and it's ruling is consistent with the undercurrent of the criminal justice system - that where an injustice has occurred, all benefit of the doubt, consistent with current case law and precedent, must be afforded an accused.Thus, for the factual and legal reasons stated above, this result is mandated by the principles of justice.

VI. People's Renewal of Motion for Recusal is denied

Finally, the People move for renewal of their oral motion seeking recusal of this Court, originally made on November 28, 2007. The Court, for the reasons stated on the record, denied the People's motion. In their Post-Hearing Submission, the People move to renew their previous motion seeking the Court's recusal upon the same grounds alleged on their oral motion. Defendant opposes the People's motion for recusal. The People's post-hearing submission is an inappropriate vehicle to make such motion, therefore, it is hereby deemed severed. In addition, at the conclusion of the hearing, the People sought to introduce the affidavit of Ms. Cohen in support of the recusal motion, which had been denied days earlier. The Court ruled that Ms. Cohen's affidavit in connection with same would not be accepted, or be made part of this record, as it was not presented contemporaneously with the recusal motion. Despite the Court's ruling and Order that [*41]Ms. Cohen's affidavit not be made part of the record at the hearing, the People, in their typical contemptuous fashion have, in violation of the Court's ruling, submitted Ms. Cohen's affidavit in their post-hearing submission. In lieu of oral argument, the Court granted each side permission to submit post-hearing memoranda arguing the respective merits of their positions. The invitation to submit such legal memoranda was not an invitation to submit new evidence that the People failed to properly introduce during the hearing. ADA Ward's negligence in failing to have Ms. Cohen available as a witness at the time he made his motion for recusal, or to have an affidavit prepared by Ms. Cohen at that time, does not justify the submission of new evidence after the hearing has been concluded and in contravention of the Court's ruling. As noted, the People's Motion to Renew has been severed, and the affidavit is hereby rejected, and not made part of this record.

New York Civil Practice Law and Rules § 2221(e) states that a motion for

leave to renew shall be identified as such and shall be based upon new facts not offered on the prior motion that would change the prior determination or show that there has been a change in the law that would change the prior determination. A motion to renew must be based upon additional material facts, which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not presented to the Court on the prior motion. *Foley v. Roche*, 68 AD2d 558, 418 NYS2d 588 (1st Dep't 1979). Renewal should be denied where the moving party fails to offer a valid excuse for not submitting the additional facts upon the original application. *Branca v. Dept. of Education of the City of New York*, 25 AD3d 485, 808 NYS2d 77 (1st Dep't 2006); *Davidson v. Ambrozewicz*, 23 AD3d 903, 803 NYS2d 810 (3rd Dep't 2005); *Caramoor Capital Group, Inc. v. Blauner*, 302 AD2d 550, 755 NYS2d 298 (2nd Dep't 2003). Moreover, a motion for renewal is unavailable where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application. *Foley v. Roche, supra* . Upon review, the People have failed to raise any new material facts, which existed at the time the prior motion was made but were not then known to them at the time they made their oral motion. Thus, the People's motion for leave to renew is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 17, 2008_____

White Plains, New YorkHonorable Rory J. Bellantoni

County Court Judge

Footnotes

Footnote 1: Defendant's Memorandum of Law, dated September 21, 2006, p. 1. While Defendant makes the foregoing requests, the Court lacks the authority to "reduce" Defendant's conviction to manslaughter. Such a reduction can only be made upon consent of the District Attorney's Office. Defendant's request for a reduction is in the nature of a plea bargain, which has never been the subject of discussions in this case.

Footnote 2: Defendant, his co-defendant father and his co-defendant brother-in-law were found not guilty of each and every other charge in the indictment, including Defendant's charge of intentional murder.

Footnote 3: Ironically, while Defendant was convicted of depraved indifference murder, the elements of which were briefed extensively by both parties, the Appellate Division referred to the Defendant's conviction only as one for second degree murder it never mentioned or analyzed the crime as depraved indifference murder, and never mentioned or cited to the then seminal case of *People v. Register*, *infra*, in upholding Defendant's conviction. Such would be akin to a court upholding a defendant's confession without mentioning the seminal cases of *People v. Huntley*, 15 NY2d 72, 255 NYS2d 838 (1965) or *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Footnote 4: Affirmation in Opposition, p. 17.

Footnote 5: As mentioned above, the District Attorney's Office has refused to discuss any reduction to manslaughter. In this matter a reduction cannot take place without consent of the District Attorney.

Footnote 6: Defendant initially filed his notice of motion on September 21, 2006. On November 15, 2006, Defendant filed a supplemental notice of motion including additional grounds for the relief sought. The People were granted two adjournments, on consent of all parties, to file their response papers.

Footnote 7: When *Payne* was decided, judges such as myself were flooded with C.P.L. § 440 motions to vacate depraved indifference murder convictions. The court, in deciding *Policano* 2-3 years after it originally opened the floodgates in these matters, actually sought to close the floodgates that had been opened.

Footnote 8: In *Payne*, the court clarified well-established but newly reaffirmed principles as to new facts, holding that one-on-one shootings or knifings can almost never qualify as depraved indifference murder. In *Suarez*, the court also applied very similar well-established principles of law to new facts, reestablishing the line drawn in *People v. Register*, *infra*, holding that only in rare circumstances can a defendant be convicted of depraved indifference murder where only a single person was injured. It was not until *Feingold* that *Register* was overruled, when the court found that depraved indifference to human life is a culpable mental state. Indeed, the court in *Policano* recognized these principles when it found that the aforementioned principles, based on those cases, were now clear. While the decisions in *Hafeez* through and including *Payne* clarified existing principles of law, the court in *Feingold* purportedly created a new principle. Thus, the blurry line that had been drawn in *Register* between intentional and depraved indifference murder was now made clear.

Footnote 9: It must be noted that although *People v. Register*, 60 NY2d 270 (1983) focused on the factual circumstances surrounding the homicide therein to determine whether it constituted depraved indifference murder, *People v. Wall*, 29 NY2d 863 (1971), a Court of Appeals case, was not overturned by *Register*. In fact, *Wall* and its holding were valid case law when the defendant herein was prosecuted. *See*, *Wall*, *supra* .

Footnote 10: Ultimately, the Court of Appeals had to clarify the line at which *Register* no longer applied; otherwise, all murders could be bootstrapped by *Register* and considered depraved indifference murder. In its recent line of cases, the Court of Appeals clarified where *Register* applies and where it does not.

Footnote 11: In the present case, even if Defendant had struck a bystander when he shot at the victim, the proper charge would have been intentional murder under a transferred intent theory. It is axiomatic that a crime commenced with intent to cause harm cannot be completed with depraved indifference.

Footnote 12: As further evidenced by the *Hafeez et al*. line of cases, up to and including *Feingold*, each of which rejected depraved indifference murder convictions under *Register* without overruling *Register*, *Policano* holds that it is never permissible in New York, even under *Register* and *People v. Sanchez*, 98 NY2d 373, 748 NYS2d 312 (2002) for a defendant to be convicted of depraved indifference murder where the evidence at trial indicates that if the

defendant committed a homicide *at all*, he committed it with *the conscious objective* of killing the victim which was the People's stated theory of the case herein, as reflected in both their opening and closing statements. The People cannot, therefore, have it both ways.

Footnote 13: *Feingold* and *Policano* were decided subsequent to Judge Alessandro's decision denying Defendant's 2004 C.P.L. § 440 motion. By clarifying and defining the principles that it did in said cases, the Court of Appeals clarified what the other cases had not. By overruling *Register*, clarifying existing law, and setting forth a new pronouncement regarding old principles, the Court of Appeals empowered this Court with the jurisdiction to vacate an improper conviction. Under these facts and the factual theory of this case as presented by the People, combined with the clarified and newly reaffirmed law and principles as set forth in the Court of Appeals line of cases from *Hafeez* through and including *Policano*, Defendant could no more stand convicted of depraved indifference murder on the facts of his case than he could of arson, burglary or rape.

Footnote 14: In 1999, the *Hafeez* line of cases, up to and including *Policano*, had not yet been decided. Thus, the Appellate Division, Second Department, did not have the benefit of the holdings of said cases, which clarified the circumstances in which a homicide either is, never was, or never will be, one of depraved indifference murder. The case at bar was an intentional crime, if it was a crime at all. The fact that other people might have been injured or killed during this intentional act, would only have made Defendant liable for such a killing (intentional murder) under a transferred intent theory, not depraved indifference.

Footnote 15: Although termed a dissent, the Chief Judge dissents only with respect to the certified questions before the court. Her discussion of the history of intentional murder jurisprudence was in no way affected by the majority's decision. The majority's decision purports to create new law and, thus, establishes precedential value, if at all, with respect to the newly defined mens rea of depraved indifference murder and the non-retroactive application of applying said newly defined mental state to defendants properly charged under *Register*.

Footnote 16: Indeed, this Court holds that *Policano* does not prevent collateral review and relief in all cases, though it severely limits it. As discussed herein, only cases *properly* brought under *Register* at the time they were brought are not subject to retroactivity. Collateral retroactive relief is only barred in cases

where the depraved indifference murder conviction was arguably proper under a *Register* standard. As mentioned *ad nauseum* in this decision, based upon *Hafeez* through and including *Policano*, if a depraved indifference conviction, though upheld under *Register*, was improper under *Register*, and if such conviction was consistent with the holdings in *Payne* and *Suarez*, in that, under long-standing principles applied to new facts, the crime, if a crime at all, was intentional, then collateral relief is warranted and the *Policano* rule against retroactivity is inapplicable. This judge is not the only judge who feels this way. Indeed, the Appellate Division, Third Department seemed poised to rule in a similar manner in *People v. Stewart*, 36 AD3d 1156, 828 NYS2d 670 (2007) but found in that case that ". . .it cannot be said that there is no evidence in the record that defendant acted unintentionally." If there were no such evidence, query whether the Appellate Division, Third Department would have set the verdict aside, as this Court has.

Footnote 17: At some point in the future, based upon some form of further review, if despite the detailed analysis herein and overwhelming Court of Appeals authority to the contrary, Defendant is found to have been properly convicted under *Register*, then the interests of justice and the dictates of Due Process require that Defendant be afforded relief, retroactively or otherwise.

Footnote 18: Under C.P.L. § 440.10(3), Judge Alessandro's decision, in and of itself, does not preclude Defendant from requesting the relief herein. As set forth more fully in C.P.L. § 440.10(3), "although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment." Such is the case herein.

Footnote 19: In rendering its decision, this Court must be mindful of every manner in which evidence newly discovered would have or could have affected the original trial verdict. Had the trial court been aware of the undue influence placed upon Michael Dillon by the Dobbs Ferry Police Department, the jury would never have heard Mr. Dillon's "adopted" version of the events, which contradicted his original statement describing the events that unfolded on the night of the incident.

Footnote 20: While Richard Lyman testified at trial that he witnessed portions of the shooting, he did not come forward until the day after the shooting and readily admitted on cross-examination at the trial that the events he observed were seen from a distance of at least several blocks away.

Footnote 21: However, the People cannot even keep this theory consistent - that is, the theory that although Mr. Campbell was holding the bat in a batter's stance, he was "backing up" at the time he was shot, and therefore, not a threat to the elder DiGuglielmo. Richard Lyman, a witness for the People, testified at trial that after Mr. Campbell took the bat out of his trunk, he took 4-5 steps backward and then hit Defendant's father. Mr. Lyman further testified that he thought that Mr. Campbell was going to take the elder DiGuglielmo's head clean off. Apparently, backing up does not equal retreat.

Footnote 22: In fact, ADA Murphy testified at the hearing that whether the bat was swinging or not was not only an important fact, it may well have been the most important fact in this prosecution.

Footnote 23: Indeed, at the hearing in this matter, James White credibly testified that after the night of the shooting when he gave his original statement, Dobbs Ferry Police Detectives brought him back to the station several times in an effort to get him to change his statement, as discussed more fully below.

Footnote 24: Moreover, it is important to note that even Mr. Lyman's testimony at trial tended to support Mr. Dillon, Mr. White and Mr. O'Donnell's initial account - that at the time he was shot, Mr. Campbell was in a batter's stance. Interestingly, that is how Mr. Lyman described Mr. Campbell immediately before Mr. Campbell struck the elder DiGuglielmo the first time - that "he had the bat up over his shoulder in the *hitting* position." (emphasis added).

Footnote 25: Despite the fact that it appears Mr. Dillon had been at the police station for several hours during the October 7th interrogation, Lt. Guarnieri testified that the DFPD only advised Mr. Dillon that there were some discrepancies in some statements and asked him to go over his recollection of the events, at which time the second contradictory statement was given. Based on Lt. Guarnieri's testimony, Mr. Dillon should have only been at the police station a short time.

Footnote 26: Disturbingly, neither Mr. Dillon's second statement nor the People's witnesses offer any explanation as to why Mr. Dillon's account had changed so drastically. Additionally, this new statement now seemingly contradicted all other accounts, as it seems uncontroverted that, at the time Mr. Campbell struck the elder DiGuglielmo with the bat, the initial altercation had ended and Mr. Campbell was now alone with the elder DiGuglielmo. Indeed,

the People's witness, Mr. Lyman testified as such during his trial testimony.

Footnote 27: It is no wonder that Mr. Dillon's Grand Jury testimony "mirrors" his October 8th statement, as ADA Murphy testified, since it was given only 4 days later. In the Grand Jury, and cloaked in its statutory secrecy, Mr. Dillon "adopted" the statement he purportedly gave on October 8th - that is, in the Grand Jury where there was no defense attorney and no judge, and where he was not subject to cross-examination.

Footnote 28: In what became his typical outlandish style, ADA Ward went so far as to attempt to imply that the attorney assigned by this Court to represent Mr. Dillon, a highly respected defense attorney and local justice, coached Mr. Dillon in how to be evasive on cross-examination without exposing himself to charges of perjury.

Footnote 29: Mr. Dillon felt "stuck" with a false statement that was made as a result of undue influence by the police, which was offered by the People during the Grand Jury proceeding and at trial. The People cannot bury their heads in the sand and avoid responsibility for offering false testimony by hiding behind the fact that they never unearthed the real reason why Mr. Dillon altered his story. If the People knew or should have known that Mr. Dillon's statement was the result of undue influence, it follows that the People themselves may have suborned Mr. Dillon's perjurious testimony.

Footnote 30: What is even more bizarre, and consistent with Defendant's theory that the prosecution simply wanted to overlook Mr. Dillon's original statement, is that there is no reference to the original October 3rd statement contained anywhere in the second statement, the statement of October 8th no mention on the form itself that it is a supplemental, amended, or updated statement; and no mention in the body of the second statement, such as the reason for its creation or an attempt to reconcile it with the original statement.

Footnote 31: It should be noted that in his original statement to the police on October 3, 1996, Mr. O'Donnell admitted that he embellished his role in the aftermath of the shooting by attempting to portray himself as a hero. As such, it was probably not difficult for the police to "convince" Mr. O'Donnell, who already lied, to adopt their version of the night's events.

Footnote 32: Mr. White's written statement to the Dobbs Ferry Police on October 3, 1996 indicated that "the male black was *still swinging the bat* in a wild and aggressive manner in the direction of (Defendant's father) [when]

Defendant then went up to the male black, approximately 5 to 10 feet away, and fired three shots at the male black." (Emphasis added).

Footnote 33: This testimony seems consistent with that of Mr. Lyman who testified at trial that he thought that Mr. Campbell was going to take the head off of the elder DiGuglielmo.

Footnote 34: Although Mr. White's October 3rd statement was not "newly discovered" to the defense, the fact that he was repeatedly brought into the police station for questioning and yet continued to support Defendant's version of the events is new evidence. Also newly discovered was the fact that the police repeatedly portrayed different accounts of the incident and attempted to get Mr. White to adopt their version of the events. Moreover, Mr. White was not called as a witness for Defendant at trial because, as he testified during the hearing, he "would not talk to lawyers prior to [trial]." He explained that Defendant's investigators discussed with him the fact that no attorney would put him on the stand without at least speaking with him first, but he nevertheless refused to speak with them. Mr. White testified that the reason he would not cooperate with the defense was the fact that his father, age 76 at the time, told him not to do so and he did not want to cause his father to have a stroke, as he was in poor health.

Footnote 35: While ADA Ward attacked Mr. White at the hearing, as did ADA Sauer in the People's papers, the People failed to call any witness at the hearing who could establish Mr. White's alleged intoxication. The People improperly attempt to impeach Mr. White's hearing credibility in their post-hearing submission, with the trial testimony of Lt. Gelardi, who they did not call to testify at the hearing. Moreover, Defendant's counsel successfully impeached Lt. Gelardi at trial with respect to her opinion that Mr. White was intoxicated based upon her 25-second discussion with him at the scene of a homicide, (Trial tr. at 273, line 15), and the fact that no police report indicated that Mr. White was intoxicated.

Footnote 36: This meeting took place prior to the Court's assignment of Mr. Warhit as counsel for Mr. Dillon.

Footnote 37: Indeed, an e-mail memo from Mr. Dillon to Investigator Thomas Duno, an investigator for the defense team, following the meeting memorializes the fact. It states that as a result of the meeting, Mr. Dillon felt he could not be put on the stand, that the People had all but discredited him already and would "shred" him at the hearing. The meeting with the investigator and ADA Ward

caused Mr. Dillon to suffer heart palpitations, stomach problems, it caused trouble at home and caused him to be otherwise unhappy. A 90-minute meeting with the ADA and his investigator severely affected Mr. Dillon. It is clear how repeated interrogations would have affected him over 10 years ago at 20-years-of-age.

Footnote 38: As discussed herein, Mr. White, whose statements and hearing testimony support Mr. Dillon's original statements, did not recant (*Borgess v. State, supra*). Also discussed at length herein, as well as contained in the hearing record, is the appearance that Mr. Dillon recanted on October 8th (as well as at the Grand Jury and at trial) as a result of "pressure and intimidation" (*State v. Tharp, supra*), an appearance that Mr. Dillon's recantation was equivocal (*State v. Hill, supra*), and the admission by Mr. Dillon that the recantation was produced by fatigue and frustration. (*People v. Ellison, supra*).

Footnote 39: The defense was likewise unable to speak with Kevin O'Donnell to learn what tactics, if any, the police used during their re-interview of him, during which he ultimately changed his statement. The People, in their papers, include statements from Maria O'Donnell, Kevin O'Donnell's wife and a retired police officer, who stated that she told Defendant's investigators not to come to her house to speak with Kevin.

Footnote 40: Indeed, in the People's papers, despite having a position (and a strong one at that) on just about every issue in this matter, the People concede, indeed express throughout their post hearing submissions, that they are unaware of any motive Mr. Dillon has at this point in time to testify that his ultimate testimony was obtained by undue influence. The lack of a motive for Mr. Dillon to lie is precisely one of the factors the Court relied on in accepting Mr. Dillon's testimony and adopting his version of the events.

Footnote 41: C.P.L. §440 is the proper vehicle by which to raise said post-judgment motion to vacate.

Footnote 42: During the hearing, Mr. Dillon testified, credibly, that he observed the police taking notes during the "newly revealed"interrogations. As the sum and substance of these notes remains unknown, such that it is not known whether such notes contain any *Rosario* material, the Court finds no *Rosario* violation has occurred. Moreover, though Defendant contends that there were also tape recordings of these interrogations, when asked specifically if he had seen any recording devices while being interviewed by the DFPD, Mr. Dillon responded: "I remember something being on a desk that could resemble

a recording device but I can't say for certain." Notwithstanding the absence of a *Rosario* violation, because the sum and substance of the interrogations and the circumstances surrounding their existence also constitute *Brady* material, the information should have been made known to Defendant by the People.

Footnote 43: The Court of Appeals, however, allowed retrial of the defendant in *Suarez* for intentional manslaughter because the charge of intentional manslaughter was contained in the original indictment, but the jury in his first trial was denied an opportunity to consider the intentional manslaughter charge. In the case at bar, however, the prosecution failed to indict the Defendant on the charge of intentional manslaughter. Moreover, the failure of the People to ask that the lesser included charge of intentional manslaughter be presented to the jury and/or the failure of the trial judge to, *sua sponte,* present the lesser charge of intentional manslaughter to the jury bars a subsequent prosecution on that charge under the principles of double jeopardy. *Id.*