State of New York
Court of Appeals

BEFORE: HON. MICHAEL J. GARCIA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

FARID "JOHN" POPAL,

Appellant.

ORDER DISMISSING LEAVE

Ind. No. 2186/02

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law (CPL) § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is dismissed because the order sought to be appealed from is not appealable under CPL § 450.90(1).

Dated: August 26, 2019

Associate Judge

*Description of Order: Order of a Justice of the Appellate Division, Second Department, dated June 28, 2019, denying leave to appeal to the Appellate Division from an order of Supreme Court, Queens County, dated November 29, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-14

P R E S E N T: HON. BARRY A. SCHWARTZ
Justice

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THE PEOPLE OF THE STATE OF NEW YORK

BY: BARRY A. SCHWARTZ, JSC

-against-

MOTIONS: TO VACATE JUDGMENT PURSUANT TO CPL § 440

FARID "JOHN" POPAL,

IND. NO.: 2186-02

Defendant.

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Abe George, Esq. and Defendant, *pro se*
For the Motions

RICHARD A. BROWN, D.A.

BY: Brad Leventhal, Esq. and Christopher J. Blira-Koessler, Esq.
Opposed

Upon the foregoing papers, the motions are denied. See the accompanying memorandum.

Kew Gardens, New York
Dated: November 29, 2018

BARRY A. SCHWARTZ, JSC

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-14

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THE PEOPLE OF THE STATE OF NEW YORK **BY: BARRY A. SCHWARTZ , JSC**

-against- **DATED: November 29, 2018**

FARID "JOHN" POPAL,

IND. NO.: 2186-02

Defendant.

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Defendant again moves for an order pursuant to CPL § 440.10 to vacate his judgment of conviction on the grounds of newly discovered evidence, consisting of a recantation by a trial witness, Joseph Miata. Defendant's application for a conditional examination of this witness has been withdrawn.[1] The People oppose the motion, arguing that the recantation affidavit of the witness is inherently unreliable, the witness had no reason to falsely implicate defendant in the murder, the trial testimony is credible, there is evidence that the witness was bribed into recanting his trial testimony, and that even with

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[1]In his application, defendant initially moved for a conditional examination of this witness, pursuant to CPL § 660, upon the mistaken belief that the witness "is dying of cancer" and that he "does not want to die without correcting the record. He wished he had come forward before now, but the prospect of dying has focused his mind" (see Defense Affirmation at ¶ 36). However, defendant has withdrawn this application upon learning that the witness does not have cancer and is not dying (see email from Defense Counsel addressed to the Court, dated June 14, 2017). Furthermore, this Court has conducted an in-camera inspection of the witness' medical records provided from St. Peter's Hospital in Albany, New York and no mention of any terminal illness such as cancer is revealed. These records cover the time-period from April 9, 2017 to April 11, 2017. A further medical evaluation of the witness has also been provided by defense counsel conducted by Joseph Asch, M.D., who examined Mr. Miata on June 6, 2017. The purpose of the evaluation was to determine "the cardiac status [of Mr. Miata] prior to testifying in a criminal case." Nothing in this report states that the witness, if required, would be unable to testify. Thus, this portion of defendant's application is now moot and has been withdrawn (see Defendant's Reply Affirmation).

the affidavit of the witness, where he reaffirms certain facts and fails to recant other facts, the jury's verdict is still supported. The People further oppose a conditional examination of the witness (see Footnote 1).

Defendant, *pro se*, also submitted an additional motion, dated December 9, 2017, to vacate the judgment pursuant to CPL 440.10, alleging that his conviction was founded upon police and prosecutorial misconduct and was obtained in violation of his Brady rights.

On October 16, October 27 and November 2, 2017, this Court conducted a hearing as to defendant's new claims regarding the alleged recantation by the trial witness. Defendant called Joseph Miata as a witness at the hearing. Defendant also testified on his own behalf. The People called Assistant District Attorney Barry Weinrib.[2] At the conclusion of the hearing, the Court set a memorandum schedule for submissions from the parties. After numerous requests for additional time to submit memoranda of law by both sides, the Court postponed the date to issue a decision on the hearing.

On May 21, 2018, counsel for defendant and the assigned assistant district attorneys appeared for a conference where the People informed defense counsel that they had evidence that defendant's witness, Joseph Miata, received payments for his testimony at the hearing. The Court, on its own motion, reopened the hearing to entertain this evidence, but gave time for the parties to investigate the matter.

On June 7, 2018, with defendant's consent, the Court granted an application by his attorney, Jonathan Edelstein, to be relieved. Defendant's new counsel, Abe George, filed his Notice of Appearance on that date. The matter was adjourned to continue the re-opened hearing on July 16, 2018.

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[2] In addition to the testimony adduced at the hearing, this Court takes judicial notice of all of the motion papers, exhibits, trial testimony, memoranda of law and the entire case file in determining the instant motions.

On July 16 and 18, 2018, the hearing was concluded. The People re-called Miata to testify as to alleged evidence of payments.[3] The People also called representatives from Sprint Corporation and Western Union as witnesses at the re-opened hearing. With the exception of Miata, this Court finds the People's witnesses gave credible and reliable testimony. This Court further determines that the testimony of Assistant District Attorney Barry Weinrib and Detective (Sgt.) Steve Brown were credible and reliable. This Court further finds that the testimony of defendant was largely irrelevant to the matter before the Court. As to Miata, as discussed below, this Court credits certain portions of his testimony and discredits other portions.

FACTS

On August 1, 2002, Indictment No. 2186-02 was filed charging defendant with Murder in the Second Degree (PL §125.25[1]) and related charges for an incident that occurred in Queens County on November 12, 1999. The underlying facts are that defendant killed his girlfriend, Samiya Haqiqi and secreted her body. Specifically, on November 12, 1999, at approximately 7:00 P.M., defendant met Haqiqi in a Grand Union parking lot in Queens County. Defendant had hoped to marry Haqiqi, but she broke up with him that night. Enraged by the break up, defendant killed Haqiqi and then called his brother Frank, who was

[3]Due to his failing health, the People moved for permission to take Miata's testimony via video conference to avoid producing him to court in New York from Florida. On the consent of both parties, Miata's testimony was taken live from a police station in Florida via Skype video conference. Additionally, Michael Anastasiou, Esquire, was appointed to represent Mr. Miata and was present at the hearing. During the direct questioning, the People sought the Court's permission, pursuant to C.P.L. §§ 50.20 and 50.30, to confer immunity to Mr. Miata as to answers pertaining to any potential perjury charges stemming from his earlier testimony at the hearing. Over defense counsel's objection, the Court granted that request.

also known as "Farhad Achekzayee," at a transmission shop where Frank worked. He told his brother that he had killed Haqiqi, and the two conspired to dispose of the body. Frank arranged with his employer, Joseph Miata, to close the shop by himself. After the employer left, defendant and his brother incinerated the body of the victim, leaving evidence of a fire in the shop. A lock of Haqiqi's hair was found in the hydraulic catch basin of the shop. Following the murder, defendant received the help of a friend, Seymour Morrison, to clean the shop, dispose of the car, and provide him a false alibi.

On August 2, 2002, defendant was arrested in Freemont, California and flown to Queens County. On the airplane, defendant stated: "you can't judge me. Only God can judge me [Haqiqi] would be considered a whore [in Afghanistan] for what she did and for the way she lived and that [he] would be considered a hero"; that he wished he were in New York, so that he could "borrow [the detective's] gun and kill the family"; and, that "you don't have a body." This latter fact was known only to the police, the victim's family, and the perpetrator.

On April 5, 2006, following a jury trial, defendant was convicted of Murder in the Second Degree (PL § 125.25[1]), two counts of Tampering with Physical Evidence (PL § 215.40[2]) and Conspiracy in the Fifth Degree (PL § 105.05)(Hanophy, J.). On May 9, 2006, defendant was sentenced to an indeterminate prison term of twenty-five years to life on the murder count, one and one-third to four years on each of the tampering counts, to run concurrently to each other but consecutive to the murder count, and one year on the conspiracy count. Defendant is currently incarcerated pursuant to this judgment.

PROCEDURAL HISTORY

Defendant's conviction was affirmed on appeal and the Court of Appeals denied his leave application (People v. Popal, 62 A.D.3d 912 [2d Dept. 2009], *lv. denied* 13 N.Y.3d 748 [2009], *cert. denied* Popal v. New York, 559 U.S. 909 [2010]). The Appellate Division held that defendant received meaningful representation, was afforded effective assistance of counsel, the verdict on each count was legally sufficient to establish his guilt beyond a reasonable doubt, the verdict of guilty was not against the weight of the evidence and defendant waived any argument related to venue.

Defendant's subsequent application for DNA testing of a necklace that was found hanging from the rearview mirror of the victim's car, which had been discovered in a Grand Union parking lot on Northern Boulevard in Queens County three days after Haqiqi went missing, was denied (see Decision dated February 7, 2011, McGann, J., *aff'd.* People v. Popal, 117 A.D.3d 1087s [2d Dept. 2014], *lv. denied* 23 N.Y.3d 1066).

A *pro se* motion to vacate his judgment was filed on March, 2011 in which defendant claimed that: he received ineffective assistance of counsel; he was actually innocent as demonstrated by deficiencies in the People's proof at trial; newly discovered evidence existed that proved his innocence; and that prosecutorial misconduct occurred based upon previously raised arguments in his appeal and based upon the claims raised in his CPL § 440 application.

In his first CPL § 440 application, defendant argued defense counsel was ineffective because he allegedly: 1) failed to request a jury charge on geographical jurisdiction; 2) failed to object to hearsay testimony; 3) failed to move to preclude testimony from the victim's mother about voicemail messages from defendant; 4) failed to make an appropriate motion

to dismiss at the end of the People's case; 5) delivered an ineffective summation; 6) failed to completely investigate and prepare a defense; 7) failed to hire a private investigator and expert witnesses; and 8) had a conflict of interest because he misled defendant's family into believing that his retainer included representation of his brother Farhad "Frank" Popal.

Defendant's first five claims were previously raised on defendant's direct appeal and were rejected on the merits by the Appellate Division. Defendant's claims that counsel did not completely investigate the case and that he was ineffective for failing to call the co-defendant's wife would not have exculpated defendant in any way and were likewise rejected (see Decision, dated May 14, 2012, McGann, J.).

Regarding defendant's claim that counsel failed to hire expert witnesses, defendant claimed that an expert in the Farsi language would have shown that "Haqiqi" might have some meaning in that language other than the name of his girlfriend, the Court held that defendant failed to show that there would be any relevance to that testimony. Defendant's further claim that an expert could have testified that there was no catch basin in the shop was rejected since testimony from numerous witnesses described the catch basin and it was depicted in crime scene photographs introduced in evidence at the trial (see Decision, dated May 14, 2012, McGann, J.). Additionally, defendant conceded that his attorney did not represent both himself and his brother so no conflict existed.

Addressing defendant's claim of actual innocence, the Court held that the Appellate Division already determined that legally sufficient evidence existed to support defendant's conviction and denied this claim.

Defendant's assertion that newly discovered evidence existed entitling him to a new trial was also rejected because defendant failed to meet the criteria that such evidence

existed. To support this claim, defendant asserted that a Nassau County Health Inspector sketch allegedly showed there were no catch basins in the shop and that the shop owner lied when he testified that no fines or violations were ever levied against his business. However, the health inspector reports were made years before defendant's trial and there was overwhelming evidence of the existence of the catch basins and the alleged fines also predated defendant's trial by many years (see Decision, dated May 14, 2012, McGann, J.). Defendant's additional claims of prosecutorial misconduct were deemed meritless and some of these claims were on the record and should have been raised on appeal.

Thus, defendant's first CPL § 440 application was denied and his application for leave to appeal from the denial of his motion to vacate the judgment was likewise denied. (2012 NY Slip Op 86921[U] [2d Dept. 2014]).

On March 6, 2015, defendant filed an application for a writ of habeas corpus in federal court. That petition was denied on September 11, 2015. The Court rejected defendant's claims, including that his proof of guilt was legally insufficient and that his counsel was ineffective. Popal v. Superintendent, Wende Corr. Facility, 2015 U.S. Dist. LEXIS 121477 (E.D.N.Y. Sept. 11, 2015).

THE PRESENT APPLICATIONS

DEFENDANT'S *PRO SE* MOTION TO VACATE THE JUDGMENT

Addressing defendant's *pro se* application first, under CPL § 440.10, at any time after the entry of judgment, the Court, upon motion of the defendant, may vacate the judgment on the grounds that it was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for on in behalf of a court or a prosecutor. CPL § 440.10(1)(b). The Court can also vacate a judgment if it was obtained in violation of a right

of the defendant under the state or federal constitution. CPL § 440(1)(h). Notwithstanding these provisions, the Court may deny this motion without a hearing when "upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." CPL § 440.10(3)(c).

In support of his *pro se* motion, defendant alleges that, at the time of trial, the prosecution withheld purportedly exculpatory photographs of the victim's hair that was recovered from her apartment and that these photographs would disprove the prosecution's theory at trial that hair recovered at the mechanic's shop showed that defendant dismembered and burned the victim's body at that location. However, in his motion, defendant admits that he discovered these photographs in 2010 but for "strategic reasons" did not raise this issue in any prior applications to vacate the judgment pursuant to this section. Indeed, although these same photographs were attached as exhibits to his first motion to vacate filed in March, 2011, defendant failed to raise the instant arguments in that application. Since defendant could have raised these claims in his prior motion and failed to do so, this Court finds that he is procedurally barred from doing so now.

Additionally, defendant claims that he used these photographs and "argued the same" in his federal habeas corpus petition. As previously noted, that application was denied on September 11, 2015. As such, this claim is may also be rejected pursuant to CPL § 440.10(3)(b), since the issue raised was previously determined on the merits upon a motion in federal court.[4]

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[4] To the extent that defendant argues that these photographs, combined with Miata's recantation evidence, constitute "newly discovered evidence," for the reasons discussed below, the Court rejects that contention since it finds Miata's recantation

DEFENDANT'S INSTANT MOTION PURSUANT TO CPL § 440(1)(g)

Defendant now moves by his attorney to vacate the judgment based on purported newly discovered evidence. Specifically, defendant claims that a witness, Joseph Miata, has now recanted various portions of his trial testimony. Defendant submitted an affidavit from Miata which stated that Miata has come forward recently because he is dying of cancer, and that contrary to his earlier testimony, Miata never overheard Frank Popal yell out "Haqiqi, Haqiqi" while on the phone with defendant; that when he saw defendant's car, it was not burned or missing seats, but only had scraping on the right side; and neither defendant or his brother made admissions of guilt to Miata. The affidavit further claimed that the police could not have physically recovered any evidence from the well underneath the lift in Miata's shop and that in regards to his testimony, Miata was told "what to say and how to say it" by the prosecutor shortly before he testified at trial.

THE HEARING PURSUANT TO CPL § 440

The defense called Miata and defendant on its direct case at the hearing. Initially, when called as a defense witness on direct examination, Miata asserted, contrary to his trial testimony, that he never observed the police remove any hair from a "pit" or catch basin inside of his transmission shop and that since the compressors in his shop were functional, he was prevented from overhearing a conversation between defendant and his brother Frank where Frank screamed out the victim's name. However, on cross examination, Miata admitted that he had truthfully testified at trial regarding witnessing the police recover hair from the pit and as to hearing defendant's brother scream the victim's name.

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unworthy of belief.

On direct examination, Miata alleged that he did not see any previously-testified-to damage to defendant's vehicle but later, when confronted on cross examination, admitted that his trial testimony as to the damage was truthful. While Miata further claimed that ADA Weinrib told him how to answer questions posed to him in the grand jury, he later admitted that his testimony at grand jury and trial was accurate and that the assistant district attorney did not go over his testimony prior to trial.

On both direct and cross-examination, Miata confirmed that he testified truthfully in the grand jury and at trial. He further admitted that his memory during those events was better than his memory at the hearing. He also testified that he had an "excellent" relationship with defendant and had no reason to make false statements about him in connection with this case. He admitted that, contrary to his sworn affidavit, he did not in fact have terminal cancer and confirmed that the affidavit contained other inaccuracies. Miata provided inconsistent information as to whether he initiated contact with defense counsel regarding his recantation or if counsel contacted him first. He did, however, maintain that he paid for his airfare, hotel and other expenses surrounding his trip from Florida to New York to testify and that he had not been offered any financial incentive to testify.

Defendant, when called to the stand, testfied regarding an alleged search of his car, a 1997 Grand Prix and about the alarm system in the car shop in an attempt to corroborate some of Miata's testimony. After confirming with the parties that his evidence was already part of or could have been made part the record at trial, the Court curtailed this testimony, finding it irrelevant to the instant hearing.

The People called Assistant District Attorney Barry Weinrib on rebuttal, who described how Miata stated that he "loved" defendant like a son. Weinrib testified that Miata

provided him with all of the relevant information when they met to discuss the case and that he in no way told Miata what to say during grand jury or trial testimony. Weinrib also recounted a conversation during trial where defendant offered to tell him "everything" in exchange for a plea deal of eight years. Defendant then provided some details of the murder but did not provide further information on the crime or where the body was located after the assistant district attorney told him he would have to get his request approved by supervisors.

After the Court, on its own motion, re-opened the hearing, Miata re-took the witness stand via a remote Skype connection, where he admitted that he made false statements in his sworn affidavit and that he had received financial incentives in exchange for his affidavit and testimony, including approximately $10,000.00 from Frank Popal's girlfriend, Halime Aghdassi. He further received an additional $2,000.00 in an envelope that contained photographs of boats and homes in Florida which Miata understood to be further payment for his "cooperation." Miata informed the Court that the initial $10,000.00 was wired to his cousin, Raymond Patuano in Florida from Canada via Western Union and that he obtained the money at a local Publix supermarket.

Throughout his second stint testifying, Miata provided inconsistent testimony as to whether he lied to law enforcement officials when they came to visit him after the initial hearing and whether he lied at trial. However, he did confirm that specific aspects of his trial testimony were true, such as his observation of the police recovering hair from the pit.

The People introduced into evidence Sprint telephone records to corroborate Miata's testimony regarding phone contact made between Miata and Frank Popal between December 1, 2016 and February 28, 2017, which showed over 400 phone calls. Additionally, the People introduced Western Union records that confirmed that there were money

transfers made by Halime Aghdassi to Raymond Patuano prior to the start of the hearing in October, 2017.

Defendant called Detective (Sgt.) Steve Brown at the hearing who testified that he, along with another detective and an assistant district attorney, visited Miata in May, 2017 after learning that Miata was paid for his testimony. At this meeting, Miata admitted that he received money in exchange for his testimony.

LEGAL ANALYSIS

The power to vacate a judgment and order a new trial is purely statutory and may only be exercised by the court when the requirements of the statute have been satisfied (see People v. Powell, 102 Misc 2d 775, 779, affd 83 AD2d 719 [2d Dept. 1994]). Pursuant to Criminal Procedure Law §440.10 [1][g]:

> (1) At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial.

For evidence to be considered "newly discovered" six criteria must be met: (1) the evidence must be such that it would probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it be must be such that it could not have been discovered before the trial through due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and (6) It must not be merely impeaching or contradicting the former evidence. (See People v. Salemi, 309 N.Y. 208, 216, cert denied, 350 U.S. 950 [1955] and CPL §440.10 [1][g]). Recently, the Appellate Division has refined this analysis, holding that for newly discovered evidence, a new trial is only warranted if the evidence was discovered since the entry of the judgment, it could not have been discovered at trial through due diligence and the evidence created the probability of a more favorable result at trial. (See People v. Hargrove, 162 A.D.3d 25 [2d Dept. 2018]). In assessing the

probability of a more favorable verdict, courts should evaluate "in light of the evidence adduced by the People at trial and the circumstances surrounding the trial as established by the record on appeal in order to determine what 'the reactions of the jurors' would have been had they been made aware" of this new evidence. Id. at 57-61 (quoting People v. Rensing, 14 N.Y.2d 210, 214 [1964]).

Furthermore, because of its inherent unreliability, when the newly discovered evidence comes in the form of a witness recantation, that evidence alone is insufficient to require setting aside a conviction (see People v. Brown, 126 A.D.2d 898 [3d Dept. 1987], People v. Legette, 153 A.D2d 760, 760 [2d Dept 1989]). Indeed, recantation evidence is considered the most unreliable form of evidence (see People v. Shilitano, 218 N.Y. 161, 170 [1916]). In evaluating this type of evidence, the Court of Appeals has enumerated the following factors to consider: "(1) the inherent believability of the substance of the recanting testimony; (2) the witness's 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; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie." (Id. at 170-172).

Here, after careful evaluation of all the relevant documents and testimony in this case, this Court finds that the recantation by Miata is not credible on its face and is inherently unreliable as it was contradictory to Miata's claims at the hearing, unsupported by any other evidence in the record and motivated by a financial incentive.

When he first testified at the hearing, Miata showed severe lapses in memory, which he attributed to having suffered a stroke in December of 2016. He appeared confused and provided multiple statements that were contradictory to the affidavit he signed and his testimony often conflicted with his own earlier statements at the hearing itself. Miata could not remember the circumstances of signing the affidavit on April 10, 2017. He further admitted to not fully reading the affidavit and stated that he did not understand certain words like "conviction" and "vacate" that were included in the document. At one point, Miata stated that the trial happened twenty-six years ago when in fact it occurred in 2006. He provided contradictory testimony as to whether initially he reached out to or was contacted by defense

counsel to make this recantation. Importantly, his credibility was further belied by the fact that he signed the affidavit which stated that he was dying of cancer when in fact he never suffered from cancer and certainly was not dying when he swore to the document.

Although Miata stated that the passage of time and his having undergone a stroke have caused him trouble remembering the trial, at the hearing, when confronted with portions of his prior testimony, Miata stated that everything he testified to in the grand jury and at trial was true. When specific testimony from the trial relevant to allegations in the affidavit was brought to his attention, with few exceptions, he again affirmed that his testimony at trial was truthful. He also admitted that his memory was better when he testified before the grand jury in 2002 and at the trial in 2006 than during the hearing in October 2017. Since Miata never expressly recanted his trial testimony at the hearing, this Court finds that his affidavit recanting his trial testimony is incredible. (See People v. Blake, 219 A.D.2d 730 [2d Dept. 1995]).

This Court further rejects Miata's claim that the prosecution acted improperly by providing him with the answers to his grand jury and trial testimony. This claim is belied by numerous police reports where Miata provided information to police detectives long before he first came into contact with ADA Weinrib, the prosecutor whom he accuses of telling him what to say when he testified. Furthermore, at the hearing, Miata could not remember or articulate what, if any, answers were provided to him by ADA Weinrib. Indeed, when Miata testified the second time, he admitted that the assistant district attorney did not go over his testimony prior to trial and that his testimony was accurate.

Miata's reasons for testifying at the trial and later making the recantation further undermine the credibility of this recantation evidence. Miata, who considered defendant like a "son" to him, had no motive to lie when he testified at trial and certainly no reason to fabricate evidence that would implicate defendant. Indeed, he testified at trial that the victim did not deserve to die and that he had counseled defendant to "do the right thing" (See Trial Transcript Pgs 1038-39). These statements show that his testimony at trial was motivated by a sense of doing what is just and fair and therefore add credibility to his trial testimony. On the other hand, Miata's purported reason for recantation–that he was dying of cancer and needed to clear his conscience–had been shown to be false and seriously undermines

any credit to be given to this recantation. At the hearing, Miata admitted that he does not have cancer nor any terminal illness. Although in the affidavit he stated that he initiated contact with defense counsel after "the prospect of dying has focused" his mind, at the hearing, Miata claimed that he reached out to defense counsel after receiving a letter from an organization (which he could not name) and after a possible visit from investigators where he was told that his trial testimony was false. He was also provided with photographs of the victim's hair on a rug and concluded that his testimony regarding the recovery of the victim's hair in the pit by the police must have been mistaken. This Court rejects the notion that these developments prompted him to come forward with his recantation.

Even if this Court found that Miata truly believed that he was mistaken at trial, however genuine Miata's motivation may have been in making the recantation, his numerous memory lapses, confused and conflicting testimony make this recantation simply unworthy of belief. This Court finds that Miata's recantation proffered through his affidavit and testimony at the initial hearing–by itself–is incredible. Moreover, the evidence presented at the re-opened hearing—that Miata was paid to recant—further undermine the credibility of the recantation. Miata came forward, signed the affidavit and testified at the initial hearing because he had received over $12,000.00 and the implicit promise of boats and homes in Florida from associates of defendant's brother for his cooperation. Furthermore, Miata's admission that he was paid to recant was supported by the telephone and Western Union records introduced at the re-opened hearing. As such, the credibility of the recantation is clearly belied by Miata's financial motivation in making it.

Additionally, this Court finds that Miata's trial testimony was corroborated by the other evidence at trial, including the testimony of Seymour Morrison, whom, like Miata, also testified at trial to overhearing defendant's brother, while speaking to defendant on the telephone, utter the victim's name twice. Morrison also corroborated Miata's observations of damage to defendant's car after the victim went missing and that defendant's brother made a statement regarding the victim getting what she deserved after learning of defendant's arrest.

Moreover, Miata's statements in the affidavit and at the hearing do not qualify as "newly discovered evidence" pursuant to CPL 440.10(1)(g) because they do little more than

impeach and/or contradict his former testimony. (See People v. Howington, 122 A.D.3d 1289, 1290 [4th Dept. 2014]; People v. Cassels, 260 A.D.2d 392, 393 [2d Dept. 1999]). Since they do not fall within the meaning of the statute, this Court does not find that they warrant vacatur of defendant's conviction. In addition, even if the Court were to believe portions of Miata's recantation, this evidence fails to create a reasonable probability of a more favorable verdict upon a new trial. In light of the other evidence adduced the trial that strongly favored a finding of guilt, this Court does not believe that Miata's partial recantation, which merely impeached his prior testimony, would change the result were a new trial to be ordered. (See People v. Behlin, 133 A.D.2d 835 [2d Dept. 1987]).

Likewise, defendant's testimony at the hearing, which consisted of self-serving statements and claims attempting to bolster Miata's credibility, was also in no way "newly discovered evidence" as his testimony dealt with issues that were testified to at trial, were otherwise made part of the record of the case, or were available to defendant and counsel to be made part of the record at the time. Since he failed to show that his claims were discovered since the trial, nor has he shown that these claims could not have been discovered before the trial through the exercise of due diligence, he has not met the burden of showing that this evidence is newly discovered within the meaning of the statute. (See People v. Latella, 112 A.D.2d 321, 322 [2d Dept. 1985]).

Accordingly, defendant's motions to vacate the judgment are denied in all respects.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for the defendant, defendant and the District Attorney.

BARRY A. SCHWARTZ, J.S.C.