No. 20-

IN THE

Supreme Court of the United States

KIMBERLY HANZLIK,

Petitioner,

v.

SUPERINTENDENT JOSEPH JOSEPH, BEDFORD HILLS CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was the Second Circuit's denial of Petitioner's application for a certificate of appealability unreasonable based on the standards for certificate of appealability to issue as set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where Petitioner demonstrated a substantial showing of a denial of a constitutional right about which reasonable jurists can disagree?

LIST OF PARTIES

The Petitioner is Kimberly Hanzlik. The Respondent is Joseph Joseph.

RELATED CASES

Hanzlik v. Joseph, 17 Cv. 6577 (SDNY 2020) (federal habeas corpus),

February 12, 2020

Hanzlik v. Joseph, 20-694 (2d Cir. 2020) (certificate of appealability application),

July 14, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kimberly Hanzlik prays for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, in a motion order dated July 14, 2020, denied a certificate of appealability from the denial of a 28 U.S.C. § 2254 motion in the United States District Court for the Southern District of New York. *See* Appendix A. The relevant opinion and order of the District Court, which is unreported, is reprinted in the appendix at Appendix B.

JURISDICTION

The order of the Court of Appeals was entered on July 14, 2020. This petition for a writ of certiorari is being timely filed within one hundred fifty days of the entry of that order, in compliance with Rule 13.3 of this Court's rules and the Order of this Court dated March 19, 2020 providing an additional sixty days. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions: U.S. CONST. amend. VI; U.S. CONST. amend. VIII; U.S. CONST. amend. XIV; New York State Criminal Procedure Law Section 440.10; New York State Penal Section 125.25, which are reprinted in the appendix at Appendix I.

STATEMENT OF THE CASE

This case raises an issue that has been discussed by this Court and other Circuit and District Courts but never fully clarified. Specifically, does a district court have the authority to grant a writ of habeas corpus from a state court conviction solely on a freestanding claim of actual, factual innocence? In 1993, three Justices of this Court explicitly recognized that authority while the balance of the Court, in several different opinions, assumed that to be the case. *Herrera v. Collins*, 506 U.S. 390 (1993).

Citing *Herrera,* this Court, in 2009, sent a case back to the District Court in Georgia specifically to hear facts relating to the claim of innocence. *In re Troy Anthony Davis*, 557 U.S. 952 (2009). As no lower court had heard the underlying facts, this Court directed the District Court to hold a testimonial hearing in order to intelligently rule on the petitioner's claim. Consistent with *In re Troy Anthony Davis,* the United States Court of Appeals for the Eleventh Circuit ruled that such an innocence claim can be made and granted pursuant to a writ of habeas corpus. *In Re Davis*, 565 F.3d 810 (11th Cir. 2009). In several decisions rendered by district courts, the availability of this remedy to correct an unjust conviction has also been "assumed." *See*, *e.g.*, *Tomlinson v. Burt*, 509 F. Supp. 2d (N.D. Iowa, 2007).

A decision by this Court to settle any ambiguity surrounding the availability of this remedy would, therefore, not be one that expands the law regarding the purpose and scope of a writ of habeas corpus. Rather, it would simply be a continuation of the recognition that the Founding Fathers had incorporated the

"Great Writ" into the body of the Constitution specifically to address cases in which an innocent person remains imprisoned. Later, the writ was approved to address violations of constitutional rights in cases emanating from state court convictions.

One of those rights is delineated in the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. The Founding Fathers approved that amendment regarding its proscription as fundamental to the moral and just system they were creating and inscribed the writ of habeas corpus into the Constitution as the vehicle by which that right would be enforced.

Indeed, the writ of habeas corpus was hardly a novelty when it was codified in Article I, Section 9 of the Constitution. Five hundred years earlier, the "Great Writ" was one of the principle features of the ferment in England that also produced the Magna Carta. The Founding Fathers, recognizing that the King of England had treated his enemies, especially the colonists clamoring for independence, as if they were criminals, responded by ingraining the writ as a fundamental check on the power of the state, ironically relying on the centuries old principle of the very nation from which they were seeking to separate. That check was affirmed and strengthened years later in the Habeas Corpus Act of 1679.

In the Ratification Debates, the founders recognized that the writ was essential to the establishment of a government that, in principle, sought to prevent the arbitrary abuse of authority. Indeed, there was virtually unanimous agreement that the writ of habeas corpus was so critical that it should never be suspended. *See* James Madison and William Randolph, *The Debates in the Several State Conventions of the*

Adoption of the Federal Constitution vols. 2-3, available at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1906/1314.02_ Bk.pdf and https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1907/1 314.03_Bk.pdf.

Therefore, by the use of habeas corpus as incorporated in the Constitution, prisoners across the nation have challenged their imprisonment as contemplated by the drafters when adopting and continuing what had been the law, accepted by all for centuries before the founding of the United States. An innocent prisoner's only recourse after exhausting state remedies is to petition for a writ of habeas corpus.

Yet, at the present time, there is agreement that a plausible claim of actual innocence only serves as a "gateway" to the presentation of a claim that some other Constitutional violation had occurred. However, if a petitioner received a "fair" trial but is actually innocent, there currently is no agreement – rather, there is still some ambiguity – that he or she can be exonerated by a district court. It is not even clear that a district court can hold a testimonial hearing. Such an anomalous unfair status quo is inconsistent with the long-held moral position that an innocent person should not suffer the consequences as if he or she were guilty. Yet, the District Court below held that, even if Ms. Hanzlik could prove her innocence, she had no remedy – not even pursuant to the ancient writ of habeas corpus.

This District Court and others have ignored the clear meaning and rationale of this Court in rulings going back at least a century. In *Herrera v. Collins*, a landmark case, each of the nine justices held that an innocent person facing a death sentence is entitled to have his conviction overturned through the granting of a writ

of habeas corpus. While three of the justices recognized that the writ should be available to an innocent state prisoner regardless of the crime of conviction and the sentence imposed, the majority opinion did not reach that issue as that circumstance was not before them. In other words, such a ruling for the majority would have been considered *dicta*. Even Justice Scalia, concurring in the denial of the writ, commented on this circumstance: there is "no legal error in deciding a case by assuming, *arguendo*, that an asserted constitutional right exists…" *Herrera* 506 U.S. at 428 (underline supplied).

The instant case presents that issue squarely. It is the perfect vehicle for this Court to recognize that the Court's heretofore unanimous assumption is the law. Surely if, as the *Herrera* Court ruled, the Constitution prohibits the imposition of the death sentence on the grounds of actual innocence and authorizes a district court to grant a habeas petition solely on that ground, then the same constitutional underpinnings cited in *Herrera* must also apply to one serving a *mere* life sentence.

In addition, such an unfair outcome should also be barred by application of the Fourteenth Amendment's guarantee of due process of law. Both procedurally and substantively, the continued incarceration of an innocent person is, in one word: unfair. Though Justice Brennan assumed "no State today would inflict a severe punishment knowing that there was no reason whatever for doing so", in that very same case Justice Marshall emphasized the fact that "Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof." *Furman v. Georgia*, 408 U.S. 281, 366 (1972).

Plainly, "it is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is." *Id.* at 248 citing Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., Ernest van den Haag, testifying on H.R. 8414 et al. To be sure, how could any rational human being believe otherwise? In the instant case, neither the state courts nor the District Court even felt it necessary to hold a testimonial hearing to test the claim of actual innocence. If there was any doubt that Ms. Hanzlik was innocent despite the overwhelming support for that fact in the record, as will be easily recognized *post*, then the witnesses whose testimony was instrumental at the trial should have, at minimum, been heard – **by some court.** Yet, what is clear, is that the District Court felt bound by the law that, at that time, did not give him clear authority to grant the writ solely on the claim of actual innocence; there would be no point to holding a hearing if the District Court felt that there was nothing he could do. Therefore, both substantively and procedurally, Ms. Hanzlik's constitutional right to a fair hearing was violated.

Also at issue herein – and for which a Certificate of Appealability should have also been ordered – is that the conceded ineffectiveness of counsel clearly resulted in the conviction of an innocent person. There is no doubt – as the record is absolutely clear – that trial counsel did not understand the rules of impeachment. The star witness, upon whom the conviction rested, had given a statement to a prosecutor and three detectives with his lawyer present in which he exonerated Ms. Hanzlik six months after the murder. The statement, memorialized in notes, provided a

completely different set of facts from that which he testified at trial when he implicated her. Incredibly, trial counsel did not impeach him nor in any other way present to the jury this accomplice's statement that Ms. Hanzlik was **not** present, was **not** involved at all, and was therefore **actually innocent.** Trial counsel admitted in an affidavit that he would have cross-examined the accomplice with the written statement but misunderstood the law of impeachment: he believed he could not confront the accomplice-witness because he did not know which detective wrote the notes. Yet, as the law makes clear, he had a good faith basis to do so.

I. PROCEDURAL BACKGROUND

Petitioner, Kimberly Hanzlik, was charged, along with co-defendant, Joseph Meldish, with Murder in the Second Degree in violation of New York State Penal Section 125.25. Both were indicted for this crime eight years after the incident which resulted in the death of Joseph Brown. Ms. Hanzlik was released on bond; Meldish was not. The trial was held three years later in the Supreme Court of the State of New York, County of the Bronx. Both were found guilty. Ms. Hanzlik was sentenced to twenty years to life; Meldish to twenty-five years to life, the maximum under the law. Ms. Hanzlik filed a direct appeal to the Supreme Court, Appellate Division, First Department. Her conviction was affirmed and an application for leave to appeal to the Court of Appeals of the State of New York was denied. Meldish has yet to perfect his appeal.

A post-conviction motion pursuant to New York State Criminal Procedure Law Section 440.10 was brought by new counsel on behalf of Ms. Hanzlik. It alleged, as

the sole ground, the ineffective assistance of counsel. The motion pointed to the uncontroverted fact that Ms. Hanzlik's counsel had not impeached the State's star witness – the accomplice to the murder and the only one with incriminating, although false evidence – with his prior inconsistent statement that exonerated Ms. Hanzlik. This statement, contained in handwritten notes, was made to an Assistant District Attorney and three detectives six months after the murder. The trial court judge denied the motion on the grounds that – using an objective standard – it could have been a "strategy" decision by some defense lawyers. However, as indicated, that was not the reason provided by trial counsel who had confirmed his ignorance of the law. This first CPL 440 motion was denied and counsel obtained permission to appeal that denial. Once again, the Appellate Division affirmed the conviction. Importantly, neither the CPL 440 court nor the appellate court was aware that trial counsel had admitted in an affidavit (that the prosecution withheld from them) his ignorance of impeachment law and that his failure was not a strategy decision.

Petitioner, then, through new counsel, the undersigned, brought a second CPL 440 motion. This new motion revealed for the first time that the aforementioned affidavit by trial counsel obtained by the prosecution in connection with the first CPL 440 motion had not been revealed to the trial judge nor provided to counsel. The prosecutor withheld that affidavit from the court because it established that counsel's failure to impeach the accomplice witness with his prior statement was due to his ignorance of the law. In other words, it was a sworn admission that he had not

provided the effective assistance of counsel – and the prosecutor knew that so he hid it from the judge and counsel.

This second CPL 440 motion also raised for the first time that the court must grant the motion on the separate and permissible ground that Ms. Hanzlik was actually and factually innocent. Another ground was prosecutorial misconduct which was later amplified by a third CPL 440 motion. Although such misconduct contributed to the verdict and the later denial of the first CPL 440 motion, it is not alleged as a basis for this application. Ultimately, that second and third CPL 440 motions were denied. Permission to appeal was likewise denied, exhausting all state remedies. A petition for a writ of habeas corpus was then filed.

II. STATEMENT OF FACTS

A. EVENTS OF MARCH 21, 1999

On March 21, 1999, at approximately 2:00 a.m., Joseph Brown was shot and killed while inside Frenchy's, a crowded bar in the Bronx. On that date Joseph and his wife, Eileen, after attending a birthday party, decided to go to Frenchy's Bar on East Tremont Avenue in the Bronx ("Frenchy's"), where Eileen's friend Josephine had told her earlier that day she was planning to go with her new boyfriend. (Tr. 54-55, 149) [1]. When the Browns arrived at Frenchy's at about 12:15 a.m., the bar was very crowded and a bouncer was collecting a cover charge at the door for the live band performance. (Tr. 56-57).

[1] References preceded by "Tr. __" are to the trial transcript.

The Browns made their way through the crowd to the back of the bar and joined Josephine at a round table with two stools. (Tr. 57-59). Joseph leaned against one of the stools near the back wall. (Tr. 61, 186). Michael Hangan, a bartender, did not notice the gunman when he entered, but first observed him at the corner of the bar behind which he was working. (Tr. 934, 940) As the man neared Hangan, Jason Fox, who was collecting money at the door, yelled "get that clown," and Hangan began to approach him from behind the bar (Tr. 946, 951).

Around 1:30 a.m., as Hangan approached the shooter (approximately 45 minutes after Josephine and her boyfriend left) the shooter approached the Browns, drew a gun, said "This is for you, motherfucker," and, from approximately twenty feet away, started firing at Joseph. (Tr. 59-61, 65, 68, 130-131, 135-36). The shooter was dressed all in black, wore a black ski mask or something that had a brim, and that was covered by a black hood. (Tr. 63). Ms. Brown described the shooter as approximately five foot eight, and, based on what she could see through his mask, could tell only that he was white. (Tr. 63-64).

After the first shot, Joseph pushed Eileen against the door of the women's restroom. Eileen entered the restroom and remained inside until the gunshots concluded. (Tr. 61-66). When the man stopped shooting, he pointed his gun at Hangan and walked out of the bar. (Tr. 941-42). As Hangan moved toward Joseph, Ms. Brown exited the restroom. (Tr. 958). As she emerged, she saw Joseph's body on the floor, wounded by gunshots and surrounded by blood. (Tr. 62, 67, 840-55).

B. THE NEW YORK POLICE DEPARTMENT'S INVESTIGATION OF JOSEPH BROWN'S MURDER PRIOR TO KIMBERLY HANZLIK'S ARREST

The New York Police Department ("NYPD") responded promptly to calls that a male was shot at Frenchy's and began interviewing patrons. Of the approximately one hundred people in Frenchy's Bar in the early morning hours of March 21, 1999, NYPD interviewed at least twenty.

Not one of these twenty individuals indicated that Ms. Hanzlik was at Frenchy's on March 21, 1999. The bouncer, Jason Fox, did not identify Ms. Hanzlik to law enforcement. It was Fox's responsibility to collect money from every individual entering Frenchy's that night, yet he did not see Ms. Hanzlik.

Similarly, neither Thomas Silverberg nor Michael Hangan, the bartenders working at Frenchy's the night of the homicide, identified Ms. Hanzlik. Not once did the bartenders state that another individual could have been involved in the murder. Despite the immediate investigation by the NYPD, there was absolutely no physical evidence, no forensic evidence, and not one statement by a Frenchy's patron or employee linking Ms. Hanzlik to the crime.

Though Frenchy's was crowded on March 21, 1999, and though law enforcement interviewed numerous possible witnesses, the investigation centered around two individuals: Eileen Brown and David Thiong.

Eileen Brown

Eileen Brown spoke to detectives on the night of the shooting, as well as the following day. (Tr. 69-70). Ms. Brown did not place Ms. Hanzlik at Frenchy's in either of these meetings. In fact, Ms. Brown did not mention Ms. Hanzlik or describe any

woman unknown to her. Ms. Brown's next contact with law enforcement authorities with regard to the shooting occurred in 2006, seven years later, when Detective Kevin Tracy, of the "cold-case" squad, left a card in her mailbox indicating that he had been assigned to the re-opened investigation and wanted to interview her. (Tr. 71-73). At that meeting, which lasted over three hours, Ms. Brown did not say she saw a woman, let alone Ms. Hanzlik, at the bar.

Then, quite surprisingly, at a second meeting with Detective Tracy on August 14, 2006, seven and a half years after the shooting, she, for the first time, told him that, while she and her friend Josephine were washing their hands in the bathroom at Frenchy's, she looked in the mirror and saw the reflection of a woman behind her "who did not look like they fit in the bar." (Tr. 755, 666).

First Thiong Interview

After an unrelated arrest on April 14, 1999, three weeks after the murder, David Thiong was questioned by the police about the Joseph Brown homicide. At that time, he did not claim to have any information about Joseph Meldish going to Frenchy's or being involved in a homicide. (Tr. 438-59, 485-86, 538-41). Rather, Thiong told police that, on March 21, 1999, he took Meldish briefly to the Half Crowne Bar, then to Ms. Hanzlik's house. Thiong and Meldish waited for Ms. Hanzlik to come outside with Meldish's laundry. Thiong then drove Meldish and Ms. Hanzlik to Crosby Cab between 2:00 and 3:00 a.m.

Second Thiong Interview

David Thiong was interviewed a second time about the Joseph Brown homicide on August 12, 1999 after being arrested on another unrelated charge four months later. Similar to his first interview, he told law enforcement that he had driven Meldish and Ms. Hanzlik to the Half Crowne and then to Ms. Hanzlik's house, but said nothing about taking them to Frenchy's. (Tr. 441-43, 487-88).

Third Thiong Interview

On September 14, 1999, almost six months after the Brown homicide, David Thiong was interviewed a third time – this time at the Bronx District Attorney's Office. Assistant District Attorney Thomas D. Kapp, Detectives Torrellas and Ronda, Sergeant Powers, and Thiong's defense attorney were present.

In that interview, Thiong stated, inter alia, that on March 21, 1999, in the early morning hours, he met with Joseph Meldish at Skinny Donny's house. After Thiong, Meldish, and Ms. Hanzlik briefly went to the Half Crowne Bar, they dropped Ms. Hanzlik off at home. After dropping Ms. Hanzlik off at home, **only** Thiong and Meldish drove to Frenchy's Bar on Tremont Avenue. Meldish got out of the car and went into the bar. Thiong then heard about five shots and saw Meldish leave the bar. Meldish had a gun. He got back in the car and the two went back to Ms. Hanzlik's house. Thiong picked her up and dropped her and Meldish at a cab company on Crosby and Westchester Avenues. Thiong then drove away. No charges were brought against Meldish or Thiong as a consequence of this interview.

In that account, in direct contradiction to his trial testimony thirteen years later, Thiong completely exonerated Ms. Hanzlik in the crime. He specifically said that Kimberly Hanzlik was not at the scene and had nothing to do with the murder. Detective Torrellas had taken clear, legible notes of this interview. The names of the participants appear at the top of his notes. Thirteen years later, at the trial, these notes were turned over to defense counsel, Jonas Gelb. They were denoted "Exhibit G for identification." Three weeks after this interview, on October 11, 1999, a typewritten report of that interview was prepared and signed by Detective Torrellas. Mr. Gelb swore that he had not been provided with that official report, just the handwritten notes.

Fourth Thiong Interview

In 2007, Thiong was incarcerated in Westchester following his arrest for a drug sale that was charged as a B felony, as well as a violation of his previously imposed lifetime parole. Thiong, therefore, faced a new prosecution that could send him back to prison for the rest of his life. While incarcerated, Thiong was visited by Detective Tracy. (Tr. 448-53, 477-83). Now, when Thiong was questioned about the Brown murder case, he gave a different version of the events of March 21, 1999. This time he implicated both Meldish **and** Kimberly Hanzlik.

Subsequently, Thiong met with the prosecutor at the Bronx County District Attorney's Office and agreed to testify against the defendants in the present case. In exchange, he was given **total immunity** in connection with the Joseph Brown murder, in which he now claimed to have been involved, and was permitted to plead guilty to

a misdemeanor rather than a felony on his pending drug charge. He did so, and received a sentence of time served, which represented a term of eleven months' imprisonment for the drug sale, plus ninety days for the parole violation. (Tr. 450-51, 480-83). As a result of this deal, he testified before the grand jury and an indictment for murder was filed against both Meldish and Ms. Hanzlik. Almost three years later, the trial commenced.

C. TRIAL

The critical witness at the trial, twelve years after the murder of Joseph Brown, was David Thiong. Thiong was thirty-four years old at the time of his testimony but had begun selling marijuana, crack, heroin, cocaine, and prescription drugs in the Northeast Bronx as a teenager, earning $500 to $1000 per day. (Tr. 409-11). From 1997 to 1999, he had owned several guns including a Tec-9, a Mac 10, and a nine-millimeter shotgun, and, without being fired on himself, he had shot at approximately six rival drug dealers in 1998. (Tr. 435-36, 518). At the time of trial, he had been convicted of four drug-related felonies. (Tr. 446-47). After his release, Thiong **again** returned to selling drugs, was arrested in Putnam County, and was sentenced in 2010 to a five-year term of imprisonment, which he was serving at the time of his testimony for the prosecution in the present case. (Tr. 331-32, 456-57).

Thiong testified that, beginning in approximately 1990, he regularly supplied drugs to addicts at a Bronx crack house. (Tr. 333). In 1998 and 1999, one of his customers was Kimberly Hanzlik, who purchased crack from him daily. (Tr. 334-36). He identified her in court, but noted that she looked more "together" now than in

1999. (Tr. 335). Thiong testified that, in 1999, Ms. Hanzlik appeared "strung out" on crack and was so emaciated that her skull was visible through her face. (Tr. 395). Thiong testified that "[w]e used to call her Skeletora," a reference to a cartoon character with a visible skull. (Tr. 396-97, 509).

According to Thiong's testimony, he met Meldish a few months after meeting Ms. Hanzlik, and became his crack supplier as well. (Tr. 336-38). In 1998 and 1999, Thiong often took Meldish to various bars so that he could borrow or demand money with which to pay for crack. (Tr. 420-21, 587-88). Thiong testified that he would occasionally drive Meldish and Ms. Hanzlik to various locations, but that he had a falling out with Meldish because of things Meldish had said about him. (Tr. 339-42).

According to Thiong, on March 20, 1999, he was asked to go to the home of a mutual acquaintance named Skinny Donny, and he saw Ms. Hanzlik and Meldish there. (Tr. 341-43). Following a conversation during which Meldish apologized to him, Meldish told Thiong that he needed to go to the Half Crowne Bar on Crosby Avenue in the Bronx, and Thiong drove Meldish and Ms. Hanzlik there. (Tr. 343-44). Meldish needed to go to Half Crowne Bar to get money with which he would pay Thiong for drugs Thiong had given him earlier. (Tr. 520-21). After less than a minute in the bar, Meldish returned to the car without any money and told Thiong to drive to Ms. Hanzlik's house. (Tr. 344-45).

According to Thiong, Ms. Hanzlik went into her house. (Tr. 346-47). In this altogether different version of the events, the **three** then drove to Frenchy's. (Tr. 347).

Upon arrival, Meldish nudged Ms. Hanzlik from the back seat and they whispered to one another, but Thiong did not hear what was said. (Tr. 348).

Thiong testified that Ms. Hanzlik went into Frenchy's, returned to the car no more than two minutes later, and told Meldish which stool "Brown" was sitting on. (Tr. 348-49, 432).[2] Meldish then put on a mask and went into the bar with a gun; Thiong did not recall the color of the gun, but testified that it was a semiautomatic. He recalled that Meldish was wearing a black "hoodie" and black jeans, and that the mask was "dark blue" with a visor, and that it did not cover Meldish's eyes or the bridge of his nose. (Tr. 348-53, 433).

Thiong testified that he heard approximately six gunshots. He asserted that Meldish returned to the car, pointed the gun at him, and told him to drive to the Crosby cab company. (Tr. 349-50). Thiong testified that, after he drove Meldish and Ms. Hanzlik there, they took the gun and bag and exited his car. (Tr. 354-55). According to Thiong, about a week later Meldish threatened to kill him or his family if he ever spoke about the homicide at Frenchy's (Tr. 356-57).

Trial Attorney's Failure to Cross-Examine David Thiong

Defense counsel Gelb, who was in possession of the handwritten account of the interview of Thiong at the District Attorney's office in 1999, did not cross-examine Thiong at trial with these prior interview statements that completely exonerated Ms. Hanzlik. Thiong's new version of the occurrence was not attacked by Mr. Gelb in any way. Those prior inconsistent statements went to the very heart of the case against

[2] On cross examination, Thiong testified that Hanzlik told Meldish where "Joseph Brown" was sitting; when asked if he remembered clearly hearing her say that, he answered, "I believe so, yes." (Tr. 433).

Ms. Hanzlik as it was a factual account that exonerated her. It also bears noting that the defense at trial was prevented from probing any inconsistencies between Thiong's trial testimony and the statements he made to authorities after he agreed to cooperate because the lead investigator, Detective Tracy, in defiance of standard law enforcement protocol, intentionally "made it a point to prepare no notes." (Tr. 757).

Weak Corroborating Testimony by Brown's Wife

The sole "corroboration" of career criminal David Thiong's testimony was the belated testimony of Mr. Brown's wife. Although Ms. Brown did not know Ms. Hanzlik, Ms. Brown testified at trial that she saw, for a few brief seconds, Ms. Hanzlik's reflection in the bathroom mirror. This belated "identification" was the only so-called evidence that connected Ms. Hanzlik to the crime. Without it, New York State law would not permit a prosecution solely on the word of Thiong. [3] It was attacked as the product of suggestion by Detective Tracy who, admittedly neglected to take notes of his interview with Thiong – the government's star witness.

Ms. Brown testified at trial that there were only two toilet stalls in the bathroom and only the two sinks that she and Josephine were standing in front of when she made this observation. (Tr. 133-34). She did not see the woman enter or leave the bathroom. (Tr. 134-35). This observation occurred while she was with Josephine, whom she acknowledged had left Frenchy's forty-five minutes before the

[3] New York Criminal Procedure Law § 60.22 provides "A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense…. A witness who is an accomplice… is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, **immunity**, or previous prosecution…" (emphasis added).

shooting. (Tr. 130-36). Ms. Brown was not sure how long Josephine had remained at Frenchy's after the two of them had gone to the bathroom together. (Tr. 186). Josephine was never found nor interviewed by the state.

Based on her brief observation of the face in the mirror, Ms. Brown described the woman as having a "[h]eavy-set face." Thiong, on the other hand, had testified that Ms. Hanzlik was "emaciated" and was called "Skeletora", meaning that one could see the bones in her face; therefore, not "heavy-set." Importantly, Ms. Hanzlik herself was arrested shortly after the shooting on March 22, 1999 on an unrelated misdemeanor drug charge later disposed of by community service and her arrest photo depicted her as in fact emaciated, thereby contradicting completely Ms. Brown's supposed identification. When the prosecutor asked Ms. Brown if anyone in the courtroom "looks familiar to you," she responded that she was "unclear." (Tr. 75). The prosecutor subsequently said, "Now you indicated that you weren't sure of an individual that you may recognize in this courtroom" (even though that had not been Ms. Brown's earlier testimony), and then asked where "that person" was. Although an objection to that question was sustained, the prosecutor continued: "explain to us who you were talking about when you made that statement." Ms. Brown responded, "the defendant" and pointed to Ms. Hanzlik. (Tr. 77).

The prosecution was then permitted to show Ms. Brown a photograph taken in 2002 (People's Exhibit 1), which Thiong subsequently identified as a picture of Ms. Hanzlik, and Ms. Brown testified that she recognized it as a photograph of the person she saw in the bathroom mirror. (Tr. 87-89, 401).

Other Facts Demonstrating Kimberly Hanzlik's Innocence

Other than Ms. Brown, the People did not call any witnesses who had been present at the time of the shooting. Two different witnesses present at the time of the shooting, however, were called by Joseph Meldish's attorney: Michael Hangan, a bartender at Frenchy's, and Jason Fox, a bouncer at Frenchy's. Like Ms. Brown, Hangan testified that the shooter was dressed all in black and wore a ski mask that covered all of his face other than the bridge of his nose; he recalled that the mask was made of a "shiny material" and was of a style that was popular at the time. (Tr. 937-49). Hangan could tell that the shooter was white. (Tr. 950). Hangan knew Meldish, and testified that he had been at the bar as recently as a day or a week before the shooting, but he did not identify him as the shooter. (Tr. 947-48, 962-65).

Jason Fox, who also testified as a defense witness, was working as a bouncer and collecting the five-dollar cover charge at the door of Frenchy's on March 21, 1999. He confirmed that the bar was very crowded that evening, confirmed by the fact that he collected over $1000. (Tr. 970-72, 985). Fox recalled that, at roughly 2:30 a.m., a man walked past him without paying and Fox followed him into the crowd. When the man swung at him, Fox yelled to Hangan and pointed at the man. As Hangan began to step out from behind the bar, the man drew a gun, took a few steps, went straight to the end of the bar, and began to shoot. (Tr. 973, 981).

The jury was not made aware that Ms. Hanzlik was **also** offered immunity if she would testify against Meldish. She was innocent and, therefore, would have had to commit perjury to conform her testimony to Thiong's; she had no choice but to reject

the offer. Ms. Hanzlik took and passed a polygraph examination wherein it was confirmed that she was not at Frenchy's Bar and, therefore, completely innocent. Kimberly Hanzlik was convicted of murder in the second degree.

Applicable Law Regarding Granting a Certificate of Appealability

28 U.S.C. § 2252(c)(2) authorizes a court to grant a Certificate of Appealability ("COA") upon a "substantial showing of the denial of a constitutional right." As enunciated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003), a "substantial showing" is when a petitioner demonstrates that "another court could resolve the issues differently," and that they are "debatable among jurists of reason." In the instant case the previous courts denied a COA. However, just as in *Miller-El*, this Court should now reverse the circuit's denial and thereby give the petitioner the opportunity for appellate review of the District Court's denial of the writ of habeas corpus. The *Miller-El* decision followed this Court's ruling in *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) in which the Court held that if reasonable jurists could disagree on the resolution of the constitutional claims and conclude that the issues presented are adequate to deserve encouragement to proceed further, a COA should be granted. Importantly, a COA need not be granted only when the deciding court determines that there is merit to the claim; but only that the issue decided below substantially demonstrates a denial of a constitutional right about which reasonable jurists can disagree.

In making this determination, the court can review and analyze the facts in the attempt to discern whether that substantial showing has been made. Justice

Scalia, concurring in *Miller-El,* made an extensive review of the record established at the trial level regarding the reasons provided by the prosecution in striking six black venirepersons. He concluded, as did the majority, "there is room for debate as to the merits of Petitioner's *Batson* claim." *Miller-El v. Cockrell*, 537 U.S. at 350. It is the strength of the claim and the fact that reasonable jurists could disagree as to its merits that informs the decision whether to grant the COA.

Recently, in *Buck v. Davis,* 580 U.S __ (2017), 137 S.Ct. 759 (2017), this Court reaffirmed this analysis. The Court made clear that a petitioner need only show that the decision of the District court was "debatable." *Id.* at 774. In addition, the petitioner need not demonstrate "extraordinary circumstances" or that he or she would succeed on the merits. As Chief Justice Roberts pointed out, debatable is different than meritorious. *Id.* at 774 ("that a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.")

REASONS FOR GRANTING THE PETITION

I. Petitioner Demonstrated a Substantial Showing of a Denial of a Constitutional Right About Which Reasonable Jurists Can Disagree: There is a Constitutional Basis Permitting a District Court to Grant a Writ of Habeas Corpus Solely on the Grounds of Actual Innocence.

In *Herrera v. Collins*, 506 U.S. 390 (1993), three Justices categorically held that an actually innocent person should have his or her conviction overturned solely on that ground regardless of the nature of the conviction and the sentence imposed. This Court unanimously gave innocence a central role in habeas jurisprudence. The majority made an "assumption" that such an innocence claim is cognizable, and went

so far as to label it as the "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. All of the Justices agreed that executing an innocent person would be a constitutional violation and warrant federal habeas relief. *Id.* at 417.

The various opinions in that case shed clear light on the subject although expressed in different terms by the Justices. One thing emerges, however. The Court was not prepared to go all the way beyond an "assumption" to a definitive ruling because it did not have to. The overwhelming proof that the petitioner was guilty afforded the Court the opportunity to affirm the denial of the petition without definitively articulating the holding of the three dissenters that a district court can grant a writ of habeas corpus solely on a claim of actual innocence.

The *Herrera* Court's assumption of such a right was based on a legion of prior decisions containing opinions that support that conclusion. For instance, in *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979), this Court articulated the standard when reviewing the record: "whether any trier of fact could have found "that the essential elements of the crime could be proven.

What is required, therefore, is an analysis of the facts. In *Townsend v. Sain,* 372 U.S. 293, 297 (1963), Chief Justice Warren, recognizing that an innocence claim must be heard, wrote, "Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court *must* grant an evidentiary hearing" (emphasis supplied). Therefore, based upon the sufficiency of the petition in establishing a

substantial basis for the claim of innocence, the district court can grant the writ if the facts in the petition clearly support innocence but, at minimum, must hold a hearing. After listening to the witnesses, the district court can then rule on whether any rational jury could find the petitioner guilty beyond a reasonable doubt. In the instant case, as noted below, *not one reviewing court has heard any witness testify regarding actual innocence.* This is especially egregious here since there really was only one witness that inculpated Kimberly Hanzlik and he gave a prior inconsistent statement to a prosecutor in which he exonerated Ms. Hanzlik – a statement that the jury never heard due to the incompetence of trial counsel.

Herrera contemplated the necessity of a hearing and this was affirmed in the Supreme Court's later decision in *In re Troy Anthony Davis*, 557 U.S. at 952. Justice O'Connor, in *Herrera,* pointed out the difference that was later to be revealed between the two cases. First, she remarked as a foregone conclusion that executing an innocent person is inconsistent with the Constitution. In concluding what was obvious – that petitioner Herrera was undoubtedly guilty – she noted that the majority merely exercised "restraint" by simply "assuming" that the right exists. *Id.* at 420. Indeed, she and Justice White assumed that if the petitioner were to make an exceptionally strong showing of actual innocence, execution would not go forward. In fact, in *Jackson*, Justice White held that a writ should be granted if the petitioner shows that he (or she) is "probably innocent." *Jackson*, 443 U.S. at 314.

Justice O'Connor confirmed that the District Court did not hold a hearing specifically because there was no doubt of the petitioner's guilt. In her words, a

hearing would have been "futile." *Herrera*, 506 U.S. at 424. She went on: "If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case…" *Id.* at 427. The instant case is so clearly an extraordinary one as Point II will plainly demonstrate. Justice O'Connor wrote that the Supreme Court in *Herrera* reserved the ultimate question for a later case in which it could be answered. "That difficult question remains open." *Id. at 427.* This petition for certiorari is surely that later case.

Indeed, three Justices did not have to wait. Justices Blackmun, Stevens, and Souter, in dissent, viewed a habeas petition as an available remedy when an innocence claim is made by a state petitioner. There need be no other constitutional claim for a District Court to grant such a petition. As Justice Blackmun wrote: "In other words, even a prisoner who appears to have had a constitutionally perfect trial retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is incarcerated." *Id.* at 438. While Ms. Hanzlik did not receive a constitutionally perfect trial – as demonstrated so clearly by her lawyer's ignorance of the law – she should at least be permitted to present witnesses at a hearing so that the District Court can make an informed and intelligent decision by finding, at minimum, that she is "probably" innocent although there will be, in the end, no doubt that she is.

Indeed, such a hearing has been authorized by this Court. The unquestionable significance of innocence in habeas jurisprudence was underscored when the Supreme Court instructed the United States District Court for the Southern District

of Georgia to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *In re Troy Anthony Davis*, 557 U.S. at 952.

In this nation, thousands of convicted persons have been exonerated. *The National Registry of Exonerations*, http://www.law.umich.edu/special/exoneration/Pages/about.aspx. This is so despite the fact that, in many of these cases, they otherwise received a fair trial. While the District Court below did not find a constitutional violation emanating from the woeful inadequacy of trial counsel that required a new trial – a decision that is difficult to justify – and, therefore, that Ms. Hanzlik's trial was "fair" (enough), that simply does not mean that she was actually guilty. It is time for this Court to recognize the seemingly obvious conclusion that incarcerating an innocent human being is cruel and unjust and, therefore, clearly in violation of the Eighth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment.

"Concern about the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). Though there are procedural safeguards in the attempt to protect the innocent, the system sometimes fails and innocent people are convicted. To date, DNA testing has led to the exoneration of more than 375 individuals, and "[m]istaken eyewitness identifications contributed to approximately 69%" of those overturned convictions. Innocence Project, *Eyewitness Identification Reform,* http://www.innocenceproject.org/eyewitness-identification-reform/.

Perhaps the most obvious demonstration of fallibility in the criminal justice system is the recent creation of conviction integrity or review units, focusing on "identifying and correcting past errors in convictions." Over twenty-five of these units exist in prosecutors' offices across the country demonstrating that, contrary to the confidence in criminal trials and Constitutional protections afforded to defendants, even prosecutors' offices concede that innocent individuals are sometimes convicted. John Holloway, *Conviction Review Units: A National Perspective*, Univ. of Penn. Law School Faculty Scholarship, http://scholarship.law.Upenn.edu/faculty_scholarship/1614 (April, 2016).

Kimberly Hanzlik's continued incarceration also violates the Due Process Clauses of the Fifth and Fourteenth Amendments, which provide that no state shall deprive any person of life, liberty or property, without due process of law. The Supreme Court has held that due process proscribes the government from engaging in conduct that is arbitrary, "shocks the conscience," *Rochin v. California*, 340 U.S. 165, 172 (1952), or is "contrary to contemporary standards of decency." *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). While "the twofold aim [of criminal law] is that guilt that shall not escape or innocence suffer." *United States v. Nixon*, 418 U.S. 683, 709 (1974), the "[c]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. at 325 (quoting *In re Winship*, 397 U.S. at 372 (1970) (Harlan, J., concurring)). Does it not "shock the conscience" to imprison an innocent person?

Similar to the Supreme Court's continuous assumption that a freestanding innocence claim exists, *Schlup v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2006), many lower federal courts assume the claim is cognizable. The Eleventh Circuit "recognized that possibility of freestanding actual innocence claims," *In re Davis,* 565 F.3d 810. 817 (11th Cir. 2009). The Western District of Oklahoma stated "[e]ven if a freestanding actual innocence claim in a non-capital case were cognizable in a federal habeas action, a review of the record demonstrates that Petitioner failed to make the required extraordinarily high showing." *Robinson v. Dinwiddie*, 2009 WL 2778657, at *5 (W.D. Okla. Aug. 31, 2009) *See Tomlinson v. Burt*, 509 F.Supp. 2d at 776. Even after a procedurally fair trial, "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion).

With that authority, based upon the facts and circumstances in this case, it is clear that the State Court's denial of Ms. Hanzlik's innocence claim was unreasonable and wrongly decided. It was contrary to, or involved an unreasonable application of, clearly established federal law and was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

II. Kimberly Hanzlik Is Actually Innocent Of The Crime For Which She Is Serving A Life Sentence.

The record below makes it crystal-clear that Kimberly Hanzlik is completely innocent of this crime. The critical witness was an accomplice to the murder who had every reason to lie about Ms. Hanzlik's involvement. His account of the murder

contradicts every other witness including the deceased's wife who provided the only other "evidence" that tended to connect her to the crime. To be sure, Ms. Brown's account, given over eight years later after multiple questioning by the cold-case detective intent upon "clearing" the case, is totally unreliable. Claiming to have seen Ms. Hanzlik's face in the bar's bathroom mirror for a few brief seconds, Ms. Brown's account – and especially her description of the woman she claimed to have seen – is directly contradicted by David Thiong, the accomplice. Ms. Brown described the woman as "full-faced" despite, as Thiong confirmed since he knew her, that Ms. Hanzlik was so skinny in the face that she was called "Skeletora." In addition, Ms. Brown said it was at least about forty-five minutes after the bathroom sighting that the shots were fired that killed her husband. Yet, Thiong, who should know, said it was only minutes later.

Most critically, several weeks before the trial, the prosecutor presented an offer to Ms. Hanzlik. If she would conform her testimony to Thiong's – meaning admitting she was present at Frenchy's Bar and "fingered" Joseph Brown – she, like Thiong, would also receive total immunity. Ms. Hanzlik could not do so as she would have been committing perjury. Eleven years had passed after the murder during which time she had had no contact with Meldish. If she were guilty, there was absolutely no reason for her to have turned down the prosecutor's offer. Indeed, even some innocent defendant facing such a trial with life penalty implications might plead guilty and avoid the possibility of a wrongly rendered guilty verdict.

Kimberly Hanzlik **is** completely innocent of the crime of murder of which she was convicted. At minimum, pursuant to *People v. Hamilton*, 115 A.D.3d 12 (2d Dept. 2014), a landmark New York case, its progeny, and the Constitutions of the United States and the State of New York, as reflected in decisions assuming such a free-standing claim of innocence is cognizable in a habeas petition, Justice April Newbauer was required to and should have ordered a hearing in order to decide the issue of innocence. And this is what United States District Court Judge Alvin Hellerstein should have ordered and held as well. Clearly, there was sufficient, and, indeed, overwhelming proof and documentation of innocence to support the holding of a hearing. Such proof included: the deal made by Thiong to avoid prosecution, his prior statement exonerating Ms. Hanzlik, the questionable testimony of Ms. Brown which came out for the first time almost seven years later, the fact that Ms. Hanzlik did not know Mr. Brown (so how could she "finger" him?), and the statements made by Ms. Hanzlik to the polygraph examiner that she did not go to Frenchy's that early morning. Importantly, the second 440 Motion also brought out that Ms. Hanzlik had been offered immunity if she would have testified against Meldish.

At such a hearing, Justice Newbauer or Judge Hellerstein would have had the benefit of exploring the credibility of the critical witnesses involved in this unjust prosecution. Unlike the trial, David Thiong would be finally questioned to explain his exoneration of Ms. Hanzlik when speaking to the District Attorney only six months after the murder. Because trial attorney Jonas Gelb failed to bring out that earlier statement and cross-examine Thiong about this turnaround, no court, nor jury, has

yet had the benefit of this explanation. Such a hearing would allow the court to explore issues that had never been dealt with before regarding critical facts that support Ms. Hanzlik's claim of innocence – the purpose and reasoning behind the *Hamilton* decision and Supreme Court precedent. The circumstances herein, viewed objectively, indicate the overwhelming likelihood – if not certainty – that a person has been convicted of a crime that she did not commit.

Justice Newbauer denied the motion without a hearing on innocence. Judge Hellerstein continued the injustice by also refusing to order a hearing despite Supreme Court law – as noted above – that authorized such a fact-taking proceeding. Indeed, those unpresented facts – Thiong's prior exoneration and the offer and refusal to accept immunity – are uncontroverted. They are not minor nor inconsequential – especially compared to the weakness inherent in the State's case.

Judge Hellerstein noted those deficiencies although denying the petition. As he wrote, there are "weaknesses in the government's case, ranging from Eileen Brown's delayed identification of Petitioner, to discrepancies as to the exact timing of the shooting, to the testimony of Frenchy's employees having not seen Petitioner on the night of the murder, to the absence of physical evidence." (Appendix B at 21).

And, without question, especially in light of these weaknesses, a hearing **is** necessary where the proffered new evidence raises additional significant doubts about the defendant's guilt. Here, the proffered evidence – Thiong's exoneration of Ms. Hanzlik made in statements to the District Attorney and Ms. Hanzlik's rejection of immunity – are conceded to be true.

Throughout the recent history of countless exonerations of innocent individuals, appellate courts had originally-and even on many occasions-upheld the conviction until the new information was tested at a hearing after which the defendant was finally exonerated. In *Goldblum v. Klem*, 510 F.3d 204 (3d Cir. 2007), a case ironically cited by Justice Newbauer, in which a hearing **was** conducted, the Third Circuit wrote about the court's function when considering an innocence claim which requires a probabilistic analysis:

> a court must consider all of the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern a trial and assess how reasonable jurors would react to the overall, newly supplemented record.

Goldblum v. Klem, 510 F.3d 204, 225-26 (3d. Cir. 2007) (internal quotations omitted). Therefore, the only way for a court to come to a reasonable conclusion as to what the jury would have done if they had heard **all** of the circumstances – some of which would have come directly from the mouth of David Thiong – the critical witness whose credibility was the only real issue in the case - is for that court to hear it all for itself. It would then be in an informed position to put his complete testimony in perspective and consider it with all the other evidence – old and new.

This notion, therefore, that Thiong's prior statement to the District Attorney was "half-consistent, half-inconsistent" is simply irrelevant and, in any event, not accurate as it applies to Ms. Hanzlik. While it is true that Thiong maintained in all his statements that Meldish was a guilty party, that was not the case with Ms. Hanzlik. As to her, his prior statement was **totally** inconsistent. But, in any event,

whether one calls Thiong's prior statement "half-consistent" or not, is based solely on the statement itself and not a full-blown exploration of the reasons behind its making and the nature of the man who made it. Without a hearing, a court's judgment on its impact can only be educated guesswork, not an evidentiary-based meaningful assessment.

Without question, Justice Newbauer and Judge Hellerstein abused their discretion in denying a hearing on the actual innocence claim. That is why their decisions are constitutionally infirm. As a result, there has been an additional delay in freeing Kimberly Hanzlik from prison where she is serving a life sentence for a crime of which she is innocent. There should no longer be any delay.

This is not to suggest, of course, that in every case where a defendant moves for post-conviction relief on the grounds of actual innocence, a court is obligated to hold a hearing. Some will be very obviously frivolous. This, however, is not one of those cases.

III. The Courts Below Incorrectly Concluded That Trial Counsel's Admitted Ineffectiveness Did Not Warrant Overturning The Conviction Nor The Granting Of A Writ of Habeas Corpus. District Court, Therefore, Rendered A Decision Which Was An Unreasonable Application Of Federal And State Constitutional Law And Involved An Unreasonable Determination Of The Facts.

Kimberly Hanzlik was convicted on the testimony of David Thiong. Apart from the most unreliable of testimony from Mrs. Joseph Brown, the deceased's wife, nothing presented at the trial in any way connected Ms. Hanzlik to the crime. But this is not just a case of reasonable doubt. Kimberly Hanzlik is factually innocent of the crime. (See Section II above). She was not at Frenchy's. No witnesses who worked

or were present at the bar testified to her presence there. In addition, Ms. Hanzlik rejected the prosecutor's offer of immunity. David Thiong **said** she was innocent when interviewed by a prosecutor in the presence of his own lawyer.

In the decision below, the District Court accepted that trial counsel, Jonas Gelb, was ineffective for failing to bring before the jury that Thiong had exonerated Ms. Hanzlik at that meeting in the District Attorney's Office. Mr. Gelb's "explanation," – that he did not know the identity of the author – as Judge Hellerstein recognized, is "contrary to New York and Second Circuit law, which provide that counsel need only have a "good faith" basis for posing a question on cross-examination." (citing cases). Nevertheless, the Court ruled that the jury would not likely have rendered a different verdict had they heard that Thiong had earlier stated to law enforcement that Ms. Hanzlik was innocent. Judge Hellerstein's view is a totally unreasonable application of the law to the undisputed facts herein.

The law mandates that the undisclosed exculpatory evidence must be examined in the context of the weakness of the prosecution's case. Here, this was an extremely thin case with a single witness whose credibility was as low as could be imagined. In addition, Thiong lied at the trial when he claimed that he could not even **remember** that noteworthy meeting with the District Attorney. In this case, the unheard evidence was from this sole eyewitness who told a prosecutor: **Kimberly Hanzlik was not there.**

Judge Hellerstein simply, but blatantly, misapplied the standard in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). He should have granted the writ as "there

is a reasonable probability that, but for counsel's unprofessional errors, the proceeding would have been different." Indeed, how could a jury not entertain a reasonable doubt once hearing that the only essential witness gave a completely different **factual** account of the incident – one that left Ms. Hanzlik entirely out of the crime – especially when considering all of the other indicia of his mendacity? Simply stated, Thiong's prior statement was not just additional impeachment that cast doubt on the witness's credibility. **It was a complete exoneration of Ms. Hanzlik.**

In addition, despite being aware that Ms. Hanzlik had been offered immunity, the District Court did not even mention this circumstance as a factor in coming to his decision. No guilty person would have ever turned down such an offer from the prosecution in which her future freedom was guaranteed. Clearly, had the jury been apprised of Ms. Hanzlik's rejection of the offer, an acquittal would have been the virtually certain verdict. *See United States v. Biaggi*, 909 F. 2d 662, 690-92 (2d Cir 1990) ("…a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacked knowledge of the wrongdoing… Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we have not hesitated to order a new trial." (citing cases)); *see* F.R.E. 401.

Despite the powerful nature of this excluded exculpatory evidence, the District Court decided that the verdict would not have likely changed even if the jury had learned of it. That conclusion simply defies common sense and, indeed, the law. It is almost guesswork. Rather than unwarranted speculation, the way in which to

determine what a jury will do if they hear this exculpatory evidence is to grant the writ and have a new trial where – with effective counsel – the jury would finally **hear** Thiong's testimony that he had, clearly and specifically, once told the truth to law enforcement – that Ms. Hanzlik was innocent because she took no part in the murder. And they will also hear – which they did not because of the prosecutor's misconduct in not correcting the record – that Thiong **did** have a third meeting during which he exonerated Ms. Hanzlik.

The standard, per *Schlup v. Delo*, 513 U.S. 298 (1995), put as a question is: is it more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence? *Murray v. Carrier,* 477 U.S. 478, 487 (1986). In *Schlup,* this Court recognized that the newly presented evidence – here the exoneration of Ms. Hanzlik by the only real witness, David Thiong, – calls into question the credibility of that witness. 513 U.S. at 330. Yet, although we have argued that the uncontroverted statements omitted from the trial are alone sufficient to order a new trial, Petitioner asked the District Court – if he felt it appropriate – to order a hearing at which Thiong and others could testify. This is the procedure suggested by then-Chief Justice Rehnquist despite his dissent in *Schlup.* Recognizing that a habeas court must make credibility determinations, in appropriate cases, a district court should conduct a limited evidentiary hearing to put the court in "as good a position as possible to make the determination." *Id. at* 342.

Indeed, no judge has ever heard any testimony regarding the taking and implications of Thiong's statement to law enforcement exonerating Ms. Hanzlik.

While Petitioner still strongly maintains that a hearing was not necessary in order for the District Court to have granted the writ, at minimum, the petition should not have been denied without at least having one.

However, it is clear that no hearing is really necessary because the undisclosed evidence considered in comparison to the weak and contradictory so-called evidence of guilt mandates a new trial for Ms. Hanzlik. First, as indicated, Ms. Brown provided the most unreliable evidence one could imagine concerning the "identity" of a woman who was purportedly in the bathroom the morning of the shooting. Yet, nowhere in his opinion did Judge Hellerstein refer to – or even consider – that Ms. Brown's description of the woman she saw was completely at odds with the facial characteristics of Ms. Hanzlik at the time; "heavy-set face" is totally the opposite of one described as "skeletora." In addition, if the jury had heard that Thiong had told a prosecutor only months later that Ms. Hanzlik was **not** involved in the homicide, it would have caused them as well to more likely reject Ms. Brown's purported "identification."

Second, none of the other evidence before the jury pointed to Kimberly Hanzlik. In fact, it pointed to her innocence. Both the bouncer, Jason Fox, and the bartender, Mike Hangan, were in positions to see and monitor all who entered. Neither saw any woman who came into the bar, stayed for a few short minutes, and then left. And certainly no one in the bar – at any time – matched the description of Ms. Hanzlik. The only way, we are told, that Meldish was able to get to Mr. Brown was by rushing

past the bouncer – an act that no woman also did a few minutes earlier. The District Court gave short shrift to this important exculpatory evidence.

As the cases make clear, whatever so-called evidence inculpated a defendant must be considered in comparison with the evidence that was **not** presented that exculpates a defendant. *Schlup*, 513 U.S. at 332.

This Court's precedents make it clear that many other conclusions arrived at by the District Court were both unreasonable applications of clearly established federal law and involved an unreasonable determination of the facts. For instance, the District Court also incorrectly concluded that Thiong's statements that the jury did not hear were "**entirely** duplicative" of the impeachment evidence adduced at the trial. *See* Appendix B (emphasis supplied). This is simply not the case. They were not duplicative at all – apart from being *entirely* duplicative. If evidence duplicates other evidence, it means that the nature of it is the same. The statements Thiong made six months after the murder were not the same as his non-statements made in the two previous interviews by law enforcement. At no time did the jury hear Thiong say that Ms. Hanzlik was **not** at Frenchy's – in other words – **innocent**! In a complete turnaround, Thiong finally admitted his own involvement **and left Ms. Hanzlik out.**

The District Court also made the completely unwarranted conclusion that the unheard testimony would have had no effect upon the jury since it would have duplicated **arguments** already put before them. How could that be? Defense counsel Gelb never argued in closing – because he could not have – that which he himself knew but failed to bring out at the trial – that Thiong in a third statement had

exonerated Ms. Hanzlik. Concomitantly, he also could not – and did not – argue to the jury that Thiong had committed perjury by not admitting that he actually had a third meeting with law enforcement where he had **made** that statement.

It is abundantly clear that there are overwhelming factors in Kimberly Hanzlik's case that "undermine confidence in the verdict." *Kyles v. Whitley,* 514 U.S. 419, 435 (1995). Without question, had the jury been apprised of the undisclosed evidence – that David Thiong had told a prosecutor that Ms. Hanzlik was innocent and that he lied at the trial about that statement – it is more likely than not that the jury's verdict would have been different. *Kyles* at 433; *House v. Bell, supra* at 538; *Murray v. Carrier, supra* at 487; *Schlup v. Delo*, *supra* at 321 ("a constitutional violation has probably resulted in the conviction of one who is actually innocent.").

Therefore, this is clearly a case in which a Certificate of Appealability must be granted. It is not simply a situation in which reasonable jurists could disagree that there is "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2); *Slack v. McDaniel*, 529 U.S *at* 484. That is a given. Here, it is clear that virtually most, if not all, reasonable jurists would disagree with the conclusion that the exonerating evidence – whose absence was caused by a Fifth Amendment violation of the right to the effective assistance of counsel – would not have had a critical impact upon the jury's verdict. Without question, at minimum, it certainly is "debatable." *Buck v. Davis,* 580 U.S. __, 137 S.Ct. at 774 (2017). In effect, Judge Hellerstein held that, even if the jury had heard that the only actual witness had, soon after the murder, completely exonerated Ms. Hanzlik, it would not have caused

a juror to have a reasonable doubt. Such an unwarranted conclusion constituted an unreasonable application of the facts to the law.

CONCLUSION

The petition for a writ of certiorari should be granted and a Certificate of Appealability should be issued.

Respectfully submitted,

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APPENDIX

APPENDIX A

S.D.N.Y. – N.Y.C.
17-cv-6577
Hellerstein, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of July, two thousand twenty.

Present:

José A. Cabranes,
Richard J. Sullivan,
Steven J. Menashi,
Circuit Judges.

Kimberly Hanzlik,

Petitioner-Appellant,

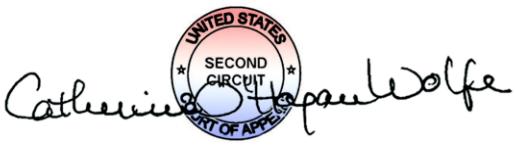
v. 20-694

Superintendent Joseph Joseph, Bedford Hills Correctional Facility,

Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KIMBERLY HANZLIK,	:	**ORDER DENYING HABEAS PETITION**
Petitioner,	:	
v.	:	17 Civ. 6577 (AKH)
JOSEPH JOSEPH, Superintendent, Bedford Hills Correctional Facility.,	:	
Respondent	:	

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Kimberly Hanzlik, currently incarcerated at the Bedford Hills Correctional Facility in New York, was convicted in 2011 of second-degree murder, in violation of N.Y. Penal Law § 125.25(1), and sentenced to an indeterminate term of twenty-years-to-life in prison. Thereafter, Petitioner brought two rounds of challenges to her conviction under N.Y. C.P.L. § 440.10, both of which were rejected by the New York state courts. Petitioner filed the instant petition in 2017, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. After this petition was fully briefed, the parties notified the Court of then-newly unsealed plea minutes covering the 2007 guilty plea of one David Thiong—a central prosecution witness in Petitioner's murder trial—to unrelated drug possession charges. Petitioner contended that the plea minutes showed that Thiong's plea deal provided more incentive for him to testify against Petitioner than was disclosed at her trial. I stayed the matter to enable Petitioner to pursue an additional state-court challenge based on the minutes. *See* May 2018 Order, ECF No. 23. Petitioner's motion premised on the minutes was denied in April 2019 by the Bronx County Supreme Court, and the First Department denied Petitioner leave to appeal that July. The parties then filed supplemental briefing to address this most recent round of state court decisions, and I lifted the stay. For the reasons set forth herein, the petition is denied.

Background

This petition concerns the murder of Joseph Brown, who was shot and killed while out with his wife at Frenchy's Bar in the Bronx ("Frenchy's). Petitioner and her alleged accomplice, then-boyfriend Joseph Meldish, were both convicted of the murder. The following background, presented to the extent relevant to the disposition of this matter, is taken from the records of Petitioner's trial and Petitioner's posttrial § 440 motions.

A. The Murder Investigation

Joseph Brown was shot and killed at around 2:00 a.m. on March 21, 1999 at Frenchy's by a male shooter wearing a mask that hid the shooter's face. The New York Police Department promptly began an investigation. The police interviewed several persons of interest, including Eileen Brown, the wife of the late Joseph Brown, and David Thiong, an acquaintance of both Meldish and Petitioner who had, on occasion, provided Meldish and Petitioner with drugs. In an interview conducted the night of the attack, Eileen Brown told the police that the deceased's brother, Thomas Brown, had recently had an altercation with someone by the name of "Meldish," but Ms. Brown did not at that time identify Petitioner as having been present at Frenchy's.

On April 14, 1999, Thiong was questioned by the police. Thiong denied having any information about the homicide, and told the police that, on the night of the murder, he had driven Meldish and Petitioner to the "Half Crowne Bar." On August 12, 1999, Thiong was questioned again by the police. Thiong again denied having any knowledge of the murder. On September 14, 1999, Thiong was questioned for a third time, and this time related a different story. Thiong told the police that on the night of the murder, Thiong had driven Meldish and Petitioner to the Half Crowne Bar; that, thereafter, Thiong and Meldish had driven Petitioner to her home; that Thiong and Meldish, without Petitioner, then drove back to Frenchy's, at which

time Meldish entered the bar, Thiong (still in his car) heard five gunshots from inside, and Meldish returned to Thiong's car with a gun in his hand. This third interview was memorialized in the handwritten notes of a detective present at the interview and in a typed "DD5" report. *See* State Record ("SR") 231 (Interview Notes); SR 34 (DD5 Report).[1] The parties agree that the handwritten notes were produced to Petitioner before trial.

The homicide was not actively prosecuted for several years. In or around 2006, Detective Kevin Tracy was assigned to Joseph Brown's cold case file. Detective Tracy reviewed the case file and re-interviewed a number of individuals, including Eileen Brown and Thiong. In August 2006, Detective Tracy met with Eileen Brown, at which time she recalled that, on the night of the murder, she had seen a woman in the restroom who "did not look like [she] fit in." In January 2007, Thiong was arrested on drug charges and for violation of his parole, and was imprisoned in Westchester County. Detective Tracy visited Thiong in jail and, during this meeting, Thiong changed his account of the events surrounding the murder. Thiong told Tracy in relevant part that on the night of the murder, Thiong had driven both Meldish and Petitioner to Frenchy's, and that Petitioner had participated in the murder by scouting Joseph Brown's whereabouts in the bar and relaying that information to Meldish.

On August 16, 2007, Thiong attended a meeting with officials from the Bronx District Attorney's ("DA's") office and Westchester DA's office, including Bronx Assistant District Attorney ("ADA") Christine Scaccia, the assistant who was to prosecute the case against Petitioner through trial. Thiong agreed to testify against Meldish and Petitioner before a grand jury and at trial, in exchange for immunity as to Joseph Brown's murder. Later on the same day (August 16), (a) Thiong pleaded to a lesser drug offense in Westchester County and (b) Thiong's

[1] References to "SR" correspond with the "State Record" submitted as an attachment to the government's answer, available at ECF Nos. 14-1 through 14-5.

pending parole violation was withdrawn. The parties dispute whether Thiong's reduced drug plea was the result of a three-way plea deal among the Bronx DA's office, the Westchester DA's office, and Thiong, or whether the Westchester DA's office acted itself, in its own discretion, to allow Thiong to plead to lesser charges. This claim is discussed in more detail, *infra*.

In November 2007, a Bronx County grand jury charged Petitioner with second-degree murder, in violation of N.Y. Penal Law §125.25(1).

B. The Trial

1. The Prosecution

The trial began on January 20, 2011, almost 12 years after the homicide. The prosecution theory was as follows. A few months before Joseph Brown was shot, Meldish and Thomas Brown—Joseph's brother—got into an argument regarding Thomas's refusal to lend Meldish money. Meldish, looking to exact revenge, planned to go to Frenchy's with the intent to shoot Thomas. Thiong drove Meldish and Petitioner to Frenchy's. Petitioner entered the bar, surveilled the clientele, and saw a man she believed to be Thomas Brown, but was in fact the brother, Joseph. Petitioner returned to Thiong's car, told Meldish where in the crowded bar he could find "Thomas," and then Meldish walked into the bar and shot Joseph, killing him.

Thiong was the central witness and testified to the following. Thiong had, prior the murder, often supplied Meldish and Petitioner with crack cocaine. The night of the murder, Thiong gave Meldish drugs, which Meldish and Petitioner consumed. Later that night, around 2:00 a.m., Thiong drove the trio to Frenchy's at Meldish's direction. Thiong testified that, once the car was parked nearby Frenchy's, Meldish and Petitioner began to whisper to each other:

> We get to Frenchy's and Kim [Petitioner] is taking forever to do what she supposed to do. So we sitting there. Like two, three minutes go by, I'm like, Joey [Meldish], what's going on? And he nudges her like go ahead, go ahead Kim. Do what you gotta do. They start whispering.

Trial Tr., ECF No. 14-9, at 348. Eventually, Petitioner exited the car, walked inside Frenchy's, returned minutes later, and told Meldish where a man, a man thought by Petitioner to be Thomas Brown, was sitting.[2] Meldish then entered Frenchy's to carry out the shooting:

> [Petitioner] comes out and she says that Brown is in there sitting, somewhere sitting on a stool. She said the exact stool . . . . Joey then puts the mask on, and the gun. He gets out, he goes inside. The shots went off. I'm ducking in the car because I didn't want anybody to identify me. . . . I almost pulled off. I'm getting real nervous. . . . Kim tells me to wait, and eventually Joey comes out within a minute and he points a gun at me, told me to drive.

Id. at 349. About one week after Joseph Brown's murder, Thiong spoke with Meldish, and Meldish warned him that "he would kill [Thiong] or [his] family if [he] spoke up against the Frenchy's homicide."

Eileen Brown was called by the prosecution to corroborate Thiong's account.[3] She testified to the following. On the night of the murder, Eileen and Joseph Brown arrived at Frenchy's, which was "very crowded" and noisy, and found a few "bar stools" in the back where it was quieter. At some point, Eileen Brown went to use the women's restroom, and while there saw a woman in the mirror "who did not look like [she] fit in th[e] bar" and appeared to be "very heavily on drugs." At trial, Eileen Brown was shown a photograph of Petitioner taken in 2002 and identified the person in the photograph as the woman from "the bathroom in Frenchy's." Around 2:00 a.m. the night of the murder, Eileen Brown heard a "commotion" and saw a man wearing all-black clothing and a ski mask approach. The man pulled out a gun, said "This is for you, Motherfucker," and started firing at Joseph Brown. Eileen Brown fled to a restroom for

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[2] The prosecution introduced several pieces of evidence to show that Thomas Brown and Joseph Brown looked alike. For example, a photograph of Thomas and Joseph standing next to one another was introduced as an exhibit, and both Thomas Brown and Eileen Brown testified that the brothers were similar in age, height, and appearance.

[3] Under New York law, "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborate evidence tending to connect the defendant with the commission of such offense." N.Y. C.P.L. § 60.22.

cover; when she returned, she found Joseph Brown shot dead.

2. The Defense

The defense focused principally on discrediting Thiong and Eileen Brown. Petitioner's trial counsel cross-examined Brown and Thiong, and introduced the testimony of others present at Frenchy's the night of the murder.

On direct examination, the defense examined Mike Hangan, a bartender working at Frenchy's the night of the shooting, and Jason Fox, a bouncer working at Frenchy's that same night. Hangan testified that the bar was very busy that night and that a man with a mask fired several shots at Joseph Brown. Hangan did not recall seeing Petitioner at Frenchy's that night. Fox testified that the bar was crowded and that he was responsible for collecting entrance fees from patrons. Fox testified that around 2:30 a.m., a man walked by him without paying; that Fox chased after the man into the crowd; and that the man then pulled out a gun and began to fire. Like Hangan, Fox did not recall having seen Petitioner that evening.

On cross examination, defense counsel pressed Eileen Brown on the details of her memory. Eileen Brown confirmed she had not mentioned seeing Petitioner in the restroom until meeting with Detective Tracy, years later. Defense counsel asked Eileen Brown if, on the night of the shooting, she had given "all the names of people" she recognized at Frenchy's, and she responded that she had not, because she "was a nervous wreck." Eileen Brown conceded she could not recall the exact time that she went to the restroom. Defense counsel also drew out on cross that Eileen Brown remembered the shooting as taking place approximately 45 minutes after seeing Petitioner in the restroom, which counsel later contrasted with Thiong's testimony that the shooting had taken place within minutes of Petitioner returning to his car.

Defense's cross-examination of Thiong was extensive, spanning nearly 300 pages of trial transcript. Defense counsel brought out to the jury, *inter alia*, that Thiong was a career

drug dealer; that Thiong's Westchester county drug arrest was serious and entailed a substantial potential term of imprisonment; that Thiong had, in the two 1999 interviews, lied to authorities by saying that he did not have knowledge of the Frenchy's murder; and that Thiong had entered into a plea deal (or deals) with the police that resulted in immunity for any conduct relating to the murder and a sentence of time-served for the Westchester drug charges. Thiong made clear that he understood that his testimony against Petitioner obtained for him (a) immunity for the murder of Joseph Brown, and (b) a favorable disposition of the Westchester drug charges:

> Q: Now, when you met with Ms. Scaccia, you are telling this Jury that the only deal you got was immunity from prosecution on this homicide, correct?
>
> A: Incorrect.
>
> Q: Is that correct?
>
> A: That's incorrect.
>
> Q: It's incorrect, you got another deal, what other deal did you get?
>
> A: Time served.
>
> . . . .
>
> Q: You got the misdemeanor as part of the deal with Ms. Scaccia and the Westchester County District Attorney's Office?
>
> A: And immunity.
>
> Q: And immunity. So, the misdemeanor was part of the deal, it wasn't just immunity, correct?
>
> A: Correct.

Trial Tr. at 480:18-481:24. The Defense did not question Thiong on the 2007 interview with law enforcement, in which Thiong had said that Meldish had carried out the murder on his own.

In the defense closing, counsel argued to the jury that Detective Tracy seemed to have a "magical" effect on the ability of witnesses to remember details of the murder:

> It seems that whenever he appeared, all of a sudden, he had this magical effect and everything was put together. Witnesses remembered, the case was made and we move on. He closes the case, which is limited for your consideration, essentially, as far as my client, Kimberly Hanzlik, is concerned, to two people. Trust David Thiong, rely on his testimony. Rely on the memory and accuracy of Eileen Brown. If you have questions that are reasonable then you can't. Then you have to find them not guilty.

Trial Tr., ECF No. 14-13, at 1083. Counsel contended that Thiong's plea deal amounted to a "purchase of his testimony" against Petitioner:

> Was this a purchase of his testimony? Well, nobody paid money for it, but there are other ways to purchase testimony, aren't there? There [are] other ways to purchase things. There is bartering: I give you something, you give me something. In this particular case, instead of facing the . . . felony, many, many years in prison, he's out in eleven months [on time served], and what's the condition for that? Tell us that Joey and Kim did it.

Id. at 1070.

3. The Verdict and Sentence

On February 16, 2011, the jury convicted Petitioner of second-degree murder. On March 9, 2011, Petitioner was sentenced to a term of incarceration of twenty years to life. *See* Sentencing Tr., ECF No. 14-15, at 12:3-4. The First Department of the Appellate Division unanimously affirmed the conviction on May 15, 2012, *People v. Hanzlik*, 945 N.Y.S.2d 229 (1st Dep't 2012), and the New York Court of Appeals denied Petitioner's application for leave to appeal on August 20, 2012, *People v. Hanzlik*, 19 N.Y.3d 997 (2012).

B. Posttrial Proceedings

1. First § 440 Motion

On June 25, 2013, Petitioner, via new counsel, moved pursuant to N.Y. C.P.L. § 440.10 to vacate her conviction on the ground that trial counsel, Jonas Gelb, was ineffective. *See* SR 20, 39. Petitioner contended that Gelb's failure to impeach Thiong with the statements made in his third interview with police—reflected in the handwritten notes and DD5 report and

which inculpated Meldish but exculpated Petitioner—rendered Gelb ineffective. Gelb claimed to have never received the DD5 report (although a private investigator hired by Petitioner's new counsel claimed to have found the DD5 report in Gelb's files, *see* SR 29).

The Bronx County Supreme Court denied Petitioner's motion on February 20 2014, reasoning in part that, whether or not Gelb had been given the DD5 report, Petitioner had not demonstrated that Gelb's failure to question Thiong was prejudicial:

> [T]here is nothing to suggest that the introduction of the statement or questioning of Thiong regarding the statement would have brought about a different result.
>
> . . .
>
> A review of the trial transcript indicates an exhaustive cross-examination by counsel of Thiong. Counsel elicited that Thiong had made numerous statements both exculpating and inculpating both defendant Hanzlik and co-defendant Meldish. Counsel established that Thiong did not make a statement which inculpated Hanzlik and Meldish until he was given immunity for his participation in the murder. . . . Thus the jury was keenly aware of the inconsistencies and discrepancies in the numerous statements made by Thiong.
>
> . . . .
>
> [C]ounsel attempted to discredit Thiong's August 2007 statement to Det. Tracy, in which he inculpated both defendants, by introducing two statements made by Thiong to other detectives in April and August 1999, in which he exculpated both of them; and by attributing the abrupt turn-around in Thiong's statement to improper influence or inducement by Det. Tracy. . . . Both counsel argued that obviously Det. Tracy had induced Thiong to inculpate the defendants . . . . Thus, the strategy was to present Thiong's trial testimony as a manufactured, and hence, unbelievable departure from his earlier truthful statements.
>
> . . . .
>
> That position—that there was a complete turnaround in Thiong's account of the incident once Det. Tracy got involved—would not have been advanced by a report that showed that Thiong's account had incrementally changed . . .

SR 12-15. The First Department unanimously affirmed on April 9, 2015, echoing the lower court's finding on prejudice:

> [D]efendant has not satisfied the prejudice prongs of either a state or federal ineffectiveness claim. Defendant has not shown that counsel's failure to use the statement at issue deprived defendant of a fair trial, or that there is a probability sufficient to undermine confidence in the outcome that use of the statement would have led to a more favorable verdict. Under the circumstances, the jury would likely have perceived the statement as merely another inconsistent statement made by the witness long before he entered into a deal with the prosecutors. As the trial actually unfolded, the jury chose to credit the witness's testimony, and discredit the contradictory earlier narrative. It is not likely that introduction of a half-consistent, half-inconsistent statement would have altered the jury's analysis.

People v. Hanzlik, 8 N.Y.S.3d 271, 272 (1st Dep't 2015) (quotation marks omitted). The Court of Appeals denied leave to appeal. *See People v. Hanzlik*, 25 N.Y.3d 1164 (2015).

2. Second § 440 Motion

On March 28, 2016, after again retaining new counsel—counsel in this present action—Petitioner filed a second § 440 motion seeking vacatur of her conviction, raising three main arguments: (a) Gelb was ineffective; (b) the government withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (c) Petitioner was actually innocent. *See* SR 346.[4] Petitioner contended principally that whether or not Gelb had been given the DD5 report: Gelb received the handwritten notes containing the same information; Gelb failed to cross Thiong on the notes on the erroneous view that the notes could not be introduced as an exhibit; the assistant ADA who opposed Petitioner's first § 440 motion had, during that round of § 440 proceedings, procured an affirmation from Gelb confirming that Gelb's failure to cross Thiong on the notes was due to his incorrect view as to their inadmissibility, not any strategy[5]; and that the ADA had

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[4] While the Supreme Court has not expressly recognized "actual innocence" as a cognizable standalone habeas claim, *see McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013), such relief is available in New York state habeas proceedings, *see People v. Hamilton*, 979 N.Y.S.2d 97, 108 (2d Dep't 2014).

[5] Gelb's affirmation suggests that he believed he could not question Thiong on the handwritten notes because, in the notes, "the author was unidentified and the document itself was undated." SR 422. This is contrary to New York and Second Circuit law, which provide that counsel need only have a "good faith" basis for posing a question on cross-examination. *See, e.g., People v. Crawford*, 256 A.D.2d 141, 142 (1st Dep't 1998) (citing, *inter alia*, *People v. Schwartzman*, 24 N.Y.2d 241 (1969), *cert. denied* 396 U.S. 846; *United States v.*

failed to submit Gelb's affirmation to the court in violation of *Brady*.

The Bronx County Supreme Court denied Petitioner's motion on August 24, 2016, *see* SR 472, and denied her motion for reargument on December 8, 2016, *see* SR 501. Leave to appeal that decision was denied.

3. Federal Habeas Petition

Petitioner filed the instant federal habeas action on August 29, 2017, claiming ineffective assistance of trial counsel, prosecutorial misconduct, and actual innocence. *See* ECF No. 1. The government filed an opposition, *see* ECF Nos. 14, 15, and oral argument was set for June 19, 2018, *see* ECF No. 20. Around six weeks before the scheduled argument, Petitioner submitted a letter notifying the Court that the transcript of Thiong's 2007 plea to Westchester County drug charges had been unsealed. Petitioner alleged that the unsealed minutes showed that, despite the government's trial attorney—Bronx ADA Christine Scaccia—denying at trial that there was any agreement on the part of the Bronx DA's office concerning the disposition of Thiong's Westchester County charges, there was in fact a three-way agreement between Thiong, the Westchester DA's office, and the Bronx DA's office. *See* ECF No. 21, at 1-2. Petitioner pointed to a passage of the minutes in which Westchester county ADA Kevin Kennedy described the meeting that took place between, *inter alia*, his office, the Bronx DA's office, and Thiong, shortly before Thiong's plea:

> Earlier this morning there was a meeting had in the courthouse between the representatives of the Bronx District Attorney's Office as well as . . . the New York Police Department. The understanding between all parties, *which will include the Bronx District Attorney's Office*, is as follows: The defendant is to give full and complete cooperation to the Bronx District Attorney's Office in an ongoing homicide investigation. This shall include but is not necessarily limited

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Concepcion, 983 F.2d 369, 391 (2d Cir. 1992). The record reflects that Gelb later asked the government lawyer with whom he was communicating to amend this affirmation, which led to Gelb filing a second affirmation that, among other things, no longer included the language indicating that Gelb believed he was not allowed to introduce the notes. *See* SR 429.

> to his truthful, full testimony before the Bronx County Grand Jury in the near future. And of course if necessary trial testimony. If his cooperation is completed, we will, based on a representation of the Bronx District Attorney's Office that that was so, allow him to withdraw his previously entered plea to criminal possession of a controlled substance in the fifth degree, have him withdraw that and just proceed to sentence on the possession. . . . It's represented by the Bronx District Attorney's Office that they will request a withdrawal of the charges of the parole violation.

Id. at 2 (quoting David Thiong Plea Tr., ECF No. 33-2, at 4-5) (emphasis added by Petitioner). Petitioner contrasted this description of Thiong's cooperation arrangement with Scaccia stating at the trial that any deal with Thiong as to his Westchester drug charges was made under the sole prerogative of the Westchester DA's office:

> The Court: So, the question Ms. Scaccia to you is, whether the deal [between the Bronx DA's office and Thiong] included this . . . time served and a misdemeanor in Westchester or not.
>
> Ms. Scaccia: No, they were bringing him up there to take the deal that day. . . . I went over there and made the deal on the murder. . . .
>
> The Court: . . . Your understanding was with Mr. Thiong did not include any plea to a misdemeanor on a Westchester case?
>
> Ms. Scaccia: That was their deal with him. And, the one thing they did ask me if I had any opposition to it and I said no, he can be sentenced, they can do whatever they want.

Trial Tr. at 494 (cited at ECF No. 1).

The government filed a response letter noting, *inter alia*, that because "the plea had been taken in Westchester County and had been entered under seal and not unsealed until recently," the Bronx District Attorney had only obtained it "about a week" before Petitioner filed her letter notifying the Court of its existence. ECF No. 22, at 1.

On May 18, 2018, I issued an order staying the case to allow Petitioner to pursue a new claim in state court based upon the newly released plea minutes. *See* May 2018 Order, ECF No. 23. In the order, I explained that a stay was the proper response to new evidence that

had not yet been considered by the state courts:

> [I]n federal habeas proceedings of this kind, I am not permitted to consider materials that have not yet been reviewed by the state court that adjudicated petitioner's claim. As the Supreme Court explained in *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." . . . . I am bound by this precedent.

Id. at 6-7. I noted that while the plea minutes provided Petitioner with a "colorable" claim, she would still "ultimately have to demonstrate that, taken cumulatively with the remainder of the evidence, there is a *reasonable probability that the result of her case would have been different*." *Id.* at 7-8 (emphasis added) (quotation marks omitted). I instructed Petitioner to promptly file a new claim in state court and cautioned that, for the time being, this "Court expresse[d] no views on the merits of the underlying petition as it was originally presented." *Id.* at 2 n.1.

4. Third § 440 Motion

Petitioner filed her third § 440 motion in June, 2018, citing the unsealed plea minutes as evidence that Thiong, ADA Scaccia (on behalf of the Bronx DA's office), and the Westchester DA's office, entered into a "global resolution of *all* of Thiong's pending matters[,] which included his case in Westchester." Cohen Aff. in Support of § 440 Motion, ECF No. 33-1, at ¶ 16. The government opposed, citing a sworn statement from Scaccia that she had never asked the Westchester County DA's office to take a particular action on Thiong's Westchester charges, that her offer of immunity on the murder was independent, and that she never saw the plea transcript and was thus unaware of comments made therein implying that the Bronx DA's office was part of any three-way deal. *See* Gov't Opp. Mem., ECF No. 36-2, at 33-34.

The Bronx County Supreme Court scheduled a hearing on Petitioner's motion. *See* Nov. 16 2018 Order Granting Hearing, ECF No. 33-3. The court limited the hearing to, *inter alia*, questions regarding the extent to which (1) "the Bronx District Attorney's office was

involved in any offers . . . in related proceedings," and (2) "any facts not disclosed or belatedly disclosed affected the ability of the defense to challenge the witness's credibility at trial." *Id.* at 2. The hearing was held over three days spanning from late January to mid-February 2019. *See* Hearing Tr., ECF No. 33-4.

i. Petitioner's case

Petitioner opened by calling her trial counsel, Jonas Gelb. Gelb testified that at the time of trial, he was aware that Thiong had been given immunity for the murder and that Thiong was simultaneously facing drug charges in Westchester. *Id.* at 7:12-21. Gelb testified that Scaccia had informed him that "the only promise or the only thing she was part of or knew about was the murder case . . . in the Bronx, but she was not part of any sentence that he received in Westchester." *Id.* at 7:23-8:1. Gelb recalled that Thiong "was cross examined extensively about the fact that he received such a light sentence and such an ultimate deal based upon his record and the charges against him in Westchester." *Id.* at 8:2-4.

Gelb affirmed that Scaccia indicated to him that "she had no involvement in . . . the disposition of the Westchester County case," *id.* at 9:7-10, and that if Gelb had known of any joint cooperation agreement between Thiong and both DA's offices, he would have "used that information" to "ask[] more questions," *id.* at 10:25-11:5, 13:12. However, Gelb conceded he had "questioned Mr. Thiong quite vigorously regarding the disposition of that Westchester case, which seemed like the greatest sweetheart deal," *id.* at 11:10-12, and, when asked on cross, Gelb was unable to provide examples of additional questions he would have asked on the minutes:

> Q: So what else would you have asked him that you didn't have the ability to ask him, but you didn't know about a deal?
>
> A: Well, I think if I had had, and I believe they were sealed at the time, so we weren't able to get his plea minutes out of Westchester, that's my recollection, and if that's the case, I would have gone into that plea and seen what it said.

. . . .

> Q: Okay. I'm going to ask again, sir, what questions would you have asked that you did not have the ability to ask[?]
>
> A: . . . [I]f I had the actual deal exactly what it said, and what promises were made, I think I would have gone into more detail about it. . . . well, you're asking me what I would have said, so I'm telling you. . . . Now, if you're asking me what I would have asked, it depends on what would have been revealed as to the exact details of the promise.

Id. at 17:11-18:19.

Next, ADA Scaccia was called to testify. Scaccia testified that at the time she met Thiong, he was already in custody in Westchester, and that Scaccia needed to communicate with the Westchester DA's office in order to set up a meeting with Thiong. *See id.* at 36:17-23. Scaccia recalled speaking with the Westchester DA's office to schedule a meeting with Thiong, but did not recall details from these conversations. *See id.* at 37:9-20. Scaccia testified that on the day that Thiong was set to appear in Westchester court, Scaccia met with Thiong, Thiong's attorney, Westchester ADA Patrick Moore, and Bronx Detective Tracy, at which time Thiong was given a "queen for a day" deal to speak freely about the events surrounding the murder. Scaccia testified that she decided during this meeting that she would like to call Thiong as a witness in the murder trial; that she left the meeting before Thiong's plea; and that she did not attend Thiong's plea. *See id.* at 46-49.

Scaccia testified repeatedly that there was no agreement on her part that Thiong was to receive a benefit from the Westchester DA's office on his drug charges. *See, e.g., id.* at 62:21-22 ("Whatever Westchester County did with Mr. Thiong was Westchester County's deal with Mr. Thiong."); 67:14-17 ("Q: Did . . . Mr. Thiong, during cross examination, state that in addition to immunity, he had received time served on the drug charge, do you recall that? A: That was his Westchester deal . . ."); 79:23 ("I was not involved in that at all."); 82:5-7 ("Q: And

as far as you were concerned, whatever Westchester wanted to do was up to them? A: Yes."). Scaccia affirmed that she was not aware that reference was made at Thiong's Westchester plea hearing to his promised testimony in the homicide trial. *See id.* at 87:4-15. Finally, Scaccia testified that, prior to Thiong's plea, she received a call from a Westchester ADA asking whether it would interfere with Scaccia's prosecution of the homicide if the ADA were to offer Thiong some kind of a deal on the Westchester drug charges. Scaccia believed this inquiry was made as a "professional courtesy." *See id.* at 94:11; *id.* at 101:3-5 ("[H]e knows he has a defendant I'm interested in using as a witness, so he reached out and was asking if I had any objection to it going forward.").

Next, Murray Richman, the attorney who represented Meldish at trial was called. Richman testified that, at the time of the trial, Scaccia advised the defense that she had gone to see Thiong in Westchester County, but that "there was no deal" between her and Thiong as to the Westchester drug charges. *See id.* at 118:11-15.

ii. The Government's case

The government's only witness was Patrick Moore, who was chief of the gang violence and firearms bureau in the Westchester DA's office at the time of Thiong's plea. *See id.* at 131:1-18. Moore testified that he was present at the August 16, 2007 meeting with Thiong and that he did not recall any discussion with Scaccia at that meeting regarding a disposition of the Westchester drug charges. *See id.* at 133:15-17. Moore was asked to review Thiong's case file from Westchester, and testified that the file indicated that there were "issues" with the case against Thiong that were recorded before any contact with Scaccia, *e.g.*, a confidential informant upon which the government would need to rely for prosecution of Thiong's drug charges was not willing to cooperate. *See id.* at 134:1-24. Moore testified that in such circumstances, it would not be unusual to offer the defendant a plea to a lesser charge. *See id.* at 136. Moore testified

that he was not aware of Scaccia asking him or anyone in the Westchester DA's office "to do anything for [Thiong] on the Westchester case." *Id.* at 136:20-22. Moore was not present at Thiong's actual plea hearing. *See id.* at 143:5-9.

On cross, Moore was shown notes from the case files of the Westchester DA's office. One of the notes, made by Kevin Kennedy, the Westchester ADA who was present at Thiong's plea, said "CI [confidential informant] to provide information regarding a homicide that took place several years ago in Bronx allegedly by the target in exchange for a reduced plea and sentence on Westchester drug possession case." *Id.* at 142:5-8. Moore testified that Kennedy was the ADA present at Thiong's plea hearing. *See id.* at 143:8-11.

iii. Ruling

On April 8, 2019, the Bronx County Supreme Court denied Petitioner's motion. The court commented that it was "unsettling" that Scaccia had "attempt[ed] to insinuate during her summation that she indeed could have offered the defendant something in his Westchester case in exchange for his testimony, while simultaneously denying the existence of any influence over the Westchester outcome," and that it was "farfetched" that Scaccia did not recall the details of her conversation with the Westchester ADA aside from arranging a meeting with Thiong. April 8, 2019 Decision, ECF No. 33-6, at 14-15. Nonetheless, the court reasoned that while Thiong's favorable plea in Westchester county might "suggest a potential violation of *Brady*" if in fact the prosecution failed to disclose a three-way agreement between the Westchester DA, Bronx DA, and Thiong, other possibilities were just as likely:

> [It is] also conceivable that the two offices had separate agendas, or that the Westchester DA just chose to accommodate Bronx without it being a deal. . . . The only aspects of the situation which have now surfaced are the Westchester ADA's running notes and the August 16, 2007 [sealed plea] transcript, which reveals the ADA's characterization of the plea to the Westchester judge. ADA Scaccia repeatedly affirmed that she was not present at the plea or sentencing of Thiong during the trial, in her affirmation and at the 440 hearing. She could not

have known what the Westchester prosecutor actually said to the court.

. . . .

It was not incumbent on the Bronx Assistant District Attorney to explain how notes that could imply a three way deal were in the Westchester ADA's file unless of course she knew. The defendants did not call ADA Kennedy. Neither did defendants call Thiong's attorneys as to the negotiations that ensued after ADA Scaccia left the Westchester courthouse. A hearing court is left to conjecture whether the Westchester DA's office acted independently because of issues in their case, or as a courtesy to the Bronx DA, or for other reasons.

Id. at 11, 14. The court also noted that Petitioner's counsel had "vigorously" attacked Thiong's credibility at trial due to his deal with the Bronx DA's office and his favorable Westchester plea, and that further exploration of a three-way deal would not have changed the picture for the jury:

[T]he defense had a full opportunity to cross examine the witness at trial and did so vigorously. Both defense attorneys during their cross examinations asked Thiong if his understanding of his cooperation deal included a plea to a misdemeanor on his Westchester narcotics case and time served plus ninety days on his violation of parole. Thiong agreed that he received other benefits beyond immunity. Thiong may have believed based upon the timing of the plea and a conjoined meeting with both District Attorney's offices that his cooperation agreement included immunity as well as the Westchester plea as evidenced by his testimony during the trial. But both defense counsel amply cross examined Thiong's credibility based upon Thiong's understanding of the various parameters of the cooperation agreement. In their summations, both counsel attacked Thiong's credibility based upon his plea deal. The jury was able to consider each of these issues in conjunction with Thiong's credibility and, nonetheless, found each of the defendants guilty.

Id. at 12-13 (quotation marks omitted).

iv. Postruling procedural history

The Appellate Division's First Department denied leave Petitioner leave to appeal on July 23, 2019. *See People v. Hanzlik*, 2019 WL 3294947, 2019 N.Y. Slip Op. 75876(U) (1st Dep't, July 23, 2019). That October, Petitioner notified the Court of the First Department's ruling, and I lifted the stay and ordered supplemental briefing. *See* ECF Nos. 24, 29.

Discussion

Petitioner's federal habeas petition raises three challenges to her conviction: (1) prosecutorial misconduct; (2) ineffective assistance of counsel; and (3) actual innocence. None of these claims warrants disturbance of her conviction, for the reasons that follow.

A writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The most recent state court ruling clearly adjudicated Petitioner's claim of prosecutorial misconduct on the merits, but did not address Petitioner's claims of ineffective assistance and actual innocence. Although the two earlier rounds of state court decisions denying Petitioner's § 440 motions expressly rejected her ineffective assistance and actual innocence claims, for the avoidance of doubt I assume that the most recent decision is operative for purposes of review, and review these claims *de novo*.[6]

I begin by rejecting Petitioner's freestanding claim of actual innocence. As the Second Circuit recently explained: "Actual innocence is not itself a constitutional claim—except

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[6] The Supreme Court recently held that, in § 2254 petitions, federal courts are to "'look through' the state appellate courts' 'unexplained decision[s] to the last related state-court decision that *does* provide a relevant rationale.'" *Scrimo v. Lee*, 935 F.3d 103, 111 (2d Cir. 2019) (quoting *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)). Here, however, Petitioner—who does not specifically address the correct standard of review in her most recent round of briefing—seems to suggest that the unsealed plea minutes changed the complexion of her ineffective assistance claim vis-à-vis the evidence as presented in her earlier § 440 petitions, *see, e.g.*, Reply Mem. in Support of § 2254 Pet., ECF No. 39, at 2, making it perhaps arguable that less deference should be applied than that commanded by AEDPA. *Cf. Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts . . . never reached the issue . . . we examine this element of the *Strickland* claim *de novo*."). The Court need not resolve this question because, for the reasons stated above-the-line, even under *de novo* review, Petitioner's ineffective assistance claim fails.

perhaps when raised in the context of an Eighth Amendment challenge to a capital sentence." *Hyman v. Brown*, 927 F.3d 639, 656 n.20 (2d Cir. 2019) (quotation marks omitted). An actual innocence claim, "[e]ven if successful, . . . cannot itself afford [Petitioner] habeas relief from [a] state conviction," and instead is only capable of—in extraordinary circumstances—"open[ing] a gateway to federal review of an otherwise procedurally barred" constitutional claim. *Id.* at 655. Here, Petitioner's claim is not procedurally defaulted,[7] because it was made within one year of a "factual predicate" of her claims, *i.e.*, the unsealed plea minutes, and thus the actual innocence gateway is irrelevant. *See* 28 U.S.C. § 2244(d)(1)(D).

Despite the convolution of the factual and procedural history of Petitioner's claims of ineffective assistance and prosecutorial misconduct, the legal resolution of these claims is straightforward: These claims must be rejected for the simple fact that she was not prejudiced by any of the trial deficiencies she alleges. To succeed on a claim of ineffective assistance or prosecutorial misconduct, a claimant must show that she was prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (one must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense"); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (to make out a claim under *Brady*, "[t]he evidence at issue must be favorable to the accused"; that "evidence must have been suppressed"; and "prejudiced must have ensued"). To establish prejudice under *Strickland*, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding would have been different." 466 U.S. at 694. As to prejudice under *Brady*, we ask if the evidence was "material," that is, we ask whether "there is a reasonable probability that, had the evidence been

[7] The government argues that Petitioner's claims are untimely. *See* Gov't Opp. Br., ECF No. 15, at 29, Gov't Supp. Opp. Br., ECF No. 37, at 3. But while the government focuses its efforts on contesting Petitioner's ability to make a showing of actual innocence, the government ignores the statutory basis for filing a petition after new evidence is discovered, *see* 28 U.S.C. § 2254(d)(1)(D), and the resultant significance of the plea minutes being unsealed in the spring of 2018.

disclosed to the defense, the result of the proceeding would have been different." *United States v. Orena*, 145 F.3d 551, 557 (2d Cir. 1998) (quotation marks omitted). "It is well settled that where ample ammunition exists to attack a witness's credibility, evidence that would provide an additional basis for doing so is ordinarily deemed cumulative and hence immaterial." *Id.* at 559; *see also United States v. Avellino*, 135 F.3d 249, 257 (2d Cir. 1998); *United States v. Jackson*, 345 F.3d 59, 74 (2d Cir. 2003) ("A new trial is generally not required . . . when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.") (quotation marks omitted).

The evidence Petitioner claims was either (a) not properly examined by trial counsel or (b) shrouded by the prosecution, would have been entirely duplicative of evidence and arguments already put in front of the jury. Petitioner claims that trial counsel was ineffective for failing to cross Thiong on his third interview with the police, in which he inculpated Meldish but exculpated Petitioner. But as detailed *supra*, trial counsel cross-examined Thiong thoroughly, in the process making it clear to the jury both that Thiong has partaken in an abundance of criminal conduct, and that Thiong had twice falsely told the police that he knew nothing about the murder. Trial counsel also ably drew the jury's attention to a number of weaknesses in the government's case, ranging from Eileen Brown's delayed identification of Petitioner, to discrepancies as to the exact timing of the shooting, to the testimony of Frenchy's employees having not seen Petitioner on the night of the murder, to the absence of physical evidence. As the New York state court decisions observed, questioning on Thiong's third interview would have been repetitive of the evidence showing that Thiong had given multiple precursor accounts of the murder that did not comport with his final story, and may also have undercut the theory that Thiong constructed a narrative wholly under the influence of Detective Tracy. It was not error to reject a *Strickland* claim based upon these facts.

As for the *Brady* allegations, Petitioner claims that the prosecution concealed evidence either (a) having to do with Thiong's third interview with police, or (b) Thiong's plea deal on the Westchester drug charges.[8] To start, I note that, as the state court observed, two individuals present at the meeting between the Bronx DA's office, Westchester DA's office, and Thiong, testified that the Bronx DA's office was not involved in resolving Thiong's Westchester drug charges. What's more, Petitioner did not call as a witness ADA Kennedy, the ADA whose comments at Thiong's plea suggested a possible three-way deal and, as a result, predicated the stay imposed by this Court. Nor did Petitioner introduce testimony from Thiong's counsel or other parties present at the August 16, 2007 meeting. This, the state court reasoned, precluded a finding that there was a three-way deal to be concealed. These facts alone support rejection of the *Brady* claim concerning an alleged arrangement with the Westchester and Bronx DA's offices. *See* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue by a State court shall be presumed to be correct. The applicant shall have the

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[8] Petitioner also seems to attempt a *Brady* claim based on the failure to disclose Gelb's affirmation, in which Gelb stated that he believed he could not introduce the handwritten notes documenting Thiong's third interview with law enforcement at trial. This argument essentially duplicates the claim that it was prejudicial for Petitioner to conceal evidence of Thiong's interview with the police. For the same reasons, as explained above-the-line, that withholding of information on Thiong's third interview with police was immaterial, so too was Gelb's view as to admissibility of such information immaterial. I also note that, while this issue is not addressed by Petitioner, the Supreme Court has declined to extend *Brady* to postconviction state proceedings—the government's alleged failure to disclose Gelb's affirmation took place in the context of Petitioner's postconviction § 440 motions. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

Finally, Petitioner makes a secondary *Brady* claim that the prosecution "failed to correct" Thiong's testimony that "he did not know if he ever spoke again to law enforcement" after his second interview, Pet. Supp. Mem., ECF No. 33, at 7, but this claim is internally contradictory and contrary to the trial transcript, as it is clear that Thiong simply was unclear on the timing of any further discussions with law enforcement. *See* Trial Tr. at 488-89. This did not give rise to an duty on the part of the prosecutor to intervene. And in any case, because this testimony concerned Thiong's much-discussed (in this order) third interview, even if the testimony were false it would "not rise to the level of a [Constitutional] violation" because there was not a "reasonable likelihood that the testimony affected the judgment of the jury" or "the outcome of the trial." *Mills v. Scully*, 826 F.3d 1192, 1195 (2d Cir. 1987).

burden of rebutting the presumption of correctness by clear and convincing evidence.").

But assuming *arguendo* that this evidence was so concealed, such concealment was not prejudicial. For one, evidence of Thiong's third interview would not have meaningfully changed the mix of evidence presented to the jury for the reasons already discussed. And as to the Westchester drug deal, here too the jury already had the full argument that Petitioner claims she was deprived of making. Trial counsel's cross underscored the seriousness of the charges against Thiong and made clear that Thiong had been guaranteed immunity on the murder charge. Not only that: Thiong testified that he understood his plea deals with the Bronx and Westchester DA's offices to provide not just for immunity on the murder, but for a plea of time served on his drug offenses. Whether this deal did or did not involve the Bronx DA's office, the jury was made aware that Thiong gave his testimony with an expectation of favorable treatment on the Westchester drug charges. Indeed, trial counsel referred to the favorable Westchester result in a long closing statement that argued first and foremost that Thiong's testimony was "purchased." In short, the "main thrust [the] defense" was to challenge Thiong's credibility, but the "jury was unimpressed." *Jackson*, 345 F.3d at 75. To reject the *Brady* claim was to reasonably apply federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d).

To summarize: Even if counsel's performance fell below an objective standard of reasonableness, and even if the details of a three-way deal and Thiong's third interview with the police were improperly withheld by the prosecution, counsel's performance was not prejudicial and the withheld information was not material. The habeas petition must therefore be denied.

Conclusion

For the reasons stated herein, the petition is denied. As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); *Matthews v. United States*, 682 F.3d 180, 185 (2d Cir. 2012).

The Clerk is directed to terminate the motion (ECF No. 33) and close this case.

SO ORDERED.

Dated: New York, New York
February 12, 2020

ALVIN K. HELLERSTEIN, U.S.D.J.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK, **440 Hearing**

DECISION & ORDER

-against-

Ind. # 4344/2007

JOSEPH MELDISH

KIMBERLY HANZLIK,

Defendants.

APRIL A. NEWBAUER, J.:

On November 5, 2018, this court granted a hearing on post-conviction motions brought by defendants Joseph Meldish[1] and Kimberly Hanzlik[2]. Pursuant to Criminal Procedure Law (CPL)

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[1] Procedural History regarding defendant Meldish:
On February 16, 2011 in Bronx County, the defendant Meldish was convicted of murder in the second degree. On October 18, 2011, following Justice Webber's denial of defendant's CPL 330 motion to set aside the verdict, the defendant was sentenced to a term of imprisonment of twenty-five years to life.

[2] Procedural History regarding defendant Hanzlik:
On February 16, 2011 in Bronx County, the defendant Hanzlik was convicted of murder in the second degree. On March 28, 2011, after Justice Webber denied defendant's CPL 330 motion to set aside the verdict, she was sentenced to a term of imprisonment of twenty years to life. On May 15, 2012, the First Department unanimously affirmed her conviction (*People v. Hanzlik*, 95 A.D3d 601 (1st Dept 2012)). On August 20, 2012, the Court of Appeals denied leave to appeal the First Department's decision (*People v. Hanzlik*, 19 NY3d 997 (2012)). On July 14, 2013, the defendant filed her first CPL §440 motion to vacate the conviction on the grounds of ineffective assistance of counsel because her attorney fail to cross-examine the cooperating co-conspirator, David Thiong, about a prior inconsistent statement. On February 20, 2014, defendant's motion was denied as the court found there was nothing to suggest that the introduction of the statement or questioning of Thiong would have brought about a different result (*citing Harrington v. Richter*, 131 SCt 770 (2011)). On December 4, 2014, the defendant filed an appeal. On April 9, 2015, the First Department unanimously affirmed her conviction (127 AD3d 447 (1st Dept 2015)).

sections 440.10(1)(f) and 440.10(1)(h), the defendants moved to vacate their convictions of murder in the second degree based on alleged *Brady* violations by the Bronx District Attorney's office. Defendants alleged that the District Attorney's Office withheld *Brady* material in the form of concealing the extent of its involvement in reaching a plea agreement with cooperating witness David Thiong. The defendants had sought and obtained sealed plea minutes from Thiong's Westchester guilty plea on August 16, 2007 in which the Westchester DA's office represented to the court in Westchester as follows:

> Earlier this morning there was a meeting had in the courthouse between the defendant and representatives of the Bronx District Attorney's office as well as the New York, the New York Police Department. The understanding between all parties, which would include the Bronx District Attorney's Office, is as follows: This defendant is to give full and complete cooperation to the Bronx District Attorney's Office in an ongoing homicide investigation. This shall include but is not necessarily limited to his truthful, full, truthful and full testimony before the Bronx County Grand Jury in the near future. And of course if necessary trial testimony. If his cooperation is completed, we will be, we will, based on a representation of the Bronx District Attorney's Office that that was so, allow him to withdraw his previously entered plea to criminal possession of controlled substance in the fifth degree, have him withdraw that and just proceed to sentence on the possession seventh...(Minutes, Ex E, White

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On March 28, 2016, Hanzlik moved a second time to vacate her conviction on the grounds of ineffective assistance of counsel or alternatively, to renew and reargue the denial of her prior motion to vacate her conviction and to dismiss the indictment on actual innocence grounds. The motion was denied. The defendant reargued the denial, claiming the court misapprehended the law. Relying on the recent First Department case of *People v. Jiminez,* 2016 NY Slip Op 05620, the court found that the court in denying the defendant's appeal and unanimously affirming her conviction, essentially foreclosed the defendant's claim of actual innocence. Thiong's interview with the detectives was referred to as a "half-consistent, half-inconsistent statement" that would 'not likely persuade a jury' and the complaining witness's identification testimony was corroboration 'placing the defendant at the scene', which would contradict Thiong's statement. The defendant's factual allegations lacked sufficient merit to warrant the exercise of the court's discretion to grant a hearing surrounding use of the Thiong statement as an actual innocence claim.

In a decision dated August 24, 2016, the court found the defendant failed to meet her burden of establishing by clear and convincing evidence that she was actually innocent of the crime of murder in the second degree . On October 14, 2016, the First Department denied the defendant permission to appeal. In a decision dated December 8, 2016, this court denied defendant's motion to reargue her September 19, 2016 motion, as defendant simply reiterated the issues argued in her prior motion. On August 29, 2017, defendant petitioned the United States District Court for the Southern District for a writ of *habeas corpus,* which is being held in abeyance pending resolution of the current motion.

affirmation.)

The assigned Assistant from the Bronx District Attorney's office denied the existence of a three-way deal: "My offer was wholly independent of any Westchester County offer on SCI 440S-2007". (Affirmation of Christine Scaccia, Ex.1 to People's opposition)

Upon review of the documentation submitted and considering the relevant statutes and case law presented in the moving papers, the court conducted a hearing.[3] The hearing was commenced on January 28, 2019 and concluded on February 11, 2019. The parties were given an opportunity to supplement the hearing with additional memoranda of law and each side filed additional papers. At the conclusion of the hearing and upon consideration of the testimony at the hearing as well as the trial transcript, court file and legal authority, the defendants' motions to vacate their convictions pursuant to CPL § 440.10(1)(f) and 440.10(1)(h) are denied.

The court reviewed the following submissions regarding the motion:

Defendant Meldish's notice of motion and affirmation of Brendan White, supporting documents and Memorandum of Law, filed April 30, 2018;

Defendant Hanzlik's notice of motion and affirmation of Irving Cohen, supporting documents and Memorandum of Law filed June 13, 2018;

People's Notice of Motion to Rescind Appointment of Special District Attorney filed June 21, 2018;

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[3] The court granted a hearing to determine the factual issues involving defendant's motion including 1) the extent to which the Bronx District Attorney's office was involved in any offers to the cooperating witness in related proceedings; 2) precisely what was disclosed regarding any such offers to defense counsel, and in what form and when the disclosures were made; and 3) the extent to which any facts not disclosed or belatedly disclosed affected the ability of the defense to challenge the witness's credibility at trial.

People's Affirmations in Opposition to defendant Meldish's motion and Memorandum of Law and Exhibits 1-5 filed August 21, 2018;

People's Affirmations in Opposition to defendant Hanzlik's motion and Memorandum of Law and Exhibits 1-9 filed August 21, 2018;

Defendant Meldish's Reply Memorandum filed September 18, 2018;

Defendant Meldish's Post Hearing Memorandum of Law in support of motion to vacate pursuant to CPL § 440.10 filed 3/1/2019

People's Post Hearing Submission filed 3/1/2019

Defendant Hanzlik's Post Hearing Memorandum of Law in support of motion to vacate pursuant to CPL § 440.10 filed 3/4/2019

Complete trial transcript and court file

The defendants seek to vacate the judgment of conviction pursuant to CPL § 440.10 based on the hearing record and the unsealed plea minutes of Thiong from Westchester County on August 16, 2007. Defendant Meldish claims that in violation of *Brady v Maryland*, 373 US 83 (1963), the United States Constitution and New York State Constitution, the People failed to disclose the true nature of Thiong's cooperation agreement. Defendant Hanzlik concurred and added that the Bronx ADA was not candid about the agreement she had with David Thiong, and thus violated her *Brady* obligation, hindered defense counsel's cross examination and hampered the prior claim defendant raised of ineffective assistance of counsel.

In opposition, the People contend that they did not make any misrepresentations regarding Thiong's cooperation agreement. Moreover, the jury had ample information regarding Thiong's cooperation which the defense attorneys thoroughly used in cross examination and in arguing that Thiong was compromised by his cooperation. Finally, if there was any failure to disclose *Brady*, it

would not have changed the outcome of the case.

The Witnesses

During the hearing, counsel for defendant Hanzlik called Jonas Gelb, Esq. Gelb represented defendant Hanzlik during the hearing and trial in 1999. Gelb had a specific recollection that a witness at the trial, David Thiong, who was considered an accomplice[4] of the defendants in committing the murder, cooperated with the People and testified in the grand jury with immunity and at trial against Meldish and Hanzlik. Gelb recalled that he was made aware during his cross examination of Thiong, that Thiong had charges pending in Westchester county for sale and possession of a large quantity of drugs, with a potential maximum sentence of 25 years' incarceration. Thiong's sentence exposure was significant because of his criminal history, and the fact that Thiong was on parole at the time.[5] Yet he was offered a plea to a misdemeanor and a minimal sentence if he fulfilled his cooperation deal in the Bronx.

Gelb testified that the Bronx ADA informed both the trial judge and the defense counsel that she had no involvement in the disposition of the Westchester matter. Gelb asked and was told that Thiong's deal only involved immunity for the homicide and did not involve any sentence he would receive on the Westchester case. Gelb testified that in his cross examination of Thiong, he acted under the assumption that the Westchester District Attorney's office was free to do whatever it

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[4] Thiong testified that he was the getaway driver for the defendants.

[5] The People introduced four pages of the trial transcript marked People's Exhibit #1 to refresh Mr. Gelb's recollection that Thiong believed that his deal included testimony in the grand jury and at trial and as part of the package deal in Westchester case he would receive a misdemeanor and time served (which was eleven months) and immunity on the homicide in the Bronx. On page 481 in the trial transcript, Thiong indicated that he met with ADA Scaccia and the only deal he received from the Bronx was immunity and he received a misdemeanor in Westchester county for testifying in the grand jury and at trial.

wanted with respect to the plea offer without input from the Bronx District Attorney's office. Gelb testified that it would have affected his actions at trial in cross examining Thiong if he knew that the cooperation agreement entailed the Westchester plea and sentence-- because he would have asked more questions "revealing that his result in Westchester County of such a lenient disposition was contingent upon his cooperation or testimony against the two defendants in the Bronx". Gelb believed that if Thiong had been asked more questions about the result of the Westchester case, it would have impaired Thiong's credibility as a motivated witness.[6] Gelb characterized the misdemeanor plea in Westchester County as a "sweetheart deal" considering the charges Thiong was facing, the fact that he was on lifetime parole and that he was a predicate felon.

Meldish's attorney then called Assistant District Attorney Christine Scaccia as his witness. Scaccia testified that she recalled Thiong being mentioned in a DD5 early in the homicide investigation before she became involved in the matter. Scaccia stated that at the time she became involved in the homicide investigation, Thiong was in custody facing drug-related charges in Westchester County, so she contacted Westchester County to set up time to meet with Thiong as he was a potential witness in her Bronx county case.[7] Scaccia also represented that she never takes notes and that she did not remember any content from this conversation except that it was to arrange the meeting. On May 3, 2007, Scaccia learned that Thiong was an alleged accomplice in the homicide as his role was the getaway driver. Eventually Scaccia met with him on August 16, 2007,

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[6] The trial transcript (480 et seq.) reveals that Gelb extensively cross examined Thiong about his Westchester County plea to a misdemeanor, attempting to suggest that it was part of his deal of testifying for the People in the homicide.

[7] Scaccia explained that she needed permission from the Westchester County District Attorney's office as well as the defendant's attorney, Marilyn Reader, to pull Thiong out to speak with him. Westchester County District Attorney's office contacted Thiong's counsel and set up the meeting that took place on August 16, 2007.

a day where Thiong also had a court appearance scheduled in Westchester County Court. Scaccia, an NYPD detective, Thiong, Thiong's counsels Robin Bauer and Marilyn Reader, and ADA Moore, a member of the Westchester County District Attorney's office were present for the meeting in the Westchester County courthouse. Thiong executed a "queen for a day" proffer and informed the parties about his role in the homicide as well as the defendants' involvement.

Scaccia indicated that there was no agreement that Thiong would receive a benefit in the Westchester county case in exchange for his cooperation in the Bronx. Scaccia testified that the only agreement between Thiong and the Bronx District Attorney's office was that Thiong would receive immunity for his role in the homicide investigation, and in exchange he would testify in the grand jury and if necessary at trial. Scaccia was not present in the court when Thiong took his plea in Westchester and she stated that she did not follow up with respect to the outcome of the Westchester case or the parole violation. After the meeting, Scaccia and her detective left. Thiong's case appeared on the calendar in Westchester later that day. The plea minutes were sealed by the court after Thiong took his plea.

Scaccia insisted that she did not ask Westchester County to reduce the charges Thiong was facing in Westchester in return for his cooperation in the Bronx. Scaccia testified that during the proffer with Thiong she did not discuss any offer or deal in the Westchester case; that there was no mention of the charges pending in Westchester during the proffer, and that she did not discuss with Thiong receiving any benefit as to parole.[8] Essentially she maintained that whatever Westchester chose to do was 'Westchester's deal'. Prior to calling Thiong as a witness at trial, Scaccia learned

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[8] The only contact ADA Scaccia indicated that she had with parole was to inform parole that Thiong was going to cooperate by testify at trial as is required when any parolee testifies at trial.

that he did receive a time served sentence and was violated on parole. Scaccia testified that as a matter of professional courtesy, ADA Moore from Westchester asked her if she had any opposition to offering Thiong a plea in the narcotics case. Scaccia said she told ADA Moore to do whatever he wanted to do because the Bronx case was unrelated to the Westchester case.[9] In addition, Scaccia testified she never obtained the minutes from Thiong's plea.

Counsel for defendant Meldish also called as a witness in the hearing Murray Richman, Esq., Hanzlik's trial attorney. Richman learned some time leading up to the trial that the People were going to call David Thiong as a cooperating witness. During the course of the trial, Richman testified that he requested *Brady* from ADA Scaccia including any and all deals that Thiong made with the ADA. He said Scaccia advised him that she went to see Thiong in Westchester County but there was no deal on the Westchester case. Richman recalled cross examining Thiong regarding any deals Thiong had with the ADA for his testimony. After Thiong's testimony, he stated, there was a sidebar before the court regarding any arrangements made between Bronx county and Thiong. Again, Scaccia represented that she did not make a deal involving the Westchester case and had nothing to do with the plea there. Richman testified that he had not seen a transcript of the plea. Richman indicated that the minutes of this plea would have been important to cross examine Thiong to impeach his credibility.[10]

After the defendants rested , the People called ADA Moore as their witness. Moore has been

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[9] ADA Scaccia stated that she offered immunity because Thiong was the getaway driver and never entered the location where the homicide took place. The information Thiong proffered was consistent with what ADA Scaccia already knew about the case .

[10] As shown in the trial transcript at pages 447, 449-51, 453, 445-458, 471-474, Mr. Richman extensively cross examined Thiong about his Westchester County plea to a misdemeanor as part of his deal to testify for the People in the homicide, and how incompatible the Westchester sentence was considering his criminal record, his predicate status and the pending felony charges.

in the Westchester DA's office for 32 years and is currently the Chief of the Gang Violence and Gun Bureau. Moore testified that he along with an investigator from his office, two attorneys for Thiong, ADA Scaccia and an NYPD Detective were present for Thiong's proffer session. ADA Moore recalled the Westchester case was not discussed during the proffer; only immunity in the Bronx case was discussed. On March 3, 2007, he first became aware of the Bronx interest in Thiong. Moore testified that in April of 2007, the Chief of Narcotics (Tom Luzio) made an offer before he was in contact with ADA Scaccia to allow Thiong to plead to criminal possession of controlled substance in the fifth and seventh degrees with the hope that the defendant would withdraw his plea on the felony and be sentenced on the misdemeanor. A favorable offer was made because of 'issues' in the case. ADA Moore testified that it was not usual at that time to offer a misdemeanor to defendants who were charged with possession with intent to sell, but was not aware of anyone from the Bronx seeking favor on the Westchester case for Thiong's cooperation or testimony. Moore was confronted on cross examination by notations made by ADA Kevin Kennedy on May 8, 2007, "CI to provide info regarding homicide in exchange for reduced plea on Westchester narcotics case." ADA Kennedy was not present for the proffer on August 16, 2007 and only appeared in court for the plea.

Legal Analysis

In order to set aside a verdict based upon newly discovered evidence, the defendant must establish that there was evidence which was discovered since the trial, and could not have been discovered prior to trial, is not cumulative and does not merely impeach or contradict the record but would probably change the result if a new trial is granted. *People v Wainwright*, 285 AD2d 358, 360 (1st Dept 2001), *citing People v Salemi*, 309 NY 208, 219 (1955).

The duty of a prosecutor to disclose exculpatory material includes the disclosure of evidence

impeaching the credibility of a prosecutor's witness, whose testimony may be determinative of innocence or guilty. *See People v Baxley*, 84 NY2d 208 (1994). To establish a *Brady* violation in this context, a defendant must show that the evidence not disclosed was favorable as either exculpatory or impeaching in nature, the evidence was suppressed by the prosecution, and prejudice arose because the suppressed evidence was material, in that there exists a reasonable possibility that it would have changed the result of the proceedings. The First Department in the case of the *People v Sibadan*, 240 AD2d 30, 34 (1st Dept 1998), held that a prosecutor's duty to disclose *Brady* material applies to evidence affecting credibility of government witnesses, including evidence of any agreement or promise of leniency given to a witness in exchange for favorable testimony against an accused. The disclosure obligation arises only where the prosecutor and the witness have reached an understanding in which the witness' cooperation has been exchanged for some *quid pro quo* on the part of the prosecutor (*People v Novoa*, 70 NY2d 490, 497 (1987)), or where there is any other indication that the witness's cooperation was bargained for, directly or indirectly. *See People v Piazza*, 48 NY2d 151, 163 (1979).

Two recent appellate opinions address these issues and reach different conclusions. *See People v. Lalonde,* 160 AD3d 1020 (3d Dept 2018); *People v. Giuca*, 158 AD3d 642 (2d Dept 2018), *lv. to appeal granted* 31 NY3d 1117 (June 28, 2018). In *People v. Lalonde,* 160 AD3d at1028, the court rejected the defendant's CPL§440 claim without a hearing because the defendant was aware of the witness's cooperation agreement and was free to cross examine the witness about it. The court emphasized that even if the prosecutor did not disclose the full extent of a three way agreement and that constituted a *Brady* violation, the witness's testimony did not go "wholly unimpeached". The strength of the prosecution's case also factored into the court's decision.

In *People v. Giuca,* 158 AD3d 642, in contrast, the Second Department vacated the

defendants's conviction, finding that factual information which could be construed as a promise was *Brady* material, notwithstanding how the promise was formed or labeled. While the evidence in that CPL§440 hearing did not demonstrate an express promise between the witness and the District Attorney's office, it left a strong inference of the expectation of a benefit, and the court determined that information should have been put before the jury. The conviction was vacated due to the prosecutor's failure to convey the tacit understanding between the prosecutor and the witness that he would receive leniency despite his poor performance in a drug program because he agreed to testify against the defendant at trial.

This case presents a different permutation of similar facts, with the added wrinkle of more than one District Attorney's office being involved. Assistants from the two District Attorney's offices met after a telephone conversation to arrange a meeting. The defendant was facing significant charges in Westchester. The meeting was arranged to include the Westchester DA's office; it was not just between the Bronx DA and the witness. The Westchester ADA had the opportunity to be present for the "queen for a day" disclosures. With the Westchester DA present, the Bronx DA agreed to give the witness immunity for a homicide in exchange for his testimony in the grand jury and at trial. The defendant did not immediately agree. The Bronx ADA and NYPD detective left. The Westchester DA was left with the witness and his attorneys. A favorable plea ensued, which the Westchester DA justified to the court as an accommodation to a Bronx cooperating witness. The witness cooperated with the Bronx DA.

When arranged in this way, the facts here suggest a potential violation of *Brady* akin to what was present in *People v. Giuca,* 158 AD3d 642. However also conceivable that the two offices had separate agendas, or that the Westchester DA just chose to accommodate Bronx without it being a deal. Any role played by Thiong's Westchester defense counsel is unknown. In addition, nearly all

of these facts were known to the defense counsel at the time of the defendants' trial. The only aspects of the situation which have now surfaced are the Westchester ADA's running notes and the August 16, 2007 transcript, which reveals the ADA's characterization of the plea to the Westchester judge. ADA Scaccia repeatedly affirmed that she was not present at the plea or sentencing of Thiong during the trial, in her affirmation and at the 440 hearing. She could not have known what the Westchester prosecutor actually said to the court. An ADA is not obligated to turn over minutes to which she does not (yet) have access. *See People v. Fishman,* 72 NY2d 884 (1988). Moreover, although Thiong's Westchester plea was discussed during the trial, neither defense counsel requested the plea minutes or objected to the absence of the minutes.[11]

Further, the defense had a full opportunity to cross examine the witness at trial and did so 'vigorously'. Both defense attorneys during their cross examinations asked Thiong if his understanding of his cooperation deal included a plea to a misdemeanor on his Westchester narcotics case and time served plus ninety days on his violation of parole. Thiong agreed that he received other benefits beyond immunity. Thiong may have believed based upon the timing of the plea and a conjoined meeting with both District Attorney's offices that his cooperation agreement included immunity as well as the Westchester plea as evidenced by his testimony during the trial. But both defense counsel amply cross examined Thiong's credibility based upon Thiong's

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[11] Meldish's attorney Murray Richman had requested documents from August of 1999 of Thiong's Bronx prosecution in which Thiong went to trial and was convicted of two counts of A-2 narcotics felonies and one count of a B narcotics felony. (Trial transcript p. 388.) Later (p. 492) Richman claimed there was a *Brady* violation based on the Westchester case because the prosecution represented that the only deal the Bronx District Attorney's office made with Thiong was immunity for the Bronx homicide. Richman alleged that Thiong was also promised time served on the Westchester case (which was 11 months) for a misdemeanor plea and 90 days on his violation of parole to run consecutive. The People represented that was an offer made by Westchester after negotiations with Thiong's attorney and had nothing to do with her Bronx case. Although addressed on the record, neither counsel requested that the minutes of the plea of the Westchester case or the Putnam case in which Thiong was serving his sentence at the time of the trial.

understanding of the various parameters of the cooperation agreement. In their summations, both counsel attacked Thiong's credibility based upon his plea deal.[12] The jury was able to consider each of these issues in conjunction with Thiong's credibility and, nonetheless, found each of the defendants guilty. In this motion, the defendants failed to establish how further disclosure would have been material and not cumulative to impeachment. *See People v Richards,* 184 AD2d 222, 222-223 (1st Dept 1992), *lv denied* 80 NY2d 1029; *People v Sibadan*, 240 AD2d 30, 35 (1st Dept 1998). In addition, the defendants have not demonstrated that there is a reasonable possibility or probability that the outcome of the trial would have been different.

The defendants' real contention--that the Bronx DA intentionally concealed a three way agreement--was not borne out by the facts adduced at the hearing. The People informed defense counsels of Thiong's cooperation agreement prior to trial. [13] There was no showing that anyone in the Bronx DA's office asked Westchester county prosecutors to take any action with respect to the Westchester felony narcotics case or Thiong's violation of parole. ADA Moore was present as a moderator during the proffer session and both he and ADA Scaccia testified that the Westchester case was not discussed.

The Westchester District Attorney's file notes indicate that in April, 2007, the offer to Thiong was a plea to criminal possession of a controlled substance in the fifth and seventh degrees, and "no

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[12] In the trial transcript at pages 1069 - 1071, Gelb attacked the Thiong's veracity by comparing his statements to the act of bartering: "Tell us that Joey and Kim did it" (p. 1069, l. 22) and ""you're going to get out of jail free card in exchange for your testimony here" (p. 1070, l. 19-20). Then Richman reinforced that Thiong is not to be believed as he has a motive to lie as an accomplice facing significant time but who gets out of jail only because he testifies for the People against the defendants under a cooperation agreement (p. 1091-1092, 1103).

[13] The court notes that prior to any interaction with Thiong and someone from the Bronx District Attorney's office, Thiong was already in custody for eight months. An Assistant in Westchester already noted that Westchester was inclined to reduce counts on the indictment prior to any interaction between Thiong and the Bronx District Attorney's office..

position" on sentencing. On May 3, 2007, there is a reference to a reduced sentence if Thiong successfully cooperated, presumably with the Bronx, although there is no explicit notation. On May 23, 2007 a lengthier set of notes indicates "speaking with Christine Scaccia", that Thiong is alleged to be the get away driver in the Bronx, and the same offer to be made ("(1)CPCSS 220.06/5 2 ½ + 2 PRS + (2) CPCS 7 220.03 option open re coop"). The August 16, 2007 court minutes reflect that on May 23, 2007, Thiong was offered a plea to a two count superior court information of criminal possession of a controlled substance in the fifth and seventh degrees. The Westchester DA's sentence position was two and one half years' incarceration with post release supervision on the felony count and would leave the possession seventh count open based upon cooperation.

ADA Scaccia apparently did not inform the defense counsel of the conversations and offers being made in Westchester, but the question is why. The Westchester DA's position was significantly different after the proffer meeting, but again, the question is why. It is not clear what precipitated the Westchester DA's positions. It was not incumbent on the Bronx Assistant District Attorney to explain how notes that could imply a three way deal were in the Westchester ADA's file unless of course she knew. The defendants did not call ADA Kennedy. Neither did the defendants call Thiong's attorneys as to the negotiations that ensued after ADA Scaccia left the Westchester courthouse. A hearing court is left to conjecture whether the Westchester DA's office acted independently because of issues in their case, or as a courtesy to the Bronx DA, or for other reasons. Not much light was shed on these questions at the 440 hearing.

There are some unsettling aspects of the Bronx ADA's conduct in this matter, including her attempt to insinuate during her summation that she indeed could have offered the defendant

something in his Westchester case in exchange for his testimony,[14] while simultaneously denying the existence of any influence over the Westchester outcome before the trial judge. The ADA was obliged to reformulate her statements to the jury after an objection. Second, while she might not remember the entire conversation or conversations, the fact that the ADA herself called the Assistant handling the Westchester case directly to arrange a meeting about getting cooperation in a two defendant homicide but cannot recall discussing anything except arranging the meeting is farfetched.

Conclusion

The court finds that the defendants did not show there was willful misconduct on the part of the People to conceal the truth. *See People v Williams*, 7 NY3d 15, 1920 (2006). The defendants failed to demonstrate a reasonable possibility that further disclosure of the parameters of Thiong's cooperation deal would have changed the verdict. *See People v Richards*, 184 AD2d at 222-223. Moreover, most of the documentary proof that defendants rely on in support of their motion and claim that the People failed to disclose the full extent of their cooperation agreement with Thiong does not constitute new evidence as contemplated by CPL § 440.10, since the majority of those facts were known to defendants at the time of trial.

Accordingly, although the defendants established that Thiong's plea minutes were discovered since the trial, standing alone they are cumulative and could merely be used to impeach or contradict the record but would not likely change the result if a new trial was granted. The defendant's motions pursuant to Criminal Procedure Law (CPL) sections 440.10(1)(f) and 440.10(1)(h) to vacate their convictions of murder in the second degree are denied.

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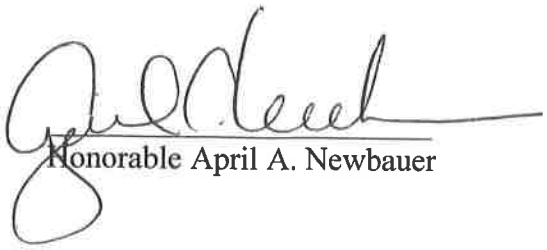
[14]"If I had wanted to given him a deal for seven grams of crack I would have no problem telling you that."

This decision shall constitute the order of this court.

ENTER,

Dated: Bronx, New York
April 8, 2019



Honorable April A. Newbauer

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KIMBERLY HANZLIK,

Petitioner,

-against-

JOSEPH JOSEPH, Superintendent Bedford Hills Correctional Facility,

Respondent.

OPINION AND ORDER STAYING HABEAS PETITION

17 Civ. 6577 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Kimberly Hanzlik ("Petitioner"), currently incarcerated at the Bedford Hills Correctional Facility in New York, brings this counseled petition for a writ of habeas corpus under 28 U.S.C. § 2254. In 2011, petitioner was convicted of second-degree murder in New York state court and was sentenced to an indeterminate term of twenty years to life in prison. After the petition was filed and came fully briefed, petitioner's counsel received new evidence in the form of recently unsealed plea minutes from the prosecution's central cooperating witness in the case against petitioner. *See* Letter from Irving Cohen, ECF 21. In light of this new evidence, and for the reasons that follow, the Court enters a stay and abeyance of the petition so that petitioner may pursue her claim based on this new evidence in state court.

Background

This petition concerns the 1999 murder of Joseph Brown, who was shot and killed at Frenchy's Bar in the Bronx. After the case went cold for nearly a decade, Petitioner and her alleged accomplice, Joseph Meldish ("Meldish"), were convicted by a jury of second-degree murder in 2011. What follows is a brief recitation of the facts relevant to the Court's disposition.

A. Factual and Procedural Background

According to the government's theory of the case, Meldish set out on March 21, 1999 to murder Thomas Brown after the two had a dispute over a loan. On the mistaken belief that Joseph Brown was actually his brother Thomas, Meldish entered Frenchy's Bar in the Bronx, shot and killed Joseph in the crowded bar, and fled in a car driven by David Thiong, a local drug dealer. In interviews conducted immediately after the crime, Thiong twice refused to provide information on his role in the shooting. On a third occasion, Thiong apparently told detectives that he drove Meldish to Frenchy's Bar on the night in question, but that petitioner was not present at the time.[1]

After sitting dormant for nearly a decade, the case was assigned to Detective Tracey, a New York Police Department cold case detective. During his investigation, Tracey turned up two key pieces of evidence that led to the convictions of petitioner and Meldish. First, facing drug charges in Westchester County, Thiong agreed to testify against petitioner and Meldish. Thiong testified at the trial that because Frenchy's Bar was crowded on the night in question, petitioner entered first to scout the victim's location. According to Thiong, once petitioner identified the victim, she returned to the car and relayed the information to Meldish, who traced petitioner's path into the bar and carried out the shooting. It is undisputed that Thiong's testimony was crucial to the government's case. Second, Joseph Brown's wife, who was at Frenchy's Bar that night, identified petitioner as having been present at the bar immediately prior to the shooting, corroborating Thiong's account.[2]

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[1] This meeting, which was memorialized in a DD5 document drafted by the detective on the case, largely underpins the original petition currently before the Court. Petitioner argues that her trial counsel was constitutionally ineffective for failing to cross examine Thiong based on this document, and for relying instead on the two previous meetings with police that exculpated both Meldish and petitioner. In light of the stay and abeyance entered in this case, the Court expresses no views on the merits of the underlying petition as it was originally presented.

[2] Eileen Brown, Joseph Brown's wife, did not mention seeing anyone suspicious before the shooting until she met with Detective Tracey in 2007, approximately eight years after the shooting. The parties dispute whether her testimony was reliable and consistent with Thiong's, but there is no question that her testimony was crucial to the government's case against petitioner.

Largely based on this evidence, petitioner was convicted by the jury of second-degree murder on February 16, 2011, and was sentenced by Justice Webber to an indeterminate term of twenty years to life in prison.[3] The Appellate Division unanimously affirmed petitioner's conviction on May 15, 2012, *People v. Hanzlik*, 945 N.Y.S.2d 229 (App. Div. 2012), and the New York Court of Appeals denied her application for leave to appeal on August 20, 2012, *People v. Hanzlik*, 19 N.Y.3d 997 (2012).

On June 25, 2013, petitioner sought review of her conviction in New York state habeas proceedings, pursuant to N.Y. Crim. Proc. § 440.10, principally arguing that her trial counsel was ineffective for failing to cross examine Thiong with his third statement to police, described above, which inculpated Meldish and exculpated petitioner. The New York Supreme Court denied the motion on February 20, 2014, *see* SR 8–17,[4] and the Appellate Division unanimously affirmed the denial on April 9, 2015, *People v. Hanzlik*, 8 N.Y.S.3d 271 (App. Div. 2015), holding that petitioner did not receive constitutionally deficient assistance of counsel during her trial. The New York Court of Appeals denied petitioner's application for leave to appeal on June 19, 2015. *People v. Hanzlik*, 25 N.Y.3d 1164 (2015).

After retaining new counsel, Petitioner filed a second state habeas petition on March 28, 2016. In addition to the ineffective assistance claim, the second § 440 petition also argued that the prosecutor withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that petitioner was actually innocent.[5] The Bronx Supreme Court denied the motion on August 24, 2016, *see* SR 472–79, and this petition followed.

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[3] Meldish was convicted of second-degree murder and sentenced to an indeterminate term of 25 years to life in prison.

[4] References to "SR" refer to the State Court Record submitted by respondent. *See* Response, ECF 14.

[5] Unlike federal courts, which have not explicitly recognized a freestanding claim of actual innocence in federal habeas proceedings, *see McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."), such relief is available in New York state habeas proceedings, *see People v. Hamilton*, 979 N.Y.S.2d 97, 108 (App. Div. 2014) ("Thus, we conclude that a freestanding claim of actual innocence may be addressed pursuant to CPL 440.10(1)(h), which provides for vacating a judgment which was obtained in violation of an accused's constitutional rights."). However,

B. New Evidence

In a letter dated May 9, 2018, petitioner's counsel raised new evidence central to petitioner's claim. *See* Letter from Irving Cohen, ECF 21. The letter states that on May 4, 2018, petitioner's counsel received—for the first time—an unsealed transcript of a guilty plea entered by Thiong in Westchester County on drug charges prior to petitioner's trial. According to a separate letter submitted by respondent on May 14, 2018, both parties received the transcript from the Bronx District Attorney's Office in early May 2018. *See* Letter from Lisa E. Fleishmann, ECF 22, at 1. Apparently the Bronx District Attorney's Office recently received the unsealed transcript as part of petitioner's post-judgment motions. *Id.* Because the transcript surfaced recently, this evidence was not before the state court when it considered petitioner's *Brady* claim in her second § 440 petition. Taken with records from the trial, the transcript of Thiong's plea casts doubt on petitioner's state court proceedings and requires the Court to enter a stay and abeyance of this petition to allow petitioner to exhaust her new claims in state court.

1. Background

A central issue at petitioner's trial was Thiong's credibility. He was the prosecution's star cooperating witness, and his testimony placed petitioner right at the heart of Joseph Brown's murder. According to Thiong, petitioner scouted Joseph Brown's location in the crowded bar and reported that location to Meldish, who carried out the shooting. Together with the testimony of Eileen Brown, the victim's wife, Thiong's testimony was crucial to the prosecution's case.

One of petitioner's central defense strategies was to impeach Thiong's credibility by arguing that his testimony was tainted by the grant of immunity on the Bronx murder charge.

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the Supreme Court has recognized that "a credible showing of actual innocence may allow prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief." *Id.*

But petitioner also attempted to connect Thiong's cooperation in the murder case to his plea to misdemeanor drug charges in Westchester County. During the trial, petitioner's trial counsel sought discovery of any materials related to Thiong's plea deal with the Westchester County District Attorney's Office. *See* Letter from Irving Cohen, ECF 21, Ex. 4, at 493. During a colloquy with the Court, Assistant District Attorney Scaccia represented that the Westchester plea deal, in which Thiong pled down to a misdemeanor drug charge, was "not any deal I made with him, that's what Westchester gave him on this case." *Id.* The Court then asked more directly: "So, the question Ms. Scaccia to you is, whether the deal included . . . the time served and a misdemeanor in Westchester or not." *Id.* at 494. Ms. Scaccia responded: "That was *their* deal with him." *Id.* (emphasis added). In short, the prosecutor represented to the Court that Thiong's plea deal on drug charges in Westchester County was unrelated to his cooperation in the murder trial.

2. Thiong's Plea Transcript

Thiong's plea minutes, which were recently unsealed and delivered to petitioner's counsel only weeks ago, demonstrate that this was not accurate. During Thiong's plea hearing in Westchester County, the judge described the plea agreement as follows:

> The understanding between all parties, which would include the Bronx District Attorney's Office, is as follows: This defendant is to give full and complete cooperation to the Bronx District Attorney's Office in an ongoing homicide investigation. This shall include but is not necessarily limited to his truthful, full, truthful and full testimony before the Bronx County Grand Jury in the near future. And of course if necessary trial testimony. If his cooperation is completed, we will be, we will, based on a representation of the Bronx District Attorney's Office that that was so, allow him to withdraw his previously entered plea to criminal possession of controlled substance in the fifth degree, have him withdraw that and just proceed to sentence on the possession seventh.

See Letter from Irving Cohen, ECF 21, Ex. 1, at 5. During the plea, Thiong's counsel stated that "one of the reasons he's pleading today is with the understanding that he's going to receive full immunity on the Bronx case." *Id.* at 7. It was also agreed that "once [Thiong] testifie[d] before the grand jury" in petitioner's case, he would be released on bail in the Westchester County drug case. *Id.* at 8. The deal also included a condition that "if things [fell] apart in the Bronx case . . . Mr. Thiong would have the right to withdraw his plea" in Westchester. *Id.* at 9. Finally, during his allocution, Thiong was asked whether he understood what his "expectations [were] with regard to the Bronx District Attorney's Office and what your sentencing commitments would be," and he responded in the affirmative. *Id.* at 17.

These portions of Thiong's plea transcript indicate that, contrary to the prosecutor's representations to the New York Supreme Court, Thiong's cooperation was secured through a global plea agreement that covered the Westchester County drug charges and the Bronx murder case against petitioner. But these materials, which clearly bear on Thiong's credibility, were not disclosed to petitioner before trial, and were apparently not revealed until years after petitioner's conviction and multiple rounds of appellate review.

Discussion

Petitioner urges the Court to consider this new evidence in evaluating her petition, both as "a separate ground for granting the writ," and as evidence reinforcing her claim that she is actually innocent.[6] *See* Letter from Irving Cohen, ECF 21, at 4. But in federal habeas proceedings of this kind, I am not permitted to consider materials that have not yet been reviewed by the state court that adjudicated petitioner's claim. As the Supreme Court explained

[6] In a letter dated May 14, 2018, respondent argues that the newly discovered plea transcript simply "evidences that Thiong's cooperation agreement was more generous than the prosecutor had represented at trial. But proof that Thiong had a greater incentive to testify is not affirmative proof of petitioner's innocence." Letter from Lisa E. Fleischmann, ECF 22, at 2. Although the Court has reservations about this position, as explained herein, my review is limited to the evidence that was before the state court that adjudicated petitioner's claim.

in *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." The Supreme Court reached this conclusion based on the text of § 2254(d)(1) and "the broader context of the statute as a whole, which demonstrates Congress' intent to channel petitioners' claims first to the state courts." *Id.* at 181–82 (internal quotation marks omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). I am bound by this precedent.

Thus, the proper course is to stay and abey these habeas proceedings to allow petitioner "to present to the state court [her] *Brady* claim," including the new materials contained in Thiong's plea transcript. *Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011). This is similar to the path followed by the Ninth Circuit in *Gonzalez v. Wong*, *see id.*, and advanced by Justice Breyer in his concurring opinion in *Pinholster*, in which he wrote that a petitioner "can always return to state court presenting new evidence not previously presented," *Pinholster*, 563 U.S. at 206 (Breyer, J., concurring in part and dissenting in part). Similar to the situation the Ninth Circuit faced in *Gonzalez*, petitioner "raised and the state court explicitly rejected a *Brady* claim," and "the suggestion that [petitioner] has presented a 'new claim' inherently invites questions regarding exhaustion." *Gonzalez*, 667 F.3d at 979.

With the inclusion of this new evidence, petitioner has a colorable—and potentially meritorious—claim under *Brady v. Maryland*, 373 U.S. at 87, which requires a prosecutor to turn over potentially exculpatory evidence to the defense before trial, and *Giglio v. United States*, 405 U.S. 150, 153–54 (1972), which extended the *Brady* rule to impeachment evidence. Of course, petitioner will ultimately have to demonstrate that, taken cumulatively with the remainder of the evidence, there is a "reasonable probability" that the result of her case

would have been different. *Kyles v. Whitley*, 514 U.S. 419, 434–35 (1995). But whether petitioner can do so must be resolved in the first instance by the state court.[7]

Finally, the stay and abey process adopted here is the same one that the Supreme Court recognized in *Rhines v. Weber*, which considered a habeas petition with unexhausted claims.[8] 544 U.S. 269, 278 (2005). In *Rhines*, the Supreme Court held that "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics[,] . . . the district court should stay, rather than dismiss," the petition. *Id.* Because petitioner was unaware of Thiong's plea transcript, which was only recently unsealed and turned over to petitioner's counsel, and because petitioner has a potentially meritorious claim, the stay and abey process is the appropriate course. Doing so reflects "petitioner's interest in obtaining federal review of his claims," *id.*, and preserves the state's role as the initial arbiter of habeas claims, *see Pinholster*, 563 U.S. at 181–82.

Finally, as the Supreme Court explained in *Rhines*, I retain discretion to structure the stay in a manner that reflects the "timeliness concerns" of the federal habeas statute. *Rhines*, 544 U.S. at 277–78. Accordingly, the stay is conditioned on petitioner filing her *Brady* claim in state court within 30 days of the filing of this Order. If petitioner wishes to renew this petition following the completion of the state court's review, she must do so within 30 days after the state court proceedings are exhausted.

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[7] The § 440 court may also wish to consider whether sanctions or other relief is appropriate based on the serious allegation of prosecutorial misconduct.

[8] Petitioner's claim is not, strictly speaking, an unexhausted claim covered by *Rhines v. Weber*, for as the Ninth Circuit implicitly recognized in *Gonzalez*, petitioner's claim also rests on recently discovered *new evidence* presented for the first time to the federal habeas court. *Gonzalez*, 667 F.3d at 980.

Conclusion

For the reasons stated herein, the Court enters a stay and abeyance of the petition to allow petitioner to pursue her unexhausted claims in state court. The stay is conditioned on petitioner pursuing relief in the state court within 30 days of the filing of this Order, and petitioner may move to renew the petition, if necessary, within 30 after the state court proceedings are exhausted.

SO ORDERED.

Dated: May 18, 2018
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX T-33

THE PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

-against-

Ind. # 4344/2007

KIMBERLY HANZLIK,

Defendant.

APRIL A. NEWBAUER, J.

Defendant Kimberly Hanzlik has moved to reargue the Court's prior decision dated August 24, 2016 denying her motion for an order pursuant to Criminal Procedure Law (CPL) sections 440.10(1)(h) and 440.20 to vacate a conviction of Murder in the Second Degree and sentence of an indeterminate prison term of twenty-five years to life.[1]

The court reviewed the following submissions regarding pending motion:

Defendant's notice of motion and affirmation by Irving Cohen and legal argument dated September 19, 2016 and September 18, 2016, respectively;

Affirmation in Opposition by Michael Barsky dated October 14, 2016.

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[1] The defendant's principal claim is that her trial attorney failed to use on cross examination a prior inconsistent statement made by David Thiong, a key witness, which exculpates the defendant. This Court denied the defendant's motion of actual innocence based on Thiong's pre-trial statement In addition, this Court denied defendant's motion to renew and reargue the decision of the court (Webber, J.), denying a prior CPL §440 motion to vacate her conviction of Murder in the Second Degree and dismiss the indictment.

After reviewing the documentation submitted and considering the relevant statutes and case law, the defendant's motion is denied.

Procedural History

On February 15, 2011 in Bronx County, the defendant was convicted of murder in the second degree. On March 28, 2011, the defendant was sentenced to a term of imprisonment of twenty years to life after Justice Webber denied defendant's CPL 330 motion to set aside the verdict. On May 15, 2012, the First Department unanimously affirmed her conviction (*People v. Hanzlik*, 95 A.D.3d 601 (1st Dept. 2012)). On August 20, 2012, the Court of Appeals denied leave to appeal the First Department's decision (*People v. Hanzlik*, 19 NY3d 997 (2012)).

As indicated in the procedural history section of the previous decision, on July 14, 2013, Gerald McMahon filed the defendant's first CPL §440 motion to vacate the conviction on the grounds that the trial attorney rendered ineffective assistance of counsel by failing to cross-examine a cooperating co-conspirator, David Thiong, about a prior inconsistent statement. In the statement to detectives, Thiong claimed defendant Hanzlik was not present when co-defendant Meldish committed the murder.[2] On February 20, 2014, the defendant's motion to vacate her conviction was denied by Justice Webber[3] as there was

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[2]In Thiong's statement to detectives, he says that he and the other co-defendant dropped Hanzlik off at her house before proceeding to the bar where Joseph Brown was killed.

[3]The court suggested that although Thiong's trial testimony was contrary, it was corroborated by the victim, who testified that she observed a female 'who looked like Hanzlik' in the bathroom mirror before the shooting, and who had identified Hanzlik from a six person photo array as the person she saw in the bar. Justice Webber also reviewed trial counsel's failure to use the statement under an objective standard and determined there were viable strategic reasons for not using the statement. Coupled with the defense attorney's robust cross examination of Thiong and overall competent and vigorous representation of the defendant, the court found the process fair as a whole (*see People v. Benevento,* 91 NY2d 708 (1998), and saw no reason to justify holding a hearing.

nothing to suggest that the introduction of the statement or questioning of Thiong would have brought about a different result (*citing Harrington v. Richter,* 131 S.Ct. 770 (2011)).

On December 4, 2014, the defendant filed an appeal to the First Department on ineffective assistance of counsel grounds. On April 9, 2015, the First Department unanimously affirmed her conviction (*People v. Hanzlik*, 127 AD3d 447 (1st Dept. 2015))[4]. On March 28, 2016, Hanzlik moved a second time through current counsel to vacate her conviction on the grounds that her trial attorney rendered ineffective assistance of counsel or alternatively, to renew and reargue Justice Webber's denial of her motion pursuant to Criminal Procedure Law section 440 to vacate her conviction and to dismiss the indictment on the grounds of actual innocence.

In response, Michael Barsky, Esq., acting as a Special District Attorney in Bronx County, filed an affirmation opposing the defendant's CPL §440 motion, arguing that the trial judge and the First Department had already considered defendant's claims and

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[4]The First Department held:

> It was objectively reasonable to impeach the witness by means of the statements that exculpated both defendants but not by means of the statement that treated them differently. The statement at issue essentially cut both ways. While it might well have been reasonable to use this statement, it would also be reasonable to avoid revealing to the jury that in 1999 the witness made a statement that was at least partly consistent with his trial testimony, and that was arguably made before the motive to falsify arose or fully ripened. In other words, it was not unreasonable to adopt a strategy that sharply contrasted the witness's 1999 exculpation of both defendants and his radically different trial testimony. In any event, defendant has not satisfied the prejudice prongs of either a state or federal ineffectiveness claim. Defendant has not shown that counsel's failure to use the statement at issue deprived defendant of a fair trial, or that there is a "probability sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 694) that use of the statement would have led to a more favorable verdict. . . . It is not likely that introduction of a half-consistent, half-inconsistent statement would have altered the jury's analysis.

The Court added: ..."as we noted on defendant's direct appeal (citation omitted), the testimony of [Thiong] was corroborated by an eyewitness who placed defendant at the scene." On June 19, 2015, the Court of Appeals denied leave to appeal the First Department decision. *People v. Hanzlik*, 25 NY3d 1164 (2015).

rejected them; the defendant received effective assistance of trial counsel as well as prior counsel for the CPL § 440 motion; that since there were no new facts in defendant's current CPL § 440 motion, the Court should not revisit the issue again and grant a hearing; and, finally, that defendant's motion to dismiss on actual innocence grounds should be denied because the trial testimony placed her at the scene as an active participant[5] of the crime moments prior to her co-defendant pulling the trigger killing Joseph Brown.

After careful consideration, this Court denied the motion. In doing so, it noted that in applying the test articulated in *People v. Jiminez,* 2016 NY Slip Op 05620 to new affidavits secured after the conviction, this Court viewed the documents as merely competing against the testimony of eyewitnesses who testified the defendant shot the victim.[6] This Court concluded that the defendant's factual allegations lack sufficient merit to warrant the exercise of the court's discretion to grant a hearing surrounding use of the Thiong statement as an actual innocence claim.[7]

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[5]The testimony at trial was that Hanzlik, Thiong and Meldish went to Hanzlik's house and she entered her home and returned to the car that Meldish and Thiong were all seated in with a duffle bag which was given to Meldish just prior to him removing a mask and gun. They drove to Frenchy's bar together. She entered the bar and returned to the car and informed Meldish where the deceased was seated. Meldish exited the vehicle and enter Frenchy's with the mask and gun. She remained inside the car during the shooting and direct Thiong not to leave the location without Meldish. Together they left the location and Thiong dropped Meldish and Hanzlik off together at another location after the shooting. The decedent's wife identified Hanzlik looked like the female that was inside the bathroom of Frenchy's prior to the shooter entering the bar.

[6] In considering the test the court conducted in *Jiminez*, the Appellate Division essentially foreclosed the defendant's claim of actual innocence on Thiong's interview with the detectives by previously referring to this evidence as a "half-consistent, half-inconsistent statement" that would 'not likely persuade a jury' and characterizing the complaining witness's identification testimony as corroboration in 'placing the defendant at the scene', which would contradict Thiong's statement.

[7] Contrary to the defendant's contention that the results of the polygraph test is indicative of the defendant's innocence, the Court of Appeals has specifically determined that the results of polygraph examinations are not reliable. *People v. Shedrick*, 66 NY2d 1015 ((1985), *rearg. denied* 67 NY2d 758 (1986). Therefore, as all reliable evidence must be

Thereafter, in a motion dated August 24, 2016, the defendant reargues the denial of the motion to vacate the conviction and to dismiss the indictment asserting that it was error to deny the motion without holding a hearing as there were sufficient facts submitted for the Court to warrant a hearing. In addition, the defendant claims that the Court misapprehended the law as it has developed in rendering its decision.[8] In opposition, the Special Prosecutor responded that the defendant's arguments are meritless as the current claims raise neither a factual nor legal basis for vacating a conviction or setting aside the sentence.

Conclusions of Law

Civil Practice Law and Rules section 2221(d) provides that a motion to reargue must specifically state that the court overlooked or misapprehended the facts or the law in determining the prior motion but must not include any new facts or issues not offered on the prior motion. *See Phillips v. Oriskany*, 394 N.Y.S.2d 941 (4th Dept. 1977); *see also People v. Bachert*, 69 N.Y.2d 593, 597 *(quoting Simpson v. Loehmann,* 21 N.Y.2d 990(1968)); *Mariani v. Dyer*, 193 A.D.2d 456, 458 (1st Dept. 1993). Whether to grant a motion for leave to reargue under Civil Practice Law and Rules sections 2221 is within the sound discretion of the court. *See Alpert v. Wolf*, 194 Misc.2d 126 (Civ. Ct. N.Y. Cty 2002).

In her motion to reargue, the defendant contends that the Court erred in deciding not to conduct a hearing pursuant to *In re Troy Anthony Davis*, 2010 WL 3385081 (S.D.Ga 2010) which is controlling on the analysis of claims of "actual innocence." The defendant

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considered in an actual innocence claims pursuant to *Hamilton*, the results of the polygraph test would not be admissible and not grounds for defendant's claim.

[8] In his motion, the defendant concedes that he failed to cite or provide the Court with the relevant law on the prior CPL§ 440 motion on which he is relying in his current motion to reargue.

erroneously argues that this case stands for the proposition that a court is obligated to hold a hearing to assess the viability of a claim of actual innocence in post-conviction cases. Rather, *In re Davis* articulated that the standard needed to be shown by a defendant was clear and convincing evidence that no reasonable juror would have convicted her in the light of the new evidence. Here, the defendant did not present an offer of proof to meet this standard and warrant a fuller exploration by the Court. Instead, she raises only mere doubt as to her guilt which the jury has previously heard and rejected. [9]

Contrary to defendant's assertions, the Court was well aware of this case and considered its persuasiveness in rendering its prior decision. However, this Court is guided by *People v. Hamilton,* 115 AD3d 12 (2[d] Dept 2014), in which the Second Department on January 15, 2014 held that a defendant seeking to vacate a judgment of conviction may be entitled to relief on a free-standing claim of actual innocence.[10] Shortly thereafter, the First Department explained that CPL §440.10(1)(h) embraced a claim of actual innocence in *People v. Jiminez,* 2016 NY Slip Op 05620, 2016 WL 3919161 (1st Dept. 2016) and advised that the *Hamilton* standard should be viewed along the more general standard applicable on any motion to vacate a conviction under CPL§440.10.

Criminal Procedure Law § 440.30(4)(a) provides in pertinent part that "upon considering the merits of a motion, the court may deny it without conducting a hearing if the moving papers do not allege any ground constituting a legal basis for the motion."

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[9] The defendant provided a self serving affidavit alleging that she is innocent and that she has taken and passed a polygraph test. The defendant wants this Court to conduct a hearing to explore the credibility of the critical witnesses involved in the trial and to allow the defendant to testify that she was not present at the crime scene and this is corroborated by the fact that she past a polygraph test.

[10] Actual innocence means factual innocence, not merely legal insufficiency of guilt. *Hamilton,* 115 AD3d at 23; *Bousley v. US*, 423 US 614, 623-24 (1998).

Thus, motion papers must contain sworn allegations of facts and any hearsay statement in support of CPL §440 motions are not probative evidence. *See People v. Simpson*, 120 AD3d 412 (1st Dept. 2014); *People v. DeVito*, 287 AD2d 265 (1st Dept. 2001). A claim of actual innocence must be based upon reliable evidence which was not presented at the defendant's trial. *People v. Hamilton,* 115 AD3d at 23 (*citing Schlup v. Delo*, 513 US 298, 324 (1995)). "A prima facie showing of actual innocence is made out when there is 'a sufficient showing of possible merit to warrant a fuller exploration' by the court." *Id.* at 27 (*quoting Goldbum v. Klem*, 510 F3d 204, 219 (2002), *cert. denied* 555 US 850 (2008)); *see also People v. Woods*, 120 AD3d 595 (2d Dept 2014)(motion to vacate based upon an actual innocence claim properly denied without a hearing); *People v. Caldavado*, 116 AD3d 877, 878 (2d Dept 2014)(motion to vacate based upon an actual innocence claim properly denied without a hearing).

Guided by the general standard applicable on motions to vacate as well as considering the test conducted in the recent First Department case of *People v. Jiminez* the new affidavits provided in defendant's motion merely compete against the testimony of eyewitnesses who testified the defendant shot the victim. *Id.* As indicated in this Court's previous decision, the First Department, in denying the defendant's appeal and unanimously affirming her conviction, essentially foreclosed the defendant's claim of actual innocence on Thiong's interview with the detectives by previously referring to this evidence as a "half-consistent, half-inconsistent statement" that would 'not likely persuade a jury' and characterizing the complaining witness's identification testimony as corroboration in 'placing the defendant at the scene', which would contradict Thiong's statement. The defendant's factual allegations lack sufficient merit to warrant the exercise of the court's discretion to

grant a hearing surrounding use of the Thiong statement as an actual innocence claim. *See People v. Jiminez,* 2016 NY Slip Op 05620.

The Court is governed by Civil Practice Laws and Rules section 2221 which dictates that such motion for leave to reargue must be based upon matter of fact or law allegedly overlooked or misapprehended by the court. C.P.L.R. § 2221(d). The Court reviewed the moving papers, documents in support thereof and relevant legal authority. In its decision dated August 24, 2016, the Court found the defendant failed to meet her burden of establishing by clear and convincing evidence that she is actual innocent of the crime of murder in the second degree for which the trial jury found her guilty in 2011. In her current motion to reargue, the defendant simply reiterates exactly the same issues as were argued in his prior motion. The Court in its August 24, 2016 decision and order considered and specifically rejected these claims. Since the defendant has not demonstrated that this Court misapprehended any of the relevant facts that were before it or misapplied any controlling principles of law to warrant reversal of the decision, the defendant's motion for leave to reargue is denied. *Boboyev v. Gomez*, 304 A.D.2d 600, 601 (2d Dept. 2003).

Accordingly, for all of the foregoing reasons, the defendant's motion is denied in its entirety.

ENTER,

Dated: Bronx, New York
December 8, 2016

Honorable April A. Newbauer

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX T-33

THE PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

-against-

Ind. # 4344/2007

KIMBERLY HANZLIK,

Defendant.

APRIL A. NEWBAUER, J.

Defendant Kimberly Hanzlik has moved for an order pursuant to Criminal Procedure Law (CPL) sections 440.10(1)(h) and 440.20 to vacate a conviction of Murder in the Second Degree and sentence of an indeterminate prison term of twenty-five years to life. The defendant's principal claim is that her trial attorney failed to use on cross examination a prior inconsistent statement made by David Thiong, a key witness, which exculpates the defendant. In the alternative, the defendant moves to renew and reargue the decision of the court (Webber, J.), denying her prior CPL §440 motion to vacate her conviction of Murder in the Second Degree and dismiss the indictment. Finally, the motion asserts grounds of actual innocence based on Thiong's pre-trial statement.

The court reviewed the following submissions regarding the motion:

Defendant's notice of motion and affirmation by Irving Cohen and legal argument dated March 28, 2016 with Exhibits A - I;

People's Affirmation in Opposition dated August 5, 2016 and

Memorandum of Law filed by Special District Attorney Michael Barsky;

Defense counsel's Reply Memorandum dated August 12, 2016.

After reviewing the documentation submitted and considering the relevant statutes and case law, the defendant's motion is denied.

Procedural History

On February 15, 2011 before Justice Webber in Supreme Court, Bronx County, the defendant was convicted of murder in the second degree for acting in concert with her co-defendant Joseph Meldish in the killing of Joseph Brown on March 21, 1999. On February 25, 2011, the defendant's attorney filed a CPL § 330 motion seeking to set aside the verdict of the jury. On March 28, 2011, Justice Webber denied the motion. The defendant was sentenced to a term of imprisonment of twenty years to life. The defendant filed a timely notice of appeal. On May 15, 2012, the First Department unanimously affirmed her conviction (*People v. Hanzlik*, 95 A.D.3d 601 (1st Dept. 2012)). On August 20, 2012, the Court of Appeals denied leave to appeal the First Department's decision (*People v. Hanzlik*, 19 NY3d 997 (2012)).

On July 14, 2013, Gerald McMahon, a new attorney, filed a CPL §440 motion to vacate the conviction on the grounds that the trial attorney rendered ineffective assistance of counsel by failing to cross examine a cooperating co-conspirator, David Thiong, about a prior inconsistent statement. In the statement to detectives, Thiong claimed defendant Hanzlik was not present when co-defendant Meldish committed the murder.[1] On February

[1] In Thiong's statement to detectives, he says that he and the other co-defendant dropped Hanzlik off at her house before proceeding to the bar where Joseph Brown was killed.

20, 2014, Justice Webber denied defendant's motion to vacate her conviction, ruling there was nothing to suggest that the introduction of the statement or questioning of Thiong would have brought about a different result (*citing Harrington v. Richter,* 131 S.Ct. 770 (2011)). The court suggested that although Thiong's trial testimony was contrary, it was corroborated by the victim, who testified that she observed a female 'who looked like Hanzlik' in the bathroom mirror before the shooting, and who had identified Hanzlik from a six person photo array as the person she saw in the bar. Justice Webber also reviewed trial counsel's failure to use the statement under an objective standard and determined there were viable strategic reasons for not using the statement. Coupled with the defense attorney's robust cross examination of Thiong and overall competent and vigorous representation of the defendant, the court found the process fair as a whole (*see People v. Benevento,* 91 NY2d 708 (1998), and saw no reason to justify holding a hearing.

On December 4, 2014, the defendant filed an appeal to the First Department on ineffective assistance of counsel grounds. On April 9, 2015, the First Department unanimously affirmed her conviction (*People v. Hanzlik*, 127 AD3d 447 (1st Dept. 2015)). The First Department held:

> It was objectively reasonable to impeach the witness by means of the statements that exculpated both defendants but not by means of the statement that treated them differently. The statement at issue essentially cut both ways. While it might well have been reasonable to use this statement, it would also be reasonable to avoid revealing to the jury that in 1999 the witness made a statement that was at least partly consistent with his trial testimony, and that was arguably made before the motive to falsify arose or fully ripened. In other words, it was not unreasonable to adopt a strategy that sharply contrasted the witness's 1999 exculpation of both defendants and his radically different trial testimony. In any event, defendant has not satisfied the prejudice prongs of either a state or federal ineffectiveness claim. Defendant has not shown that counsel's failure to use the statement at issue deprived defendant of a fair trial, or that there is a "probability sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 694) that use of the statement would have led to a more favorable verdict. . . . It is not likely that

introduction of a half-consistent, half-inconsistent statement would have altered the jury's analysis.

The Court added: ..."as we noted on defendant's direct appeal (citation omitted), the testimony of [Thiong] was corroborated by an eyewitness who placed defendant at the scene." On June 19, 2015, the Court of Appeals denied leave to appeal the First Department's decision. *People v. Hanzlik*, 25 NY3d 1164 (2015).

Hanzlik now moves a second time through new counsel, Irving Cohen, Esq., to vacate her conviction on the grounds that her trial attorney rendered ineffective assistance of counsel or alternatively, to renew and reargue Justice Webber's denial of her motion pursuant to Criminal Procedure Law section 440 to vacate her conviction of Murder in the Second Degree and to dismiss the indictment on the grounds of actual innocence.[2]

On April 18, 2016 pursuant to County Law section 701.1(b), Michael Barsky, Esq. was appointed as a Special District Attorney, Bronx County, to represent the People of the State of New York in this matter because the new District Attorney of the Bronx, Honorable Darcel D. Clark, had previously sat on the First Department bench and was a member of the panel that ruled on the defendant's prior appeal. In preparing to respond to the defendant's current 440 motion, Mr. Barsky stated he reviewed the trial transcript and realized that he previously worked in the Bronx District Attorney's office at the same time as the decedent's widow. Mr. Barsky informed defendant's counsel in writing of that fact and that he did not perceive a conflict. Defendant moved to have Mr. Barsky barred from continuing as the prosecutor as a result of this familiarity. In a decision dated August 9, 2016, this Court denied defendant's

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[2]New counsel also maintains that Gerald McMahon should have requested a hearing as part of the first section 440 motion.

motion for recusal. [3]

On August 5, 2016, the People through Michael Barsky filed an affirmation opposing the defendant's CPL §440 motion, arguing that the trial judge and the First Department had already considered defendant's claims and rejected them. In addition, Barsky claimed that the defendant received effective assistance of trial counsel as well as prior counsel for the CPL § 440 motion and motions on appeal. Moreover, the prosecutor argued that since there were no new facts in defendant's current CPL § 440 motion, the Court should not revisit the issue again and grant a hearing. Finally, the prosecutor contended that defendant's motion to dismiss on actual innocence grounds should be denied because the trial testimony placed her at the scene as an active participant[4] of the crime moments prior to her co-defendant pulling the trigger killing Joseph Brown.

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[3] In deciding the motion, this Court concluded that as the defendant failed to demonstrate any conflict or potential conflict and there is no appearance of impropriety or substantial risk of an abuse of confidence, the defendant's motion to recuse Mr. Barsky as the Special District Attorney for the Bronx District Attorney's Office is denied. *See Matter of Schumer v. Holtzman*, 60 NY2d 46, 55(1983); *People v. Zimmer*, 51 NY2d 390 (1980); *People v. Shinkle,* 51 NY2d 417 (1980); *see also People v. Gentile*, 153 Misc.2d 986 (Sup. Ct. Queens Cty. March 23, 1992). *See also People v Torturica*, 23 AD3d 1040 (4th Dept. 2005)(prosecutor not disqualified even though victim's boyfriend was related to an employee of the office absent a showing by defendant that he suffered actual prejudice or there was a substance risk of an abuse of confidence). Mr. Barsky was not privy to any confidential conversations with Ms. Brown or with the defendant nor did he received any confidential information from Ms. Brown or the defendant. *See, e.g. People v. English*, 88 NY2d 30 (1996); *People v. Abar,* 99 NY2d 406 (2003); *Shinkle*, 51 NY2d 417 (1980).

[4] The testimony at trial was that Hanzlik, Thiong and Meldish went to Hanzlik's house and she entered her home and returned to the car that Meldish and Thiong were all seated in with a duffle bag which was given to Meldish just prior to him removing a mask and gun. They drove to Frenchy's bar together. She entered the bar and returned to the car and informed Meldish where the deceased was seated. Meldish exited the vehicle and enter Frenchy's with the mask and gun. She remained inside the car during the shooting and direct Thiong not to leave the location without Meldish. Together they left the location and Thiong dropped Meldish and Hanzlik off together at another location after the shooting. The decedent's wife identified Hanzlik looked like the female that was inside the bathroom of Frenchy's prior to the shooter entering the bar.

Conclusions of Law

The defendant raised most of the same central issues in her prior CPL §440 motion. The defendant's arguably new claims are: of actual innocence based on the exculpatory statement by Thiong; the fact that the trial attorney may not have had the typewritten form of the statement, through the People's *Brady* or *Rosario* violation or because he overlooked it; the trial attorney's statement that if he had the typewritten DD5 version at trial he would have used it in cross examination; and the co-defendant's attorney's sworn statement that the decision not to use the statement was not one of strategy between the parties as posited by Justice Webber. As detailed below, none of the new material merits the court's consideration at a hearing.

In the decision dated February 20, 2014, Justice Webber denied defendant's motion to vacate her conviction. The defendant then filed an appeal to the First Department on December 4, 2014, raising an ineffective assistance of counsel claim on the ground that her attorney failed to cross examine the co-conspirator, David Thiong, about the same prior inconsistent statement referenced here. On April 9, 2015, the First Department unanimously affirmed her conviction. *(People v. Hanzlik*, 127 AD3d 447 (1st Dept. 2015)). Both the Supreme Court of Bronx County and the First Department rejected defendant's claims, finding that trial counsel was effective. Considering the findings and analysis by the First Department, it matters not for the purposes of this motion whether counsel failed to cross examine the witness because he did not have or recognize the typewritten statement, or because he chose not to.[5] The new material and argument counsel proffers

[5]The typewritten DD5 memorializes the detective's handwritten notes, which were turned over to the defense. There is no *Rosario* violation and no demonstrated *Brady* violation. *See People v. Serrano,* 184 AD2d 1094 (1st Dept 1992); *People v. Whitaker,* 165 AD2d 775 (1st Dept 1990).

would not sufficiently elevate the statement's significance under the Appellate Division's framework. A court must deny a motion to vacate a judgment when the ground or issue raised "was previously determined on the merits...upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue." CPL § 440.10(3)(b). Because the defendant has not presented any new facts that would change the court's prior determination (*see* CPLR §2221(e)) or demonstrated that the Court overlooked or misapprehended the relevant facts or misapplied the controlling law to warrant reversal of the decision (CPLR §2221(d)), the defendant's motion for leave to renew or reargue is denied.

Actual Innocence Claim

In a case of first impression, on January 15, 2014, the Appellate Division, Second Department held that a defendant seeking to vacate a judgment of conviction may be entitled to relief on a free-standing claim of actual innocence. *People v. Hamilton*, 115 AD3d 12 (2nd Dept. 2014). Actual innocence means factual innocence, not merely legal insufficiency of guilt. *Hamilton,* 115 AD3d at 23; *Bousley v. US*, 423 US 614, 623-24 (1998). The claim of actual innocence must be based upon reliable evidence which was not presented at the defendant's trial. *Hamilton* at 23 (*citing Schlup v. Delo*, 513 US 298, 324 (1995)). "A prima facie showing of actual innocence is made out when there is 'a sufficient showing of possible merit to warrant a fuller exploration' by the court." *Hamilton* at 27 (*quoting Goldbum v. Klem*, 510 F3d 204, 219 (2002), *cert. denied* 555 US 850 (2008)).

In *People v. Jiminez,* 2016 NY Slip Op 05620, the First Department agreed that

CPL§440.10(1)(h) embraces a claim of actual innocence. Further, the court advised that the *Hamilton* standard should be viewed along the more general standard applicable on any motion to vacate a conviction under CPL§440.10. In applying that test to new affidavits secured after the conviction, the court viewed them as merely competing against the testimony of eyewitnesses who testified the defendant shot the victim. *Id.*

Considering the test the court conducted in *Jiminez*, the Appellate Division essentially foreclosed the defendant's claim of actual innocence on Thiong's interview with the detectives by previously referring to this evidence as a "half-consistent, half-inconsistent statement" that would 'not likely persuade a jury' and characterizing the complaining witness's identification testimony as corroboration in 'placing the defendant at the scene', which would contradict Thiong's statement. The defendant's current factual allegations thus lack sufficient merit to warrant the exercise of the court's discretion to grant a hearing surrounding use of the Thiong statement as an actual innocence claim. The Court summarily denies the motion for the reasons stated above.

Conclusion

The defendant's motion is denied in its entirety.

ENTER,

Dated: Bronx, New York
August 24 , 2016

Honorable April A. Newbauer

APPENDIX G

Opinion 4/9/15

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

14766-
14767 The People of the State of New York,
Respondent,

Ind. 4344/07

-against-

Kimberly Hanzlik,
Defendant-Appellant.

Gerald J. McMahon, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Order, Supreme Court, Bronx County (Troy K. Webber, J.), entered on or about February 20, 2014, which denied defendant's CPL 440.10 motion to vacate her judgment of conviction, unanimously affirmed.

The court properly denied defendant's motion to vacate her conviction on the ground of ineffective assistance of counsel. Defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

At trial, defense counsel impeached the principal prosecution witness by showing that within a few months of this 1999 homicide, the witness made several statements that completely exculpated both defendant and her codefendant. The defense established that it was not until 2007, after a motive to

falsify had arisen, that the witness inculpated the two defendants. However, in her CPL article 440 motion, defendant faulted trial counsel for failing to use another statement, which was also made by the witness in 1999, and which exculpated defendant but inculpated the codefendant.

Trial counsel's lack of recollection makes it impossible to determine whether he failed to notice this statement, which was undisputedly disclosed as *Rosario* material, or consciously chose not to use it as a matter of strategy. Defendant asserts that trial counsel was ineffective in either event.

It was objectively reasonable to impeach the witness by means of the statements that exculpated both defendants but not by means of the statement that treated them differently. The statement at issue essentially cut both ways. While it might well have been reasonable to use this statement, it would also be reasonable to avoid revealing to the jury that in 1999 the witness made a statement that was at least partly consistent with his trial testimony, and that was arguably made before the motive to falsify arose or fully ripened. In other words, it was not unreasonable to adopt a strategy that sharply contrasted the witness's 1999 exculpation of both defendants and his radically different trial testimony.

In any event, defendant has not satisfied the prejudice

prongs of either a state or federal ineffectiveness claim. Defendant has not shown that counsel's failure to use the statement at issue deprived defendant of a fair trial, or that there is a "probability sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 694) that use of the statement would have led to a more favorable verdict. Under the circumstances, the jury would likely have perceived the statement as merely another inconsistent statement made by the witness long before he entered into a deal with the prosecutors. As the trial actually unfolded, the jury chose to credit the witness's testimony, and discredit the contradictory earlier narrative. It is not likely that introduction of a half-consistent, half-inconsistent statement would have altered the jury's analysis. Moreover, as previously discussed, use of the additional statement could have been counterproductive. Finally, as we noted on defendant's direct appeal (95 AD3d 601 [1st Dept 2010], *lv denied* 19 NY3d 997 [2012]), the testimony of this witness was corroborated by an eyewitness who placed defendant at the scene.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 2015

DEPUTY CLERK

APPENDIX H

2/20/14

REC'D FEB 24 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART H92

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
Ind. No. 4344/07

KIMBERLY HANZLIK,

Defendant.

----------X

WEBBER, J. :

Defendant, by Notice of Motion dated July 11, 2013, moves for an order pursuant to CPL § 440.10 to vacate her judgement of conviction. On October 4, 2013, the People filed papers in opposition to the defendant's motion. Oral arguments were heard on November 26, 2013.

Procedural History

Defendant was charged by indictment with Murder in the Second Degree (PL§ 125.25[1]). It was alleged that on or about March 21, 1999, defendant Hanzlik acting with defendant Joseph Meldish caused the death of Joseph Brown. The sole charge of Murder in the Second Degree was submitted to the jury on February 10, 2011, and on February 16, 2011, the jury returned a verdict of guilty. Defendant, by Notice of Motion dated February 23, 2011, moved pursuant to CPL § 330.30 [1] to set aside the jury verdict rendered on the grounds that: (1) the defendant lacked the mental culpability necessary for the jury to conclude that she acted with Joseph Meldish to commit the crime of Murder in the Second Degree; (2) the Court erred in allowing into evidence a ski mask which was testified to as looking like the ski mask worn by the shooter; (3) the Court erred in allowing into evidence a photograph of the defendant Hanzlik; (4) the testimony of Eileen Brown was incredible as a matter of law; and (5) the credible evidence did not establish defendant's guilt beyond a reasonable doubt. On March 17, 2011, this Court

denied defendant's motion.

On or about March 11, 2011, a direct appeal was taken to the Appellate Division, First Department. The defendant argued that (1) the evidence was legally insufficient to establish the defendant committed Murder in the Second Degree; (2) the verdict was against the weight of the evidence; (3) testimony about paperwork from non-testifying detectives that indicated that defendant, co-defendant Meldish, and accomplice David Thiong, were "suspects" or "persons of interest" should have been excluded as inadmissible hearsay; (4) the prosecutor knowingly introduced testimony about physical evidence that was unconnected to the crime, or to either of the defendants, for the sole purpose of misleading the jury; (5) the prosecutor improperly sought to appeal to the jurors' emotions; and (6) the defendant's sentence was excessive and should have been reduced. The Appellate Division unanimously affirmed the defendant's conviction and declined to reduce the sentence (*People v Hanzlik*, 95 AD 3d 601 [1st Dept 2012], *lv to appeal denied* 19 NY 3d 997[2012]).

Defendant now moves to vacate the conviction on the grounds that her attorney rendered ineffective assistance of counsel by failing to cross-examine the co-conspirator, David Thiong, about a prior inconsistent statement. Specifically defendant claims that her trial attorney did not question Thiong about a complaint follow-up report memorializing an interview from a meeting on September 14, 1999. Defendant argues that counsel failed to do so because either he failed to see it, or because he was afraid of introducing it to evidence in that it would have inculpated co-defendant Joseph Meldish, even though it would have helped defendant.

Testimony at Trial

Eileen Brown testified that on March 21, 1999 at approximately 2:30 a.m., she and her

husband, Joseph Brown, were in the back bar area of Frenchy's Bar and Restaurant, 3392 East Tremont Avenue in Bronx County. At the time of the shooting, Joseph Brown was leaning against a bar stool and Ms. Brown was standing to his side. According to Ms. Brown, at some point she heard "a lot of noise, like a scuffle, getting loud and rowdy. A lot of people were making a lot of noise, louder than usual. People were moving fast and running around." A man who was wearing all black including a black ski mask approached and pulled out a gun. He stated, "this is for you mother -fucker" and began firing shots. The deceased threw Ms. Brown up against the door to the left which was the entrance to the ladies' room. Ms. Brown ran into the ladies' room and remained there. Shots continued to ring out. When she no longer heard shots, she came out to find her husband lying on the floor dead.

Ms. Brown testified that prior to the shooter entering the bar, she had been in the ladies room. There, she observed a female who she testified "did not look like she belonged at Frenchy's." In Court, Ms. Brown testified that while the defendant Hanzlik looked like the female she saw in the ladies room earlier the night of the shooting, she could not be sure as the defendant now looked different.

David Thiong testified that on March 21, 1999 at approximately 2:00 a.m., he was asked by defendant Meldish to drive Meldish and defendant Hanzlik to Frenchy's bar. When they entered Thiong's car, defendant Hanzlik was carrying a duffle-like bag. As she entered the car, she gave the bag to defendant Meldish. When they arrived at Frenchy's, Thiong over heard a discussion between Meldish and Hanzlik. Thiong testified that Meldish nudged Hanzlik and stated "go ahead." They then began whispering. Thiong could not make out the whispering. After some time Hanzlik entered the bar. When she returned to the car, she stated to defendant

Meldish that Brown was seated on a particular stool at the bar. Thiong could not recall what stool she stated, however, he recalled that Hanzlik did state a particular stool. According to Thiong, Meldish, who was wearing all black, then removed a black ski mask and gun from the duffle-like bag, placed the ski mask on his face and proceeded into the bar. Thiong heard shots fired. He testified that he was told by Hanzlik not to drive off. Meldish soon returned to the car and directed that he and Hanzlik be taken to the Crosby Cabs which was located a short distance away. Thiong admitted making numerous prior inconsistent statements regarding the incident. He admitted that at some point he stated that neither Meldish or Hanzlik were involved in the shooting.

Detective Charles Villani testified that on March 29, 1999, he recovered a duffle bag containing female clothing, shirts and a ski mask. Detective Christopher Munger, currently a Special Agent with FBI, testified that in February of 2001, he came into possession of the large duffle bag, referred to by Det. Villani, which contained a number of pieces of clothing including a ski mask. Retired detective Kevin Tracy testified that he had been assigned the cold case of the homicide of Joseph Brown in 2006. Pursuant to the assignment he reviewed the case file, reviewed documents and re-interviewed various witnesses including Eileen Brown. Det. Tracy also retrieved from Det. Munger's possession, a ski mask. The ski mask was ultimately sent to the lab for DNA testing.

Discussion

In sustaining his burden of showing ineffective assistance of counsel, defendant "bears the high burden of demonstrating that [she] was deprived of a fair trial"(*People v Hobot*, 84 N.Y.2d 1021, 1022 [1995]). "[M]ere losing tactics" do not constitute ineffective assistance of

counsel (*People v Satterfield*, 66 NY2d 796, 798 [1985], *quoting People v Baldi*, 54 NY2d 137, 146 [1981]). No defendant is entitled to perfect counsel or a perfect trial (*Strickland v Washington*, 466 US 668, 684 [1984]; *People v Aiken*, 45 NY2d 394, 398 [1978]). This Court's function is not "to second guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*Satterfield*, 66 NY2d at 799-800; *see also People v Benevento*, 91 NY2d 708, 712 [1998]). Rather, counsel's assistance will be considered effective if "it reflects an objectively reasonable and legitimate trial strategy under the circumstances and evidence presented" (*People v Berroa*, 99 NY2d 134, 138 [2002]). In other words, in the face of a claim that trial counsel could have been more efficacious, the dispositive issue "is not whether defendant's representation could have been better but whether it was, on the whole, constitutionally adequate" (*People v Borell*, 12 NY3d 365, 370 [2009]).

Here, defendant alleges that her trial attorney rendered ineffective assistance by failing to cross-examine Thiong about a statement contained on a police complaint follow-up report from September 1999. First, there is nothing to suggest that the introduction of the statement or questioning of Thiong regarding the statement would have brought about a different result. Defendant has failed to establish a substantial likelihood that use of the report in question would have brought about a different trial result (*see Harrington v Richter*, 131 S Ct 770, 792 [2011] [in evaluating whether the outcome of the trial would have been different but for counsel's alleged error, "the likelihood of a different result must be substantial, not just conceivable"]; *see also People v Benevento*, 91 NY2d at 714 [prejudice component focuses on the "fairness of the process as a whole"].

Thiong's trial testimony was corroborated by Eileen Brown. Thiong testified that Hanzlik had entered the bar prior to Meldish and had returned to the car with information as to where a male individual was seated in the bar. Ms. Brown testified that she observed a female who looked like Hanzlik in the ladies' room shortly before the shooter entered the bar. Ms. Brown identified a photograph of Hanzlik as Hanzlik appeared in 2007 as the female she saw in the bar.

In sum and substance, the prior statement by Thiong was that on the night of the incident he met with co-defendant Meldish. Early the next morning, Meldish asked Thiong to drive him to a bar. Meldish entered the bar and returned a short time later and asked that Thiong drive to defendant Hanzlik's home. Sometime later, he and Meldish, without defendant Hanzlik then went to Frenchy's bar. Meldish exited the car, entered the bar, whereupon Thiong then heard about five shots. Meldish then exited Frenchy's Bar, entered the vehicle holding a pistol and told Thiong to stay quiet. Thiong then drove Meldish back to defendant Hanzlik's home where defendant Hanzlik entered the vehicle and Thiong drove defendant and Meldish to a taxi service, where both Hanzlik and Meldish exited the vehicle.

A review of the trial transcript indicates an exhaustive cross-examination by counsel of Thiong. Counsel elicited that Thiong had made numerous statements both exculpating and inculpating both defendant Hanzlik and co-defendant Meldish. Counsel established that Thiong did not make a statement which inculpated Hanzlik and Meldish until he was given immunity for his participation in the murder. Parenthetically, counsel for defendant Meldish also conducted an exhaustive cross-examination of Thiong establishing that for a substantial period of time Thiong never even told police that he and Meldish went to Frenchy's, nor that Meldish was involved in the shooting at Frenchy's. Thus the jury was keenly aware of the inconsistences and

discrepancies in the numerous statements made by Thiong.

The People argue that there was a common defense or approach to the defense by counsel for Hanzlik and counsel for Meldish. The question is whether an *objectively* reasonable strategy was pursued by defense counsel; trial counsel's *subjective* reasoning is immaterial (*see Satterfield*, 66 NY2d at 798-800). From an objective standpoint, the strategy was totally reasonable. Defense counsel sought to attack the credibility of Thiong, emphasizing his criminal background, the numerous inconsistent statements made by him as well as his attempts to obtain a benefit for his testimony. Further, there was a commonality of purpose in suggesting that the investigating detective, Det. Tracey, fed or suggested to Thiong what statements he should make to law enforcement in order to inculpate both defendant Hanzlik and defendant Meldish.

Both counsel attempted to discredit Thiong's August 2007 statement to Det. Tracy, in which he inculpated both defendants, by introducing two statements made by Thiong to other detectives in April and August 1999, in which he exculpated both of them; and by attributing the abrupt turn-around in Thiong's statement to improper influence or inducement by Det. Tracy. Highlighted was the lack of documentation by Det. Tracy, in particular his failure to document his interviews with Thiong until after "a deal" had been struck. Both counsel argued that obviously Det. Tracey had induced Thiong to inculpate the defendants in that it was when Det. Tracy entered the case, that "all of a sudden, he had this magical effect and everything was put together." As such, according to the defendants, Thiong's statements inculpating defendants was the result of "a purchase." Thus, the strategy was to present Thiong's trial testimony as a manufactured, and hence, unbelievable, departure from his earlier truthful statements.

While defense contends that there should not have been a mutual defense, stating, ---- "No right thinking criminal defense attorney would want to do anything more than to separate Hanzlik from Meldish, not to join them in a mutual defense"---- there is nothing to suggest that there cannot or should not be a commonality of purpose (see *People v McGee*, 20 NY3d 513 [2013]). Here, the defense set forth was certainly reasonable and plausible given the facts of the case. The strategy pursued need not be the best one that can be assessed with the benefit of hindsight (*see e.g. People v Turner*, 5 NY3d 476 [2005]; *People v Benevento*, 91 NY2d 708, 714–715; *People v Baldi*, 54 NY2d at 146-147). Thus, defendant has failed to "demonstrate the absence of strategic or other legitimate explanations" for counsel's alleged deficient representation (*People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant further argues that either trial counsel did not read the report in question which had been turned over to him, or trial counsel intentionally chose not to use it for fear of offending co-defendant, Joseph Meldish (who was alleged to have committed multiple murders in the past). In either event, according to defendant, counsel's representation was ineffective and without any strategic or tactical explanation, and that there can be no strategic or tactical explanation for trial counsel's failure to use the report in question. First, there is no credible basis for such an argument. More importantly, as stated above there appears to have been a viable, plausible strategy employed by counsel. As suggested by the People, had trial counsel questioned Thiong about the report in question, it would have severely undercut the position that Thiong had not implicated either defendant in the murder of Joseph Brown until after Det. Tracy became involved in the case seven years later. That position— that there was a complete turnaround in Thiong's account of the incident once Det. Tracy got involved — would not have been advanced by a report that showed that Thiong's account had incrementally changed along

the way.

The Court of Appeals has held that an ineffective assistance of counsel claim brought under CPL § 440.10 can be denied without a hearing when the "the evidence, the law and the circumstances of a particular case, viewed together and as of the time of representation, reveal that meaningful representation was provided [and that thereby] defendant's constitutional right to the effective assistance of counsel has been satisfied" (*Satterfield*, 66 NY2d at 798-800). If, when considered "objectively, the transcript and the submissions reveal the existence of a trial strategy that might well have been pursued by a reasonably competent attorney," then a hearing "to probe the actual reasons in the mind of trial counsel for that decision." is unnecessary, since counsel's "subjective reasons for his choice of this strategy in this case [are] immaterial" [*id.*]. This court should not "second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" [*id.*].

This Court is satisfied that defendant received effective assistance from her trial counsel. Preliminarily, it is noted that this Court observed the performance of trial counsel. Defendant failed to demonstrate ineffective assistance of counsel under the federal constitution. She has not shown that (1) counsel's representation fell below an objective standard of reasonableness, and (2) [s] he suffered prejudice (*see Strickland*, 466 US at 694). The New York standard offers even greater protection to defendants than the federal standard (*see Caban*, 5 NY3d at 156). To prevail on a state claim of ineffective assistance of counsel, a defendant must demonstrate that his attorney failed to provide meaningful representation. Defendant has failed to satisfy either standard in this case.

In support of her argument, defendant cites *People v Cantave*, 83 AD3d 857 [2d Dept 2011], *People v Arnold*, 85 AD3d 1330 [3d Dept 2011], and *People v Clarke*, 66 AD3d 694 [2d

Dept 2009]. In *Cantave* and *Arnold*, the Courts found that there was no conceivable reason not to question witnesses about prior exculpatory inconsistent statements. In *Clarke*, the Court found that "defense counsel engaged in an inexplicably prejudicial course of conduct throughout the trial . . . the cumulative effect of which was to deprive the defendant of the effective assistance of counsel and his right to a fair trial" [*Cantave*, 83 AD3d at 858-859; *Arnold*, 85 AD3d at 1332-1334; *Clarke*, 66 AD3d at 697]. Here, the record reflects a legitimate tactical and strategic reason not to explore that statement. Further, the effect of not doing so in no way compromised the defendant's right to a fair trial (*Caban*, 5 NY3d at 143,152; *see also Strickland*, 466 US at 688; *Baldi*, 54 NY2d at 137; *Benevento*, 91 NY2d at 708; *People v Ford*, 86 NY2d 397[1995]).

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

Dated: February 20, 2014
Bronx, N.Y.

Troy K. Webber, J.S.C.

APPENDIX I

U.S. CONST. amend. VI provides the following, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Criminal Procedure Law Section 440.10

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:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) 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; or

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

(g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States; or

(i) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution or promoting prostitution) or 230.00 (prostitution) or 230.03 (prostitution in a school zone) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law, sex trafficking of a child under section 230.34-a of the penal law, labor trafficking under section 135.35 of the penal law, aggravated labor trafficking under section 135.37 of the penal law, compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that

(i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or compelling prostitution crime or has sought services for victims of such trafficking or compelling prostitution crime, subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking or compelling prostitution crime that may be jeopardized by the

bringing of such motion, or for other reasons consistent with the purpose of this paragraph; and

(ii) official documentation of the defendant's status as a victim of trafficking, compelling prostitution or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph;

(j) The judgment is a conviction for a class A or unclassified misdemeanor entered prior to the effective date of this paragraph and satisfies the ground prescribed in paragraph (h) of this subdivision. There shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences, and there shall be a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment under section five of article one of the state constitution based on such consequences; or

(k) The judgment occurred prior to the effective date of this paragraph and is a conviction for an offense as defined in subparagraph (i) or (ii) of paragraph (k) of subdivision three of section 160.50 of this part, in which case the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal. This paragraph shall not apply to a motion under paragraph (i) of subdivision one of this section; or

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

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right, or to a motion under paragraph (i) of subdivision one of this section; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) 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.

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.

4. If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. If the court grants a motion under paragraph (i) or paragraph (k) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances.

7. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court upon an appeal from the judgment, or by any court upon a previous post-judgment motion.

8. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

9. Upon granting of a motion pursuant to paragraph (j) of subdivision one of this section, the court may either:

(a) With the consent of the people, vacate the judgment or modify the judgment by reducing it to one of conviction for a lesser offense; or

(b) Vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant in accordance with the amendatory provisions of subdivision one-a of section 70.15 of the penal law.

New York State Penal Section 125.25

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) (i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the

second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person; or

5. Being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he or she intentionally causes the death of such person.

Murder in the second degree is a class A-I felony.