

To Be Argued By:
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Indictment No. 96-01403
Appellate Division Second Department Case No. 2008-08651

Court of Appeals

STATE OF NEW YORK



THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

RICHARD D. DIGUGLIELMO,

Defendant-Appellant.

**BRIEF FOR DEFENDANT-APPELLANT
RICHARD D. DIGUGLIELMO**

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PRELIMINARY STATEMENT

This is a case about a son who shot and killed a man who, it is undisputed, was armed with a metal baseball bat and had already struck his father “full force” with the bat at least once. A. 43a.¹ The son, an off-duty New York City police officer named Richard DiGuglielmo, contended that the shooting was justified. The key issue at trial was whether the father was in immediate danger when Mr. DiGuglielmo shot the assailant, Charles Campbell. After key witnesses testified that Campbell had not been swinging the bat at the time that the shots were fired, Mr. DiGuglielmo was convicted of depraved-indifference murder and sentenced to 20 years to life in prison. More than a decade later, new evidence presented at a lengthy hearing established that the key witnesses in the case had actually seen Campbell swinging the bat at the critical moment, but the witnesses had been improperly and repeatedly pressured to change their stories. This resulted in the submission of false testimony at trial. The County Court, after hearing the witnesses and judging their demeanor,

¹ References to “A.” are to the Appendix accompanying this brief.

expressed dismay about what had occurred and freed Mr. DiGuglielmo from prison.

Without disturbing the findings of misconduct, the Appellate Division reversed, asserting that the jury, which had acquitted Mr. DiGuglielmo of both intentional murder and assault and which had specifically asked for re-instruction on reasonable doubt, would still have found lack of justification, beyond a reasonable doubt, if it had heard the key eyewitnesses provide exculpatory—rather than inculpatory—testimony. That ruling cannot be sustained.

QUESTIONS PRESENTED

1. Where the County Court determined at an evidentiary hearing that the testimony of key witnesses at trial about the central issue at trial had been false and had been procured by police misconduct:
 - A. Whether the County Court properly granted relief under CPL § 440.10 after determining that the result of the trial would probably have been different if the newly uncovered facts had been known.
 - B. Whether the County Court properly granted relief under *Brady v. Maryland* after determining that there was a reasonable possibility that the result of the trial would have been different if newly uncovered facts had been known.

(Appellate Division's answers: No; County Court's answers: Yes)

2. Whether it is permissible under state and federal law to continue to imprison the appellant for conduct that could not as a matter of law make out the crime of conviction if charged today.

(Appellate Division's answer: Yes; County Court's Answer: No)

FACTUAL AND PROCEDURAL BACKGROUND

A. The Shooting And Trial

On October 3, 1996, Richard D. DiGuglielmo, an off-duty police officer, was helping out at his parents' deli in Dobbs Ferry. Charles Campbell drove up to the deli and parked in one of the parking spaces in front of the deli that were owned by the deli and reserved for its customers. A. 399, 1809-10. Campbell began walking across the street to a pizzeria. The father and Campbell then exchanged words, and Campbell continued to the pizza store. A. 400-01.

When Campbell got to the pizzeria, one of its employees told him that the elder DiGuglielmo might place a sticker on his car for having parked in the deli's reserved space. Campbell — “a big guy” who was an amateur boxer and had just spent several hours working out (A. 185, 225, 92-95) — responded, “if he puts a sticker on my car you know I'm going to kick his ass.” A. 402.² Shortly thereafter, the father did place

² Mr. DiGuglielmo also proffered evidence that Campbell had a record of prior assaults, including a violent altercation with four police

a sticker on the car's passenger-side window, and Campbell ran across the street to confront him. At that point Mr. DiGuglielmo emerged from the deli and stepped between Campbell and his father. Although the witnesses at trial disagreed about how and by whom the first blow was struck, it is undisputed that the two men began fighting. The fight was joined by the father and Mr. DiGuglielmo's brother-in-law, who was also working at the store. The DiGuglielmos ultimately subdued Campbell, and the altercation appeared to be over. *See, e.g.*, A. 231, 435, 464. Mr. DiGuglielmo re-entered the deli, but his father paused to give Campbell back his cellular telephone and his shirt, which had come off during the fight. A. 185, 1288, 1737.

Campbell, however, did not take the phone or the shirt. Instead, he pulled a metal baseball bat from the trunk of his car. With full force (A. 230, 922), he swung it at the elder DiGuglielmo, striking him with such power that prosecution witnesses some distance away could hear the sound of the blow. A. 696, 922-23, 943. Observing Campbell attacking the father, one of the People's eyewitnesses recalled saying

officers. In a ruling that DiGuglielmo contended was error, the trial judge precluded him from placing this information before the jury.

“my God. He’s going to take his head clean off his shoulder like this
* * * I expected his head to explode like a watermelon.” A. 189, 230.

Mr. DiGuglielmo saw Campbell swing the bat at his father. A. 1738-39. He grabbed a licensed firearm that was kept behind the counter in the deli and rushed back outside. When he got there Campbell was facing his father with the bat raised again, in the stance of a batter who was “about to hit a baseball.” A. 639; *see also* A. 189, 254-55, 418, 664, 890, 908, 1071-72, 1093-94. The closest object to the raised bat was the father’s head. A. 908. Before Campbell could strike his father again with the bat, Mr. DiGuglielmo fired three shots into Campbell’s “center mass,” as he had been trained by police instructors. A. 1719-20, 1782, 1910-11. Campbell died shortly thereafter.

Mr. DiGuglielmo was charged with intentional murder, depraved indifference murder, and assault. The defense at trial was justification. The People “made the lynchpin of their case the movement of Campbell and the positioning of the bat in his hand when he was shot by Defendant.” A. 42a. The prosecution sought to establish Campbell’s movements and handling of the bat through eyewitness testimony.

There were a number of witnesses (several of them children) who saw only part of the chain of events, or whose views were obstructed.

There were, however, “three people who were in the best position to witness the shooting in its entirety as it occurred on October 3, 1996, and who gave statements that very night describing what they saw.”

Id. Those witnesses were Michael Dillon, James White, and Kevin O’Donnell. The prosecution put Dillon and O’Donnell on the stand in support of its case. Each testified at trial that Campbell was not swinging the bat at the time that he was shot. *People v. DiGuglielmo*, 75 A.D.3d 206, at 209, A. 4a (2d Dep’t 2010).

The jury wrestled with its decision, asking for re-instruction on reasonable doubt. A. 2380-84. After three and a half days of deliberations, the jury ultimately acquitted on intentional murder and assault. But the prosecution’s evidence on the two key issues — Campbell’s movements and the position of the bat — apparently convinced the jury that Campbell was not poised to use force “readily capable of causing death or other serious physical injury,” *see* Penal Law §§ 10.00(11), 35.15(2)(a), and therefore that the shooting was not justified. Mr. DiGuglielmo was convicted of depraved-indifference

murder. The sentencing judge stated his belief that Mr. DiGuglielmo's decision to shoot "was the product of genuine love and concern for the well being of his father" (A. 2461), but nonetheless felt compelled to impose a sentence of 20 years to life.

B. The New Evidence And Hearing

After Mr. DiGuglielmo had spent over a decade in prison, new evidence came to light establishing that the police had pressured eyewitnesses Dillon, White, and possibly O'Donnell to provide statements that were favorable to the prosecution. Each of those three eyewitnesses had stated to the police on the night of the shooting that Campbell had been attacking the father with the bat immediately before he was shot, and that the shooting was therefore justified. The new evidence showed that in the ensuing week, the police had chosen to repeatedly re-question these witnesses, and *only* these witnesses, in lengthy interview sessions conducted in an atmosphere of custodial interrogation. All of the witnesses altered their statements to make them more favorable to the prosecution. In fact, two of them (Dillon and O'Donnell) completely changed their positions and ended up

testifying at trial that the shooting victim had *not* been swinging the bat and had *not* been acting aggressively when he was shot.

The changes in these witnesses' stories came about after police and prosecutors embarked on what the County Court characterized as "a mission to pressure certain eyewitnesses into changing or conforming their testimony to fit the charge of murder that had been filed, rather than filing charges that fit the facts as revealed in the statements of the eyewitnesses." A. 41a-42a (footnotes omitted); *see also id.* at A. 42a-62a.

For example, Dillon recounted that after the night of the shooting, police officers twice appeared at his work, drove him to the police station, placed him in an "interrogation type of room," and interrogated him for "at least a couple of hours." A. 2496-97. Having twice failed to move Dillon from his initial statement, on October 7 the Chief of the Dobbs Ferry Police Department and the *entire* detective division picked up Dillon for further questioning. A. 2984-85, 2987. He was again interrogated for several hours, until finally, after midnight, he signed a statement that gave a completely different account of the shooting than the one given in his original statement. A. 73a.

White provided a similar account of police pressure. He too was “called back several times” for interviews (A. 3211), and the detectives “repeatedly stopped [him] from leaving” these sessions. A. 3320. The police showed him “different scenarios of what other people had said” in an effort to have him conform his story to “what other people had said.” A. 3211, 3345. White had “no doubt that they were trying to have me change my testimony”; “[t]hey didn’t seem happy with what I was saying * * * and they were just telling me how other people saw something different.” A. 3319; *see also* A. 3220.

The result of these interrogations was a near-complete reversal of these two witnesses’ story. On the night of the shooting, Dillon had told the police that Campbell had originally struck the elder DiGuglielmo “at full force and very hard,” and that, when he was shot, he “was still swinging the bat” at DiGuglielmo’s father. A. 84a. And he had told a local news station that DiGuglielmo’s actions “were self-defense from what I saw.” A. 114a. On that same night, O’Donnell reported to the police that after Campbell struck DiGuglielmo’s father with the bat, the father and brother-in-law attempted to get the bat away from Campbell, but Campbell “was able to get free of his grip from that stumble and

took a batter's stance and was about to strike the second white male who was trying to regain his balance." A. 82a. O'Donnell's statement explained further that Campbell "was about to hit the" father when Mr. DiGuglielmo fired the fatal shots. *Id.*

On October 8, both witnesses signed entirely different statements. Dillon's new statement — which was typed by a Dobbs Ferry detective (A. 54a) — declared that Campbell was "not swinging the bat" when he was shot, and that "this situation did not have to happen as the male black [Campbell] seemed to be defending himself as he had been outnumbered." A. 89a. The statement elaborated, explaining that Campbell "was just holding the bat to protect himself and did not have the intention of seriously hurting anyone." *Id.* As for O'Donnell, whereas his original statement had described Campbell as "about to strike" when he was shot, the October 8 statement said that Campbell was "getting ready to defend himself" and that he "was not swinging the bat" and had "never swung the bat." At trial, both Dillon and O'Donnell gave testimony that was consistent with the statements that they

signed on October 8. That testimony was central to the People’s case at trial.³

The defense knew that these witnesses had changed their stories, but it did not know *why*. It also did not know the witnesses continued to *believe* that their original accounts had been accurate. Had the defense known these facts, they undoubtedly would have been an aspect of the defense’s case. But instead Dillon became “the cornerstone of the People’s prosecution of Defendant. Mr. Dillon was in the best position from which to see the shooting as it occurred * * *.” A. 71a. “Mr. Dillon was a key witness for the People, not only because he failed to testify that Defendant was justified in his actions, but by going even further — he testified that defendant *was, in fact, unjustified*, in the shooting of Mr. Campbell.” *Id.* at A. 72a (emphasis in original).

³ White, too, retreated from his October 3 statement. In a statement signed on October 11, White maintained that Mr. Campbell had been swinging the bat at the time of his death. Unlike White’s October 3 statement, however, this new statement did not state that the bat was being swung in a “wild aggressive manner,” and the new statement also added language that was self-impeaching — it described White as being “hypnotized the whole time which made it hard * * * to judge distance.” 75 A.D.3d 206, at 213, A. 7a-8a; *see* A. 86a-87a, 90a-91a.

Upon learning of this new evidence, Mr. DiGuglielmo filed a motion to vacate his conviction under CPL § 440.10.⁴ Attaching signed statements from Dillon and White, the motion argued that this newly discovered evidence showed that the People had violated their obligations under *People v. Rosario*, 9 N.Y.2d 286 (1961), and *Brady v. Maryland*, 373 U.S. 83 (1963). The motion also argued that this evidence would have shown that witnesses were pressured and manipulated into giving an account of the tragic events of October 3, 1996, that matched the prosecution's theory of the case.

The County Court held an evidentiary hearing at which Dillon and White both testified, and the judge found their testimony credible. The court further determined that “the most reliable statements made by Mr. Dillon regarding the shooting are those that were made on October 3, 1996 * * * before the intimidation, interrogation and will-

⁴ At the time this motion was filed, on November 9, 2006, another § 440.10 motion was also pending. That motion, filed on September 21, 2006, argued that the conviction should be vacated following several decisions of this Court establishing that the conduct for which Mr. DiGuglielmo was convicted does not, as a matter of law, amount to a violation of New York's depraved-indifference murder statute. A. 19a-34a. Ultimately, as discussed below, the County Court granted both petitions, vacating the conviction on two alternative grounds.

bending tactics of the police and prosecution were upon him, and at a time when Mr. Dillon had no reason to lie, embellish or otherwise misrepresent the facts.” A. 58a.

Given the impact of these findings on the primary disputed fact at trial — whether Campbell was handling the bat in a manner indicating that he was about to use deadly physical force against the elder DiGuglielmo — the County Court concluded the “the evidence * * * was such that it would probably change the result of the trial if a new trial were granted,” and therefore held that DiGuglielmo prevailed on his claim under § 440.10(1)(g). A. 70a-75a. Citing the standard set forth in *People v. Vilardi*, 76 N.Y.2d 67 (1990), the County Court also found that the conviction could not stand under *Brady*, because there was “a reasonable possibility that the failure to disclose such material contributed to the verdict.” A. 74a. Indeed, “[h]ad the defense been made aware of the extent and nature of the exculpatory evidence, their trial strategy indeed the trial itself would very well have been different.” A. 76a.

The County Court therefore granted Mr. DiGuglielmo’s Section 440.10 motion, vacated his conviction, ordered his release, and denied

the People leave to re-indict. Mr. DiGuglielmo was released from the Eastern N.Y. Correctional Facility on September 19, 2008.

C. The Appellate Division's Decision

Following Mr. DiGuglielmo's release, the People appealed, and the Appellate Division reversed, reinstating Mr. DiGuglielmo's conviction and sending him back to prison after 20 months of freedom, during which time he had lived as a model citizen, making up for lost time with his family and working as a union "sandhog" on major underground construction projects in New York City. On June 3, 2010, Mr. DiGuglielmo voluntarily surrendered to resume serving his sentence.

The Appellate Division did not take issue with the trial court's description of the pressure applied to the witnesses or the effect that the pressure had on their statements and trial testimony. Instead, the Appellate Division reversed "on the law" (75 A.D.3d 206, at 218, A. 12a), after concluding that the "the defendant failed to establish the probability that the jury would have found his belief in Campbell's imminent use of deadly force to be objectively reasonable under all the circumstances." *Id.* at 216, A. 11a. The Court held that *even if* the three witnesses had testified that Campbell, at the time he was shot,

was swinging the metal bat at Mr. DiGuglielmo's father, and even if Campbell was only five and a half feet (within striking distance — *e.g.*, a 33 inch bat and a 33 inch reach) from the father, those facts did not “significantly increase the level of Campbell's aggressiveness.” *Id.*

Therefore, according to the Appellate Division, Mr. DiGuglielmo had

time to display the handgun and deliver a warning. In this regard, the jury was entitled to consider the defendant's testimony as to his background and training as a police officer to use deadly force only as a last resort.

In sum, considering the trial and newly discovered evidence in combination, the circumstances did not support an objectively reasonable inference that a deadly strike with the bat was imminent. Had the jury heard the evidence of undue police pressure on witnesses and fully credited the October 3rd statements of Dillon, O'Donnell, and White, the People still would have disproved the defense of justification beyond a reasonable doubt. The defendant, thus, failed to meet his burden of establishing the probability that, had the newly discovered evidence been received at trial, the verdict would have been more favorable to him, and the County Court erred in granting that branch of the defendant's motion which was pursuant to CPL 440.10(1)(g) to vacate the judgment on the ground of newly discovered evidence.

Id. at 217, A. 11a. Without citing *Vilardi* and its “reasonable possibility” standard, the Appellate Division rejected Mr. DiGuglielmo's

Brady claim on similar grounds, holding that “because the defendant’s *Brady* claim was based upon the same newly discovered evidence, the defendant failed to meet his burden of establishing a ‘reasonable probability’ that nondisclosure of the evidence affected the outcome of the trial.” *Id.*

SUMMARY OF ARGUMENT

The Appellate Division improperly interpreted and applied the prejudice standards that apply to claims of newly discovered evidence and *Brady* violations. Its approach improperly creates a virtually insurmountable obstacle to vindication on either ground. That is especially troubling because both claims go to the very heart of a defendant’s guilt or innocence. Here, the evidence concerned pivotal eyewitnesses who, on the very day of the shooting, made statements to the police that established that Mr. DiGuglielmo’s actions were justified. By the time of the trial, however, two of those individuals had completely changed their stories, and one of them became the People’s star witness. On the facts found by the County Court and not disturbed by the Appellate Division, the People not only deprived Mr. DiGuglielmo of the opportunity to present the full truth to the jury, but

also presented their own fiction. That fiction has already cost Mr. DiGuglielmo 11 years of his life. It was error for the Appellate Division to reinstate the conviction.

The Appellate Division's error was compounded by a second one: the Appellate Division also reversed the County Court's conclusion that Mr. DiGuglielmo's conviction, whether or not it was tainted by false testimony, was improper under the Due Process Clause of the federal constitution because it was based on evidence that subsequent decisions of this Court have made clear is insufficient to sustain a conviction for depraved indifference murder. There is no dispute that Mr. DiGuglielmo could not be convicted of — or even properly charged with — depraved indifference murder under the law as it stands today. Under established federal law, it is therefore unconstitutional for the state to continue to imprison him for this flawed conviction.

ARGUMENT

I. The Appellate Division Misapplied The Prejudice Standards Of Section 440.10(1)(g) And *Brady v. Maryland*.

The Appellate Division did not disturb the County Court's factual conclusions: that Dillon's and White's testimony at the evidentiary hearing was credible, that the People improperly failed to disclose

exculpatory evidence to the defense, and that the People adduced false testimony from Dillon and White at the trial.⁵ Nevertheless, the Appellate Division reinstated Mr. DiGuglielmo's conviction, concluding that Mr. DiGuglielmo had suffered no prejudice. Even if the jury had "fully credited" the original, exculpatory statements given by Dillon, White, and O'Donnell, the Appellate Division concluded, there was no "reasonable probability" that the new evidence would have changed the jury's verdict. In so holding, the Appellate Division misapplied the prejudice standards of § 440.10(1)(g) and the Due Process Clause of the Fourteenth Amendment.

A. The Appellate Division Misapplied The Prejudice Standard Of § 440.10(1)(g).

The Second Department transformed a "reasonable probability" standard into a far more rigid test requiring something approaching "certainty." The fact that the only adult witnesses who actually saw the shooting would have testified to the opposite of what they testified and trial, and that their false testimony was caused by police interference, "destroys the basis upon which the judgment of conviction rests."

⁵ Given that the County Court's decision was based largely on credibility determinations, it is not surprising that the Appellate Division accepted them.

People v. Shilitano, 218 N.Y. 161, 170 (1916). At the very least, the excision of this testimony “might well have altered the focus of the entire case.” *People v. Lackey*, 48 A.D.3d 982, 984 (3rd Dep’t. 2008). That is enough to satisfy the statute’s prejudice prong and require that the conviction be vacated.

Contrary to the Appellate Division’s conclusion, it is almost inconceivable that the trial’s result would have been the same if the defense had had access to the newly discovered evidence. The jury in such a trial would have heard:

- Testimony from Dillon that Campbell had originally struck the elder DiGuglielmo “at full force and very hard”; that, when he was shot, Campbell “was still swinging the bat” at Mr. DiGuglielmo’s father; and that Mr. DiGuglielmo’s actions “were self-defense from what I saw.” A. 84a, 114a.
- Testimony from O’Donnell that that Campbell “was about to strike the [father], who was trying to regain his balance” when he was shot. A. 82a.
- Testimony from White that after the initial fistfight appeared to be over, Campbell “pulled out a baseball bat and started to wildly attack Richie Sr., striking him several times with the bat,” and testimony that Campbell “was still swinging the bat in a wild aggressive manner in the direction of Richie Sr.” when he was shot. A. 87a.

And the jury in such a trial would *not* have heard:

- Testimony from Dillon that, at the time he was shot, Campbell was not swinging the bat and was not in any motion of any kind. A. 891.
- Testimony from O'Donnell that, at time he was shot, Campbell was not swinging the bat and was not even close to the elder DiGuglielmo. A. 668-69.

Moreover, the jury in a trial with all of the withheld and missing evidence would have heard testimony from witnesses that the police had embarked on a campaign to press the three witnesses into changing their original statements to ones that were unfavorable to Mr. DiGuglielmo. On these facts, the Appellate Division's assumption that "the People still would have disproved the defense of justification beyond a reasonable doubt" even if "the jury [had] heard the evidence of undue police pressure on witnesses and fully credited the October 3rd statements of Dillon, O'Donnell, and White" (75 A.D.3d 206, at 217, A. 11a) is unsustainable.

The Appellate Division somehow concluded that the new evidence "did not support an objectively reasonable inference that a deadly strike with the bat was imminent" (*id.*), even though it *accepted* that the new evidence would have included testimony that Mr. Campbell "was still swinging the bat" when he was shot (Dillon's statement), was doing so in a "wild aggressive manner" (White), and "was about to hit the second

white male” (O’Donnell). *Id.* at 213, A. 7a-8a. On such a record, any jury would have been hard-pressed to reject Mr. DiGuglielmo’s claim that he reasonably believed that his father faced the imminent use of force capable of causing death or other serious injury. At a minimum, it is at least probable that a jury would have had *reasonable doubt* about the supposed lack of justification.

In the courts below, and in its papers urging this Court to deny review, the People have repeatedly stressed that there were a number of witnesses whose testimony conflicted with the October 3 statements of Dillon, O’Donnell, and White. As the County Court correctly found, none of those other witnesses offered testimony that was nearly as consequential as Dillon and White – for the simple reason that none of them, other than a handful of children who gave conflicting testimony, testified to having *seen* the actual shooting. But in any event, the dispute is immaterial here. The Appellate Division did not reverse because it felt that the jury would have credited other witnesses over Dillon, O’Donnell, and White. The Court instead held that “[h]ad the jury heard the evidence of undue police pressure on witnesses and *fully credited* the October 3rd statements of Dillon, O’Donnell, and White,

the People still would have disproved the defense of justification beyond a reasonable doubt.” 75 A.D.3d 206, at 217, A. 11a (emphasis added). Accordingly, the correctness of the decision below does not turn on a weighing of various witnesses’ competing testimony; it turns on the soundness of the Appellate Division’s conclusion that the jury would have reached the same verdict even if it believed that Campbell was swinging the bat in a wildly aggressive manner and was about to strike the elder DiGuglielmo when he was shot.

That conclusion at best relied on impermissible speculation. For example, the court’s supposition that because “the defendant’s gun was a far swifter deadly instrument than the bat in Campbell’s hands, there was time to display the handgun and deliver a warning” (*id.*), is facially without merit (if a bat is *being swung* at someone’s head, even a two-word warning would not be completed before metal smashed into bone) and without support in the record.⁶

⁶ Additionally, if raised at any new trial, any speculation about a warning would be rebutted by testimony from a former NYPD firearms instructor stating that officers are trained that an armed person with a knife, bat, or blunt object can cover 20 to 25 feet before the officer can draw his gun and aim. The decision to shoot must be made in a split second.

Similarly improper and baseless speculation plagues the Appellate Division's prejudice analysis as a whole. For instance, the suggestion that new evidence showing "Campbell still swinging the bat at the moment he was shot does not significantly increase the level of Campbell's aggressiveness" is unsupported, unexplained, and practically self-refuting. If a man swinging a metal baseball bat at another man's head does not make him more aggressive (or at least make it reasonable for an onlooker to believe he is more aggressive), nothing does. It is equally senseless to suppose that because the father and brother-in-law "were in positions facing Campbell" that therefore "they had been pursuing Campbell rather than the other way around." See 75 A.D.3d 206, at 216, A. 11a. Campbell was facing the DiGuglielmos as much as they were facing him. And in any event, who would turn his back on someone about to swing a bat at his head?

Of equal significance, the Appellate Division's ruling rests on a mischaracterization of the standard governing the use of deadly force to defend another. Such force can be used when the actor reasonably believes that the person being defended is facing the use of deadly physical force, which, in turn, is defined as physical force "which, under

the circumstances in which it is used, is readily capable of causing death or other serious physical injury.” Penal Law §§ 35.15, 10.00(11). “Serious physical injury” includes physical injury which causes “serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.” *Id.* § 10.00(10). In other words, deadly force can be used to defend another against whom force is about to be used that is *readily capable* of causing, among other things, “serious and protracted disfigurement” or “protracted loss or impairment of the function of any bodily organ.” Obviously, a swinging bat is readily capable of doing that. Yet the Appellate Division stated that Campbell “was not actually using deadly physical force at the moment he was shot,” and asserted that a “deadly strike with the bat” was not imminent. 75 A.D.3d 206, at 216-217, A. 10a. That reflects either a profound misreading of the record or a misguided belief that deadly force can be used in defense of another only when actual death is imminent and certain.

To prevail under § 440.10(1)(g), Mr. DiGuglielmo did not have to prove that a jury *definitely* would have acquitted him. His burden was far more modest: he only had to establish that the new evidence — that

Campbell, when he was shot, was wildly and aggressively swinging a metal bat and about to strike the elder DiGuglielmo — was the type of evidence that would *probably* have created reasonable *doubt* in the jurors' minds on the issue of justification.

The Appellate Division is alone in believing that this new evidence would not have done that. The Dobbs Ferry police knew that what Campbell was doing at the time he was shot, and in particular that the position of the bat was a crucial fact directly relevant to the validity of the murder charge that had already been lodged. *See, e.g.*, A. 2978-79 (Detective Guarneri acknowledging that the “statement that the bat was swinging was more supportive of the defense position in this case than of the prosecution position”); A. 2979 (Detective Guarnieri agreeing that “if the bat is swinging, the shooting may well be justified”). The prosecuting attorney knew it too. *See* A. 42a n.22 (“ADA Murphy testified at the hearing that whether the bat was swinging or not was not only an important fact, it may well have been the most important fact in this prosecution.”). Indeed, concern that the evidence would have undermined the case against Mr. DiGuglielmo is the only explanation for the campaign to pressure the key eyewitnesses

to sign false statements and offer false testimony on the topic. And the County Court, after hearing the witnesses and judging their demeanor, was certain that this new evidence — both the evidence of Campbell’s actions, and the evidence of the police misconduct — would have led to an *acquittal*. A. 72a (“In this case, the discovery of new evidence * * * would *certainly* lead to a more favorable verdict at a new trial.” (emphasis added)). The judgment of the police department and the County Court in this case about the impact of the newly discovered evidence comports with common sense: in a case involving a defendant’s shooting of an individual armed with a metal bat, a jury that believed the individual was swinging the bat and about to hit a third party would probably reach a different outcome than a jury that believed the individual was holding the bat defensively and not swinging at anyone.

The Appellate Division’s holding reflects an extraordinary — and wholly misplaced — skepticism about the impact of newly discovered evidence, and hence misapplies the applicable legal standard for prejudice. Indeed, if a reasonable probability of a different verdict does not exist in this case, it is hard to imagine a case in which it would.

Consequently, the decision below, unless corrected, threatens to eliminate § 440.10(1)(g) as a meaningful avenue of relief for individuals who are actually innocent.

B. The Appellate Division Misapplied The *Brady* Materiality Standard.

The Appellate Division believed that Mr. DiGuglielmo's *Brady* claim was foreclosed by its rejection of his § 440.10(1)(g) claim; it believed, apparently, that the analysis of prejudice was the same under *Brady* and § 440.10(1)(g). *See* 75 A.D.3d 206, at 217, A. 11a ("Similarly, because the defendant's *Brady* claim was based upon the same newly discovered evidence * * *.") Both this Court and the U.S. Supreme Court, however, have articulated a materiality standard for *Brady* claims that differs from the standard that the Appellate Division employed when disposing of Mr. DiGuglielmo's § 440.10(1)(g) claim. Accordingly, even if the Appellate Division's § 440.10(1)(g) analysis were correct (which it was not), the court's *Brady* analysis was erroneous.

As an initial matter, with respect to Mr. DiGuglielmo's challenge under New York's guarantee of due process, the Appellate Division should have applied the "reasonable possibility" test to the *Brady*

violation, not the “reasonable probability” standard. The County Court properly did so, citing *People v. Vilardi*, 76 N.Y.2d 67 (1990), which holds that the lower standard applies where there has been a specific request for the material in question.⁷ In applying a more stringent

⁷ The People conceded below that Mr. DiGuglielmo expressly sought the production of *Brady* material. That would be a sufficiently specific request given the nature of the withheld evidence. *See, e.g., People v. Bond*, 95 N.Y.2d 840, 843 (2000) (“The People concede that Green’s prior denial of having witnessed the shooting is *Brady* material and that defendant made a specific request for such material in his omnibus motion. Thus, reversal of defendant’s conviction is required if there is a ‘reasonable possibility’ that, had that material been disclosed, the result would have been different (*see, People v. Vilardi*, 76 NY2d 67, 77).”). And Mr. DiGuglielmo’s Nov. 4, 1996 Demand To Produce did far more than that. It sought, among other things, “any statement by anyone that addresses any issue in all of Article 35 of the Penal Law [Justification Defense]”; “[a]ll material evidence or information * * * detracting from the prosecution’s case or the credibility of the prosecution’s witnesses,” with “[p]articuliar attention * * * directed to those matters relevant to Article 35 of the Penal Law”; “[a]ny statements known to be false or erroneous or conflicting * * * by persons intended to be called as witnesses”; “[a]ny statements, records or information, indicating that any prospective witness has given contradictory or deceitful information in the course of the investigation of this case”; “any information indicating that any prospective witness has given information inconsistent or materially different from information received from other more reliable sources”; “statements of any person(s) interviewed by or on behalf of the People or who are known to have been witnesses to the events underlying the charge whom the People do not intend to call as witnesses”; “[a]ny other records or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the prosecution’s evidence”; “disclosure of * * * [a]ny * * * coercive

probability test, the Appellate Division failed even to cite *Vilardi*. That legal error was significant. While Mr. DiGuglielmo should prevail under either standard, there is no plausible argument that the missing evidence would not have created a “reasonable possibility” of a different result at trial. The Appellate Division’s failure to apply the proper test thus is reason enough to reverse.

But if the “reasonable probability” standard did apply, the Appellate Division erred in how it applied that test to the facts of this case. That is so both as a matter of state and federal law. The Supreme Court in *Brady* held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” 373 U.S. 83, 87 (1963). The Court subsequently elaborated, explaining that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985).

measures directed against any witness.” See A. 93a-111a (Demand to Produce), at ¶¶ 9, 10, 11, 13, 14, 15, 16, 21, 22, 22c, 49b, 49c, 49d, 49e.

While *Bagley*'s "reasonable probability" language echoes that of § 440, the phrase has a particular meaning under federal law. In *Kyles v. Whitley*, the Supreme Court identified some "aspects of materiality under [*Brady* that] bear emphasis." 514 U.S. 419, 434 (1995). Two of those aspects illustrate the difference between the prejudice analysis demanded by § 440.10(1)(g) (at least as undertaken by the Appellate Division) and the analysis required under *Brady*. *First*, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* The relevant question instead "is not whether the defendant would more likely than not have received a *different verdict* with the evidence, but whether in its absence he received a *fair trial*, understood as a trial resulting in a verdict worthy of confidence." *Id.* (emphasis added). If the government's suppression of evidence "undermines confidence in the outcome of the trial," that alone is sufficient to vacate the defendant's conviction. *Id.* (quoting *Bagley*, 473 U.S. at 678).

Second, the materiality inquiry "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the

inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Id.* at 434-35. Accordingly, “[o]ne does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 35.

The Appellate Division did not follow those precepts in this case. Instead, the court’s analysis focused solely on whether the newly discovered evidence would have resulted in an acquittal. *See* 75 A.D.3d 206, at 217, A. 11a (“Had the jury heard the [newly discovered evidence] * * *, the People still would have disproved the defense of justification beyond a reasonable doubt.”). That is simply not the right question under *Brady*. What matters for federal constitutional purposes is whether the suppression of evidence undermines confidence in the jury’s verdict, regardless of whether there remained sufficient evidence to convict. It plainly does so in this case, and the Appellate Division’s two-sentence *Brady* holding failed even to grapple with that

critical issue.⁸ Had it done so, it would have been forced to conclude, as this Court should, that the People's failure to disclose exculpatory evidence had a profound effect on the course of the defendant's trial, and likely influenced the result. This Court should therefore reverse the Appellate Division's order, to vindicate "the vital interest this Court has long recognized in a decision rendered by a jury whose ability to render that decision is unimpaired by failure to disclose important evidence." *Vilardi*, 76 N.Y.2d at 78.

II. The Appellate Division Violated Due Process By Reinstating The Conviction.

There is a second, independent reason to reverse the Appellate Division's decision and reinstate the County Court's order. The County Court granted Mr. DiGuglielmo's motion on an alternative ground, holding that the People's evidence was insufficient as a matter of law to establish a violation of the depraved-indifference statute. That holding

⁸ See also *People v. Hunter*, 11 N.Y.3d 1, 6 (2008) (ordering new trial under *Brady* where withheld "evidence would have added a little more doubt to the jury's view of the * * * allegations. We find it reasonably probable that a little more doubt would have been enough."); *People v. Bond*, 95 N.Y.2d 840 (2000) (reversing denial of § 440.10 motion predicated on the People's failure, under *Brady*, to disclose an oral statement made by a witness that contradicted that witness's trial testimony).

was based on language in this Court's cases, decided after Mr. DiGuglielmo's conviction became final, that clarified (rather than departed from) the law as it existed when Mr. DiGuglielmo was convicted, and established that a person who *intentionally* fires a weapon at another person, as Mr. DiGuglielmo did, cannot be convicted of "depraved indifference murder." A. 22a-23a.

The County Court's ruling was correct. Because this Court's decisions make clear that the People failed to prove their case beyond a reasonable doubt under the law that existed at the time of Mr. DiGuglielmo's conviction, the Due Process Clause of the Federal Constitution will not allow the conviction to stand. *See Fiore v. White*, 531 U.S. 225 (2001). Thus, the Appellate Division's decision should be reversed, and the conviction should be vacated. And even if this Court believes, as the People urged below, that *Fiore* does not apply because the post-conviction depraved-indifference cases represent a substantial departure from the law as it existed at the time of conviction, continued imprisonment for an act that is not now recognized as a crime remains a violation of due process.

A. The Facts Were Insufficient To Sustain A Conviction For Depraved-Indifference Murder Under New York Law.

Mr. DiGuglielmo was convicted of depraved indifference murder upon evidence that he intentionally fired three shots at Charles Campbell's "center mass," with the intention of killing Mr. Campbell. As the County Court held, it is beyond dispute that these facts could not support a charge of depraved indifference murder, were the case brought today. The court recognized that after Mr. DiGuglielmo's conviction, this Court, "in case after case[,] vacated depraved indifference murder convictions where there was no evidence of an unintentional killing, because such convictions were unconstitutionally obtained." A. 21a. These cases, beginning with *People v. Hafeez*, 100 N.Y.2d 253 (2003), clarified "long-settled New York law" and established that in a case such as this one, "where there is *only* proof of an intentional killing, a depraved indifference murder conviction cannot be sustained." *Id.* at A. 26a. *See Hafeez*, 100 N.Y.2d at 260; *People v. Gonzalez*, 1 N.Y.3d 464, 468 (2004); *People v. Payne*, 3 N.Y.3d 266, 271 (2004); *People v. Suarez*, 6 N.Y.3d 202, 210 (2005).

B. The Conviction Violates Due Process.

Relying on *Fiore v. White*, 531 U.S. 225 (2001), the County Court held that Mr. DiGuglielmo's conviction for depraved indifference murder violated due process. A. 33a-34a. That conclusion was correct. In *Fiore*, the U.S. Supreme Court held that it is unconstitutional for a state to sustain a criminal conviction based on evidence that the State's highest court later clarifies is insufficient to satisfy the elements of the charged crime.

This case is governed by the same due process rule. As in *Fiore*, where the Pennsylvania Supreme Court issued decisions after the defendant was convicted clarifying that the defendant's conduct did not violate the criminal statute under which he was convicted, here, *Hafeez*, *Gonzalez*, *Payne*, and *Suarez* made clear that certain conduct — such as Mr. DiGuglielmo's conduct — as a matter of law did not constitute depraved-indifference murder and thus could not support the conviction. The County Court properly found that for this reason, “[t]he simple, inevitable conclusion is that [Mr. DiGuglielmo's] conviction fails to satisfy the Federal Constitution's demands.” *Fiore*, 531 U.S. at 229.

The Appellate Division held that because Mr. DiGuglielmo had challenged the sufficiency of the evidence on his direct appeal, § 440.10(2)(a) prevented him from re-presenting the argument in a collateral attack unless he was invoking a “retroactively effective change in the law.” 75 A.D.3d 206, at 211, A. 6a. According to the Appellate Division, the County Court should have summarily denied any such attack based on the content of the law as it existed when Mr. DiGuglielmo’s conviction became final (notwithstanding the subsequent clarification of the statute’s meaning).

That holding was incorrect. The Second Department affirmed Mr. DiGuglielmo’s conviction on direct appeal before this Court’s new decisions on depraved-indifference murder. Nothing in CPL § 440.10(2)(a) deprives the County Court of the power to apply this Court’s decisions, and the concomitant due process rule announced by the Supreme Court in *Fiore* in 2001, to the facts of this case — something the Appellate Division was not in a position to do in 1999 when it reviewed Mr. DiGuglielmo’s conviction on direct appeal. For this reason, Mr. DiGuglielmo’s conviction was properly vacated under

CPL § 440.10(1)(g), and the Appellate Division should not have reinstated it.

In any event, if the Appellate Division was correct in its interpretation of § 440.10(2)(a) — that it does not permit the vacation of a conviction based on grounds that were rejected as incorrect by an intermediate appellate on direct appeal but then substantiated as correct by the Court of Appeals in subsequent decisions — then § 440.10(2)(a) *itself* is unconstitutional under *Fiore*. The constitution does not permit a state to imprison a defendant based on a conviction later revealed to have been unsustainable based on the evidence presented at trial.

C. The Failure To Apply New Law Retroactively Also Violates Due Process.

Finally, even if, as the People urged below, the *Hafeez* line of cases did not “clarify,” but rather “changed” New York law, this Court should nonetheless reverse, because the failure to retroactively apply such a judge-made change in substantive law (*see Policano v. Herbert*, 7 N.Y.3d 588, 602-603 (2006)) would itself violate Mr. DiGuglielmo’s federal due process rights. The Due Process Clause does not allow a person to be convicted and kept in prison for committing a statutorily defined

“offense” that was thought to be a crime at the time of his conviction *only* because the courts were misconstruing the applicable statute.

In the federal system, while new rules of criminal *procedure* are applied retroactively on collateral review only rarely, *see Teague v. Lane*, 489 U.S. 288 (1989), the U.S. Supreme Court has held in *Bousley v. United States* that new *substantive* interpretations of criminal statutes must always be given retroactive effect. 523 U.S. 614, 620-21 (1998). Because “[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction,” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994), any judicial clarification of the meaning of a criminal statute must always apply to conduct that took place both before and after that clarification was handed down. If it were otherwise, what conduct is criminal and what conduct is not would be at the whim of the courts rather than of the legislature. That is at odds with a criminal-justice system that long ago jettisoned the idea of common-law crimes.

Although it remains an open question for the U.S. Supreme Court to resolve, the Fourteenth Amendment, properly interpreted,

imposes similar constraints upon the power of state courts to refuse to give retroactive effect to judicial narrowing of substantive criminal statutes. That is a matter of basic fairness. To let stand a conviction that was based on a judicial misinterpretation of the relevant criminal statute would be to reject a defendant's right to be free from imprisonment absent proof of guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, Mr. DiGuglielmo's conviction and continued imprisonment are unconstitutional.

CONCLUSION

The Appellate Division order reinstating the judgment of conviction should be reversed, and the County Court order vacating the judgment of conviction should be reinstated. The judgment of conviction should be vacated.

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