

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.

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

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INTRODUCTION

The People have submitted a 97-page brief in opposition to this appeal, consisting of barely 35 pages of argument appended to a slanted summary of the facts that fills nearly 60 pages. The facts, of course, should not be, and are not, in dispute at this stage; the People have chosen to focus on them nonetheless because they cannot defend the Appellate Division's conclusions on the law. The Appellate Division concluded that the jury would still have convicted Mr. DiGuglielmo of homicide even if it knew that the police had engaged in a campaign of intimidation against every witness who supported his version of the facts, and that at least one of those witnesses, who testified at trial for the prosecution, actually believed him to be innocent. The lower court's holding was that relief under § 440.10 and federal constitutional law is simply unavailable to a criminal defendant even if he proves that exculpatory evidence was withheld from him prior to trial and that the chief witness against him was coached unremittingly by police until he finally agreed to change his story.

For all its heft, the Peoples' response is little more than an attack on the credibility of the witnesses who testified at the hearing. The

People urge this Court to disregard those witnesses' testimony altogether, because they were lying, or they were confused, or they were "malleable." But as the Court is fully aware, it does not have the power to make factual determinations – certainly not ones that are based on assessments of witness credibility. Even the Appellate Division, which normally has broad power to review factual determinations, is severely restricted in its ability to second-guess a trial judge's credibility findings. The fact that the hearing witnesses were telling the truth has been established – for good reason – and cannot now be disturbed, either by this Court or by the Appellate Division.

Other than *ad hominem* attacks on these disinterested witnesses (and, for good measure, the trial judge), the Peoples' response boils down to the untenable assertion that the new evidence adduced at the hearing would not have made a difference at trial if the jury had heard it. *That* assertion, and not the witnesses' testimony, is what is incredible. The only witnesses who actually *saw* the shooting believed at the time that it was justifiable and was a direct response to an imminent deadly attack on the defendant's father. It defies reason to assert that there is not a "probability" (under § 440.10), or at least a

“reasonable possibility” (under *Brady*), that the result at trial would have been different had the jury known that the police systematically, repeatedly, and consistently intimidated these witnesses until they changed their stories.

The Appellate Division’s order should be reversed, and the County Court order vacating the conviction should be reinstated.

ARGUMENT

I. The Evidence Uncovered At The Hearing Is “New Evidence.”

The People expend considerable energy attempting to establish that the evidence uncovered at the § 440.10 hearing was not “newly discovered” within the meaning of the statute. Their argument takes up a great deal of space, but it ultimately boils down to two relatively simple assertions: (1) the witnesses who testified at the hearing were lying – and therefore their testimony is not “evidence” at all; and (2) even if the testimony was true, it is consistent with these witnesses’ prior statements – and therefore it is not “newly discovered.”

Neither argument holds water. First, as the People know full well, credibility determinations are not for this Court to make; to the contrary, the judge who heard these witnesses testify, who watched

them while they were cross examined, and who questioned them himself, was charged by law with assessing their truthfulness. The People have now had two opportunities to convince the New York courts that these witnesses' testimony was not worthy of belief; they are not entitled to a third. As for the suggestion that the testimony, if true, was nothing "new," that is simply wrong. There is no dispute, as the People state repeatedly, that the jury knew Dillon had changed his story. But the jury absolutely did *not* know that he did so as a result of police intimidation – and that other witnesses were intimidated as well, in what can only be described as a concerted effort by the Dobbs Ferry Police Department to secure damaging testimony against Mr. DiGuglielmo. Nor did the jury know that Dillon's exculpatory October 3 account of what he had seen was the true one. It is hard to say with a straight face that the hearing testimony added nothing "new" to the record in this case.

We briefly discuss each witness's testimony in turn:

A. Michael Dillon

As they did at the § 440 hearing, the People mercilessly attack Dillon, their own former witness, in their appellate brief, calling him

“inherently incredible” (Br. 60), “evasive” (*Id.*), “equivocal and fanciful” (Br. 66), and a “paranoid man in need of a tin foil hat” (*Id.*). They assert that he was lying, or at best confused, when he testified at the hearing about the multiple police interviews to which he was subjected in the days after he witnessed the shooting, urging this Court to conclude, as a matter of fact, that contrary to the County Court’s factual determination – and counter to the theory on which the Appellate Division rested its own decision – those interviews “never took place.” Br. 68. In any event, the People assert that even if Dillon’s hearing testimony *was* accurate, it was not “newly discovered,” because the “inconsistenc[ies]” in Dillon’s statements about the shooting were “known” to the jury, which “saw and heard Dillon flip-flop on the stand on this very specific point.” Br. 65. These arguments are baseless.

1. The People’s Attack On Dillon’s Credibility Is Misplaced, And Wrong.

To begin, this is not the forum for the People to reanimate their hitherto unsuccessful attacks on Dillon’s honesty and psychological well being. The trial judge determined as a matter of fact that Dillon’s hearing testimony was truthful. The Appellate Division, which heard all these same arguments from the People, chose not to disturb that

finding. This Court simply does not have the power to second guess the trial judge's assessment at this late stage. *See* N.Y. Const. Art VI, § 3 (“The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division *** finds new facts and a final judgment or a final order pursuant thereto is entered.”); *see also* *People v. Turriago*, 90 N.Y.2d 77, 84 (1997) (the Court of Appeals, unlike the Appellate Division, does not have “broad power to review questions of fact and discretion as well as questions of law”); Arthur Karger, *The Powers of the New York Court of Appeals* § 21:10 (3d ed. 2005) (same). Indeed, even on “mixed question[s] of fact and law,” this Court must defer to lower-court factual findings so long as they are, in any way, “supported by evidence in the record.” *People v. Foster*, 85 N.Y.2d 1012, 1014 (1995) (citing *People v. Benjamin*, 51 N.Y.2d 267, 270 (1980); *see also* *People v. Cloud*, 79 N.Y.2d 786, 786-87 (1991)).

Even the Appellate Division, which ordinarily has “broad authority to make its own findings of fact,” *Green v. William Penn Life Ins. Co.*, 74 A.D.3d 570, 572 (1st Dep’t 2010) (Saxe, J., concurring), is sharply limited in its ability to overturn a factual finding based on a

trial judge's assessment of a witness's credibility. *See Thoreson v. Penthouse Int'l, Ltd.* 80 N.Y.2d 490, 495 (1992) (“[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court’s conclusions could not be reached under any fair interpretation of the evidence, *especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses.*”) (emphasis added); *see also Lou Atkin Castings, Inc. v. M. Fabrikant & Sons, Inc.*, 216 A.D.2d 111, 111 (1st Dep’t 1995) (articulating this standard for review of a nonjury trial); *Green*, 74 A.D.3d at 572 (“where the findings rest predominantly on credibility determinations,” a trial court’s conclusions are entitled to “substantial deference”).

The fact is, even if this Court did have the option to question the County Court’s findings, there would be no cause to do so. It is no accident that the Appellate Division chose not to disturb the trial court’s factual conclusions; they were entirely reasonable. For one thing, Dillon’s hearing testimony was independently corroborated by other witnesses. Like Dillon, for example, White testified at the evidentiary hearing that Campbell was swinging the bat at the

defendant's father at the time he was shot. A. 3209. And, like Dillon, White testified that after he gave an initial exculpatory statement on the night of the shooting, the Dobbs Ferry Police brought him in for repeated additional interrogation sessions in which they tried various tactics – including telling him that his story did not match those of other witnesses – aimed at having him give a new statement that would be in line with the murder charges that the police had by that time filed against Mr. DiGuglielmo. A. 3212-13, 3219-20, 3322. In addition, as the Court is aware, O'Donnell also gave a statement on the night of the shooting that matched Dillon's statements – changing his mind only after he, too, had been re-interviewed by police.

The trial judge had other good reasons to believe that Dillon was telling the truth at the hearing and that his trial testimony was incorrect. As well established New York law makes clear, a judge making a credibility determination when faced with a witness who recants his trial testimony should consider the witness's motives, both for testifying as he did at the original trial and for telling a different story later. *People v. Shilitano*, 218 N.Y. 161, 172-173 (1916); *People v. Wong*, 11 A.D.3d 724, 726 (3d Dep't 2004). Here, the reasons that

Dillon gave for testifying as he did at the original trial – that he had been pressured and intimidated into giving an inculpatory statement a week after the shooting, and then “felt stuck” with that statement (A. 2752, 2739) – provide a compelling reason for setting aside the original testimony. Just as in *Wong*, where the People’s witness had a motive to lie at trial because he had been promised favorable treatment by the People in exchange for his testimony (*see* 11 A.D.3d at 726), here, Dillon had a powerful reason not to back away from the second statement he gave to the Dobbs Ferry Police. Not only would doing so have potentially landed him in legal trouble, but he had already seen first-hand the relentless and harassing efforts the police had employed after the first time he gave an account favorable to Mr. DiGuglielmo.¹

On the other hand, “[t]he present record reveals no reason that [Dillon] would now have to not testify truthfully.” *Wong*, 11 A.D.3d at 726. Dillon has no relationship at all with the DiGuglielmos, much less one that would suggest a “motive to lie.” *Id.* As Dillon testified at the

¹ Indeed, the risk of a perjury prosecution – to which the People point as if it somehow helps their argument (Br. 84) – only bolsters Dillon’s credibility. *Wong*, 11 A.D.3d at 726 (“Despite his apparent belief that he could be prosecuted for perjury, [the witness] recanted.”).

hearing, he is not friendly with Mr. DiGuglielmo or his family; he was not offered anything in exchange for this testimony at the evidentiary hearing; and he was not threatened by Mr. DiGuglielmo or his supporters in an effort to get him to testify. A. 2746. Indeed, Dillon testified that he “did not want to be up here” testifying on behalf of Mr. DiGuglielmo.²

Perhaps most importantly, the trial judge had the opportunity to judge for himself Dillon’s demeanor at the evidentiary hearing, and he concluded that Dillon testified in a highly credible manner. He was temperate, thoughtful, and did not embellish his testimony, even when doing so would have helped Mr. DiGuglielmo. For example, Dillon stated that the police offered him food (A. 2669-70, 2680) and never yelled or physically abused him (A. 2664-65, 2683). When he did not remember something, he said so, rather than making up an answer. Similarly, when invited by the Court to identify language in his written statement that was not his own, Dillon carefully read the entire

² Dillon’s trepidation was well founded: after meeting with lawyers and investigators from the District Attorney’s office before the hearing, he felt as if they would “shred” him if he testified. A. 2518-19. As the People’s brief to this Court demonstrates, Dillon had good reason to be nervous.

document and pointed to a limited set of words or phrases. A. 2753-54. Such conduct is not the hallmark of a lying witness attempting to help one side; rather, it is what a neutral truth-teller would do.

2. Dillon’s Hearing Testimony Is “Newly Discovered.”

In addition to claiming that Dillon was lying, or mentally incompetent, the People also claim that his testimony at the hearing, even if true, does not constitute “new” evidence because Dillon “flip-flopped” at trial “as to the accuracy of his [original] statement” to the police. Br. 64. Thus, his recantation at the § 440 hearing, the People assert, was simply more of the same. The People can make this assertion only by selectively ignoring portions of Dillon’s testimony and distorting others.

First, the people claim that Dillon’s hearing testimony was essentially consistent with his trial testimony, because he “never renounced” his trial testimony “and even allowed that his trial testimony could be true.” Br. 62. That is, in fact, not what Dillon said. He never “allowed” that his testimony about whether Campbell was swinging the bat at the time of the shooting was true. The “allow[ance]” the People cite was far less consequential, and quite difficult to even

understand in the context of a confusing and hostile cross examination. In response to a series of complex, leading questions from the People, Dillon testified at the hearing that “it was possible” that he had believed, at the time of trial, that one of the reasons he changed his story was that, as he testified at the time, he was “tired” and it was “hard to think clear” on the night of the shooting. A. 2272-75. He did not, however, suggest that the version of the shooting he described at the trial was accurate.

To the contrary, Dillon was clear at the hearing that his original statement to the police and news media, and *not* his subsequent statements or trial testimony, was an “accurate” description of the shooting. He testified without qualification that Campbell *was* “swinging the bat at the time he was shot.” A. 2738-39. This was new evidence. At trial, Dillon had testified that Campbell was *not* swinging the bat, or moving at all. A. 891.

The People grudgingly acknowledge this difference, but they nonetheless claim that the hearing testimony was not “new,” because it was purportedly one more “flip flop” in a long series of vacillations, including several the People claim occurred at trial. The jury, the

People assert, heard Dillon “flip flop” “four separate times as to the accuracy of his October 3 statement – to whether or not Campbell was swinging the bat when he was shot.” Br. 64. Thus, there is nothing “new” about one more change of heart.

This is simply untrue. The people cite four instances in the trial transcript in which Dillon was asked whether he made a statement on October 3, or whether that statement differed from the testimony he gave at trial. *See* Br. 64 (citing A. 909, 945, 952-55). Dillon certainly acknowledged at trial that he had made a contrary statement on the night of the shooting. But he did not “flip flop” on the question of its “accuracy.” He was, instead, consistent in his testimony that his original statement was *not* accurate, and that Campbell was not, in fact, swinging the bat when he was shot. The jury never heard any contrary testimony from Dillon. The revelation at the § 440 hearing that Dillon observed Campbell swinging the bat – that is, that he believes his original statement to be true – was newly discovered.

And of course, the People do not even attempt to suggest that Dillon’s description at the hearing of multiple intimidating police interviews, and the effect those interviews had on his trial testimony,

was somehow known to the jury. This evidence was brand new, and it was very consequential. As we explained in our opening brief, the jury may have been aware that Dillon had changed his story, but it did not know *why*.

In short, the People's suggestion that Dillon's hearing testimony was not "newly discovered evidence" does not withstand scrutiny.

B. James White

The People's central attack on White's hearing testimony is the same as its attack on Dillon's: the testimony, they claim, is untrue. The People also say that the testimony cannot be "new" evidence because White never testified at trial, and his hearing testimony was consistent with the statements he made at the time. These arguments are no more persuasive with respect to White than they are with respect to Dillon.

The allegations of untruthfulness are unsurprising: the People continue their scorched-earth campaign against the witnesses who testify contrary to their version of the shooting. White is described as "an alcoholic and a drug addict," with the People assailing him for telling a deli employee he "needed a beer" after witnessing a fatal

shooting. Br. 38. They describe his hearing testimony as “tailored” and “designed to mirror Dillon’s claim of multiple police interviews” (Br. 69); believing White’s statements, the People urge, “defies any notion of common sense and logic” (Br. 70).

Again, and without belaboring the point, it is simply not this Court’s function to make credibility judgments. The People have made these factual arguments to two tribunals so far, and they have been unsuccessful. The trial judge heard White testify, observed his demeanor, and determined him to be truthful – despite hearing exactly these protestations from the People. *See* A. 69a-70a (“This Court, which was in the best position to determine the credibility and reliability of the witnesses at the within hearing, found the hearing testimony of *** James White to be reliable and credible.”). The Appellate Division heard the same arguments, but it chose to assume White’s statements to be true rather than overturn the trial judge’s credibility finding. The People’s attacks have no place here.

As for the claim that White’s hearing testimony, if true, was nothing “new,” that is wrong for the same reason it was wrong with respect to Dillon. The defense may have known at the time of trial that

White had an exculpatory recollection of the shooting. But no one – certainly not the jury – knew that White, like Dillon, had been pressured relentlessly by the Dobbs Ferry Police to change his story. That is an important new fact, particularly since it corroborates Dillon’s account.³

II. The Suppression Of This Evidence Prejudiced The Defense.

We argued in our opening brief that the Appellate Division misapplied the prejudice standards under both § 440.10 and *Brady v. Maryland* when it reinstated Mr. DiGuglielmo’s conviction. The People’s response to this argument falls flat. As discussed above, their brief is primarily an attack on the credibility of the hearing witnesses. If one disregards those improper attacks, the People are left to argue

³ This corroborative function also explains why it was important for the trial court to consider Kevin O’Donnell’s testimony. The People make much of the fact that the County Court discussed O’Donnell’s testimony even though he did not testify at the hearing. *See, e.g.*, Br. 70 (characterizing the County Court opinion as a “mishmash,” and asserting that the judge’s discussion of O’Donnell’s testimony “proves that the hearing court was not bound by any legal rules”). But O’Donnell, like Dillon, originally gave an exculpatory account of the shooting – then changed his story after being interviewed by police. Considering the testimony from both Dillon and White that the Dobbs Ferry Police targeted them and questioned them repeatedly in an attempt to influence their stories, O’Donnell’s change of heart is cast in an entirely new light.

that the Appellate Division was correct when it when it determined that there was no “probability” the result at trial would have been different, even if Dillon, White, and O’Donnell had *all* testified at trial consistent with their original accounts of the shooting. That conclusion is indefensible on the facts and on the law.

A. The Newly Discovered Evidence Would Have Substantially Affected The Trial.

1. Dillon

The most significant effect of the newly discovered evidence at trial would have been the change in Dillon’s testimony. Dillon testified at trial that Campbell had not been swinging the bat at the time he was shot; the new evidence reveals that Dillon did not believe this account to be true, and that he had been pressured to change his story by the police.

The People say that such testimony from Dillon would not have made a difference to the jury. Despite proffering Michael Dillon as a prosecution witness, both before the grand jury and at trial, the People now claim that his testimony was so inconsequential that the jury would still have convicted Mr. DiGuglielmo even if Dillon had testified for the defense. This claim rests on the People’s argument that a long

procession of other witnesses gave testimony inculcating Mr. DiGuglielmo at trial; a change in one witness's story, the People assert, would not have altered the weight of the evidence against the defendant. But that claim is based on one-sided and misleading summaries of the eyewitness testimony presented at trial – summaries that ignore the crucial fact that, other than Dillon and O'Donnell, most of the People's witnesses *did not testify to having seen the actual shooting*, and thus simply were not able to corroborate Dillon's account. The trial judge was correct that Dillon was a crucial witness at trial: he, White, and O'Donnell were the only three adult witnesses who even saw the shooting.

For example, John Stasi, the pizza shop manager, testified that because a "big van" was blocking his view, "I had missed the gentleman who shot him. I didn't see that." A. 420-21. Benjamin Fontanillas likewise had his view of the shooting obscured by the van. A. 1677. Similarly, although the People characterize the testimony of Elaine Grossman, a customer in a second-floor hair salon near the deli, as stating that she "did not see a bat in the victim's hand" (Br. 16), that conveniently ignores the fact that Ms. Grossman testified that she

heard, *but did not see*, the shooting. A. 964-68. The same was true of the two witnesses who were in the liquor store next to the deli. A. 594-95, 847. As for the People's other witnesses, both Ruth Castellon and Susan Rogler saw the initial fight, but drove away from the scene before the shooting occurred. A. 580, 360-67. Lief Larson, in contrast, saw only the aftermath of the shooting. A. 775. And although Maryann Wekerle, who was in the deli, did see the shooting, she made no affirmative statement as to where the elder Mr. DiGuglielmo was positioned with respect to Mr. Campbell at the time of the shooting. A. 516. Ms. Wekerle also acknowledged that she did not even notice the bat (or how it was positioned) at the time Campbell was shot. A. 516.

That leaves the five child witnesses who were on the sidewalk more than 50 feet from where the shooting occurred. As the People concede, one of these witnesses, Ian Connett, expressly disclaimed having seen the shooting, testifying that his "back was turned" when Campbell was shot. A. 1132-33. The remaining four minors each testified to seeing various parts of the shooting, but their testimony was often vague or self-contradictory. For instance, although Tyler Grant, who was 12 at the time of trial, did claim to have seen Campbell get

shot, his testimony was highly questionable in that he acknowledged that he “wasn’t really paying attention” and that he did not actually remember seeing a gun until after the shooting. A. 643. Similarly, Zach Connett, age 10, testified that at the time of the shooting, Campbell was approximately 14 feet from the “deli men,” but also acknowledged that this version of events contradicted his earlier signed statement to police, which placed Campbell only five feet from the younger Mr. DiGuglielmo at the time of the shooting. A. 1074-75, 1077-79. Joseph Kay, also 10, testified about the relative locations of Mr. Campbell and Mr. DiGuglielmo, but he did not identify where the defendant’s father was at the time of the shooting and stated that “I don’t remember that much.” A. 1095. Finally, although Matt Kay, 11, testified about the shooting (A. 1112-15), he also averred that before the shooting occurred, one of the TCI cable repairmen (presumably O’Donnell or Dillon) was outside the cable truck standing very close to the scene (A. 1119) – a version of the events contradicted by the testimony of both occupants of the vehicle and unsupported by any other witness’s testimony.

In the end, then, without Dillon's testimony, the People's case at trial would have come down to the self-contradictory testimony of a few minors under the age of 13; an adult witness (Richard Lyman) who was in his vehicle about 20-30 car lengths away and whose view was occasionally blocked by street traffic (A. 206-09); another who witnessed the incident at closer range yet curiously did not even remember seeing a bat (Wekerle); and a final witness (O'Donnell) whose story had completely changed from the day of the incident to the time of trial. The weakness of such a case is plain. Much as the People would now like it to be otherwise, Dillon's testimony was crucial to the People's successful effort to convict Mr. DiGuglielmo of murder. Take that eyewitness testimony away and this would have been a very different trial.⁴

⁴ As in the lower courts, the People rely on the trial testimony of the medical examiner as independent evidence of Mr. DiGuglielmo's guilt. Br. 21-23, 78; A. 2877-78 (P. Murphy testifying that one of the "most important" reasons she was confident that Dillon's October 7-8, 1996 statement to police was correct was because "it was corroborated conclusively by the testimony and the autopsy findings of the medical examiner"). Such reliance is entirely misplaced. At trial, the medical examiner simply agreed with the Assistant District Attorney that Campbell's bullet entry wounds *could* be consistent with the theory that Campbell was poised in a batter's stance. A. 1586-87. On cross-examination, however, the medical examiner acknowledged that

2. White

As for White's testimony, the People dismiss it out of hand. His new statement, they assert, is inconsequential because he "never testified at trial." Br. 74. To the contrary, the People claim, although White's exculpatory account was known to the defense, the "defendant did not want him as a witness." *Id.*

This response ignores the fact that White gave a *new* account at the hearing that differed materially from the account he gave to police (and that was therefore known to the defense) at the time of trial. Like Dillon, White testified at the § 440 hearing that he had been re-interviewed by the police on multiple occasions following his initial statement on the night of the shooting, and that the police had suggested to him that he change his story because it purportedly didn't match up with the statements made by any other witnesses.

This account corroborates Dillon's hearing testimony – and, as the trial judge found, casts considerable doubt on O'Donnell's trial testimony as well, because he, like White and Dillon, gave an

Campbell's wounds merely captured a single moment in time and thus, the forensic evidence "doesn't tell us if [Campbell] was standing still" or actively swinging the bat. A. 1611. This testimony thus provides no independent support for the People's theory of the case.

exculpatory statement on the night of the shooting and was then re-interviewed by police prior to changing his story.

It is, of course, true that the defense chose not to call White to testify at trial, but that was before the defendant knew the full extent of White's account. It does not follow that White would have been kept from the jury had the defense known that he and Dillon would both testify to a series of intimidating police interviews apparently designed to convince them to change their stories.

B. These Differences More Than Meet the Prejudice Standards Under Section 440 and *Brady*.

Of course, the ultimate question for this Court is not whether the hearing witnesses were lying, or whether their testimony was known to the defense at the time of trial. The question is whether the Appellate Division was correct as a matter of law when it concluded that *even if* the jury had heard exculpatory testimony from Dillon, White, and O'Donnell, and *even if* it had heard Dillon and White's testimony about police intimidation, there was still no "probability," or even "possibility" that the result at trial would have been different.

We showed in our opening brief that the new evidence, if credited (as it was in both lower courts) was more than sufficient to create a

“reasonable probability” that at least one juror would have had reasonable doubt as to Mr. DiGuglielmo’s guilt. This is hard to deny; as we explain above, the testimony would have “altered the focus of the entire case[.]” *People v. Lackey*, 48 A.D.3d 982, 984 (3d Dep’t 2008). We argued in our opening brief that the Appellate Division’s application of the “reasonable probability” standard effectively elevates it from a high but surmountable bar to an insuperable obstacle. Despite the length of their brief, the People do not really confront this argument. As described above, they argue at length that the hearing witnesses were lying, and that their testimony was contradicted by other trial witnesses. But they never wrestle with the question raised by the Appellate Division’s order: 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,” was there at least a “probability” that one juror would have had reasonable doubt about Mr. DiGuglielmo’s guilt? The answer is yes. This was a jury that spent days deliberating, that acquitted the defendant of intentional murder and assault, that asked for re-instruction on reasonable doubt, and that heard the prosecutor emphasize in closing argument that “not one”

witness had corroborated the defendant's version of the shooting. A. 2199. If *three* witnesses had done so, it is inconceivable that there would not "probably" have been at least one juror who had doubts.

Of course, under *Brady*, the defendant only needs to show a "possibility" that the result at trial would have been different had he been provided with exculpatory evidence. The Appellate Division did not even address this different standard, and the People's response on appeal to this Court is to express indignation (Br. 83-84 & 84 n.23), and to unreasonably limit the scope of the evidence. In a brief suffused with unremitting anger at the trial judge and overt accusations of judicial bias, the People express outrage and dismay at the mere notion that any prosecutor who has taken an "oath of office" might, even inadvertently, have withheld exculpatory evidence from a defendant. As to the substance, the People claim that the hearing testimony fails to meet the *Brady* standard for the same reasons it supposedly fails to meet the § 440 prejudice standard: given the other witnesses' testimony, the People argue, there is not even a possibility that new evidence from Dillon and White would have changed the result at trial. This response was unpersuasive with respect to the state standard (see

above); it is doubly unpersuasive when made in the context of the much more permissive federal one.

III. This Court Has The Power And Duty To Reverse The Appellate Division, Without Remand.

The People suggest that if this Court reverses the Appellate Division on the law, it should remand so that the lower court can “make factual and credibility determinations on the hearing record.” Br. 6. Such a remand would be both unnecessary and futile. This Court should reverse the Appellate Division and reinstate the order vacating Mr. DiGuglielmo’s conviction.

1. To begin, the People are wrong when they contend that this Court “*must*,” in the event of a reversal on the law, remand the case to the Appellate Division for consideration of the facts. Br. 6 (emphasis in original). The rule cited in the People’s brief, C.P.L. 470.40(2)(b), requires remand only if the facts “were not, or are presumed not to have been, considered and determined by the intermediate appellate court.” *Id.* But here, the Second Department *did* “consider and determine” the relevant facts. There is no need for a remittal to permit yet a third factual consideration.

The People briefed the Second Department extensively on the facts of this case. Indeed, factual challenges comprised at least 50 pages of the People’s 103 page opening brief in the lower court, and at least seven pages of their 21-page reply brief. In light of that briefing, and the court’s ultimate opinion, there should be no serious dispute that the court “considered and determined” the facts. To be sure, the Second Department’s decision states that it was made “on the law” (A. 12a), but throughout its opinion, the court acknowledged and embraced its responsibility to “engage in a ‘critical analysis of the evidence’ and ‘view and evaluate all of the evidence in its entirety.’” A. 9a (citation omitted). Indeed, the People themselves note in their brief to this Court that the Second Department grappled meaningfully with the facts. Br. 55-59.⁵

⁵ We acknowledge, of course, that the C.P.L. establishes a baseline presumption that facts were not considered in an appellate decision unless the opinion so states. *See* C.P.L. § 470.25(2)(d). But as this Court has repeatedly recognized, the presumption is not conclusive. Rather, even a decision describing itself as “on the law” may, as here, disclose through an analysis of the text that the intermediate appellate court considered and adjudicated the facts. *See, e.g., People v. Baker*, 64 N.Y.2d 1027, 1028 (1985) (determining that a decision made “on the law” was actually made in the exercise of discretion). Similarly, in the civil context, this Court may reject the Appellate Division’s boilerplate assertion that a decision was “on the law,” if it becomes clear on

2. In any event, remand would be futile in this case. The requirement of remand exists only to discharge the constitutional guarantee of two full levels of factual review. *People v. Bleakley*, 69 N.Y.2d 490, 496 (1987). The People have received the benefit of this promise. But even had they not, it would not matter, because the factual questions in this case turn entirely on assessments of witness credibility, which the Appellate Division cannot overturn except in extreme circumstances not here indicated. As we explain above (*see supra* at 5-7), the Appellate Division is sharply limited in its ability to review a trial court's assessments of witness credibility, particularly after a bench trial. Any factual review on remand would therefore be limited to the type of analysis that the Second Department already *did* conduct.

IV. The Conviction Cannot Survive This Court's Reinterpretation Of Depraved Indifference Homicide.

The People do not meaningfully challenge the conclusion that Mr. DiGuglielmo could not be convicted of depraved indifference homicide if he were prosecuted today. They persist, however, in the assertion that

reviewing the opinion below that the facts were considered. *See, e.g., Nassau Educ. Chapter of Civil Serv. Emps. Assoc., Inc. v. Great Neck Union Free Sch. Dist.*, 57 N.Y.2d 658, 660 (1982).

he should nonetheless continue to be imprisoned, for a crime that this Court has stated with clarity he did not, in fact, commit. This violates due process, and the People have not adequately responded.

By focusing on the question of retroactivity, the People miss the point. As *Fiore v. White* makes clear, when a state high court authoritatively construes a criminal statute, it does not make new law, and “retroactivity is not at issue.” 531 U.S. 225, 226 (2001). Rather, the court simply reinstates the statute as it was originally written. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (“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.”). Consistent with the separation of powers, a court does not (and cannot) create “new law” by construing a criminal statute, unless it overrules it. See *id.*; *Rogers v. Tennessee*, 532 US 451, 472 (2001) (Scalia, J., dissenting). Such alterations do apply on collateral review, because they do not remake the law, but state the law as it should have been.

As in *Fiore*, the only question here is whether New York “can, consistently with the Federal Due Process Clause, convict [Mr.

DiGuglielmo] for conduct that its criminal statute, as properly interpreted, does not prohibit.” *Id.* “The simple, inevitable conclusion” is that it cannot. *Id.* at 229.

The People’s citation (at Br. 94) to *Wainwright v. Stone*, 414 U.S. 21 (1973), is not to the contrary. The *Wainwright* Court addressed an entirely distinct situation in which a state court *invalidated* a criminal statute. *Id.* at 23-24. A court’s decision to overrule a legislative act *does* constitute new law; its decision to correct a misunderstanding of a statute does not. *Fiore*, 531 U.S. at 228. In any event, as we argued in the opening brief, the failure to retroactively apply a judge-made change in substantive criminal law itself violates due process. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998).

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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