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**Supreme Court of the State of New York**

**APPELLATE DIVISION: THIRD DEPARTMENT**

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

**Appellant,**

**-against-**

**KATHERINE SEEBER,**

**Defendant-Respondent.**

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**BRIEF FOR AMICUS CURIAE  
DISTRICT ATTORNEYS ASSOCIATION  
OF THE STATE OF NEW YORK**

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November 2011

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

PRELIMINARY STATEMENT.....1

THE RELEVANT FACTS.....2

STATEMENT OF AMICUS.....5

POINT  
THE REVELATIONS ABOUT INADEQUACIES IN  
TESTING PROCEDURES SEVEN YEARS AFTER  
DEFENDANT’S PLEA OF GUILTY AND THREE  
YEARS AFTER THE JUDGMENT BECAME FINAL  
DID NOT WARRANT VACATUR OF THE  
JUDGMENT CONVICTING DEFENDANT ON HER  
PLEA OF GUILTY.....6

CONCLUSION .....25

## TABLE OF AUTHORITIES

### **CASES**

<u>Brady v. Maryland</u> , 373 U.S. 83 (1963) .....	7, 11
<u>Brown v. Greene</u> , 577 F.3d 107 (2d Cir. 2009).....	23
<u>Giglio v. United States</u> , 405 U.S. 150 (1972).....	12
<u>Gruning v. DiPaolo</u> , 311 F.3d 69 (1 <sup>st</sup> Dept. 2002) .....	22
<u>Jameson v. Coughlin</u> , 22 F.3d 427 (2d Cir. 1994) .....	23
<u>Moran v. Burbine</u> , 475 U.S. 412 (1986) .....	22
<u>People v. Baldi</u> , 54 N.Y.2d 137 (1981).....	22
<u>People v. Black</u> , 220 A.D.2d 563 (3d Dept. 2000) .....	24
<u>People v. Brown</u> , 56 N.Y.2d 242 (1982).....	10
<u>People v. Bryce</u> , 88 N.Y.2d 124 (1996).....	11
<u>People v. Carncross</u> , 14 N.Y.3d 319 (2010) .....	22
<u>People v. Di Raffaele</u> , 55 N.Y.2d 234 (1982).....	20
<u>People v. Drossos</u> , 291 A.D.2d 723 (3d Dept. 2002) .....	9, 10
<u>People v. Gervais</u> , 195 Misc.2d 129 (Crim. Ct., N.Y. Co. 2003) .....	12
<u>People v. Hansen</u> , 95 N.Y.2d 227 (2000) .....	24
<u>People v. Holloway</u> , 33 A.D.3d 442 (1 <sup>st</sup> Dept. 2006).....	17
<u>People v. Konieczny</u> , 2 N.Y.3d 569 (2004).....	21
<u>People v. Latella</u> , 112 A.D.2d 321 (2d Dept. 1985) .....	24
<u>People v. LaValle</u> , 3 N.Y.3d 88 (2004).....	17
<u>People v. Livingston</u> , 836 N.Y.S.2d 494 (County Ct., Nassau Co.) .....	17
<u>People v. Lynn</u> , 28 N.Y.2d 196 (1971).....	24
<u>People v. Mullady</u> , 180 A.D.2d 408 (1 <sup>st</sup> Dept. 1992) .....	17
<u>People v. Muniz</u> , 215 A.D.2d 881 (3d Dept. 1995).....	17
<u>People v. Oliveri</u> , 49 A.D.3d 1208 (4 <sup>th</sup> Dept. 2008).....	20
<u>People v. Ortiz</u> , 127 A.D.2d 305 (3d Dept. 1987).....	21

<u>People v. Perkins</u> , 288 A.D.2d 506 (3d Dept. 2001).....	20
<u>People v. Philips</u> , 30 A.D.3d 621 (2d Dept. 2006) .....	21n.
<u>People v. Portalatin</u> , 132 A.D.2d 581 (2d Dept. 1987).....	10
<u>People v. Pryor</u> , 12 A.D.3d 695 (2d Dept. 2004) .....	20
<u>People v. Rodriguez</u> , 55 N.Y.2d 776 (1981).....	21
<u>People v. Seeber</u> , 4 A.D.3d 620 (3d Dept. 2004).....	3
<u>People v. Seeber</u> , 4 N.Y..3d 780 (2005) .....	2, 3
<u>People v. Sides</u> , 242 A.D.2d 750 (3d Dept. 1997).....	24
<u>People v. Taylor</u> , 65 N.Y.2d 1 (1985) .....	21, 24
<u>People v. Thomas</u> , 53 N.Y.2d 338 (1981) .....	21
<u>People v. Tripp</u> , 232 A.D.2d 200 (1 <sup>st</sup> Dept. 1996) .....	20
<u>People v. Vasquez</u> , 214 A.D.2d 93 (1 <sup>st</sup> Dept. 1995).....	18
<u>People v. Vilardi</u> , 76 N.Y.2d 67 (1990).....	11
<u>People v. Watson</u> , 198 A.D.2d 461 (2d Dept. 1993).....	17
<u>People v. Williams</u> , 7 N.Y.3d 15 (2006).....	12
<u>People .v Wright</u> , 86 N.Y.2d 591 (1995) .....	18
<u>Stickler v. Greene</u> , 527 U.S. 213 (1999).....	17
<u>United States v. Rosner</u> , 516 F.2d 269 (2d Cir. 1975).....	18n.
<u>United States v. Ruiz</u> , 536 U.S. 622 (2002).....	15

**OTHER AUTHORITY**

CPL Section 440.10.....	<i>passim</i>
CPL Section 440.10(1)(b) .....	<i>passim</i>
CPL Section 440.10(1)(c).....	10
CPL Section 440.10 (1)(g) .....	11, 24
Rules of Professional Conduct 3.4(a)(1).....	12
Rules of Professional Conduct 3.4 (a)(3).....	12
Rules of Professional Conduct 3.8(b) .....	12

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**BRIEF FOR AMICUS CURIAE  
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK**

PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York (“DAASNY”) submits this brief as amicus curiae in the above captioned appeal. The People appeal from an order of the County Court, Saratoga County (Scarano, J.), dated June 27, 2011, vacating a judgment of the same court and judge, rendered April 3, 2001, pursuant to CPL Section 440.10. By the vacated judgment, defendant had been convicted, on her plea of guilty, of felony murder and burglary, and sentenced to aggregate terms of from twenty years to life imprisonment.

Crucial to the vacatur order was the motion court’s finding, after a hearing, that certain fiber evidence found on duct tape affixed to the victim’s mouth had been linked to gloves that defendant had worn. The fiber analysis was conducted by Gary Veeder of the State Police Laboratory. Years after the plea, Veeder’s work on this and

other cases was marred by questions about his poor work habits, failure to follow protocol, and the quality and integrity of his work. In this case in particular, the court found that defendant had been advised to plead guilty because of what the court characterized as “a faulty item of evidence.” The problems with Veeder’s work product were discovered in 2008, over three years after the Court of Appeals had affirmed the judgment of conviction on direct appeal. People v. Seeber, 4 N.Y.3d 780 (2005). The motion court concluded that the plea had been induced by misrepresentation of the fiber evidence, that the People were guilty of a Brady violation, and that trial counsel was ineffective. The court reached this conclusion even though at the time defendant entered her plea in 2001, there was no reason to doubt Veeder’s competence in general or his work on this case in particular.

Amicus will address the unavailability to defendants of relief under the circumstances presented here – a discovery, years after a judgment rendered by guilty plea has become final, of an infirmity in forensic evidence.

### THE RELEVANT FACTS

Defendant’s conviction arose from her involvement in the burglary and murder of her 91 year old step grandmother Ruth Witter. After Mrs. Witter disappeared in February 2000, the ensuing police investigation focused on defendant and her boyfriend, Jeffrey Hampshire. Over the course of several days, defendant gave conflicting accounts of her activities during the relevant period. Eventually, defendant led police to the body of her step grandmother in Saratoga County and

subsequently confessed to her participation in the murder in oral and written statements. In the course of her admissions, defendant told the police that their victim had been strangled with an electrical cord, duct taped and wrapped in a bedsheet, then disposed of by use of defendant's car.

In the course of the investigation that followed the arrest, a pair of black suede gloves was found in defendant's car, gloves that defendant wore the day of the murder. Trace evidence examination was conducted by a trace evidence analyst, Gary Veeder, of the New York State Police, and he concluded that fibers found on the duct tape were identical to the fibers in the black suede gloves. This conclusion, which the People had no reason to doubt, was provided the defense before defendant entered her plea of guilty. When she pleaded guilty, defendant admitted that she had visited her stepgrandmother's house with her co-defendant, positioned herself in a way that was intended to allow the co-defendant to steal property without the victim's knowledge, and assisted in causing the victim's death. This Court affirmed the judgment of conviction that followed over claims that her suppression motion was improperly denied, that her factual allocution was inadequate, and her sentence was unduly harsh. People v. Seeber, 4 A.D.3d 620 (3d Dept. 2004), aff'd, 4 N.Y.3d 780 (2005).

In 2008, in the course of routine reaccreditation proceedings involving the state laboratory, it was discovered that in certain instances of fiber analysis Veeder did not follow the prescribed laboratory protocol. Based upon this and a subsequent report

by the State Inspector General concerning Veeder and the state laboratory and questions about his competence and the integrity and quality of Veeder's work, defendant moved to vacate the judgment of conviction pursuant to CPL Section 440.10.<sup>1</sup>

The court ordered a hearing on the motion. At that hearing, defendant's counsel, John H. Ciulla, Jr. testified about the significance of the Inspector General's report and the Veeder fiber comparison evidence to his recommendation that defendant accept the plea. As particularly relevant here, he explained that the information about Veeder's lack of proper training in fiber analysis would have given him ammunition by which to cross-examine the otherwise apparently unassailable scientific evidence about the fibers found in the duct tape on the victim's mouth. This would have, in counsel's view, enabled him to contend that defendant had a defense to the felony murder charge.<sup>2</sup> As a result, he would have counseled her differently.

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<sup>1</sup> In the course of a routine reaccreditation review of the state police laboratory by the American Society of Crime Laboratory Directors, allegations were made that examiner Veeder had failed to conduct certain required tests while examining fiber evidence, then falsified documentation to conceal these problems. The Inspector General was then asked to investigate the alleged misconduct. The report is available at <http://www.ig.state.ny.us/pdfs>.

<sup>2</sup> It is in fact difficult to see how this evidence would have advanced the affirmative defense. As the People observe in their brief, defendant admitted her presence in the house before the murder and she had seen her Hampshire knock the 91 year old victim to the floor. Plainly, it could not remotely be contended that defendant "[h]ad no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury," a necessary element of the affirmative defense (See People's Brief at 48).

In addition, Jeffrey Lynn of the Ohio Bureau of Criminal Identification, assigned to review a large number of files of Veeder's work after the Inspector General's report had been issued, opined that based upon the information contained in the worksheets Veeder had prepared, were within the range of acceptable opinion. He did add, however, that the protocols used by Veeder would not have satisfied the protocols of his laboratory and that the method he had used for testing the fibers was atypical. Peter DeForest, an expert criminalist and retired forensic science professor at John Jay College of Criminal Justice testified that he had tested fibers taken from the gloves and duct tape and concluded that while Veeder had overstated his conclusion when he concluded that they were identical, they were indeed similar.

Following the hearing, the motion was granted on three separate theories: (1) that the plea had been obtained as a result of misrepresentation of the test results by law enforcement; (2) that defendant's right to Brady material had been violated; and (3) that counsel had been ineffective.

#### STATEMENT OF AMICUS

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their nearly 2900 assistants. Members of the Association are responsible for the investigation and prosecution of crimes, for compliance with constitutional and statutory discovery obligations, and the defense of convictions against vacatur, be it

on direct appeal or collateral attack. These dual responsibilities places the Association in a unique position to aid the Court in its resolution of an attack on a judgment that has been final since 2004, when the judgment was affirmed, inasmuch as the attack is grounded in a claimed discovery violation and the effectiveness of trial counsel in the face of such violation.

It cannot be overemphasized that DAASNY's members demand of their assistants compliance with the highest ethical standards that can be expected of members of the legal profession, an insistence that mandates compliance with all discovery obligations. But the impact of an affirmance in this case would go far beyond addressing any ethical concerns that a failure to disclose Brady material might bring. It would rewrite CPL Section 440.10 to afford relief unwarranted by the plain meaning of the statute and would expand Brady itself to impose a disclosure obligation that is, frankly, impossible to meet.

#### POINT

THE REVELATIONS ABOUT INADEQUACIES IN TESTING PROCEDURES SEVEN YEARS AFTER DEFENDANT'S PLEA OF GUILTY AND THREE YEARS AFTER THE JUDGMENT BECAME FINAL DID NOT WARRANT VACATUR OF THE JUDGMENT CONVICTING DEFENDANT ON HER PLEA OF GUILTY

In 2008, the New York State Police Forensic Investigation Center underwent a routine reaccreditation audit conducted by the American Society of Crime Laboratory

Directors Laboratory Accreditation Board. Auditors discovered anomalies in a proficiency test of fiber analysis completed by State Police Forensic Scientist Garry Veeder. As a result of questions raised by the report, Veeder was interviewed by state police internal investigators on several occasions and, while the investigation continued, he notified the state police of his intention to retire. About 10 days before his scheduled retirement date, Veeder was asked to appear for another interview. He declined, stating he intended to seek the advice of an attorney, and committed suicide a few days later. Eventually, the matter was referred to the State Inspector General for investigation and in December 2009, that agency issued a report .

In September 2010, defendant moved to vacate the judgment pursuant to CPL Section 440.10, alleging that the failure to disclose Veeder's misconduct to defendant, even though it was unknown at the time of defendant's plea, entitled her to relief pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963), that the plea was grounded in misrepresentation by the People as to the accuracy of the Veeder report concerning the fibers on the duct tape that had been used to tape the mouth of the victim, entitling her to relief under CPL Section 440.10(1)(b), and that she had been denied the effective assistance of counsel. After the People's response, a hearing was held on the motion, and after the hearing, Judge Jerry Scarano granted defendant's motion on three separate theories: (1) that the plea had been obtained as a result of misrepresentation of the test results by law enforcement; (2) that defendant's right to Brady material had been violated; and (3) that counsel had been ineffective.

Contrary to the motion court's decision, defendant was not entitled to relief on any of the proffered bases. Preliminarily, the entire premise underlying grant of the vacatur motion suffers from a critical flaw. Though the motion court identified specific grounds under CPL Section 440.10 justifying vacatur, that relief was granted, in effect, on the theory that, unbeknownst to defendant before she entered her plea of guilty, the scientific evidence was flawed and thus, the People's proof was not as compelling as defendant believed. But defendant pleaded guilty and, more to the point, admitted under oath that she committed the charged crime. This sworn admission moots any question about the weight of the People's proof. That defendant may not have been aware of the precise strength of that proof before entering her plea implicates no constitutional concerns, particularly where, as here, that admission and the guilty plea which followed was not induced by any knowing misrepresentation by the People. In effect then, it is evident that the motion court granted vacatur on a theory on which vacatur of a judgment grounded in a plea of guilty cannot be granted in New York – that newly discovered evidence, namely Veeder's sloppy work and the Inspector General's report, put the validity of the judgment in question.

Nor, as will be further developed, is a defendant is entitled to relief because of a prosecutor's misrepresentation unless that misrepresentation is knowing; there is no dispute here that the prosecutor did not know of the purported problems with the Veeder fiber analysis at the time the plea was taken. Further, in view of defendant's

plea of guilty, there has been no Brady violation. And, with respect to the ineffective assistance of counsel question, it simply cannot be the case that an attorney can be charged with constitutionally ineffective representation when the basis of that accusation is information that was known to no one at the time of the plea.

A. Relief Under CPL Section 440.10(1)(b) Is Warranted Only Upon A Showing That The Judgment Was Obtained By A Knowing Misrepresentation By The People

In granting relief, Judge Scarano concluded that relief should be granted under CPL Section 440.10(1)(b), which provides that a judgment shall be vacated if it “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.” In a case with eerie parallels to this one, this Court has recognized, however, that relief under this subsection is available only if the fraud or misrepresentation was known to the People at the time the plea was offered and accepted. In People v. Drossos, 291 A.D.2d 723 (3d Dept. 2002), the defendant had pleaded guilty to Criminal Possession of Dangerous Weapon in the First Degree arising from his placement of an explosive device into a police vehicle. About nine or ten months after the plea, the People learned, and advised defendant, that in the course of an investigation into evidence tampering by the State Police, they had discovered that a former investigator had confessed to having fabricated a palm print evidencing the defendant’s contact with the vehicle in which he had planted the device.

In affirming the denial of CPL Section 440.10 relief, this Court, inter alia, rejected the notion that subdivision (1)(b) of the statute entitled the defendant to relief. As the Court wrote:

we find no evidence supporting defendant's contention that his plea and conviction were obtained by fraud. Although defendant speculates that the prosecution was aware of the falsified palm print in June 1992, it is clear that the People's only information at that point concerned a different State Police Investigator who had admitted fabricating fingerprints in an unrelated case. There is simply no evidence to contradict the People's statement that March 1993 was the first time that they learned that the palm print may have been falsified.

People v. Drossos, 291 A.D.2d at 724.

In other words, unless the People knew of the fabrication but nevertheless accepted the plea, a defendant could not obtain relief on the ground of prosecutorial misconduct at the time of the plea. People v. Portalatin, 132 A.D. 2d 581 (2d Dept. 1987); see also People v. Brown, 56 N.Y.2d 242 (1982) (recognizing that unless there is some evidence that the People had actual knowledge that a witness's testimony was false justifying relief under subsection [1][c] which authorizes vacatur of a judgment for introduction of false evidence at trial, the motion may be denied without a hearing).

It is certainly true that subsection (1)(b) provides that the misrepresentation for which relief may be granted can be the misrepresentation of someone working on behalf of a prosecutor. This could, presumably, include a police officer or forensic

examiner. But, of course, the Drossos court itself rejected sub silentio the notion that the misconduct of a forensic investigator can be held against the People; after all, it denied relief even though the fabrication alleged to serve as the misrepresentation was created by a state police officer.

This is only logical. Even if it were to be assumed for purposes of argument that the Veeder fiber comparison was wrong and was the product of his own misconduct, that simply cannot be attributed to the People. Whatever motive Veeder may have had in conducting the fiber comparison in an inappropriate and incomplete fashion, it cannot be said that the People acquiesced in such incorrect results (if that is indeed what they were) and thus, it cannot be said that Veeder was working on behalf of the prosecutor when he reached his conclusion.<sup>3</sup>

B. There Has Been No Brady Violation.

A defendant has a right, guaranteed by the Due Process Clauses of the Federal and State Constitutions, to discover favorable evidence in the People's possession which is material to either guilt or punishment. Brady v Maryland, 373 US 83, 87 (1963); People v Vilardi, 76 N.Y.2d 67, 73 (1990); People v. Bryce, 88 N.Y.2d 124, 128-129 (1996). Included in the scope of exculpatory evidence whose disclosure may

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<sup>3</sup> This is not to say that a defendant who discovers after a trial that resulted in his conviction that some of the evidence introduced at that trial was fabricated could not obtain relief. His remedy in that circumstance is in CPL Section 440.10(1)(g), which authorizes a new trial when “[n]ew 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” (emphasis added). As will be discussed later in text, defendant who has pleaded guilty has no such right.

be mandated by the constitution is impeachment evidence when such material is intertwined with the defendant's guilt or innocence. Giglio v United States, 405 U.S. 150, 153-154 (1972); People v. Williams, 7 N.Y.3d 15, 25 (2006).

Apart from the constitutional imperative, the Brady duty is a statutory and ethical obligation as well. Subdivision (1)(h) of CPL Section 240.20, which outlines the material discoverable by a criminal defendant on demand, provides that the People disclose, pursuant to CPL Article 240, “[a]nything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.” See People v. Gervais, 195 Misc.2d 129, 135 (Crim. Ct., N.Y. Co. 2003). And, of course, the Rules of Professional Conduct, codified at 22 NYCRR Part 1200, provide that “[a] lawyer shall not suppress any evidence that the lawyer . . . has a legal obligation to reveal or produce,” Rule 3.4(a)(1) or “conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.” Rule 3.4(a)(3). Prosecutors have special responsibility in this regard. Rule 3.8(b) provides that “[a] prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.”

1. Once Defendant Pleaded Guilty, Any Entitlement She May Have Had To Exculpatory Material Was At An End

While Judge Scarano opined that defendant was entitled to relief because of a Brady violation, it is not at all clear what he believed had been withheld from defendant. It would appear that the judge was referring to Giglio impeachment material. After all, at the hearing on defendant's motion, counsel testified that his recommendation to defendant to plead guilty was grounded largely, if not wholly, on his inability to combat the evidence of a fiber match found by Veeder. As counsel explained it, Veeder's evidence that fibers from the gloves worn by defendant matched those found on the duct tape on the victim's mouth contradicted defendant's statement that she had not been present when the victim was killed thus "undermin[ing] the defense in the felony murder statute that [counsel] thought up until that point in time, would have been available to her" (Hearing Minutes: 31). As counsel subsequently added, the Veeder report was critical in his recommendation because "that was the one piece of evidence that undermined her statement that she was not present at the time when the murder occurred" (Hearing Minutes: 85).

Subsequently, counsel clarified precisely what the newly discovered information about Veeder would have meant to the defense and the recommendation to plead guilty. As counsel explained it, the Inspector General's Report had revealed Veeder's admissions that neither he nor his peer reviewer had been properly trained in fiber

analysis. That alone, continued counsel, would have given him “pause as to whether or not to go forward with the felony murder defense, equipped with that evidence, to be able to cross-examine Garry Veeder with regard to how and why he prepared the reports in the manner that he did” (Hearing Minutes: 94). At the time of the plea, however, counsel “didn’t have a basis in 2000 and 2001 to contest the viability, the believability, the ability of a Senior State Police Investigator, who had testified in numerous cases and, previous to that, had not been disqualified against any of this testimony, that I believe that had I known this about him at that time, I would have been able to successfully cross-examine him so as to refute his contention that the felony murder defense did not exist for her. That may have made a very big difference in the decision as to whether or not she should go to trial with regard to the felony murder counts.” (Hearing Minutes: 95).

Counsel went on to say that he would have counseled defendant differently had he known of the problems with the testing protocol used by Veeder (Hearing Minutes: 96). He emphasized that even if it were to turn out that the report’s conclusion about the fibers was accurate, he believes he still would have advised defendant to go to trial because of the fodder for cross-examination (Hearing Minutes: 97; see also Hearing Minutes: 99)

What this means in this case is obvious. Though Judge Scarano did not identify precisely the nature of the violation he found, the testimony discussed above would lend credence to a single conclusion – that the People had not disclosed

material crucial to the impeachment of Veeder – so-called Giglio material – in the form of the Inspector General’s report about deficiencies in the State Laboratory in general and with Veeder’s performance in particular.

In fact, it is difficult to see how Judge Scarano could have concluded otherwise. As the judge himself observed in his opinion and is evident from the hearing evidence, the most that can be said about the conclusion Veeder reached when he conducted the fiber analysis was that his conclusion that the fibers on the glove defendant had worn and those on the duct tape on the murder victim’s mouth were identical was an overstatement. After all, Jeffrey Lynn, of the Ohio Bureau of Criminal Identification, assigned to review a large number of files of Veeder’s work after the Inspector General’s report had been issued, testified that the conclusions reached based on the information on Veeder’s worksheets were within the range of acceptable opinion. And Dr. Peter DeForest, who compared fibers from the gloves to the fibers on the duct tape, concluded that they were similar. Quite obviously, these conclusions were not exculpatory in the classic sense since they were consistent with defendant’s presence in the house when the murder was committed.

But the failure to provide a defendant with impeachment material before she pleads guilty does not implicate the due process concerns of Brady and Giglio. In United States v. Ruiz, 536 U.S. 622 (2002), defendant Ruiz, in whose possession a large quantity of marijuana had been found, was offered the chance to plead guilty and waive indictment, trial, and appeal, in exchange for a government

recommendation to the sentencing judge of a two level downward departure from the otherwise applicable Federal Sentencing Guidelines. Part of this original agreement required that the government continue to turn over information establishing the defendant's factual innocence but not impeachment evidence or information relevant to any possible affirmative defense. Ruiz declined, was indicted for a drug crime and pleaded guilty in the absence of any agreement.

On appeal, Ruiz maintained that she was entitled to receive impeachment material before a plea just as she would have been entitled before trial. The Ninth Circuit agreed and vacated the plea, but the Supreme Court reversed. In pertinent part, the Court held that while a defendant is entitled to information necessary to ensure that his plea is voluntary and that any waiver of rights is knowing and voluntary with awareness of the consequences of a guilty plea, impeachment information has nothing to do with the voluntariness of a plea but relates only to fairness of a trial. While the more information a defendant has the more aware he may be of the likely consequences of his plea and the wisdom of his decision, the Constitution does not require that all useful information be shared with defendant. Ruiz at 629.

Applying these principles here, it is abundantly clear that there was no constitutional violation. Simply put, because the material that was not disclosed bore only on impeachment, the failure to disclose it simply did not state a due process violation. In fact, the only two reported New York cases citing Ruiz have rejected

claims that Brady/Giglio mandated pre-plea disclosure of impeachment material. See People v. Holloway, 33 A.D.3d 442 (1st Dep't 2006); People v. Livingston, 836 N.Y.S.2d 494 (County Ct., Nassau Co. 2007).

There is a more fundamental reason that there was no Brady violation. This Court has held that Brady is not violated when the People learn of the exculpatory evidence in question only after the defendant has entered her guilty plea. People v. Muniz, 215 A.D.2d 881 (3d Dept. 1995). The First and Second Departments have also so held. People v. Mullady, 180 A.D.2d 408 (1<sup>st</sup> Dept. 1992); People v. Watson, 198 A.D.2d 461 (2d Dept. 1993). In other words, if the exculpatory material did not exist at the time of the trial or plea there can have been no disclosure obligation; this is only logical – the People can hardly be expected to disclose something that did not exist.

Indeed, there can be little doubt that Brady cannot be violated by the failure to disclose something that does not exist at the time disclosure would be required. “There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281-282 (1999); see People v. LaValle, 3 N.Y.3d 88, 110 (2004). The crucial element for purposes of this argument is, of course, suppression by the state. Obviously, when the evidence does not exist at the time disclosure is mandated, it cannot remotely be maintained

that it has been suppressed and, absent suppression, there has been no Brady violation.

Here, the information that Judge Scarano considered as Brady information was the Inspector General's report about the State Police Laboratory. That report was created years after defendant entered her guilty plea and thus, its non-existence at the time of the prosecution necessarily means that there has been no Brady violation.

To be sure, the People are chargeable with a Brady disclosure obligation even when the prosecutor himself did not know of the material if it is in the possession of the police. People v Wright, 86 N.Y.2d 591, 598 (1995). The only possible information that could conceivably be viewed as existing while the prosecution was pending was Veeder's own awareness of the deficiencies in his laboratory practices and thus, because the People must be charged with Veeder's knowledge of those deficiencies, the failure to disclose them establishes a Brady violation. But to so conclude sets a standard no prosecutor could meet. After all, as a general matter, actions taken by officers, not in furtherance of law enforcement but rather in pursuit of an unlawful scheme of their own have never been held to be attributable to the prosecution, particularly where the misconduct in question bears on credibility alone and not on the particular case. People v. Vasquez, 214 A.D.2d 93, 101 (1st Dept. 1995).<sup>4</sup>

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<sup>4</sup> With respect to the People's knowledge of the existence of exculpatory information, the result might well be different if the withheld information bore directly on the guilt/innocence question.

Of course, as noted above, there are two other bases for the People's obligation to disclose exculpatory evidence: CPL Section 240.20(1)(h) and a number of the rules of professional responsibility. But CPL Article 440 does not authorize relief for a mere statutory violation or for an ethical violation.

As relevant here, CPL Section 440.10(1) authorizes vacatur of a judgment grounded in a guilty plea only on a limited number of grounds. Specifically, such judgments may be vacated 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

\* \* \* \*

(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

\* \* \* \*

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

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See, e.g., United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976). This is not such a case, inasmuch as the hearing evidence revealed that the fibers in question, though not identical as Veeder had concluded, were similar and thus consistent with defendant's guilt.

On the face of the Article 440 framework, then, vacatur is not available for statutory violations that may have preceded a plea or for ethical violations that have preceded a plea.

Sound policy concerns mandate the conclusion that a Brady violation discovered after a plea of guilty cannot undo a judgment founded on that plea. When a defendant pleads guilty, she has

admitted commission of the crime with which [s]he was charged, h[er] plea renders irrelevant h[er] contention that the criminal proceedings preliminary to trial were infected with impropriety and error; h[er] conviction rests directly on the sufficiency of h[er] plea, not on the legal or constitutional sufficiency of any proceedings which might have led to h[er] conviction after trial. The rationale and objective of appellate reversal of a trial conviction because of misconduct on the part of a prosecutor is not to discipline or punish the prosecutor but to protect the rights of the defendant and to assure that h[er] conviction has not been accomplished by impermissible means. This rationale and objective would not be served by the vacatur of a conviction based on the defendant's plea of guilty.

People v. Di Raffaele, 55 N.Y.2d 234, 240 (1982).

For that reason, the four appellate divisions have all concluded that claims concerning discovery violation that do not relate to the sufficiency of the plea are forfeited by virtue of the plea of guilty. See, e.g., People v. Perkins, 288 A.D.2d 506 (3d Dept. 2001); People v. Oliveri, 49 A.D.3d 1208, 1209 (4th Dep't 2008); People v. Pryor, 12 A.D.3d 695 (2d Dept. 2004); People v. Tripp, 232 A.D.2d 200 (1<sup>st</sup> Dept. 1996). Because a defendant forfeits discovery related claims upon a plea of guilty and

cannot raise such claims on appeal, it follows, a fortiori, that such claims cannot be raised in a CPL Section 440.10 motion where the violations at issue do not relate to the voluntariness of the plea.

This is true whether the disclosure obligation that has been violated is constitutional or statutory. “A guilty plea generally represents a compromise or bargain struck after negotiation between defendant and the People. As such, it marks the end of a criminal case, not a gateway to further litigation. More than a confession, a guilty plea signals defendant's ‘intention not to litigate the question of his guilt, and necessarily involves the surrender of certain constitutional rights, including the right to confrontation, the privilege against self incrimination and the right to trial by jury.’ A guilty plea not only constitutes an actual waiver of certain rights associated with a trial, but also effects a forfeiture of the right to renew many arguments made before the plea, even those of constitutional dimension such as a claim of an alleged unconstitutional presumption in a statute, (People v Thomas, 53 N.Y.2d 338 [1981] or an allegation of selective or vindictive prosecution. People v Rodriguez, 55 N.Y.2d 776 [1981]). People v Taylor, 65 N.Y.2d 1, 5 (1985).<sup>5</sup>

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<sup>5</sup> It is worthy of note that the Second Department has concluded that even constitutional discovery claims are waived by a guilty plea, see, e.g., People v. Philips, 30 A.D.3d 621 (2d Dept. 2006), though this Court has held to the contrary. People v. Ortiz, 127 A.D.2d 305 (3d Dept. 1987). Amicus would urge that the Second Department view is the better one, inasmuch as the Court of Appeals explained that exceptions to the forfeiture rule are limited to jurisdictional matters (such as an insufficient accusatory instrument) or to rights of a constitutional dimension that go to the very heart of the process (such as the constitutional speedy trial right, the protection against double jeopardy or a defendant's competency to stand trial)." People v. Konieczny, 2 N.Y.3d 569, 573 (2004).

It cannot be seriously contended that a Brady/Giglio violation in the plea context goes to the heart of the process. At most, the disclosure failure bears on a defendant's decision whether or not to plead guilty; the constitution does not require that a prosecutor share all useful information with a defendant before she decides whether or not to plead guilty. Ruiz at 629; Moran v. Burbine, 475 U.S. 412, 422 (1986) (the Constitution has never been held "to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights"); Gruning v. DiPaolo, 311 F.3d 69 (1<sup>st</sup> Cir. 2002) (no obligation to allow criminal defendant exclusive access to audiotape of court ordered psychiatric examination before he decides to waive privilege against self-incrimination).

### C. Counsel Was Not Ineffective

In granting defendant's motion, Judge Scarano ruled that defense counsel had been ineffective. There is simply no support for the notion that counsel was ineffective in counseling defendant to plead guilty. But, of course, in determining whether a defendant has been deprived of effective assistance of counsel, the reviewing court must examine whether the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation. People v Baldi, 54 NY2d 137, 147 (1981); People v Carncross, 14 N.Y.3d 319, 331 (2010). In other words, an attorney cannot be ineffective when recommending that a defendant accept a plea offer when,

based on the information available to him at the time the recommendation is made, it was an appropriate recommendation. Indeed, to conclude otherwise would mean that an attorney would be charged with ineffective assistance when he fails to predict or anticipate that the law will be changed in a fashion more favorable to his client. This, of course, is simply not the case. Brown v. Greene, 577 F.3d 107 (2d Cir. 2009); Jameson v. Coughlin, 22 F.3d 427 (2d Cir. 1994).

In this case, original counsel's testimony makes clear that the advice he gave was, as of the time of the representation, appropriate. As noted above, counsel explained that at the time of the plea, he had no basis to contest the Veeder fiber comparison evidence and that, according to counsel, made a big difference in deciding whether or not she could succeed with a defense to the felony murder charge. Plainly then, viewed in totality and as of the time of representation, the attorney provided meaningful representation.

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Amicus has demonstrated that defendant is not entitled to relief on any of the grounds propounded by the motion court. There has been no knowing misrepresentation by the People, a necessary element for relief under CPL Section 440.10(1)(b). Nor has defendant been denied a constitutional right: there is no constitutional entitlement to Brady/Giglio material before entry of a guilty plea and it cannot be said that counsel was ineffective where it is apparent that, on the

information available to him, his recommendation that defendant plead guilty was well within the bounds of appropriate advice.

Because it is painfully apparent that none of the grounds advanced by the motion court entitle defendant to relief, there is only one way to understand what the motion court did. That is that it granted relief on the ground of newly discovered evidence, to wit, the report of the Inspector General that detailed improper conduct in the State Police Lab and, more particularly, in Veeder's own practices. This is something that the motion court simply could not do. This Court has consistently held that it cannot grant relief on the ground of newly discovered evidence after a plea of guilty for the simple reason that the plain language of CPL Section 440.10(1)(g) conditions vacatur of a judgment of conviction on this ground upon the existence of a verdict of guilt after trial. See, e.g., People v. Sides, 242 A.D.2d 750, 751 (3d Dep't 1997); People v. Black, 270 A.D.2d 563, 566 fn.\* (3d Dept. 2000). Accord People v. Latella, 112 A.D.2d 321, 322 (2d Dept. 1985).

The logic of this view is unassailable. As noted above, a plea of guilty "bespeaks of the defendant's intention not to litigate the question of his guilt . . . ." People v. Lynn, 28 N.Y.2d 196, 201 (1971) (citations omitted). Further, as the Court of Appeals has repeatedly observed, a plea of guilty generally marks the end of a criminal case, not a gateway to further litigation. People v. Hansen, 95 N.Y.2d 227, 230 (2000); People v. Taylor, 65 N.Y.2d 1 (1985). Of course, permitting a defendant

to obtain vacatur of a judgment founded on a plea of guilty on the ground of newly discovered evidence would necessarily put this long recognized principle in question.

In sum, there was no basis whatever upon which defendant was entitled to relief. There has never been any suggestion that the People were complicit in any misrepresentation or fraud to induce the plea, nor was there any constitutional violation here. In the end, the motion court effectively granted defendant relief on a ground wholly unavailable to her once she pleaded guilty – newly discovered evidence. Consequently, the order of the court below must be reversed and the conviction reinstated.

#### CONCLUSION

The vacatur order should be reversed and the judgment of conviction reinstated.

Respectfully submitted,

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November 2011