No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of New York

SUPPLEMENTAL APPENDIX

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To be argued by
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New York Supreme Court

Appellate Division -- First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

Bronx County
Ind. No. 1221/13

DARRYL HEMPHILL ,

Defendant-Appellant.

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PRELIMINARY STATEMENT

Darryl Hemphill appeals from a judgment of the Supreme Court, Bronx County, rendered January 6, 2016, convicting him, after a jury trial, of second-degree murder (P.L. §125.25(1)) and sentencing him to 25 years' to life imprisonment (Barrett, J., on motions, trial and sentence).

Timely notice of appeal was filed. On November 29, 2016, this Court granted Mr. Hemphill leave to appeal as a poor person and assigned Robert S. Dean, as counsel.

No stay has been sought. Mr. Hemphill had no co-defendants and is currently incarcerated pursuant to the judgment.

QUESTIONS PRESENTED

1. Whether Mr. Hemphill's guilt was not proven beyond a reasonable doubt where multiple eyewitnesses independently identified another man, Nicholas Morris, as the shooter, and Morris possessed .9 mm ammunition, the type used in the shooting, and had bruises on his knuckles consistent with his involvement in the fistfight which preceded the shooting. U.S. Const., Amend. VI, XIV; N.Y. Const., Art. I, §6.

2. Whether the court denied Mr. Hemphill the right to confront the witnesses against him where it admitted Nicholas Morris's guilty plea statements to prove that Morris possessed a different caliber gun on the date of the shooting, not the .9mm that killed the victim, because the defense had opened the door to this evidence, even though counsel had scrupulously followed the court's in limine rulings. Const., Amend. VI; N.Y. Const., Art. I, §6.

3. Whether the court denied Mr. Hemphill his due process right to a fair trial, to confront witnesses, and to present a defense where it prohibited counsel from establishing a critical witness's prior inconsistent statements about her identification of Morris because counsel had not adequately confronted the witness with the inconsistency, although counsel had read verbatim the questions and answers the witness had provided during her grand jury testimony; the prosecution then exploited the court's erroneous ruling to argue that the defense was fabricating evidence, an argument the jury seized upon during deliberations. U.S. Const., Amend. XIV; N.Y. Const., Art. I, §6.

4. Whether the court denied Mr. Hemphill due process by repeatedly allowing the prosecution, over constant objection, to impeach its own witnesses and unfairly

attack the credibility of a key defense witness. U.S. Const., Amend. XIV; N.Y. Const., Art. I., §6.

5. Whether the court denied Mr. Hemphill his right to present a defense where it prohibited the introduction of evidence to counter the prosecution's evidence of Mr. Hemphill's alleged flight, while allowing the prosecution to consistently introduce evidence of Nicholas Morris's innocence because he did not flee and precluding a statement that Morris had confessed to the shooting immediately afterwards and the weapons recovered from his apartment. U.S. Amend. XIV; N.Y. Const, Art. I, §6.

6. Whether the court erred in permitting the prosecution to introduce, over objection, hearsay relating to critical issues without appropriate limiting instructions. U.S. Amends. VI, XIV; N.Y. Const., Art. I, §6.

7. Whether the court applied an erroneous legal standard in allowing the prosecution to introduce 12 pictures of the two-year-old victim as well as inflammatory medical examiner testimony relating to the child's suffering where cause of death was not contested. U.S. Amend. XIV; N.Y. Const. Art. I, §6.

8. Whether the prosecutor's summation comments which appealed to the jurors' emotions, shamelessly vouched for the integrity of the prosecutor's office and denigrated the defense function denied Mr. Hemphill due process. U.S. Amend. XIV; N.Y. Const., Art. I, §6.

9. Whether the court denied Mr. Hemphill due process and his right to be present during a critical stage of the trial, when it removed him from the courtroom prior to the jury being polled, without warning him that he would be removed if he continued to disrupt the proceedings. U.S. Amend. VI, XIV; N.Y. Const., Art. I, §6.

10. Whether the integrity of the grand jury proceedings was compromised where the prosecution failed to present any of the exculpatory evidence relating to the identifications of Nicholas Morris; the court erred in denying the defense motion to dismiss. U.S. Amend. V, XIV; N.Y. Const., Art. I, §2.

11. Whether the court erred in refusing to hold a Franks hearing where the defense came forward with specific allegations demonstrating that the statements in the warrant application to obtain Mr. Hemphill's DNA were recklessly false. U.S. Const, Amend. IV; N.Y. Const., Art. I, §12; Franks v. Delaware, 438 U.S. 154 (1978).

12. Whether Mr. Hemphill was denied his constitutional right to a speedy trial due to the seven-year delay in his prosecution where the prosecution failed to adequately explain the delay. U.S. Const., Amend. XIV; N.Y. Const., Art. I, §6.

13. Whether the court erred when it applied the wrong legal standard to deny the defense request for a single adjournment of sentence to allow counsel to file a C.P.L. §330.30 motion alleging serious juror misconduct based on specific allegations that the jury foreman knew a prosecution witness and had spoken to her about the case during the trial. U.S. Const., Amend. XIV; N.Y. Const., Art. I, §6.

14. Whether the 25-years-to-life prison sentence was excessive where Mr. Hemphill was a first offender with a history of employment and supporting his family. U.S. Amend. XIV; N.Y. Const., Art. I, §6.

INTRODUCTION

On Easter morning in April 2006, two-year-old David Pacheco, Jr., was shot and killed by a stray bullet that pierced his mother's minivan as she was driving her family on Tremont Avenue in the Bronx. The shooting resulted from a fistfight minutes earlier during which Ronell Gilliam and an African-American man in a blue top fought with a group of Hispanic men and women. The sole issue at trial was the identity of the shooter.

Within hours of the shooting, based on interviews with neighborhood witnesses, including a woman named Michelle Gist, the police had identified Gilliam and come to suspect his best friend, Nicholas Morris, of the shooting. Morris subsequently appeared on News 12 to proclaim his innocence. When the police searched his apartment they found guns and ammunition, including a .9mm bullet, the type of ammunition used in the shooting. Upon Morris's arrest, the police observed bruises on his knuckles consistent with his having been in a fistfight. Three witnesses then independently identified Morris as the shooter in a lineup and another picked him out of a photo array as looking like the shooter.

Based on this evidence, the prosecution indicted Morris and proceeded to trial against him in 2008. Following opening statements, the court declared a mistrial with the prosecution's consent. At the prosecution's insistence, in exchange for his

immediate release from prison, Morris subsequently pleaded guilty to possessing a .357 caliber gun on the day of the shooting.

In 2011, the prosecution obtained a warrant to obtain Mr. Hemphill's DNA, to test it against DNA found on a blue sweater recovered from Gilliam's apartment shortly after the incident. While Mr. Hemphill's DNA was found in a single location on the sweater's collar, not a single witness identified the sweater, which was covered in metal shavings and moth-eaten, as the one worn by the shooter. Nor did any witness ever identify Mr. Hemphill. In fact, two additional years passed from the time of the DNA match until Mr. Hemphill's indictment and subsequent arrest.

The 2015 trial which resulted in Mr. Hemphill's murder conviction was pervaded by error. Despite the prosecution's failure to prove Mr. Hemphill's identity as the shooter beyond a reasonable doubt, the court's pattern of erroneous rulings resulted in a conviction that lacks integrity.

The court allowed the prosecution, over a specific Confrontation Clause objection, to introduce Morris's guilty plea statements to prove that Morris did not possess the .9 mm murder weapon. The court ruled that the defense had opened the door to this evidence by mentioning during opening statements that .9mm ammunition had been recovered from Morris's apartment. But this evidence-based observation adhered to the court's

specific in limine ruling relating to the admissibility of only certain contraband recovered from Morris's apartment.

The court also restricted counsel's cross-examination of a critical witness, Brenda Gonzalez, who had attempted to break up the fight between the blue-clad shooter and her friend. Although Gonzalez shortly after the shooting had identified Morris in a lineup and described her interactions with him during her 2006 and 2007 grand jury testimony against Morris and Gilliam, the court ruled that counsel had not adequately confronted her with her prior testimony to allow impeachment.

While counsel had read verbatim from the grand jury testimony, the court ruled that because counsel had confused the year of that testimony, Gonzalez had not been adequately confronted with her prior inconsistent statements. The court then allowed the prosecution to call the court reporter from the 2006 grand jury proceedings to demonstrate that Gonzalez had not provided the testimony identifying Morris which counsel had recounted. The court would not allow the defense to call the 2007 grand jury reporter to establish the inconsistency. Thereafter, the prosecutor argued on summation that the defense had misled the jury about Gonzalez's prior testimony. During deliberations, the jury repeatedly asked to rehear the court reporter's testimony relating to Gonzalez's 2006 grand jury testimony. Counsel renewed his objection that the court's ruling had misled the jury on an issue critical to the defense.

In contrast to the court's strangely restrictive rulings relating to Mr. Hemphill's right to cross-examination, the court allowed the prosecution great leeway in impeaching its own witnesses. The court also allowed the prosecution to badger a critical defense witness about a remote prior conviction and introduce a certificate of conviction relating to that offense.

Similarly, the court applied the hearsay rules in a manner that solely benefitted the prosecution, allowing the introduction of hearsay about the circumstances surrounding the recovery of a blue sweater, Ronnell Gilliam's retaining an attorney allegedly paid for by Mr. Hemphill, Morris's consent to DNA tests and his exculpatory statements to News 12. In contrast, despite an initial in limine ruling finding the evidence admissible, the defense was precluded from eliciting that shortly after the shooting, Mr. Hemphill's attorney offered to make him available to the police if they wanted to speak with him. The court also ruled inadmissible on hearsay grounds Morris's statement to a defense witness admitting the shooting.

Although the sole issue at trial was the shooter's identity, the court allowed the prosecution, over objection, to admit multiple pictures depicting the child's body. The court also allowed the medical examiner to describe, over objection, the excruciating nature of the child's injuries. These rulings served no purpose but to inflame the jury's passions in this already emotion-charged case. The prosecution's summation

similarly played to the jurors' emotions, vouched for the integrity of the prosecutor's office and denigrated the defense function.

When the jury returned its verdict, Mr. Hemphill declared his innocence and, emotionally distraught, asked to be removed from the courtroom. Rather than adjourning the proceedings momentarily to allow Mr. Hemphill to regain his composure in order to be present for the polling of the jury, the court ordered him removed, and remarked to the jurors that the outburst was consistent with that of a guilty man.

Prior to sentence counsel timely sought a single adjournment to investigate a serious claim of juror misconduct. During sealed proceedings, counsel advised the court that he had learned after the verdict that the jury foreman was friends with a prosecution witness, Mr. Hemphill's estranged sister-in-law. Counsel had confirmed that the juror had spoken with this witness during the trial and had not revealed his friendship with her during voir dire or trial. Counsel explained that his attempts to file a C.P.L. §330.30 motion had been hindered by the Christmas holidays during which witnesses were out of town.

The court refused to grant counsel's adjournment request ruling that the defense could file a C.P.L. §440 motion following sentence which would preserve Mr. Hemphill's rights. Counsel protested that the two motions were procedurally distinct and he wished to file a C.P.L. §330.30 motion prior to

sentence. But the court refused to adjourn sentencing, despite counsel's protest that he was not ready to proceed and had not yet submitted a pre-sentencing memorandum. The court then imposed the maximum 25 years-to-life prison sentence although Mr. Hemphill had no criminal record, a steady history of employment and supported his children.

STATEMENT OF FACTS

On Easter Morning In April 2006, Following A Street Fight, A Stray Bullet Kills Two-Year-Old David Pacheco, Jr.; Based On Witness Accounts, The Police Quickly Identify Ronnell Gilliam and Nicholas Morris As the Culprits.

At approximately 2:00 p.m. on April 16, 2006, Easter Sunday, police received information about a shooting in the area of Tremont and Harrison Avenues in the Bronx (Detective Ronald Jimick: 653-654).[1] After learning that a two-year-old, David Pacheco, Jr., had been shot and killed, the police extensively canvassed the area for witnesses and evidence (655-656). Detective Jimick spoke with Michelle Gist, who had witnessed a fight prior to the shooting (661-662). Gist recognized two men she had known for years as being involved in the fight, identifying them as "Burg" and "Nick" (743-744, 796, 798).

After speaking with Gist, police conducted a computer

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[1]Numbers in parentheses refer to pages of the trial minutes dated October 26, 2015, et seq. Numbers preceded by "J.S." refer to the pages of the jury selection minutes dated September 21, 2015, et seq. Numbers preceded by "JS2" refer to the continuation of jury selection dated October 14, 2015 et seq. Numbers preceded by "S." refer to the pages of the sentencing proceedings and "PSR." to the pre-sentencing report.

search for a person with the nickname "Burg" which was traced to Ronnell Gilliam (662). The police gained access to Gilliam's apartment where they recovered from a closet a blue Izod sweater in a plastic bag (664). While the police were searching his apartment, Gilliam, who was evading the police, called his brother William, who was present during the search; Gilliam asked if the police were there and told William to get rid of "the shirt" (667, stipulation: 1494)(emphasis added).

The police conducted additional computer searches to identify Gilliam's known associates (668). Based on conversations with Gist, Morris's association with Gilliam, and his meeting the descriptions of the shooter provided by the 911 callers, the police went to search Morris's apartment (742). By midnight of April 16, 2006, the police had gained access to Morris's Bronx apartment located at 1962 University Avenue (668). Morris was not there, but his family allowed the police to search his bedroom, where they recovered inter alia, various types of ammunition from his night stand -- for a .357 revolver and a .9mm gun -- the type of weapon used during the shooting (679,750).

The police arrested Morris the following day, April 17, 2006, at the News 12 television station (682). That same day, another witness viewed a photo array and picked out Morris, stating that he looked like the shooter (757). On April 18, 2006, the police conducted lineups at 1086 Simpson Street (683).

Of the four witnesses who viewed the lineup, three identified Morris as the shooter (684, 697). The one witness who did not identify Morris, did not want to be involved and viewed the lineup for a couple of seconds (763). Based on the three identifications, Morris was arrested and charged with Pacheco's murder (697). Morris's right knuckles were bruised as if he had been in a fight (721, 752).

On April 26, 2006, Ronnell Gilliam, accompanied by an attorney, met with prosecutors and police detectives at the Bronx District Attorney's office (723-725). During this first statement, Gilliam told the police that Morris was the shooter (Ronnell Gilliam: 1010). A few weeks later, on May 9, 2006, Gilliam returned to make a second statement (725). While waiting to speak to the police, Gilliam received a call from Morris who was at Rikers Island (726, 773). Gilliam then told the police that Morris was innocent and Mr. Hemphill was the shooter (1014-1015). On October 20, 2006, Gilliam was arrested and charged with hindering the prosecution and tampering with evidence (Jimick: 729).

Aware That DNA Was Obtained From The Blue Sweater, The Prosecution Proceeds To Trial Against Nicholas Morris, Before Agreeing To A Mistrial And Procuring Morris's Guilty Plea To Weapon Possession.

In October 2006, OCME tests revealed that DNA capable of being compared to a known suspect had been recovered from the collar of the blue sweater taken from Gilliam's apartment. See

Court File: Notice of Motion To Dismiss for Pre-Arrest Delay at p. 2. On March 3, 2008, the police obtained a sample of Morris's DNA which did not match the DNA recovered from the sweater. See Court File: Decision and Order dated 2/4/14, denying Motion To Dismiss Due To Pretrial Delay at 2. Nonetheless, the prosecution proceeded to trial against Morris. Id. Following opening statements on April 14, 2008, the prosecution agreed to a mistrial. Id., fn.2.

By that time, Morris had been in prison for two years. On May 29, 2008, the prosecution agreed to his immediate release if he pleaded guilty to weapon possession charges and acknowledged that on the date of the incident he possessed a .357 caliber revolver -- not the .9mm weapon that killed Pacheco. Id., at 2; (1181-1185). Morris took the plea against his defense attorney's advice, as there was no evidence supporting that Morris possessed a .357 caliber gun on the day of the incident (1182-1183).

> In April 2011, The Court Issues A Warrant To Obtain Mr. Hemphill's DNA Which Matches The DNA On The Blue Sweater; The Prosecution Then Waits An Additional Two Years To Indict Mr. Hemphill Without Presenting To The Grand Jury Any Of The Exculpatory Evidence Relating To Nicholas Morris.

Shortly after the 2006 incident, Mr. Hemphill and his family relocated to North Carolina. See Court File, Notice of Motion To Dismiss, dated November 6, 2013 at 2. On April 26, 2011, Justice Barrett issued a search warrant to allow the

police to obtain Mr. Hemphill's DNA. See Court File: Search Warrant. The affidavit in support of the warrant, sworn to by Detective Nicholas Ciuffi, represented that "an eyewitnesses [sic] known to the Police Department" "has now come forward to name Daryl [sic] Hemphill as the shooter." Id., Affidavit at ¶ 11 [emphasis added]. The affidavit also suggested that the DNA evidence had been "left upon the body of the murder victim." Id., at ¶16. On June 24, 2011, OCME issued a report reflecting that Mr. Hemphill was the source of the DNA found on the blue sweater's collar. Court File: Answering Affirmation dated December 11, 2013 at 10.

Mr. Hemphill was not arrested until April 24, 2013, because there was insufficient evidence to arrest him pending the discovery of additional evidence or witnesses. Id., Notice of Motion To Dismiss dated November 6, 2013, Memorandum of Law at 1; Decision and Order dated 2/4/14 at 3. Mr. Hemphill waived extradition from North Carolina and was arraigned on April 26, 2013. Id. During the grand jury proceedings which resulted in the murder indictment, the prosecution conceded that "the People did not present to the grand jury evidence of the identification of Nicholas Morris as the individual who shot and killed David Pacheco, Jr." Id., Answering Affirmation at 5.

The In Limine Rulings[2]

The Court Precludes Evidence Relating To Weapons Recovered From Nicholas Morris's Apartment Within Hours Of The Shooting.

Before jury selection began, the prosecution sought to preclude the defense from eliciting that contraband was recovered from Morris's apartment within hours of the shooting. According to the prosecution, the only admissible evidence was the single .9mm caliber bullet recovered from Morris's night stand (J.S. 105). The police had also recovered from Morris's bedroom an .8mm starter's pistol, a .22 caliber rifle missing its magazine, .357 caliber ammunition, and two photographs depicting Morris brandishing guns and having them brandished at him while smoking a blunt (J.S. 106-107). According to the prosecution, this evidence merely showed that Morris was "into guns" and was irrelevant (106-107).

Counsel urged the court to deny the prosecution's application, arguing that the evidence was relevant to Morris's guilt and the prosecution had intended to present it at Morris's trial (J.S. 111-112). It was relevant that Morris had access to guns, counsel urged (J.S. 118). The court ruled that evidence demonstrating Morris's propensity to possess guns was irrelevant, would mislead the jury and encourage speculation (J.S. 118-119, 157). Counsel objected that uncharged crimes

[2]Facts relating to the pre-trial motions to dismiss the indictment and for a Franks hearing will be set forth in the argument sections addressing those claims.

evidence was precluded out of concern for the rights of the accused, a concern not present when such evidence was not being used against a defendant. Morris's displaying photos of himself brandishing weapons and his habits relating to firearms were relevant to Mr. Hemphill's defense that Morris was the shooter, counsel argued (J.S. 119-121). The court suggested that the evidence would only be relevant if Morris were testifying and noted the defense's exception (J.S. 122, 157).

The Court Rules That Counsel Can Elicit From The Investigating Detective That Mr. Hemphill's Lawyer Advised The Police That He Was Willing To Talk To Them About The Incident, To Rebut The Prosecution's Evidence Of Flight, But Then Reverses The Ruling.

The prosecution announced it would introduce evidence of Mr. Hemphill's alleged flight to North Carolina shortly after the incident (J.S. 152). Counsel objected that while Mr. Hemphill moved with his family to North Carolina following the incident, law enforcement knew where to find him because the family had retained counsel who advised the police that Mr. Hemphill would be willing to speak to them (J.S. 152-153). The court ruled that Mr. Hemphill's leaving the jurisdiction the day after the incident could constitute evidence of consciousness of guilt, but the defense would be entitled to counter this evidence through Mr. Hemphill's testimony (J.S. 153).

Counsel responded that he intended to elicit through the case officer that he communicated with Mr. Hemphill's attorney who offered to make Mr. Hemphill available to law enforcement

(J.S. 154). The court responded, "that's fine, but that will not eliminate the basis for the consciousness of guilt charge" (J.S. 154)(emphasis added).

Following opening statements, after counsel had suggested that the police knew Mr. Hemphill's location based on conversations with his attorney, the court denied it had ruled that the testimony could be elicited through the case detective and warned counsel he could not elicit "hearsay" concerning his client's "state of mind" (74, 141-142, 146-148).

The Court Deems Admissible The Soundless News 12 Interview With Morris To Demonstrate His Appearance Shortly After The Incident And The Broadcast's Influence On The Subsequent Line-up Identifications.

The prosecution asked to introduce News 12 footage taken during Morris's interview the day after the incident (J.S. 122-129). According to the prosecution, the videotape was relevant because it was viewed by witnesses who subsequently identified Morris during the lineup and it also showed that Morris did not have tattoos on his forearms -- a feature which some eyewitnesses had attributed to the shooter (J.S. 122-124). The prosecution recognized that the interview was hearsay but offered to play it without sound and the court observed it could come in if Morris testified to rebut a claim of recent fabrication (J.S. 123-124). The prosecutor advised that Morris would not testify because, based on his weapon possession guilty plea, he had been barred from readmission to the United States

after he went to Barbados (J.S. 124).

Counsel was surprised by the suggestion that witnesses had viewed the interview of Morris prior to the lineups and that this information had never before been revealed (J.S. 130). The prosecution explained that when the witnesses viewed Morris on television, they did not believe he was the shooter (J.S. 160-161). Counsel was "taken aback" by the information, found it incredible it had not been disclosed previously and objected to the witnesses being asked their conclusions on viewing the videotape years earlier (J.S. 164, 167). The court ruled the broadcast interview and the part in which Morris displayed his arms, which was never broadcast, would both be admissible (J.S. 168-169, 182).

The Court Rules That The Prosecution Will Be Given Substantial Leeway To Impeach Its Own Witnesses.

In light of the prosecution's stated intention to call the witnesses who had identified Morris as the shooter, counsel expressed concern that the prosecutor would be allowed to cross-examine his own witnesses (J.S. 183). The court stated that it had discretion to allow examination that could be considered impeachment of prior testimony incriminating Morris (J.S. 185). The jury's evaluation of the key issue of Morris's culpability "necessitate[d] some level of impeachment of the prosecution's own witnesses" (J.S. 186). The court granted the defense an exception to its ruling and observed that the objection was not

"frivolous" but "in balance" the court would exercise its discretion in favor of the prosecution (J.S. 187).

The Court Refuses To Limit The Prosecution's Introduction Of Photos Of The Deceased.

Counsel moved to preclude the prosecution from introducing pictures of the two-year-old's dead body, characterizing the pictures as overly prejudicial because the cause of death and path of the bullet would not be contested (JS2. 3-4). The prosecution offered to "self-sensor" and not introduce seven of the pictures, but sought to offer a long range shot of the child's body to give "context to the investigation" (JS2.7). While recognizing the only contested issue would be identification, the prosecutor suggested that defense theories could change and he needed to prove every element of the crimes (JS2.8).

Counsel protested the introduction of photographs of a "dead baby still in his diapers" as "extremely disturbing" and asked that the pictures be precluded (JS2. 9). The court deemed the pictures disturbing but not prejudicial because the victim's photographs were relevant in a homicide trial to establish "the identity and humanity of the victim" and impress upon the jury the "importance" of its job (JS2. 13). It was not appropriate to try to "sanitize" the evidence. Because the case involved the "most serious crime known to our civilization" all the photographs were "highly relevant" and the prosecutor would be

permitted to introduce "any and all" the photographs with the exception of the defense (JS2. 13, 14, 16). When counsel continued to protest, the court admonished him to save his arguments for his appellate brief (JS2. 16).

Immediately prior to trial, counsel renewed his objection, protesting that the sheer number of photographs was cumulative (4). The prosecutor responded that he would offer four to five photographs from the autopsy and three to four others of the child (4-5). The court ruled that if the prosecution offered 24 pictures of the autopsy, they could be considered cumulative, but that the prosecutor would demonstrate "appropriate self-regulation" (10).

The Trial

Opening Statements

The prosecutor began his opening by advising the jury that the deceased's mother was driving her car down Tremont Avenue, "a ride that most of us have taken" when she heard gunshots, "the kind of sound that many of us who have spent our whole lives in the Bronx are so used to hearing" (12). The court overruled counsel's objection to these comments. The prosecutor continued by observing that the bullet pierced the "soft skin" of "David," resulting in the "two-year-old bleeding out" (13).

According to the prosecution, following the shooting, the "innocent stayed" and the guilty fled (17). Mr. Hemphill ran to North Carolina while Nicholas Morris walked into News 12 "to

let police take him in" and "invited them on the air to come arrest him" (19). Counsel's objection that "we are getting into things that are not going to be testified to at trial," was overruled (19). The prosecutor continued that Morris's walking into News 12 was "not what a murderer does" (22). Moreover, Morris showed his arms during the interview, revealing that he did not have tattoos attributed to the shooter (25).

According to the prosecutor, the DNA recovered from the blue sweater proved Morris was not the shooter. But Morris was not some innocent man; he was on his way to the scene with a .357 revolver. Counsel's objection to these comments was overruled (28). While the prosecutor advised the jury that three witnesses had identified Morris, and such a case would ordinarily be considered "over," the prosecution was "better than that" (20).

The defense observed that the people who identified Morris as the shooter had been involved in a close altercation with him minutes earlier (32). Not a single disinterested eyewitness would identify Mr. Hemphill, counsel predicted (33). The sole witness who would implicate Mr. Hemphill would be Ronnell Gilliam, who had provided inconsistent statements after the incident, first identifying Morris as the shooter, then Mr. Hemphill (39-40).

When the police searched Morris's apartment, a .9mm bullet was found, the caliber of gun used in the incident, counsel

explained (42). Morris also had bruises on his knuckles, consistent with his having been in an earlier fistfight (43).

Counsel also advised that, while Mr. Hemphill left the area after the incident, the police knew where he was as he did not hide or change his name and his lawyer was in contact with law enforcement (47). While the evidence would show that at some point Mr. Hemphill wore the blue sweater, its connection to the shooting would not be proven, counsel predicted (48-49). It contained no gunshot residue and the shooter's top had been described as a shirt by several witnesses, not a sweater (48-49).

Eyewitnesses Describe A Ten-Minute Altercation Culminating In The Shooting Minutes Later And The Subsequent Identification Of Nicholas Morris.

On April 16, 2006, Easter Sunday, Brenda Gonzalez, her daughter, Marisol Santiago, and their respective partners, Jose Castro and Juan Carlos Garcia were coming from shopping in the Burnside section of the Bronx (BG: 441; MS: 839; JC: 257; JCG: 803-804). They were accompanied by Jon-Erik Vargas, Garcia's cousin (JV: 875-876; BG: 441). As the group walked towards their home located at 1731 Harrison Avenue, Gonzalez and Castro were in front of the others, when they encountered a man on a cell phone who asked "what's up?" (BG: 442). The man crossed the street to approach the group and subsequently again asked Vargas "what's up?" (BG: 443; MS: 839; JV: 875). Although no one in the group knew the man, he wanted to fight Vargas (JV:

875). A heavier man Vargas knew as "Burger" approached and Vargas squared off with both (JV. 875).

Gonzalez positioned herself between the thinner man and Vargas (BG: 443; MS. 840). She told the men that nobody needed to fight (MS. 840). The thinner man stated that Vargas was lucky his mom was there and Vargas responded that Gonzalez was not his mother (BG: 443). Vargas and the thinner man were face-to-face during this initial argument (JC: 288). They then started fighting (BG: 443-444; JV: 875). Garcia jumped in to help Vargas (JG: 805).

Milagros Pagan, her then 10-year-old son, Justin Bautista and her then-husband, Anthony Baez, also witnessed the fight (MP: 1079, 1081; JB: 1092; AB: 1157). Baez tried to break it up (AB: 1159).

The heavier man pushed Vargas into a car and Vargas fell (JV: 875, 879; JC: 262). Vargas got up and punched the heavier man and then the thinner one (JV: 880). As the men fought, Gonzalez tried to get the heavier man off Vargas (BG: 444). Castro also tried to break up the fight (JC: 262). The thinner man hit Castro three times in the back of the head (JC: 262). Garcia was also struck by both men (JG: 806; MS: 841).

When the fistfight ended, the thinner man ran from Tremont Avenue towards University Avenue; Vargas pursued him (JV: 881). Eventually, Vargas ran into another car on University and returned to where his friends were waiting (JV: 881).

The heavier man remained in the area and Vargas grabbed a milk crate, asked him if he wanted to fight and spit on him (JV: 882). The heavier man responded that Vargas was going to get "shot for that" (JV: 882). The group returned to outside Gonzalez's building (JV: 882). Vargas was feeling faint and Garcia went to get some water to revive him (JV: 882).

The group's initial altercation with the two men lasted ten minutes (MS: 861; JC: 292). As Garcia crossed the street to give Vargas the water, shots rang out (JV: 884). The shooter was the thinner man who had returned to the scene within minutes of the original altercation (JV: 885; JG: 812; BG: 457-458; JC: 267 ; MS. 843). According to Baez, the shooter returned in a black car with a female driving it; the heavyset man then told the man to "hold up" but the shooter just "opened up fire" (AB: 1157).

When the first shot was fired, a minivan driven by Joanne Sanabria passed by; she looked in her rearview mirror and saw that her two-year-old son David Pacheco Jr. was having difficulty breathing (56-57). She stopped her car a few blocks away and screamed for help before somebody came to try to revive her son and took them to the hospital where he later died (56-58).

The eyewitnesses all described the shooter as a thin African-American man wearing a blue top and a hat. According to Garcia, the shooter's top was a blue short-sleeved "golf shirt"

with three buttons on the top and an Izod logo (JG: 809-810). Because the shirt was short-sleeved, Garcia was able to see a lettered, script tattoo on the shooter's right forearm (JC: 823-824). Castro was also able to see this tattoo; when Castro was shown the blue long-sleeved sweater the prosecution introduced into evidence, he could not identify it, observing that "it was similar" to the shooter's but a common type (JC: 283-284; People's 98C). Ultimately, he recounted that the shooter's top was short-sleeved (JC: 295, 296). Gonzalez described the shooter as wearing a "blue sweater" and was not asked to identify the one in evidence (BG: 442, 443, 444, 445). Vargas described the shooter as wearing a "sky blue" sweater and Yankees hat; Vargas also never identified the sweater in evidence (JV: 877,879, 880).

Santiago merely described the shooter's top as a "blue sweater" and did not identify the one in evidence (MS: 840). But she had described the top as a "blue shirt" to the police immediately after the incident (MS. 861). She also observed a lettered tattoo on the shooter's forearm (MS. 863). Baez described the top as "light bluish" with "embroiderment" (AB: 1160). He did not identify the sweater in evidence (1160). Pagan and Bautista also merely described the thin man as wearing a blue sweater and were not asked to identify the one in evidence (MP: 1081; JB: 1092)

Vargas, who had argued with the thinner man face-to-face,

viewed a lineup two days later and identified Morris as the shooter (JV: 886). Santiago, who did not need glasses, picked Morris out of the same lineup; at the time she was "sure" about her identification (MS. 853, 866). She subsequently testified in the 2006 grand jury that she was certain Morris was the shooter (856, 857, 858, 870).

But by the time of trial, she believed that she had picked out Morris because she had seen him on News 12 prior to the lineup (MS. 853). Castro never viewed a lineup or photo array, but he did see the News 12 interview of Morris, which the prosecution repeatedly played for the jury, and believed Morris was not the shooter (JC: 280, 281). Nonetheless, in 2007 Castro testified before the grand jury and referred to Morris as the shooter throughout his testimony (297, 306, 309). Garcia viewed the line-up but did not recognize the shooter as being present (JG: 819). He had not watched any news reports prior to the lineup (JG: 819).

Baez was shown a photo array the day after the incident (AB: 1163; Defense Exhibit E [photo array containing Nicholas Morris's picture in position 5]). Baez remembered telling the police that the shooter "looked like" Morris, but at trial nine years later insisted that he was only able to narrow down the photo array to being possibly the men depicted in the number four or five pictures (AB: 1170). But the police report memorializing the April 17, 2006, procedure reflected that Baez

picked out Morris, saying he looked "like" the shooter (Jimick: 756).

During Brenda Gonzalez's Cross-Examination Counsel Confronts Her With Her Prior Grand Jury Testimony Identifying Morris; The Prosecutor Does Not Object To The Cross-Examination But Subsequently Accuses Counsel Of Misleading The Witness.

Gonzalez viewed the lineup two days after the shooting and had identified Morris as the shooter (461). Although Gonzalez had never seen the News 12 interview with Morris, the prosecutor played it for her and she observed that Morris looked "too chubby" to be the shooter (468; People's Exhibit 101[video of Morris interview]). She also insisted that she had not been wearing her glasses on the day of the incident and could not see the shooter's face during the fight or at the lineup (448, 469).

On cross-examination Gonzalez admitted her vision was better in 2006 and her memory of events was fresher (476). Counsel asked if she remembered testifying in the grand jury in 2006 recounting the questions and answers in detail:

Q: And who was the skinny guy?

A: Mr. Morris (479).

Gonzalez responded that she had "never said that" (479)(emphasis added). The prosecutor refused to stipulate to the accuracy of minutes, without objecting to the dates of the grand jury transcript from which counsel was reading (479). The court would also not allow counsel to show Gonzalez the transcript to refresh her recollection (480).

Gonzalez also denied ever testifying in the grand jury that she was certain of her identification of Morris. Again, counsel read from the grand jury minutes:

> Q: Is there any doubt in your mind that you saw Nicholas Morris fire that first shot?
>
> A: No doubt.

Gonzalez insisted she "didn't say that" (488). She did not recall ever saying in the grand jury that the shooter was Morris (490).

Counsel continued to read from the transcript:

> Q: Are you sure it was Nicholas Morris who fired the shot?
>
> A: Morris is the skinny one.
>
> Q: Have you previously identified Morris as the person you saw firing that first shot?
>
> A: Yes.

Gonzalez could not recall this testimony or her previous testimony that she had stood between Morris and Vargas during the initial encounter (489, 491). Counsel read from the grand jury transcript:

> Q: What did you see happen when Burger came out of the building?
>
> A. They came running toward us while we was walking towards my house. They were running behind us and finally Morris catched up to us and I got-he started talking to Jon and I got between Jon and him. (491).

Gonzalez insisted that "they" must have added Morris's name to the transcript because she never knew Morris's name (497).

She also insisted that she had told the police during the

Morris lineup that he was "too big on the cheek" to be the shooter (500). Once again, counsel attempted to confront her by reading from the grand jury transcript.

Q: Who did your recognize?

A: Number 2, the shooter.

Gonzalez claimed she did not "say that" in the grand jury (500).

Following Gonzalez's testimony, counsel objected that the prosecutor had not stipulated to the accuracy of his reading of the grand jury minutes. Counsel had never before "encountered" such a situation and believed it would be difficult to get the court reporter from the 2006 grand jury proceedings. The prosecutor responded that he would consider stipulating to the minutes' accuracy after he had a chance to review them (506). Counsel responded that Gonzalez had testified on two dates (506).

The prosecutor later sought to call the 2006 grand jury reporter to establish that Gonzalez had not named Morris as the shooter at that time (583). Counsel had been reading from the 2007 grand jury minutes when he questioned Gonzalez, the prosecutor explained (583). Counsel responded that whether he was reading form the 2006 or 2007 minutes was not material because he had specifically asked about Gonzalez's testimony before the grand jury (586). The court responded that it would "normally agree" with counsel, but "in this particular instance," was not "inclined to" (587). According to the court,

there had been "more publicity" that would have contaminated the witness by 2007 (588).[3] The court suggested that the matter could be addressed by a stipulation (588).

Counsel protested that allowing the prosecutor to call the 2006 court reporter to testify that Gonzalez had not made the statements counsel had asked about, because the statements were made during the 2007 grand jury proceedings, would mislead the jury (592). But the prosecutor would not stipulate to the accuracy of the 2007 grand jury testimony because Gonzalez was not "confronted" with the 2007 minutes (593).

Initially, the court recognized that if the prosecutor would not stipulate, the defense might be allowed to recall Gonzalez and then call the 2007 grand jury court reporter (594). Counsel explained that his questioning had not been an intentional attempt to mislead Gonzalez (596). The court urged the prosecutor to stipulate to the accuracy of the 2007 grand jury minutes, recognizing that it would "not get into a situation where the matter is not before the jury" because to do so would not protect Mr. Hemphill's rights and the fairness of the trial (594, 596).

Despite the court's urging the prosecution to stipulate to the accuracy of the contents of all the grand jury testimony, the prosecutor called the 2006 grand jury reporter, Cheryl

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[3]There was no evidence supporting the court's speculation about the impact of publicity.

Laurel. The prosecutor then read from counsel's trial cross of Gonzalez, and elicited that Gonzalez had not said that Morris was the skinny guy (615), and that she did not say she was certain Morris was the shooter (616). Gonzalez did not testify she had previously identified Morris prior to her grand jury testimony (616) or that she saw Morris point the gun from across the street (617). Gonzalez did not testify in the grand jury that she saw Morris standing on the corner shooting (617). She did not describe seeing Morris speak with Vargas prior to the shooting (618). According to Laurel, Gonzalez did not mention the name Morris or Gilliam (619). Counsel then elicited that Laurel did not know if Gonzalez had testified before a grand jury in 2007 (620).

Counsel later protested that the prosecutor had misrepresented the record concerning the defense questioning of Gonzalez in suggesting that counsel had keyed his questions to the 2006 grand jury date (711). Counsel stated that he had mentioned the 2006 date only once and all his other questions merely referenced the grand jury testimony without specifying a date (712). Again, counsel sought a stipulation concerning the accuracy of his reading of the 2007 grand jury testimony or to call the 2007 grand jury reporter to establish Gonzalez's previous testimony (713). The court responded that the only date mentioned by counsel was the 2006 date, leading the jury to conclude the statements were made then (714). Counsel responded

that the jury should learn that the references were to the 2007 proceedings and again asked to call the 2007 court reporter (715).

The prosecutor objected because Gonzalez had not been fairly apprised of the statement subject to impeachment (717). The court recalled that Gonzalez had acknowledged making the statements and the prosecutor clarified that she had not done so (717). The court then ruled that because counsel's questions were reasonably interpreted to have referenced the 2006 grand jury proceedings, there was no basis for the defense to be permitted to call the 2007 grand jury court reporter to establish the content of Gonzalez's 2007 grand jury testimony (719).

The Prosecutor States His Intent To Pay Michelle Gist Thousands Of Dollars To Relocate Based On Death Threats Received After Her Grand Jury Testimony Was Disclosed, Claims That Later Prove To Be "Muddled".

Before calling Michelle Gist, the prosecutor made a Giglio disclosure revealing that, because Gist was allegedly subject to death threats after the disclosure of her grand jury testimony, the prosecution intended to pay her $2000 to $4000 to move out of state (326). The prosecutor sought to elicit as "consciousness of guilt" evidence that a defense investigator had told Gist not to come to court (359). But when Gist was questioned about these alleged threats, outside the jury's presence, she explained that the investigator had met with her

shortly after the shooting and said he was working for Morris (368). The investigator returned a long time later, while the Morris case remained pending (370). The prosecutor then revealed that Gist had changed her account of these threats and had originally stated they happened after the Morris case had been dismissed (371). According to the prosecutor, Gist had "muddled things" (372).

Michelle Gist had pleaded guilty to petit larceny after she charged up her husband's credit card during a contentious divorce (343). On April 16, 2006, she was driving to her mother's home at 1812 Harrison Avenue when a group of men started fighting on her car, a white Jaguar X6 (343, 381). There was one Hispanic man and two African-American men in the fight (343). Gist got out and yelled at the men, telling them "there will be none of this on top of my car" (352). When asked to mark the position of her car during the fight, Gist made a "mistake" and placed it on Harrison Avenue, when it was actually on the corner of Morton Place (383).

Upon witnessing the fight, Gist felt nervous, and when she got upstairs to her mother's apartment, she told her grandson to lie on the floor. She then heard multiple shots (344). Two to three minutes had passed from the time she had witnessed the altercation (391).

Gist, 48 years old at the time of trial, had lived in the neighborhood since 1980. She knew the first African-American as

"Burgos" and the other man as "D" (341, 349). According to Gist, D was always hanging out on the corner of Burnside and Harrison Avenue (349). She also knew "Nick" (349). Although Gist claimed to have known "D" for a very long time, he did not know her (350). "D" had long hair and it was braided; he wore earrings in his ears and a blue sweater (351, 352). "D"'s real name was Darrel and she identified Mr. Hemphill in court (351).

Mr. Hemphill stated "Miss, I never met you in my life" (352). The court admonished him and struck the comment (352A).

Gist first spoke to the police at her mother's apartment; she made a longer statement at the 47th Precinct (353). She claimed that she told the police that three people were involved in the altercation, Burgos, Nicholas and Darrel (375). In fact, Gist had not mentioned "Darrel" during her 2006 interviews with the police (Jimick: 743-744). To the contrary, her specific identification of Morris, a person she claimed to have known for years, as Gilliam's partner during the altercation, had been the reason Morris was arrested (Jimick: 7976-798).

But at Mr. Hemphill's trial, Gist denied telling the police that only Nick and Burgos were involved (376). She picked out "Burgos" from a photo array (354). She was not shown a photo array of Morris (354). When she left her mother's apartment after the shooting, she saw Morris walking down Morton Place (354). She did not remember what he was wearing (354). She knew Morris had been arrested, but did not tell the police they

had arrested the wrong person (385).

Cooperator Ronnell Gilliam's Account

Ronnell Gilliam, testified pursuant to a cooperation agreement rewarding him with a five-year prison sentence if his testimony was deemed truthful (969). Otherwise he would receive 25 years in prison (969). At the time of his testimony, he was free, although he had not served the full term, but he believed he would have to return to jail after testifying (970). Although Gilliam had never intended to murder anyone, he admitted, under oath, intending to kill David Pacheco, Jr., to secure his agreement (974, 1055). After entering the plea, he then committed another crime, and pleaded guilty to possessing stolen property relating to a $5,000 check (975). Gilliam sold crack as a teenager (976). He also had prior arrests for possessing marijuana and trespassing (975).

Gilliam's mother died when he was 12 and he had no father. He had lived with his grandmother, Arnell Gilliam, and brother, William Gilliam, at 1878 Harrison Avenue for most of his life (976). Mr. Hemphill was his older cousin, who owned a music studio; they had a "typical" relationship (987, 1046). Mr. Hemphill had his zipcode (10453) tattooed on his upper right shoulder (989).

In 2006, Gilliam was 26 years old and Morris had been his best friend since age eight (988). Gilliam spent a lot of time with Morris and knew he had guns and ammunition (1046). Mr.

Hemphill and Morris had "no relationship" (988). The prosecution introduced pictures of Morris and Mr. Hemphill; the pictures accurately depicted how both men looked on the date of the incident (1061; People's 102 [Morris]; 103 [Mr. Hemphill]).

On April 16, 2006, Mr. Hemphill rang Gilliam's doorbell and asked him to come downstairs. Gilliam saw Mr. Hemphill arguing with three men and two women (977). Mr. Hemphill swung a fist at one of the men and Gilliam pushed him into the side of a car which kept going (977). Gilliam was then fighting three men by himself (977). A man tried to break up the fight (977). The men pulled Gilliam's shirt over his head and he continued to fight bare-chested (978). After the fight broke up, Gilliam went to look for Mr. Hemphill, who had run up University Place (978, 993). Gilliam walked up Morton Place, towards University and Tremont Avenues (978).

While Gilliam stood on University and Tremont, the two men he had just fought approached him and wanted to continue the fight (978). One of the men tried to spit on Gilliam and Gilliam told the man to get his gun because he was going to kill him; Gilliam then called Morris for help (978, 995). Morris said he was on his way and asked Gilliam where he was located (979).

A blue car, belonging to Mr. Hemphill's wife, Aida, drove past Gilliam and Mr. Hemphill got out (979). The men involved in the earlier fight were across the street on Tremont Avenue

(979). Although Gilliam told Mr. Hemphill they could beat the men in a fight, Mr. Hemphill took out a gun and started shooting at the men across Tremont, when a car sped by (979).

Mr. Hemphill and Gilliam started running towards Gilliam's apartment (980, 998). In the lobby of his building, Gilliam saw Mr. Hemphill's wife, Aida, Morris, and William (980). They went up to Gilliam's apartment into his bedroom where they heard sirens (980). Mr. Hemphill told Gilliam to take his gun. Morris had brought a gun also, a .357 caliber revolver, and Gilliam took it as well (980). The others left the apartment while Gilliam stayed behind (980).

Before leaving the apartment, both Morris and Mr. Hemphil, changed their shirts (1002). Mr. Hemphill had been wearing a blue sweater (1002). But Gilliam did not identify the one in evidence (1002).

A short while later, Gilliam received a call from a friend who said people were describing him as being involved in the shooting, describing the perpetrator as a fat guy, with a lazy eye and braids (981). Gilliam denied he had been involved (981). Gilliam called Mr. Hemphill who told him to take the guns and the sweater and get rid of them (981). According to Gilliam's trial account, he gave the guns to a crackhead he knew in the neighborhood (981, 1042). He then called Mr. Hemphill because he was "stuck" at his apartment and the police were approaching (981). Mr. Hemphill promised to call someone to

help (982). Someone picked Gilliam up and dropped him at 170th Street and the Grand Concourse (982). Then, Mr. Hemphill's friend "Nana" picked Gilliam up and took him to Morris's house on University Avenue (983). Morris told Gilliam he should leave the area (984).

Gilliam went to another friend's house where Mr. Hemphill called him to tell him to get rid of the sweater (984). Gilliam called William to tell him to get rid of "the sweater" and the police picked up the phone and told Gilliam to surrender (984). The DD-5 memorializing this conversation reflected that Gilliam had instructed William to get rid of the shirt, not the sweater (stipulation: 1494). Gilliam insisted that he had never told William to get rid of the "shirt" (1051).

Mr. Hemphill told Gilliam to go to Brooklyn to "Vernon's" house (984). Once Gilliam arrived, Mr. Hemphill announced they would go to North Carolina (985). Gilliam had previously lived in Greensboro with an aunt (1002). They decided to go to Durham (1004). Mr. Hemphill, his wife Aida, and their young son, drove with Gilliam down to North Carolina; the couple's daughter remained in New York (1003). Once in Durham, Gilliam stayed at a hotel (1004). Gilliam threw out his cell phone because he believed the police were tracing it (1005-1006). The prosecution did not introduce any of Gilliam's cell phone records.

The family moved around hotels and eventually rented a

house where they stayed for one night (1006). Mr. Hemphill told Gilliam that Vernon had told the police what happened and they needed to move again (1005).

After a "couple of days," Mr. Hemphill told Gilliam he and Aida were returning to New York to see what was going on (1006). Their daughter was in New York (1064). For days, Gilliam stayed in a hotel without a phone or money, while Mr. Hemphill's friends brought him food (1007). At some point, one of these friends told Gilliam that Mr. Hemphill wanted to speak with him (1007). Using this friend's cell phone, Mr. Hemphill told Gilliam that Morris was informing the police about the incident, naming Gilliam as the shooter and instructed Gilliam to return to New York to identify Morris as the shooter (1008). Mr. Hemphill promised to get Gilliam a lawyer (1008).

The following day, additional unnamed friends of Mr. Hemphill drove Morris up to New York (1009). Gilliam called the lawyer Mr. Hemphill had arranged (1009). He met the lawyer at the courthouse and gave his first statement on April 26, 2006 (1009,1028).

During this first statement, Gilliam identified Morris as the shooter (1012). Gilliam explained that he had gotten into a fight with a guy in the grocery store and he called Morris, who came and did the shooting (1039-1040). He did not mention his own role in disposing of the guns or that Mr. Hemphill was the shooter (1012). He lied about how he had returned from

North Carolina, insisting he had taken the bus (1049). After making this initial statement, Gilliam felt guilty, especially after he saw an interview with Morris in which he did not name Gilliam (1013).

On May 9, 2006, Gilliam returned to the police precinct, with Mr. Hemphill's brother, Stephen Hemphill (1014, 1034). While there, Morris coincidentally called Stephen's phone from Rikers (1015, 1031). Gilliam spoke to Morris and promised to "make it right" (1015, 1031).

In his second statement, Gilliam named Mr. Hemphill as the shooter (1015). But Gilliam continued to lie about the guns and did not mention that Morris had possessed a .357 caliber revolver because he wanted to prevent any prosecution of Morris (1016, 1017). He did not remember telling the police that Mr. Hemphill had thrown the .9mm gun into the East River; "it might have been another lie" (1035-1036, 1041).

The following day, Gilliam made a third statement, with his lawyer present, at the courthouse (1017). Gilliam did so against the advice of his attorney (1018). In his third statement, Gilliam again named Mr. Hemphill as the shooter and insisted that he had described disposing of both guns two doors down from his apartment (1018). In fact, in all three statements Gilliam only mentioned a single gun (1034). In the May 10, 2006 statement, Gilliam had described throwing the gun away in Robert Clemente Park -- another lie (1037-1038). He

only mentioned the existence of Morris's .357 revolver, years later in 2010, pursuant to his cooperation agreement (1034). He was arrested in 2007 for murder and hindering the prosecution (1018, 1019). He pleaded guilty in order to take responsibility for his actions (1020).

The Court Allows The Prosecution To Introduce Morris's Guilty Plea Admitting To Possessing The .357 Weapon, Over Counsel's Confrontation Clause Objection, Ruling The Defense Had Opened The Door To The Evidence.

Having successfully opposed any mention that .357 ammunition was recovered from Morris's bedroom, the prosecution mid-trial sought to introduce Morris's plea statements admitting that he possessed the .357 weapon during the incident (831). According to the prosecution, the plea qualified as a statement against penal interest (832). Counsel opposed, arguing that the prosecutor wanted to "have it both ways" "whatever suits his case at the moment" (646). Counsel objected to the court's allowing a mid-trial change in position (672). The statement was not really against Morris's penal interest because he pleaded guilty to obtain immediate release and the statement bore no indicia of reliability (832-834).

The prosecutor also argued that Morris's plea statements did not implicate Mr. Hemphill so as to run afoul of the Confrontation Clause (893). The court asked if the prosecution had spoken with Morris; the prosecutor responded that Morris had refused to testify and could not be brought back to the country

because he then might seek asylum to bar his return to Barbados (895-896).

Counsel protested that the prosecution was offering the plea to incriminate Mr. Hemphill (896). The court ruled that the recovery of the .357 caliber ammunition from Morris's bedroom, and Gilliam's statements about the .357 weapon supported the reliability of Morris's plea (910). Counsel responded that Gilliam had never mentioned the .357 weapon until his own cooperation agreement years after the incident (914).

The court initially ruled that because the guilty plea statements did not directly implicate Mr. Hemphill there was no Crawford violation (917). Counsel disagreed, arguing that the statements were being offered to support Mr. Hemphill's identity as the shooter, without giving the defense an opportunity to cross-examine Morris (916).

According to the court, Morris's plea statements were "central" to the issues being litigated at trial and went "to the heart of the case" (676, 918). The court returned to the issue later and cited People v. Hardy, 4 N.Y.3d 192 (2005), recognizing that where plea statements are used to strengthen the prosecution's case they are testimonial in nature and cannot be introduced under Crawford.

Nonetheless, the court admitted Morris's plea statements, finding the defense had "opened the door" to the evidence by suggesting during opening that Morris was the shooter (1130).

While this defense argument was "appropriate and necessary," it opened the door to Morris's statements pursuant to People v. Reid, 19 N.Y.3d 382 (2012), the court ruled (1131). The court noted the defense's objection (1133, 1134).

The prosecution then called Shameeka Harris, the court reporter who had transcribed Morris's plea statements (1181). Harris recounted that Morris pleaded guilty against the advice of his attorney because the prosecution had no evidence to establish his possession of the .357 weapon, apart from his admissions (1183). Morris nonetheless pleaded guilty to an SCI which assured his immediate release, admitting that "on April 16, 2006 at approximately 2:00 p.m. in the vicinity of Harrison Avenue and Milton Place within Bronx County" he possessed "a loaded operable firearm" (1184). The loaded, operable firearm Morris possessed was a ".357" (1185).

The Court Deems Hearsay Testimony Admissible Through Gilliam's Attorney.

Prior to the prosecution calling Gilliam's attorney, counsel asked for an offer of proof (945). The prosecutor responded that Mr. Hemphill had hired the attorney for Gilliam to script his statements to the police (945). Counsel protested that the attorney's statements would be hearsay and irrelevant, because the attorney had never spoken directly with Mr. Hemphill (945). The court nonetheless deemed the statements "admissions" (946).

The prosecutor acknowledged that the attorney had never spoken directly with Mr. Hemphill, but offered the evidence as relevant to "consciousness of guilt" (946). The court deemed the evidence relevant and admissible, granting the defense an exception (948).

George Vomvolakis had been working for Joseph Tacopina in 2006. Tacopina represented "A-Rod" and "Bernie Kerik," the prosecutor elicited (950-951). The prosecutor also elicited, over objection, that on April 26, 2006, Vomvolakis had spoken with Adam Mehrfar, who had referred Gilliam's case to him (952). Vomvolakis had an office on Madison Avenue and 40th Street but he met Gilliam by the courthouse (953). Vomvalakis could not remember how much he was paid; payment was through Adam Mahrfar or Mahrfar's clients -- Mr. Hemphill or his wife (954,962). Over objection, Vomvolakis was allowed to testify that he had spoken to Mahrfar, who told him that there was a shooting in the Bronx where someone was killed and Vomvolakis was to represent a witness, someone involved in the shooting (954).

Vomvolakis spoke to Gilliam for fifteen minutes and felt "comfortable that he was being honest" (955). The court overruled counsel's objection to this testimony (955). Vomvolakis sought to represent Gilliam diligently and believed it was in Gilliam's best interest to cooperate with the police (955).

On May 9, 2006, Vomvalakis called the precinct because he

was upset his client was being questioned by the police outside his presence (958). Gilliam had not called to tell him that he was at the precinct (958). The day after this call, Vomvalakis and Gilliam had another meeting with the prosecutors where Gilliam gave another statement (959). This statement was inconsistent with the original April 26, 2006 statement (959, 964). Vomvalakis did not tell Gilliam not to cooperate with the prosecutors because he thought it was in Gilliam's best interest to cooperate (961). But he doubted Gilliam's honesty after his initial statement (965). By the time of trial, Vomvolakis had lost his file and did not have notes to review (960).

Gilliam's Grandmother, Who Has Trouble Recognizing Mr. Hemphill In Court, Testifies She Remembers Him Wearing A Blue Sweater on Easter Morning 2006.

Ardell Gilliam, 76 years old at the time of trial, had been suffering from cancer in April 2006 (604). When asked if she saw Mr. Hemphill in court, she looked towards the jury box before asking "which way am I supposed to look?" (601). She then identified Mr. Hemphill as her grandson, although she was not certain he was related to her by blood (601, 602, 605).

Ardell then claimed that she remembered that on Easter 2006 Mr. Hemphill had been wearing a blue sweater (602, 603). On cross-examination she said she could not remember what he was wearing (611). On re-direct she said Mr. Hemphill was wearing a long-sleeved blue sweater, but she could not recall what Gilliam, the grandson she had helped raise, had been wearing

(611, 612). In any event, Ardell was never asked to identify the sweater in evidence as the one Mr. Hemphill had been wearing (612).

She claimed that she spoke to the police on the day of the shooting when they came to her apartment (608). She also claimed that she had gone to the 46th Precinct to speak with the police again in May 2006 (602). According to Ardell those two dates were the only time she spoke to police about the incident (607). But according to Detective Jimick, the precinct conversation occurred on April 6, 2007, approximately a year after the incident (Jimick: 727).

Arnell knew Morris, who was Ronnell Gilliam's best friend (609). She did not see Morris that day in her apartment (610).

The Court Allows The Prosecution To Impeach Its Own Witnesses Elisa Hemphill and Vernon Mathews.

Elisa Hemphill[4], was married to Mr. Hemphill's brother, David (416). She had known Mr. Hemphill since childhood (417). When she testified that she "did not recall" if he had a tattoo on his forearm on Easter Sunday 2006, the prosecution responded: "Don't recall? What did you tell me this morning?" (417). Counsel's objection to this questioning was overruled (417).

Elisa responded that the prosecutor had asked if Mr. Hemphill had a tattoo on his forearm that said 10458 and she

[4]Elisa's name is spelled "Alisa" at times throughout the record. Her name will be spelled the way it was during her testimony for purposes of consistency.

answered the question (418). The prosecution then asked "So what happened between this morning when I dropped you off in the witness waiting room and now, half an hour later?" (418). Again, the court overruled counsel's objection (418). Elisa responded a long time had passed and the prosecutor had shown her certain evidence (418).

The prosecutor continued by observing "we actually met up in the 5th floor lunchroom this morning" (418). Counsel objected to the prosecutor cross-examining his own witness (418). The court announced it would allow the questioning based on the "change in testimony" (419). The prosecutor advised the court that he had spoken with the witness two months earlier about the tattoos and days earlier and each time she had said Mr. Hemphill had tattoos on his "arm" (420). The court then agreed the prosecutor could further question Elisa.

The prosecutor asked: "the first time you told me about the tattoo was not this morning?" (421). The defense objection was overruled (421). Elisa responded she had said she "might" have seen a tattoo on Mr. Hemphill's arm which contained numbers (421). The prosecutor then continued: "this morning I met you coming out of a cab in front of the criminal courthouse, took you to a side entrance to the lunch room with no one else there. We discussed tattoos again" (422). Elisa then testified "there was a tattoo" which had been there before 2006 (424). She could not remember the exact location of the tattoo (426). It could

have been on Mr. Hemphill's shoulder (426).

Mr. Hemphill displayed his arms to the jury, requiring that he remove his entire shirt (431). There was no tattoo on either forearm (435). "DA 10453" was tattooed on his right shoulder (436).

Before calling Vernon Matthews, the prosecutor advised the court that Matthews had been avoiding detectives for years and would be testifying pursuant to a material witness order (1244). He had been arrested and asked for a lawyer (1245). Matthews had said he would not testify (1245). After an off-the-record discussion with Matthews assigned counsel, Paul Horowitz, the court explained that Matthews still did not want to testify and had been abusive (1246).

Counsel protested that he anticipated the prosecution calling Matthews to declare him a hostile witness to try to introduce Matthews' prior statement (1248). The court stated that Mathews had no Fifth Amendment right not to testify (1250).

Vernon Matthews, 35 years old, was a janitor with no criminal record (1251-1252, 1280). He knew Mr. Hemphill, his friend and mentor, as "DA" (1252). Mr. Hemphill was a "good guy" who took Matthews in for no reason and helped him by allowing Matthews to work at his music studio (1311). On April 16, 2006, Matthews lived in Brooklyn (1253). His mother had recently committed suicide and a lot of people were dropping by to pay their respects (1260, 1312). His fiancee was home the

whole evening (1260). He did not recall getting a call from "DA" or the details of what had transpired (1253). At some point Mr. Hemphill and Ronnell Gilliam came to his house that evening (1256).

He did not remember speaking to the police on April 20, 2006 at the 46th Precinct (1254). He did not even know where the precinct was located (1254). He remembered writing something for the police at some point so they would let him go home (1254). He identified People's Exhibit 120 for Identification as his statement (1254). He made "stuff up" so the police would let him go (1256, 1257). Nine years later, he could no longer remember what he had overheard that evening (1257, 1259).

The prosecutor proceeded to ask, "You never wrote down that they started talking about how it was -how it went down in the Bronx?" (1264). The court sustained counsel's objection that the prosecutor was reading from a document not in evidence (1264). Matthews admitted that he had made a written statement (1264). The prosecutor then asked if Matthews "told police [DA] did something criminal?" (1265). Counsel objected and the court struck the question (1265). The court then removed the jury (1266).

Counsel objected that the prosecutor was seeking to impeach Matthews with his prior statement and Matthews had merely stated he did not remember what he had heard (1266). The prosecutor asked to impeach Matthews pursuant to C.P.L. §60.35 (1266). The

court responded that the law would not be "held hostage to perjury" (1267) and announced its intention to admonish Matthews (1268).

Counsel protested that Matthews could not recall what had happened nine years earlier and was represented by counsel (1268). It would be inappropriate for the court to directly address Matthews, counsel argued (1268). The court then threatened Matthews with a perjury prosecution and contempt proceedings if he did not testify truthfully (1270-1271). According to the court, Matthews claimed lack of memory about the contents of his statement did not "ring true" (1272). Matthews told the court that his first statement had been destroyed by the police (1273). The court warned Matthews that it was hard to "maintain a lie" and he would remember if his mentor had said he shot at people (1274).

Horowitz told the court he had advised Matthews to assert his 5th Amendment rights based on the court's warnings (1277). The court refused to allow Matthews to invoke his right to remain silent because the Fifth Amendment could not be used to avoid perjury charges and the court assumed the prosecution would agree not to prosecute Matthews (1278-1279).

Following the court's warnings, Matthews continued to insist that he did not recall what he had overheard inside his home on Easter Sunday 2006 (1281). His statement to the police was false (1281). The police had thrown away his initial

statement (1313).

At sidebar, the prosecutor again sought to impeach Matthews (1282). Counsel objected that impeachment was improper because Matthews had merely professed an inability to remember (1283). The court ruled that the prosecution could impeach Matthews pursuant to C.P.L. §60.35; counsel asked to research the issue (1284).

The court announced it would once again warn Matthews about the consequences of committing perjury (1285). Counsel protested that the court had already warned Matthews and was now improperly pressuring him (1285). The court thought it appropriate to "take action" to avoid perjury (1285-1286). The court cautioned Matthews in the "strongest possible terms" (1288).

Counsel then moved to preclude further examination of Matthews, arguing the prosecution had called him in bad faith, knowing he would not remember what he overheard and would disavow his statement (1289). The prosecution had only called Matthews in order to impeach his testimony with his prior statement, counsel protested (1290). Impeachment would be improper because Matthews' failure to remember did not disprove any aspect of the prosecution's case (1290-1291).

According to the prosecutor, years earlier, in 2012, Matthews told an investigator his statement was true (1292). Counsel responded that Matthews had told a defense investigator

his statement was not true a month before testifying and in June 2014 (1299). The court was not "impressed" with Matthews' disavowal of the statement because he had not filed a complaint against the police (1300).

The prosecutor insisted that Matthews was a critical witness because he had said he heard Mr. Hemphiill admit shooting a gun on April 16, 2006 (1293). The prosecutor believed Matthews might change his testimony and admit his statement was true (1295). The court responded that because Matthews had merely stated he could not remember what he had heard, the prosecution would not be allowed to impeach him with his prior statement (1296). But the court agreed to restore Matthews to the stand (1297).

The prosecutor resumed his questioning by asking Matthews to separate what he currently remembered from what he said in his statement (1303). Counsel objected to any questioning about the statement (1303), but the court ruled it would allow it (1303). The prosecutor then advised Matthews that if he needed to refresh his recollection about his statement it was "right in front of" him (1303). The court overruled counsel's objection (1303).

The prosecutor then asked:

> On April 16, 2006, in your home in Brooklyn did you hear the defendant, DA, say that some guys tried to rob him and he fought them, and then he went and got a gun, and he shot at them, that he was aiming his gun at them?

The court overruled counsel's objection to this question (1303-1304). Matthews asked if the prosecutor was reading from his statement and said he did not recall hearing "that" (1305).

The prosecutor continued to ask Matthews if in his statement he had written "things" that he remembered more clearly on April 20, 2006 (1307). The court overruled counsel's objection (1307). Matthews explained that the police had told him certain things that he put into his statement (1309). The prosecutor then asked: "So the police made you say something against your mentor on April 20, 2006?" (1309). Counsel objected to the "content" of the statement, but the court allowed the questioning and Matthews responded "Yes" (1309). The prosecutor proceeded: "You have the written statement in front of you?" and Matthews responded "yes" (1310). The prosecutor also asked if Matthews was as sure that the police "crumbled up your first statement as you are that you never told the police that DA was airing the gun?" (1314). The court overruled counsel's objection (1314).

Matthews again insisted that the police had crumpled up his first statement (1317). Matthews did not recall what he had said in his first statement (1317).

The court then allowed the prosecution to recall Detective Jimick to testify that he had taken an oral statement from Matthews which Jimick asked him to transcribe and Matthews reluctantly agreed to do so (1321). Jimick did not crumple up

this statement (1321). Nor did Jimick tell Matthews he could not leave the precinct (1321).

The Forensic Evidence

Detective Michael Cunningham responded to Bronx Lebanon Hospital on April 16, 2006, to document the deceased's injuries (89). The prosecution introduced nine pictures of the deceased depicting his body from various angles and the surgical interventions he underwent (90-100; People's Exhibits 2-11). The pictures were admitted over counsel's previously stated objections (95,99). Cunningham also recovered and photographed a .9mm bullet (101; People's Exhibit 11-16 [pictures]; People's 94B [bullet]).

He then went to the crime scene where he photographed the area of Tremont and Harrison Avenues (116-117). Cunningham also took pictures of the minivan which was parked a block away and had a bullet hole in its side door (126-128; People's 41). The bullet's trajectory went through a child's car seat (133, 136; People's 46-48, 52).

The prosecution also introduced five discharged .9 mm shell casings and pictures depicting from where they were recovered on the Harrison Avenue sidewalk (156-156, 182, 220; People's 54 [shells]; People's 63-68). Cunningham acknowledged that the position of the casings could have changed due to pedestrian traffic in the area (249). The shells were recovered and tested for fingerprints, but none were found (206-207). No additional

evidence recovered from the crime scene was sent for fingerprint testing (248).

Cunningham took several pictures of a utility box located on the northwest corner of Harrison and Tremont Avenues which evidenced bullet impact marks (158; People's 69-74). A deformed bullet was recovered beneath the utility box (158). There was also a bullet hole towards the base of a building located on the southwest corner of Harrison and Tremont and in a window at 1730 Harrison Avenue (159, 160; People's 75, 77). Bullet fragments were recovered from a bed beneath the window and within the wall of the building (218,226). Cunningham returned to the scene later to take additional pictures to create the crime scene diagram (166; People's 93).[5]

After leaving the crime scene, Cunningham took a picture of a blue sweater he had received from Detective Jimick contained in a black plastic bag (163; People's 84). The sweater itself was introduced into evidence as Exhibit 98C (237). In addition to being covered with metal shavings, it had a hole under its right arm. See People's 84. Cunningham did not know how Jimick obtained the sweater (238-239).

Detective James Valenti, concluded that the shell casings all came from a single gun, a .9mm Luger semi-automatic (1204-1205). Valenti was not made aware that a .9mm live cartridge

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[5]The court granted the prosecution's request for the jury to independently view the crime scene (1240-1242).

had been discovered in Morris's bedroom (1216). He was not asked to compare this live round with the other ballistics evidence (1216). A live round could be examined to see if it had any kind of extractor or chambering marks to trace it to a particular weapon (1216-1217). Ammunition for a .357 weapon could not be fired from a .9mm gun (1216).

Dr. James Gill, conducted the deceased's autopsy (921). The cause of death was a single gunshot wound which perforated the lung, spinal columns and spleen (929). Not only did the prosecution introduce an additional three pictures of the body, over counsel's previously stated objections, but the court allowed the prosecutor to elicit, over relevance objections, that the child would have suffered pain as a result of each injury (932). Injury to the spleen would cause pain and bleeding (933). The severing of the spinal chord would cause, pain, bleeding and paralysis (933). The collapsed lung would cause "problems moving air" and there was "going to be pain associated with that" (933). The perforation of the diaphragm would cause difficulty breathing (933). Death would not occur instantaneously, Gill explained (934).

Jason Berger, a criminalist with the police laboratory, reviewed the results of gunshot residue testing performed on the blue sweater in 2006 (1110). There was no gunshot residue on the sweater (1120).

Aluminum metal fragments were detected on both the

sweater's sleeves (1111, 1112). These metal fragments were not consistent with any ballistics evidence; bullets contained lead and copper which were not found in the sweater's aluminum shavings (112). There was no test in forensic science which could prove whether someone had fired a gun (1113). The police laboratory did not conduct "primer residue analysis" to detect gunshot residue, even though the department possessed the machinery to perform such testing because the laboratory had not been validated to do so (1115-1116).

On July 27, 2006, Natalya Yanoff, a criminalist with OCME, examined the blue sweater introduced into evidence (555, People's Exhibit 98C). She scraped a single area on the collar and submitted the sample for DNA testing (556, 580). While DNA was found on the scrapings, Yanoff could not determine when it was deposited (555). The DNA could have been many years old (575). DNA could be deposited if a person directly touched an object or if someone transferred the DNA by touching the person and then the object (574).

Yanoff compared the DNA to a sample received from Morris but it did not match (559). Later, she received "pseudo exemplars" from a Pepsi and water bottles (560). A pseudo sample is not taken directly from an individual and is not the scientifically preferred way for obtaining DNA. The DNA obtained did not match the DNA on the sweater (565). Yanoff then received a sample of Mr. Hemphill's DNA which matched that

on the sweater (567, 572, 573).

The prosecution was allowed to elicit, over a defense hearsay objection, that Morris had consented to DNA swabbing on March 3, 2008 (Detective Joseph Russell: 535). On June 16, 2008, Modesto Acevedo traveled to North Carolina to observe Mr. Hemphill (937). Acevedo went to separate towns in North Carolina and sorted garbage from an address where police believed Mr. Hemphill was living; the water and Pepsi bottles were seized in the hope of extracting his DNA (938). Nobody observed Mr. Hemphill drinking from the bottles (939).

This process of obtaining pseudo samples was undertaken because the prosecution had not yet sought a search warrant for Mr. Hemphill's DNA. See Court File: search warrant dated April 26, 2011. On April 26, 2011, Detective James McSloy pulled Mr. Hemphill's car over in North Carolina pursuant to a search warrant and obtained two DNA swabs from him (524-527).

The Court Permits The Introduction Of Hearsay Concerning The Recovery Of The Blue Sweater But Bars The Defense On Hearsay Grounds From Rebutting The Evidence Of Flight.

Detective Ronald Jimick recounted his role as the case detective throughout the investigation (651-798). He described going to Gilliam's apartment shortly after the shooting where he saw William Gilliam, Ronell's brother (663). When Jimick testified that "based on conversation we had with William we were directed to," counsel objected, but the court overruled the

objection (664). Jimick then testified "I was directed to a back bedroom closet by William. Inside the closet he directed me to a black plastic bag that was on a shelf inside the closet" (664). Inside the plastic bag was the sky blue Izod sweater introduced into evidence (664-665). Although William Gilliam lived minutes from the courthouse, he was never called by the prosecution to testify (1371-1372). Jimick claimed there was an overwhelming smell of gunpowder from inside the bag, a significant fact he failed to note in any report (667, 742). He also did not ask for the bag itself to be tested for fingerprints (740).

Jimick also testified that he knew where Mr. Hemphill and his wife Aida were located in North Carolina based on a "trap and trace" device placed on Aida's cell phone pursuant to a warrant (774, 784). Counsel was precluded from eliciting that Mr. Hemphill's attorney had contacted Jimick within days of the incident offering to make him available to the police; at that time Jimick had responded he did not wish to speak with Mr. Hemphill (635-636). The court deemed this evidence inadmissible hearsay and rejected counsel's argument that it was a statement of future intent by the attorney and "important for the jury to understand the nature of the investigation" (636, 638).

The Defense Motion To Dismiss

At the close of the prosecution's case, counsel moved to dismiss based on the prosecution's failure to prove beyond a

reasonable doubt Mr. Hemphill's identification as the shooter (1326). Counsel recounted the prior identifications of Morris and Gilliam's unreliability (1326). The prosecution opposed, arguing its case raised questions for the jury and the court denied the motion (1326). Counsel later renewed the motion arguing that the evidence of Mr. Hemphill's identity as the shooter was legally insufficient (1723). The prosecutor responded that the evidence created a question of fact and the court again denied the motion (1723).

The Court Precludes Significant Aspects Of The Defense Case.

Counsel announced that he would be calling a witness to testify that, shortly after the incident, Morris had admitted being involved in the altercation with Gilliam, retrieving his .9mm gun and firing it (1430). The prosecution opposed the statement's introduction on hearsay grounds (1429). Counsel argued the statement was against Morris's penal interest, but the court ruled that Morris was not aware the statement was against his interest when it was made (1430-1431). According to the court, Morris had been exculpated by competent investigators, had asserted his innocence during the News 12 interview, and then pleaded guilty to only possessing the .357 weapon. As such, his acknowledgment of guilt was highly

unlikely (1434-1435).[6] Counsel excepted to the court's ruling, arguing that in light of the strong evidence suggesting Morris was the shooter, the statement bore the necessary indicia of reliability to be admissible (1435).

The court also precluded the defense from eliciting through Detective Jimick that contraband had been seized from Morris's apartment and his family members taken into custody as a result (1378). Counsel sought to demonstrate that Morris had turned himself in because he was concerned for the well-being of his family (1380). This argument was supported by Morris's statements during the News 12 tape, counsel argued (1381). Counsel also renewed his objection to the court's precluding the defense from introducing evidence of the contraband recovered from Morris's apartment (1384). The evidence was necessary to counter the prosecutor's opening remarks that "innocent Morris" turned himself into the authorities while Mr. Hemphill fled, counsel argued (1385).

The court dismissed the proffer as "too speculative" and "misleading" (1386). According to the court, Morris's actions were "not the point" (1387). Counsel took exception to the court's ruling (1387). The court cautioned the prosecutor not to argue on summation that Morris was innocent merely because he did not flee and not to contrast his actions with those of Mr.

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[6]At Morris's trial, the prosecution intended to introduce a statement against penal interest by Morris admitting he was the shooter. (JS. 13-14).

Hemphill (1388-1389).

The Court Allows Extensive Cross-Examination Of A Critical Defense Witness Based On A Remote Prior Bad Act.

Nana Owusuafriyie ("Nana") had been friends with Mr. Hemphill for twenty years and had never been convicted of a crime (1444). He testified in uniform because he was on active duty with the United States Navy, where he had risen to Chief during his 19 years of service (1445). He had earned multiple medals for his campaigns in Iraq and Kosovo (1445). He served the medical needs of 300 soldiers when out at sea (1446).

On April 16, 2006, Nana met Mr. Hemphill at his music studio at about 1:00 p.m. (1447). Mr. Hemphill was wearing a white t-shirt, blue jeans and white sneakers (1448). Nana lent him $300 because Mr. Hemphill wanted to take his family out to dinner for Easter (1448).

Nana, who was on leave, returned home to watch a baseball game on television and saw a news report about an incident on Harrison Avenue (1449). His phone began to ring constantly. Ronnell Gilliam, who he knew from the neighborhood, was calling and asked him to go to Nick Morris's house to meet (1450). Nana also knew Morris from the neighborhood (1450). At around 6:00 p.m., Nana went to Morris's house, spoke to the two men and drove Gilliam to 170th Street and Grand Concourse (1451). When speaking to Morris, Nana noticed that his knuckles were bruised (1451).

On cross-examination the prosecution asked extensively about a court martial proceeding which Nana had been subjected to over fifteen years earlier (1452, 1455, 1456). Specifically the prosecutor asked if on March 31, 2000, and April 25, 2000, Nana had knowingly made false statements, and remarked that if Nana did not remember, the prosecutor had the "court martial documents here" (1456). Nana remembered participating in a court martial and receiving a week in the brig, but the proceedings occurred "a very long time ago" (1457, 1458). The charges arose from Nana's participation in a scheme to get a computer, along with two other men (1458). Repeatedly, the prosecutor asked Nana to recollect the nature of his false statements, but Nana could not recall them (1461, 1462, 1463, 1466). Nana acknowledged that he had ordered a computer online and had it shipped to another person's home (1464). He was 22 years old at the time and "bounced back" from the incident (1465-1466).

Nana explained that he did not believe he had ever been convicted of a crime because the military and civilian justice systems were different, resulting in the following exchange:

[Prosecutor]: They are not as a matter of law.

[Counsel]: Objection.

The Court: Overruled.

[Counsel]: He's [the prosecutor] is testifying.

The Court: He's stating a fact.

[Counsel]: Objection.

The Court: Overruled again.

The prosecutor then continued to ask why Nana had told the jury under oath that he had never been convicted of a crime (1468). Again, Nana explained that he had been convicted at a special court martial.

The prosecutor continued with this line of questioning:

> [Prosecutor]: Why didn't you tell the jury this morning that you were convicted of four crimes when [counsel] asked you were you convicted of four crimes?
>
> [Counsel]: I'm going to object. It's been asked and answered four times. He's given the answer four times.
>
> The Court: I'm not sure, and I overrule your objection. Answer the question (1469).

The prosecutor then continued to ask precisely the nature of Nana's false statements from fifteen years earlier (1469). Again Nana admitted that he had been found guilty of making a false statement, but he could not remember from 15 years earlier exactly what happened (1470).

On re-direct, Nana admitted he had done something wrong 15 years earlier which he regretted, but he sought to be better after that incident (1474). The prosecutor then returned to questioning about the 15-year-old offense on re-cross:

> [Prosecutor]: But the reality is you have been convicted of four crimes, correct?
>
> [Counsel]: Objection. This is improper. We have been over this a dozen times.

The Court: Notwithstanding, overruled.

Again, the prosecutor was allowed to elicit that Nana had been convicted of four separate crimes in military court (1478). The prosecutor also elicited again, over objection, that Nana had "lied in an official statement" (1478-1479). "So, it's two separate lies?," the prosecutor continued (1479). Nana admitted the two separate misstatements (1479). The prosecutor continued to ask about the nature of the statements (1480-1481). He then cited the portions of the Uniform Code of Military Justice which had been violated (1481). The court permitted the questioning to continue over the defense objection of "improper re-cross" (1481).

The prosecutor then offered "an official record certified of the convictions" (1481). Counsel objected to the prosecutor's testifying as to the content of a document being offered (1481).

After dismissing the jury, the court remarked that its precluding Morris's statement admitting the shooting to Nana could have been based on the witness's inability to tell the truth (1484). The court announced it intended to write a letter to Nana's commanding officer concerning his "disgusting display" (1484).

The court then let the prosecution introduce the official record of the court martial showing Nana had been found guilty on four charges, over counsel's objection that "the witness

admitted it" (1487). The court ruled that the witness had been "evasive" and "those of us familiar with the Uniform Code recognize those are crimes" (1487).

Summations

Counsel began his summation by asking the jury not to reject Nana's testimony over something he had done 15 years earlier (1500-1501). Particularly because Nana's account about seeing bruises on Morris's knuckles was confirmed by Jimick, Nana's account deserved to be credited (1502).

Counsel characterized the prosecution's case as "a mess" based on evidence that had changed and been manipulated over time (1503). Gist's account had changed over time so that she now claimed it was not Morris and Gilliam involved but Mr. Hemphill (1506). But Gist said Mr. Hemphill had long hair and braids at the time of the incident, a description of the shooter not given by a single other witness (1502). Jimick testified that Gist had originally stated it was Morris who was involved in the fight, counsel recalled (1509-1510). She had not named Mr. Hemphill (1510-1511).

Concerning the sweater introduced into evidence, counsel argued it was unlikely to be the one worn by the shooter on Easter (1566). It was an old, dirty sweater, covered in metal shavings which had probably been lying around for years (1555-1556). While Jimick claimed at trial there was an overwhelming smell of gunpowder on the sweater, he failed to note that

significant fact in his reports and there was no trace of gunpowder on the sweater (1512, 1515).

Gilliam had told his brother to get rid of the shirt, not a sweater and admitted Morris had changed his shirt at the apartment, counsel recalled (1520). Castro described the shooter's top as being short-sleeved (1546). Garcia described it as a blue golf shirt with three buttons, counsel recounted (1548). Santiago also originally described the blue top as a "shirt" to the police (1552).

Counsel urged the jury to resist appeals to their emotions, where the prosecution introduced multiple pictures of the child's body. There was no dispute that he had been shot (1516-1517).

The prosecution's case relied heavily on Gilliam, who had lied about every aspect of his account and faced 25 years in prison if he did not cooperate, counsel argued (1517-1518). Gilliam's grandmother had merely testified to help him secure the benefit of his bargain (1591). Counsel reminded the jury that Gilliam first mentioned the existence of the .357 weapon when he entered his cooperation agreement in 2010, after Morris had pleaded guilty to possessing that weapon, a charge the prosecution had no evidence to prove (1581, 1583). Morris's purported possession of the .357 gun used to suggest he did not fire the .9mm, "smells bad," counsel suggested, explaining "this type of evidence should bother you." (1581, 1584). When counsel

asked why the prosecution had failed to call Morris and William Gilliam, the court sustained a prosecutorial objection and told the jury to disregard the argument (1585).

The defense did not have to prove that Morris was the shooter, although there was plenty of evidence he was, counsel urged (1519). The lineups, eyewitness testimony, .9mm ammunition recovered from Morris's bedroom and Morris's bruised knuckles all supported his identity as the shooter, counsel recounted (1521).

Three people had independently identified Morris from a fair, carefully constructed line-up (1523-1525). Particularly where the identification witnesses interacted with the shooter for ten minutes during the original altercation, those independent identifications were reliable, counsel argued (1527). Brenda Gonzalez put herself between the shooter and Vargas during the altercation (1530). Counsel urged that the eyewitnesses were good people, with plenty of opportunity to view the shooter, who were not all making the same mistake (1534). Baez also looked at an array and said Morris looked like the shooter, counsel reminded the jury (1536). The police then recovered the .9mm ammunition next to Morris's bed, counsel recalled (1537).

That the shooter had tattoos on his forearm further undermined any identification of Mr. Hemphill, counsel argued (1559). Three witnesses had described seeing a lettered tattoo

on the shooter's forearm, a tattoo which Mr. Hemphill did not have (1563-1564). Counsel concluded by again characterizing the prosecution's case as a "mess" and warning it was not the jury's job "to clean it up" (1598).

The prosecutor argued that this case involved "an execution, cold blooded, premeditated well thought out execution, nothing less" (1606). Mr. Hemphill did not care that there were "innocents all over the block" when he caused "an excruciating death" to the child, the prosecutor observed (1607). The prosecutor claimed to be "stunned" when defense counsel suggested he was playing to the jury's sympathy, stating "I don't need your sympathy. Mind you, I'm not too proud to take your sympathy if it would bring back that little boy form the cemetery and into his parents' arms" (1607).

The prosecutor also accused defense counsel of using sympathy

> to get you to ignore the evidence. . . as if the child is being used, the murder of this child, as if the defendant is hiding behind that baby, as if calling this a tragedy makes everything okay so we can all go home, except it doesn't make it okay, not by any stretch of the imagination. This murder, this execution, this intentional murder of an innocent, it's not just a single act that can be excused. This murder tore the fabric of this community. (1608-1609).

The prosecutor acknowledged that its case was not "pretty" or "tied up in a bow," but the "only" question was whether Morris or Mr. Hemphill was the shooter (1610-1611). The prosecutor then, despite the court's earlier admonition, insisted that Morris's lack of flight proved his innocence,

comparing "Nick Morris, the man who didn't flee, the man who didn't run down to North Carolina like the guilty people do" (1611). According to the prosecution, the three eyewitnesses who viewed the lineup merely picked out the person they had seen on television (1612).

The prosecutor characterized the case as both the trial of Nick Morris and Mr. Hemphill, insisting he did not "have to" bring in the witnesses who had identified Morris but "I did that because it was important for you to see those witnesses" (1618). The court overruled counsel's objection (1618). The prosecutor then argued that "because this was two trials in one," the jury needed to take a broad view of the evidence (1621).

According to the prosecutor, certain witnesses "got a quick case of amnesia" like Elisa Hemphill (1622); "Vernon Matthews caught the same amnesia when he couldn't remember hearing the defendant say on April 16, 2006, in the Bronx some guys tried to rob the defendant and defendant fought them off, got his gun and was airing it out" (1623). Counsel's objection to this comment was again overruled (1623).

According to the prosecutor, in earlier decades the eyewitness identifications "would have been enough. No DNA, no second thought. But we're smarter now. We're better now" (1628). Counsel's objection to this comment was again overruled (1628).

The prosecutor insisted that defense counsel had accused

him of manipulating the evidence and not trusting the evidence credited back in 2006, and suggested:

> This is how I propose you address the allegations the defense made against me, because they are serious and they go to the essential fairness of this trial. I ask that you, the jury, judge me. You decide. . if I manipulated the evidence like defense counsel said I did. . .If you have seen me do something, do anything by way of comment, how I treated anyone in this courtroom, how I acted at any single moment in this trial, forget unfair, forget manipulative, but even disrespectful or rude, I ask you to hold it against me and my case. . . I want you to hold me to a higher standard than the law because that's only fair and that's only just (1637-1638).

Counsel's consistent objections to these comments were overruled (1637, 1638).

The prosecutor continued:

> some people might call the act of questioning evidence against Nick Morris an act of integrity, some people might call it doing what's right, not doing what's easy. That's not for me to do, to give this a name. It's just another day at the office. So I submit myself to you. If you think I fixed the evidence. . .(1639).

In response to counsel's objection, the court remarked that counsel had not argued the prosecution fixed the evidence, but the court allowed the argument to stand (1639).

The prosecutor continued:

> If you think I fixed the evidence, manipulated it. If I convinced the grandmother to walk in in May 2006 and say he was the man in the blue sweater, if I framed him, if I'm that person then walk the defendant, find him not guilty (1640).

The prosecutor then went on to accuse the defense of manipulating the evidence (1640). Counsel's objection was

overruled (1641).

According to the prosecutor, Gist never said that she had seen Morris in the fight (1643). Gist, "knew the guns would come out" after she saw the fight, "and they did," the prosecutor argued. "Looks like she knew the defendant better than he thought," the prosecutor urged (1649).

Similarly "when [defense counsel] tried to get Brenda Gonzalez to admit she said things before the grand jury in 2006 that she never said. That's why I had to call the grand jury reporter to prevent facts from being manipulated," the prosecutor claimed (1644-1645). "I am not the lawyer in this courtroom trying to manipulate the evidence," the prosecutor insisted (1645).

The prosecutor also argued that Ardell Gilliam's confusion over whether Mr. Hemphill was wearing a blue sweater resulted from defense counsel's "lowering his voice" during his questioning. The court overruled counsel's objection (1646).

Concerning Nana's testimony, the prosecutor argued that he lied about his past to help out Mr. Hemphill. "If I didn't find out about his criminal record, he would have gotten away with it," the prosecutor insisted (1652).

The prosecutor advised the jury that he did not "like" Ronnell Gilliam, "never have, never will" (1654). The court sustained counsel's objection (1654). "I am going to be demanding Gilliam go back to jail if for five years or 25

years," the prosecutor insisted (1655). "I'm also the person who told you Gilliam was a liar," the prosecutor recounted (1655). But Gilliam did not deny making prior statements "even though they were right in front of him in his own handwriting, like Vernon Matthews," the prosecutor claimed. Counsel's objection was overruled (1656). According to the prosecutor, Gilliam "gained nothing by telling the truth" (1658).

The prosecutor also argued that Vomvolokis met with Gilliam near the courthouse to prevent "watching eyes so no one [could] see what Vomvolakis was going to do with Gilliam" (1661). Instead of being concerned for Gilliam upon finding out he was in the precinct on May 9, 2006, Vomvolokis merely "called the precinct" and "found out what was up on behalf of defendant," the prosecutor claimed (1661). Counsel's objection was overruled, and the court remarked that the jury would determine whether the argument was based on the evidence (1662).

The prosecutor continued:

> Once Vomvolakis found the jig was up, he covered up the cover up. That's why Vomvolakis was having such trouble remembering, no notes, no papers on a murder case, and no record of who paid him. Because when you're committing a crime, when you're covering up a crime, when you're setting up your client, a young kid to take the fall because someone is paying you to do that, you make sure, especially if you are a lawyer, that you leave no trace of evidence of what you did. That's what a good criminal defense lawyer will do for the man who paid him (1662).

The court again overruled counsel's objection, commenting "same ruling" (1662).

The prosecutor continued:

> Vomvolakis walked out of the case when it went south and let some poor court appointed lawyer clean up his mess. And now they call him a liar after they made him a liar (1664).

But Matthews "corroborated" Gilliam "before he got amnesia," the prosecutor insisted. "Even the defense mentee corroborates" Gilliam, the prosecutor claimed (1667).

Concerning the evidence of the .357 weapon, the prosecutor argued "I put that piece of evidence before you." (1669). "And in the end, Nick Morris. . . admits possessing the .357 that day. Do you know why? Because that's the crime he actually committed" (1669). The prosecutor insisted that Morris did not get "time served" but "two years," and that Morris did not have to plead guilty but chose to "take responsibility for the crime he committed" (1670). Then the prosecutor insisted that the delay in obtaining Mr. Hemphill's DNA was due to his fleeing and living under a fake name, requiring the police to take the wrong DNA "out of the trash" (1671). Counsel's objection was overruled (1671).

The prosecution concluded by observing:

> I've been carrying this case, this child, David Pacheco, Jr. for years, for too many years. You will take little David with you into the jury room. . .You all have an opportunity, a rare opportunity. You can't undo the agony that was inflicted on that child, on that family, on this community. You can't undo what has already been done. . .
>
> It's not enough to simply convict the defendant. With one word, with one simple word, as calmly and cooly as

> the defendant pointed his gun across the street and emptied his clip, without caring who was walking or driving by, with the ease with which the defendant essentially walked over the dead body of David Pacheco, Jr., without a care in the world. . . I ask you to call him what the evidence at this trial has proven him to be, and what the law requires, a murderer, a cold-blooded cowardly murderer of a child (1674-1675).

Charge and Deliberations

The court submitted a single count for the jury's consideration -- intentional murder based on a transferred intent theory (1702, 1708). The court also instructed on consciousness of guilt (1684), accomplice testimony (1696), and identification (1704). The court specifically instructed that the jury heard evidence of Morris's prior identification as the shooter only to determine the guilt or non-guilt of Mr. Hemphill (1704, 1705). Counsel subsequently objected that this aspect of the court's charge suggested that the defense had a burden to prove Morris was the shooter and Morris was just "one factor" in the defense (1710). The court overruled the objection, stating that it had previously read the charge to the parties (1711). The court granted counsel an exception (1711).

The jury's first note requested to review Gilliam's cooperation agreement, the street diagram, DNA comparison, Morris's mug shot, "grand jury testimony from Brenda Gonzalez read by court reporter" and Mr. Hemphill's tattoo (1720). Counsel immediately objected that the jury had been left with an inaccurate and unfair impression that the statements counsel

read to Gonzalez were fabricated because she denied making them, and the portions of the 2006 grand jury presentation which the jury was now requesting reflected she did not say them, without revealing that there was a 2007 presentation where Gonzalez had made the statements counsel had read (1726).

Counsel recounted his contemporaneous objection that the jury was being misled, being left with an inaccurate and unfair impression that Gonzalez never made those statements, which had been said in 2007; the defense had been precluded from calling the 2007 reporter (1726-1727). The jury's note reinforced counsel's perception of the ruling's unfairness and the court remarked "you have an exception" (1727). Counsel asked the court to include his questioning of the court reporter reflecting that she did not know if Gonzalez had testified again before the 2007 grand jury, but the court refused (1727-1728).

The jury's next note again requested "cross-examination of Brenda Gonzalez specific to previous testimony at grand jury," and to hear Gilliam's and his grandmother's testimony again (1734). The following day, the court again read back the testimony of the grand jury court reporter relating to Gonzalez's grand jury testimony (1746). The jury's third note requested to rehear Gist's and Vomvolakis's testimony, and photographs of the street and the sweater (1748).

During its third day of deliberations, the jury requested to rehear Baez's testimony, and for the court to repeat its

instructions on "how to evaluate the evidence" (1759). The court repeated most of its original charge (1761-1779). The jury's next note requested to see the photo array Baez viewed and pictures of Morris and Mr. Hemphill (1781).

Following lunch on December 7, 2015, the third day of deliberations, the jury announced it had reached a verdict (1782). Although the court had submitted a single count, the jurors asked for instructions on how to complete the verdict sheet (1782).

The Court Removes Mr. Hemphill From The Courtroom Prior To Polling The Jury Without Adjourning The Proceedings.

When the foreman announced the guilty verdict, Mr. Hemphill declared "I didn't do it" and asked to be taken out of the courtroom (1785). The court ordered the court officers to "take [Mr. Hemphill] out" (1785). The prosecutor announced that Mr. Hemphill had yelled at the jury and his family had disrupted the proceedings (1785).

The court remarked that he saw that some of the jurors were crying and asked that Mr. Hemphill's outburst have no effect on them. "What you just saw was, could very well be, simply a statement by a person who is completely guilty of the offense and notwithstanding has decided to attack the verdict this way" (1786-1787). The court then polled the jury in Mr. Hemphill's absence and accepted the verdict (1787-1788). It later remarked that it had "no alternative" to removing Mr. Hemphill from the

courtroom (1792).

In thanking the alternates, the court remarked that if any of the original jurors had been lost, a retrial would have been "extremely unlikely" if not "impossible"(1790). The court then adjourned the matter for sentencing on January 6, 2016.

The Court Refuses To Grant The Defense A Single Adjournment of Sentence To Permit Counsel To File A Motion Alleging Serious Juror Misconduct.

On January 6, 2016, counsel appeared ex parte to request an adjournment in order to finalize a C.P.L. §330.30 motion based on juror misconduct (S. 2). Counsel explained that after the verdict, he learned that the jury foreman had been in touch with Elisa Hemphill, Mr. Hemphill's estranged sister-in-law who had testified at the trial (S. 2-3). Elisa hated Mr. Hemphill because she blamed him for her husband's serving time for a murder he did not commit (S. 3).

Counsel had obtained a sworn affidavit from Elisa and had tried to contact the juror, but he had been out of town for the holidays (S. 3). Not only did the juror know Elisa, they actually communicated during the trial, counsel explained (S. 2-3). Counsel requested additional time to follow up on the investigation and finalize his 330.30 motion (S. 3).

The court acknowledged that counsel was acting in "good faith" but refused to grant the adjournment request because counsel could put in the "same claims" in the form of a 440 motion (S. 4). Counsel protested that a C.P.L. §330.30 motion

had to be filed prior to sentencing and was different procedurally from a 440 motion (S. 4). The court responded that counsel could make "exactly the same claims" in a C.P.L. §440.10 motion (S. 4). Counsel protested that he was not prepared for sentencing and had informed the court that he would be requesting an adjournment (S. 5). Counsel pleaded for a month to finalize the motion prior to sentence arguing that nobody would be prejudiced by the adjournment (S. 5). The court refused the request, remarking that it was "highly skeptical" of the defense claims which could be raised in a 440 motion after sentence (S. 5-6). Again, the court insisted that there was no distinction between the two types of motions and the defense was "not being prejudiced" (S. 6).

Counsel continued to protest that he was not prepared for sentencing and had not completed a pre-sentencing submission (s. 6). The court granted the defense an exception (S. 6). The court then stated it was skeptical of all claims involving juror misconduct (S. 6). According to the court, the family of the deceased was entitled to "closure" (S. 7). Again, the court insisted that all the remedies available via a C.P.L. §330.30 motion would be available by filing a C.P.L. §440.10 motion instead (S. 7).

Counsel was "taken aback" by the court's ruling, as "the juror has confirmed the existence of a relationship both pre-trial and during trial" (S. 7). "Okay, overruled," the court

responded (S. 7). Counsel protested that he would have liked to have been advised that the court would not grant the adjournment, so he could have prepared for sentence, as the court's ruling caught him "off guard" (S. 8). He had never "encountered a situation like this" and asked for a few minutes to prepare Mr. Hemphill for sentence (S. 8).

The court remarked that it had received counsel's letter the previous day, the first day the court was back in session after the holidays (s. 8). The letter did not make clear that counsel was asking to adjourn sentencing, the court claimed (S. 9). The court agreed to give counsel "a couple of minutes" before going forward with the sentencing and sealed the minutes requesting the adjournment (S. 9).

When the proceedings continued, counsel protested that he had not seen the presentencing report and reviewed it in court (S. 10). The prosecution then requested 25 years to life for the cold-blooded intentional killing which evidenced a pathological disregard for human life (S. 11). The deceeased's sister had prepared a statement and his mother spoke prior to sentence about her loss (S. 12-13).

Counsel renewed his application to submit a C.P.L. §330.30 motion, and the court again denied the request (S. 16). Counsel then argued that the evidence suggested Morris was responsible for the crime (S. 17). Mr. Hemphill, 37 years old at the time of sentencing, had no prior contacts with the criminal justice

system (S. 17; PSR. 4,5). He had supported his family through his music business for years, including his children, counsel observed (S. 17-18). Accordingly, counsel asked the court to impose the minimum sentence (S. 17).

Mr. Hemphill extended his condolences to the deceased's family but maintained his innocence (S. 18). He was "not a criminal" and had "nothing to do with this crime" (S. 18).

The court acknowledged the trial was "unusual" but nonetheless characterized the evidence as substantial (S. 20). Recognizing that Mr. Hemphill had owned a small business and had no criminal record, the court insisted that the crime itself defied the possibility of mitigation (S. 20, 22). Accordingly, over Mr. Hemphill's protestations of innocence, the court imposed the maximum permissible sentence, 25 years to life in prison (S. 23, 25).

ARGUMENT

POINT I

MR. HEMPHILL'S GUILT WAS NOT PROVEN BEYOND A REASONABLE DOUBT WHERE MULTIPLE EYEWITNESSES INDEPENDENTLY IDENTIFIED ANOTHER MAN, NICHOLAS MORRIS, AS THE SHOOTER, AND MORRIS POSSESSED .9MM AMMUNITION, THE TYPE USED IN THE SHOOTING, AND HAD BRUISES ON HIS KNUCKLES CONSISTENT WITH HIS INVOLVEMENT IN THE FISTFIGHT WHICH PRECEDED THE SHOOTING. U.S. CONST., AMEND. XIV; N.Y. CONST. ART. I, §6.

This case was not simply "a mess" (1503, 1598), "unusual" (S. 20) or not "tied up in a bow" (1610), as the parties described it throughout trial. Rather, this case involves the

conviction of a 37-year-old man with no prior criminal history where compelling evidence implicated another. Mr. Hemphill's conviction was secured through an astounding series of shifting accounts and a relentless pattern of unfair rulings. The prosecution failed to prove his identity as the shooter beyond a reasonable doubt, but the lay jurors were unable to adequately assess the weakness of the prosecution's proof. Accordingly, Mr. Hemphill's conviction violates due process, must be reversed and the indictment dismissed. U.S. Const. Amend. XIV; N.Y. Const., Art. I, §6.

Mr. Hemphill's identity as the shooter was not proven beyond a reasonable doubt as a matter of law. In determining whether the prosecution has presented legally sufficient evidence to prove a defendant's guilt, a reviewing court must consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). But the prosecution cannot satisfy this burden by merely producing some proof supporting the guilt of the accused. People v. (Mary) Reed, 40 N.Y.2d 204, 208 (1976).

Guilt cannot be established beyond a reasonable doubt by the testimony of a witness "who, is evidently, either from moral or mental defects, irresponsible." Id at 209, quoting People v. Ledwon, 153 N.Y.10 (1897); accord People v. (Gregory) Reed, 64 N.Y.2d 1144, 1147-1148 (1985); People v. Russell, 99 A.D.3d 211

(1st Dept. 2012)(evidence insufficient where complainant was under a high degree of stress and her description was not corroborated by videotape).

Additionally, "even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further." People v. Bleakley, 69 N.Y.2d 490, 495 (1987)[citations omitted]. "If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." Id. In essence, the Appellate Division acts as a thirteenth juror and "if it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict." Id.; People v. Danielson, 9 N.Y.3d 342, 348, 349 (2007). This Court conducts a "de novo review of the evidence" pursuant to its weight of the evidence review power. See People v. Diaz, 115 A.D.3d 498, 500 (1st Dept. 2014).

A. The Eyewitnesses Who Identified Morris Interacted With The Shooter At Close Range, In Good Lighting, For Ten Minutes, Providing Compelling Evidence Of His Guilt.

Here, the eyewitnesses interacted with the blue-clad thinner man for an extended period of time, ten minutes, at close range, in broad daylight during the initial altercation.

See People v. Berry, 27 N.Y.3d 10, 13 (2016)(characterizing 5-to-10 minute confrontation as lasting for "a considerable period of time"). Jon-Erik Vargas spoke to the shooter face-to-face, prior to any physical confrontation, as they asked each other "what's up" (JV: 875) and the man chided that Vargas was lucky his mother was around to prevent a fight. Vargas responded that Brenda Gonzalez was not his mother. Gonzalez then actually placed herself next to the thinner man during this initial interaction, seeking to calm the two men down. Anthony Baez also interacted with the men at close range, as he too tried to break up the initial fight. Meanwhile, Marisol Santiago stood nearby watching the events unfold. And Vargas eventually pursued the blue-clad man after he fled down University Avenue (where Morris lived), providing an additional opportunity to view him beyond the 10-minute initial encounter.

One day later, Baez picked Morris's photo out of an array, saying he looked like the shooter. While at trial, Baez insisted he was not sure of his identification, the contemporaneous report of the photo array memorialized Baez's initial statement selecting Morris. There is no reason, at that early stage of a high-stakes investigation, the police would have been anything but careful in recording such a procedure. See Diaz, 115 A.D.3d at 499 (while the complainant denied statements to detective, "the People do not offer, nor can we perceive of, any reason why the detective would have been

untruthful not only on the witness stand, but also in a contemporaneous internal report documenting the investigation").

Within two days of the shooting, Vargas, Gonzalez and Santiago had independently selected Morris from a fairly comprised and carefully conducted lineup. Gonzalez and Santiago subsequently testified in sworn grand jury testimony that they were sure of their identifications. While by the time of trial, nine years later, the prosecution argued the line-up identifications had been tainted by pre-trial publicity, Gonzalez testified she did not view the News 12 interview with Morris; nor did Vargas. Gonzalez insisted at trial that she was not wearing her glasses during the encounter or at the lineup, but she also testified that back in 2006 her eyesight had been better. There was no evidence she expressed any difficulty viewing the lineup at that time. As such, the four independent eyewitnesses who identified Morris in 2006 provide compelling proof that Mr. Hemphill was not the shooter.

Moreover, in 2006, Michelle Gist also identified Morris as the person involved in the initial altercation with Gilliam. While the prosecution argued at trial that Gist had never identified Morris, once again, Detective Jimick's contemporaneous reports reflected that Gist had mentioned only "Nick" and "Burgos" in 2006. Indeed, her identification of Morris was the reason he originally came under suspicion. In 2006 she did not mention Mr. Hemphill. Unbeknownst to the

jury, Gist then tried to use her cooperation with the prosecution at Mr. Hemphill's trial to secure thousands of dollars in housing funds based on alleged threats. When called upon to recount those threats she traced them back to an investigator working for Morris. Even the prosecutor admitted Gist had "muddled" her claims (372). Gist had previously been convicted of petit larceny for the unauthorized use of a credit card, suggesting she was willing to place her own financial interests above those of society.

Her attempts to implicate Mr. Hemphill at trial were highly questionable. She described "D," the man in the altercation, as having long braided hair, a description of the shooter not offered by any other witness and never attributed to Mr. Hemphill. None of the other eyewitnesses recounted seeing or speaking to Gist, or the fight taking place on top of her white Jaguar X6, as she claimed. Indeed, Gist admitted she was mistaken about her car's location when she marked the crime scene diagram, indicating it was on Harrison Avenue. Gist's testimony only added to the quantum of reasonable doubt created by the prosecution's case.

Additionally, Mr. Hemphill and Nicholas Morris, other than both being African-American men, do not resemble each other. See People's Exhibits 102, 103 (pictures of both men). This lack of any physical resemblance further reduces the chances that numerous eyewitnesses would have independently mistaken

Morris for Mr. Hemphill shortly after the incident.

B. The Weapons Seized From Morris's Apartment And His Bruised Knuckles Further Supported His Identification As The Shooter.

Within hours of the shooting, by midnight on April 16, 2006, the police had gained access to Morris's Bronx apartment. Unbeknownst to the jury, there they found a trove of weapons and ammunition and pictures of Morris brandishing guns and using drugs. The police recovered .9mm ammunition on the night stand next to Morris's bed. Morris's easy access to weapons, immediately after the incident, further supported his identity as the shooter. See, e.g., People v. Negron, 26 N.Y.3d 262, 268 (2015)(third-party's arrest and possession of weapons in close proximity to time of offense, supported inference of guilt); People v. DiPippo, 27 N.Y.3d 127, 139 (2016)(reverse-Molineux evidence, showing similar bad acts, supported third party's guilt).

Moreover, Morris had injuries similar to those of someone who had recently been in a fight, further supporting his identification as the blue-clad shooter. See Matter of Abe A., 56 N.Y.2d 288, 298 (1982)(that defendant had injuries consistent with his having been involved in a fight, gave rise to probable cause to believe he was the perpetrator). Here, both Detective Jimick and Nana testified that shortly after the incident, Morris had bruised knuckles. The prosecution's theory, that Morris had merely been in the area of the shooting, but had not

been involved in the original encounter, did not explain why Morris's knuckles would have been bruised. This injury, given the compelling identifications, and Morris's ready access to guns, could not have been "a strange coincidence." Id.

That Morris did not have tattoos on his forearms when he spoke to News 12, did not undercut his identity as the shooter. First, it is unclear whether the tattoo observed was merely temporary, in which case Morris would have had time to remove it before going to News 12. Of course, Morris never testified, so he was never subjected to cross-examination on this point. In any event, Mr. Hemphill also did not have tattoos on his forearms, so that aspect of the eyewitness descriptions did not support his guilt.

C. Ronnell Gilliam's Testimony Was Inherently Unreliable.

Gilliam was the only witness at trial to identify Mr. Hemphill as the shooter. The law views the testimony of an accomplice with a "suspicious eye." People v. Moses, 63 N.Y.2d 299, 305 (1984)(citing, inter alia, People v. Berger, 52 N.Y.2d 214, 218 (1980). Especially where the motivation behind an accomplice's testimony is his hope of receiving lenient treatment, accomplice testimony lacks the inherent trustworthiness of testimony provided by a disinterested witness. Id. (citing People v. Daniels, 37 N.Y.2d 624, 629 (1975); People v. Kress, 284 N.Y.452, 459 (1940)). Accordingly, accomplice testimony is regarded with the "utmost caution." Id.

Not only was Gilliam a cooperator attempting to get out from under a murder sentence himself, he repeatedly changed his account. First, he told the police that Morris was the shooter. Then later, apparently at Morris's insistence, Gilliam changed his story. To help Morris, his best friend from childhood, Gilliam identified Mr. Hemphill as the shooter. But Gilliam admitted that he continued to lie to the police about the guns, insisting that Mr. Hemphill had thrown the .9mm weapon in the East River. In his third police statement, Gilliam continued to lie, claiming he had personally thrown the gun away in Robert Clemente Park.

Gilliam did not mention Morris's alleged possession of the .357 caliber gun until he entered into his cooperation agreement years later in 2010. By that time, Morris had already pleaded guilty to possessing that weapon, so Gilliam could implicate Morris without harming him. The court then improperly allowed the prosecution to use Morris's plea, which it had procured, to corroborate Gilliam's account. See Point II.

While the prosecution argued that Gilliam was "a young kid" who was "taking the fall" (1662) and easily manipulated by Mr. Hemphill, Gilliam was 26 at the time of the shooting and a savvy enough criminal to deal crack throughout his teenage years without getting caught. He was able to maintain his cooperation agreement even after committing an additional crime involving the theft of $5000. He was best friends with Morris, a

demonstrated gun enthusiast with a trove of weapons and ammunition in his apartment. Gilliam was able to dispose of the guns without detection. He was far from the criminal novice the prosecution depicted him to be. That Mr. Hemphill drove Gilliam to North Carolina after the incident and retained a lawyer for him, hardly made Mr. Hemphill, who had no criminal history, the mastermind the prosecution claimed.

Nor did Ardell Gilliam's testimony corroborate Gilliam's claims that Mr. Hemphill was the shooter. On direct Ardell said Mr. Hemphill was wearing a blue sweater on Easter morning, but then said she could not remember when cross-examined, before returning to her original claim. She went to the police, by her account, only after Gilliam, the grandson she had helped raise, had implicated Mr. Hemphill as the shooter.

While Ardell claimed she had gone to the precinct to cooperate in May 2006, Jimick claimed that this precinct interview occurred a year later in April 2007. Thus, Ardell's account shifted over the years. It was unlikely she could remember Mr. Hemphill's attire on Easter morning when she was battling cancer and confined to her bed. Rather, her shifting testimony can only be viewed as an attempt to help the grandson she raised over the one whose provenance she doubted. Indeed, in court she could not even recognize Mr. Hemphill initially. Her conflicting testimony could not corroborate Gilliam's ever-changing story.

D. The Forensic Evidence Did Not Prove Mr. Hemphill's Identity As the Shooter.

The blue sweater introduced as People's Exhibit 98C, loomed large in the prosecution's case. According to the prosecution, the recovery of the DNA from the sweater's collar proved Mr. Hemphill's identity as the shooter. There were several glaring problems with this reasoning.

First, not a single witness, not Gilliam, Ardell, or a single eyewitness, identified the sweater as the one worn by the shooter. Moreover, numerous witnesses in contemporary reports described the shooter's top, not as a sweater, but as a shirt. Thus, Marisol Santiago told the police the shooter was wearing a blue shirt. Gilliam, when he called his brother William immediately after the incident, instructed him to get rid of the blue shirt, not a sweater. At trial, Juan Carlos Garcia described the shooter's top as a "golf shirt" with three buttons on top-- not a description that matched the blue sweater.

Moreover, numerous witnesses described being able to see the shooter's forearms, which suggested the blue top was short-sleeved. Castro ultimately described the shooter's top as short-sleeved. Similarly, Garcia and Santiago described seeing a tattoo on the shooter's forearms.

With not a single witness identifying the stretched out, dirty sweater, covered in metal shavings, as the one worn by the shooter, the prosecution relied on William Gilliam's providing

the sweater to the police during their search of the apartment and Jimick's testimony that he smelled gunpowder upon opening the bag containing the sweater. Both aspects of this evidence were readily challenged.

First, William, although minutes away from the courthouse during trial, and according to Gilliam present in the apartment immediately after the incident, was never called as a witness to establish the importance of the sweater or why he gave it to the police. Instead, the court improperly allowed the prosecution to introduce the facts surrounding the sweater's recovery through hearsay. See Point VI.

As for Jimick's claim of smelling gunpowder, there was no gunpowder detected on the sweater although it was examined for this trace evidence shortly after the incident. Moreover, Jimick did not record this observation in any contemporaneous report, although he recognized its significance. That the sweater was covered in aluminum metal shavings, stretched out and had holes in it, suggested it had not been worn by Mr. Hemphill on Easter morning.

But even assuming the shooter wore the sweater, the DNA did not prove that Mr. Hemphill was wearing it at the time of the shooting. There was no dispute that Morris changed his clothes in Gilliam's apartment immediately after the incident. Yanoff, who examined the DNA, made clear that there was no way to tell when the DNA had been deposited on the sweater. The sweater

could have been handed down years earlier to Mr. Hemphill's cousins and then briefly worn by Morris during the shooting such that he did not deposit his DNA before changing out of the sweater in Gilliam's apartment. The blue sweater, which not a single witness identified, could not establish Mr. Hemphill's identity as the shooter.

The remainder of the forensic evidence did nothing to help the prosecution's case. While the shell casings recovered at the scene were tested for fingerprints, none were recovered. And the prosecution failed to test the .9mm ammunition recovered from Morris's apartment to see if it had ever been chambered and had markings matching the ballistics evidence connected to the shooting.

E. The Evidence Of Flight Was Ambiguous.

The prosecution relied heavily on Mr. Hemphill's moving his family to North Carolina after the incident to establish his consciousness of guilt. But the evidence on this point was ambiguous at best. According to Gilliam, within a couple of days of the initial trip down to North Carolina, Mr. Hemphill and his family announced that they were returning to New York. They had left their son there and it is not clear when they permanently moved down to North Carolina. Moreover, while the prosecution portrayed Mr. Hemphill as constantly evading the police, the family had retained a New York attorney to convey Mr. Hemphill's willingness to cooperate with the authorities

during the initial stages of the investigation. The evidence of flight was weaker than the prosecution was permitted to convey. See Point V.

In sum, the prosecution failed to prove beyond a reasonable doubt Mr. Hemphill's identity as the shooter. In this highly unusual case, where there was compelling evidence of Nicholas Morris's identity as the shooter, the lay jurors were not capable of assessing the import of the shifting accounts, particularly in light of the court's erroneous rulings. Counsel preserved this issue for appellate review as a matter of law by his specific motions to dismiss which were denied by the trial court. At the very least, the verdict was against the weight of the evidence. The conviction must be reversed and the indictment dismissed.

POINT II

THE COURT DENIED MR. HEMPHILL HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHERE IT ADMITTED NICHOLAS MORRIS'S GUILTY PLEA STATEMENTS TO PROVE THAT MORRIS POSSESSED A DIFFERENT CALIBER GUN ON THE DATE OF THE SHOOTING, NOT THE .9MM THAT KILLED THE VICTIM, BECAUSE THE DEFENSE HAD OPENED THE DOOR TO THIS EVIDENCE EVEN THOUGH COUNSEL HAD SCRUPULOUSLY FOLLOWED THE COURT'S IN LIMINE RULINGS. U.S. CONST., AMEND. VI; N.Y. CONST. ART. I, §6.

To prove that Morris did not possess the .9mm murder weapon, the court allowed the prosecution to introduce Morris's plea statements over counsel's Confrontation Clause objection. The court recognized that Morris's statements admitting to possessing a different kind of gun, were "central" to the trial

issues and went "to the heart of the case"(676, 918). The court ultimately ruled that the defense had opened the door to Morris's plea statements by arguing that Morris was the shooter who possessed .9mm ammunition. This ruling was unfair on many levels. First, it was the prosecution which changed its position mid-trial to argue that the .357 ammunition should be admitted, after the defense had scrupulously adhered to the court's in limine ruling precluding this evidence. Second, there was nothing misleading or improper with the evidence-based argument that Morris possessed .9mm ammunition on the day of the shooting. This evidence was recovered within hours of the incident during a police search of Morris's apartment. The court recognized that counsel's arguments were "appropriate and necessary" (1131). A party cannot open the door to inadmissible evidence by making proper arguments based on the court's rulings. As such, the court denied Mr. Hemphill his 6th Amendment right to confront the witnesses against him on an issue critical to the defense. The conviction must be reversed and a new trial ordered. U.S. Const., Amend. VI; N.Y. Const., Art. I, §6.

The Supreme Court of the United States has recognized that statements made during a guilty plea, under oath and in a judicial proceeding, are "plainly testimonial" in nature. Crawford v. Washington, 541 U.S. 36, 64, 65 (2004). Such statements cannot be introduced against the accused without

affording him the opportunity to cross-examine the witness. Id., at 67 ("the Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with our own devising"); accord People v. Hardy,4 N.Y.3d 192, 198(2005)("there can be little debate over whether a plea allocution" is "testimonial"; accordingly admission of plea statements violated defendant's Sixth Amendment right to confrontation); People v. Douglas, 4 N.Y.3d 777 (2005)(same); People v. Schlesinger Electrical Contractors, Inc., 143 A.D.3d 516 (1st Dept. 2016)(introduction of guilty plea statements violated Confrontation Clause, requiring reversal); People v. Encarnacion, 6 Misc. 3d 1027(A)(N.Y. Sup. 2005)(reversing murder conviction based on Crawford due to introduction of guilty plea statements).

The door-opening doctrine recognizes that a defendant can open the door to otherwise inadmissible evidence by presenting potentially incomplete or misleading evidence that makes it necessary to introduce otherwise-inadmissible evidence to correct a misrepresentation. See, e.g., People v. Ko, 15 A.D.3d 173 (1st Dept. 2005)(defendant could not selectively reveal portions of statement potentially helpful to the defense, while concealing portions that would place the statements in context); People v. Reid, 19 N.Y.3d 382, 388 (2012)(defense opened the door to inadmissible non-testifying co-defendant's statements in

order to correct defense counsel's misleading impression created where the defense admitted only the exculpatory portion of the statement). Courts apply the doctrine to avoid "unfairness and to preserve the truth-seeking goals of our courts." People v. Reid, 19 N.Y.3d at 388. Here, the court's ruling undermined both the trial's fairness and truth-seeking process by placing unreliable evidence before the jury where the defense had adhered to the court's in limine rulings.

There can be no debate that Morris's plea statements were testimonial in nature. See Crawford, 541 U.S. at 65 (that plea statements are made under oath during a judicial proceeding renders them testimonial"); People v. Hardy, 4 N.Y.3d at 198 ("there can be little debate" whether such statements are "testimonial"). Accordingly, "the only indicium of reliability to satisfy constitutional demands" for the admission of Morris's statements, was "the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 69. The court recognized, after reviewing People v. Hardy, supra, that Morris's plea statements were testimonial in nature.

But the court then ruled that the defense had "opened the door" to the statements by arguing during openings that Morris was the shooter who possessed .9mm ammunition. This ruling was entirely unfair. First, as the court itself recognized, the defense argument, far from being misleading was "appropriate and necessary" (1131). There was no dispute that .9mm ammunition

had been recovered from Morris's apartment immediately after the shooting. Nor was there any dispute that counsel adhered to the court's in limine ruling preventing the defense from revealing the other types of weapons and ammunition recovered from Morris's apartment. It was the prosecution which changed its position mid-trial to seek admission of the .357 ammunition and Morris's guilty plea statements.

Second, Morris's guilty plea statements were themselves highly questionable and unreliable. Morris pleaded guilty to gain his immediate release from prison, to an SCI setting forth a charge not contained in the original indictment, against the advice of his attorney, where the prosecution had no evidence he possessed the .357 weapon at the time of the incident, apart from his plea statements. Gilliam had not mentioned the existence of the .357 weapon during his three police statements and only did so years later when negotiating his own cooperation agreement. The introduction of this type of evidence did nothing to further the trial's truth-seeking function. Rather, the prosecution's conduct here represented the type of overreach the Confrontation Clause was enacted to prevent: the production of evidence procured by the government without affording the accused the opportunity to question its reliability through cross-examination.

Even assuming, arguendo that counsel opened the door to admission of evidence that Morris possessed a gun other than the

.9mm murder weapon, the court could have merely permitted the introduction of the .357 ammunition, without resorting to the admission of testimonial hearsay in violation of the Confrontation Clause. See People v. Schlesinger Electrical Contractors, Inc., 143 A.D.3d at 517 (assuming defense created a misleading impression that a certain party had not been prosecuted, such impression could have been corrected by demonstrating that person was prosecuted without introducing "evidence that he was convicted based on an in-court admission of guilt"); accord People v. Reid, 19 N.Y.3d at 388 (inquiry concerning what evidence is admissible if counsel opens the door is "twofold-whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression").

Here, the court allowed the prosecution to change its position mid-trial and admit all the .357 ammunition recovered from Morris's apartment. That mid-trial change was itself unfair, as counsel had adhered to the court's in limine ruling during openings and had not mentioned that ammunition. But introducing the ammunition was certainly sufficient to show that Morris had access to other types of weapons beyond a .9mm gun. The court nonetheless then went on to admit Morris's guilty plea testimonial statements. That evidence was not reasonably necessary to meet the defense arguments.

Nor can the introduction of this evidence be deemed harmless beyond a reasonable doubt, the constitutional standard for harmless error applicable here. People v. Hardy, 4 N.Y.3d at 198. There is more than a "reasonable possibility" the error might have contributed to the outcome. See People v. Bell, 153 A.D. 3d 401, 413 (1st Dept. 2017)(where hearsay evidence purported to establish an alibi for man defendant claimed was responsible for the shooting there was "a significant probability" the error was harmful). Here, the proof of guilt was legally insufficient, not overwhelming. See Point I, supra.

Morris's plea statements, which the prosecution relied upon in closing, undermined the defense. That Morris was in the area of the incident supported Gist's account of seeing him following the shooting. The prosecution also used the plea statements to shore up Gilliam's inherently suspect account and to argue that Morris had taken responsibility for his own misconduct which did not include possessing the murder weapon. All of these claims harmed the defense. As this issue was preserved by counsel's constant, specific constitutional objections to the introduction of the plea statements, the conviction must be reversed and the matter remanded for a new trial before a different judge.

POINT III

THE COURT DENIED MR. HEMPHILL HIS DUE PROCESS RIGHT TO A FAIR TRIAL, TO CONFRONT WITNESSES, AND TO PRESENT A DEFENSE WHERE IT PROHIBITED COUNSEL FROM ESTABLISHING A CRITICAL WITNESS'S PRIOR IDENTIFICATION OF MORRIS BECAUSE COUNSEL HAD NOT ADEQUATELY ADVISED THE WITNESS OF THE INCONSISTENCY, ALTHOUGH COUNSEL HAD READ VERBATIM THE QUESTIONS AND ANSWERS THE WITNESS HAD PROVIDED DURING HER GRAND JURY TESTIMONY; THE PROSECUTION THEN EXPLOITED THE COURT'S ERRONEOUS RULING TO ARGUE THAT THE DEFENSE WAS FABRICATING EVIDENCE, AN ARGUMENT THE JURY SEIZED UPON DURING DELIBERATIONS. U.S. CONST., AMEND. XIV, XIV; N.Y. CONST., ART. I, §6.

Brenda Gonzalez was a critical witness. She interacted with the shooter for ten minutes during the initial encounter, placing herself directly between him and Jon-Erik Vargas. Two days later she identified Morris as the shooter and then went on to testify in the grand jury that she was certain of her identification. But nine years later, at Mr. Hemphill's trial, Gonzalez insisted that she had told the police during the lineup that Morris was "too big on the cheek" (500) to have been the shooter and that she had never mentioned Morris's name in the grand jury. This evidence was devastating to Mr. Hemphill's third-party defense. Counsel extensively questioned Gonzalez about her prior grand jury testimony, but she was firm that she had never said Morris was the shooter in the grand jury. When counsel tried to establish Gonzalez's prior inconsistent testimony by calling the grand jury court reporter, the prosecutor argued that counsel had not properly alerted Gonzalez to her prior testimony to allow the impeachment. The court then

allowed the prosecution to call the 2006 grand jury reporter to establish that Gonzalez had not identified Morris during those proceedings and then barred the defense from calling the 2007 reporter to establish her prior testimony identifying Morris. The court initially recognized the unfairness of the prosecutor's request to call only the 2006 reporter, but ultimately sided with the prosecution.

These rulings standing alone would warrant reversal. The prosecutor argued that the defense was trying to manipulate the evidence in suggesting that Gonzalez had previously identified Morris in the grand jury. The jury seized on this argument and twice asked to rehear the 2006 court reporter's testimony concerning Gonzalez's prior testimony. As counsel consistently protested, the court's rulings misled the jury into believing Gonzalez had never previously identified Morris and that the defense was fabricating evidence. As such, the rulings denied Mr. Hemphill due process, the right to confront the witnesses and to present a defense. U.S. Const., Amend. VI, XIV; N.Y. Const., Art. I, §6.

While the scope of cross-examination is ordinarily within the sound discretion of the trial judge, a court abuses its discretion as a matter of law when its rulings prevent issues critical to the defense from being developed and impact the accused's right to confront the witnesses against him. People v. McLeod, 122 A.D.3d 16, 19 (1st Dept. 2014). "Indeed, a trial

court's discretion should be narrowly construed when a defendant's fundamental rights are at issue, and the confrontation right is perhaps as fundamental as any other." Id, citations omitted. See, e.g., People v. Dachille, 14 A.D.2d 554 (2d Dept. 1961)(court unduly restricted cross-examination of witness by precluding evidence that he had previously testified he had been unable to identify the defendant's voice on the night of the incident, where he identified defendant's voice at trial); People v. Bradley, 99 A.D.3d 934, 937 (2d Dept. 2012)(court improperly excluded evidence that wife had previously said her husband caused her injuries accidentally, even though counsel never specified date of prior statement or to whom statement had been made); People v. Collins, 145 A.D.3d 1479 (2d Dept. 2016)(reversal required where court precluded testimony that complainant told a defense witness that she did not think defendant "did this").

In order for a party to impeach a witness with a prior inconsistent statement, a proper foundation must be laid. See Fisch, New York Evidence (2d Ed. 1977) §477 at p. 313. The witness must be informed of the contents of the alleged prior inconsistent statement and her testimony directed to the "circumstances of its making." Id. But "since the purpose of laying the foundation is to eliminate surprise and to refresh the memory of the witness so as to enable him to recall whether he made the alleged statement, foundation requirements should

not be rigidly enforced" or "made indispensable prerequisites to proof." Id. at 313-314 "To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he has made such statements." Sloan v. New York Central Railroad Company, 45 N.Y. 125, 127 (1871); accord Larkin v Nassau Electric R. Co., 205 N.Y. 267, 269 (1912)("the attention of the witness having been thus called to the contradictory statements, they may be proven and introduced in evidence in the regular course of the trial"); People v. Wise, 46 N.Y.2d 321, 326 (1978)("to set the stage for the prior inconsistency, the questioner must first inform the witness of the circumstances surrounding the making of the statement, and inquire of him whether he in fact made it").

Here, counsel on cross-examination read verbatim from Gonzalez's grand jury testimony, detailing the questions and alerting her to the answers she had given (479, 480, 488, 489, 490, 491, 500). While counsel did not ask the date of each statement because he was confused by the dates of the two grand jury presentations, Gonzalez was not misled. She testified she had "never" made the statements counsel read and suggested that someone had added Morris's name to the minutes after her testimony (479, 488, 497). Counsel also sought to actually show Gonzalez the minutes of her testimony in an attempt to refresh her recollection, but the court refused to let him do so. The prosecutor did not contemporaneously object to counsel's reading

of the grand jury testimony, suggesting that he also did not pick up on any alleged confusion created by the different grand jury dates. Indeed, counsel only keyed one set of questions about Gonzalez's grand jury testimony to the 2006 proceedings. Under these circumstances, the record does not suggest that counsel was attempting to mislead or confuse Gonzalez about the nature of her prior grand jury testimony.

To the contrary, it was the prosecutor who failed to contemporaneously object to the questioning and then sandbagged the defense by calling only the 2006 grand jury reporter to establish that Gonzalez had not testified before the grand jury as counsel had claimed. Counsel objected that the prosecutor's chosen course, which counsel had never before encountered, would mislead the jury. While the court initially recognized that it would be unfair for Gonzalez's prior testimony not to be "before the jury" (594, 596), ultimately that is exactly what happened when the court refused to allow the defense to call the 2007 grand jury reporter.

The court justified its unusual ruling by suggesting that there was a material difference between the 2006 and 2007 grand jury presentations because, by 2007, Gonzalez would have been exposed to greater publicity about the shooting (587-588). Nothing in the record supports this conclusion. The only evidence of Gonzalez's exposure to post-incident publicity related to the days immediately following the shooting, prior to

her April 18, 2006, lineup identification and well before the 2006 grand jury presentation.

But even if the court's speculation were true, Gonzalez had been confronted with the precise content of her prior testimony and the circumstances surrounding its having occurred before the grand jury. Counsel also tried to show her a copy of the actual testimony but was shut down by the court. Under these circumstances, that counsel did not specify the date of the grand jury testimony in each question was immaterial.

The court's rulings and the prosecutor's exploitation of those rulings cannot be deemed harmless beyond a reasonable doubt. There is far more than a reasonable possibility they impacted the outcome where the prosecution's evidence was beyond questionable. See Point I.

The prosecutor extensively argued on summation that counsel had attempted to mislead the jury by manipulating the evidence when counsel "tried to get Brenda Gonzalez to admit she said things before the grand jury in 2006 that she never said." (1644-1645). "That's why [the prosecutor] had to call the grand jury reporter to prevent the facts from being manipulated," the prosecutor insisted (1645). Such arguments were designed to mislead the jury into believing Gonzalez had never previously identified Morris under oath in the grand jury. But that was not true. There was no dispute that counsel had accurately read from the 2007 minutes when questioning Gonzalez. The jurors

§6.

Criminal Procedure Law §60.35(1) provides:

> when upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory of such testimony.

But where the witness's testimony "does not tend to disprove the position of the party who called him," evidence relating to the witness's prior statement cannot be introduced. C.P.L. §60.35(3). Moreover, a party may not use the prior statement "for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of facts." Id.

These statutory provisions recognize the dangers in prosecutorial use of out-of-court statements for impeachment because even with judicial instructions, juries "when actually confronted with dramatically cogent impeaching evidence, treat it as though it were in fact direct evidence of guilt or innocence in criminal trials." People v. Fitzpatrick, 40 N.Y.2d 44, 49 (1976). There is also a real danger that the use of such statements will, at the very least, confuse the jury. Id.

The legislature's adoption of Criminal Procedure Law §60.35 also resulted from "concern that the prosecution might misuse impeachment techniques to get before the jury material which could not otherwise be put in evidence because of its

extrajudicial nature." Id. To protect against this danger, "before a prior statement could be used to impeach one's own witness, the in-court testimony of the witness had to be not merely inconsistent with the prior statement but damaging to the case of the party calling him as well." Id., at 50; People v. Berry, 27 N.Y.3d 10, 17 (2016).

A witness's failure to recall the circumstances surrounding the crime does not constitute affirmative damage sufficient to warrant impeachment by resort to extra-judicial statements. Id. at 52; accord People v. Grierson, 154 A.D.3d 1071(3d Dept. 2017)(witness's testimony denying telling police that she had previously spoken with defendant about a gun did not damage the prosecution's case so as to allow impeachment with her prior grand jury testimony); People v. Gaston, 147 A.D.3d 1219 (3d Dept. 2017)(witness's testimony that he did not recall defendant, or his visiting apartment where heroin was kept, did not allow for prosecutorial impeachment as it did not harm the prosecutor's case); People v. Navarette, 131 A.D.2d 326, 328 (1st Dept. 1987)(reversal where prosecution revealed through witness that defendant had previously confessed to her, where witness testified she did not recall the confession but "trial jury was still made aware that [the witness] had previously testified a confession was made"; the result of the examination was not to stir the witness's memory, "but to acquaint the jury with the gist of her [prior testimony]"); People v. DiAntonio, 174 A.D.2d

356 (1st Dept. 1991)(error for prosecution to impeach defendant's girlfriend with her prior testimony concerning defendant's confession, as her trial testimony did not affirmatively damage the prosecution's case).

Additionally, a prosecutor does not act in good faith when he calls a witness primarily to impeach him "and thereby place otherwise inadmissible evidence before the jury." See People v. Wieber, 202 A.D.2d 789, 790 (3d Dept. 1994); accord People v. Fitzpatrick, 40 N.Y.2d at 53 (prosecutor "was amply warned" that witness would testify that he did not recall details of the crime and "to permit impeachment under such circumstances would be to allow a boot-strap procedure clearly transgressing any balancing of interests the Legislature could have had in mind"); People v. Griffiths, 247 A.D.2d 550, 551 (2d Dept. 1998)("it was error for the People to call a witness in their behalf solely for the purpose of impeaching her with her prior inconsistent statement"); People v. Russ, 79 N.Y.2d 173, 178-180 (1992)(error for court to permit prosecution to call teenage witnesses in order to impeach them with their grand jury testimony in order to circumvent protections against inadmissible evidence where the failure of the witnesses to implicate defendant at trial "came as no surprise").

Here the prosecutor's actions with respect to Matthews were not undertaken in good faith. The prosecutor had ample warning that Matthews would not recollect his prior statement. Matthews

Nana's questioning when the court placed no limits on the prosecutor's badgering this critical defense witness about a 15-year old offense. A court has a duty "to protect a witness from questions which go beyond the proper bounds of cross-examination merely to harass, annoy or humiliate him." Alford v. United States, 282 U.S. 687, 694 (1931). The risk of prejudice from questioning about uncharged crimes evidence is "particularly acute when the prior crime or conduct is remote in time." People v. Barrett, 189 A.D.2d 879 (2d Dept. 1993), citing People v. Bennette, 56 N.Y.2d 142; accord People v. Brown, 201 A.D.2d 576, 577 (2d Dept. 1994)(questioning defendant about burglary from nine years earlier deemed improper).

Here, the prosecution was allowed to question Nana, over constant objection, about a remote incident even after he had repeatedly admitted the misconduct and sought to explain it. The court then improperly allowed the prosecutor to admit a record of the prior conviction in contravention of C.P.L. §60.40(1). That section applies only to the "narrow" situation involving "a witness who has refused to admit" his past conviction. Preiser, Practice Commentary, C.P.L. §60.40 [McKinney's 1992]. Here, Nana admitted the fact of his prior court martial, but could not recall the precise nature of the false statements he had made over 15 years earlier. As a layman, he also did not have a mastery of whether a finding after court martial was the same as a criminal conviction. The

prosecution then again exploited the court's rulings to argue that the defense was trying to subvert the truth-finding process and would have been successful in doing so, but for the prosecutor's crusade to uncover its attempts. "If I didn't find out about his criminal record, he would have gotten away with it," the prosecutor argued (1652).

The cumulative effect of these errors was to fatally undermine the fairness of Mr. Hemphill's trial. Because the evidence of guilt was dubious, the errors cannot be deemed harmless. See Point I. The issues were preserved by counsel's in limine application prior to trial objecting to any cross-examination of the prosecution's own witnesses, the court's ruling that it would give the prosecutor leeway in this area, and counsel's specific, contemporaneous objections during the examinations of Matthews, Elisa, and Nana. The court overruled almost all these objections and let the prosecution engage in a pattern of unfettered and improper attacks. Accordingly, the conviction must be reversed and a new trial, before a different judge, ordered.

POINT V

THE COURT DENIED MR. HEMPHILL HIS RIGHT TO PRESENT A DEFENSE WHERE IT PRECLUDED EVIDENCE TO COUNTER THE PROSECUTION'S EVIDENCE OF FLIGHT, WHILE ALLOWING THE PROSECUTION TO CONSISTENTLY INTRODUCE EVIDENCE OF NICHOLAS MORRIS'S INNOCENCE BECAUSE HE DID NOT FLEE AND PRECLUDED A STATEMENT THAT MORRIS HAD CONFESSED TO THE SHOOTING AND THE WEAPONS RECOVERED FROM HIS APARTMENT. U.S. CONST. AMEND. XIV; N.Y. CONST. ART. I, §6.

From the outset of these proceedings, the prosecution urged that Morris was innocent because he "stayed," while Mr. Hemphill was guilty because he fled (17). Morris, according to the prosecution, went on air at News 12 and invited the police to arrest him, "not what a murderer does" (22), while Mr. Hemphill fled to North Carolina. Apart from being facially improper, the prosecutor's arguments were misleading. Pursuant to the court's rulings, the jury never learned that Morris had a trove of weapons in his apartment shortly after the crime, that his family had been arrested as a result, that Mr. Hemphill had retained a lawyer to communicate with the police who offered to make him available during the early days of the investigation, or that Morris had confessed to Nana. The cumulative impact of these errors was to fatally undermine Mr. Hemphill's right to present a complete defense in violation of his constitutional rights. U. S. Const., Amend. VI, XIV; N.Y. Cont. Art. I, §6.

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" People v. DePippo, 27 N.Y.3d 127, 135 (2016), quoting Nevada v. Jackson, 569 U.S. 505 (2013); Crane v. Kentucky, 476 U.S. 683 (1986) [other citations omitted.] With respect to third-party culpability defenses, the court must determine the relevance of evidence by weighing its probative value against its danger of prejudice. DePippo, citing People v. Primo, 96 N.Y.2d 351 (2001). "Remote acts, disconnected and outside the crime itself

cannot be separately proved to show that someone other than the defendant committed the crime." Id, quoting People v. Schulz, 4 N.Y.3d 521, 529 (2005). But evidence that a third-party, arrested in close proximity to the time of the crime, "possessed weapons and ammunition (including the type used in the shooting)" "under circumstances evincing consciousness of guilt," cannot be classified as "remote" or "disconnected" from the crime at issue. People v. Negron, 26 N.Y.3d 262, 269 (2015).

Moreover, where the prosecution has offered evidence of the defendant's flight to demonstrate his consciousness of guilt, the accused is entitled to offer any explanation of his flight consistent with innocence. People v. Gonzales, 92 A.D.2d 873 (2d Dept. 1983), aff'd., 61 NY2d 633 (1983); People v. Price, 135 A.D.2d 750 (2d Dept. 1987)(error for court to preclude arresting officer from testifying, on hearsay grounds, that defendant was hiding because he believed he was being arrested for a violation of parole not connected to the instant offense); People v. Etheridge, 71 A.D.2d 861 (2d Dept. 1979)(error for court to preclude, on hearsay grounds, that defendant fled because he had heard victim's friends were looking for him).

A defendant is also entitled to introduce a third-party's statements confessing to the crime, as statements against penal interest, if the unavailable declarant with competent knowledge of the facts knew the statement was against his interest, and

there is a "reasonable possibility that the statement might be true." People v. Soto, 113 A.D.3d 153, 160 (1st Dept. 2013), aff'd. 26 N.Y.3d 455 (2015), quoting People v. Deacon, 96 A.D.3d 965 (2d Dept. 2012). "It is irrelevant whether the court believes the statement to be true: if the proponent of the statement is able to establish the possibility of its trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create a reasonable doubt of guilt." People v. Soto, 26 N.Y.3d at 462, quoting People v. Settles, 46 N.Y.2d 154, 170 (1978).

Here, the court's precluding evidence critical to the third-party defense that Morris was the shooter violated Mr. Hemphill's constitutional right to present a complete defense. The court's precluding evidence of the stash of weapons recovered from Morris's apartment and the pictures revealing him brandishing weapons and using drugs was erroneous. As in Negron, supra, these weapons were recovered in close spacial and temporal proximity to the crime under circumstances evincing Morris's consciousness of guilt. That Morris left certain weapons behind, but disposed of others, was certainly information the jury was entitled to learn, as was Morris's enthusiasm for all types of weapons. The cache of weapons recovered from Morris's bedroom within hours of the incident suggested that he had easy access to others, a fact supporting his identity as the shooter.

The court also erred in precluding evidence that Mr. Hemphill, after leaving the area following the incident, hired a lawyer who offered to make him available to the police during the early stages of the investigation. Counsel offered this evidence as an exception to the hearsay rule, since the lawyer had expressed his future intent to make Mr. Hemphill available. The defense also offered the evidence for a non-hearsay purpose, as background to explain the investigation. Without this evidence, the jury was left with the unfair impression that Mr. Hemphill had consciously evaded the police from the outset of the investigation and was tracked down through warrants and the tracing of his wife's cell phone.

The court's ruling was particularly unfair given that the court allowed the prosecution to create an evidentiary picture of Morris's innocence through irrelevant evidence. "A person involved in criminal activity has a strong incentive to feign nonchalance upon contact with authorities, and such conduct would constitute a self-serving assertion of innocence that would constitute inadmissible hearsay." People v. Torres, 289 A.D.2d 136 (1st Dept. 2001). Such evidence of consciousness of innocence is generally inadmissible. Id.

Despite this well-established rule, the prosecution was allowed to argue throughout the trial that Morris was innocent because he did not flee, went on television to invite the police to arrest him, and generally acted in a way inconsistent with

his being the shooter (22). According to the prosecutor Morris was "the man who didn't flee, the man who didn't run down to North Carolina like the guilty people do" (1611). The prosecution also introduced, over objection, that Morris consented to the DNA swab, while Mr. Hemphill submitted only as a result of a search warrant. The prosecutor advanced these arguments after the defense had been precluded from offering evidence through Jimick that Morris had another motive for turning himself into the authorities, to take responsibility for the weapons recovered from his apartment in order to secure his family members' release. In the wake of this ruling, the court had warned the prosecutor not to argue on summation that Morris was innocent because he did not flee (1388-1389). The prosecutor ignored this warning and repeated his opening remarks contrasting Mr. Hemphill's flight to Morris's turning himself into the authorities.

The court also erred in precluding the defense from offering through Nana that Morris had confessed to the shooting. There was no dispute that Nana spoke to Morris on the day of the incident. Gilliam testified that Nana drove him to Morris's house within hours of the incident. Ultimately, the court ruled that the statement was inadmissible because the court did not believe Nana's testimony, a factor the Court of Appeals has deemed "irrelevant." See People v. Soto, 26 N.Y.3d at 462.

The cumulative effect of these erroneous rulings served to

deny Mr. Hemphill his right to present a complete defense. The errors cannot be deemed harmless beyond a reasonable doubt, as the evidence here was not overwhelming. See Point I. Counsel objected to each ruling in a timely and specific manner, rendering the errors preserved for appellate review as a matter of law. Accordingly, the conviction must be reversed and the matter remanded for a new trial before a different judge.

POINT VI

THE COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE, OVER OBJECTION, HEARSAY RELATING TO CRITICAL ISSUES, WITHOUT APPROPRIATE LIMITING INSTRUCTIONS. U.S. CONST., AMEND. VI, XIV; N.Y. CONST., ART. I, §6.

The prosecution was allowed consistently to introduce hearsay evidence relating to critical aspects of the police investigation. The court admitted this evidence, over objection, without any limiting instructions. Thus, the jury learned about the recovery of the blue sweater from William Gilliam, without the prosecution ever calling him to testify. The jury learned about Morris's declaring his innocence on television, while displaying the lack of tattoos on his forearms, that Morris subsequently consented to a DNA swab, and that Mr. Hemphill retained a lawyer for Ronnell Gilliam. The cumulative impact of these rulings allowed the prosecution to place information before the jury that could not be subjected to cross-examination, denying Mr. Hemphill the right to confront the witnesses against him. As the evidence was not

overwhelming, the consistent introduction of hearsay testimony on critical matters warrants reversal and ordering a new trial before a different judge.

The Court of Appeals has examined, in the context of two unrelated cases, the issue of when the "introduction of purported 'background and narrative' evidence through the testimony of police detectives violated defendants' right to confrontation." People v. Garcia, 25 N.Y.3d 77, 80-81 (2015). In People v. Garcia, 25 N.Y.3d at 80, a police detective testified that the investigation focused on the defendant after the deceased's sister informed the police that the deceased was "having a problem" with the defendant. Id., at 81-82. The Court of Appeals reversed the conviction because this testimony went "beyond the permissible bounds" of providing background information about how and why the police pursued the investigation. Id., at 86-87. Instead, it provided a motive for the shooting and "exceeded what was necessary to explain the police pursuit of defendant." Id. at 86.

The Court reached the opposite conclusion in the companion case, People v. DeJesus, 25 N.Y.3d at 83, where the police received an anonymous phone call identifying the defendant as the shooter, prior to his identification by an eyewitness. When the prosecutor moved to admit evidence concerning the anonymous phone call, the trial court precluded it, but permitted the detective to testify that the police were looking for the

defendant prior to speaking with the eyewitness as a result of their "investigation." Id., at 84. This statement -- that the detective had begun looking for the defendant prior to speaking with the eyewitness -- could not be characterized as testimonial because "it simply is not an out-of-court substitute for trial testimony." Id., at 87. Accordingly, the detective's testimony did not violate the Confrontation Clause. Id.

A court cannot introduce evidence which does not merely explain the police investigation, but improperly provides proof on the central issue of identification. See People v. DeJesus, 134 A.D.3d 463, 464 (1st Dept. 2015); accord People v. Grierson, 154 A.D.3d 1071 (3d Dept. 2017)(reversal due to court's permitting police officers to testify about statements which gave rise to the search for the gun defendant convicted of possessing); People v. Lloyd, 115 A.D.3d 766, 769 (2d Dept. 2014)(right to confrontation violated by testimony giving impression that a non-testifying witness implicated defendant to police).

Here, the court consistently admitted hearsay without any limiting instructions. Detective Jimick was permitted to testify, over objection, that "based on conversation [the police] had with William [Gilliam]" they were "directed to a back bedroom closet by William" and "directed" to the black plastic bag containing the blue sweater introduced into evidence (664). The blue sweater was a central piece of evidence in the

prosecution's case purporting to link Mr. Hemphill to the shooting. The circumstances surrounding the sweater's recovery were therefore critical, as the defense challenged whether the sweater introduced into evidence was worn by the shooter. The obvious import of the police "conversation" with William Gilliam was that the sweater he provided was connected to the incident. Despite counsel's objection, the court admitted this hearsay without any limiting instructions.

The court also overruled counsel's objection when the prosecutor argued on opening that Morris "invited [the police] on the air to come arrest him." (19). Counsel specifically objected that the prosecutor's argument was "getting into things that are not going to be testified to at trial" (19). The court then allowed the prosecution to show the News 12 video during which Morris displayed his arms to reveal that he did not have tattoos. This series of rulings also placed critical hearsay evidence before the jury that was not subject to cross-examination. See People v. Rodriguez, 64 N.Y.2d 738 (1984)(court properly refused to allow defendant to display his tattooed hands without being subjected to cross-examination); People v. DiMaria, 22 A.D.3d 229 (1st Dept. 2005)(court properly excluded defendant's expression of a desire to turn himself into the police as "consciousness of innocence" evidence).

Similarly, Morris's "consent" to the DNA test, which the prosecution elicited, over objection, from Detective Joseph

Russell was also inadmissible hearsay. See People v. Jardin, 154 Misc. 2d 172 (Bx. Sup. 1992), aff'd 216 A.D.2d 105 (1st Dept. 1995), aff'd. 88 N.Y.2d 956 (1996)(testimony describing defendant's willingness to submit to DNA testing found inadmissible on hearsay grounds); accord People v. Ross, 56 A.D.3d 380 (1st Dept. 2008)(court properly precluded defendant's voluntary submission to DNA testing as devoid of probative value).

The court also erred in admitting the hearsay evidence relating to Vomvolakis's conversations with Adam Mahrfar, Mr. Hemphill's attorney. The court allowed Vomvolakis to testify in detail about his conversations with Mahrfar, how he obtained payment through Mahrfar, and the information he learned about the case from Mahrfar. There was no evidentiary exception which permitted the introduction of this hearsay evidence. While the court suggested that Mahrfar's statements were admissions attributable to Mr. Hemphill, such oral, out-of- court statements by an attorney made to a third party do not qualify as formal admissions, particularly where they are used as part of the prosecution's case-in-chief. See People v. Cassas, 84 N.Y.2d 718, 722 (1995); compare People v. Brown, 282 A.D.2d 312, 313(1st Dept. 2001), aff'd. 98 N.Y.2d 220 (2002)(attorney was clearly defendant's authorized agent for purposes of making a Sandoval motion, rendering any representations made in this context binding on defendant). Assuming Mr. Hemphill (as

opposed to his wife) retained Mahrfar, there was no waiver of the attorney-client privilege to allow Vomvolokis to recount these statements. People v. Cassas, 84 N.Y.2d at 723.

In sum, the court consistently allowed the prosecution to admit hearsay evidence on critical issues without any limiting instructions. These errors were preserved for appellate review as a matter of law. Counsel objected to the introduction of this evidence throughout the trial and the court overruled his objections.

Nor can the introduction of this evidence be deemed harmless beyond a reasonable doubt, the standard applicable here. People v. Lloyd, 115 A.D.3d at 769 (a constitutional error may be harmless where evidence of guilt is overwhelming and there is no reasonable possibility that it affected the outcome of the trial). First, the evidence of guilt, far from being overwhelming, was insufficient. See Point I. Additionally, during deliberations the jury specifically asked to hear Vomvolakis's testimony in its entirety, including the hearsay. The conviction must be reversed and the matter remanded for a new trial before a different judge.

POINT VII

THE COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN ALLOWING THE PROSECUTION TO INTRODUCE 12 PICTURES OF THE TWO-YEAR-OLD VICTIM, AS WELL AS INFLAMMATORY MEDICAL EXAMINER TESTIMONY RELATING TO THE CHILD'S SUFFERING, WHERE CAUSE OF DEATH WAS NOT CONTESTED. U.S. CONST. AMEND. XIV; N.Y. CONST. ART. I, §6.

The court applied an erroneous legal standard in assessing the defense application to preclude the prosecution from introducing numerous pictures of the deceased two-year-old child. According to the court, it was not appropriate to try to limit any prejudice created by the pictures because the case involved a homicide; it was important to establish the humanity of the victim and impress upon the jury the importance of its task. The court's view is ungrounded in the governing law, resulted in inflammatory evidence being placed before the jury, and warrants reversal. U.S. Const. Amend. XIV; N.Y. Const. Art. I, §6.

"Photographs of the victim's corpse are likely to arouse the passions and resentment of the jury and thus should not be admitted unless they tend to prove or disprove some material issue of fact in issue." People v. Stevens, 76 N.Y.2d 833, 835 (1990). Only when "relevance is demonstrated" does "the question as to whether on balance the jury should be permitted to view such photographs" fall to the "sound discretion of the trial court." Id.; accord People v. McGhee, 103 A.D.3d 667 (2d Dept. 2013)(court erred in admitting identical pictures of victim's head after he died where defense counsel offered to stipulate that the victim was the person upon whom the autopsy was performed); People v. Chambers, 18 A.D.3d 571 (2d Dept. 2005)(error for court to admit 17 post-mortem pictures of the victim which did not serve to prove a disputed fact); People v.

Foss, 267 A.D.2d 505 (3d Dept. 1999)(error to admit photographs of victim's skeletal remains where medical testimony established cause of death).

Here, the court refused to limit the prosecution's introduction of multiple pictures of the deceased two-year-old child even though the only contested issue was the identity of the shooter. The court reasoned that the pictures were admissible to demonstrate the "humanity of the victim" and impress upon the jury the "importance" of its job (JS2. 13). However, those concerns did not tend to prove or disprove any material fact. Instead, the court's rationale appeared grounded in arousing the emotions of the jurors - the very reason such photographs should be precluded. The court failed to consider the relevant legal standards established by the Court of Appeals. See People v. Stevens, supra. As such, its ruling was not a discretionary one, but instead legally erroneous. See People v. Cronin, 60 N.Y.2d 430, 433 (1983)(court's failure to exercise its discretion to allow expert testimony because it believed it had no discretion to exercise was erroneous as a matter of law); People v. Williams, 56 N.Y.2d 236, 239(1982)(where court applied an erroneous legal standard in determining Sandoval ruling there was no "indication that the court engaged in any exercise of discretionary power to weigh the various relevant factors").

The court also erred when it allowed the medical examiner

to testify in detail about the deceased's pain and suffering. It was simply not relevant to the jury's task to consider the child's suffering, where the cause of death was not contested. This testimony, like the multiple pictures of the dead two-year-old child, simply served to arouse the jurors' emotions and undermined the fairness of the trial.

These errors were preserved by counsel's specific, timely objections which were overruled by the court. As the evidence of guilt was not overwhelming, the errors cannot be deemed harmless. See People v. Dohnohue, 229 A.D.2d 396, 398 (2d Dept. 1996)(in a close case, "there is a significant probability that the photograph impermissibly tipped the scales in favor of the People"). Accordingly, the conviction should be reversed and the matter remanded for a new trial before a different judge.

POINT VIII

THE PROSECUTOR'S SUMMATION COMMENTS, WHICH APPEALED TO THE JURORS' EMOTIONS, SHAMELESSLY VOUCHED FOR THE INTEGRITY OF THE PROSECUTOR'S OFFICE, AND DENIGRATED THE DEFENSE FUNCTION, DENIED MR. HEMPHILL DUE PROCESS. U.S. AMEND. XIV; N.Y. CONST., ART. I, §6.

This case, involving the death of a toddler on Easter morning, was charged with emotion. On summation, the prosecutor blatantly appealed to the jurors' emotions, vouched for the integrity of his office and denigrated the defense. This flagrant pattern of misconduct denied Mr. Hemphill his due process right to a fair trial. The conviction must be reversed and a new trial ordered. U.S. Const., Amend. XIV; N.Y. Const.,

Art. I, §6.

The public prosecutor occupies a critical role in the criminal justice system whose mission is not merely to convict but to achieve a just result. See People v. Collins, 12 A.D.3d 33, 36 (1st Dept. 2004). "Criminal trials are to be so conducted that the proof will be legal evidence, unimpaired by intemperate conduct, impertinent counsel and irrelevant asides, all of which obfuscate the development of factual issues and sidetrack the jury from its basic mission of determining the facts relevant to guilt or innocence." People v. Alicea, 37 N.Y.2d 601, 605 (1975); accord People v. Calabria, 94 N.Y.2d 519, 523 (2000).

Additionally, summation is not an unbridled debate in which counsel are free to employ any rhetorical device likely to sway the jury. "There are certain well-defined limits." People v. Ashwal, 39 N.Y.2d 105, 109 (1976); People v. LaPorte, 306 A.D.2d 93, 95 (1st Dept. 2003).

> It is fundamental that the jury must decide the issues on the evidence, and therefore fundamental that counsel, in summing up, must stay within the "four corners of the evidence" and avoid irrelevant comments which have no bearing on any legitimate issue in the case. Thus the district attorney may not refer to matters not in evidence, or call upon the jury to draw conclusions which are not fairly inferable from the evidence. Above all he should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant.

People v. Ashwal, 39 N.Y.2d at 109-110 [citations omitted].

At best, here the prosecution forgot these well-established

rules. There was no dispute that the child was not the shooter's intended target. But the prosecutor nonetheless accused Mr. Hemphill of an execution, with "innocents all over the block" and inflicting "an excruciating death" (1607) on the child. The prosecutor also accused Mr. Hemphill of "hiding behind that baby." (1608). Urging the jurors "to take little David into the jury room," the prosecutor accused Mr. Hemphill of walking over the baby's dead body "without a care in the world" (1674-1675). These kinds of inflammatory comments have resulted in reversal. See People v. Redd, 141 A.D.3d 546 (2d Dept. 2016)(reversal due to prosecutor's arguments which were designed, inter alia, to "inflame the jury and arouse sympathy" for the victim); accord People v. Brisco, 145 A.D.3d 1028, 1029 (2d Dept. 2016)(prosecutor improperly appealed to jury's sympathy by asserting defendant possessed a loaded gun while families with children were present); People v. DeJesus, 134 A.D.3d 463, 464 (1st Dept 2015)(prosecution improperly appealed to jurors' emotions on summation).

The prosecutor also repeatedly vouched for the integrity of his office and inappropriately inserted his own alleged good character into the proceedings, contravening long-established precedent. See People v. Paperno, 54 N.Y.2d 294, 299(1981)("the prosecutor cannot inject his own credibility into the trial"); People v. Carter, 40 N.Y.2d 933, 934 (1976)(improper for prosecutor to vouch for his own conduct by injecting integrity

of the District Attorney's office into the case); People v. Lovello, 1 N.Y.2d 436, 438 (1956)(serious misconduct for prosecutor to support his case with "his own veracity and position").

The prosecutor specifically asked the jury to judge him instead of the evidence, "a higher standard than the law," because "that's only fair" and "that's only just" (1637-1638). These comments were blatantly improper and urged the jury to focus on irrelevant considerations. By suggesting the jury could acquit if it felt the prosecution was underhanded, the prosecutor conveyed that the jury should convict if it found him personally honorable (instead of focusing on the evidence). The prosecutor also suggested that his questioning the evidence against Morris was "an act of integrity," "doing what's right" (1639). But the prosecutor assured the jury that for him, "[i]t's just another day at the office" (1639). Such comments had no place in a murder trial and merely served to shore up the prosecutor's shaky case with the prestige of his office.

These arguments were particularly improper given how the prosecutor relentlessly denigrated the defense for purportedly impeding the trial's truth-seeking function. According to the prosecutor, defense counsel had consistently manipulated the evidence, trying to get Brenda Gonzalez to admit to erroneous testimony before the grand jury. "That's why I had to call the grand jury reporter to prevent facts from being manipulated," the

prosecutor insisted (1644-1665). The prosecutor accused counsel of attempting to trick Ardell Gilliam by lowering his voice during his cross-examination and purposefully presenting false testimony through Nana.

The prosecutor also resorted to prejudicial arguments with no evidentiary grounding. According to the prosecutor, Vomvolakis committed a crime during his representation of Gilliam, set up his client, and then covered his tracks by purposefully losing his file. "That's what a good criminal defense lawyer will do for the man who paid him," the prosecutor explained (1662). But there was no evidence that Vomvolakis did anything other than provide adequate representation for his client. There was certainly no evidence that he acted unethically and criminally during that representation.

Similarly, the prosecutor misled the jury about the import of the pseudo-samples when he suggested the police were forced to sort through trash because Mr. Hemphill was evading the authorities. In fact, the police attempted to get those samples because the prosecution had not yet sought a search warrant.

The prosecutor also implied that Gist knew Mr. Hemphill, who had no prior criminal record, to be prone to violence. Gist, "knew the guns would come out" the prosecutor argued, because "she knew the defendant better than he thought."(1649).

In sum, to shore up a case that was legally insufficient, see Point I, the prosecutor engaged in a pattern of inflammatory remarks, vouched for his own integrity, and put forth prejudicial

arguments with no evidentiary support. The court did nothing to reign in the misconduct and overruled counsel's numerous objections. Accordingly, the conviction should be reversed and a new trial, before a different judge, ordered.

POINT IX

THE COURT DENIED MR. HEMPHILL DUE PROCESS AND HIS RIGHT TO BE PRESENT DURING A CRITICAL STAGE OF THE TRIAL, WHEN IT REMOVED HIM FROM THE COURTROOM PRIOR TO THE JURY BEING POLLED, WITHOUT WARNING HIM THAT HE WOULD BE REMOVED IF HE CONTINUED TO DISRUPT THE PROCEEDINGS. U.S. AMENDS. VI, XIV; N.Y. CONST. ART. I, §6.

When the jury announced its verdict, Mr. Hemphill, obviously distraught, declared his innocence and asked to be taken out of the courtroom. The court ordered him removed without warning him that he would be absent for a material stage of the proceedings -- the rendering of the verdict. By ordering Mr. Hemphill removed, without momentarily adjourning the proceedings to afford him the opportunity to compose himself and continue being present at the trial, the court denied Mr. Hemphill his constitutional and statutory rights to be present at a material stage of the trial. U.S. Const., Amend. XIV; N.Y. const., Art. I, §6. Accordingly, the conviction must be reversed and a new trial ordered.

A criminal defendant's right to be present during all "material stages" of a trial has "long been held to include rendering the verdict." People v. Rivas, 306 A.D.2d 10, 11 (1st Dept. 2003). "While this fundamental right may be forfeited by disruptive conduct, the court must first provide the defendant with a warning

that any further outburst will result in removal from the courtroom." Id., citing Illinois v. Allen, 397 U.S. 337 (1970); People v. Parker, 57 N.Y.2d 136, 139-140 (1982); accord People v. Johnson, 37 N.Y.2d 778, 779 (1975)(defendant waived his right to be present where he continued to disrupt the proceedings even after the court repeatedly warned him that he would be removed and the trial continued in his absence).

Apart from the constitutional right to be present, Criminal Procedure Law §260.20 only permits the court to remove a defendant from his trial "if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct." C.P.L. §260.20. The "trial" includes "receiving and recording the verdict." People v. Morales, 80 N.Y.2d 450, 455-456 (1992), quoting Maurer v. People, 43 N.Y.1 (1870). An exception to this mandate exists only where a defendant goes "far beyond a mere disruption," and through threat of physical violence creates "an emergency situation." People v. Wilkins, 33 A.D.3d 409, 410 (1st Dept. 2006); compare People v. Burton, 138 A.D.3d 882 (2d Dept. 2016)(defendant's request to leave the trial and informing the jury that he had been incarcerated for months without the prosecution calling "none of [his] witnesses," did not warrant his removal without warning, as defendant's conduct was not violent in nature so as to create an emergency requiring his immediate removal).

Mr. Hemphill's actions here, in declaring his innocence and asking to be removed from court, while disruptive, did not create

an emergency situation warranting his expulsion from the courtroom without any warning. Mr. Hemphill did not act violently. Rather, he was emotionally distraught. Like the defendant in Rivas, supra, Mr. Hemphill was improperly deprived of his right to be present at a material stage of his trial by his removal from the courtroom before the jury was polled. Although the court subsequently remarked that it had "no alternative" to removing Mr. Hemphill (1792), the court could have easily called a brief recess, excused the jury and admonished Mr. Hemphill outside its presence. Instead, the court ordered Mr. Hemphill removed and then remarked that his outburst probably evidenced his guilt, a remark that was improper given that the jurors had not yet been polled and their verdict recorded. As a defendant's absence from a material stage of the proceedings is a mode of proceedings error that requires no preservation, or consideration of harmless error analysis, the conviction must be reversed and a new trial ordered. See People v. Rivas, 306 A.D.2d at 12.

POINT X

THE INTEGRITY OF THE GRAND JURY PROCEEDINGS WAS COMPROMISED WHERE THE PROSECUTION FAILED TO PRESENT ANY OF THE EXCULPATORY EVIDENCE RELATING TO THE IDENTIFICATIONS OF NICHOLAS MORRIS; THE COURT ERRED IN DENYING THE DEFENSE MOTION TO DISMISS THE INDICTMENT. U.S. AMENDS. V, XIV; N.Y. CONST., ART. I, §2.

Although at least four eyewitnesses with an excellent opportunity to view the shooter had identified Nicholas Morris in the days following the incident, the prosecution did not present any

of this evidence to the grand jury that indicted Mr. Hemphill. As a result, the prosecution compromised the integrity of the grand jury proceedings by failing to present exculpatory evidence which could have prevented an unfounded prosecution. The court erred in denying the defense motion to dismiss the indictment. This Court should now reverse the conviction and dismiss. U.S. Amends. V, XIV; N.Y. Const., Art. I, §2.

A. The Relevant Facts

On October 31, 2013, defense counsel filed his omnibus motion seeking dismissal of the indictment pursuant to C.P.L. §§210.20(1)(b),(h), because the prosecutor "failed to present exculpatory evidence to the grand jury, which evidence, if believed, would have resulted in a finding of no criminal liability." See Court File: Omnibus Motions and Discovery Requests at ¶C. Counsel's supporting affirmation set forth that the prosecution "had substantial evidence that a person other than Darryl Hemphill, to wit: Nicholas Morris, was in fact the shooter." See Court File: Supporting Affirmation at 2, ¶7. The "evidence against Morris was so strong, and apparently convincing, that he was indicted as the shooter and brought to trial in 2008," counsel explained. Id. Counsel further recounted the physical evidence, including the .9mm ammunition recovered from Morris and that Morris had been identified during police-arranged procedures. Id., at 3. As this evidence, if believed, would establish a complete defense for Mr. Hemphill, the prosecutor was obligated to present this exculpatory evidence

to the grand jury, counsel argued. Id., at 3, ¶8, citing People v. Lancaster, 69 N.Y.2d 20, 26-27 (1986).

The prosecution's answering affirmation conceded that "the People did not present to the grand jury evidence of the identification of Nicholas Morris as the individual who shot and killed David Pacheco, Jr.." See Court File: Answering Affirmation dated December 11, 2013 at 5. According to the prosecution, there was no legal authority in New York State obligating the prosecution "to present exculpatory or evidence favorable to a defendant to the grand jury." Id. at 6.

In reply, counsel set forth that only after filing his motion to dismiss did he learn the names of the witnesses who had identified Morris during the lineup and who subsequently testified in the grand jury. See Court File: Reply Affirmation dated December 23, 2013 at ¶3. This information would have undoubtedly influenced the grand jury, counsel argued, and, as the prosecutor knew the identities of these witnesses, there would have been no need for them to conduct any additional investigation to seek them out. Id., at ¶3-4.

On February 4, 2014, the court denied the motion to dismiss, finding that the prosecution maintained "broad discretion in presenting [its] case to the Grand Jury and [is] not obligated to present to the Grand Jury all evidence in their possession tending to exculpate the accused. See People v. Mitchell, 82 N.Y.2d 509, 515 (1993)." Court File: Decision and Order dated February 4, 2014 at

5. The court observed that the prosecution should have given an instruction with respect to accomplice testimony, but this omission also did not compromise the integrity of the grand jury proceedings. Id.

B. The Prosecutor Compromised The Integrity of The Grand Jury Proceedings By Failing To Disclose That Numerous Eyewitnesses Had Identified Nicholas Morris As The Shooter.

A prosecutor's discretion in presenting his case to a grand jury "is not unbounded" because he "performs a dual role of advocate and public officer, charged with the duty not only to secure indictments but also to see that justice is done." People v. Lancaster, 69 N.Y.2d 20, 26 (1986). In order for the grand jury to perform its proper functions of both investigating crimes and "protecting individuals from needless and unfounded prosecutions," the grand jurors "ought to be well informed concerning the circumstances of the case before" them. Id., at 25; see also People v. Isla, 96 A.D.2d 789(1st Dept. 1989)(recognizing that the grand jury was "entitled to the full story so that it could make an independent decision that probable cause existed to support an indictment"). An exculpatory defense "that if accepted eliminates any grounds for prosecution, should be presented to the grand jury." People v. Morel, 131 A.D.3d 855, 859 (1st Dept. 2015); People v. Goldstein, 73 A.D.3d 946,948 (2d Dept. 2010)("the prosecutor must inform the grand jury of exculpatory defenses" which have the "potential for eliminating a needless or unfounded prosecution").

Consistent with the demands of due process, the prosecutor cannot procure an indictment he knows to be based on misleading evidence. People v. Thompson, 22 N.Y.3d 687, 697 (2014). The prosecutor's duties to deal fairly with the accused and of "candor to the courts" extends to the prosecutor's submission of evidence to the grand jury. Id. A conviction after trial does not cure defective grand jury proceedings. People v. Huston, 88 N.Y.2d 400, 411 (1996).

As misidentification is a complete defense, that would prevent an unfounded prosecution, courts have dismissed indictments where prosecutors have failed to introduce exculpatory evidence to support that defense. See, e.g., People v. Wright, 125 Misc.2d 550, 561 (Sup. Ct., Bronx County 1984)(prosecutor's failure to apprise grand jurors that eyewitness equivocated before identifying defendant at lineup warranted dismissal); People v. Curry, 153 Misc. 2d 61 (Sup. Ct., Queens County 1992)(dismissal due to prosecutor's withholding identifying witness's recantation prior to her testimony inculpating defendant in the grand jury); People v. Lee, 178 Misc. 2d 24 (Sup. Ct., Nassau County 1998)(dismissing indictment due to prosecutor's not disclosing to grand jury that a witness had identified another person as the culprit); accord People v. Archie, 28 Misc. 3d 617 (Sup. Ct., Kings Co. 2010)(dismissing indictment due to prosecutor's failure to present alibi witnesses who could have undermined identification evidence).

Here, there is no dispute that the prosecution did not present

any of the exculpatory identification evidence to the grand jury. There were four witnesses, Brenda Gonzalez, Marisol Santiago, Jon-Erik Vargas, and Anthony Baez, who had interacted with the shooter at close range during a ten-minute altercation in broad daylight and had then identified Morris as the shooter. Three of those witnesses had picked out Morris during a fairly composed lineup within days of the incident. Anthony Baez had selected Morris's picture from a fairly composed photo array the day after the shooting. Some of these witnesses had also testified against Morris in the grand jury proceedings that resulted in his indictment.

The prosecutor failed to present this evidence because he was apparently unfamiliar with the legal standards governing his obligation to present evidence which provided a complete defense to the charges. The defense, which did not know the names or personal information of the witnesses who identified Morris, was not in a position to request that the grand jurors call these witnesses. Therefore, the obligation of candor and fair dealing weighed strongly on the prosecutor, an obligation he failed to honor. Under no view of the evidence did the grand jury receive the full story of the incident to which it was entitled before voting to indict Mr. Hemphill. That the grand jurors also received no instruction concerning how to evaluate Gilliam's accomplice testimony, only further compromised the integrity of the proceedings. See People v. Pacheco, 56 A.D.3d 381 (1st Dept. 2008)(prosecutor should have instructed grand jurors on nature of accomplice testimony, but

omission did not compromise integrity of proceedings where defendant's own testimony and that of four police officers established his participation in the crime).

Accordingly, the court erred in refusing to grant the motion to dismiss. This Court should reverse the conviction and dismiss the indictment with leave for the prosecution to resubmit the case to a different grand jury.

POINT XI

THE COURT ERRED IN REFUSING TO HOLD A FRANKS HEARING WHERE THE DEFENSE CAME FORWARD WITH SPECIFIC ALLEGATIONS DEMONSTRATING THAT THE STATEMENTS IN THE WARRANT APPLICATION TO OBTAIN MR. HEMPHILL'S DNA WERE RECKLESSLY FALSE. U.S. CONST., AMEND. IV; N.Y. CONST., ART. I, §12; FRANKS V. DELAWARE, 438 U.S. 154 (1978).

In April 2011, five years after the incident, the prosecution sought a warrant to obtain Mr. Hemphill's DNA. The affidavit in support of the warrant set forth that an eyewitness has "now come forward" to name Mr. Hemphill as the shooter. In reality, the eyewitness was Ronell Gilliam who had come forward in 2006. The affidavit also set forth that foreign DNA had been discovered on the victim's body. Both the recent discovery of the eyewitness and the statements about the discovery of DNA on the victim's body, were false, and known to be false at the time they were made in support of the warrant. The defense repeatedly sought a hearing to challenge the process through which the warrant was obtained, specifically referencing these glaring misrepresentations. The court repeatedly refused to order a hearing. As the defense alleged

specific false statements in the warrant application, Mr. Hemphill was entitled to a hearing at which to challenge the warrant's legitimacy. The appeal should be held in abeyance and a hearing ordered.

A. The Relevant Facts

In his omnibus motion, counsel sought to suppress the DNA evidence recovered from Mr. Hemphill. See Court File: Omnibus Motion, dated October 31, 2013 at 2, ¶(d). Counsel set forth that a search warrant for Mr. Hemphill's DNA had been issued in April 2011 based on an affidavit submitted by Detective Nicholas Ciuffi. Id., Affirmation In Support at 4, ¶9. Counsel explained that the affidavit alleged that an eyewitness "has now come forward to name Darryl Hemphill as the shooter." Id., at ¶10 [emphasis added]. The defense contested that such a witness had come forward at the time of the warrant application. Id. Counsel also alleged that the witness's information was unreliable because it was "contradicted" by his previous statements and other evidence in the case. Id. Had the information provided by the witness been reliable, counsel argued, the police would not have waited two additional years to arrest Mr. Hemphill after obtaining his DNA. Id. Even following the DNA match, a notation in the discovery materials set forth that there was "insufficient evidence to arrest pending corroboration from additional witnesses or evidence." Id.

Counsel also set forth that Ciuffi's affidavit falsely asserted that DNA had been left upon the body of the deceased. "There was

no DNA taken from the victim," counsel explained. Id. at 5, ¶ 11.

The prosecutor's response insisted that the defense had not moved to suppress tangible evidence or to controvert the warrant; the prosecutor opted not "to respond to the noticed motion until such time as the defendant moves the court to suppress tangible evidence." Court File: Answering Affirmation dated December 11, 2013, at 6-7. The court held the motion to controvert the search warrant and suppress the DNA evidence in abeyance and ordered a Darden hearing, as the court's finding of probable cause had been based upon information obtained from a confidential informant who was not brought before the court prior to the issuance of the warrant. Court File: Decision and Order dated 2/4/14 at 5-6.

On May 29, 2015, the court conducted the ex parte Darden hearing and found the informant's testimony both credible and reliable. The court further found that the Aguilar-Spinelli test was satisfied and that there existed probable cause for the issuance of the warrant. Id., Decision and Order dated 7/28/15.

On October 19, 2015, prior to trial, counsel announced that he had recently received Rosario material which included the Darden haring minutes (JS2. 176-177). Those minutes clarified that Gilliam was the confidential informant to whom Ciuffi referred in his affidavit, counsel explained (JS2. 177). Gilliam had not just come forward when the prosecution applied for the warrant. The prosecution had Gilliam's statements implicating Mr. Hemphill in May 2006, counsel explained, which undercut the veracity of Ciuffi's

affidavit (JS2. 177, 179). Ciuffi's statement that a new witness had come forward in 2011 was false, counsel argued (JS2. 180).

The prosecutor denied that Ciuffi "ever said that" (JS2. 181). Counsel responded the defense was entitled to a hearing to examine the reliability of Ciuffi's statements (JS2. 182). The court responded that the timing of Gilliam's coming forward was not important (JS2.183). Counsel explained that the prosecution did not believe Gilliam in 2006 because Morris was being prosecuted at that time (JS2. 184). Also, a police report from July 6, 2011, set forth that there was insufficient evidence to arrest Mr. Hemphill without corroborating Gilliam's statements (JS2. 184). The court responded that the prosecution concluded there was sufficient evidence to put into the grand jury (JS2. 184). Counsel excepted to the court's ruling based on Ciuffi's material false statements which were the basis upon which probable cause was determined for the DNA warrant (JS2. 185). The court observed Ciuffi's statements were "true," because Mr. Hemphill had been identified, which established probable cause for issuance of the DNA warrant (JS2. 186).

The prosecutor later objected that Cuiffi never referred to Gilliam in his affidavit (JS2. 344). Counsel responded that Ciuffi had specifically sworn that an eyewitness "has now come forward to name [Mr. Hemphill] as the shooter," which plainly suggested a new witness had been discovered as of 2011, the time of the warrant application; in truth Gilliam had come forward and given statements in 2006 which the police had deemed unreliable (JS2. 345). The

court ruled the defense application for a hearing "inconsequential" (JS2. 345).

B. The Defense Was Entitled To A Hearing To Challenge Ciuffi's False Statements In Support Of The DNA Search Warrant.

While a sworn affidavit in support of a search warrant is presumed valid, a defendant is entitled to an evidentiary hearing into the warrant's validity where there are specific allegations of deliberate falsehood or reckless disregard for the truth, and those allegations are accompanied by an offer of proof. Franks v. Delaware, 438 U.S. 154, 171 (1978). The offer of proof should specify the portion of the warrant affidavit claimed to be false and be accompanied by a statement of supporting reasons. Id.; see also People v. Solimine, 18 N.Y.2d 477, 480 (1966)(to be entitled to a hearing defendant "must throw doubt on the truthfulness of the affiant's allegations"); People v. Franklin, 137 A.D.3d 550 (1st Dept. 2016)(defendant not entitled to hearing where he failed to show that affiant's statement about defendant's apartment number was knowingly false or made in reckless disregard of the truth); People v. Seybold, 216 A.D.2d 935 (4th Dept. 1995)(remitting for a Franks hearing where defendant set forth specific challenge to veracity of affidavit by alleging that informant had not been present during the controlled buy).

Here, counsel's specific allegations relating to Ciuffi's affidavit were sufficient to warrant the hearing counsel requested. There was no dispute that the eyewitness to whom Ciuffi referred in

his affidavit was Ronell Gilliam. Neither the prosecutor nor the court claimed otherwise. There was no other eyewitness who identified Mr. Hemphill at trial. Nor was there any dispute that Ciuffi represented in 2011, at the time of the warrant application, that Gilliam had "now come forward" to identify Mr. Hemphill as the shooter. The plain import of this language was that a new witness had been discovered through the police investigation. The phrasing of Ciuffi's affidavit purposefully covered up that the alleged eyewitness had been known for five years, but his identification of Mr. Hemphill deemed unreliable by both the police and prosecution in light of the strong evidence against Morris and Gilliam's lifelong friendship with him.

Without Ciuffi's intentionally misleading phrasing, a neutral magistrate would have questioned Gilliam's reliability since the police had not arrested Mr. Hemphill in 2006 when Gilliam first identified him. Instead, the prosecution proceeded against Morris. Notably, the search warrant application did not allege that Gilliam was a reliable witness who had provided trustworthy information in the past. See People v. Rivera, 283 A.D.2d 202 (1st Dept. 2001)(search warrant application insufficient to support a finding of probable cause where it failed to provide basis for concluding that the confidential informant was reliable); People v. Martinez, 80 N.Y.2d 549 (1992)(probable cause necessary for the issuance of a search warrant is lacking if the warrant application is supported by confidential informant's statements and informant was not

questioned by the issuing court and his reliability has not been established).

Counsel also set forth that Ciuffi's affidavit was false with respect to the significance of the DNA evidence itself. While foreign DNA found on the body of the deceased would be highly probative of guilt, and Ciuffi represented that such DNA was present in this case, that statement was false.

In sum, the defense was entitled to a Franks hearing to explore the validity of the DNA search warrant. The appeal should be held in abeyance and the matter remanded for such a hearing before a different judge. See People v. Seybold, 216 A.D.2d at 936.

POINT XII

MR. HEMPHILL WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL DUE TO THE SEVEN-YEAR DELAY IN HIS PROSECUTION WHERE THE PROSECUTION FAILED TO ADEQUATELY EXPLAIN THE DELAY. U.S. CONST., AMENDS. VI, XIV; N.Y. CONST., ART. I, §6, 12.

As of October 2006, the prosecution was aware of every material witness called at Mr. Hemphill's trial and that DNA capable of comparison had been recovered from the blue sweater obtained from Gilliam's apartment. Yet the prosecution did not indict Mr. Hemphill until April 2013. There was no reasonable justification for this delay, other than the prosecution's botched prosecution of Morris, followed by additional unjustified delay in pursuing the prosecution of Mr. Hemphill. The seven-year delay denied Mr. Hemphill his due process right to a speedy trial. The court erred in denying the motion to dismiss the indictment on speedy trial

grounds. Accordingly, this Court should now reverse and dismiss. U.S. Amends. V, XIV; N.Y. Const., Art. I, §6.

A. Relevant Facts

On October 31, 2013, defense counsel filed a motion to dismiss the indictment based on pre-indictment delay. See Court File: Notice of Motion to Dismiss Pre-Arrest Delay. Counsel's motion recounted the procedural history of the case, Morris's arrest and prosecution, the obtaining of Mr. Hemphill's DNA in 2011, and his subsequent arrest years later in 2013. Id., at 2-3. Counsel set forth that "at all times up until his arrest," law enforcement was "aware of Mr. Hemphill's address." Id., at 2.

Counsel argued that the delay in Mr. Hemphill's prosecution had been unreasonable and constituted a denial of due process. Id., at 3. As there had been a protracted delay in prosecution, the burden was on the prosecution to establish good cause for the delay. Id., citing People v. Singer, 44 N.Y.2d 241, 254 (1978). A defendant is entitled to dismissal, even in the absence of prejudice where there is no just cause for the delay, counsel argued. Id., at 4.

Counsel recounted the five factors set forth by the Court of Appeals in People v. Taranovich, 37 N.Y.2d 442 (1975) to analyze whether an indictment should be dismissed on constitutional speedy trial grounds: the extent of the delay, the reason for it, the nature of the charge, pre-trial incarceration and prejudice. Id., at 5-7. The extent of the delay supported dismissal counsel argued because the seven years between the crime and the indictment was

extraordinary. Id., at 5. There was no satisfactory reason for the delay, as the prosecution had obtained all the relevant evidence early in the investigation. Id., at 6. Counsel conceded that the charges were serious and set forth that Mr. Hemphill was being held without bail since the date of his arrest. Id. Finally, counsel argued that the defense had been prejudiced because the crime took place on a crowded block with many witnesses who could have been interviewed to mount a defense. Id. These witnesses were now unavailable and their memories had faded, irreparably harming Mr. Hemphill's ability to mount a persuasive defense, counsel argued. Id. at 6-7.

The prosecution responded that the delay should be calculated from the date the DNA results became available to the prosecution, June 24, 2011, "less than two years." Court File: Answering Affirmation, dated December 11, 2013 at 9. According to the prosecutor, the delay was caused by the misidentification of Morris, the procurement of relevant DNA samples, and continued investigatory efforts to acquire evidence. Id., at 10-11. The prosecution dismissed the defense claims of prejudice as "speculative" because counsel had not submitted an affidavit from an investigator demonstrating that witnesses could not be located. Id., at 11-12.

The court denied the motion because the prosecution had a good faith basis to proceed against Morris. Decision and Order dated February 4, 2014. According to the court, between April 2008 and April 2011, "defendant's whereabouts were unknown," a justification

for the delay never alleged by the prosecution. Id., at 2; compare Answering Affirmation at 11 (explaining delay was due to Morris misidentification, procurement of relevant DNA samples, DNA testing, and investigatory efforts to corroborate DNA evidence). The court relied on Ciuffi's affidavit setting forth that Mr. Hemphill had only recently been located at the time of the DNA warrant. Id., at 2-3. Following the DNA match, the prosecution continued to attempt to locate corroborating evidence, the court found. Id., at 3. Only in April 2013 did the prosecution discover a new corroborative witness that allowed the case to proceed, the court ruled. Id., at 3.

Analyzing the remaining Taranovich factors the court characterized the seven-year delay "not excessively lengthy" given the murder charges and Mr. Hemphill's remaining at liberty until his April 2013 arrest. Id., at 4. The court dismissed the defense claims of prejudice as "conjecture." Id., at 4.

Counsel subsequently renewed the speedy trial motion prior to trial after receiving the Rosario material (JS2. 176-180). The court had justified the delay because a new witness had come forward, but the discovery materials revealed that no new witnesses had done so, counsel argued (JS2. 177). The prosecutor countered that the new witness was "Justin" who established the shooter was wearing a "blue sweater" (JS2. 178). Counsel also argued that Ciuffi's affidavit was false concerning the timing when a new witness came forward (JS2. 179-180). The court found Ciuffi's

affidavit reliable (JS2. 185).

B. The Court Erroneously Applied The *Taranovich* Factors In Denying Mr. Hemphill's Speedy Trial Motion.

The Sixth Amendment to the United States Constitution and the New York State Constitution guarantee the right to a speedy trial. People v. Singer, 44 N.Y.2d 241 (1978). The prosecution has the obligation to bring the defendant to trial promptly. Barker v. Wingo, 407 U.S. 514 (1972). New York's constitution provides even broader due process protection for the accused to obtain a speedy prosecution without unjustified delay. People v. Singer, 44 N.Y.2d at 253. The speedy trial right protects both the accused and society's interest in speedy resolution of criminal charges. Barker v. Wingo, 407 U.S. at 519.

The Court of Appeals has identified five factors for courts to examine to determine whether a defendant's constitutional speedy trial right has been violated: 1) the extent of delay; 2)the reason for the delay; 3) the nature of the underlying charge; 4)whether there has been a period of pretrial incarceration; and 5)whether there is any indication that the defense had been impaired. People v. Taranovich, 37 N.Y.2d 442, 445 (1975). Here, the court erroneously analyzed significant aspects of Mr. Hemphill's speedy trial claim.

With respect to the extent of the delay, the court ruled that seven years was "not excessively lengthy" and deemed this factor to "strongly militate in favor of denying" Mr. Hemphill's claim.

Decision and Order at 4. To the contrary, this Court has recently recognized in the context of a murder prosecution that "there is no question that the six-year delay between the shooting. . .and defendant's guilty plea. . . was 'extraordinary'." People v. Wiggins, 143 A.D.3d 451, 455 (1st Dept. 2016). This extraordinary delay weighed in favor of granting defendant's claim and lead to the consideration of the second factor, the reason for the delay. Id.

A "protracted delay, certainly over a period of years" places the burden "on the prosecution to establish good cause." People v. Singer, 44 N.Y.2d at 254. Here, once again, the court erred in analyzing the reason for the delay. Every piece of material evidence introduced at Mr. Hemphill's trial was available to the prosecution as of October 2006, the time when OCME tests recovered the DNA sample on the blue sweater and advised that this sample was capable of comparison.

The prosecution's response offered no explanation for why it had not moved for DNA testing in 2006, rendering its failure to exercise due diligence in this regard uncontested. See People v. Rahim, 91 A.D.3d 970, 971-972 (2d Dept. 2012)(in context of C.P.L. §30.30 motion finding prosecution failed to exercise due diligence in failing to request DNA testing for 3 ½ months); People v. Wearen, 98 A.D.3d 535, 538 (2d Dept. 2012)(charging time to prosecution where prosecution had not adequately explained delay in obtaining DNA results). Nor did the prosecution claim, contrary to the court's findings, that Mr. Hemphill could not be located in order

to obtain his DNA sample. Ciuffi's affidavit, on which the court relied, was demonstrably false, see Point XI, which is probably why the prosecutor did not rely upon it in seeking to explain the delay.

The additional two-year delay after Mr. Hemphill was determined to be the source of DNA on the sweater, was also not adequately explained. While the prosecution claimed it had uncovered another witness "Justin," during this time period (JS2. 178), an apparent reference to Justin Bautista, this witness testified to nothing more than the shooter's wearing a blue sweater and did not identify the one introduced into evidence. That the shooter was wearing a blue top, was not a contested issue, as multiple eyewitnesses testified to this fact. The discovery of an eyewitness who offered cumulative testimony hardly sufficed to excuse two additional years of delay.

While there was no dispute that this case involved serious charges and that Mr. Hemphill was not incarcerated prior to his 2013 arrest, the court erred in dismissing the defense claims of prejudice as conjectural. This incident took place on a crowded street in broad daylight with numerous eyewitnesses present. Many of those witnesses identified Morris as the shooter immediately afterwards. But by the time of Mr. Hemphill's trial, they claimed to have made statements to the police undermining their identifications. The passage of time undercut the compelling nature of the Morris identifications and allowed the witness accounts to shift.

In any event, given the extraordinary delay and the

prosecution's failure to offer any reasonable justification for its failure to act with due diligence to obtain DNA comparisons shortly after October 2006, dismissal is warranted even in the absence of any showing of prejudice. See People v. Montague, 130 A.D.3d 1100, 1102 (3d Dept 2015)(given extraordinary five-year delay which was not adequately justified by the prosecution, dismissal proper even without any showing of prejudice in child pornography case). Accordingly, as the motion court misapplied the relevant governing factors in analyzing the motion to dismiss, this Court should reverse that ruling and dismiss the indictment.

POINT XIII

THE COURT ERRED WHEN IT APPLIED THE WRONG LEGAL STANDARD TO DENY THE DEFENSE REQUEST FOR A SINGLE ADJOURNMENT OF SENTENCE TO ALLOW COUNSEL TO FILE A C.P.L. §330.30 MOTION ALLEGING SERIOUS JUROR MISCONDUCT BASED ON SPECIFIC ALLEGATIONS THAT THE JURY FOREMAN KNEW A PROSECUTION WITNESS AND HAD SPOKEN TO HER ABOUT THE CASE DURING THE TRIAL. U.S. CONST., AMEND. XIV; N.Y. CONST., ART. I, §6.

Prior to the date Mr. Hemphill was scheduled to be sentenced, counsel wrote to the court and prosecutor to advise them that he would be seeking a single adjournment of sentencing. See Court File: letter dated December 28, 2015. When counsel appeared on January 6, 2016, he advised the court that he had recently learned that the jury foreman, unbeknownst to the defense, was friends with Mr. Hemphill's estranged sister-in-law. Not only was the juror friends with a prosecution witness, a fact not disclosed during the trial, counsel alleged that the foreman had spoken with the witness during the trial. These allegations cast serious doubt on whether

Mr. Hemphill had received the unbiased jury trial to which he was constitutionally entitled. But when counsel sought a single adjournment to further develop the issue and file a C.P.L. §330.30 motion to set aside the verdict, the court refused to postpone sentencing, finding that counsel could file a C.P.L.§440.10 motion instead without Mr. Hemphill suffering any prejudice. This ruling, based on the court's misunderstanding of key procedural differences between the two motions was erroneous. Moreover, the court then forced counsel to proceed to sentencing although he was not prepared. This ruling denied Mr. Hemphill his rights to counsel and appeal, and warrants holding the appeal in abeyance and remanding the matter for de novo sentencing proceedings before a different judge. U.S. Const. Amend. VI, XIV, N.Y. Const., Art. I, § 6.

The decision whether to grant an adjournment is ordinarily committed to the sound discretion of the trial court, but "when the protection of fundamental rights has been involved in requests for adjournments, that discretionary power has been more narrowly construed." People v. Spears, 64 N.Y.2d 698 (1984)(abuse of discretion as a matter of law for court to deny request for brief continuance for counsel to consult with his client about taking the stand, implicating defendant's fundamental right to confer with counsel).

Where a basic right is implicated, a court abuses its discretion when for the sake of convenience or expediency it denies a good faith request for a brief adjournment See People v. Foy, 32

N.Y.2d 473, 477 (1973)(reversible error where court denied adjournment to locate witness); People v. Rohadfox, 114 A.D.3d 1217 (4th Dept. 2014)(court abused its discretion as a matter of law in refusing defendant's request for short adjournment to retain substitute counsel where attorney had expedited the trial without defendant's consent); People v. Susankar, 34 A.D.3d 201 (1st Dept. 2006)(court should have granted adjournment of sentencing where counsel stated he had not yet been able to speak with defendant's family members); People v. Jones, 227 A.D.2d 982 (4th Dept. 1996)(court erred in denying motion for adjournment of sentencing so that counsel could investigate defendant's mental state at time of plea to determine whether plea was voluntary); compare People v. Spears, 24 N.Y.3d 1057(2014)(no abuse of discretion to deny adjournment where defendant requested it at sentencing hearing eight weeks after pleading guilty, in order to consider whether he should move to withdraw the plea because it was "a big decision", where no basis for plea withdrawal was cited and none was apparent).

Here there can be no doubt that counsel's request for a single adjournment to file a motion alleging serious juror misconduct implicated Mr. Hemphill's core constitutional right to be tried by an impartial jury. See People v. Southall,156 A.D.3d 111(1st Dept. 2017)(defendant denied his right to impartial jury where juror's concealment of material information during voir dire deprived defendant of impartial jury comprised of 12 jurors whom he had selected and approved); see also C.P.L. §330.30(2)(court may set

aside verdict based on juror misconduct which might have affected a substantial right of the defendant). Counsel set forth that he had obtained a sworn affidavit from Elisa Hemphill admitting to her relationship with the jury foreman, but that the juror could not be contacted because he was out of town for the holidays. Counsel further alleged that not only did Elisa know the jury foreman, they had discussed the case during trial.

Although the court acknowledged that counsel was acting in "good faith," it denied the request for a single adjournment because the defense could raise "exactly the same claims" in a post-judgment 440 motion (S. 4). The court was wrong. As counsel argued, a C.P.L. §330.30 motion and C.P.L. §440.10 motion are procedurally distinct. Most critically, claims raised in a 330 motion are part of the record on appeal and are subject to review on direct appeal as a matter of right. In contrast, a defendant must petition for permission to appeal the denial of a C.P.L. §440.10 motion. See C.P.L. §§450.15(1), 460.15 (setting forth that defendant must obtain certificate granting leave to appeal the denial of a C.P.L. §440.10 motion). Additionally, because a C.P.L. §330.30 motion is part of the trial proceedings, a defendant is entitled to the assistance of counsel to file such a motion. In contrast, following sentence, a criminal defendant in New York must apply for appellate counsel, who does not have any obligation to file a collateral motion. See Coleman v. Thompson, 501 U.S. 722, 753 (1991) (there is no right to counsel in state collateral proceedings). These distinctions were

particularly critical here where the court expressed skepticism of all claims involving juror misconduct.

As the court's decision to deny counsel's request for a single adjournment was grounded in legal error, it cannot be deemed an appropriate exercise of discretion. People v. Williams, 56 N.Y.2d 236, 239(1982)(where court applied an erroneous legal standard in determining Sandoval ruling there was no "indication that the court engaged in any exercise of discretionary power to weigh the various relevant factors"). The court then forced counsel to proceed to sentencing without affording him an opportunity to prepare a pre-sentencing memorandum advocating for less than the maximum sentence. This ruling further compromised Mr. Hemphill's right to create an appellate record.

In sum, the court's denial of counsel's request for a single adjournment to file a motion to set aside the verdict based on serious juror misconduct was erroneous. Accordingly, the matter should be remanded for de novo sentencing proceedings before a different judge to give counsel an opportunity to file the motion and submit additional mitigating sentencing arguments.

POINT XIV

THE 25-YEARS-TO-LIFE PRISON SENTENCE IS EXCESSIVE WHERE MR. HEMPHILL WAS A FIRST OFFENDER WITH A HISTORY OF EMPLOYMENT AND SUPPORTING HIS FAMILY. U.S. AMEND. XIV; N.Y. CONSGT., ART. I, §6.

Mr. Hemphill stood before the court at sentencing as a 37-year-old man with no prior contacts with the criminal justice system.

He had supported his family as a small business owner for many years. Assuming he committed this crime, but see Point I, it was entirely aberrational. Under these circumstances the maximum sentence imposed by the court is excessive and should be reduced in the interest of justice.

This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible range," and even though it was not an abuse of discretion. People v. Delgado, 80 N.Y.2d 781, 783 (1992). This sentence review power may be exercised in the interest of justice, without deference to the trial court. Id.; People v. Edwards, 37 A.D.3d 289 (1st Dept. 2007).

In determining an appropriate sentence, a court should consider the crime charged, the particular circumstances of the offender, and the purposes of a penal sanction. People v. Farrar, 52 N.Y.2d 302, 305 (1981); People v. Suitte, 90 A.D.2d 80, 83 (2d Dept. 1982). The objectives of punishment include not only deterrence, rehabilitation, retribution, and isolation, People v. King, 146 A.D.2d 648 (2d Dept. 1989); People v. Suitte, 90 A.D.2d 80, but also the "promotion of [the defendant's] successful and productive reentry and reintegration into society . . ." Penal Law section 1.05[6]. The sentencing court must be guided by the overriding principle that a minimum sentence should be imposed consistent with the public's protection, the offense's gravity, and the defendant's rehabilitative needs. People v. Notey, 72 A.D.2d 279, 282-83 (2d

Dept. 1980).

Here, the maximum sentence imposed by the court reflected only the gravity of the crime. But while the prosecution consistently sought to characterize the offense as a brutal execution of a child, that is not what happened here. There was no dispute the child was not the intended victim and that this crime arose from an argument that escalated between adult men.

Moreover, Mr. Hemphill up until his conviction had no prior contacts with the criminal justice system. The court file is brimming with letters from family and friends -- submitted in connection with the bail application, since the court would not allow counsel time to prepare a pre-sentencing memorandum -- attesting to Mr. Hemphill's kindness and good character. A maximum sentence serves no purpose here. A reduced sentence will merely give the parole board a chance to review Mr. Hemphill's prospects for re-entry after 15 years without any guarantee of release. Indeed, release after the first appearance is unlikely given the nature of the offense. Accordingly, this Court should reduce the sentence to the minimum term of 15 years to life.

CONCLUSION

FOR THE REASONS SET FORTH IN POINTS I, X AND XII, THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; FOR THE REASONS SET FORTH IN POINTS II-IX, THE CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED; FOR THE REASON SET FORTH IN POINT XI, THE APPEAL SHOULD BE HELD IN ABEYANCE AND THE MATTER REMITTED FOR A FRANKS HEARING; FOR THE REASONS SET FORTH IN POINT XIII, THE MATTER SHOULD BE REMITTED FOR DE NOVO SENTENCING PROCEEDINGS; FOR THE REASONS SET FORTH IN POINT XIV, THE SENTENCE SHOULD BE REDUCED.

Respectfully submitted,

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February 2018

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DARRYL HEMPHILL,

Defendant-Appellant.

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 1221/13.

2. The full names of the original parties were the People of the State of New York against Darryl Hemphill.

3. This action was commenced in Supreme Court, Bronx County.

4. This action was commenced by the filing of an indictment.

5. This appeal is from a judgment convicting appellant, following a jury trial of murder in the second degree, P.L. §125.25(1) and sentencing him to 25 years to life in prison (Barrett, J., at trial and sentence).

6. This is an appeal from a judgment of conviction rendered January 6, 2016.

7. Mr. Hemphill has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

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Argued by
JORDAN K. HUMMEL

NEW YORK SUPREME COURT
Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DARRYL HEMPHILL,

Defendant-Appellant.

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Respondent,

-against-

DARRYL HEMPHILL,

Defendant-Appellant.
----------X

RESPONDENT'S BRIEF

STATEMENT

Darryl Hemphill appeals from a judgment of the Supreme Court, Bronx County, rendered January 6, 2016, convicting defendant, by jury verdict, of second-degree murder (Penal Law §125.15[1]), and sentencing him to an indeterminate term of from twenty-five years to life incarceration (Barrett, J.).

Defendant is incarcerated.

QUESTIONS PRESENTED

(1) Whether the second-degree murder verdict was legally insufficient or against the weight of the evidence when testimony by a cooperating witness, multiple eyewitnesses, and law enforcement, hundreds of crimes-scene photographs, expert DNA, ballistics, and medical testimony, and physical evidence, established the elements of the crime.

(2) Whether the court violated defendant's confrontation right by admitting a non-co-defendant third-party's plea allocution to a violent felony offense as a statement against penal interest, in response to a third-party culpability defense against that third-party advanced during opening and cross-examination, where the third-party had no prior convictions and was unavailable due to exclusion from the United States as a result of the plea.

(3) Whether defendant abandoned his request to refresh a witness' recollection with prior grand jury testimony where he directed the witness' attention to her prior testimony in a different proceeding and briefly sought to call the grand jury stenographer from the later proceeding to correct his error, but did not raise the issue again until the jury was deliberating.

(4) Whether the court abused its discretion in permitting the People to briefly lead two hostile prosecution witnesses, associated with defendant, who feigned memory loss and to cross-examine a defense witness about his criminal history that he denied on direct and cross-examination.

(5) Whether the court thwarted defendant's right to present a defense, after permitting the People to introduce evidence of defendant's consciousness of guilt through his immediate flight out-of-state following the murder and evidence that the third-party consented to a DNA swab to complete the narrative of the police investigation, while precluding defendant from presenting evidence that weapons and photos of the third-party with weapons (none of which matched the caliber of the murder weapon) were recovered from the third-party's apartment, that the third-party may have reported to a local media station because his family was arrested, of the third-party's alleged "confession" to a friend as a statement against penal interest, and double hearsay through the case detective that defendant had hired an attorney to communicate with police early in the investigation.

(6) Whether the court abused its discretion in admitting the case detective's testimony about the recovery of a sweater eyewitnesses identified as worn by the shooter, that the third-party reported to a local news station where he was arrested, did

not have a tattoo on his forearm as some eyewitnesses reported the shooter did, and consented to a DNA swab, and that the cooperating witness' attorney's testimony about conversations with defendant's former attorney about how he was retained and paid as evidence of defendant's consciousness of guilt.

(7) Whether the court abused its discretion in admitting a limited selection of photographs of the victim and the medical examiner's testimony to prove essential elements of the charged crime.

(8) Whether the prosecutor's comments on summation, responding to defense counsel's summation and reviewing the evidence at trial, constituted misconduct by appealing to the juror's emotions, vouching for the integrity of the prosecutor's office, and denigrating defense counsel.

(9) Whether the court properly removed defendant from the courtroom after the jury's verdict was announced where he yelled at the jury and requested to be removed.

(10) Whether the court properly denied defendant's motion to dismiss the indictment because the prosecution did not present evidence that eyewitnesses had previously identified a third-party as the shooter.

(11) Whether the court properly determined probable cause supported the search warrant for a buccal swab of defendant's saliva to obtain a DNA sample, based on credited testimony of a civilian witness.

(12) Whether, in a homicide prosecution, the court properly denied defendant's CPL §30.20 constitutional speedy trial motion alleging an improper seven-year pre-arrest delay where the People pursued an investigation against and prosecution of a third-party and, later, had good cause for delay to reinvestigate.

(13) Whether the court properly denied defendant's letter request for an adjournment in sentencing, received by the court the day before sentencing, where counsel withheld the underlying reason for his request–to prepare a CPL § 330.30 motion alleging improper contact between a juror and the People's hostile witness—until the day of sentencing and the court invited defendant to file his same claim under CPL §440.10.

(14) Whether defendant's sentence is fair and proper.

THE FACTS

The Indictment[1]

By Indictment 1221/2013, filed April 23, 2013, defendant was charged with two counts of second-degree murder (Penal Law §§125.25[1],[2]).[2]

The Trial

The People's Case

A. David Pacheco, Jr.

On April 16, 2006, Easter Sunday, Joanne Sanabria put her son, David Pacheco, Jr., and two daughters in their minivan to go to her sister's house. When she reached a stoplight on Tremont Avenue, she heard a loud sound. She began screaming when she saw "the look" on her two-year-old son's face.[3] Angel Cruz, a former EMT, heard the gunshots and offered to help. He performed CPR on David in the street and in a cab to Bronx Lebanon hospital. David could not be saved (Sanabria: T.55-57; Cruz: T.61-63).[4]

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[1] Numerals preceded by "PT," "VD," "T," and "S," refer to pre-trial proceedings between September 21 and October, 7 2015; voir dire beginning on October 14, 2015, jury trial, and sentencing, respectively.

[2] After the final charge conference, only an intentional theory was submitted to the jury.

[3] The jurors, escorted, visited the crime scene (T.1241-43).

[4] Dr. James Gill, Deputy Chief Medical Examiner for Bronx County, and an expert in forensic pathology, performed David Pacheco, Jr.'s autopsy. The bullet entered David's left side near his underarm, travelled through his lower lobe, left lung, diaphragm, and spinal column and exited through his upper right back. These injuries would have caused David's lung to collapse causing difficulty breathing, bleeding and pain to his lung, spleen, and spinal cord, likely resulting in paralysis,

B. The Fight

Earlier that day, around 1:30 p.m., Jose Castro, Brenda Gonzalez, Marisol Santiago, Juan Carlos Garcia, and Jon Erik Vargas walked home toward Harrison Avenue after shopping on Burnside Avenue.[5] Vargas' tapped on Castro's shoulder and asked if he knew the guy across the street; the guy was staring and said, "What's up." Across the street stood two African American men; one heavyset, approximately 400 lbs., with his hair in braids and cockeyed, wearing a white t-shirt and dark pants—defendant's cousin Ronnell Gilliam or "Burger,"[6]—and the other, defendant, was taller and slimmer, wearing a blue sweater and a baseball hat (Castro: T.257-60; Gonzalez: T.441-42; Garcia: T.803-05,808-10; Santiago: T.839-40; Vargas: T. 875-77; R.Gilliam: T.985-87).

A fight broke out; Burger against Garcia and Vargas. Gonzalez and Castro tried to break up the fight and calm everyone down; Castro was hit in the head three times. The fight continued on top of Michelle Gist's car, which was parked near Gist's

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and caused his death. David's death would not have occurred instantaneously, but would have taken some time as he lost blood and oxygen levels (T.925,927-29,932-34).

[5] At the time, Castro and Gonzalez were married. Santiago is Gonzalez' daughter. Santiago was dating Garcia and learned she was pregnant the day after the shooting. Vargas was Garcia's cousin (Castro: T.257; Gonzalez: T.441; Garcia: T.803-04; Santiago: T.839).

[6] Gilliam will be identified as Burger hereinafter. He testified against defendant as part of a cooperation agreement: he pleaded guilty to attempted second-degree murder in exchange for a promised sentence of five years' incarceration, if he testified truthfully. As of trial, Burger had been incarcerated for approximately four years, thus, even if he received the full benefit of his cooperation, he would still be required to serve eight months more (T.987,969-71,974,1020; Exhibit 118, Cooperation Agreement: T.973).

mother's house at 1812 Harrison Avenue. Gist recognized the two African American men, who were about the same age as her son, from the neighborhood; the heavier one Gist knew as "Buros," and the slimmer man she knew as "Darrell" or "D." As the fight moved into the street, Vargas was hit by a van and fell as Garcia and Burger engaged in a fist fight. After the slimmer man left, Vargas began fighting Burger, eventually chasing him up the block where the slimmer man had run (Castro: T.261-63; Gist: T.343,349,351; Gonzalez: T.443-44; Garcia: T.805-06; Santiago: T.841-42; Vargas: T.875,881; R.Gilliam: T.977-78,986,990-94).

An unknown man approached the fight, said he was an off-duty cop, and told them to break it up. Vargas continued to challenge Burger to fight and spit on him. Burger responded, "Listen, go get your gun. I'm going to kill you," or "I'll shoot you" (Vargas: T.888, R.Gilliam: T.977-78,994-95). The conflict broke up.

The family caught their breath in front of 1731 Harrison Avenue, where Castro lived. Garcia went across the street to a bodega to buy a water for Vargas, who remained disoriented and dizzy from being struck by the van (Castro: T.265-66; Gonzalez: T.450; Garcia: T.812-13; Santiago: T.843; Vargas: T.882-84). Nearby, Burger called Nick Morris and defendant to join him, saying, "This dude try to jump me, come through." They agreed to come.[7] Defendant arrived at the scene in a blue car, got out, and asked Burger "where they at?," referring to the people who tried to jump him. Burger pointed

[7] Castro and Santiago recalled seeing Burger on the phone at this time, but could not hear what he said (Castro: T.265; Santiago: T.843).

to them. Defendant brandished a gun. Burger told him to chill and not to shoot (R.Gilliam: T.978-79,996,998).

The family noticed the man in the blue sweater had returned. He stood across the street on the corner of Harrison and Tremont Avenues holding a gun (Castro: T.267,272,292-93; Gonzalez: T.451,457-58; Garcia: T.812-15; Santiago: T.843-44; Vargas: T.882-84). Some witness recalled he had a tattoo on his right forearm. The family retreated into the building; Garcia arrived last since he ran across the street while the man in the blue sweater, defendant, fired multiple shots at him. After the shooting, Burger saw a car speed down the block (Castro: T.268; Gist: T.344; Gonzalez: T.459-60; Garcia: T.812; Santiago: T.844; R.Gilliam: T.979, 998-1000).

Separately, Milagros Pagan, her then-husband, Alvin Bridgewater, her friend, Melissa Gonzalez, her friend's boyfriend, Anthony Baez, and her two sons, Aaron and Justin Bautista, were parked on Harrison Avenue preparing to attend an Easter picnic. They heard a commotion, people screaming, and saw a crowd of African American and Hispanic men fighting. Bridgewater and Baez approached the group and attempted to break up the fight and an African American man wearing a long-sleeved knitted blue sweater and blue jeans ran from the scene up Morton Avenue.[8] The fight subsided

[8] Witnesses differed on the details of the blue sweater. Santiago said the shooter wore a blue sweater, not a t-shirt, with the sleeves rolled up revealing a tattoo (T.863). Gist, who had known defendant since he was a child, said he had long braided hair under a hat and wore a blue/periwinkle light blue sweater and earrings (T.349,351-52,379). Burger said defendant wore a blue sweater (T.987). Ardell Gilliam, defendant's grandmother, saw him in her apartment that day wearing a long-sleeved blue sweater (T.602,611-12). Baez described the sweater as long-sleeved, light blueish; he did not see any design (T.1160,1171). Bautista recalled the shooter wore a blue sweater with a short-sleeved

momentarily so Pagan went on her way. Ten minutes later, Baez saw a black car driven by an African American woman pull up, an African American man exit the car, and the heavy-set African American man come out of a building and tell the other man, "They're over there, hold up." From the parked car, Bautista saw the men return and, just a few feet away, the same man wearing a blue sweater fire approximately five gunshots towards Tremont Avenue (Pagan: T.1080-81,1083-84,1087-88; Bautista: T.1091-93; Baez: T.1157-61).[9]

C. The Investigation

Around 2:00 p.m., police began the investigation at Bronx Lebanon Hospital, where David received medical attention. Det. Ronald Jimick attempted to speak to David's family to ascertain if he was the target of the shooting (T.654-56). Crime Scene

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undershirt, and did not remember if it had buttons, a design, or short sleeves (T.1092,1096-98). Pagan testified the sweater was a long-sleeved knitted blue sweater. She could not recall if she saw forearms, but assumed she could not due to the long sleeves, and did not recall if there were any buttons or designs (T.1088). Castro said it was a blue sweater, but on cross and in a statement to a defense investigator on May 3, 2014, said it could be a short-sleeved garment or had the sleeves rolled up (T.267,295-96,317). Gonzalez testified the shooter wore a blue sweater and hat that covered his face. She admitted she needed glasses to see distances at the time, was not wearing them that day, and did not focus on the shooter's face (T.445-48). Garcia identified the sweater as a short-sleeved blue golf shirt with three buttons on top and an alligator logo (T.808).

[9] Castro said the shooter's tattoo was on one of his forearms and could not describe it, but noted it was a nice tattoo and he was thinking of getting one himself (T.270-71). Elisa Hemphill, defendant's sister-in-law, stated in 2006 defendant had a tattoo of numbers on his upper right arm, not his forearm, but could not recall what the numbers meant or if the numbers were a zip code "10458" (T.420-22). Garcia remembered seeing a tattoo of script lettering on the shooter's right forearm (T.808). Santiago recalled the shooter had a lettered tattoo on his right forearm (T.862-63). Burger testified that in 2006 defendant had one tattoo of "D.A. 10453" on his upper right shoulder (T.988-89). Bautista did not remember if the shooter had a lettered tattoo on his forearm or if his forearms were even visible (T.1098-98).

At trial, defendant displayed his arms to the jury revealing no tattoos on either forearm, but "D.A." and "10453" tattooed on his upper right arm (T.433-36). Vernon Matthews stated defendant's nickname was "D.A." and that his real name was "Darrell" (T.1252).

Unit Det. Michael Cunningham documented the hospital location, took photographs, and collected evidence including David's clothing and a bullet found on the floor next to David's bed (Cunningham: T. 88-90,101-13; Exhibits 2,3,4,5 [victim covered by blanket], Exhibit 6 [victim from waist up with chest stitches], Exhibit 7 [close-up of victim's chest stitches], Exhibit 8 [close-up of victim's chest stitches with ruler], Exhibit 9 [close-up of victim's face]: T.64,95,98; Exhibit 10 [sheets appearance where bullet recovered], Exhibit 11 [close-up of bullet on sheets]: T.100).

The investigation continued on Tremont and Harrison Avenues. Again, Det. Cunningham photographed the scene and collected and documented evidence. Sanabria's minivan remained parked on the street with a bullet hole through the rear driver's side door and David's car seat. On the sidewalk there were five discharged shell casings and a utility box with an impact mark from being struck by a bullet. Additionally, there was a bullet hole in an apartment window of 1730 Harrison Avenue and bullet fragments on the bed inside that apartment. The ballistics evidence was recovered and sent to the NYPD lab for testing; no fingerprints were recovered, however, all of the shell casings and bullet fragments were determined to be fired from the same gun (Cunningham: T.114-17,126-34,157-6,206-07; Jimick: T.657-58; Det. James Valenti: T.1190-96,1204,1212-15).

On the scene, Gist told Det. Jimick that "Burg" was involved in the altercation, though she had not seen the shooting, and that Morris was there, but could not remember if that was before or after the shooting. NYPD searches of "Burg" led the investigation to 1878 Harrison Avenue, Apt. 3E. There, police spoke to William Gilliam, Burger's brother, and Ardell Gilliam, his grandmother, and recovered evidence.

William directed Det. Jimick to a black plastic bag inside of the closet that contained a blue cable izod sweater. Det. Jimick opened the bag and smelled burnt gunpowder residue.[10] Det. Jimick applied for a search warrant for the apartment. With police there, Burger happened to call William to ask if he had gotten rid of the sweater; Det. Vasquez listened to the call. Police dispatched Burger's information and looked for known associates. This led them to 1962 University Avenue, where Morris lived. Morris was not home, but his mother allowed the police to look around and they recovered photos of Morris. Pursuant to a search warrant, they also recovered four pieces of ammunition (one .9mm and three .357 caliber) on the nightstand (Jimick: T.661-64,666-69,678-80,788-89; R.Gilliam: T.984; Exhibit 98, Sweater: T.666).

D. Defendant and Burger's Initial Flight

After the shooting, but before police arrived at his apartment, Burger returned to 1878 Harrison Avenue, Apt. 3E,[11] and saw Morris, his brother William, defendant,

[10] Det. Jimick wrote about the smell in the NYPD lab request, but not a DD5. The NYPD ballistics testing was negative for gun powder residue on the sweater (T.741-42). As Officer Jason Berger, an expert in gunshot residue analysis explained, the NYPD Lab is not certified to conduct primer residue testing, which would indicate that an individual wearing a piece of clothing was the shooter by measuring the concentration of gunshot residue released backwards onto the shooter's clothing, and, therefore, did not conduct such testing on the blue sweater. Instead, the lab conducted muzzle to target testing, which would indicate the distance between the firearm and the target by measuring the concentration of gunshot residue released from the firearm, travelling forward in the direction of the projectile, and landing on the victim's clothing. Based on the lab's test results, he concluded that gunshot residue was not present on the sweater. Officer Berger noted that his conclusion did not reveal whether the shooter was wearing the sweater, that even a positive primer residue test would not definitively prove that the shooter was wearing the sweater, and, in fact that no test in forensic science could tell if someone actually fired a weapon–all that could be revealed would be that someone was near a weapon when it was fired or came in contact with something contaminated with gunshot residue (T.1102-10,1113-14,1117).

[11] Burger lived in the apartment with his grandmother (who was also defendant's grandmother) and his brother, William (A.Gilliam: T.604).

and Aida Llanos (defendant's girlfriend) in the lobby.[12] Defendant took off the blue sweater once inside the apartment.[13] Defendant insisted that Burger hold two guns (Morris' .357mm and defendant's .9mm). Burger agreed, and defendant and Llanos left the apartment (A. Gilliam: T.600-05,610; R. Gilliam: T.976,980,1001-02).

A friend called Burger and alerted him that the police were looking for someone matching his description (a fat guy with a lazy eye and braids) for a shooting. Burger told defendant. Defendant instructed Burger to get rid of the sweater and guns. Burger took the guns to a nearby crack house, but left the sweater. When Burger attempted to go home, he learned the police were at his building so defendant arranged for him to meet defendant and Llanos at a friend's apartment off of 170th Street and Grand Concourse. Then, another friend, Nana Owusuafriyie, brought Burger to Morris' house where they smoked weed and cigarettes. Morris advised Burger that since he was at the shooting he should not stay in the area. Burger agreed and went to his friend Doc's apartment in Washington Heights. While there, defendant called Burger to confirm that he had gotten rid of the sweater; Burger told him he forgot (R.Gilliam: T.980-84).

[12] A.Gilliam did not recall seeing Morris in her apartment that night (T.610).

[13] In May 2006, A.Gilliam went to the 46 precinct and told the police defendant wore a blue sweater when she saw him in her apartment that night (T.600-05).

E. Defendant and Burger's flight to North Carolina

In the meantime, Burger updated defendant that the police were at his house and defendant told Burger to get in a cab and come to Vernon Matthews'[14] house in Brooklyn; Burger complied and when he arrived defendant told him they would go to North Carolina. That night, Burger, defendant and Llanos fled to North Carolina in a blue car with defendant's and Llanos' son, leaving their daughter, defendant's music studio, and Llanos' career as a paramedic behind (Jimick: T.784, R.Gilliam: T.984-85,1002-03).

In Durham, North Carolina, Burger, defendant, and Llanos stayed in a series of hotels and homes, changing location each night. Burger also cut his hair to alter his appearance and threw away his phone. One night, defendant woke Burger up and said that Matthews told the police what had happened and they needed to leave so defendant and Burger went to another hotel. Defendant told Burger he, Llanos, and their son were going to go back to New York to find out what was going on and that defendant's friends would take care of Burger while he was gone. Burger lived in a hotel for approximately four days before defendant told him that Morris had told the police that Burger was responsible for the shooting. Defendant further told Burger that he would

[14] Matthews testified pursuant to a material witness order. He received assigned counsel, Paul Horowitz, Esq., who advised him about his obligations, including the potential consequences of refusing to testify or of not providing truthful testimony (T.1249). Matthews described defendant as his mentor who he knew from childhood and who had taken him in and paid him as a part of a music career. Matthews confirmed that either defendant or Burger called him that day before they came to his house. He said he did not know why they were coming and the visit had not been previously arranged (T.1260,1265,1311).

hire him a lawyer and that he should tell the police that "Nick" was the shooter. The next day Burger was driven back to New York (R.Gilliam: T.1004-09).

F. The case against Nicholas Morris

On April 17, 2006, Morris walked into the News 12 Bronx office, gave an interview, and was arrested at the headquarters around 6:00 p.m. The interview was broadcast on April 17 and 18, 2006, and was published on the News 12 website.[15] During the interview Morris' displayed his forearms; no tattoos were visible (Jimick: T.681-82; Brooke Rothenberg: T.332-35; Exhibit 101, News 12 broadcast: T.408; Exhibit 104, stills from broadcast: T.411).[16]

That day, officers showed Baez a six-person photo array containing Morris' photo. Baez explained that he could not really see the shooter's face, but remembered his body type (tall/lanky) and that he was wearing a sweater. Baez said numbers four and five (Morris) most closely resembled the shooter's body type, from what was visible in the headshots, but he could not definitively identify the shooter (Jimick: T.756; Baez: T.1161,1163-65,1170-71; Exhibit E, Nicholas Morris Photo Array: T.779).[17]

[15] The broadcast was played for the jury without sound.

[16] During Morris' arrest, Det. Jimick confirmed that he did not have any tattoos on his right arm and noted that his right knuckles were bruised (T.720-21).

[17] That day, Baez was shown a second photo array and he was able to accurately identify Burger as the heavy guy involved in the fight. Baez explained he was able to make that identification because he was up close and personal with Burger when he was breaking up the fight (Baez: T.1167-69,1171,1175; Exhibit F, R.Gilliam Photo Array: T.116B).

On April 18, 2006, Gonzalez, Vargas, and Santiago participated in a lineup procedure and each identified number two (Morris) as the shooter.[18] Gonzalez stated she had never seen the News 12 Broadcast before and that the man in the segment played in court (Morris) looked too chubby to be the skinny man in the blue sweater. She also noted that she was not wearing her glasses during the lineup and qualified that she stated number two could be the shooter, but that he was too "full in the cheeks." Santiago noted that she saw the News 12 broadcast before viewing the lineup, thought the man in the broadcast was not the shooter because the shooter's face was thinner, but, nonetheless, identified the person she saw on the news. She also noted that during the shooting she had focused on Garcia running across the street when the shots were fired and the shiny gun in the shooter's hand, not the shooter's face. Vargas stated he never saw the shooter's face, had seen an article about the shooting in the Daily News, and felt pressure to do justice and pick someone from the lineup when he was not wearing his glasses, but was not certain about his identification (Gonzalez: T.467-69,487; Jimick: T.684; Santiago: T.844-49,851-53; Vargas: T.885-87).[19]

[18] Garcia, participated in the lineup procedure, but was unable to identify anyone (Jimick: T.763-64; Garcia: T.819). Castro did not participate because he was working that day and he was never shown a photo array to make an identification. He noted that he saw a broadcast about the shooting on News 12 that morning and realized the African American man depicted in the segment (Morris) was not the shooter (Castro: T.280; Exhibit 100, News 12 Broadcast: T.334).

[19] Gist was not shown any photos to identify defendant or Morris, but picked Burger out of a photo array (Gist: T.353-54,386-88; Exhibit C, Burger Photo Array: T.388).

On April 20, 2006, Det. Jimick spoke to Matthews at the 46 precinct and Matthews provided an oral and written statement.[20] Approximately three days later, Det. Jimick also spoke to defendant's wife, Llanos in the 20 precinct with her attorney, Adam Mehrfar (Jimick: T.731-34).

On April 26, 2006, Det. Jimick and other members of the investigative team met with Burger and his attorney, George Vomvolakis, at the District Attorney's Office and Burger identified Morris as the shooter.[21] During this initial statement Burger did not tell the investigative team about his role in the fight or that he had disposed of any guns. When Burger realized that Morris had not implicated him in the shooting, he returned to make another statement to the police and tell the truth. On May 9, 2006, Burger and Stephen Hemphill (defendant's brother) went to the 46 precinct and gave Det. Jimick a second statement that defendant was the shooter, not Morris, and that Burger had disposed of the gun, though he did not tell the police where the murder weapon was or

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[20] Matthews claimed he did not recall the details of April 16 or 20, 2006, or speaking to police at the precinct. He recognized Exhibit 120 as his handwritten statement, but alleged he made it up because he wanted to go home. He claimed a large Spanish Detective intimidated him. He also said that police crumbled up his first written statement because it was not good enough and threatened to arrest him so he wrote the second statement (T.1254-57,1259,1264-65,1307-10,1312-13).

On being recalled, Det. Jimick testified that he had taken Matthews' statement and Det. Rodriguez had driven Matthews' to the precinct, but neither Det. Rodriguez nor Det. Vasquez participated in the statement. He further testified that Matthews' began with an oral statement and reluctantly agreed to write a statement. He did not tell Matthews' to crumble up his first statement, that his statement was not good enough, or that he could not leave; he only asked him to tell the truth (T.1320-21,1323).

[21] Vomvolakis was connected with Burger through another criminal defense attorney, Mehrfar. Burger never paid for his services, either Mehrfar or whoever he was representing – defendant or Llanos – paid the fee (Vomvolakis: T.951-54,966).

that Morris had a .357 caliber firearm and defendant had a .9mm firearm. During this second statement, Morris called to speak to Det. Jimick, but Det. Jimick advised him he needed to communicate through his attorney.[22] On May 10, 2006, Burger made a third statement at the District Attorney's Office with his attorney present, against his attorney's advice, that defendant was the shooter and that Burger disposed of the murder weapon two buildings down from his apartment.[23] Burger was arrested on October 20, 2006, for hindering prosecution and tampering with physical evidence, to wit, the murder weapon.[24] He was later charged with the David's murder, not as the shooter, but under an acting in concert theory (Jimick: T.724-26,728-30; Vomvolakis: T.952,955-56,959,964; R.Gilliam: T.1009-10,1012-19).

G. DNA Evidence Recovered from the Blue Sweater Turns the Investigation Towards Defendant

On October 3, 2006, Natalya Yanoff, a Level 3 Criminalist employed at the Office of the Chief Medical Examiner (OCME) tested the blue sweater for DNA scrapings, which were found on the neck of the sweater, and generated a DNA profile

[22] Vomvolakis recalled someone other than Burger called him to let him know Burger was making a second statement, though he did not recall who or if he spoke to his client on the phone that day. He only knew that Burger's statements during this meeting were inconsistent with his original statement to the District Attorney (T.958,964-65).

[23] Burger originally told police defendant had thrown the gun in to the East River and that he had taken the guns to Roberto Clemente Park. He did not tell police that he brought the guns to the drug house because he did not want to further implicate Morris (R.Gilliam: T.1041-42).

[24] Vomvolakis testified that was he was unaware of this arrest and did not represent Burger in any legal proceedings after their May 10, 2006 meeting (T.961).

based on the scrapings.[25] This necessitated a comparison between that profile, Morris, and defendant—the two men who had been named as the shooter. On March 3, 2008, Detective Investigator Joseph Russell administered two oral swabs for Morris' DNA with his consent. As for defendant's DNA, after an unsuccessful attempt to recover it from garbage found outside a location in Durham, North Carolina, leased to "Darrell Davis,"[26] the People obtained a search warrant and on April 26, 2011, in North Carolina, Detective James McSloy pulled defendant over and administered two oral swabs for his DNA. When Yannoff compared the DNA recovered from the sweater to defendant's and Morris' DNA, it matched defendant's profile, not Morris.' Thus, defendant contributed DNA to the sweater (McSloy: T.524; Russell: T.534-35; Yanoff: T.538,544,550-53,555-56,559,565,567,572-75; Exhibit 110, DNA Comparison Table; T.570).[27]

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[25] The OCME received the sweater on July 26, 2006 (T.553).

[26] On June 16, 2008, Detective Investigator Modesto Acevedo and his partner travelled to Durham, North Carolina, to attempt to surveil defendant at possible locations. At a location leased to a "Darrell Davis," Det. Acevedo had seen Llanos and two children exit the home, but not defendant. He recovered two empty plastic bottles (one soda, one water) from the garbage and had them swabbed for DNA at the North Carolina Department of Investigations, although no one had seen who drank from the bottles (T.937-42). Yanoff created DNA profiles from the pseudo exemplars (when the identity of a contributor is unknown) taken from the bottles, but they did not match the DNA recovered from the sweater (T.560-565).

[27] Morris ultimately pleaded guilty to third-degree criminal possession of a weapon, to wit a .357 caliber firearm, against the advice of his attorney. The nature of the proof of that firearm was insufficient to indict him and was only made out through his own admission. In exchange, Morris, who had served two years pending trial, was released from jail the same day and if conditions were met he would receive a sentence of time served and a conditional discharge (Shameka Harris: T.1180-85; Court Exhibit II, Nicholas Morris' Plea Minutes).

On April 24, 2013, defendant was arrested pursuant to an arrest warrant in North Carolina for the murder. He was extradited to New York the next day (Jimick: T.737).

The Defense Case

Nana Owusuafriyie, defendant's friend, testified about his Naval career and how he had known defendant for approximately 20 years from growing up in the same neighborhood. He also testified that he had never been convicted of a crime, despite having been found guilty in a special court martial of four separate offenses for attempting to steal $5,500 from MBNA America and computer equipment valued at $2,724, and making two false official statements for which he served approximately one week in a military jail (T.1444-46,1456-57-61,1466,1470,1481).[28]

He testified that on April 16, 2006, defendant called him to meet up at his music studio around 1:00 p.m. They met outside the studio and defendant wore a white t-shirt, blue jeans, and white sneakers.[29] Owusuafriyie gave defendant approximately $300 to take his family out for Easter. They talked for approximately 20 minutes

[28] Owusuafriyie attempted to mitigate these offenses because they were adjudicated in a military rather than civilian court and occurred fifteen years ago. He further claimed that he was less culpable because he did not actually steal anything, his two co-conspirators were removed from the Navy so he was left to answer for all of the charges, he was young (22 years old) and he did not know he was committing a crime, and he continued his military service (T.1452-53,1457-59,1460-62,1464-67,1469,1470,1473-74,1478).

[29] Owusuafriyie said he did not know that clothing was important to this case until the day he testified, but that nine years later he remembered exactly what defendant was wearing on Easter Sunday 2006 (T.1475,1477).

amongst themselves and with defendant's Uncle Jimbo who had walked by, and Owusuafriyie returned home (T.1447-48).

Within 20 minutes of arriving home, Owusuafriyie saw a news flash about an altercation on Harrison Avenue, but did not think anything of it because "it is the Bronx." He received phone calls from a phone number he recognized as Burger's to meet up around 6:00 p.m. on University Avenue at Morris' home. When Owusuafriyie arrived, he spoke to Burger and Morris for approximately ten minutes, noticed Morris' knuckles were bruised, and drove Burger to 170th Street and Grand Concourse (T.1449-52).

ARGUMENT
POINT ONE

DEFENDANT'S GUILT WAS PROVEN BEYOND A REASONABLE DOUBT AND WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

"A verdict is legally sufficient when, viewing the facts in the light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt.' . . . A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof." People v Danielson, 9 NY3d 342,349 (2007) (internal citations omitted). The conviction should be upheld if there is "any valid line of reasoning and permissible inferences which could lead a rational

person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged." People v Bleakley, 69 NY2d 490,495 (1987).

When assessing a weight of the evidence claim, the appellate court must first ascertain "[i]f based on all the credible evidence a different finding would not have been unreasonable." Id.. If so, then the court must, "like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." Id. (internal quotations omitted). Although this Court has the authority to set aside the verdict if it determines that the jury "failed to give the evidence the weight it should be accorded," it should not substitute itself for the jury, "whose determinations are entitled to [g]reat deference based on its opportunity to view the witnesses, hear the testimony and observe demeanor." People v Green, 104 AD3d 126, 129 (1st Dept 2013) (alteration in original; internal quotation marks omitted).

Defendant's conviction of second-degree murder was proven beyond a reasonable doubt. That required proof he "[w]ith intent to cause the death of another person, [] cause[d] the death of such person or of a third person." Penal Law §125.25(1). Here, the People proved that defendant intended to kill another person, one of the individuals from the fight, by shooting a .9mm semi-automatic firearm in their direction, at least five times, and actually caused the death of David Pacheco, Jr., who was seated in his car seat in his mother's minivan driving by the scene when the

shots were fired. The People proved their case through 29 witnesses, including an accomplice, eyewitnesses, experts, police officers, and defendant's friends and family members, and more than 120 exhibits including photographs, reports, ballistics evidence from the scene, a sweater containing defendant's DNA that matched the description of the sweater the shooter was wearing, recovered hours after the shooting at the cooperating witness' home, and defendant's flight and change of name immediately following the shooting.

The shooter's intent to kill was proven through the physical evidence and eyewitness testimony. Officers recovered five spent shell casings from a .9mm firearm and a deformed bullet at the crime scene on Harrison and West Tremont Avenues and one fired bullet next to David's hospital bed. Ballistics expert Det. James Valenti testified that all of the shells and all of the bullets had been fired from the same firearm.[30] The number of shots fired within that contained area indicated a clear intent to kill. People v Santiago, 134 AD3d 472,472-73 (1st Dept 2015). And, though David was not the target, the trial court properly instructed the jury on the issue of transferred intent

[30] Defendant notes that police recovered no fingerprints on the shell casings and did not test the single round of .9mm ammunition recovered from Morris' apartment against the ballistics evidence recovered from the scene (def.br.,p.93). These arguments evince a lack of understanding about the ballistics testing. A spent shell casing that has travelled through the barrel of a firearm is exposed to extreme heat that evaporates secretions that would normally cause fingerprints (Cunningham: T.253). Additionally, to determine if the same firearm fired multiple rounds of recovered ammunition, experts examine markings left on the ammunition due to rifling by the firearm as the bullet leaves the chamber (Valenti: T.1193-96). Otherwise, the testers need the firearm used in the shooting. Thus, here, it would be impossible to "test" an unfired bullet recovered from Morris' apartment to see if it matched the ballistics recovered from the scene because the murder weapon was not recovered.

(VD.605; T.1701-02,1708). David's autopsy confirmed that the manner of death was a homicide and the cause of death was the gunshot wound to the trunk with perforation of lung, spinal cord, and spleen, as the bullet had entered David's left side chest, near his underarm, travelled through the lower lobe, left lung, diaphragm, and spinal column and exited through his upper right back (Gill: T. 927-29). Thus, it is undisputed that the shot fired caused David's death. Unsurprisingly, these elements are uncontested on this appeal.

The only disputed trial issue was the shooter's identity, which forensic evidence and eyewitness testimony established as defendant. Eyewitnesses to the shooting testified that the shooter wore a blue sweater (Santiago: T.863; Baez: T.1160,1171; Bautista: T.1092,1096-98; Pagan: T.1088; Gonzalez: T.445-48; Castro: T.267,295-96), though one thought it was a short-sleeved shirt (Garcia: T.808-09). Several witnesses who knew defendant—including Burger, who was right next to him during the shooting, his grandmother who he saw immediately after the shooting, and Gist who had known defendant from the neighborhood since childhood and saw him during the initial fight—testified that he had been wearing a blue sweater the day of the shooting (R.Gilliam: T.987; A.Gilliam: T.602,611-12; Gist: T. 349,351-52,379).[31] Hours after the

[31] Defendant challenges Ardell Gilliam's testimony about her statement at the police precinct that defendant was wearing a blue sweater on Easter Sunday for several reasons (def.br.,p.90). First, he argues that Gilliam recalled what defendant was wearing on direct and re-direct, but not on cross-examination, however, on re-direct it was clarified that she had misunderstood counsel during cross-examination and thought he was asking about Burger's attire on Easter, which she did not remember (T.611). Thus, there was no inconsistency. Second, he notes that Gilliam said she went to the police precinct in May 2006 (T.602), while Det Jimick said this occurred in April 2007 (T.727), and argues it

shooting, a Lacoste long-sleeved light blue sweater was recovered from Burger's closet, concealed inside of a black plastic bag (Exhibit 98). A DNA profile was developed from scrapings along the neck of the sweater (the area where DNA is highly likely to be deposited due to contact with skill cells and sweat [T.555]) and it was compared to various suspects in this case. Those comparisons excluded Morris and Burger as contributors, but confirmed defendant's DNA was on the sweater.

While defendant challenges the consistency of the witness testimony with respect to descriptions of the blue sweater (def.br., p.91), these contentions more accurately challenge the witnesses' ability to describe an item of clothing, rather than their ability to remember it. A review of Exhibit 98, a photograph of the blue sweater recovered from Burger's apartment hours after the shooting, and the eyewitness testimony, which varies in detail about the sweater, makes this clear. Some of the differences in the details witnesses described included the shade of blue (Santiago: T.863; R. Gilliam: T.987; A.Gilliam: T.602,611-12; Pagan: T.1088; Castro: T.267,295-96; Gonzalez: T.445-48;

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was "unlikely she could remember [defendant's] attire on Easter morning when she was battling cancer" (def.br.,p.90). It is possible that Gilliam confused the date. Moreover, there is no evidence that her cancer had any impact on her ability to remember the events in question. Third, defendant claims she "shift[ed her] testimony" "to help the grandson she raised [Burger] over the one whose provenance she doubted" (defendant) (def.br.,p.90), but this assertion completely contradicts her testimony that while "some people" say defendant is not her "actual grandson," when asked for her opinion, she responded, "I claim he's my grandson" (T.605). Finally, defendant claims that "in court she could not even recognize [defendant] initially" (def.br.,p.90); however, the record reflects that she was confused by the in-court identification procedure (and possibly nervous about testifying against her grandson at his homicide trial). When asked if she saw defendant in court, she asked "Which way am I supposed to look?," the court officer told her to "Just look around," she responded "Not in the jury box," then she indicated defendant was wearing a "black suit." Her confusion continued when the prosecutor announced for the record "Indicating the defendant" and she said "I beg your pardon" (T.601). This record should not be read that she was unable to identify her own "grandson."

Garcia: T.808 [blue]; Gist: T.349, 351-52, 379 [blue/periwinkle-light-blue]; Baez: T.1160,1171 [light blueish]), whether the sweater was embroidered or knitted (Baez: T. 1160,1171 [same color embroidery from chest to waist on both sides]; Pagan: T.1088 [knitted]), or had buttons or a logo (Garcia: T.808 [three buttons on top and an alligator logo]). Looking at Exhibit 98, those are all fair descriptions of the sweater, albeit with varying degree of details from different perceptions. The same is true for the witnesses who said the top may have been short-sleeved; that, too, is an accurate description if the shooter had his sleeves rolled up as other witnesses had described. Thus, any weight defendant ascribes to these differences should be attributed to different perceptions and what details each witness chose to include in their descriptions. See Michigan v Payne, 412 US 47,57 (1973)(commenting "witnesses in criminal trials[] lack infallible memories"); United States v Persico, S 84 CR. 809 (JFK), 1990 WL 3218, at *8 (SDNY Jan. 5, 1990)("inconsistencies in the [witnesses] testimony . . . developed because the witnesses were fallible people with human memories who were testifying based on their recollection of events past.").

Det. Jimick testified that when he removed the sweater from the bag there was an overwhelming smell of gunpowder (T.667). While defendant claims Det. Jimick failed "to record this observation in any contemporaneous report" (def.br., p.92), that is not true; he included this detail in the contemporaneous lab request for testing (T.741). That no gunpowder or other ballistics evidence was discovered on the sweater is unsurprising since the NYPD lab is not certified to conduct Primer Residue Testing,

the type that would reveal such evidence on a shooter's clothing (Berger: T.1102-06,1108). Moreover, that the sweater appeared stretched and had holes and some metal in it does not prove the sweater was not worn. In fact, these conclusions are consistent with testimony that defendant wore the sweater when he engaged in a fist-fight with a large number of people during which his sweater may have been stretched or holed.

Defendant also complains that no witness actually identified the sweater in evidence (Exhibit 98), as the sweater the shooter was wearing (def.br., p.91). This requirement goes too far. The testimony established that the shooter fled from the scene wearing a blue sweater. No eyewitness could know what happened to the sweater after defendant fled. The witness who was in the best position to know this information, Burger, testified that the sweater was left at his home and defendant had asked him to get rid of it. Det. Jimick corroborated this testimony when he testified that he recovered the sweater from Burger's closet, concealed in a black plastic bag, hours after the shooting; however, Burger was not present when the sweater was recovered. This was further corroborated by Det. Jimick's testimony that he was present when Burger called William hours after the shooting and told him to dispose of the sweater. This evidence strongly indicates that the sweater Det. Jimick recovered and the sweater the shooter wore were one in the same. Since a blue sweater is far more fungible than many types of evidence, it would be impossible for any witness to positively identify the sweater in evidence as the very sweater that the shooter was wearing. The best one

could hope for is that it looked like the sweater the shooter wore. To require any one witness, then, to make such an identification would be unreasonable.[32]

Most importantly, Burger identified defendant as the shooter. Defendant argues that Burger's testimony was inherently unreliable because he was a cooperating witness and crack dealer, he had previously identified Morris as the shooter, and had not mentioned Morris possessing a .357 firearm until after pleading guilty and cooperating (def.br., pp.88-90). This argument should be rejected. As defendant recognizes, a cooperating witnesses' testimony, so long as it is corroborated by other evidence, can support a conviction. CPL §60.22(1); People v Besser, 96 NY2d 136,143-44 (2001). Here, there is no dispute, law enforcement, eyewitness, and expert testimony, and the physical and forensic evidence, sufficiently corroborated Burger's testimony.

Burger's testimony also was reliable. That he sold drugs does not render his testimony unworthy of belief. If anything, Burger's candid testimony about his criminal activity for which he had not been arrested, much less convicted, should bolster his credibility, not detract from it. That Burger had previously identified Morris as the shooter ignores the evidence of defendant's vested interest in controlling Burger's interactions with the police by assisting him to flee and facilitating his return when defendant discovered his friend, Matthews, had identified him as the shooter.

[32] Defendant further complains that William, Burger's brother, was never called to testify about giving the sweater to the police (def.br., p.92). Again, defendant requires too much. William did not "give" the sweater to Det. Jimick; after a conversation with William, Det. Jimick recovered the sweater from Burger's closet (Jimick: T.664).

Defendant arranged for Burger to flee with him to North Carolina and provided him with food and shelter, until defendant directed him to return to New York to implicate Morris in the murder. The record provides a further inference that defendant, through his own attorney, retained and paid for Burger's lawyer to represent him while he implicated Morris as the shooter. These actions demonstrated defendant's vested interest in controlling Burger's statements to the police, likely since he was an eyewitness to the homicide, and undermine the reliability of his initial identification of Morris as the shooter. When Burger was left to speak to the police freely, outside the presence of the attorney defendant had hired for him, he consistently said defendant was the shooter. Finally, Burger's failure to mention the .357 firearm until after Morris had pleaded guilty does not discredit his testimony. Burger candidly admitted that he did not want to implicate Morris in any criminal activity so it is unsurprising that he did not offer this detail until Morris had implicated himself with the weapons possession. Ultimately, the court instructed the jury that they were entitled to credit all, some, or any amount of Burger's testimony (T.1687); the jury had ample reason to credit him.

Additionally, the People presented ample evidence of defendant's consciousness of guilt through his own flight. While defendant suggests this evidence was ambiguous (def.br., p.93), that is simply not true. Defendant's flight with his girlfriend and Burger—it began at Burger's apartment, then he bounced around various apartments around New York City, and, finally, left for North Carolina that same night with only one of his children—strongly supported his guilt. Indeed, upon arriving in North

Carolina, defendant did not stay in one place, but moved to a different hotel or home each night, until eventually he leased a residence under the false name "Darrel Davis." Defendant's continued presence in North Carolina, eventually being joined by his other child, was all the more suspicious because he owned a music studio in New York, his girlfriend had been employed there as a paramedic for nearly 20 years, and each forfeited those established positions and undertook this move without job prospects. These actions supported the consciousness of guilt for killing the child and wanting to avoid apprehension as the motive to flee.[33]

Defendant next focuses his challenge to the evidence against him by reference to the alleged strength of the evidence against Morris (def.br., pp.83-88). The court issued two instructions with respect to Morris' identification at trial—during voir dire (VD.165) and the final jury charge (T.1704-05)—that the jury was not to speculate about Morris' status and that the evidence was only admitted to aid the jury in determining defendant's guilt or non-guilt.

Initially, and undisputedly, the People previously found sufficient evidence to prosecute Morris for this murder; however, further investigation revealed a case of mistaken identity and that he was not the shooter. Now, defendant misstates and

[33] To the extent defendant relies on evidence not introduced at trial regarding a defense attorney approaching law enforcement on his behalf, there is no actual evidence in the record of this happening notwithstanding that defendant, had he chosen to testify on his own behalf, had the opportunity to present it (see Point 5). Thus, it cannot be considered on weight of evidence review.

exaggerates the record in attempts to support his claim that the People's further investigation was wrong and that Morris is the true shooter.

With respect to the eyewitnesses who identified Morris in a lineup, as the prosecutor explained during summation, they did not know defendant or Morris and only observed them for a relatively brief time, under a threat to their safety, during a fist-fight, and when the shooter fired shots in their direction (T.1621). The stress of this situation likely caused the eyewitnesses to make an incorrect identification. This is particularly true for Santiago and Vargas, who were exposed to Morris' name and face through the media coverage (Santiago: T.844-45; Vargas: T.885-86; T.1611-12,1621). See People v LeGrand, 8 NY3d 449 (2007).

Indeed, these eyewitnesses provided explanations for their respective misidentification. Gonzalez testified she did not have her glasses she needed for distance at either the fight or the lineup and that she did not get a good look at the man in the blue sweater's face (which was shaded by his hat) because she was focused on getting the "chubby" guy off of Vargas. At the lineup, she "knew a child had been killed" and was "trying to help," so she said it "might be" "No.2 . . . but he looks too full in the face" (T.445-49,469,487,496,501). Vargas explained that he never saw the shooter's face and before the lineup he saw a newspaper article about the incident with a "gentleman on the cover," though he was not sure that that was the shooter. He testified that he "felt confused about the situation" "being under that pressure, never being in that situation [or a lineup] in [his] life, [he] just felt like [he] wanted to get justice

done" because he "knew that a child had been killed." Ultimately, without his glasses, he picked number two as the "guy [he] was fighting," but was uncertain at trial due to "the nervousness and the amount of pressure that was on [him]" (T.886-88). Santiago testified that during the fight she was not looking at the shooter because she was focused on Garcia and that before the lineup, she saw a Bronx News 12 broadcast about the incident and thought "that's not the guy" because "he was chunky in the face." At the lineup she picked number two, who was the person she saw "on the news," not the person she "saw in the fistfight" (T.844-45,853). It was for the jury to determine whether they found those reasons credible.

As for Baez, defendant argues that "Baez picked Morris's photo out of an array, saying he looked like the shooter" (def.br., p.84). The evidence at trial differed. Police testimony and Baez' testimony revealed that when he was shown a photo array with Morris' photo he said that Morris looked like the shooter, but he could not positively identify him (Jimick: T. 781-82, 784; Baez: T. 1163-65, 1170-71).

And, as for Gist, defendant argues that Gist originally identified Morris as the individual involved in the initial fight, not defendant, that she financially benefited from her testimony, that her prior petit larceny conviction suggested "she was willing to place her own financial interests above those of society," and that her testimony was "highly questionable" because she, and no other witness, described defendant as having long braids (def.br., pp.84-85). Defendant misstates the record. Gist testified that she told Det. Jimick that on the day of the shooting Burger, defendant, and Morris were all part

of an altercation, but that she only saw Morris walking down Morton Place after the fight had ended (T.354,375-76). Additionally, information about any money Gist may have received to relocate after receiving death-threats related to this case was never put before the jury (because counsel elected not to ask her about it [T.326-27] even after it was discovered, during a colloquy outside the presence of the jury, that the threats occurred close in time to the shooting, before counsel and the prosecutor were involved in the case [T.371-72]), thus, it cannot be considered on weight of the evidence review. Additionally, Gist's petit larceny conviction was based on her using her husband's credit card during a "bad divorce" and he "got mad" at her and reported it (T.343), which hardly represents her "willing[ness] to place her own financial interests above those of society" (def.br., p.86). Moreover, Gist's testimony that defendant had long braided hair was a reasonable perception where she explained that the braids were tucked into a hat (T.352,379). Indeed, Burger (T.987), Vargas (T.877), Santiago (T.840,851,862), Garcia (T.810,824), Gonzalez (T.442,447,458), and Castro (T.260), each said that the man in the blue sweater wore a hat. This fact also explains why other eyewitnesses may have overlooked this detail or failed to include it in their testimony.[34]

[34] Gist's testimony that two men "proceeded to start fighting on my car. Once I parked and I got out and I said you're not going to do this on top of my car. So the fight went to the street" (T.343) can be explained in several ways. First, Baez described the exact same scene – "A fight broke out right in front of me . . . between two groups of men. The fight was getting too close to my vehicle, so I got out and I tried, you know, to stop the . . . heavyset black male from getting too close to my car in a fight" (T.1157). The only difference is that Baez was able to exit his car in time to prevent the fight from coming in contact with it. Second, Vargas testified that he was hit by two cars during the fight (T.881), so one of those cars may have been Gist's car. Finally, "on top of my car," may have meant very close to her car.

Defendant further complains that "[u]nbeknownst to the jury, [police] found a trove of weapons and ammunition and pictures of Morris brandishing guns and using drugs" (def.br., p.87). Yet, the jury did, in fact, learn that police recovered a single round of .9mm ammunition and three rounds of .357 ammunition from Morris' bedside and defendant made this a significant part of his summation (T. 679-80,749-50; T.1537-44). The jury also learned, through Morris' guilty plea, that he possessed a .357 caliber firearm on the date and time of the shooting (T.1184-85). As to the remaining precluded evidence –a starter pistol (.8mm firearm), a non-functioning .22 caliber rifle, a photo of Morris holding two firearms and a photo of another individual pointing a gun at Morris while he played video games (none of which were .9mm or .357 caliber)—this Court cannot consider it in its weight of the evidence review as a "thirteenth juror" because it was not before the jury. Additionally, that ruling was proper since that evidence was neither linked to this crime or defendant (Point 5, subsection A, ii). Moreover, of course, an individual's access to weapons does not in any way support his or her identity as a murderer (def.br., p.87). The jury also heard about Morris' bruised knuckles which counsel argued on summation indicated Morris had recently been involved in a fist-fight (T.1502,1543). Finally, to the extent defendant says Morris' lack of tattoos could be because they were temporary and he washed them off (def.br, p. 88), the same is true of defendant, who was at liberty long after the shooting and, thus, had far more time to remove a temporary, or even a permanent, tattoo.

Ultimately, defendant cross-examined these witnesses on these subjects, and presented all of these claims to jury on summation, who had the opportunity to observe the witnesses, weigh the alleged inconsistencies, and make a determination. That decision is entitled to great deference and should not be disturbed on appeal.

Finally, in addition to denying both of defendant's motions for a trial order of dismissal (T.1326,1723), at sentencing, in light of defendant's claim that he had been framed, the court "observe[d] that there was considerable evidence that he is the perpetrator of this crime" including DNA evidence, an identification from a participant in the crime, and defendant's immediate flight, evincing his consciousness of guilt (S.20-21). Indeed, the court did not "think the day w[ould] ever come that a court says that [defendant], you're not guilty and you're going to be released" (S.23) and, when defendant insisted his conviction was due to media attention surrounding the case, citing the "thousands of people that is innocent people in jail . . . later found not guilty," the court told him, "You're not one of them, sir" (S.23-26). This strong opinion from an experienced jurist does credit to the jury's verdict.

POINT TWO

THE COURT PROVIDENTLY ADMITTED SELECT PORTIONS OF NICHOLAS MORRIS' PLEA ALLOCUTION.

During defense's opening statement, counsel argued:

> I think it's later that same day or maybe the next day, and they search Nick's apartment. And what do you think they find in Nicholas Morris' bedroom? They find a 9-millimeter bullet. A live round. And guess what kind of a gun killed

> David Pacheco just a few hours before that? Guess what kind of bullet? And the ballistic people will tell you they recovered from David Pacheco Junior's body and find other evidence of at the scene? A 9-milimeter. So shortly after this shooting when they go to Nicholas Morris' apartment there is a bullet that's exactly the same kind of bullet as the one that killed the child.

(T.42). To rebut this argument, mid-trial, the prosecutor sought to introduce Morris' plea allocution during which he pleaded guilty to possessing a .357 caliber firearm on April 16, 2006 (T.506-07,509-10).[35] After hearing argument, the court noted that this violent felony conviction had significant consequences on Morris and, therefore, constituted a statement against penal interest (T.910). It also found the statement sufficiently reliable since police found .357 bullets in Morris' home and Burger would testify that he disposed of a .357 and a .9 mm firearm (T.910-11). The court reserved its ruling until after Burger's testimony. It acknowledged that plea allocutions qualify as testimonial statements, but reasoned this allocution did not appear to implicate defendant, raising the question if he would be entitled to cross-examine on that topic (T.916-19).

After Burger testified, the court granted the prosecutor's application. It found counsel, through his opening statement and cross-examination so far implicating Morris as the shooter, had opened the door to admitting otherwise inadmissible Crawford evidence to refute that claim (T.1128-31). It also found the evidence reliable based on

[35] Morris pleaded guilty to third-degree criminal possession of a weapon (T.507)(Penal Law §265.02[4]).

Burger's testimony that Morris gave him a .357 firearm to dispose of while defendant did the same with a .9 mm firearm (T.1131-34). The parties later agreed on certain redactions to the allocution (T.1137-1153).[36]

Court reporter Shameeka Harris read the agreed upon plea allocution into the record (T.1181-86). It included:

> [Defense Counsel]: [Morris] indicates that, over my strong advice, he will take the plea. . . . the nature of the proof that exist with respect to this gun count that my client is about to plead to is not sufficient for [the People] to obtain an indictment. The only way they will be able to make out the limits of this crime is through my client's admissions, which I suppose he will be willing to make, it seems, so that he can get out of jail today.
>
> * * *
>
> [Defense Counsel]: Thank you, Judge. I also understand that the Court is going to release Morris today on his own recognizance . . . pending sentence.

(T. 1182-83). Morris admitted that on April 16, 2006, around 2:00 p.m., near Harrison Avenue and Morton Place, he "knowingly possessed a loaded operable firearm and further, that that possession was not in either [his] home or place of business" and that that firearm was a ".357" (T.1184-85). He was promised "a sentence of time served and a conditional discharge" (T.1186).

Now, defendant claims the trial court erred in admitting this testimony in violation of his confrontation right. Yet, the Confrontation Clause does not apply to Morris' plea allocution because it was not testimonial in nature with respect to

[36] The following portions were admitted: page 15 lines 17 to25; page 19 line 24 to page 20 line 12; page 20 line 17 to page 22 line 13; and page 23 lines 13 to 15 (T.1152-53,1177).

defendant's murder charge in that it did not incriminate defendant. Regardless, even if otherwise inadmissible hearsay, defendant opened the door to its admission.

The Crawford v Washington Court held a defendant has the right to confront the witnesses "who bear testimony against him." Crawford, 541 US 36, 51 (2004). Since then, the Court has addressed the testimonial nature of various out-of-court statements. See Crawford, 541 U.S. at 51 (wife's statements to police about past events); Davis v Washington, 547 US 813 (2006)(victim's statements to 911 operator versus police on scene after victim and defendant separated); Giles v California, 554 US 353 (2008)(deceased victim's statement and forfeiture by wrongdoing); Melendez-Diaz v Massachusetts, 557 US 305 (2009)(analyst certificate of controlled substance analysis); Michigan v Bryant, 562 US 344 (2011)(statements to police during ongoing emergency); Bullcoming v New Mexico, 564 US 647 (2011)(blood alcohol analysis report); Williams v Illinois, 567 US 50 (2012)(DNA profiles); Ohio v Clark, 135 S Ct. 2173 (2015)(victim's statement to teacher). In Clark, the Court espoused a straightforward test to determine if a statement is testimonial: whether in light of all the circumstances, viewed objectively, the primary purpose of the statement was to create an out-of-court substitute for trial testimony. Clark, 135 S Ct at 2180. Put another way, testimony that was not created to incriminate a defendant or, on its face, does not incriminate a defendant, cannot be testimonial and, therefore, does not violate the Confrontation Clause.

Thus, "the admission of a non-testifying co-defendant's plea allocution [i]s subject to the requirements of the Sixth Amendment's Confrontation Clause." People

v Hardy, 4 NY3d 192,193 (2005). However, the Hardy Court left unresolved whether a plea allocution by a non-co-defendant was testimonial in nature. Such a statement should not be considered testimonial.

The closest Confrontation Clause analogy is found under Bruton v United States, 391 US 123 (1968). A co-defendant is prohibited from introducing a facially incriminating confession of a non-testifying co-defendant at a joint trial, regardless of any instruction, due to the powerful nature of such evidence. However, if the statement does not facially incriminate defendant, or only incriminates when linked with other evidence, it is still admissible. See Richardson v Marsh, 481 US 200,208–211 (1987); People v Johnson, 27 NY3d 60,69 (2016).

This Court's jurisprudence illustrates this point. In People v Neal, 181 AD2d 584, 584-85 (1st Dept 1992), in a homicide prosecution, this Court found that

> The trial court properly admitted the statement of the non-testifying codefendant to a police investigator that when he heard that his brother had been killed by Almanzer he stated, "I did what I had to do." Defendant's right of confrontation was not violated by the admission of this statement, since it clearly was not facially incriminating to defendant, and the court gave explicit instructions to the jury that the statement related only to the codefendant and was not to be considered in any way as evidence in the case of defendant, and that separate verdicts were to be entered for each of the defendants.

Id. (citing Richardson, 481 US 200). Similarly, in People v Bowen, 309 AD2d 600,601 (1st Dept 2003), in another homicide prosecution, this Court held, inter alia, that a "co-defendant's statement that defendant's drug location had been robbed was properly

redacted so as to reveal only that an unidentified person had been robbed" which did not violate defendant's right to confrontation because it "was not facially incriminating as to defendant, but was only incriminating when linked with other evidence." Likewise, in People v Smith, 179 AD2d 597,598 (1st Dept 1992), in another homicide prosecution, this Court held that admitting a co-defendant's letter to his girlfriend that "implied that the co-defendant feared defendant and consequently would not reveal to the authorities their joint participation in the murder" did not violate Bruton because "the statements could only inferentially implicate defendant if the statements were linked to other evidence." Put another way by the Third Department in People v Pagan, 87 AD3d 1181,1183-85 (3d Dept 2011), "[i]n short, if the statement does not directly inculpate the accused, it cannot be deemed to have been admitted against him or her and '[t]he same attenuation . . . that prevents Bruton error also serves to prevent Crawford error.'" (quoting United States v Lung Fong Chen, 393 F3d 139,150 [2d Cir 2004], citing United States v Harris, 167 Fed Appx 856,859 [2d Cir 2006], cert den 549 US 925 [2006]; People v Torres, 47 AD3d 851 [2d Dept 2008]).

Here, Morris was not a co-defendant and his plea allocution did not facially incriminate defendant. Morris' plea allocution was admitted as evidence that he possessed a .357 firearm – not a .9mm – on the date, time, and location where the victim was killed, giving rise to the inference that he did not fire the .9mm bullet that killed the victim. This directly refuted defendant's defense that Morris was the shooter, but it in no way implicated defendant. See Neal, 181 AD2d at 584-84 (co-defendant's statement

about his own actions did not implicate defendant). Accordingly, Morris' statement did not "identif[y] the defendant as the perpetrator of a crime" for purposes of Crawford or Bruton (People v Ruis, 11 AD3d 714,714 [2d Dept 2004]), nor could it "be read by the jury [only] as inculpating defendant" under the facts of this case (People v Wheeler, 62 NY2d 867,869 [1984]). That Morris' possessed a .357 firearm that day, even combined with the fact that the victim was killed by a .9mm bullet, had little bearing on whether defendant intentionally shot and killed the victim—the only question before the jury. In short, Morris' statement was "not facially incriminating to defendant," even when combined with other evidence, and its admission at trial did not deprive defendant of his right to confront a witness against him. Neal, 181 AD2d at 584-85; Bowen, 309 AD2d at 601; Smith, 179 AD2d at 598.

Regardless, defendant opened the door to admitting this evidence. "A defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause." People v Reid, 19 NY3d 382,382-83 (2012). Such determinations are made on a case-by-case basis using a two-step inquiry: (1) "whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and [2] what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." Id. at 388 (citation omitted).

In Reid, the Court held

> by eliciting from witnesses that the police had information that [a third person] was involved in the shooting, by suggesting that more than one source indicated that [said

> third person] was at the scene, and by persistently presenting the argument that the police investigation was incompetent, defendant opened the door to the admission of the testimonial evidence, from his non-testifying codefendant, that the police had information that [the third person] was not at the shooting.

Id. at 388-89. This evidence was necessary to "prevent the jury from reaching the false conclusion that [the third person] had been present at the murder by eliciting that a person with immediate knowledge of the situation—an eyewitness who knew exactly who was at the murder—had told the police [the third person] was not there." Id.

In People v Santos, 150 AD3d 1270 (1st Dept 2017), this Court held that admitting an Assistant District Attorney's statement during the defendant's videotaped interview that his co-defendants had implicated him in the crime was appropriate because defense counsel had opened the door. Id. at 1271-72. Specifically, counsel opened on the theory that defendant's confession had been coerced so the prosecutor's statements were necessary to rebut this defense and provide an alternate reason why the defendant had confessed. Id. Moreover, this Court noted that the statements were not admitted for the truth and the jury was appropriately instructed. Id. at 1272. See also People v Taylor, 143 AD3d 1165 (3d Dept 2015)(defendant opened door to prosecutor admitting co-defendant's multiple statements by eliciting testimony about one statement); People v Walls, 45 Misc3d 1212(A),*4-5 (Sup Ct, Bronx Co 2014, Best, J.)(same).

By contrast, in People v Schlesinger Elec Contractors, Inc, 143 AD3d 516,516-17 (1st Dept 2016), this Court held that admitting hearsay testimony of a non-testifying co-defendant that he had pleaded guilty "in relation to this case" to rebut the prosecutor's perception that this misled the jury to believe that the defendant had been selectively prosecuted was error. This Court reasoned that the jury had not been misled because the witness had testified that he "did not know whether anyone at [the other company] had been prosecuted" and, even if the jury had been misled, the appropriate remedy would have been to admit testimony that others had been prosecuted, not that they had admitted their guilt. Id. at 517.

This case invites the same result as Reid and Santos. During counsel's opening statement and cross-examination of witnesses, he repeatedly suggested that since Morris had .9mm ammunition on his bedside table, he must have had access to a .9mm firearm, the same type of firearm that killed David Pacheco, Jr., and made it his trial defense that Morris used a .9mm firearm to murder David. This left the jury with "incomplete and misleading" information that Morris possessed the murder weapon on the date and time of the crime (Reid, 19 NY3d at 388) when the available evidence established that Morris had possessed a .357 firearm on the day in question. Accordingly, admitting this plea allocution was "necessary to correct the misleading impression" (Reid, 19 NY3d at 382-83) and Morris' plea allocution was the clearest and most concise evidence available to achieve that goal. As in Reid, the allocution provided information from "a person with immediate knowledge of the situation" (Reid, 19 NY3d at 388-89), through a third-

party—the court reporter who transcribed the proceeding—and had been preserved in the transcript, just as the video in Santos preserved the prosecutor's statement (Santos, 150 AD3d at 1271-72). Indeed, by redacting the plea allocution, the parties were able to prevent the jury from learning prejudicial information like the fact that the murder indictment against Morris had been dismissed. Cf. Schlesinger, 143 AD3d at 517. In sum, when defendant pursued a third-party culpability defense stating Morris possessed the same caliber weapon that killed the victim, he opened the door for the People to admit evidence that Morris possessed a different caliber weapon to avoid misleading the jury.[37] Thus, no confrontation violation occurred and defendant's claim should be denied.

While defendant claims that he had "scrupulously adhered" to the court's in limine ruling precluding evidence about the .357 ammunition and the prosecution changed theories mid-trial (def.br., p.95), this assertion ignores the fact that, based on counsel's argument during opening that Morris' identity as the shooter was confirmed by the .9mm ammunition on his nightstand hours after the shooting (T.41-42), the prosecutor sought to admit evidence that Morris possessed a .357 caliber firearm that day (through his plea allocution and the .357 caliber ammunition recovered from his

[37] This analysis does not change simply because the defense would obviously be asserted at trial – indeed, the same could be said in any case with a confession that the defendant challenges as coerced. Santos, 150 AD3d 1270 (defense counsel opened door by challenging defendant's confession as coerced).

apartment), and the court issued a second proper ruling that the .357 caliber ammunition was relevant because it was linked to the crime (T.676-77).

This ruling was proper because the evidence that defendant sought to admit pre-trial and that the People sought to admit mid-trial were significantly different, specifically with respect to their unique probative values. The fact that Morris possessed ammunition for a particular type of firearm (defendant's proposed evidence) is not the same as evidence that Morris actually possessed a particular caliber firearm on the date, time, and location in question (the People's proposed evidence). Indeed, the fact that Morris possessed .357 ammunition in his home has little relevance to the jury's ultimate question of whether defendant shot and kill David Pacheco, Jr. on Easter Sunday 2006, absent evidence that Morris admitted that he possessed a .357 firearm on the date, time, and location where David was killed by a .9mm bullet; however, taken together, this evidence tends to exculpate Morris as the shooter and rebut defendant's third-party culpability defense. Accordingly, it is unsurprising that the court's rulings on admitting these pieces of evidence, made at different times during trial, differed.

In a similar vein, although defendant notes that the court acknowledged that the third-party culpability defense was "in all respects []appropriate and under the circumstances of this case probably a necessary argument to make," this did not reflect the court's view of how the People could rebut that defense (T.1131; def.br., p.97). In fact, immediately following the statement cited by defendant, the court said that that argument "nonetheless, opens the door to evidence offered by the state refuting the

claim that Morris was, in fact, the shooter" (T.1131). Moreover, defendant was on notice before jury selection that while the court would permit him to pursue his third-party culpability defense through admissible evidence, depending on how it was presented, the People would be permitted to "respond" (VD.182-83). Undoubtedly, this was an unusual case where someone other than the defendant had been prosecuted for the homicide which presented defendant with an obvious third-party culpability defense. However, as the court recognized, those unusual circumstances did not prevent the People from offering available evidence to rebut defendant's theory. Put another way, simply because an argument is "appropriate" and "necessary" in a particular case, does not mean that it will not open the door to rebuttal evidence.

Additionally, the court was correct to admit the plea allocution as a statement against penal interest given its inherent reliability. While defendant continues to insist that the allocution is unreliable (def.br., p.98), there were several key indicia of reliability. The court found that Morris' plea allocution was reliable given the serious consequences he faced as a result of pleading guilty to an offense the People admittedly could not independently prove. It added a violent felony offense to Morris' record, when he had no prior criminal history, that could result in his deportation—it ultimately did result in his removal as an inadmissible alien—or enhancement of any future sentences (T.906-07). Further, the information Morris provided was corroborated by Burger's testimony that Morris had given him a .357 firearm to dispose of (T.1131-32).

Ultimately, if admitting the allocution were error, it was harmless beyond a reasonable doubt since "there [was] no reasonable possibility that the error might have contributed to defendant's conviction." People v. Crimmins, 36 NY2d 230, 237 (1975). Critically, defendant successfully argued to include the fact that Morris entered the plea against his attorney's strong advice because the People could not prove the case and so he would be released from prison the same day. This allowed defendant to argue on summation that Miller "just enter[ed] the plea because he want[ed] to go home" (T.1581) and to "get out of jail" (T.1583), facts the prosecutor could not rebut, and that significantly weakened the impact of this evidence. Moreover, the jury did not request a read-back of Morris' plea. These facts, combined with the strong evidence of defendant's guilt (Point One), render any error in admitting the allocution harmless.

POINT THREE

DEFENDANT ABANDONED HIS REQUEST TO REFRESH A WITNESS'S RECOLLECTION WITH PRIOR GRAND JURY TESTIMONY HE DID NOT ASK HER ABOUT.

During cross-examination, while describing the initial fight, Gonzalez testified that she never referred to the "guy in the blue sweater"/the "taller skinny person" as Morris because she "didn't know him" so how could she "know his name" (T.478-79). Counsel asked if she recalled answering questions in the Grand Jury "back in 2006," and Gonzalez said, "Yes." Counsel asked, "[D]o you recall when you were testifying . . . you were asked these questions and giving this answer," "And who was the skinny guy? [] Morris." Gonzalez said, "I never said that." The prosecutor refused to stipulate

to the transcript and objected to the defense attempting to show Gonzalez the Grand Jury testimony (from 2007) from which defense counsel had read (T.479-80). Counsel protested that he "was trying to refresh her recollection" and the court declined to provide its reason why that was incorrect before the jury. Counsel remarked, "[W]e'll come back to this" (T.480).

A few questions later, counsel asked Gonzalez about whether she saw the shooter speaking to a person in a burgundy car. Gonzalez testified that she could not remember. The court, over the prosecutor's objection, allowed counsel to show her a document to refresh her recollection and asked her if she recalled testifying in the Grand Jury to the same. Gonzalez testified, "I don't know," said she cannot read the document without her glasses, which were lost, and answered the question again "I don't remember" (T.482-84).

After Gonzalez testified about the lineup, saying she told police "it might be number two" but "he's too big in the face," counsel again asked Gonzalez about "when you were in the Grand Jury" whether she expressed any doubt that Morris was the shooter. She denied she had. Counsel, without identifying the Grand Jury proceeding, proceeded to read her multiple questions from her 2007 Grand Jury testimony and she responded either that that was not what she said, that she did not recall, and that she did recall (thrice). She emphasized "they put" Morris' name into those questions, she did not know it (T.487-93, see T.497). Counsel then asked, "When you went into the Grand Jury that was back in 2006, was it not?" Gonzalez responded, "Yes." He then

asked about her memory in 2006 compared to the same at trial (T.493). Re-direct, re-cross, and re-re-direct continued, focusing on her inability to see well in 2006, the line-up identification, and her Grand Jury testimony, with both sides objecting to the other confronting Gonzalez with her prior testimony (T.494-502).

After the jury exited, counsel stated that since the prosecutor would not stipulate to the accuracy of the Grand Jury minutes, he would be forced to call the court reporter from 2006 and the court directed the People to provide counsel with the necessary information to subpoena the court reporter (T.504-05). The prosecutor remarked that after his own review of the minutes, he may stipulate to its admission (T.505-06).

On a later court date, the prosecutor informed the court that the reporter was available and he intended to call her as a witness. The prosecutor also noted, "many questions [counsel] asked her about what she said in 2006, only two of them are questions and answers that she actually said in 2006 . . . that relates to the burgundy van and the car at the tail end of her testimony," whereas "every single question asked of [] Gonzalez . . . about the use of the names Morris and Gilliam in 2006[] weren't asked of her in 2006." She "gave no answers in 2006 about Gilliam or Morris." (T.583). Counsel, he said, had read from the 2007 Grand Jury minutes. At that proceeding, another prosecutor had used "Morris" and "Gilliam" in questioning Gonzalez. And counsel, he noted, had these Grand Jury minutes with the dates identified on them "for years." (T.584). The prosecutor asked permission to call the 2006 court stenographer to allow counsel "to complete his impeachment" as to questions relating to the "van," but also

to "dispel" the misimpression given to the jury regarding Gonzalez knowing their names in 2006. Counsel admitted it was "possible" he erred, but asserted the difference in years is not "material" because the thrust of the testimony was whether she said it in front of a Grand Jury (T.582-86). The court responded it "normally would agree" with counsel, but here the time difference is "quite consequential" (T.587).

When the court proposed a stipulation to correct the issue, and the prosecutor agreed, counsel rejected the offer. The court then reiterated that counsel had the right to call the stenographer (T.588). After a recess, counsel asked for a stipulation because he did not want an "unfair" impression made that Gonzalez never said those things, only that they were said a year later (T.592-93). The prosecutor declined, noting Gonzalez was "never confronted" properly with the 2007 Grand Jury minutes, and said he would only stipulate to the 2006 minutes (T.593-94). The court recognized counsel's inquiry was "erroneous," but said he did quote from a proceeding, and so the court was inclined to let counsel call the stenographer from the 2007 proceeding (T.595).[38]

The 2006 Grand Jury reporter, Cheryl Laurel, testified for the People about Gonzalez' 2006 testimony, stating, inter alia, she did not name Morris (or defendant) as the shooter (T.613-20). Later, counsel asked to call the 2007 Grand Jury reporter, claiming he only mentioned 2006 in the first few questions. The court, saying "I'm

[38] The prosecutor noted, in response, that the use of the wrong Grand Jury minutes did not appear to be a "mistake" by counsel, but a calculated decision; something the court recognized appeared possible. Counsel denied doing so. Still, the court said it would grant counsel a remedy even if he committed this act intentionally (T.596).

already forming my view," asked, "Do you ever mention 2007 in any of your questions?" Counsel admitted he did not. The court repeated the question to confirm (T.714). The court effectively admonished counsel for that, saying "if the jury, without knowledge that there were two presentations, were to take a reasonable interpretation of your inquiry, wouldn't it be implicit that the questions pertain to the grand jury proceeding in 2006?" Counsel admitted that is "possible" (T.714-15).

The prosecutor opposed defense calling the 2007 Grand Jury reporter because Gonzalez had not been properly confronted with her prior testimony from 2007 (T.716-18), and the Court asked the parties to be prepared to address the issue again, explaining:

> Counsel cannot impeach this witness by reference to the 2007 grand jury minutes or stenographer, because he did not present the question in a way that confronted the witness with 2007, identified as 2007 minutes, and, therefore, given the questions that pertain to 2006, the witness's answers would technically be correct and not impeachable.
>
> On the other hand, to the extent that the witness conceded that she had made inconsistent statements in the grand jury and to the extent that those concessions can only apply to the 2007 proceedings – I keep running up against a wall. I keep on coming to the conclusion that there is no basis for having the stenographer from 2007 testify when there was no impeachment regarding the 2007 minutes.
>
> I'll have to think about this further, but right now my feeling is that because the witness was not impeached by reference expressed to 2007 and because the questions could reasonably be interpreted as being 2006 grand jury testimony, there is no basis for calling the stenographer from 2007, but I have to think about that a little further.

(T. 718-19). Counsel did not raise this issue again until the jurors sent a note requesting the 2006 Grand Jury reporter testimony (Jury Note 1, T.1720) and, at that point, argued that the jury was left with an inaccurate and unfair impression about Gonzalez' testimony because he was precluded from calling the 2007 Grand Jury reporter (T.1726-27).

Now, defendant claims the trial court violated his right to confront a witness and present a defense by refusing to permit him to further impeach Gonzalez by allowing him to refresh her recollection with her prior testimony or to allow him to call the 2007 Grand Jury court reporter. This abandoned and unpreserved claim is meritless.

As the record reflects, the court never finally ruled on the issue of whether defendant could call the 2007 court reporter to impeach Gonzalez. Instead, the Court asked the parties to be prepared to address the issue again. Counsel then failed to bring that to the court's attention before the close of the defense case. Accordingly, defendant has abandoned and failed to preserve this claim. See People v Alexander, 19 NY3d 203,217 (2012); People v Graves, 85 NY2d 1024,1027 (1995); People v Martinez, 257 AD2d 479,480 (1st Dept 1999); People v Felix, 256 AD2d 135,136 (1st Dept 1998).

Furthermore, this Court should decline to review this claim in the interest of justice. Though counsel denies it, both the prosecutor and the court recognized this may have been a calculated decision by counsel to trip up the witness, given that the date he identified at the start of his cross-examination was 2006 while he held in his

hands Grand Jury minutes that listed 2007 on the cover, and that he had both sets of minutes in his possession for years. Under these circumstances, and without more of a record available, it behooves this Court not to consider such a claim. See People v Dickson, 143 AD3d 494,495 (1st Dept 2016)(declining to review claim that potentially implicated defense counsel's trial strategy in the interest of justice); People v Poston, 95 AD3d 729,730 (1st Dept 2012).

Indeed, perhaps the best reason not to consider this claim is because it rests on multiple misreadings of the record. The court never actually ruled against defendant, and if requested before the defense case, as the court invited him to do, may have granted his application to call the 2007 court stenographer. Likewise, though counsel, at one point, "tried to show [Gonzalez]" a copy of the actual testimony, but was, as defendant puts it, "shut down by the court," the reason for that sustained objection is obvious. The witness did not say she did not recall the question, but answered, "I never said that," to a defense inquiry, thereby eviscerating any need for counsel to refresh her recollection (T.479-80). Richardson, Evidence (10th ed) §465. Moments later, the court permitted counsel to refresh her recollection with pages of transcript, over prosecutorial objection, when she answered, "Don't remember" (T.483). It just so happened that Gonzalez could not read the pages anyway without glasses. Thus, no error occurred.

Indeed, defendant's only real complaint, if any exists, is against the attorneys below. As to his own attorney, he does not challenge counsel's error. Instead, he claims "the prosecutor" "sandbagged" his defense by "fail[ing] to contemporaneously object"

to counsel's mistake (def.br., p.103). Yet, the prosecutor is not responsible for establishing the foundation for defendant's cross-examination of a witness and was under no obligation to alert counsel to his error, but instead properly addressed the error during his re-direct examination of Gonzalez and by calling the 2006 court reporter. There was nothing "unfair" about that.

Regardless, defendant's claim is meritless for additional reasons. The right to present a defense "does not give criminal defendants carte blanche to circumvent the rules of evidence." People v Hayes, 17 NY3d 46,53 (2011). Before a defendant may submit evidence in support of his defense, he must adhere to the same evidentiary rules as any party, often left to the trial court's discretion. Moreover, in evaluating whether preventing a defendant from submitting evidence rises to a due process violation, courts should consider whether the evidence was critical to the defense.

Defendant never properly confronted Gonzalez with the appropriate dates of her prior testimony before seeking to call the 2007 Grand Jury reporter. People v Duncan, 46 NY2d 74,80-81 (1978). Here, defendant sought to admit the 2007 Grand Jury court reporter's testimony to impeach Gonzalez' testimony that she had not previously identified Morris by name as the shooter in the 2006 Grand Jury presentation. As the court recognized, Gonzalez' testimony was accurate–she did not identify Morris in the 2006 Grand Jury presentation (which was the only presentation defense asked about). To the extent that defendant sought to establish the identification was made in the 2007 presentation, the court providently considered that Gonzalez had

never been asked about the 2007 presentation, she would have been exposed to various media accounts of the case including Morris' name and face as the shooter between the 2006 and 2007 presentations, and that it would further confuse the jury (T.587-88,714,718-19). Though not a final ruling, this was a prudent analysis, particularly given the complex nature of this case.

Additionally, this evidence was not critical to the third-party culpability defense identifying Morris as the shooter. The evidence only would have been admissible to impeach Gonzalez' credibility about her prior Grand Jury testimony, not for its truth. Thus, it did not constitute direct evidence to support the defense. Gonzalez, as a witness, also ceased being useful once she took the stand and admitted she had bad vision in 2006, just as today. Further, the jury heard substantial evidence from other witnesses that Morris could have been the shooter, including that several other eyewitnesses had identified an individual they later came to learn was Morris during a lineup. Moreover, defendant used Gonzalez' prior identification anyway to pursue his defense. During his summation he highlighted all the eyewitnesses' prior identifications of Morris and challenged Gonzalez' credibility stating "she's not the best witness," that "she was a lot more confident when she said nine years ago than what she's saying now," and that when "[s]he's asked about her Grand Jury testimony . . . all of sudden, I seen more. I was standing in the corner, and he was shooting" (T.1523-33). Thus,

defendant was in no way prevented from presenting his chosen defense.[39] For these same reasons, any purported error relating to this testimony was harmless.

POINT FOUR

THE TRIAL COURT EXERCISED SOUND DISCRETION IN PERMITTING THE PROSECUTION LIMITED LEEWAY IN EXAMINING WITNESSES.

The trial court providently applied the rules of evidence in permitting the prosecution to call and examine Vernon Matthews (defendant's self-described mentee [T.1265]) and Elisa Hemphill (defendant's sister-in-law [T.416-17]), and to cross-examine defense witness Nana Owusuafriyie (defendant's friend). It did not permit the prosecutor to impeach a prosecution witness under CPL §60.35 as defendant alleges. Instead, the court sustained defense objections, while allowing the prosecution limited leeway to address his witnesses' sudden lack of recollection, as well as a falsity in the defense witness' testimony.[40]

Initially, the court exercised sound discretion in permitting leeway for the prosecutor to question Matthews and Elisa. The "party who calls a witness certifies his credibility" and cannot impeach him. This "general rule is subject [] to the exception

[39] Defendant also challenges the prosecutor's use of this evidence on summation. That claim is addressed in Point Eight, where defendant raises the same claim.

[40] As defendant failed to raise any constitutional claims with respect to these issues below, they are unpreserved. People v Concepcion, 136 AD3d 578,579 (1st Dept 2016)(hearsay and constitutional claims unpreserved). Consequently, any remaining alleged error is subject non-constitutional harmless error analysis. See Crimmins, 36 NY2d at 242 (whether there is a "significant probability . . . that the jury would have acquitted the defendant had it not been for the error").

that, when a witness proves hostile or unwilling, the party calling him may prove his conscience or test his recollection . . . the extent to which . . . depends upon judicial discretion." People v Sexton, 187 NY 495,509 (1907). The Sexton Court held witnesses' unwillingness was "manifest from their relations to him and from their apparent lack of recollection," therefore, it was "permissible for the district attorney to ply them with leading questions, and even to cross-examine them." Id. The Court explained, "[a]n adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist." Becker v Koch, 104 NY 394,401 (1887). Thus, it is improper to "conflate[] the examination of a hostile witness, which is a matter of discretion, with the impeachment of a party's own witness by prior contradictory statements, which is regulated by CPL 60.35." People v Rivera, 130 AD3d 487,488-89 (1st Dept 2015); see People v Elleby, 146 AD3d 687 (1st Dept 2017).

A. Vernon Matthews

On October 6, 2015, the trial court issued a material witness order for Matthews–an uncooperative witness who previously wrote a statement to police the day after the shooting about a conversation he overheard between "DA" (defendant) and Burger implicating them–resulting in his arrest and trial appearance against his will (T.1243-45). A prosecution Detective Investigator had interviewed Matthews in 2011, whereat he acknowledged the truth of that statement, but said he would never testify against

defendant (T.1245,1284). Matthews, the court noted, had since become "abusive and hostile" and claimed to lack any memory (T.1246). The court appointed counsel to advise Matthews about the consequences of not testifying under the material witness order or providing false testimony (T.1244-47,1249-50). Counsel asked that the court not declare him "hostile" before he demonstrated hostility (T.1248).

Matthews testified. He demonstrated a "selective memory" of details, first claiming not to recall anything, then recalling specifics when the questions did not incriminate defendant, and then disclaiming the truth of his written statement (T.1253-66).

The prosecutor asked permission to impeach Matthews under CPL §60.35(1). The court acknowledged "the law is not subject to being held hostile to a matter of perjury that is cloaked in a failure to remember," and that, based on the "incongruity" of his testimony, he demonstrated "evasive contempt" and possibly even "perjury" (T.1267-68). The court, over counsel's objection, cautioned Matthews (with Matthews' counsel present) that he had no Fifth Amendment right to refuse to testify, if he refused to testify he could be punished by contempt or imprisonment, and if his testimony was false he could be charged with perjury (T.1268-71). The court then identified what it saw as "significant problems" with Matthew's purported recollection, because it "does not ring true," and has "no connection with reality," when Matthews suddenly recalled and told the court, for the first time, that the "cops threw" out an earlier statement. The court noted that this, too, was evidence of a "selective memory" and "convenient failure to remember other events" that suggests untruthful testimony (T. 1272-75). Matthews,

through his attorney, unsuccessfully sought to invoke his Fifth Amendment privilege (T.1277-79).

Matthews, upon retaking the stand, again testified to a lack of recollection and otherwise fabricating his statement (T.1281). Due to Matthews "convenient failure of memory," the court, over counsel's objection and outside the jury's presence, advised Matthews about the consequences of perjury again (T.1286-88).[41]

After recess, counsel moved to preclude further testimony (T.1289-92). The prosecutor identified his good faith basis to call Matthews, in that he told an investigator in October 2012 that the statement was true, but that he did not want to testify against his friend, had become unresponsive to the prosecutor's many further attempts to contact him—Matthews had pulled his child out of school and changed addresses—and the first time he claimed to not recall was that morning (T.1292-93). After hearing from both sides, the court held the statement inadmissible under CPL §60.35, agreeing with counsel that it did not disprove a material portion of the People's case, but found the People had acted in good faith calling Matthews to testify because he had "very significant testimony" in the form of a potential "confession or admission" by

[41] The court explained the purpose of the additional warning was "to try to elicit testimony that [the court] believe[d] would be truthful to avoid perjurious testimony that [Matthews] ha[d] so far offered" (T.1285-86).

defendant, and this remained a fluid situation (T.1294-99).[42] The court also declined to hold Matthews in summary contempt (T.1298).

Matthews' evasive testimony continued, with him claiming to have no recollection, except that he now had a vivid recollection of the police crumpling up his first statement and pressuring him to write the second untrue one (T.1303-10,1312-14,1314-17).

Now, defendant claims the prosecution did not act in good faith in calling Matthews and the court erred in permitting the prosecutor to impeach Matthews with his prior signed written statement under CPL §60.35 (def.br., pp.111-13). He is wrong.

Initially, the prosecutor acted in good faith in seeking a material witness order to call Matthews as a witness. The decision to allow the People to call a witness who has previously indicated his or her unwillingness to testify is "one resting within the sound discretion of the trial court." People v Berg, 59 NY2d 294,298 (1983). The court must determine whether "any interest of the State in calling the witness outweighs the possible prejudice to defendant" resulting from any unwarranted inferences that may be drawn by the jury from the witness' refusal to testify. Id.; see People v Vargas, 86 NY2d 215,222 (1995). Here, Matthews, even at trial, acknowledged providing a written statement to law enforcement; though the jury never heard its contents, that statement contained an admission, if not a confession, by defendant to this shooting. Matthews,

[42] The court reserved decision on whether the statement was admissible as a prior recollection recorded, but noted such a finding would require "a change of testimony," with Matthews admitting the contents of the statement were true when he wrote them (T.1298).

when interviewed before trial, admitted to the truth of that statement to a prosecution Detective Investigator and then made himself unavailable. As the court found, his unwillingness to testify against his mentor on such an important issue did not render the prosecution calling him inappropriate where his testimony could change. See People v Robertson, 24 AD3d 184,184-85 (1st Dept 2005); see also People v Campney, 94 NY2d 307,310-11 (1999).

As for the prosecution's examination itself, the court ruled impeachment under CPL §60.35 was impermissible and sustained every objection that referred to the contents of the prior written statement. The court agreed with counsel that Matthews' testimony did not disprove a material portion of the People's case. Thus, the prosecutor only used the statement to clarify what Matthews remembered when he testified versus what he had written in his statement, not to impeach him:

> Prosecutor: You mentioned . . . that DA and someone else came to your home the night of Easter Sunday 2006. Is that something you remember of your mind or something you simply wrote down on paper?
> Matthews: Something I simply wrote down in the paper.
> Prosecutor: Do you have any memory as you sit here today of the defendant, your mentor, coming to your home in April of 2006?
> Matthews: No.
>
> . . .
>
> Prosecutor: On April 16, 2006, in your home in Brooklyn, did you hear the defendant, DA, say that some guys tried to rob him and he fought them, and then he went and he got a gun, and he shot, at them, that he was airing his gun out at them?
> Counsel: Objection.
> Court: Allowed. You may answer.
> Matthews: Is that in my statement?

Prosecutor: I'm asking you.
Court: He's not asking about the statement. He's asking about an occurrence.
Matthews: I don't recall that. I don't remember that. That was very long ago.

(T.1303-04,1304-05)(emphasis supplied). Thus, as the court explained, the prosecutor did not impermissibly use the statements to refresh Matthews' recollection "in a manner that disclose[d] its contents," but only clarified Matthews' independent recollection about the events that occurred. Moreover, if the prosecutor asked about anything close to the statement's contents, the court sustained objections, thus that information was never before the jury (T.1264,1310). Accordingly, defendant's claim that the People improperly used Matthews' statement to impeach him under CPL §60.35 is meritless.

If anything, defendant's complaint rests on the fact that the court provided leeway to the prosecutor to lead and thereby impeach Matthews without first declaring him hostile. Yet, the court effectively declared Matthews as such when it said, "the law is not subject to being held hostile to a matter of perjury that is cloaked in a failure to remember" (T.1267), and cautioned Matthews twice about his "evasive" testimony appearing to be perjured. That the court, in turn, allowed the prosecutor such leeway was an entirely sound exercise of its discretion. See Sexton, 187 NY at 509; People v Simone, 59 AD2d 918,919 (2d Dept 1977)(reversing in part based on court's refusal to deem witness who appeared pursuant to a court order, claimed he could not remember the events at issue, and asserted his privilege against self-incrimination hostile).

Regardless, the court instructed the jury that in rendering a verdict they could only consider the evidence–witness testimony, exhibits, and stipulations (VD.607,T.1681). The court further instructed the jury that they could only consider an attorney's question and the answer together to provide context to the meaning of the witness' answer (VD.620;T.1689). Here, the prosecutor asked whether Matthews heard defendant "say that some guys tried to rob him and he fought them, and then he went and he got a gun, and he shot, at them, that he was airing his gun out at them," and defendant said he did "not recall" (T.1304-05). The jury, then, is presumed to have followed the court's instructions in disregarding this testimony, because in the absence of an answer, it was not evidence. See People v Davis, 58 NY2d 1102,1104 (1983); People v Overlee, 236 AD2d 133,142 (1st Dept 1997).[43]

Any error in the prosecutor's brief questions clarifying Matthews' memory about the events at the time he wrote the statement versus when he testified was harmless Simply, there is not is a "significant probability . . . that the jury would have acquitted the defendant had it not been for the" prosecutor asking Matthews' about which information he independently recollected from his written statement at the time of trial. Crimmins, 36 NY2d at 242. This is particularly true given the evasive nature of his testimony during which he refused to implicate his self-described mentor, and that this

[43] Defendant's claim that the prosecutor improperly commented on these witnesses' testimony during summation (def.br., pp.112-13,115) will be addressed in Point Eight.

claim, ultimately, relates to a single question asked of Matthews for which there was no answer.

B. Elisa Hemphill

Elisa, defendant's sister-in-law, testified that she had known defendant since childhood and had seen his right forearm before and on Easter Sunday 2006, but could not recall how it appeared before that day (T.416-17). The prosecutor asked, "What did you tell me this morning?" Over overruled objection, she replied, "You asked me did he have a tattoo on his arm that said 10458?" When asked, "You said 10458," She replied negatively, "That's what you said." Asked again, "What did you say," she answered unresponsively, "You asked me did he have a tattoo on his forearm that said 10458." The prosecutor continued, "So that's what you said[?]" Elisa replied, "That's what I answered to your question." The prosecutor asked "what happened" between that morning meeting and now that made her not recall. Over an overruled objection on the grounds "she never said that," Elisa replied, "It's been a long time. I don't know you had me in there with the evidence" (T.417-18). When counsel objected to the prosecutor cross-examining his own witness, the court sustained that "correct" objection (T.418).

At a sidebar, the court indicated it was "prepared to allow the district attorney to cross-examine the witness on the basis of what [wa]s obviously a change in testimony" and was "very close to removing the jury and warning the witness about" feigning a loss of memory, but would prefer to avoid it (T.418-19). The prosecutor explained that two

months before her testimony Elisa had informed him that that defendant had "10458" tattooed on his arm, she searched Facebook for a photograph of the tattoo, but could not find one because Llanos informed her it had been removed. Two days before and the morning of her testimony she confirmed the zip code tattoo (T.420). The court permitted the prosecutor to cross-examine and lead the witness (T.420-21).

During the examination, Elisa confirmed that she had spoken to the prosecutor about the defendant's tattoo a few months ago and again the morning of her testimony and believed he had a tattoo of numbers, but did not know if he still had it (T.421-26). Later, defendant displayed both of his forearms and his entire right arm to the jury revealing no tattoos on either forearm, but "D.A. 10453" tattooed on his right arm (T.433-36).

The court providently granted the prosecution's request to cross-examine Elisa and ask her leading questions based on her change in anticipated testimony. She was not impeached under CPL §60.35.[44] Instead, two months, two days before, and the morning of trial, Elisa informed the prosecutor that she had seen defendant's tattoo of "10458" on his arm and had even searched Facebook to find a photo of it (T.420). Then, during her testimony she said she could not recall (T.416-17). This evasive behavior warranted the court's response. See Sexton, 187 NY at 509; People v Dann,

[44] Nor could she be because her prior statements were neither written nor said under oath. People v Nuculli, 51 AD3d 408,409 (1st Dept 2008).

14 AD3d 795 (3d Dept 2005); People v Mills, 302 AD2d 141,145 (4th Dept 2002), aff'd 1 NY3d 269 (2003).

Accordingly, the court properly permitted the prosecutor to cross-examine and lead her based on "what [wa]s obviously a change in testimony" (T.418-21). Indeed, Elisa's testimony was so evasive that the court stated it was "very close to removing the jury and warning the witness about" feigning a loss of memory (T.419). The prosecutor adhered to this ruling by asking Elisa leading questions that elicited the fact that she had spoken to the prosecutor about defendant's tattoo, which she believed contained numbers, a few months ago and, again, the morning of her testimony, but that she did not know if he still had the tattoo (T.421-24). Counsel then elicited the same facts on cross-examination (T.424-26). In sum, the court exercised sound discretion in permitting this inquiry.

Any non-constitutional error regarding this ruling was harmless. Defendant displayed his arm to the jury revealing his tattoo, "D.A. 10453," on his right arm (T.435-36). Thus, it is implausible that Elisa's brief testimony would have swayed the jury to convict defendant over their own first-hand observation of the tattoo. Additionally, the tattoo was not a critical identifying feature linking defendant to the crime. Some witness recalled it, some did not, some reported it had letters, some numbers, but none relied solely upon the tattoo to identify the shooter. Even counsel argued on summation that evidence about the shooter's tattoo was insufficient to convict anyone (T.1564).

C. Nana Owusuafriyie

The defense called Nana Owusuafriyie, defendant's friend of 20 years who went on to serve in the Navy. Owusuafriyie affirmatively testified that he had never been convicted of a crime (T.1442-44). On cross-examination, the prosecutor asked about Owusuafriyie's special court martial and if he was "found guilty of four different crimes." Owusuafriyie said, "Correct" (T.1452). When asked if his statement on direct was a lie, Owusuafriyie back-tracked that he said he had never been convicted because those offenses were adjudicated in a military rather than civilian court (T.1452-53,1460, 1469,1474,1478). He continued to deny the conduct for which he was found guilty, stating he did not actually steal anything (T.1458-59). He attempted to mitigate his responsibility with his answers, saying he was young (22 years old) and did not know he was committing a crime (T.1464-66), his two co-conspirators were removed from the Navy so he was left to answer for all of the charges (T.1458-59,1461-62), he continued his military service (T.1467,1470,1473-74), and the offenses occurred fifteen years ago (T.1457,1459,1464,1466,1470,1473). The prosecutor then sought to admit the official record of the court martial. The court granted the application after finding Owusuafriyie "as evasive as any witness I have ever seen" who said "everything but that he was convicted of a crime" (T.1486-87).

Now, defendant claims that the prosecutor "badger[ed]" the witness after he allegedly "repeatedly admitted the misconduct and sought to explain it," and improperly

admitted a record of his conviction pursuant to CPL §60.40(1) (def.br., p.114). This partially unpreserved claim is meritless.

Initially, defendant never objected to the prosecutor's questions on the grounds that he was badgering the witness. He only objected generally to attempts to refresh Owusuafriyie's recollection (T.1456), and specifically when the prosecutor appeared to be "testifying" (T.1467), once when a question was already asked and answered (T.1469), and to re-cross that exceeded the scope of re-direct (T.1478,1481). Additionally, he objected to the prosecutor's attempt to move into evidence the court martial document on the grounds "the witness admitted it" (T.1487). Thus, to the extent defendant claims any error beyond the latter, this claim is unpreserved. People v Bailey, 32 NY3d 70,78 (2018)(to preserve claim counsel must object and state grounds).

The scope of cross-examination is within the trial court's discretion. People v Sorge, 391 NY 198,201-02 (1950); People v Ocasio, 47 NY2d 55,60 (1979). And, the constitutional protections afforded a defendant in limiting cross-examination about prior convictions do not apply to other witnesses. Ocasio, 47 NY2d at 58-60 ("unlike the dilemma posed for a defendant, the focus of the impeachment of a witness is credibility, not guilt or innocence"). Thus, a witness can be cross-examined about "any immoral, vicious or criminal act which may affect his character and show him to be unworthy of belief" (People v Beale, 73 AD2d 547,547 [1st Dept 1979]) and a witness's denial of such acts does not preclude further questioning about them because, "if it did, the witness would have it within his power to render futile most cross-examination"

(Sorge, 391 NY at 200-01). See also People v Batista, 113 AD2d 890,892 (2d Dept 1985). A witness' denial or equivocation about "any conviction" allows the examiner to "independently prove any previous conviction" (CPL §60.40[1])(emphasis supplied), while a denial or equivocation about a "specified offense" allows the examiner to "independently prove such conviction" (People v Sandoval, 34 NY2d 371,374 [1974]; Beale, 73 AD2d at 547).

The trial court's evaluation of Owusuafriyie's testimony reveals that his lack of credibility and candor necessitated the prosecutor's vigorous cross-examination. Outside the presence of the jury, the court commented:

> I don't think this witness is capable of knowing what the truth is. In all the years, the 33 years that I've served as a judge, I've never seen such a disgusting display of audacity in my life, and I have every intention now of writing a letter to this gentleman's commanding officer[.]

(T. 1484). The court's outrage was well-deserved. Owusuafriyie was convicted pursuant to a special court martial of four separate offenses for attempting to steal $5,500 from MBNA America and computer equipment valued at $2,724, and making two false official statements for which he served one week in a military jail (T.1456-59,1460-61,1466,1470,1481). Stealing money and computer equipment worth several thousand dollars from the Navy and lying about it to investigating officials was criminal behavior, not a mere internal military infraction, that obviously would be prosecuted under the Penal Law in a civilian context and any resulting convictions would be available on cross-examination to evaluate his credibility. People v Bennette, 56 NY2d 142,148

(1982). Moreover, Owusuafriyie was incarcerated. Thus, there should have been no confusion that his actions were criminal and the jury deserved to hear about his history to evaluate his credibility.

Owusuafriyie, after denying any criminal record on direct, continuously testified on cross that his court-martialed offenses did not count as convictions because a military rather than civilian court adjudicated them (T.1452-53,1460,1469,1474,1478). He then oscillated between various excuses to mitigate his actions and responsibility. He claimed that he did not actually steal anything, and was "running with the wrong group" (T.1458). He stated that he was young (22 years old) and did not know he was committing a crime (T.1464-66). He attempted to portray himself as a scape-goat by testifying that his two co-conspirators were removed from the Navy so he was left to answer for all of the charges (T.1458-59,1461-62). Lastly, he attempted to detract from his prior criminal behavior with his continued his military service (T.1467,1470,1473-74).[45] Each denial and excuse necessitated further cross-examination to "show him to be unworthy of belief." Beale, 73 AD2d at 547. Had Owusuafriyie actually admitted his conduct and convictions, the prosecutor likely would have moved on to other areas of cross-examination, but because Owusuafriyie continued to deny and attempt to

[45] Owusuafriyie simultaneously attempted to rely on his military service to bolster his credibility by testifying in his naval uniform about the details of his service and hide his criminal conduct during that service. If his good acts in the military were to inure to his benefit, the People were allowed to introduce his bad acts in the military to challenge his credibility and provide the jury with a complete picture of his service. See CPL §60.40(2).

mitigate and excuse his convictions and underlying conduct, the prosecutor was entitled to continue to cross-examine him to show his lack of credibility. Sorge, 391 NY at 200-01; Batista, 113 AD2d at 892.

The court also properly admitted military records verifying that Owusuafriyie's testimony was false. The prosecutor asked Owusuafriyie about his prior convictions for false statements and stealing money and computer equipment and Owusuafriyie repeatedly either denied his convictions or equivocated and attempted to excuse his conduct. As the trial court found, "The witness was as evasive as any witness I have ever seen, and the witness said everything but that he was convicted of a crime" (T.1487). Thus, the People were properly permitted to admit this proof of the convictions. CPL §60.40(1); Sandoval, 34 NY2d at 374; Beale, 73 AD2d at 547.

That the conviction occurred fifteen years ago does not change this result. Ocasio, 47 NY2d at 58-60; People v Stringfellow, 176 AD2d 447 (1st Dept 1991); People v Yeaden, 156 AD2d 208 (1st Dept 1989). Nor does it matter that Owusuafriyie was convicted of military offenses. See People v Cherry, 106 AD2d 458 (2d Dept 1984). Notably, while each of Owusuafriyie's offenses would be recognized in the Penal Law, they are also likely cognizable under the New York Military Law and, thus, proper grounds for cross-examination. See MIL §130.102 (False official statements); MIL §130.103 (Military property–loss, damage, destruction, or wrongful disposition); MIL §130.113 (Frauds against the government); People v Shepherd, 179 Misc2d 171 (Sup Ct, Bronx Co 1998) (permitting cross-examination of defendant for military convictions

if cognizable under New York Military Law). Here, as in Ocasio, it was necessary to cross-examine Owusuafriyie about his prior convictions because "it was important the jury know who and what []he was." Ocasio, 47 NY2d at 60.

In any event, if the cross-examination of Owusuafriyie exceeded permissible bounds, the error was harmless. People v Perez, 36 NY2d 848,849 (1975). Owusuafriyie's substantive testimony was limited and in no way undermined the evidence of defendant's guilt. Thus, even if his credibility were damaged so much that the jury rejected his testimony, there is not a significant probability the jury would have acquitted defendant had it not been for the People's cross-examination clarifying Owusuafriyie's criminal history. Owusuafriyie explained defendant's attire earlier in the day before the shooting, which was irrelevant because defendant could have easily changed clothes or put on the blue sweater between when Owusuafriyie left and the shooting. He also testified that Burger had called him to meet at Morris' apartment at 6:00 p.m., he noticed Morris' knuckles were bruised, and that he drove Burger to 170th Street and Grand Concourse. This testimony was cumulative of other witnesses' testimony. Therefore, the jury learned no new relevant information from Owusuafriyie's testimony that would have been disregarded due to his lack of credibility. Moreover, the jury does not seem to have focused on Owusuafriyie's criminal history in their deliberations because they did not ask to have any of the cross-examination read back. Thus, it cannot be said that cross-examination about his prior convictions would have affected the jury's verdict.

POINT FIVE

THE TRIAL COURT EXERCISED SOUND DISCRETION IN ITS EVIDENTIARY RULINGS RELATING TO FLIGHT, THE RECOVERY OF EVIDENCE, AND THE THIRD-PARTY CULPABILITY DEFENSE.

Defendant claims the trial court violated his constitutional right to present a defense when it permitted the People to elicit evidence regarding Morris' "innocence," but precluded him from introducing evidence consistent with Morris' guilt and his own "innocence" (def.br., pp.116-21). Additionally, he claims the prosecutor improperly commented on Morris reporting to News 12 rather than fleeing the jurisdiction (def.br, pp.119-20). These partially unpreserved claims are without merit.

Initially, on state evidentiary grounds, defendant attempted to introduce evidence: that he hired a lawyer to communicate with police early in the investigation; that Morris possessed various weapons, ammunition, and photos of Morris brandishing firearms, recovered during the execution of a search warrant of his apartment; that Morris' family was arrested for those items; and that Morris confessed to Owusuafriyie. Counsel also objected to the People introducing evidence that Morris was arrested at News 12 headquarters where he had voluntarily given an interview about the shooting and that Morris had consented to a DNA swab. Defendant did not seek to admit any of this evidence, or otherwise object to the People's introduction of evidence, on the basis of any broader constitutional argument connected to his constitutional right to present a defense. Thus, this federal constitutional claim is unpreserved. People v

Iannelli, 69 NY2d 684,685 (1986); People v Concepcion, 136 AD3d 578,579 (1st Dept 2016).

Regardless, the trial court properly determined the admissibility of the evidence defendant now challenges under the New York rules of evidence, and in so doing, it did not deprive defendant of his ability to present his defense.

Third-party culpability defenses do not "occup[y] a special or exotic category of proof." People v Primo, 96 NY2d 351,456 (2001). Instead, courts "review the admissibility of third-party culpability evidence under the general analysis that governs the admissibility of all evidence," balancing the probative value of the evidence against the risk of delay, prejudice, or confusion to the jury. Id. at 356-57; People v Negron, 26 NY3d 262,268 (2015). The trial court properly applied this standard.

Before jury selection, the court stated that it would permit defendant to pursue his third-party culpability defense through admissible evidence, but that depending on "how the testimony goes," "what the defense claims are," and how "the defense proceeds" cross-examining the People's witnesses and presenting its own evidence, it would also permit the People to "respond" to the defense. The court offered "to make rulings in advance from the presentation of evidence or examination of witnesses" (VD.182-83).

A. Evidence of Defendant's Flight and Morris Reporting to News 12

The court properly admitted evidence of defendant's flight and of Morris' decision to report to News 12 where he was arrested. The court explained that

"[w]hether or not . . . on the day after a crime is committed an individual leaves the jurisdiction . . . can be subject of evidence with a consciousness of guilt instruction" and invited defendant to offer evidence "that might refute consciousness of guilt," "most likely . . . through [his] own testimony" (VD.153-54). Defendant's immediate departure from the state following the murder with only one of his children, abandoning both his music studio and his wife's twenty-year career as a paramedic, provided ample evidence of his consciousness of guilt that the jury was entitled to hear. See People v Joe, 146 AD3d 587,590 (1st Dept 2017). Indeed, defendant does not dispute the admissibility of this evidence.

Instead, defendant takes issue with his inability to counter that evidence with an alleged explanation of his flight, saying it deprived him of his right to present a defense (def.br., p.117). The evidence defendant sought to admit was double hearsay; he sought to elicit from Det. Jimick "the fact that he was in communication with [defendant's] attorney, and that the lawyer offered to make [defendant] available should the case officer want[] to talk to him" (VD.154). That evidence was inadmissible. Instead, the court had invited defendant to present admissible counter evidence, saying it would likely have to be through defendant's own testimony (VD.153-54). Tellingly, the cases defendant relies upon involve courts improperly precluding defendants from personally testifying to such state of mind evidence explaining their reasons for flight. See People v Gonzales, 92 AD2d 873,873-74 (2d Dept), aff'd 61 NY2d 633 (1983); People v Etheridge, 71 AD2d 861 (2d Dept 1979). Under that precedent, the court's analysis was

proper. Defendant elected to not testify so the court cannot have thwarted this defense.[46] Regardless, unlike these cases, the evidence defendant sought to admit (see sub-point E) was double hearsay, and did not attempt to explain his flight from New York, thereby rendering it irrelevant.

B. Items Recovered During Execution of Search Warrant of Morris' Apartment.

Before testimony began, the court prudently agreed with the prosecutor's application that evidence that a .9mm bullet recovered during the execution of a search warrant of Morris' apartment was admissible since it had a slight connection to the murder. And, again agreeing with the prosecutor, it found evidence about a starter pistol (.8mm firearm), a non-functioning .22 caliber rifle, three rounds of .357 ammunition, a photo of Morris holding two firearms and a photo of another individual pointing a gun at Morris while he played video games (none of which were .9mm or .357 caliber) inadmissible as irrelevant because they did not "in any way logically connect [] Morris to this crime, but invite[d] the jury to speculate" (VD.105-06,156-58). Responding to defendant's argument that other witnesses do not receive protection from propensity (i.e., habit) evidence, the court stated "the issue of propensity as it pertains to protecting an individual is not involved in this case, but the issue of propensity as it pertains to . .

[46] The remaining case defendant cites, People v Price, is inapposite. In Price, defendant introduced evidence, through cross-examination of a detective, of the reason defendant gave the detective for hiding; to wit, a parole violation. The Appellate Division found the trial court erred in failing to instruct the jury of the limited purpose of parole evidence. Price, 135 AD2d 750,751 (2d Dept 1987). Here, by contrast, defendant did not provide an explanation for his flight to a police officer.

. misleading [the jury] . . . to an illogical conclusion" is implicated (VD.118-19,122). Mid-trial, based on the prosecutor's application to admit evidence that Morris possessed a .357 caliber firearm (not a .9mm) on the date, time, and location of the shooting (see Point Two)—a decision the prosecutor made in response to the defense opening statement—the court ruled that the .357 bullets recovered were admissible given the now apparent link to the crime (T.676-77).

These separate rulings were proper (compare def.br., pp.116-18). The discovery of the same caliber ammunition used in the homicide was clearly relevant. See People v Vasquez, 214 AD2d 93,104 (1st Dept 1995). Moreover, based on counsel's opening statement arguing that Morris' identity as the shooter was confirmed by the .9mm ammunition on his nightstand hours after the shooting (T.41-42), and the prosecution's proffered evidence that Morris possessed a .357 caliber firearm—Morris' plea allocution and Burger's testimony that Morris had a .357 caliber firearm that day—the .357 caliber ammunition also became relevant. See People v Almonte, 73 AD3d 531,531 (1st Dept 2010).

By contrast, the remainder of this evidence of starter pistols, a non-functioning rifle, and two photos of Morris—one where he holds what appear to be two firearms, but of calibers unrelated to this crime, and one of another individual pointing another different caliber firearm at Morris—remained irrelevant at defendant's trial. Put simply, no evidence connected those items with any charged crime against Morris or defendant. See People v Singleton, 139 AD3d 208,213-14 (1st Dept 2016)(photographs of

defendants with gun inadmissible because not linked to charged crime or "any other criminal activity" and "not the same gun, or even the same type of gun, as that recovered"); People v Smith, 192 AD2d 394,394-95 (1st Dept 1993). Despite counsel's assertion to the contrary, this evidence also would have had no relevance at Morris' trial. Although, as the prosecutor responded, we do not know what evidentiary rulings occurred at Morris' trial (VD.111-13), a court would have exercised sound discretion in excluding this evidence as irrelevant because it had no nexus to the crime and only portrayed Morris' alleged propensity for possessing and using guns. Id. And, even if deemed admissible at Morris' trial for some unknown reason, they remained irrelevant in defendant's trial since this evidence did not link to defendant.

Still, defendant claims the trial court should have admitted this evidence under Negron where the items were "recovered in close spacial and temporal proximity to the crime under circumstances evincing Morris's consciousness of guilt" (def.br., p.118). Negron is inapposite. In Negron, the Court held that "a determination that the third-party culpability evidence was admissible would have been permissible" where the evidence would have established that the third-party bore "a general resemblance to the description of the perpetrator, lived in the same building and was arrested in close proximity to the time of the offense for possessing weapons and ammunition (including the type of ammunition used in the shooting) under circumstances evincing a consciousness of guilt." Negron, 26 NY3d at 268-69 (emphasis supplied). Those circumstances included that the third-party, fleeing police, was stopped the day after

the shooting while "attempt[ing] to discard the weapons" and ammunition "on the roof of a neighboring building" Id. at 265-66. All of this "coincided with the arrival of the police to execute the search warrant on [the] defendant's apartment" in the small, multi-family, three-floor unit where the third-party also resided.[47] Notably, this holding did not state that admitting the evidence was required, only that it "would have been permissible." Id.

Here, the court admitted the evidence the Negron Court found admissible. The jury saw Morris' physical appearance through his arrest photograph, learned his address through Det. Jimick, Burger, and Owusuafriyie's testimony (T.678,983,1450), and heard that he had pleaded guilty to possessing a .357 firearm on the date, time, and location of the shooting and that the police recovered .9mm ammunition (the same type that killed the victim) and .357 ammunition from his nightstand less than 12 hours after the shooting (T.680,749-50,1184-85). Indeed, defendant capitalized on this evidence during his closing (T.1537-44). The excluded different caliber firearms (and fake firearms) and photos of Morris with firearms do not evince his consciousness of guilt like disposing of the weapons and ammunition as the police arrived did for the third-party in Negron. Officers instead arrested Morris the day after the shooting at News 12 headquarters where he had voluntarily given an interview about the shooting. Thus, this

[47] The defendant's brief in Negron provided greater detail about the circumstances of the third-party's arrest and the structure of the building he shared with defendant (brief for defendant-appellant, available at 2013 WL 12200522,*5,10).

firearm evidence does not evince the same "consciousness of guilt" as the third-party in Negron. Indeed, defendant appears to recognize as much, when he admits "Morris left certain weapons behind, but disposed of others" (def.br., p.118). Under Negron, only the guns he disposed of are relevant. Ultimately, Morris possessed the different caliber weapons and photos for any number of reasons, none of which implicated his guilt here (VD.120-21).[48]

For that reason, any error in its non-admission also was harmless. See Crimmins, 36 NY2d at 242. Indeed, counsel still pursued his propensity argument that Morris had access to multiple firearms, rendering him the likely shooter, when he highlighted on summation that "that tells you something about Nick that's important, that when Burger and guns get mentioned, the first thing that pops into his head, 'I'll get Nick because he's the gun guy'" (T.1542).

C. Morris' Family Arrested

The court also providently exercised its discretion in declining counsel's belated request to re-call Det. Jimick for further questioning about defendant's theory that Morris turned himself in to protect his family. Counsel alleged Morris came forward after his family was arrested during the execution of the search warrant of his apartment

[48] Defendant further argues that the jury should have learned that Morris had a general "enthusiasm for all types of weapons" and "easy access" (def.br., p.118). Again, the record demonstrated that Morris had access to both .9mm and .357 caliber ammunition (Jimick: T.669,679-80) and that Burger disposed of his .357 caliber firearm for him along with defendant's .9mm (R.Gilliam: T.1016,1018). Thus, this information was before the jury.

(def.br., pp.116,120; see T.1377-87). The court aptly rejected this speculative, late application. See People v Gonzalez, 254 AD2d 5 (1st Dept 1998)(court properly denied defendant's application to recall prosecution witness where defendant could have asked the same questions on cross-examination and additional questions "might have been confusing, prejudicial, and marginally relevant"); People v Alicea, 33 AD3d 326,327-28 (1st Dept 2006). Moreover, this line of inquiry had no relevance; Det. Jimick could not conceivably know Morris' motivation for speaking to News 12 or what Morris knew about his family's arrest, facts for which defendant made no attempt to lay a foundation. Ultimately, the court did not prevent defendant from calling Morris; he was unavailable because he was excluded from the United States based on his guilty plea to the .357 caliber firearm (T.891). This should not inure to defendant's benefit.

D. Morris' Alleged Confession to Owusuafriyie

The court also correctly precluded defendant from eliciting evidence about Morris' alleged "confession" to Owusuafriyie because it did not qualify as an admission or a statement against penal interest (def.br., pp.116-18,120-21). The court ruled that any "confession" was not admissible as an admission because Morris was not a party to the proceedings. That conclusion is undisputedly correct. Nor was this purported confession a statement against penal interest, where it was made to a friend, in confidence, and, therefore, did not present a threat to Morris' penal interest (T.1430-36). People v Shabazz, 22 NY3d 896,898 (2013)(to qualify as a declaration against penal interest, inter alia, "the declarant must be aware at the time the statement is made that

it is contrary to penal interest"); People v Jones, 129 AD3d 477,478 (1st Dept 2015)(statements by friend to witnesses that he, not defendant, committed assault failed to "satisfy the reliability requirement for admissibility under the exception for declarations against penal interest"). The court also noted after Owusuafriyie testified incredibly (Point 4, subsection c), that the statement would not meet the foundational standards for the additional reason that the court did not "think [Owusuafriyie wa]s capable of knowing what the truth is" (T.1483-84). Under People Soto, upon which defendant relies, this analysis was proper. There, the Court held that while it was "irrelevant whether the court believes the statement to be true," "the proponent of the statement [must be] able to establish this possibility of trustworthiness." Soto, 26 NY3d 455 (2015) (internal citations, quotation marks, and alterations omitted). Here, the court did not opine on the truthfulness of Morris' alleged confession, but merely stated that it did not find Owusuafriyie—the proponent of the statement—could establish the possibility it was true given his own incredible testimony. Thus, the court excluded the alleged statement on proper grounds.

Notably, the court did not oppose admitting any alleged confession by Morris as a statement against penal interest, provided it met the foundational requirements. Before trial, on counsel's application, the court correctly found admissible Morris' full statement to a fellow inmate that he was present at the shooting, fired a few shots, and handed the gun to defendant who fired a few shots (VD.19-20,25-26). Counsel, who

had sought to introduce only selective portions of that confession, declined to utilize it at trial.

Ultimately, given the incredible nature of Owusuafriyie's testimony, as recognized even by the trial court, any alleged error in the court's failure to admit this evidence was harmless.

E. Defendant Hiring An Attorney

The court properly precluded defendant from introducing evidence through Det. Jimick that he had "retained a lawyer to communicate with police" and "offered to make him available during the early days of the investigation" (def.br., pp.116,119). The court reasoned that this was not an "adoptive admission" by defendant's attorney because it was not "contrary to the penal interest of the accused," but inadmissible double hearsay offered to prove the truth of the matter asserted—that defendant was available to be arrested (T.635-39). Shabazz, 22 NY3d at 898; People v Brooks, 31 NY3d 939,942 (2018)(double hearsay inadmissible). Indeed, if the statement were not admitted for its truth it would not have been capable of rebutting the allegedly "unfair impression that [defendant] had consciously evaded the police from the outset of the investigation and was tracked down through warrants and the tracing of his wife's cell phone," as defendant complains of now (def.br., p.119).

Nor could this statement have been admitted as one of future intent or as background of the police investigation, as defendant suggests (id.). The attorney's future intent to make defendant available was irrelevant because his state of mind was

not an issue in the case and, in addition to not being an adoptive admission for the reasons stated above, the attorney could not testify about defendant's future intent. See People v Chambers, 125 AD2d 88,91-92,94 (1st Dept 1987)(statements of future intent only admissible where the declarant's "state of mind is an issue in the case" and cannot be admitted to show the state of mind of anyone other than the declarant). Moreover, declarations of future intent are admitted "due to [their] high degree of trustworthiness and [] necessity, given the lack of alternative or more reliable evidence." Id. at 91-92. Here, as the court noted, there was alternative evidence on defendant's state of mind available through "the defendant's own testimony" (VD.154), which he chose not to provide. Additionally, this evidence was not a part of the police investigation, therefore, it could not be admitted to provide background information about the investigation.

Notably, the court's ruling did not deter defendant from advancing this argument during summation, despite that there was no evidence in the record to support it, when counsel addressed the flight evidence by saying, "His attorney speaks to the police with Jimick in days after the investigation" (T.1952-53).

F. Morris' Consent to a DNA Swab

By contrast, the court properly admitted Morris' consent to the DNA swab (def.br., p.120) to complete the narrative of the police investigation including how Morris, following his arrest, was excluded as a contributor to the DNA found on the blue sweater. People v Valerio, 24 AD3d 133,134 (1st Dept 2005)(hearsay admissible, with limiting instructions, "to complete the narrative and explain the actions of the

police who heard the statement")(internal citations omitted); People v Nunez, 7 AD3d 298,299-300 (1st Dept 2004)(same). Notably, while defendant objected to the testimony, he did not request a limiting instruction explaining how the testimony should be considered so his current claim is unpreserved. People v N'Guyen, 184 AD2d 274 (1st Dept 1992)(unpreserved absent request for any curative relief). In any event, the jury was generally instructed that out-of-court statements not offered for the truth of their content were admissible as non-hearsay statements (VD.613-15; T.302-03; T.1697-98 [final charge]). Additionally, the People did not mention Morris' consent on summation and only referenced that DNA did not link him to the crime (T.1611).

Moreover, the prosecution did not, as defendant suggests, introduce evidence that "Morris consented to the DNA swab, while [defendant] submitted only as a result of a search warrant" (def.br., p.120). This conclusion requires additional evidence that defendant refused to consent that is simply not in the record. Indeed, when counsel objected to the People admitting the search warrant, the court agreed that the basis of the search warrant was "none of the jury's business," but that the "existence of the warrant can be shown" to establish the legality of the police action (T.517-20). That the police obtained a search warrant for defendant's DNA before travelling to North Carolina, rather than relying on the chance that he might consent, was reasonable and did not reflect that defendant had or would have refused.

Regardless, this testimony was admissible for its truth because it did not constitute hearsay, but a verbal act. Much like the words spoken to join a conspiracy

or to enter an agreement, Morris' consent was not hearsay because it was offered to show that a legal act had been completed. See People v Lee, 143 AD3d 643,644 (1st Dept 2016)(undercover officers' testimony about co-defendant's statements during drug sale "were not hearsay, but part of the crime"); People v DeJesus, 272 AD2d 61,61-62 (1st Dept 2000)(same); People v Ayala, 273 AD2d 40,40 (1st Dept 2000)(same); People v Merante, 59 AD3d 207,208 (1st Dept 2009)(accomplice's demand for money in exchange for stolen car not hearsay). Additionally, if Morris had nodded or opened his mouth to be swabbed to express his consent, the result would be the same because this Court has held that physical actions also do not constitute hearsay. See People v Robles, 173 AD2d 337,337-38 (1st Dept 1991)("evidence of the [] officer's countenance [recoiling when arriving at the crime scene] was not hearsay").

In any event, Morris' consent was not discussed during summation and the only reference to his DNA sample was that there was no DNA evidence linking him to the crime (T.1611). Accordingly, any error in admitting this evidence was harmless.[49]

[49] Defendant's remaining claim that the prosecutor's brief comments during opening and summation that Morris' decision not leave the jurisdiction after the shooting, but to report to News 12 to give an interview about it, was not consistent with him being guilty (T.22,1611) thwarted his ability to pursue a third-party culpability defense (def.br., pp1191-20), will be addressed in Point Eight.

POINT SIX

DEFENDANT FAILED TO PRESERVE HIS CHALLENGE TO THE COURT'S DISCRETIONARY DETERMINATIONS TO ALLOW CERTAIN ARGUMENT OR EVIDENCE.

Defendant claims that the court erred in admitting certain hearsay statements (def.br., pp.121-26). This unpreserved claim is meritless.

Initially, by offering only general objections, and otherwise not requesting limiting instructions, defendant has failed to preserve his challenges to the admission of this evidence. For instance, defendant's objection to the recovery of the blue sweater may have been on the grounds that it was unresponsive to the question asked (T.664). Thus, the court properly overruled that objection. Likewise, defendant only objected on foundational grounds to the admission of the News 12 video showing Morris had no forearm tattoos since the prosecutor's application to play the video without sound removed any hearsay (PT.125;T.404-08). And, though he specifically objected on "hearsay" grounds to Morris' consent to give a swab, he did not request a limiting instruction, which is all he was entitled to (T.535). Ultimately, defendant never presented any of these claims in constitutional terms, and so those claims too are unpreserved. See People v Adams, 151 AD3d 612,613 (1st Dept 2017)(hearsay claim unpreserved); N'Guyen, 184 AD2d at 274 (unpreserved absent request for any curative relief); Concepcion, 136 AD3d at 579 (hearsay and constitutional claims unpreserved).

Further, this Court should decline to review these unpreserved claims. Here, counsel's very lack of objection suggests the lack of prejudice. See Overlee, 236 AD2d

at 142; People v Collins, 214 AD2d 483 (1st Dept 1995). Indeed, even on this appeal defendant only specifically identifies one of these purported evidentiary errors—"the jury specifically asked to hear Vomvolakis' testimony" (def.br., p.126)—as even influencing the juror's deliberations.

A. Recovery of the blue sweater

The prosecutor asked Det. Jimick a series of questions relating to the steps of his investigation, without saying what each person he spoke with told him, but identifying what others directed him to do (T.656,658,661,662). The prosecutor asked Det. Jimick, "[T]ell this jury what you recovered?" Det. Jimick responded, "[b]ased on conversations we had with William we were directed…" Counsel said "objection." Det. Jimick continued, "I was directed to a back bedroom closet by William. Inside the closet, he directed me to a black plastic bag that was on a shelf inside the closet. Inside that plastic bag was a sky blue cable Izod sweater" (T.664). He then described the vouchering process for the sweater before the prosecutor moved it into evidence (T.665-66).

Out-of-court statements may properly be admitted to "provide background information as to how and why the police pursued . . . defendant" (People v Tosca, 98 NY2d 660,661 [2002]), to show "that the statement was made" (Davis, 58 NY2d at 1103), or to show the detective's state of mind (People v Reynoso, 2 NY3d 820,821 [2004]). However, such testimony must not exceed the bounds necessary to explain the non-hearsay purpose. People v Garcia, 25 NY3d 77,86-88 (2015)(court improperly admitted officer's testimony regarding victim's sister's statement about "friction"

between the defendant and victim because it "arguably gave a motive for the shooting, [and] exceeded that which was necessary to explain the police pursuit of defendant"). To determine whether a statement is implicitly testimonial, and, therefore, inadmissible as hearsay, "[t]he relevant question is whether the way the prosecutor solicited the testimony made the source and content of the conversation clear." Id.(citing Ryan v Miller, 303 F3d 231, 250 [2d Cir 2002]; see United States v Dukagjini, 326 F3d 45,56-57 [2d Cir 2003])(alterations in original).

The trial court providently admitted Det. Jimick's testimony that after a conversation with William he was directed to the closet where the sweater was recovered. Notably, the prosecutor's inquiry of Det. Jimick to "tell" the jury "what you recovered," made no mention of William. It was, in fact, Det. Jimick who felt the need to share the steps of his investigation that resulted in the answer he provided. Thus, the statement was not admitted for its truth, did not recite an out-of-court accusation against defendant, and only briefly explained the police investigation and how the blue sweater was recovered. Thus, this case is akin to People v DeJesus, the companion case to Garcia, on which defendant relies. Garcia, 25 NY3d 77. In DeJesus the Court upheld a detective's testimony that he "began specifically looking for defendant at 4:00p.m. that afternoon without having spoken to the eyewitness" because "it simply [wa]s not an out-of-court substitute for trial testimony." Id. at 84,88. Likewise, here, Det. Jimick's indication that he looked in the closet and found the blue sweater after a conversation with William was not an out-of-court substitute for trial testimony—it was a

straightforward, brief explanation about how the investigation unfolded. Notably, like in DeJesus, the detective correctly did not disclose the contents of the out-of-court statement; he simply stated what action he took as a result of hearing the statement.

While defendant compares this case to Garcia, arguing that Det. Jimick's testimony related to the identification of defendant because the sweater he recovered was important in identifying defendant (def.br., pp.123-24), this comparison is inapposite. In Garcia, the detective testified that the victim's "sister had said that there was friction between defendant and [the victim which] indisputably was a testimonial statement inasmuch as it was procured for the primary purpose of creating an out-of-court substitute for the testimony of [the victim's] sister regarding that discord . . . [and] arguably gave a motive for the shooting." Garcia, 25 NY3d at 87; see also People v DeJesus, 134 AD3d 463,463-64 (1st Dept 2015)(improper hearsay testimony detective "learned of defendant's nickname and home address from, among others, two non-testifying informant or 911 callers describing the fleeing shooter, and that defendant was found at same address"); People v Grierson, 154 AD3d 1071,1073 (3d Dept 2017)(recognizing, as here, "general and cursory testimony by one of the officers [sufficient] to explain why they began to search," but detailed testimony about defendant having "a gun" and a "description of the gun" by "four officers" error).

Here, Det. Jimick did not divulge the content of William's statements, only the actions he took upon being "directed" toward a certain location. That did not supply any hearsay. Further, that William directed Det. Jimick to a closet is hardly comparable

to a victim's sister's statements about "friction" between the defendant and the victim. Without the content of William's statement – which the jury never heard – it cannot be inferred that it was incriminating.[50]

Moreover, the jurors were generally instructed that out-of-court statements not offered for the truth of their content were admissible as non-hearsay statements (VD.613-15; T.302-03; T.1697-98 [final charge]). Accordingly, the jury was generally aware of this concept and are presumed to have followed these instructions. See Davis, 58 NY2d at 1104. Further, as stated, there is no danger that the jury thought William had incriminated defendant without knowing the content of the statement. Furthermore, on summation, neither party addressed the sweater's recovery from the closet aside from defendant's argument that the evidence could not tell the jurors "how long the sweater had been laying in that closet before it was recovered, or the circumstances under which that happened" (T.1566). Accordingly, any purported error was harmless.

[50] Further, the record does not support a finding that William's statement would have been incriminating. It is not clear from the record that William knew that the shooter or defendant wore the blue sweater. The jurors only learned that Burger instructed William to get rid of the sweater. Thus, it is unlikely that William could have made an incriminating statement against defendant. That the sweater was later used to connect defendant to the crime does not change this result. Indeed, the importance of the sweater linking defendant's DNA to the shooting would not be revealed until years later. Notably, when the sweater was recovered the police investigation had focused on Morris; therefore, it is highly unlikely that they would be gathering evidence and seeking to specifically incriminate defendant by recovering evidence from Burger's apartment.

B. The People's opening remark that Morris invited the police to arrest him

During opening statements, the prosecutor contrasted Morris' and defendant's behavior following the shooting. He noted that when "Nick heard the police were looking for him[, h]e walked into the News 12 Studio in the Bronx to let the police take him in. He didn't run to North Carolina, he didn't hire a lawyer. As soon as he heard the police were looking for him he came to the police. He invited on the air to come and arrest him. The police put [] Morris in a line up." Counsel objected, "[W]e're getting into things that are not going to be testified to" (T.19).[51] Mid-trial, the trial court moved into evidence and allowed the prosecutor to play the News 12 broadcast for the jury without sound (Exhibit 100: T.333-34).[52] The prosecutor did not repeat this argument on summation.

[51] Pre-trial, the court granted the prosecutor's application to play two videos, "with the sound off" to avoid introducing hearsay (PT.124-26,131,138,160,180) – one during the eyewitnesses' testimony to ask them about what conclusions they drew about the identity of the shooter when they saw it in April 2006 and now and the second during the eyewitnesses' testimony regarding the "man in the blue sweater . . . having a tattoo on his arm" (PT.181-83). Counsel complained about the late disclosure of the People's intention to admit the video and requested Rosario materials related to the eyewitnesses who would view the video (which the prosecutor had turned over years ago [PT.170-71]) and reserved objections on the foundation for the video, but did not object to its admission (PT.163-71,181).

[52] Counsel later argued to the court that Morris went "on Bronx 12 to say I want everybody to know I'm innocent of the homicide. I didn't shoot anybody." The court responded, "the jury doesn't know that he said that" because the video was played without sound (T.1382).

A second video of the online edition of the broadcast was also admitted into evidence and played for the jury without sound (Exhibit 101; Rubenstein: T. 411,621). Additionally, two still-shot photos from the broadcast were admitted into evidence and published to the jury (Exhibit 104; Rubenstein: T.411-12).

The prosecutor's brief reference that Morris "invited [officers] on the air to come and arrest him," was proper because admissible trial evidence, when considered together, allowed the jurors to reach that conclusion. See People v Wiggins, 217 AD2d 407,409 (1st Dept 1995)("The prosecutor's statement in his opening that 'defendant laughingly walked off from the scene' was a fair one based on the evidence which revealed that defendant was pleased with, and celebrated, his conduct"); People v Cooper, 99 AD3d 453,455 (1st Dept 2012). The jurors watched the News 12 broadcast from the day after the shooting so they knew that Morris had gone to News 12 at some point between the shooting and when the broadcast aired the following day. Additionally, Det. Jimick testified that Morris was arrested on April 17, 2006, at approximately 6:00p.m. at the News 12 studio (T.681-82). Based on these two pieces of evidence, using common sense, the jury could deduce that once Morris appeared on the broadcast he exposed himself to arrest. This required no special prodding from the prosecutor – it was a logical conclusion for the jury to draw even absent the prosecutor's comment.[53]

To the extent that this Court finds the prosecutor's singular remark that "[Morris] invited on the air to come and arrest him" was improper, at worst it should

[53] Defendant compares this case to People v DiMaria, 22 AD3d 229 (1st Dept 2005), wherein this Court precluded a defendant from admitting evidence of his own "consciousness of innocence." This comparison is inapposite. DiMaria involved a defendant's self-serving application to admit evidence to show his "desire to surrender to police" in his own trial. Id. Here, the prosecutor did not seek to admit such hearsay evidence at trial, and the court precluded its introduction by muting the video.

have been left unsaid in light of the court's ruling permitting the video's admission without sound and Morris' unavailability and any purported error was undoubtedly harmless. An attorney's comments during opening and closing statements are not evidence. People v Roche, 98 NY2d 70,78 (2002). Here, the jury was routinely instructed on this basic principle of law (VD.59; T.1685) and is presumed to have followed that instruction (see Davis, 58 NY2d at 1104). See People v Canty, 228 AD2d 245,245-46 (1st Dept 1996)(court's opening and final instructions cured "any prejudice resulting from the prosecutor's erroneous comments in her opening statements concerning the import of an indictment")(citations omitted); People v Colon, 163 AD2d 133,134-35 (1st Dept 1990)(same). Further, this remark occurred in opening and was not repeated thereafter; the trial involved 29 witnesses over the course of 17 days.

Ultimately, a brief comment about a statement by a non-testifying witness will not deprive a defendant of a fair trial. See People v Demosthene, 225 AD2d 488 (1st Dept 1996)(prosecutor's opening regarding statement of non-testifying accomplice, did not deprive defendant of a fair trial because it "was brief and not prejudicial, and the jury never heard the contents of the statement"); People v Morrison, 214 AD2d 366,366-67 (1st Dept 1995). Notably, this Court has been reluctant to reverse a trial court in this context absent a finding of bad faith or undue prejudice, even when the prosecutor's comments were better left unsaid. Here, the prosecutor did not act in bad faith and defendant cannot demonstrate undue prejudice.

C. News 12 video shows Morris did not have a forearm tattoo

In opening, the prosecutor stated the shooter had a tattoo on his forearm, that Morris did not have a tattoo, and that the jurors would see that when they saw the News 12 broadcast (T.24-25). Counsel responded that it may or may not be true that Morris does not have a tattoo on his forearm, but neither does defendant (T.47-48). The News 12 broadcast was played for the jury without sound (T.621). Det. Jimick testified that when he arrested Morris the day after the shooting he did not have a tattoo on his right arm (T.720). During summations, counsel argued that the testimony about the evidence about the shooter's tattoo was not credible (T.1557-64) and the prosecutor briefly argued that Morris did not have a tattoo (T.1611).

The court providently exercised its discretion in admitting the video depicting Morris' lack of tattoo because of its probative value since eyewitnesses described the shooter as having a tattoo on his arm (VD.182). Defendant shifted the blame for this murder to Morris. This was an obvious, if not necessary, defense (T.1131). The People had the right to rebut it. The News 12 broadcast showed Morris did not have a tattoo on his right forearm, as several witnesses had testified the shooter had. The video, itself, was not a statement at all, but a form of demonstrative physical evidence, no different than a photograph. And, it was admitted solely to rebut defendant's claim that Morris was the shooter by demonstrating how Morris' arm appeared the day after the shooting. People v Andrade, 87 AD3d 160,162 (1st Dept 2011)(video of non-testifying witness admissible as non-hearsay to rebut defense).

Defendant cites People v Rodriguez, 64 NY2d 738 (1984), to support his position that the video showing Morris' lack of tattoos was improperly admitted, but this case is strikingly different. In Rodriguez, "the trial court did not abuse its discretion in refusing to allow defendant to display his tattooed hands in evidence . . . inasmuch as defendant offered no proof regarding the presence of the tattoos on the date in issue" (emphasis supplied). Thus, the display was irrelevant. Here, a proper foundation for the relevance of the tattoo (or lack thereof) had been established in that eyewitnesses recalled the shooter had a tattoo on his forearm. Thus, these cases are distinguishable.

In any event, any purported error was harmless. As counsel noted on summation, the evidence regarding the shooter's forearm tattoo was insufficient to convict anyone of murder (T.1564). The prosecutor, in turn, commented on summation that while the News 12 video of Morris confirmed that he did not have a forearm tattoo, that the location of the shooter's tattoo did not matter because the case "is not about picking out where the tattoo was on someone's body . . . [its] about accurately identifying someone who is a shooter" (T.1622,1624). That is particularly true where defendant likewise had the opportunity to display his arms to the jury, who saw he too did not have a tattoo on his forearms (he had one on his upper right arm instead).

D. Morris consented to his DNA swab

During trial, Detective Investigator Joseph Russell testified as to the steps he took on March 3, 2008, to obtain a DNA swab from Morris. Over an overruled "hearsay" objection, he answered affirmatively to the question "[D]id [] Morris consent

to giving a swab?" (T.535). Counsel did not request a limiting instruction. On cross-examination, counsel asked if Det. Russell had a warrant or court order, and Russell answered negatively (T.536).

Here, the court properly admitted Det. Russell's testimony that Morris consented to the DNA swab. As explained in the New York Practice Series,

> So-called "legally operative words" or "verbal acts" are not hearsay. The classic example is that of a witness who testifies about the words of offer and acceptance spoken by two parties in the course of making a contract. The words can be considered, not for any truth inherent in them, but simply because they were uttered. The words themselves have a legally operative effect in the formation of a contract. The New York Court of Appeals applied this reasoning to uphold the admissibility of statements made by coconspirators to show they agreed to participate in the conspiracy.

(Robert A. Barker & Vincent C. Alexander, Nature of Hearsay: New York and Federal (Fed.R.Evid.801)–Legally operative words (verbal acts) §8:3 [West's NY Prac Series, 2018])(footnotes and citations omitted)(citing People v Caban, 5 NY3d 143,148-49 [2005]). Thus, statements of criminal co-conspirators agreeing to enter a conspiracy or where the words uttered are part of the crime, are not hearsay. See Lee, 143 AD3d at 644; Merante, 59 AD3d at 208. Physical actions are also not hearsay. See Robles, 173 AD2d at 337-38.

Here, Morris' consent constituted either a verbal or physical act. Initially, while it does not change the result, it is unclear from the detective's brief testimony whether Morris expressed his consent verbally or physically. If Morris simply nodded or opened

his mouth when asked if the police could obtain a saliva sample, this would constitute verbal or physical act similar to the officer's countenance in Robles. If he spoke his consent, it would be a verbal act offered not for the truth of the matter asserted, but to show his agreement to provide the sample, similar to the co-conspirator's statements agreeing to join the conspiracy in Caban. Either way, this evidence was properly admitted as non-hearsay.

Moreover, it was properly admitted for the non-hearsay purpose of showing the progression of the investigation, and how the swab was obtained.[54] This testimony immediately followed testimony about the use of a search warrant to obtain defendant's DNA while he was in North Carolina (T.524-25). Having heard about how defendant's DNA was obtained, the jury rightly heard testimony about how Morris' DNA was obtained. Old Chief v United States, 519 US 172,189 (1997)("The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently . . . the effect may be like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing"). Instead, this brief reference informed the jury that law enforcement properly obtained this swab in the course of investigation (DNA discovered on the

[54] To the extent defendant claims a confrontation clause error, such a claim fails because Morris' "consent" did not implicate defendant.

sweater necessitating a DNA sample from Morris), that consent was given, and the police officer's state-of-mind that he could swab Morris once he obtained the consent.

Where the defense challenged the integrity and depth of the police investigation and made it a trial theme that defendant was only implicated in order to close a homicide case and hold someone responsible (T.1505), it was appropriate for the People to rebut the notion that the police conducted their investigation in rash, hasty, or inappropriate manner by admitting evidence of their diligence and integrity. Thus, it was proper to admit the fact that Morris consented to the DNA swab to show that the officers had not unlawfully obtained it. See Valerio, 24 AD3d at 134 (hearsay admissible, with limiting instructions, "to complete the narrative and explain the actions of the police" and to rebut defense that police planted pistol and "inadequately investigated the case"); People v Poliakov, 167 AD2d 115,116 (1st Dept 1990) (hearsay evidence of witnesses detailed description of defendant "admissible to rebut defendant's claim at trial that the identification testimony was fabricated").

The cases defendant cites are distinguishable because both address a defendant who sought to introduce his own consent to a DNA test as "consciousness of innocence" evidence. Those courts rejected this evidence as hearsay that had no probative value because the defendant would have been required to submit to the DNA test anyway. People v Jardin, 154 Misc2d 172 (Sup Ct, Bronx Co 1992), aff'd 216 AD2d

105 (1st Dept), aff'd 99 NY2d 956 (1996);[55] People v Ross, 56 AD3d 380 (1st Dept 2008).

Regardless, any purported error was harmless, given the strong evidence of guilt (Point One). The jurors were instructed about how to consider statements offered for a reason other than the truth of the matter asserted and are presumed to have followed those instructions. Notably, neither side mentioned the consent on summation. Moreover, the jury did not request a read back of this testimony during their deliberations, indicating it was not a focal point of their evaluation of the evidence.

E. Defendant retained a lawyer for Burger

Defendant complains that the court improperly allowed in testimony of the attorney for Burger, Vomvolakis, about his conversations with Adam Mehrfar, Esq.—the attorney who originally represented defendant and Llanos—about how he was retained, paid, and received information about the case. He argues the court improperly found Mehrfar's statements attributable to defendant because statements by an attorney to a third-party would not qualify as a formal admission, particularly in the People's case-in-chief, and would otherwise be protected by attorney-client privilege (def.br., pp.125-26). These arguments incorrectly state the court's ruling and are otherwise meritless.

[55] Notably, neither appellate court in Jardin mentioned hearsay in their analysis, much less affirmed on those grounds. Instead, they focused on the irrelevance of defendant's consent to the DNA test. People v Jardin, 216 AD2d 105 (1st Dept 1995), aff'd 99 NY2d 956 (1996).

Before the retained attorney for Burger, Vomvolakis, testified, counsel requested an offer of proof. The prosecutor said he would testify about being retained by defendant to represent Burger and coordinating Burger's statements to police. Counsel objected that the testimony would be hearsay and irrelevant. The prosecutor responded that it constituted consciousness of guilt evidence, where it showed defendant hired an attorney to take Burger to the police to clear defendant's name and implicate Morris (T.944-47). The court found the statements were not hearsay because "[t]he question is whether or not somebody took actions that requested that a lawyer take action," "[t]hose statements engaging him as counsel are not offered for the truth of the content, but rather for the fact that they were stated" and "whether or not somebody took actions that requested that a lawyer take action." Therefore, it held the statements admissible as evidence of defendant's consciousness of guilt (T.948).[56] When counsel represented that Vomvolakis "is not in a position to testify that [defendant] (through Mehrfar) retained him," the court deferred that issue, saying, "We will find out" (T.948).

Vomvolakis testified that Mehrfar contacted him to represent Burger (T.951-52), "someone involved" in a Bronx shooting "where someone was killed" (T.954), and that Mehrfar or his client (defendant or Llanos) had paid him (T.952-53). As to the latter,

[56] By contrast, when defendant sought to admit Mehrfar's statements to Det. Jimick, as defendant's agent making a statement of future intent that defendant would make himself available to be arrested, the court denied this application because it was offered to prove the truth of the matter asserted—that defendant was available to be arrested—and, thus, constituted impermissible hearsay (T.635-39) (see Point 5, sub-point E).

defendant did not protest that this answer should result in striking the testimony (but instead utilized it on cross-examination). Vomvolakis explained that he spoke with Burger briefly, thought he was honest, and had him speak to law enforcement twice, because he considered it better for his client to be a witness than a suspect (T.955-56,960-61). Burger's second statement was inconsistent (T.959). On cross-examination, Vomvolakis reiterated Mehrfar had originally contacted him, he could not recall who had paid him, that it was not unusual to be referred cases by another attorney or to be paid by someone other than the client (T.962-63), and that the inconsistencies in Burger's statements were so "significant" that Vomvolakis became uncomfortable with Burger (T.964-65). On re-direct he clarified he was paid by "either Adam Mehrfar, the attorney, or his clients, Darrell and Aida" (T.966).

Evidence of a defendant's consciousness of guilt does not constitute hearsay because it is not offered to prove the truth of the matter. See People v Torres, 289 AD2d 136 (1st Dept 2001)(distinction between evidence of flight, which tends to show the consciousness of guilt, and consciousness of innocence, which is hearsay); cf. People v Abdul-Malik, 61 AD2d 657,664 (1st Dept 1978)(reversing conviction based on prosecutorial misconduct on summation, commenting "[e]xcept for its tenuous admissibility under the consciousness of guilt theory, it was otherwise inadmissible, being hearsay"). Here, the People offered Vomvolakis' testimony about his interactions with Mehrfar, and the court received it, as evidence of defendant's consciousness of guilt, not to prove the truth of the matter asserted. How Vomvolakis was retained to

represent Burger and who paid for the representation were not at issue at trial. The issue was whether defendant had hired an attorney to represent Burger to blame the shooting on Morris because defendant knew that he was guilty. And, even now, defendant's brief accepts the assumption for purposes of this appeal that defendant did retain Vomvolakis through his attorney Mehrfar (def.br., pp.125-26). Thus, Vomvolakis' testimony was admitted for this proper non-hearsay purpose.

To the extent defendant claims this evidence violated the attorney-client relationship privilege, relying upon People v Cassas, 84 NY2d 718 (1995) (def.br.,pp. 125-26),[57] that too is incorrect. As the trial court noted, "the lawyer-client relationship exists between the client and not necessarily [] the person paying the bill" (T.946). Here, that privilege existed between Burger and the attorney, no one else. Thus, since Vomvolakis said he felt such a relationship had been formed between himself and Burger (T.955), and he did not disclose any privileged communication with Burger, no privilege was broken. See Priest v Hennessy, 51 NY2d 62,64,68-70 (1980)(information about fee arrangements between prostitute-witnesses who had testified in Grand Jury and "any third party who may have retained [attorneys] to appear for the prostitutes" was not privileged because "the payment of legal fees by a third person, in and of itself,

[57] In Cassas, after the defendant shot and killed his wife, his attorney took him to a precinct and "stated, 'I brought my client in to surrender. I believe he shot his wife. You'll find the gun in the room. It will have my client's prints on it.'" Id. at 721. The Court of Appeals found this statement was inadmissible on the People's case-in-chief because there "was no evidence that [it] had been authorized by the defendant as a waiver of the attorney-client privilege," which was "key to the disposition." Id. at 722-23. Since Vomvolakis testified at trial, not defendant's attorney, this case is inapposite.

[does not] create an attorney-client relationship between the attorney and his client's benefactor").

Moreover, any potential error in admitting this testimony was harmless. The evidence against defendant was strong (Point One) and, although they asked to rehear this testimony on summation, its impact was limited. Indeed, alone, the evidence as elicited had little to no probative value given Vomvolakis' testimony that Burger supplied the narrative to him, appeared to be honest initially, but then significantly changed his story over time without input from Vomvolakis. Further, defendant utilized Vomvolakis' testimony on summation to support his third-party culpability defense by arguing that Vomvolakis was "comfortable with [Burger's] honesty" when he identified Morris as the shooter, but that "even [Burger's] own lawyer didn't believe" Burger's identification of defendant (T.1521,1570-71). Accordingly, the People responded that Vomvolakis "really wasn't acting in [Burger's] best interest" which was apparent because they did not meet in Vomvolakis' office, Vomvolakis did not go to the precinct the day he received a call that his client was there making a statement, and he did not have "a single piece of paper on a murder case." The prosecutor continued "Vomvolakis was paid by the defendant, or his wife, possibly through Adam [Mehrfar], the attorney, for this case for one reason and one reason only, to walk [Burger] into the arms of the police, to frame []Morris for a crime [he] didn't commit once the defendant got a phone call from Vernon Matthews." The prosecutor explained, consistent with the court's ruling, how this representation evinced defendant's consciousness of guilt

"because the only person who would go through such lengths to frame someone else for this crime is the actual murderer" (T.1660-63). Thus, the jury had two narratives from which to select, and knew that at most, this evidence was cumulative consciousness of guilt evidence.

POINT SEVEN

THE PHOTOGRAPHS OF THE VICTIM AND MEDICAL EXAMINER'S TESTIMONY WERE PROPERLY ADMITTED TO PROVE DEFENDANT'S MENS REA AND THE VICTIM'S CAUSE OF DEATH.

In response to a defense pre-trial motion in limine to preclude their admission, the trial court agreed to admit the hospital photographs taken of the victim.[58] It correctly reasoned that, generally, it would exclude photographs if the prejudicial effect outweighed the probative value or they were "gruesome, inflammatory, or horrified" the viewer (VD.12). The court found the proffered photographs did not meet that standard. The court also commented that it would be inappropriate "to try to sanitize a case to the extent argued by the defense so as to make this simply a cold and indifferent application of certain principles to an abstraction of a case" (VD.13-14). Put another way, the court said it was appropriate, relevant, and important "that the jury understand that this is not a robotic exercise in plugging in facts to an instruction"

[58] The prosecutor had suggested a compromise of only admitting three of the nine hospital photographs taken: (1) a long range photo of the victim covered by a blanket (Exhibit 2; Cruz: T.64); (2) a mid-range photo of the medical sheets where the murder bullet was found, with some blood, but not the victim, visible; and (3) a close-range photo of the murder bullet, again with some blood, but not the victim, visible (T.6-8). Ultimately, at trial, sans objection, the prosecutor introduced all nine photographs.

because trials are "a human enterprise [a]nd the identity and humanity of the victim is relevant to the jury's understanding of the importance of their job" (VD.12-13).

In response to a defense motion in limine to preclude the autopsy photographs,[59] the court likewise ruled that the limited photographs were admissible to give "a physical reference to testimony that is anticipated by the medical examiner . . . not undoubtedly prejudicial. . . not graphic, or at least the one photo [of the bullet path] that [the defense] identified as graphic[,] [b]ut at the same time they're so abstract that is to, in my judgment, have very little prejudicial value at all" (T.8-10). The court noted that the "People have the right to offer evidence to support their case in a manner that they see appropriate. Not necessarily a manner that [the defense] agree[s] with" (T.10). Further, the court noted that defense's argument may have been meritorious if the People had sought to introduce 23 or 24 autopsy photos, but the prosecutor "demonstrated an appropriate sense of self-regulation by limiting the offer to the three or four photos" whose "probative value well exceeds the prejudicial value" (T.10-11).

Det. Cunningham testified that he responded to the hospital as the first crime scene and documented that scene through, inter alia, photos of David Pacheco, Jr. in his hospital bed (Exhibits 2-9)(T.88-98). During the medical examiner's brief

[59] The prosecutor only intended to introduce up to five autopsy photographs: (1) a close up of the victim's face with the medical examiner number (akin to establishing chain of custody) with no injuries visible (Exhibit 1; Sanabria: T.57-58; Gill: T.926-27); (2) another close up; (3) the entrance wound (Exhibit 115; Gill T.929-32); (4) the exit wound (Exhibit 116: Gill: T.929-30); and (5) the path of the bullet (Exhibit 117; Gill: T.929-30) (T. 4-6). In the end, the prosecutor only introduced four.

testimony, he explained the autopsy process, identified the victim by a close up photo of his face with the medical examiner's number visible (Exhibit 1), and described the victim's injuries using three photos: (1) the entrance wound (Exhibit 115); (2) the exit wound (Exhibit 116); and (3) the path of the bullet (Exhibit 117) (T.927-32). He testified the victim's cause of death was a gunshot wound of the trunk with perforation of the lung, spinal cord, and spleen and how each injury would have affected the body including a collapsed lung, difficulty breathing, bleeding, pain, and a high likelihood of paralysis of the lower legs (T.929,932-34).

The trial court exercised sound discretion in admitting the photographs of David Pacheco, Jr. since the probative value of that evidence outweighed the potential for prejudice. "[P]hotographs are admissible if they tend 'to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered.' They should be excluded 'only if [their] sole purpose is to arouse the emotions of the jury and to prejudice the defendant.'" People v Wood, 79 NY2d 958,960 (1992) (quoting People v Pobliner, 32 NY2d 356,369-70 [1973]). This rule persists even though "photographs of a corpse . . . portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury." Pobliner, 32 NY2d at 369-70. "That other evidence may be available on the point is a factor but it is not dispositive." People v Stevens, 76 NY2d 833, 835 (1990). Nor is the fact that the victim was a baby dispositive. See People v Santiago, 22 NY3d 740,743,750-51 (2014). Determinations about the

admission of these photos are left to the sound discretion of the trial court. Wood, 79 NY2d at 960-61.

Initially, the court applied this correct legal standard, contrary to defendant's claim. The Honorable Steven L. Barrett—who had presided over more than a hundred homicide trials at the time of this trial—correctly recognized the need to balance the probative value against the prejudice of the hospital photographs and reasonably concluded that these photographs did not meet that standard, citing the "dramatic" distinction between the hospital photographs here and photographs admitted in People v Blake, 139 AD2d 110 (1st Dept 1988) (T.12-15). That the court commented in passing on the "human enterprise" of a trial and not wanting to "sanitize" the facts to "an abstraction of a case" (T.13-14), does not change this conclusion. Likewise, with the autopsy photographs, it correctly determined they had probative value in giving "a physical reference to testimony that is anticipated by the medical examiner" and were not so overtly "prejudicial" or "graphic" so as to call for their exclusion (T.8-10). Thus, the trial court engaged in the precise discretionary determination called for in these cases.

The court also properly admitted the photos of the victim so as to "elucidate and corroborate" the medical examiner's testimony (Stevens, 76 NY2d at 836) and to "illustrate expert testimony" (Pobliner, 32 NY2d at 370); see People v Campbell, 247 AD2d 277 (1st Dept 1998). Here, the prosecutor sought to admit the photographs of the victim to prove that the victim had been killed, the cause of death was the shooting,

defendant's mens rea, and to corroborate the medical examiner's testimony. "[I]t is immaterial that the People could establish a prima facie case without the disputed evidence. They were not bound to stop after presenting minimum evidence but could go on and present all the admissible evidence available to them, regardless of the trial strategy defendant adopted." People v Alvino, 71 NY2d 233,245 (1987). The People had to prove that defendant, "with intent to cause the death of another person, [] cause[d] the death of such person or of a third person" (Penal Law §125.25[1]) or that "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engage[d] in conduct which create[d] a grave risk of death to another person, and thereby cause[d] the death of another person" (Penal Law §125.25[2]).

Here, the photographs of the victim tended to support the defendant's mens rea of depraved indifference, if not transferred intent. See Stevens, 76 NY2d ata 836 (photographs admitted to "elucidate and corroborate" medical examiner's testimony to prove intent); Wood 79 NY3d at 959-61 (photographs admitted to prove intent and disprove extreme emotional disturbance defense); accord People v Quinones, 155 AD2d 244 (1st Dept 1989)(depraved indifference); People v Blue, 55 AD3d 391,392 (1st Dept 2008)("homicidal intent"); People v Susankar, 34 AD3d 201,202 (1st Dept 2006)(intent and cause of death). Indeed, the randomness in how David Pacheco, Jr. was shot, as shown by the trajectory of the bullet going through his body, away from the targets across the street, elucidates on both charges. Likewise, cause of death was an essential element and the People properly chose to prove it through photographs of

David Pacheco, Jr. at the hospital (where a .9mm bullet was recovered next to his bed) and select photographs from the autopsy to "elucidate and corroborate" the medical examiner's testimony about how the bullet caused his death. Stevens, 76 NY2d at 836; see Campbell, 247 AD2d 277.[60]

Still, defendant argues that the court erred in admitting the photographs because "the only contested issue was the identity of the shooter" (def.br., p. 128). However, "the prosecution does not necessarily know, when presenting its case, what aspects of the proof a defendant will contest, and the People may reasonably present photographs to prove all material and possibly disputed issues relating to a defendant's guilt." People v Timmons, 78 AD3d 1241,1244-45 (3d Dept 2010)(approving admission of autopsy photographs "to support the medical examiner's testimony regarding cause of death," which was uncontested); see People v Elmore, 162 AD2d 194,194-95 (1st Dept 1990)(autopsy photographs properly admitted in homicide trial where only contested issue was identity). Simply put, a defendant cannot render material evidence immaterial by offering to stipulate or concede issues the People are otherwise required to present to meet their burden. See Wood, 79 NY2d at 960 (recognizing the nature and manner

[60] Nor was the strategy of presenting the case to the jury through photographs isolated to photographs of the victim. The People admitted 94 crime scene photographs (9 of which depicted the victim at the hospital) (Exhibits 1-93, 99), the lineup photographs (Exhibit 105), photographs of defendant and Morris (Exhibits 112-13), and 3 autopsy photographs (115-17). Thus, out of 100 photos the People admitted at trial, only 12 portrayed the victim.

On summation, the prosecutor responded to a defense accusation that he sought juror sympathy, by saying he did not need or want the jury's sympathy because they had evidence and he displayed the photographs because they were "evidence in this case as much as any witness" that "prove[d] that a murder occurred" (T.1517,1607,1636).

of the killing were material and relevant and "defendant could not make it otherwise by admitting that he had killed the victim, but contending that he had done so under the influence of an extreme emotional disturbance"). Ultimately, since the photographs were not admitted for the "sole purpose [] to arouse the emotions of the jury and to prejudice the defendant" they were admissible. Wood, 79 NY2d at 960.

Moreover, the trial court providently found the photographs not too graphic to be admissible. While defendant cited Blake, as the court correctly noted, the differences between this case and Blake are "dramatic" (T.14-15). In Blake, this Court described the 22 color photos admitted as a "gruesome sight," "including several gruesome, close-up pictures of the decedent's mutilated body" that had been stabbed 54 times, his throat slit, his "genitals cut off and stuffed in his mouth," and a knife still protruding from his abdomen. Blake, 139 AD2d at 111-12,116. Here, by contrast, the hospital photographs were akin to those of "a victim being attended in the hospital" that "were not gory, the lacerations [] having either been cleaned up or bandaged[.]" People v Bell, 63 NY2d 796, 797 (1984). The victim was shown laying on a gurney in the hospital, in four photos covered by a blanket showing no injuries, in three photos showing the medical intervention to his chest that had been cleaned and stitched (one mid-range photo, one close-up photo, and one close-up photo with a ruler), and one close-up photo of his face. Accordingly, these photos are a far cry from those admitted in Blake and their probative value outweighed any prejudice they would cause defendant.

For the same reasons, the trial court providently admitted the medical examiner's testimony. Dr. Gill briefly explained the victim's cause of death—an essential element of second-degree murder—including how David Pacheco, Jr. would have been impacted by each injury (such as bleeding, trouble breathing) (T.929-34). While defendant claims this testimony was irrelevant because the cause of death was not contested (def.br., pp.128-29), that, again, is not the standard. See Elmore, 162 AD2d at 194-95; Timmons, 78 AD3d at 1244-45. Thus, this testimony was properly admitted.

Any alleged error was harmless. Beyond the strong proof of defendant's guilt (Point One), the parties questioned potential jurors and selected them based on their answers confirming their ability to not allow the photographs of a deceased child impact their verdict (VD.258-59,416-17,559-63). The court, likewise, provided multiple limiting instructions throughout trial that the jurors could not allow sympathy to influence their verdict, specifically directing the juror's attention to the photos of the victim (VD.160-62,487-88,606,617[opening instructions]; T.1680,1686-87,1766-67 [final instructions]). Thus, the court's comprehensive instructions and parties' questions during voir dire mitigated any risk of prejudice. Moreover, the jury notes demonstrated that it followed the court's instruction. The jury never requested to see the photos or hear the medical examiner's testimony, strongly indicating that they did not unduly focus upon that evidence in their deliberations. Additionally, considering the voluminous amount of evidence admitted at trial, including 100 photos, it is unlikely 12 photos portraying the victim strongly influenced the jury's verdict. Indeed, the jury was

well aware of the fact that a two-year-old had been killed, so seeing the photos confirming what they already knew would not have added prejudice.

POINT EIGHT

THE PROSECUTOR'S SUMMATION AFFORDED DEFENDANT A FAIR TRIAL.

Defendant claims the prosecutor improperly "blatantly appealed to the jurors' emotions, vouched for the integrity of his office and denigrated the defense" (def.br., pp.129-34). These unpreserved claims are without merit.

Initially, since defendant never objected, nor moved for a mistrial claiming the summation's cumulative effect deprived him of a fair trial, he has not preserved this claim for review. See Iannelli, 69 NY2d 685; People v Torres, 171 AD2d 425 (1st Dept 1991). His individual claims are also unpreserved because he either failed to object (T.1607-08,1611,1640-42,1644,1649,1674-75), offered only unelaborated objections (T.1618-19,1623,1628,1634,1636,1638,1646), objected on grounds not asserted on appeal (1637["that's not the district attorney I was referring to"],1645[objected to comment defendant's "own family told the police he did it"], 1671[objected to statement about defendant using fake name, not pseudo DNA], 1654[objected to prosecutor's statement "I don't like [Burger] never have, never will"],1656[objecting to prosecutor's comment Burger admitted he sold drugs when he did not have to],168[objected to prosecutor's comment "Burger gained nothing by telling the truth"]), or failed to seek further remedy after the court gave a curative instruction

(T.1639,1645,1662-63). See People v Comer, 73 NY2d 955 (1989)(summation claims unpreserved where, following curative instructions, defendant neither objected to instructions nor requested further instructions); People v Mena, 29 AD3d 349 (1st Dept 2006)(summation claims unpreserved where defendant "failed to object with specificity"). There is also no cause for this Court to exercise its interest of justice review power since there was strong evidence of guilt (Point One), the prosecutor's comments reflected fair comment on the evidence or were responsive to defense summation claims, and there was no pattern of obdurate or improper comments. See Torres, 171 AD2d 425.

Defendant's individual claims lack merit. He first contends that the prosecutor inappropriately appealed to the jurors' emotions. Each of these claims about sympathy are best summarized by the prosecutor's clear comment on summation that "this case has nothing to do with sympathy [and] the reason I don't need your sympathy is because I've got the evidence" (T.1607).

Defendant argues that, while it was undisputed that the victim was not the shooter's intended target,[61] the prosecutor accused him of an "execution, with 'innocents all over the block' and inflicting an 'excruciating death' on the child" (def.br.,p.131; T.1607). The prosecutor's comments properly explained defendant's

[61] The prosecutor never suggested that the victim was the intended target; instead, he focused on defendant's acts firing multiple shots into a crowded street without regard for the safety of the bystanders to demonstrate his intent to kill (T.1604-07).

motive and intent by describing the "murder, this execution, this intentional murder of an innocent" (T.1608) began because defendant was "disrespected" (T.1604) in front of a number of bystanders including "children and mothers and fathers and innocents" (T.1606). The prosecutor continued to explain that defendant's actions "caused an excruciating death within moments of [the shots] being fired, the kind of death an angry person wishes to inflict upon someone who wronged him, the kind of death that someone who points a gun at another human being and pulls the trigger over and over intends to happen" (T.1607). These were fair comments on the evidence that tended to prove essential elements of the crime (intent and causation) and motive, which the People are entitled to prove and the jury is permitted to consider. See People v Seppi, 221 NY 62,70 (1917). The manner of death was also supported by the medical evidence. This is particularly true since prosecutors are given "wide latitude" in presenting closing argument to the jury, even where the defense views an issue as "uncontested." See Overlee, 236 AD2d at 136; People v Galloway, 54 NY2d 396,399–400 (1981); People v D'Alessandro, 184 AD2d 114,119 (1st Dept 1992).

Next, defendant takes issue with the prosecutor's comment that he was "hiding behind that baby" (def.br.,p.131; T.1608). Context reveals this comment was properly responsive to counsel's summation argument that suggested that "[a]nother way" the prosecutor attempted "to appeal . . . and get [the jury] to bring in a verdict based on [their] emotions" was the number of photos of the victim "the DA put into evidence and put up on the screen" (T.1516-17). The prosecutor responded that this case "was

never . . . and it is not about sympathy," though counsel seemed to be using it "to get [the jury] to ignore the evidence implicating the defendant in this murder as if this child is being used, . . ., as if the defendant is hiding behind that baby" (T.1608). These comments appropriately countered a defense argument suggesting the prosecutor had appealed to their sympathy by urging the jury not to consider sympathy in their deliberations. D'Alessandro, 184 AD2d at 119; People v Gould, 181 AD2d 543 (1st Dept 1992)(must evaluate prosecutor's summation in light of counsel's closing to determine if reasonable response).

Defendant also argues that the prosecutor erred by "[u]rging the jurors 'to take little David into the jury room,'" and accusing defendant "of walking over the baby's dead body 'without a care in the world'" (T.1674-1675). This allegation provides an incomplete picture of the record. The prosecutor concluded his summation by explaining that defendant's attempts to evade responsibility for his crimes had failed and that the case, and David Pacheco, Jr., would be turned over to the jury for deliberations or, in other words, the jurors would "take little David with you into that jury room." The prosecutor then urged the jurors to "give this case what it deserves[,] . . . to be fair[,] . . . to do what's right [and] just [and] hold the defendant responsible" with "one word . . . guilty," as easily as "defendant essentially walked over the dead body of David Pacheco, Jr., without a care in the world" (T.1674-75) when he fled after the shooting. That comment did not exceed the "broad bounds of rhetorical comment" permissible on summation (Galloway, 54 NY2d at 399), where the prosecutor merely

emphasized the seriousness of the jury's role in deliberations, and suggested, creatively, defendant's indifference toward anyone he had shot; a fact borne out by the evidence of his conduct after the shooting.

Second, defendant contends that the prosecutor improperly vouched for the integrity of his office and inserted his own good character into the trial (def.br., pp.131-32). Yet, the central theme of counsel's summation constituted an attack on the prosecutor's integrity, focusing on his re-investigation of the evidence against Morris and insinuating that it was motivated by a desire to manipulate the evidence to inculpate defendant (T.1503,1510,1512,1516-17,1575). Since counsel lodged this powerful, personal attack against the prosecutor, it was entirely proper, and likely necessary, for the prosecutor to respond or the jury would be left with the incorrect impression that the prosecutor had manipulated the evidence. See People v Wright, 50 AD3d 429,430-31 (1st Dept 2008)(prosecution's response to defendant's summation suggesting collusion among prosecution witnesses and tailoring of testimony proper)(internal citations omitted); cf. People v Hemmins, 290 AD2d 219 (1st Dept 2002)(isolated comments did not deprive defendant of a fair trial, noting where defense accuses police of framing defendant prosecutor cannot argue "that in order to convict defendant the jury would have to believe this prosecution constituted a conspiracy involving the District Attorney's Office"). In any event, the thrust of the prosecutor's summation properly asked the jury to evaluate the evidence of the re-investigation, standing alone, and decide if defendant was guilty. See People v Smith, 188 AD2d 359,359 (1st Dept

1992)(upholding summation where "prosecutor improperly concluded . . . by invoking the oft-condemned safe-streets argument, [because] the [] summation as a whole urged the jury to find defendant guilty based upon the evidence, rather than upon its duty as citizens to place criminals in jail").

In particular, defendant asserts that the "prosecutor specifically asked the jury to judge him instead of the evidence, 'a higher stander than the law,' because 'that's only fair' and 'that's only just' (T.1637-1638)" and that "[t]hese comments . . . urged the jury to focus on irrelevant considerations." Defendant's practical concern was that "[b]y suggesting that the jury could acquit if it felt that the prosecution was underhanded, the prosecutor conveyed that the jury should convict if it found him personally honorable (instead of focusing on the evidence)" (def.br., p.132). This inaccurate interpretation of the prosecutor's comments should be rejected. Again, counsel directly accused the prosecutor of having manipulated the evidence against defendant. (T.1503,1510,1512,1516-17,1575). The prosecutor, in turn, naturally addressed his re-investigation of the evidence against Morris and proposed that the jurors handle these "serious" allegations that "go to the essential fairness of the trial" by deciding if he had manipulated the evidence. He reminded the jurors that since the beginning of trial he had only asked that they "be fair to each other, the witnesses, and the defendant" and that he held himself "to that same standard" of fairness to all parties, even "a higher standard than the law because that's only fair and that's only just" (T.1636-38). The prosecutor then urged the jurors, "If you think I fixed the evidence . . . if I framed him

. . . find him not guilty" (T.1640). This statement did nothing but ask the jury to perform their duty to determine whether the evidence presented was credible and reach a verdict consistent with their determination. If anything, it increased the burden on the prosecution. It simply did not imply that if the jurors found that the prosecutor had not manipulated the evidence they should convict. See Wright, 50 AD3d at 430-31 ("no suggestion that the jury could only reach a not guilty verdict if it found an actual conspiracy among witnesses"). To the contrary, the prosecution explicitly told the jury "the only real question put to you is very simple: Who did it, Nick Morris or Darrell Hemphill" (T.1611) and repeatedly asked them to focus on the evidence presented and be fair (T.1607-12,1632,1652-53,1667-72,1675).

Defendant also argues that the prosecutor erred when he "suggested that his questioning the evidence against Morris was 'an act of integrity,' 'doing what's right'" (def.br., p.132; T.1639). Yet, the prosecutor said that "some people" might characterize those actions that way, but that it was not his place to do so since he was only doing his job (T.1639). As stated, this was properly responsive to counsel's repeated personal attacks on the prosecutor's integrity. Again, though, this comment did not go to addressing defendant's guilt or innocence at all.

Third, defendant argues that the prosecutor improperly denigrated the defense (def.br., pp.132-33). Initially, he claims the defense was denigrated by the prosecutor's comments that counsel "consistently manipulated the evidence, trying to get [] Gonzalez to admit to erroneous testimony before the grand jury," which prompted him

"to call the grand jury reporter to prevent facts from being manipulated" (def.br., p.132-33; T.1644-45).[62] These comments fall far short of the type of remarks that courts have found denigrate the defense. Cf. People v Ellis, 171 AD2d 619,620 (1st Dept 1991)(analogizing counsel's attacks on police credibility "to allegations made against citizens during the McCarthy era clearly exceeded fair comment by denigrating defense counsel"). Moreover, they responded to counsel's larger summation theme that the prosecutor had manipulated the evidence against defendant. See People v Pinnacle, 165 AD3d 521 (1st Dept 2018).

Next, defendant argues that the "prosecutor accused counsel of attempting to trick Ardell Gilliam by lowering his voice during his cross-examination" (def.br., p.133). Yet, the prosecutor argued the opposite. He said that "the moment at the end of defense counsel's questioning of [] Gilliam that defense commented on yesterday, that happened because defense counsel lowered his voice. It wasn't intentional, but that's . . . what []Gilliam said, 'I couldn't hear what [counsel] said'" when asked whether the name of the person she saw in the blue sweater was Darrell or Darryl (T.1646-47). This was an appropriately responsive record-based explanation of Gilliam's alleged evasive behavior during cross-examination that did not denigrate the defense.

[62] To the extent that defendant also raises these claims in Point 3 (def.br., pp.106-07), the propriety of the prosecutor's conduct will be addressed here, while the propriety of the court's ruling and any impact the prosecutor's use of the statement may have on a finding of harmlessness are addressed there.

Defendant also argued that the "prosecutor accused counsel of . . . purposefully presenting false testimony through Nana" (def.br.,p.133).[63] Yet, this comment too was not an attack on the defense, but on the credibility of its witness. It also was fair, based on Owusuafriyie's repeated and insistent denial that his military convictions should have been disclosed as convictions. Indeed, this fact was reflected in the trial court's own estimation (to the parties outside the presence of the jury) of Owusuafriyie's credibility (T.1484). See Pinnacle, 165 AD3d 521. Moreover, the prosecutor's comments were a far cry from those that this Court has found denigrates the defense. Cf. e.g. Ellis, 171 AD2d at 620.

Moreover, in Point Four, defendant argues that counsel attempted to subvert the truth-finding process through his cross-examination of Elisa Hemphill about defendant's tattoo (def.br., pp.112-13,115). Contrary to defendant's assertion, the prosecutor did not suggest this on summation, but said that the location of the tattoo was not material to identifying defendant at the shooter (T.1624).

Fourth, defendant argues that the prosecutor made various prejudicial arguments with no evidentiary support (def.br., p.133). Each claim is meritless. For instance, defendant challenges the prosecutor's comments that "Vomvolakis committed a crime during his representation of [Burger], set up his client, and then covered his tracks by

[63] In Point Four, defendant argues that counsel attempted to subvert the truth-finding process by allowing Owusuafriyie to testify that he had never been convicted of a crime (def.br., pp.112-13,115). For the reasons stated in Point Four, this claim is also meritless.

purposefully losing his file [because] 'That's what a good criminal defense lawyer will do for the man who paid him," because there was allegedly "no evidence that Vomvolakis did anything other than provide adequate representation for his client" or "that he acted unethically and criminally during that representation" (def.br., p.133; (T.1662). The comments were responsive and supported by Vomvolakis' testimony. During trial, Vomvolakis testified that he was retained to represent Burger by defendant's lawyer, and paid either by defendant, his wife, or his lawyer, but that he took no further action on Burger's case after Burger told police that defendant was the shooter and that he did not know that his client had been subsequently indicted related to the homicide. These actions obviously did not constitute "adequate representation" (def.br., p.133). The prosecutor permissibly commented that Vomvolakis' testimony evinced defendant's consciousness of guilt. Indeed, that was the sole purpose for which the court had admitted this evidence. Additionally, he properly responded to counsel's suggestion that Vomvolakis did not believe Burger's statements by arguing that any alleged lack of trust did not discredit Burger's testimony because Vomvolakis was not acting as a regular attorney in Burger's best interest, but was retained and paid by defendant "to make sure [Burger] didn't tell the truth" and that his representation of Burger was a set-up (T.1660-62). Ultimately, these arguments left it to the jury as the fact finders to decide whether to credit Vomvolakis or Burger.

Defendant also disputes that "the prosecutor misled the jury about the import of the pseudo-samples when he suggested the police were forced to sort through trash

because [defendant] was evading the authorities," when, in "fact, the police attempted to get those samples because the prosecution had not yet sought a search warrant" (def.br., p.133). This argument misreads the record. The prosecutor explained the significance of the DNA evidence against defendant was to evince his consciousness of guilt through his flight to North Carolina—inexplicably leaving behind his music studio and his wife's career as an EMT—where detectives who attempted to collect his "DNA out of garbage" discovered he was living under a false name (T.1671-74). This was not a comment focused on the need to go through the garbage to obtain the sample, but was merely part of the prosecutor's entirely accurate factual assertion that defendant was living in another state under a false name, and his argument that he was doing so to evade the authorities, thereby evincing his consciousness of guilt.

Defendant additionally argues that the "prosecutor also implied that Gist knew [defendant] . . . to be prone to violence [through his comment that] Gist, 'knew the guns would come out' . . . because 'she knew the defendant better than he thought" (def.br., p.133; T.1649). This argument also misreads the record. These comments were not said to imply that Gist knew defendant to be violent, but to explain that her general experiences in the neighborhood led her to believe that the initial fight would escalate. Additionally, the comment that "she knew the defendant better than he thought," was a reference to defendant's outburst during her testimony that he had "never met [her] in [his] life," following her in-court identification (T.352). Thus, it was entirely permissible.

Further, in Point Four, defendant argues that during summation the prosecutor improperly claimed that Vernon Matthews and Elisa Hemphill had "amnesia" during their testimony (def.br., pp.112-13). The prosecutor accurately described each witnesses' demeanor and evasive behavior during their respective testimony to argue that their testimony was incredible. He contrasted Elisa's level of cooperativeness in answering questions posed by himself and counsel noting that "her whole demeanor changed" (T.1623-24). This was an accurate description of the witness' testimony (compare T.417,421-24, with T.425-26), and a fair argument about the reliability of her testimony. He made the same argument about Matthews' testimony and directly quoted the transcript (T.1623) to support his opinion that it lacked credibility. These were fair comments on the evidence. D'Alessandro, 184 AD2d at 119.

Additionally, in Point Five, defendant claims that the prosecutor's brief comments during opening and summation that Morris' decision not leave the jurisdiction after the shooting, but to report to News 12 to give an interview about it, was not consistent with him being guilty (T.22,1611) thwarted his ability to pursue a third-party culpability defense (def.br., pp1191-20).[64] The court ruled that neither party

[64] In opening, the prosecutor observed "Nick Morris didn't run after the shooting. Nick didn't leave the city. Nick didn't leave the Bronx. He didn't do what you except a guilty man to do. Nick walked himself into the News 12 Studios without a lawyer to wait for the police to come. That's not what a murderer does" (T.22).

On summation, the prosecutor questioned "Who did it, Nick Morris or Darrell Hemphill? And within that mass of information lies the truth, so let's get to it. Nick Morris, the man who didn't flee, the man who didn't run down to North Carolina like the guilty people do, the man on television with the scar on his face, what evidence is there linking Nick Morris to this crime? There is no forensic evidence, no DNA, no videotape, no fingerprints, no confession to the police, no identification by

should speculate about Morris' motivation to report to News 12 to give an interview and noted that while the People could respond to any claims counsel raised during his summation, contrasting Morris not fleeing and defendant's flight was inappropriate (T.1387-89). Counsel spent a substantial portion of summation reviewing the evidence that, in his view, implicated Morris as the shooter, noting that it was "much closer in time to the incident than any of the evidence that you heard suggesting that [defendant] was the shooter" (T.1544), including that Morris wore a blue Yankee hat during his News 12 interview, as some had described the shooter had worn (T.1550). The prosecutor responded by highlighting the lack of evidence against Morris, briefly referencing that he "didn't run down to North Carolina like the guilty people do" (T.1611). This comment referred to Burger, who was guilty of participating in the shooting and testified that he fled to North Carolina that same night (T.985). To the extent that this comment can be read as referring to defendant's flight, if counsel had objected the prosecutor would have had the opportunity to clarify his statement. Arguing that there was a general lack of evidence implicating Morris as the shooter and that Burger fled to North Carolina, "when viewed in context, generally constituted fair comment on the evidence." Pinnacle, 165 AD3d at 522.

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someone who knew him. He was never picked out of a photo array, not a single tattoo on his arms, neither his right or left" (T.1611).

While defendant cites People v Redd, 141 AD3d 546 (2d Dept 2016), People v Brisco, 145 AD3d 1028,1029-30 (2d Dept 2016), and People v DeJesus, 134 AD3d 463 (1st Dept 2015), as examples of inflammatory comments that have resulted in reversal, each of these reversals were predicated on a persistent pattern of egregious comments in summation. In Redd, in addition to continuously commenting on evidence that was either not in or stricken from the record, the inflammatory remarks about cuts on the defendant's hand were error because they made the prosecutor an unsworn expert witness and were not supported by evidence. Redd, 141 AD3d at 549-50. Likewise, in DeJesus, the prosecutor had committed multiple errors including referring to evidence that had been stricken and making unnamed inflammatory comments. DeJesus, 134 AD3d at 464. In Brisco, the prosecutor's inflammatory comments about the defendant possessing a loaded firearm around families celebrating the Fourth of July "implied to the jury that the defendant intended to commit crimes with which he was not charged" (Brisco, 145 AD3d at 1029-30), but here the prosecutor's comments solely commented on defendant's behavior that supported the murder charge.

Additionally, defendant cited People v Paperno, 54 NY2d 294 (1981), and People v Carter, 40 NY2d 933 (1976), to support his argument that the prosecutor improperly injected his credibility into the proceedings. These cases are inapposite. In Paperno, the Court of Appeals announced the "unsworn witness rule," but made no finding that the prosecutor's conduct violated that rule and remitted the case for a determination on the facts. While that case made a brief reference to the underlying policy for the rule

that the prosecutor "may not inject his own credibility into the trial," here, the prosecutor specifically said in summation that he could not comment on his thoughts or opinions about the re-investigation and directed the jury to evaluate the evidence to decide if he fixed the evidence and, if so, to acquit defendant.

In any event, in light of the strong evidence of defendant's guilt (Point One), any isolated error in the prosecutor's summation was harmless. See People v Villalona, 145 AD3d 625,626 (1st Dept 2016), lv den 29 NY3d 953 (2017); People v Ramos, 92 AD3d 445,446 (1st Dept 2012). There is no likelihood that the verdict would have been different absent the contested comments. See People v McLaughlin, 104 AD3d 615,616 (1st Dept 2013).

Finally, contrary to defendant's assertion that the "court did nothing to reign in the misconduct and overruled counsel's numerous objections" (def.br., p.134), the court took many measures to minimize any prejudice defendant may have suffered. The court sustained counsel's objection (T.1654), issued curative instructions (T.1645,1662), corrected the prosecutor's argument about counsel's summation, and instructed the jurors that they "should not attribute any ill motives to [] counsel" (T.1639). Moreover, throughout trial the court instructed the jurors that attorneys' arguments were not evidence and that they were free to disregard the attorneys' views about the case. The jury is presumed to have followed these instructions and counsel clearly thought they were adequate to remedy any prejudice because he did not move for a mistrial or seek

any further or alternative relief. Overlee, 236 AD2d at 142. Thus, the court was not the idle participant contributing to defendant's alleged prejudice that he portrays.

POINT NINE

THE COURT PROVIDENTLY REMOVED DEFENDANT FROM THE COURTROOM AFTER THE JURY'S VERDICT WAS ANNOUNCED, BUT BEFORE INDIVIDUAL POLLING, BASED ON HIS OUTBURST AND REQUEST TO BE REMOVED.

In the midst of Gist's testimony, defendant, without provocation by or invitation from the court or counsel, yelled at her that he had "never met [her] in [his] life." The court immediately admonished him "Sir, you say another word and you won't be participating in this trial in this courtroom, do you understand me? Not a word." Defendant indicated he understood (T.352-352A). This warned defendant that any further outbursts by him would result in his removal from the courtroom while his trial continued. See People v Branch, 35 AD3d 228,228-29 (1st Dept 2006); cf. People v Parker, 57 NY2d 136 (1982).

After deliberations, the foreperson announced the jury's verdict of guilty and the jurors confirmed this verdict (T.1784-85). Defendant exclaimed, "I didn't do it. I didn't do it. Take me back to jail. I didn't do it, I didn't do it" and continued, "Take me back to jail. I've been in jail for three years for something I didn't do. I never met any, none of these people, that's why nobody said it was me, none of them people" (T.1785). At defendant's request, the court instructed the court officers, "Take defendant out." It also asked if counsel wanted the jurors polled. Counsel said, "Yes." The court again

instructed the court officers to "Remove the defendant from the Court" and the People requested "a factual finding as to what he did before he's removed." Upon defendant's removal the prosecutor stated, "Defendant yelled at the jury. His family has disrupted the proceedings. The court mandated he be removed from the court, that he's tried to stand out -- " (T.1785). Before polling the jury, the court said:

> Ladies and gentleman I'm about to poll this jury. I want you to understand that the displays that you've just seen must undoubtedly be very troubling to you, very upsetting to you. And I understand, moreover, that rendering a verdict in a homicide case is one of the most difficult things that any of you will have to do.
>
> I also want to tell you, you have distinguished yourselves throughout this case as an attentive and interested and intelligent jury and I want you to do the following, when you are polled I want you to tell me what your verdict is and I also want to be sure that you understand that the display that you just observed should not have any impact on your statement. If it is your verdict, I ask you to state your verdict. If it's not your verdict, you may state that.
>
> Once again, not withstanding the extraordinary effect that undoubtedly had on some of you, though I see crying now, that that kind of display, I want you to understand that it should not have any effect on you, that was not evidence that you just saw. What you just saw, could very well be simply a statement by a person who is completely guilty of the offense and notwithstanding has decided to attack you and attack the verdict in this way.
>
> I want you to understand your verdict will be accepted by the Court but I don't want you to feel that what you just observed is in any way a legitimate attack on you.

(T.1786-87)(emphasis supplied). The jurors were then polled (T. 1787-88).

Now, defendant argues that he was denied his right to be present at all material stages of trial because he was removed from the courtroom after the jury announced its verdict, but before the jurors were individually polled (def.br., pp.134-36). This claim is unpreserved and meritless as defendant waived his right to be present.

Defendant's claim is unpreserved because when defendant asked to be removed from the courtroom and the court instructed the court officers to remove defendant, counsel did not object. Instead, counsel informed the court that he would like the jury polled as the court continued to instruct the court officers to remove defendant. Once defendant had been removed and the court polled the jury, counsel still did not object or any way suggest that defendant should be present (perhaps in candid recognition that his client would be incapable of composing himself during the poll). Since counsel never objected to his removal below, much less expressed that defendant's state or federal constitutional rights were being violated, his claim is unpreserved. See CPL §470.05(2); Iannelli, 69 NY2d 684; Bailey, 32 NY3d at 78.

In any event, defendant was provided with an appropriate warning during Gist's testimony that any further outbursts from him would result in his removal from court and that his trial would proceed without him. Cf. Parker, 57 NY2d at 141. Thus, it should come as no surprise that when he interposed the exact same outburst for which he had already been reprimanded—that he did not know the witness(es)—that he was removed from the courtroom. Further, defendant's repeated demand "Take me back to jail" (T.1785) also waived his right to be present during the polling of the jury. This

Court held in People v Reid, 16 AD3d 130,131 (1st Dept 2005), that "[b]y demanding to be removed from the courtroom immediately after the announcement of the jury's verdict, defendant waived his right to be present for the polling." See Branch, 35 AD3d at 228-29. Here, the same principle applies. Defendant waived his current challenge that he should have been present for the polling when he requested to be removed from the courtroom.

Regardless, the court properly removed defendant from the courtroom after the jury's verdict was announced, but before individually polling jurors, based on his outburst and request to be removed. Where a defendant has a hysterical or violent outburst following the jury's announcement of their verdict, it is appropriate for the court to remove the defendant and poll the jury in the defendant's absence. See People v Jackson, 16 AD3d 156 (1st Dept 2005). Here, it was entirely appropriate for the court to remove defendant from the courtroom following his outburst. Defendant "yelled at the jury," repeatedly proclaimed his innocence, and requested to be removed (T.1785). This was clearly a violent outburst that upset the jurors to the point that some of them had begun to cry (T.1786). Accordingly, the court acted appropriately in removing defendant, and reassuring the jurors that they should announce whatever their verdict may be based on the evidence and not to be influenced by defendant's outburst (T.1786-87). This was a reasonable response to defendant's outburst (which was not his first outburst during the trial) to ensure the safety of the jurors and their ability to announce their verdict without fear of intimidation.

People v Rivas, 306 AD2d 10 (1st Dept 2003), cited by defendant, is easily distinguishable. In Rivas, the defendant was removed from the courtroom before his verdict was even announced based on his comments. Id. Here, the record is clear that defendant was present when his verdict was announced–which prompted his outburst–and was only removed for the polling of the individual jurors. Thus, this case is nothing like Rivas.

Defendant also incorrectly claims that the court "remarked that [defendant's] outburst probably evinced his guilt" and may have influenced the jurors' polling (def.br., p.135). This misstates the record. While the court attempted to calm the visibly upset and crying jurors, it commented that defendant's outburst "could very well be simply a statement by a person who is completely guilty of the offense and notwithstanding has decided to attack you and attack the verdict in this way," but advised the jury to report whatever their verdict may be and that defendant's outburst "should not have any impact on [their] statement" (T.1786). This was clearly an attempt to calm the jurors after an upsetting outburst and prevent them from being improperly intimidated into changing their verdict based on defendant's behavior. The court's instruction was proper.

While defendant also suggests that the court should have recessed, admonished him about his behavior outside the presence of the jury, given him time to compose himself, and then polled the jury (def.br., p.135), such action was unnecessary based on defendant's repeated request to be removed. It was entirely reasonable for the court to

adhere to his wishes, remove him from the courtroom, and not presume that he wanted to return moments later, particularly where no objection or request to bring defendant back to court was lodged by counsel.

POINT TEN

THE COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

Before trial, defendant moved to dismiss the indictment on multiple grounds, pertinently including that the People did not present evidence that Morris had previously been identified as the shooter (Omnibus Motion, 10/13/2013, pp.1-3). Defendant argued that because the People had "substantial evidence" that Morris was the shooter, and because "[t]hey also had conflicting eyewitness evidence indicating that Ronnell Gilliam was the shooter" this information should have been put before the Grand Jury (id., pp.2-3). He further argued that the People had DNA samples from two bottles, which allegedly belonged to defendant, but did not match the DNA from the blue sweater (id., p.3). Ultimately, defendant contended since this evidence "would establish a complete defense . . . and would result in a finding of no criminal liability . . . the District Attorney was obligated to present" it (id., p.3).

The People conceded that they had not presented the evidence of Morris' identification as the shooter, but contended that no legal authority required them to "present exculpatory or evidence favorable to the defendant to a grand jury." Instead, the People, quoting People v Mitchell, 82 NY2d 509,515 (1993), and citing People v

Edwards, 32 AD3d 281 (1st Dept 2006), relied on their "broad discretion in presenting a case to a grand jury" that does not require them to "seek out evidence favorable to the defendant or present all of their evidence tending to exculpate the accused." Defendant replied arguing that since the District Attorney already possessed the exculpatory information, they "had an affirmative obligation to present that evidence to the grand jury" (Reply, 12/24/2013, pp. 1-3).[65]

On February 4, 2014, the trial court issued its decision, inter alia, denying defendant's motion (Decision and Order, 2/4/2014). With respect to the People's failure to present exculpatory evidence, the court explained, citing Mitchell, that "[t]he People maintain broad discretion in presenting their case to the Grand Jury and are not obligated to present to the Grand Jury all evidence in their possession tending to exculpate the accused," and noted that the People had indicated that they had disclosed the exculpatory evidence (in compliance with Brady) and were aware of their continuing Brady obligation.

The trial court properly denied defendant's motion to dismiss the indictment based on the People's failure to present evidence of another identification in the Grand Jury. "The People maintain broad discretion in presenting their case to the Grand Jury and need not . . . present all of their evidence tending to exculpate the accused."

[65] Defendant additionally asserted, for the first time on reply, that the indictment should be dismissed because the People failed to give the interested witness charge with respect to Burger's grand jury testimony, since he had been considered a suspect in the homicide (Reply, 12/24/2013, p.3).

Mitchell, 82 NY2d at 515 (quoting People v Lancaster, 69 NY2d 20,25-26 [1986]); see also People v Thompson, 22 NY3d 687,698 (2014). The only circumstance under which the prosecution must admit an exculpatory statement to the Grand Jury is when it is intertwined with an inculpatory statement the prosecution seeks to introduce. Mitchell, 82 NY2d at 513. Indeed, "the prosecutor is not obligated to present the evidence or make statements to the grand jurors in the manner most favorable to the defense." Thompson, 22 NY3d at 687,698. This Court has consistently and routinely applied this precedent. People v Morel, 131 AD3d 855,859-61 (1st Dept 2015); People v Greg, 268 AD2d 369 (1st Dept 2000).

This rule is rooted in the well-established traditional purpose of Grand Jury proceedings—"to prevent prosecutorial excess by ensuring that before an individual may be publicly accused of a crime and put to the onerous task of defending himself from such accusations, the State must convince a Grand Jury composed of the accused's peers that there exists sufficient evidence and legal reason to believe the accused is guilty." Lancaster, 69 NY2d at 25 (internal citations and quotation marks omitted); Mitchell, 82 NY2d at 513; Morel, 131 AD3d at 860-61. Put another way, "the Grand Jury performs the dual function of investigating criminal activity to determine whether sufficient evidence exists to accuse a citizen of a crime, and of protecting individuals from needless and unfounded prosecutions." Lancaster, 69 NY2d at 25.

Accordingly, where there is a complete defense that would render the prosecution "needless and unfounded," the prosecutor must instruct the jury as to that

defense. Lancaster, 69 NY2d at 26-27. A complete defense is one that, if believed, absolves a defendant of criminal liability such as justification. Id. at 27-28. However, it remains that "the Grand Jury proceeding is not intended to be an adversary proceeding" and "is not a mini trial, but a proceeding convened primarily to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution." Id. at 26,30.

Dismissal of an indictment (the remedy that defendant requests [def.br., p.142]), is an extreme and rare remedy limited to when there is "a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant." Thompson, 22 NY3d at 687,699 (internal citations omitted). This a "demanding test . . . met only where the prosecutor engages in an over-all pattern of bias and misconduct that is pervasive and typically willful, whereas isolated instances of misconduct including the erroneous handling of evidentiary matters, does not merit invalidation of the indictment." Id. (internal citations omitted). Indeed, "dismissal is meant to eliminate only prosecutions that are truly unfounded, as opposed to those that merely rest on a view of the evidence that is not comprehensive." Id. at 704.

Here, the court properly declined to dismiss the indictment based on the People's decision not to present evidence that Morris was previously identified as the shooter. The court relied on the prosecution's broad discretion to present their case to the Grand Jury and lack of obligation to present exculpatory evidence, as outlined above. The only issue before the Grand Jury was whether there was reasonable cause to believe that

defendant committed second-degree murder, under both intentional and depraved indifference theories (Penal Law §190.65[1]) and the elements of those offenses were proven by DNA evidence linking defendant to the crime, multiple eyewitnesses, and an autopsy report opining on the victim's cause of death. Thus, the People were able to meet their burden of proof and were not required to present any exculpatory information, such as the identification of Morris as the shooter.

Moreover, a prior misidentification of another individual as the shooter is not a complete defense. A complete defense absolves a defendant of criminal liability. For example, in People v Golon, 174 AD2d 630,632-33 (2d Dept 1991), in a vehicular crime case, the Second Department held that the People's failure to disclose to the Grand Jury that defendant owned the vehicle required dismissal of the indictment because defendant could not illegally possess a vehicle that he owned. By contrast, here, the fact that eyewitnesses mistakenly identified someone else as the shooter does not absolve defendant. Indeed, eyewitness testimony can be inaccurate. See LeGrand, 8 NY3d 449. Moreover, if the People had presented the eyewitnesses' identifications of Morris as the shooter in the Grand Jury, it is likely that the grand jurors would have rejected that Morris was the shooter since the same evidence was presented at trial (with the added benefit of cross-examination by counsel). Thus, this evidence would not have exculpated defendant, but turned the grand jury proceeding into a "mini trial," which it is not. Thompson, 22 NY3d at 697-98. Thus, since the eyewitnesses'

identification of Morris was not a complete defense that would exculpate defendant, it was not required to be presented to the Grand Jury.

Additionally, by the time that the People presented the case against defendant to the Grand Jury on April 21, 2013, the indictment against Morris had already been dismissed (on May 29, 2008) based on the People's evaluation that the prior identifications were unreliable. Therefore, it would have been disingenuous for the prosecutor to submit evidence to the Grand Jury that he had already determined was not reliable. To do so would have been to knowingly present false or unreliable information to the Grand Jury, which is obviously prohibited. People v Mateo, 2 NY3d 383,402 (2004).

In any event, "the defect, if any, was cured by defendant's use of the alleged exculpatory evidence at trial." People v Woods, 288 AD2d 905 (4th Dept 2001). Indeed, this was the appropriate forum to consider this evidence. The People presented evidence of Morris' prior identifications and defendant utilized the evidence during his opening, cross-examination, and summation to advance a third-culpability defense, thus, this information was ultimately put before the petit jury (and they rejected it).

The cases defendant cites to advance his position that this was a complete defense are inapposite. In People v Lee, 178 Misc2d 24 (Sup Ct, Nassau Co 1998), the indictment was dismissed because defendant's right to testify before the Grand Jury was violated where the People failed to disclose Brady material to defendant. Here, it is undisputed that the Brady material was disclosed to defendant. In People v Monroe,

125 Misc2d 550 (Sup Ct, Bronx Co 1984), the court held that it was error not to disclose to the Grand Jury that the victim—the only witness to the crime and a stranger to defendant—equivocated during her lineup identification. However, the court was explicit that it was "the confluence of circumstances—the fact that this is a one witness identification case, where the only testimony relating to guilt is the testimony of the complainant—that compels this result. Were there other corroborating evidence connecting [the defendant] to the crime . . . then the indictment might survive." Id. at 561. Here, defendant's guilt was proven by DNA evidence linking him to the crime along with several eyewitnesses who knew him, thus, this case does not have the same considerations as those that were dispositive in Monroe. Moreover, this case is not similar to the recanting witness in People v Curry, 152 Misc2d 61 (Sup Ct, Queens Co 1992), in that previously identifying someone else as a shooter is not the same as saying that the defendant did not commit a crime. Finally, this case is also dissimilar to People v Archie, 28 Misc3d 617 (Sup Ct, Kings Co 2010), where the People failed to call defendant's alibi witnesses after the Grand Jury specifically asked to hear them. An alibi witness who would place a defendant out of state at the time of the crime is simply not the same as a witness who previously thought that someone else was the shooter.

Further, the indictment was not secured by misleading evidence (def.br., p. 140). Defendant was identified by DNA evidence found on the sweater identified as the item of clothing worn by the shooter by multiple eyewitnesses. Moreover, a cooperating

witness and another eyewitness, each of whom knew the defendant, identified him as the shooter. This is strong evidence that defendant was the shooter.

While defendant argues that the fact that "the grand jurors also received no instruction concerning how to evaluate Burger's accomplice testimony, only further compromised the integrity of the proceedings" (def.br., pp.141-42), this claim is meritless. The trial court, citing People v Pacheco, 56 AD3d 381 (1st Dept 2008), properly ruled that "the prosecutor should have given an instruction with respect to accomplice testimony . . . [h]owever, in light of the evidence presented and the charge that was given, these failures did not substantially impair the integrity of the Grand Jury proceedings so as to render the indictment defective" (Decision and Order, 2/4/2014, p.5). Indeed, this case is similar to Pacheco in that, while an accomplice instruction was appropriate in this presentation, the remaining evidence— defendant's identification by DNA and eyewitnesses, the medical testimony—sufficiently provided reasonable cause to believe that defendant had committed second-degree murder. Therefore, the integrity of the Grand Jury proceedings was not compromised and the court was correct in declining to dismiss the indictment.

POINT ELEVEN

PROBABLE CAUSE SUPPORTED THE SEARCH WARRANT FOR A BUCCAL SWAB OF DEFENDANT'S SALIVA TO OBTAIN A DNA SAMPLE.

In a motion dated October 31, 2013, counsel contested whether the eyewitness referenced in Det. Ciuffi's affidavit supporting the search warrant to obtain a buccal

swab from defendant existed "or that such a witness had come forward at the time of the warrant application[, or] if such a witness did exist at such time, his information was unreliable as contradicted by previous statements of such witness and other evidence in the case." Defendant averred that if the identification of this witness were deemed reliable now, it should have been reliable in 2006, and there would have been no reason to delay defendant's arrest. He continued that, based on a note in the discovery, after his DNA was matched to the DNA recovered on the sweater there was still insufficient information to arrest him (defense motion 10/31/2013, p.4, Exhibit A, Det. Ciuffi affidavit). Additionally, defendant noted that Det. Ciuffi referenced DNA on the victim's body, which was not a part of the evidence (id., p.5, Exhibit A).

In papers dated December 11, 2013, the People responded that since defendant's motion did not controvert the search warrant or ask to suppress physical evidence, they would "not respond to the noticed motion until such time as the defendant moves the Court to suppress tangible evidence."

On February 4, 2014, the court held defendant's motion to controvert the search warrant and suppress the saliva sample in abeyance pending a hearing pursuant to People v Darden, 34 NY2d 177 (1974) (Decision and Order, 2/14/2014, pp.5-6). On May 29, 2015, the court conducted an ex parte Darden hearing, and on July 28, 2015, held the confidential informant who provided information for the search warrant to obtain defendant's DNA was credible and reliable and that the warrant was supported

by probable cause (Darden Hearing Decision and Order, 7/28/2015). Defendant never sought to further challenge the search warrant or to suppress his saliva sample.

Now, defendant claims that the court improperly failed to hold a hearing pursuant to Franks v Delaware, 438 US 154 (1978) to address the validity of statements made in the affidavit filed in support of the search warrant for defendant's DNA swab (def.br., pp.142-48). This claim is unpreserved, abandoned, and meritless.

When the court ordered a Darden hearing and held its ruling on defendant's challenge to the search warrant or to suppress his saliva sample in abeyance, defendant did not protest this remedy or re-file his claim as a motion to suppress his DNA. Thus, he failed to present his request for a Franks hearing in the proper manner (as a motion to suppress his DNA sample after the Darden hearing was completed) and failed to adequately preserve his claim. People v Franklin, 137 AD3d 550,552-53 (1st Dept 2016). Alternatively, he abandoned this claim when he continued to litigate his case without re-asserting that a Franks hearing was required. See Alexander, 19 NY3d at 217.

Moreover, defendant's claim is meritless where he has failed to make a "substantial preliminary showing," of more than mere conclusory allegations, that Det. Ciuffi "knowingly and intentionally, or with reckless disregard for the truth, included in a warrant affidavit a false statement necessary to the finding of probable cause." Colorado v Nunez, 465 US 324, 327-328 (1984) (citing Franks, 438 US 154); Franks, 438 US at 171. Initially, once a warrant has been issued, the warrant and underlying affidavit in support thereof are presumed valid, and the burden of proving

otherwise falls solely upon the defendant. See People v Castillo, 80 NY2d 578,585 (1992); Franks, 438 US at 173. The issuing judge has considerable discretion in determining whether a search warrant application is valid. Courts have held that such a determination should be made "in a common sense and realistic fashion . . . and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner." United States v Ventresca, 380 US 102,108-09 (1965); People v Tambe, 71 NY2d 492,501 (1988).

Here, defendant has made insufficient factual allegations to warrant a Franks hearing because defendant's complaint implicates a technical defect, not a false statement. Defendant's main argument is that the statement that an eyewitness came forward "now" is false, however, the timing of the eyewitness' disclosure is immaterial to whether there was probable cause to obtain defendant's DNA sample. Det. Ciuffi's affidavit was written to explain the facts that necessitated obtaining a sample of defendant's DNA in 2011. Whether an eyewitness initially identified defendant as the shooter in 2006 or "now" in 2011 is immaterial to whether the identification supported a finding of probable cause. Notably, the importance of this identification changed from 2006 when Morris was being prosecuted to 2011 when DNA recovered from the sweater excluded Morris as a suspect and police focused their investigation on defendant. That the same information was previously reported in no way detracts from its reliability and ability to supply probable cause to obtain a search warrant for a buccal

swab of defendant's DNA. Further, if the timing of the disclosure were material to the court's probable cause determination, it would have been addressed at the Darden Hearing, where the court found the eyewitness to be credible and reliable, regardless of any gap between the identification and the search warrant. This is unsurprising because, again, the relevance of the initial identification did not ripen until DNA excluded other suspects. Likewise, any further complaints about the affidavit's failure to allege the eyewitness's credibility (def.br., p.147), would have been addressed at the Darden Hearing as well.

Even removing the allegedly false statement—that the eyewitness had come forward "now'—there would still be probable cause for the warrant. Det. Ciuffi's affidavit explained that witnesses to the shooting agreed that the shooter was wearing a blue sweater, immediately after the shooting defendant ran to Burger's apartment, a blue sweater was recovered from Burger's apartment that did not match Burger's or Morris' DNA profile, an eyewitness had identified defendant as the shooter, and defendant had fled to North Carolina the night of the shooting. These facts established probable cause to obtain defendant's DNA sample, regardless of when the eyewitness came forward with the identification. See People v Bigelow, 66 NY2d 417,423 (1985)(probable cause lower standard than proof beyond a reasonable requiring only "a reasonable belief that . . . evidence of a crime may be found in a certain place"); People v Ippolito, 226 AD2d 285 (1st Dept 1996)("even without the information claimed to be false, the affidavit was still based upon probable cause").

Notably, defendant also has not alleged sufficient facts to show that Det. Ciuffi—"a 28-year veteran of the New York City Police Department" "assigned to the Bronx Homicide Squad"—"knowingly and intentionally, or with reckless disregard for the truth," included a false statement in the affidavit. Nunez, 465 US at 327-328. In candor, the affidavit is not a model of careful draftsmanship—defendant's name is spelled incorrectly (Daryl Hemphill) and it references "DNA left upon the body of a murder victim," (def.br., p.148) which clearly was never a part of the evidence in this case, as would have been obvious to the prosecution and court and would not have contributed to the court's probable cause determination. However, these appear to be drafting errors akin to a scrivener's error using a template to draft the search warrant application. Indeed, it is possible that Det. Ciuffi did not intentionally add the word "now" to the affidavit to describe when the eyewitness came forward, but mistakenly failed to delete it from a previous search warrant affidavit he had used as a template to draft the current affidavit. This falls far short of the intentional or reckless inclusion of a known false statement required to justify a hearing.

Further, defendant relies upon his argument that there "was no dispute that the eyewitness to whom Ciuffi referred in his affidavit was [Burger because n]either the prosecutor nor the court claimed otherwise [and t]here was no other eyewitness who identified [defendant] at trial" (def.br., pp.146-47), but this argument misses the point. The fact that the prosecution and court did not comment on the identity of the eyewitness does not confirm that it was Burger. The eyewitness' identity was concealed

from the search warrant application to the Darden hearing, and possibly at trial, for his/her protection as an eyewitness to this homicide.[66] Thus, it is unsurprising that the prosecutor and court did not comment on the eyewitness's identity as this could have jeopardized the witness' safety.

Moreover, defendant's assumption ignores the very real possibility that there may have been another eyewitness who was not called to testify at trial. The shooting occurred on a public, populated street, in broad daylight, on Easter Sunday, in defendant's home neighborhood. Accordingly, there could have been any number of eyewitness who may have identified defendant as the shooter. To presume that no one else could identify defendant is short-sighted. Indeed, if the witness were anyone other than Burger, defendant's claim would fail because it is predicated on the allegations that Det. Ciuffi knew that Burger had identified defendant as the shooter in 2006 and did not immediately arrest defendant because he found Burger to be unreliable. As defendant argues no other eyewitness previously identified defendant, the same would not be true of any other eyewitness, and Det. Ciuffi's affidavit could not be false.

[66] That Burger testified at trial and identified defendant does not alter the notion that his identity would have been protected in the search warrant affidavit and Darden Hearing – and continued to be protected as the eyewitness during trial. Providing the information that enabled the police to obtain defendant's DNA, which led to his ultimate arrest and prosecution would obviously present a threat to Burger's life. Notably, defendant had already attempted to ensure that Burger, his cousin, would not implicate him in the murder by assisting him in fleeing to North Carolina and hiring his lawyer to aid him in implicating Morris. Thus, defendant showed an interest in silencing Burger with respect to his own criminal liability, creating a reasonable risk to his safety once he told the police that defendant was the shooter.

Defendant's remaining complaints about the affidavit—that it did not adequately allege the eyewitness' reliability (def.br., p.147) and that Det. Ciuffi referenced DNA recovered on the victim's body (def.br., p.148)—do not detract from the validity of the warrant. The court granted and conducted a Darden hearing to address the eyewitness' reliability and found the eyewitness to be reliable, thus this issue was addressed. Moreover, Det. Ciuffi's reference to DNA recovered on the victim's body was clearly a typographical error of which the prosecution and court would have been aware and it did not contribute to the court's probable cause determination.

POINT TWELVE

DEFENDANT RECEIVED A SPEEDY TRIAL.

Before trial, defendant moved to dismiss the indictment due to pre-arrest delay under People v Taranovich, 37 NY2d 442 (1975), because, he alleged, there was no good cause for the seven-year delay between the crime and his arrest when he was always a suspect, the police knew his location, and his DNA was identified on the shooter's sweater as of June 24, 2011.

The People responded. The relevant portion of the delay included approximately two years, beginning when defendant's DNA was matched to DNA from the blue sweater, since "it was unreasonable that the formal prosecution of the defendant should have begun on the same day David Pacheco, Jr. was shot and killed," and the case against defendant commenced within a reasonable time after he was identified as the shooter. The People explained that the delay was caused by the initial investigation and

prosecution of Nicholas Morris and the time it took to obtain and test defendant's DNA sample against the DNA sample recovered from the sweater, while also noting that during this time the People were continuing to "actively investigat[e] this matter seeking direct and corroborative evidence" such as locating additional eyewitnesses. The People further noted that the nature of the charges were serious, defendant had only been incarcerated for approximately seven months before motion practice, and that defendant's allegation that he could have canvassed for eyewitnesses was "speculative, unsupported by fact, and specious."

The motion court held that the People had provided "ample justification for the seven-year period of pre-arrest delay" (Order, 2/4/2014, p.1). It found the People justified in pursuing an investigation against and prosecution of Morris based on the evidence available and, later, good cause for the delay where the delay in DNA testing resulted from defendant's relocation to North Carolina and the People's need to continue gathering corroborating evidence after the DNA match (id., pp.2-3). The court also noted that "the remainder of the Taranovich factors all strongly militate[d] in favor of denying" defendant's motion where the seven-year delay was not excessive in light of the serious murder charge, defendant's relatively short pre-trial incarceration, and his inability to establish how he was prejudiced by the delay (id., p.4).

On this record, the court properly denied defendant's motion to dismiss the indictment based on pre-arrest delay.[67] An unjustified delay in prosecution will deny a defendant due process of law and, where there has been extended delay, the burden is on the People to establish good cause. See People v Decker, 13 NY3d 12,14 (2009). However, a "determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant." Id. at 14; People v Mayo, 284 AD2d 111,112 (1st Dept 2001). Indeed, even where the People are unable to demonstrate good cause for a delay, so long as it was not designed to gain a tactical advantage over the defendant, there can be no deprivation of due process. See People v Lee, 234 AD2d 140,143 (1st Dept 1996). In determining whether there has been undue delay, the following factors should be considered: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been extended period of pre-trial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay. See Decker, 13 NY3d at 15 (citing Taranovich, 37 NY2d at 445).

[67] Defendant's claim of a subsequent speedy trial violation, articulated just before trial began, based on Rosario materials he believed indicated that "the key new witness who came forward was not actually a new witness but was [Burger]" (T.176-78), is unpreserved since it is raised for the first time on appeal. To adequately preserve that claim, and render it reviewable here, defendant was required to file a subsequent speedy trial motion in writing before trial, and to give the prosecution time to respond. CPL §210.45(1); People v Lawrence, 64 NY2d 200,203-04 (1984).

The delay in this case was not excessive. Initially, the operative period of delay began when defendant's DNA was matched to the DNA sample recovered from the sweater on June 24, 2011. Thus, his arrest on April 24, 2013, was only delayed by approximately two years, a relatively short period. In any event, even considering the entire seven-year period, there is "no specific temporal period by which a delay may be evaluated or considered presumptively prejudicial" (Decker, 13 NY3d at 15 [internal quotation marks omitted]) and this delay was not lengthy considering the remaining factors. Indeed, as the Court of Appeals has noted, a delay may also work against the prosecution as the passage of time can make it more difficult for the people to meet their burden at trial. Id.; People v Vernace, 96 NY2d 886,888 (2001). In fact, here, the time that has elapsed most likely contributed to the People's witnesses not remembering details about the crime, which resulted in minor inconsistencies at trial. Notably, at trial, defendant capitalized on those inconsistencies and now, in other points of his brief, takes full advantage of them in order to argue, among other things, that the verdict was against the weight of the evidence. See People v Vernace, 274 AD2d 595 (2d Dept 2000)(17-year pre-indictment delay "was not intended to give the prosecution an unfair tactical advantage" and "place[d] the prosecution, not the defendant, at a tactical disadvantage"), affd, 96 NY2d at 886.

Most importantly, based on this record, it is clear that the People made a good faith determination to delay prosecution because there was insufficient evidence to proceed against defendant until 2013. At the time of the shooting, in 2006, the People

had probable cause to believe that Morris was the shooter, not defendant, because he had been misidentified by multiple witnesses. Accordingly, the People investigated and prosecuted Morris and defendant was not the shooting suspect. After Morris' case was dismissed on May 29, 2008, the People began their investigation anew with no witnesses because the existing witnesses had identified the wrong person. In June 2008, investigators located defendant in North Carolina living under a false name (his residence was leased to "Darryl Davis") and unsuccessfully attempted to obtain his DNA from some garbage outside his home. When that attempt failed, the investigation turned towards obtaining a search warrant for defendant's DNA, which was secured in April 2011. Approximately two months later, in June 2011, when OCME confirmed defendant's DNA was on the sweater, the People attempted to locate corroborative evidence that he was the shooter, including tracking down additional eyewitnesses such as Matthews in Delaware who refused to testify (and ultimately only testified under a material witness order). Clearly, based on the above, the People, who had insufficient evidence to prosecute defendant even in June 2011, had a good faith basis to defer prosecution until more evidence was obtained or witnesses were willing and able to testify. See Decker, 13 NY3d 19.

Decker is factually analogous. In Decker, the victim's body was found in December 1987 and police questioned defendant, but found the evidence against him doubtful and decided not to prosecute. Fifteen years later, in 2002, the case was reopened when police attempted to employ modern scientific techniques to obtain

physical evidence, specifically, testing items for fingerprints and DNA, which ultimately failed. During the investigation, however, police re-interviewed the original witnesses and decided to prosecute Decker using the same evidence that was available in 1987. The Court of Appeals found the delay justified since the witnesses were originally afraid to testify and the prosecution wanted to further investigate due to the condition of the witnesses and the lack of physical evidence against the defendant. See Decker, 13 NY3d at 13-16. The Court noted, "the subsequent decision to bring charges, albeit many years later, was not an abuse of the significant amount of discretion that the People must of necessity have, and there is no indication that the decision was made in anything other than good faith." Id. at 15; see also Vernace, 96 NY2d at 887-88 (17-year delay upheld because People determined in good faith to delay prosecution for further investigation); People v Nazario, 85 AD3d 577 (1st Dept 2011)(nearly 12-year delay to obtain corroborating evidence). Here, the People, who had no witnesses after the Morris mistrial, in good faith, turned to modern scientific techniques to re-investigate this case (DNA testing of defendant's newly acquired saliva sample) and properly continued their investigation after defendant's DNA was confirmed on the sweater due to the condition of the witnesses (who had previously identified someone else as the shooter) and the lack of physical evidence beyond defendant's DNA linking him to the crime.

Indeed, even where a delay is inadvertent, so long as it is not designed to gain a tactical advantage over the defendant, there can be no deprivation of due process. See Lee, 234 AD2d at 143; see also Mayo, 284 AD2d at 111. Contrary to defendant's

speculation, there is no indication that the defense was significantly impaired or that the People acted in bad faith. Defendant simultaneously claims that he has always been a suspect and that he had even hired an attorney to represent him in this matter long before his arrest, but also that he was prejudiced because he could not locate eyewitnesses to the crime. This inconsistent claim is speculative and cannot be true. If defendant knew that he was a suspect and had already obtained counsel, he was on notice to locate witnesses for his defense. If defendant was not a suspect and was otherwise unaware that he may be prosecuted for this offense, the People provided him with the names of multiple eyewitnesses that he could have contacted before trial. Moreover, defendant offers no proof that he attempted to locate witnesses, but was thwarted by the delay. Decker, 13 NY3d at 16; Vernace, 96 NY2d at 887.

Additionally, defendant was not arrested or detained for almost the entire seven-year period and, therefore, was neither incarcerated nor under the cloud of an indictment that would have affected his ability to live his life. See People v Wilson, 8 NY2d 391,397-98 (1960)(discussing need for speedy trial post-indictment because "one indicted for a crime and awaiting trial is subjected to the anxiety and public suspicion attendant upon an untried accusation of crime"). Instead, he was detained pre-trial before motions for only seven months, a relatively short time compared to the seven-year delay he complains of now. Decker, 13 NY3d at 15; Vernace, 96 NY2d at 888 ("There was virtually no pretrial incarceration. The defense has not been impaired; to the contrary, defendant has enjoyed significant freedom with no public suspicion

attendant upon an untried accusation of a crime"). No case defendant cites has found a constitutional speedy trial violation under similar circumstances.

Defendant relies principally on People v Wiggins, 31 NY3d 1 (2018), to support his claim, but this case is distinguishable in two critical ways. First, Wiggins addressed post-indictment delay and its holding turned, in part, on this fact. The Court plainly stated that the "People necessarily have wider discretion to delay commencement of prosecution for good faith, legitimate reasons than they do to delay a defendant's trial after charges have been filed, even for legitimate reasons and without acting in bad faith." Id. at 13 (emphasis in original). Accordingly, the Court found that the People's decision to delay defendant's trial to enhance the evidence against him could not "justify th[e] extraordinary delay through their good faith alone." Id. Here, by contrast, defendant challenges his pre-indictment delay. Indeed, the People did not arrest defendant until they had completed their investigation and gathered sufficient evidence to prosecute him, including securing Burger's cooperation and adequate evidence to corroborate Burger's testimony including obtaining, testing, and matching defendant's DNA to DNA recovered from the blue sweater, re-interviewing witnesses, and obtaining a material witness order for Matthews' testimony. This was an appropriate exercise of good faith discretion.

Second, the reason for the delays also differed. In Wiggins, despite that the co-defendant communicated that "he would never testify against defendant," "the People pursued a cooperation agreement with [him] for approximately 2½ years [and a]fter that

effort proved unsuccessful, they spent the next [3] years attempting to convict [the co-defendant over the course of several mistrials], trying him separately from defendant," which resulted in a post-indictment delay of "six years, three months, and 25 days" during which the defendant was incarcerated. Id. at 9,15. Here, of course, there was no comparable delay; the People decided to delay defendant's prosecution to complete a thorough re-investigation of this homicide of a two-year-old. After multiple witnesses had previously identified the wrong person as the shooter, this was the prudent and the only appropriate course for the prosecution. Rather than rush to judgement and assemble a hasty prosecution, the People took time and care to ensure that there was adequate evidence to prosecute defendant before commencing criminal proceedings. This wise decision should not be recast now as a tactical delay designed to prejudice defendant. To the contrary, the pre-indictment delay was incurred to protect the defendant—or any other suspect—from a wrongful prosecution.

POINT THIRTEEN

THE COURT PROVIDENTLY DENIED DEFENSE COUNSEL'S LAST-MINUTE REQUEST TO ADJOURN SENTENCING.

On December 7, 2015, the jury reached a verdict. Then, by letter dated December 28, 2016, after the court session terminated for the year, counsel sent a letter to the court "seeking to postpone sentencing." Due to the defense delay in submitting the letter, the court did not receive it until the day before sentencing, January 6, 2016. On that date, counsel requested to address the court ex parte. The court reluctantly

agreed if the conversation was on the record. Counsel requested an adjournment to further investigate and file a CPL §330.30 motion addressing claims that defendant's sister-in-law, Elisa Hemphill (the hostile witness), was friends with one of the jurors because counsel was unable to contact the juror who was out of town for the holidays (S.2-3). He claimed to have received an affidavit from Elisa, but did not supply it to the court. The court noted counsel was acting in good faith, but denied the request because he could file the same claims under CPL §440.10 (S.4). When counsel insisted that the two motions were procedurally different, the court responded it was declining the adjournment, not preventing him from investigating or filing the claim. The court added that it was "highly skeptical about the information that [counsel] put on this record," but would "keep an open mind" and "reserve decision on the merits of your claim" (S.5-6). The court explained it would not delay sentencing because "the family of the deceased is entitled to closure at this point" and that "both sides [had] a fair opportunity to prepare for these proceedings" (S.7) and proceeded to sentencing.

Defendant's claim that the court erred in denying his request to adjourn sentencing for him to investigate and file a CPL §330.30 motion is unreviewable because the denial of an adjournment amounts, at best, to a "technical error" that does not implicate a substantial right of the defendant. Under CPL §470.05, "[a]n appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties." While defendant argues that the denial of his adjournment request affected his substantial right "to an impartial jury" (T.157-58),

this conclusion improperly conflates a merits determination with a request for an adjournment. The allegations that Elisa and the foreman knew one another and had possibly discussed the case were not properly before the court. Counsel indicated that he had obtained an affidavit from Elisa and had initial conversations with the foreman. Thus, defendant's investigation of the juror issue was complete; defendant's sister-in-law provided a sworn affidavit and counsel alleged he had communicated with the juror about the claims, though he wished to obtain a sworn affidavit from him as well. As the court clarified, "I'm not preventing you from making the claims, I'm preventing you from adjourning the proceeding" and promised to "keep an open mind" and "reserve on the merits of your claim" (S.5-6).[68] Thus, the only issue before the court was counsel's request for an adjournment, which did not affect a substantial right of the defendant. Therefore, his claim is unreviewable. CPL §470.05.

Moreover, defendant easily could have had his right to an impartial jury claim reviewed by this Court by bringing a CPL §440 motion as the trial court suggested. See CPL §440.10(1)(f). Had defendant prevailed, the trial court would have vacated the conviction, the same remedy available under CPL §330.30. Had the motion failed, appellate counsel could have requested that this Court consolidate review of the denial on direct appeal, which this Court now does as a matter of course. Cf. People v Evans,

[68] Defendant's request that this case be remanded before an alternate judge (def.br., p.158) is inappropriate. Far from demonstrating any bias or unfairness towards defendant, Justice Barrett specifically invited defendant to file a CPL §440 motion asserting his claims and stated that he would "reserve on the merits" until defendant had the opportunity to do so.

16 NY3d 571,574-75 (2011)(stating the Appellate Divisions should consolidate CPL 440.10 motions with pending direct appeals to allow review). This procedure also provides defendant with the opportunity to have appellate counsel assist him with these claims, thus obviating any alleged defect defendant complains of now (def.br., pp.158-59). As an attorney for the Center for Appellate Litigation, a well-established institutional appellate defender organization that regularly files such motions before perfecting appeals, appellate counsel was undoubtedly aware of this option. Indeed, this Court may and should presume on this record that the absence of such a filing in this case is the result of defendant's appellate counsel being unable to locate any actual evidence of juror impropriety. Accordingly, defendant should not be heard now to complain of errors appellate counsel could have easily addressed.

A decision to grant or deny adjournments is left to the sound discretion of the trial court. People v Spears, 64 NY2d 698,699 (1984). Moreover, a decision to deny a defendant's request for an adjournment to investigate and file a CPL §330.30 motion is not an abuse of discretion, particularly where the court encourages the defendant to file a CPL §440.10 motion raising the purported claims. See People v Rivera, 157 AD3d 545,546 (1st Dept 2017); People v Buari, 50 AD3d 483,483-84 (1st Dept 2008). That is especially true where, as here, the defense presents nothing to the court that would actually establish that misconduct occurred. Evidence that the foreperson knew a witness—here, a witness hostile to the prosecution—or that he even had conversations with the witness during trial does not rise to the level of misconduct that would require

the juror to be disqualified. And, if defendant wanted to prove otherwise, he could have submitted his CPL §330.30 motion based on the evidence available to him at the time of sentencing, since he claimed to already have his sister-in-law's sworn affidavit. Indeed, that document alone may have substantiated defendant's claim or at least warranted a hearing on the matter without information from the foreman. The most likely reason for counsel's failure to do so is that the court already had found the witness may have engaged in perjury during her testimony (T.418-19).

The cases defendant cites are distinguishable. Many cases address a defendant's adjournment request during trial, implicating the right to present a defense before the close of evidence. Spears, 64 NY2d 698 (court denied request to adjourn for a couple of minutes to discuss whether defendant would testify after his co-defendant had testified and unexpectedly rested); People v Foy, 32 NY2d 473 (1973)(after the People rested, court denied defendant's request for an adjournment to secure alibi witnesses—the crux of his defense—after establishing prior attempts to secure such witnesses); People v Rohadfox, 114 AD3d 1217 (4th Dept 2014)(court denied defendant's pro se request for an adjournment to obtain new retained counsel, forcing defendant to represent himself). These cases are obviously distinguishable from defendant's request for an adjournment to file a post-verdict motion that he was free to file after sentencing. The remaining cases implicated the defendants' ability to participate in sentencing, beyond trial counsel failing to prepare for the proceeding. In People v Susankar, 34 AD3d 201 (1st Dept 2006), the court denied a request by substitute counsel (who only

represented defendant at a competency hearing in case trial counsel needed to be called as a witness) for a one-day adjournment in sentencing so that trial counsel could appear for the proceeding. Clearly, counsel there was only familiar with issues regarding defendant's mental capacity, not the facts of the case, and would not be able to speak intelligently about the appropriate sentence. It was equally clear that the court in People v Jones, 227 AD2d 982 (4th Dept 1996), should not have denied defendant's request for "a brief adjournment of sentencing to investigate the possibility that his mental condition at the time of his plea may have rendered the plea involuntary," because that meant the defendant was being sentenced based on his plea that may have been involuntary. These cases are a far cry from this matter where trial counsel was intimately familiar with the facts of the case and simply wanted more time to file his motion. Finally, in People v Southall, this Court found a defendant's right to an impartial jury was violated where a juror failed to disclose that she had applied to be an Assistant District Attorney with the very office prosecuting the defendant two days before she was sworn as a trial juror. Southall, 156 AD3d 111,119-20 (1st Dept 2017). The Southall juror's obvious bias towards the prosecution that would warrant the defendant challenging her during voir dire is simply not present in this case where defendant simply alleges that the foreperson knew his sister-in-law. Indeed, given defendant's relationship with his sister-in-law, as reflected in her hostility toward the prosecution when taking the stand, this appears to have inured to defendant's benefit and he has no basis to challenge the juror at all.

As discussed, defendant's fundamental right was not violated because his right to an impartial jury was never before the court and neither trial nor appellate counsel saw it fit to pursue this claim through a CPL §440.10 motion and, if denied, thereafter to seek leave to have the motion consolidated with this appeal. Ultimately, nothing prevents the defense from bringing a future CPL §440.10 motion on this basis, rendering his request to hold the appeal in abeyance academic.

POINT FOURTEEN

DEFENDANT'S SENTENCE WAS FAIR AND PROPER.

This Court should uphold defendant's sentence of from twenty-five years to life in light of the serious and violent nature of the killing and his callous attempt to evade responsibility for his crime. While not his intended target, as a result of his extreme response of firing at least five gunshots across a populated street on Easter Sunday after he had lost a fist-fight, defendant killed a two-year-old child. The court—who at the time of sentencing had been serving on the bench for 33 years and had presided over hundreds of homicide cases—in light of defendant's claim that he had been framed explained, though it was not his usual practice, that "there was considerable evidence that [defendant] is the perpetrator of this crime" including DNA evidence, a witness who was involved who identified him, and, particularly, that immediately after the shooting defendant "packed it up and took flight and lived under a different name in a different state and he evaded prosecution [and] responsibility for the crime that he committed" (S.20-21). The court highlighted that it had considered defendant's lack of

criminal history, but considering the consequences – that a child was killed – the court concluded that "the crime was so meaningless, so pointless as to, in my judgment, deny the existence of mitigation in the commission of the crime," particularly where defendant "has not expressed any remorse" (S.21-22). Accordingly, the court sentenced defendant to 25-years-to-life incarceration (S.23). Thus, notwithstanding the absence of a pre-sentence memorandum, defense counsel presented and the court considered the same claims now presented on this appeal in seeking a sentence reduction, and the court properly factored that mitigating evidence in its sentencing decision. This was a well-reasoned and just sentence that should not be reduced.

* * *

Defendant requests in nearly every point that his case, or a particular issue, be remanded before a different judge (def.br., pp.100,107,115,121,126,129,134,148,159). Given that the court's decisions throughout trial were neutral, well-reasoned, impartial, and did not evince a bias towards either party, this request should be denied. .

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD, BE AFFIRMED.

Respectfully Submitted,

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New York Supreme Court

Appellate Division – First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

Bronx County
Ind. No. 1221/13

DARRYL HEMPHILL,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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January 2019

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Respondent, :

-against- :

DARRYL HEMPHILL, :

Defendant-Appellant. :

----------X

PRELIMINARY STATEMENT

This reply brief is submitted in further support of Mr. Hemphill's appeal from a judgment of the Supreme Court, Bronx County, rendered January 6, 2016, convicting him, after a jury trial, of second-degree murder (C.P.L. §125.25(1)) and sentencing him to 25 years' to life imprisonment. Mr. Hemphill will rely on the Statement of Facts and citation formatting set forth in his original brief.

POINT I

THE EVIDENCE AGAINST MR. HEMPHILL IS INSUFFICIENT WHERE FOUR EYEWITNESSES IDENTIFIED NICHOLAS MORRIS AS THE SHOOTER, MORRIS HAD BRUISED KNUCKLES CONSISTENT WITH HIS HAVING BEEN IN A FIGHT AND .9MM AMMUNITION WAS RECOVERED FROM HIS HOME; THE PROSECUTION CONCEDES THAT THE CRITICAL EVIDENCE WAS A BLUE SWEATER CONTAINING MR. HEMPHILL'S DNA WHICH NOT A SINGLE WITNESS IDENTIFIED AS THE ONE WORN BY THE SHOOTER AND TESTING COULD NOT RESOLVE WHEN THE DNA WAS DEPOSITED ON THE SWEATER.

The prosecution concedes, as it must, that shortly after the shooting in 2006, four eyewitnesses identified Nicholas Morris as the shooter. Respondent's Brief ("RB.") at 28 (sufficient evidence existed to "prosecute Morris for this murder"); 149 (the prosecution had "insufficient evidence to proceed" until after DNA results were obtained; Morris had been identified by "multiple witnesses"). Not only was Morris identified by four separate eyewitnesses who had viewed the shooter during a prolonged encounter, at the time of his arrest, he had bruised knuckles consistent with his having been in a fight, as also described by the multiple eyewitnesses. RB. at 32. A search of Morris's apartment immediately after the incident revealed .9mm ammunition, the type used during the shooting. The evidence against Morris was overwhelming. See People v. Valasquez, 143 A.D.3d 126 (1st Dept. 2016)(testimony of four eyewitnesses with adequate opportunity to view assailant firmly established guilt).

In contrast, the evidence against Mr. Hemphill consisted

of a ratty blue sweater, recovered from his cousin's home, which contained his DNA in one spot on the collar. Testing could not resolve when the DNA had been deposited on the sweater and not a single witness identified it as the one worn by the shooter, with several eyewitnesses describing the shooter wearing a blue short-sleeved shirt. This evidence, combined with the ambiguous evidence of flight, was not sufficient to support the murder conviction.

Respondent's concession that, as late as 2013, there was insufficient evidence to indict Mr. Hemphill is critically important. RB. at 149 ("there was insufficient evidence to proceed against defendant until 2013"). By 2013, the prosecution had interviewed virtually every fact witness who ultimately testified at trial. These included:

- Ronnell Gilliam who implicated Mr. Hemphill in May 2006;
- Ardell Gilliam, who at the latest cooperated with the police in April 2007 (RB. 23, fn. 31);
- Michelle Gist, who spoke to the police "on the day of the shooting" (RB. 30).

Consistent with the concession that none of these witnesses' accounts were deemed sufficiently reliable to support even an indictment, the prosecution necessarily concedes that its trial case rested primarily on the DNA evidence found on the blue sweater. RB. at 150 (because following Morris mistrial there were "no witnesses" implicating Mr. Hemphill, the prosecution

had to rely on DNA testing).[1]

But the prosecution also concedes, as it must, that not a single trial witness identified the blue sweater introduced at trial as the one worn by the shooter and that witnesses described the shooter's blue top inconsistently. RB. at 7, fn.8; 25 (would have been "impossible" for any witness to have identified the sweater as the one worn by the shooter.) For example, Ronnell Gilliam, immediately after the incident, told his brother to get rid of the "shirt," not a sweater, a fact not included in Respondent's brief but recorded in a contemporaneous police report and conceded at trial (stipulation: 1494).

According to the prosecution, the requirement that any witness identify the sweater introduced into evidence as the one worn by the shooter, "goes too far" (RB. At 25). The law and common practice are to the contrary. See generally, People v. Julian, 41 N.Y.2d 340, 343 (1977)(when real evidence is purported to be the actual object associated with a crime the offering party must first establish the evidence is identical

[1]It is hard to reconcile the prosecution's concession that it lacked sufficient evidence to indict in 2013, with its appellate insistence that Ronell Gilliam's testimony was reliable even though he "had previously identified Morris as the shooter." The suggestion that the 26-year-old drug-dealing "Burger" was under the thrall of Mr. Hemphill does not withstand scrutiny (RB. 26). The prosecution concedes that Ardell Gilliam might have been "confused" about the timing of her interactions with the police (RB. 23). As for Gist, the prosecution concedes she originally mentioned only "Burg" (Ronnell Gilliam) and Morris as being present at the initial fight, leading to Morris's arrest (RB. 9).

and has not been tampered with); People v. Price, 29 N.Y.3d 472, 477-478 (2017)(prosecutor unable to establish gun depicted in picture extracted from social media page was the one used during the robbery where the victim was unable to identify it).

Indeed, the sweater introduced at trial was deemed so tangential to the shooter's identity that the prosecution proceeded to trial against Morris, without conducting any DNA comparison for several years; even after learning Morris's DNA was not on the sweater, the prosecution proceeded to trial against him (RB. 17)(DNA on sweater extracted 2006, compared to Morris in March 2008, prior to his April 2008 trial).

The prosecution's initial assessment that the sweater was of little import is understandable. As the prosecution now expressly concedes, the blue sweater "is far more fungible than many types of evidence" (RB. 25). Additionally, Jimick's testimony that he smelled gunpowder upon opening the bag in which the sweater was recovered was incredible. This observation was not recorded in a single police report, contrary to the prosecution's suggestion on appeal that Jimick noted it in his request for laboratory analysis. The record is precisely the opposite. Compare (RB. 24)(Jimick included observation of smelling gunpowder in his request for laboratory testing) with T. 742 (Jimick acknowledged that "the laboratory analysis report you just referred to did not find anything to suggest" he smelled gunpowder on the sweater). Of course, it is undisputed

that the sweater contained no gunpowder residue of any sort (RB. 24)("no gunpowder or other ballistics evidence was discovered on the sweater").

As such, the highly "fungible" blue sweater never identified at trial as even closely resembling the one worn by the shooter, could not serve to overcome the compelling evidence identifying Morris as the shooter -- the four eyewitnesses, injuries to Morris's hands and the matching ballistics evidence recovered from his apartment immediately after the incident.

Even assuming the sweater was worn by the shooter, the DNA analyst could not testify when Mr. Hemphill's DNA was deposited on the sweater which was found in his relatives' apartment. That DNA could have been deposited years earlier. That the sweater was stretched and moth-eaten supports this conclusion. While the prosecution argues that the sweater might have been damaged during the fight, the small holes are not consistent with violent tearing, but more indicative of age and disuse.

The prosecution's reliance on Mr. Hemphill's purported flight to North Carolina is misplaced (RB. 27-28). Indeed, the account of Mr. Hemphill's purported flight came from a single witness, Ronnell Gilliam, the same witness whose testimony the prosecution deemed too suspect to support an indictment as late as 2013 and who was an accomplice to the shooting. In any event, even by Gilliam's account, Mr. Hemphill did not flee New York permanently after the shooting but rather returned to New York

within days. While the prosecution argues that leaving his child in New York strongly supported Mr. Hemphill's guilt (RB. 27), in fact, it evidences a lack of intention to flee permanently, as did the family's return to New York and retaining a lawyer to cooperate with the authorities. The evidence of flight suggests only that Mr. Hemphill at most helped Gilliam escape New York. In any event, "the limited probative force" of even unequivocal evidence of flight has long been recognized. See People v. Yazum, 13 N.Y.2d 302, 304 (1963).

In sum, where four eyewitnesses identified Nicholas Morris as the shooter, the .9mm ammunition used in the shooting was recovered from his home, he had ready access to guns and injured knuckles consistent with his being in the fight described by the eyewitnesses, the recovery of Mr. Hemphill's DNA from an old blue sweater found in his cousin's closet and never identified as the one worn by the shooter cannot support this conviction. The evidence of flight was far too ambiguous to overcome these profound weaknesses in the prosecution's case. The lay jurors were ill-equipped to understand how truly bizarre the prosecution's presentation was in this case. Accordingly, this Court should vacate the conviction and dismiss the indictment.

POINT II

THE COURT VIOLATED MR. HEMPHILL'S CONFRONTATION CLAUSE RIGHTS BY ADMITTING NICHOLAS MORRIS'S PLEA MINUTES TO ESTABLISH HE DID NOT POSSESS THE MURDER WEAPON; THE PROSECUTION'S ARGUMENTS TO THE CONTRARY ARE PROCEDURALLY BARRED AND UNSUPPORTED BY CONTROLLING LEGAL AUTHORITY.

By the time of Mr. Hemphill's trial, the government had extracted a guilty plea from Nicholas Morris and deported him based on that plea. Thus, the government procured the statement and also Morris's unavailablity. Justice Barrett expressly ruled that Morris's plea allocution was testimonial and thus its admission violated Crawford. The court admitted the evidence exclusively because the defense purportedly opened the door to it by adhering to the court's rulings.

The prosecution's arguments that the introduction of Morris's plea statements did not violate the Confrontation Clause are procedurally barred. See C.P.L. §470.15(1)(the appellate court can consider only questions of law or fact that adversely affected the appellant). As Justice Barrett ruled in favor of the defense on this point, finding the plea statement testimonial in nature, the prosecution is not free to litigate this issue on appeal. Id.

In any event, the prosecution's arguments (RB. 36-39) reflect a complete misunderstanding of Crawford and its progeny.[2]

[2]Not surprisingly, the prosecution relies on pre-Crawford decisions in support of its argument.

According to the prosecution, People v. Hardy, 4 N.Y.3d 192 (2005) "left open" whether a plea allocution by a non-co-defendant was testimonial in nature (RB. 37). But contrary to the novel constitutional analysis proffered by the prosecution, the United States Supreme Court has made clear it is the circumstances surrounding the statements, not the status of the parties, that renders plea allocutions testimonial. Crawford v. Washington, 541 U.S. 36, 65 (2004)(recognizing that because plea statements are made under oath, during a judicial proceeding, they are plainly testimonial statements).

The prosecution's reliance on cases refusing to find Bruton error is entirely misplaced (RB. 37-39). As the prosecution's own arguments expressly recognize, in Bruton cases, the co-defendant's redacted statements are not offered as proof against the accused but only against the co-defendant. See RB. at 37-38, citing People v. Neal, 181 A.D.2d 584-585 (1st Dept. 1992)(court instructed jury that statement which did not implicate defendant, "related only to the co-defendant and was not to be considered in any way as evidence in the case of defendant"); People v. Pagan, 87 A.D.3d 1181, 1183-1185)(3d Dept. 2011)(statement of co-defendant not admitted against appellant at trial).

Here, in contrast, the evidence was admitted against Mr. Hemphill and People v. Hardy, 4 N.Y.3d at 196, is directly on point, as Justice Barrett recognized. In Hardy the trial court

redacted any mention of Hardy from the co-defendant's plea so that the admitted statements did not directly implicate him. The Court of Appeals nonetheless found their admission violated Crawford, ruling that "plea allocutions" are "plainly testimonial." Id., at 198.

The prosecution's argument that the defense opened the door to the admission of the plea minutes fares no better. (RB. at 39-43). As the Court of Appeals recognized in People v. Reid, 19 N.Y.3d 382 (2012), "the Confrontation Clause cannot be used to prevent the introduction of testimony that would explain otherwise misleading out-of-court statements offered by the defense." Accord People v. Ko, 15 A.d.3d 173 (1st Dept. 2005)(defense could not selectively reveal only portions of out-of-court statements without opening the door to the complete statement). Here, the defense adhered to all the court's rulings and offered no statements from Morris that needed to be rebutted by introduction of the plea minutes. Rather, the defense sought to demonstrate Morris's guilt through admissible, non-hearsay evidence, such as the ballistics evidence recovered from Morris's home which matched the bullets used during the shooting. It was the prosecution that admitted this evidence, not the defense.

Indeed, the prosecution can point to nothing the defense did, other than raise an entirely valid third party defense, which allegedly opened the door to the introduction of Morris's

plea statements. See, e.g.,People v. Bell, 153 A.D.3d 401 (1st Dept. 2017)(defendant's questioning detective about third party's whereabouts on date of incident, in order to raise third party guilt defense, did not open the door to hearsay evidence); People v. Johnson, 114 A.D.2d 210, 214 (1st Dept. 1986)("'opening the door' theory would only allow a party to introduce the entirety of a statement where necessary to explain or clarify those parts of the statement brought out on cross-examination"); accord People v. Maldonado, 97 N.Y.2d 522 (2002)(defense did not open door to inadmissible composite sketch by questioning nature of police investigation).

While the prosecution was certainly entitled to rebut the third party defense, it needed to do so with legally admissible evidence which did not violate Mr. Hemphill's Confrontation rights. See People v. Schlesinger Electrical Contractors, 143 A.D.3d 516 (1st Dept. 2016)(defense suggestion that defendants were being selectively prosecuted allowed prosecution to introduce evidence that others had also been prosecuted, but did not open the door to the co-defendant's guilty plea statements). The prosecution argues that the "available evidence" established that Morris possessed the .357 gun, but that "evidence" was procured by the government during a guilty plea (RB. 41). The Confrontation Clause was designed to bar admission of this type of evidence.

The prosecution's reliance on People v. Santos, 150 A.D.3d

1270 (2d Dept. 2017)(RB. 40) is misplaced. In Santos, the challenged statements were not admitted for the truth, went only to the defendant's state of mind during his confession and specific limiting instructions were given. Here, as the prosecution itself acknowledges, Morris's plea statements were admitted for their truth "to exculpate Morris as the shooter and rebut defendant's third-party culpability defense" (RB. 43).

The prosecution cannot seriously argue that this error can survive Constitutional harmless error analysis (RB. 45). Indeed, nowhere in its brief does the prosecution claim that evidence of guilt was "overwhelming," the first prong of any harmless error analysis. While the prosecution now argues its case was "strong" (RB. 45), in truth, the evidence was insufficient. See Point I, above. Moreover, as the prosecution itself concedes, the evidence was offered to exculpate Morris and rebut Mr. Hemphill's defense –the central contested issue at trial (RB. 43). See People v. Jose Ortiz, __A.D.3d__, 2019 WL 191430 *2 (1st Dept. 2019)(error which impacted misidentification defense could not be deemed harmless). Accordingly, the conviction should be reversed and a new trial ordered before a different judge.

POINT III

THE COURT ADMITTED THAT IT HAD PRECLUDED COUNSEL FROM CALLING THE 2007 GRAND JURY REPORTER TO ESTABLISH BRENDA GONZALEZ'S PRIOR TESTIMONY IDENTIFYING MORRIS AS THE SHOOTER, A RULING CAPITALIZED ON BY THE PROSECUTION TO ARGUE THAT THE DEFENSE WAS FABRICATING EVIDENCE AND SEIZED UPON BY THE JURY DURING DELIBERATIONS.

Brenda Gonzalez was a critical witness who had unequivocally identified Nicholas Morris as the shooter at a fairly conducted lineup two days after the shooting. She testified definitely in a 2007 grand jury proceeding that Morris was the shooter, she had "no doubt" (488); she also described how she had attempted to fend off Morris herself during the scuffle preceding the shooting (491). At trial she retracted this testimony saying that she never testified to positively identifying Morris and that during the lineup she told the police that Morris was too "big on the cheek" to be the shooter (500). As the prosecution recognizes, counsel sought to call the 2007 grand jury court reporter to impeach Gonzalez's trial testimony that she had never previously identified Morris (RB. 52). The court precluded this testimony because Gonzalez was never adequately confronted with her 2007 testimony, the prosecutor argued the defense manufactured Gonzalez's prior testimony and the jury seized on this argument during deliberations. This series of errors undermined the fairness of Mr. Hemphill's trial and demands reversal.

The prosecution's claim that the defense "abandoned" its

request to call the 2007 grand jury court reporter is not supported by the record (RB. 49). The court explicitly ruled that because counsel's questioning implied Gonzalez's statements were made during the 2006 grand jury presentation, Gonzalez's testimony could not be impeached by reference to the 2007 testimony; the court explained further "I keep on coming to the conclusion that there is no basis for having the stenographer from 2007 testify when there was no impeachment regarding the 2007 minutes." (718-719). These statements constituted a clear ruling precluding the defense from calling the 2007 reporter.

Indeed, when counsel raised the issue again after the jurors repeatedly requested to have the 2006 grand jury testimony re-read, counsel recounted the previous discussions and stated that he had been "precluded" from calling the 2007 court reporter (1727). Neither the court nor the prosecutor contradicted counsel's characterization of the court's prior ruling. To the contrary, the court responded "I understand your position. You have an exception" (1727)(emphasis added). There can be no argument of abandonment, where the court expressly acknowledged precluding counsel from calling the 2007 court reporter, represented that it had understood counsel's position at the time of the discussions, and granted the defense an exception. The laws of preservation do not require counsel to seek reargument or make futile protests once the court has made its position clear. People v. Mezon, 80 N.Y.2d 155, 159 (1992).

The prosecution's claim that counsel intentionally tried to trip up Gonzalez by misleading her on the dates of her grand jury testimony makes no sense (RB. 50-51). Counsel expressed genuine surprise when the prosecutor would not stipulate to his correct reading of the grand jury minutes and informed the court he had never encountered this issue before. The dates of the grand jury presentations were irrelevant to the critical impeachment material counsel was seeking to introduce -- Gonzalez's sworn testimony describing her unequivocal identification of Morris within days of the shooting. In other words, there was no advantage to the defense in misleading the witness about the date of her testimony since it referred to her entirely exculpatory actions in 2006 identifying Morris within days of the shooting. Counsel had no reason to keep this information from the jury.

The prosecution simply ignores the long line of cases recognizing that a witness must be merely informed of the content of her prior statement and the circumstances surrounding its making to lay the foundation for impeachment by prior inconsistent statement. See, e.g., People v. Wise, 46 N.Y.2d 321, 326 (1978). Brief for Defendant-Appellant at pp.103-104. Instead, the prosecution parrots the court's unsupported speculation that Gonzalez would have been exposed to media accounts between the 2006 and 2007 grand jury presentations (RB. 53). To the contrary, Gonzalez denied having been exposed to any

media accounts, even the Channel 12 Morris interview conducted immediately after the shooting (468).

The prosecution's claims that this error was harmless is belied by the record (RB. 53-54). The trial prosecutor exploited the court's ruling, arguing that the defense had attempted to manipulate the evidence to falsely suggest that Gonzalez had previously identified Morris in sworn testimony. According to the trial prosecutor, he had to call the 2006 grand jury reporter to prevent this calculated manipulation of the evidence by the defense (1644-1645). If this error was harmless and Brenda Gonzalez was not an important witness, it is hard to understand why the jurors twice requested to hear the 2006 court reporter's account of her grand jury testimony. The prosecution simply ignores this aspect of the record (RB. 53-54). In any event, this series of errors, undermined the fairness of Mr. Hemphill's trial. As there can be no claim of harmless error due to the insufficient identification evidence, the error cannot be deemed harmless under any circumstances. Accordingly, the conviction must be reversed and a new trial before a different judge ordered.

POINT IV

THE PROSECUTOR VIOLATED C.P.L. §60.35(3) BY EXPRESSLY REVEALING THE CONTENTS OF ITS OWN WITNESSES' PRIOR STATEMENTS.

The prosecution acknowledges that it had no right to impeach Vernon Matthews or Elisa Hemphill because neither witness's testimony affirmatively harmed its case (RB. 59)(prosecution only used the statement to "clarify what Matthews remembered"); (RB. 63, fn. 44)(prosecutor could not have used Elisa Hemphill's prior statements to impeach her because they were not under oath or written). But the prosecution's insistence that the prosecutor properly used the prior statements does not reflect what actually happened here. With both Matthews and Elisa Hemphill, the trial prosecutor revealed the content of its own witnesses prior statements. Accordingly, the prosecutor's actions violated C.P.L. §60.35(3)'s prohibition barring a party from using a witness's prior statement to refresh his recollection in a manner that reveals its contents to the jury. As the contents of Matthews' statement, which the prosecution quoted on summation, was particularly harmful to the defense, this series of errors warrants reversal.

The prosecution now argues that it was merely attempting to refresh Matthews about his observations on the night following the shooting, not his statement (RB. 59-60). But Matthews made clear that nine years after the event, he did not recall what

had happened. He had no memory, "none at all" of Mr. Hemphill's visit that night (1304). Despite this testimony, the trial prosecutor -- having placed the statement "right in front" of Matthews -- then elicited that there were "things" he said that he "just made up" (1304). Over objection, the prosecutor was then permitted to ask, obviously referring to Matthews' statement which was in front of him:

> on April 16, 2006, in your home in Brooklyn, did you hear the defendant, DA say that some guys tried to rob him and he fought them, and then he went and he got a gun, and he shot at them, that he was airing out the gun? (1304-1305).

The implication that the trial prosecutor was lifting information from Matthews' prior statement was inescapable, prompting Matthews himself to ask "is that in my statement?". The prosecutor then admitted he was indeed asking about the statement, saying "I'm asking you" (1305). Only then, once the content of the statement had been revealed to the jury, did the court state that Matthews should focus on his memory of what happened, not the statement.

On summation, the prosecutor again quoted from the statement arguing that Matthews faked amnesia "when he couldn't remember hearing the defendant say on April 16, 2006, in the Bronx some guys tried to rob the defendant, and defendant fought them off, got his gun and was airing it out" (1623) – a direct comment on the content of Matthews' statement.

Thus, the prosecution's argument that the prosecutor

properly tried to refresh Matthews' recollection is not supported by the record (RB. 60). Criminal Procedure Law §60.35(3) specifically bars a party from attempting to refresh the recollection of his own witness about a prior statement in a manner that "discloses its content to the trier of fact."; accord People v. Jones, 97 A.D.3d 696-697 (2d Dept. 2012)(prosecutor improperly advised jury of witness's prior statement in the guise of attempting to refresh recollection). That is precisely what happened here.

Similarly, with Elisa Hemphill, the prosecutor explicitly referenced his prior conversations with her about Mr. Hemphill's tattoo during his examination.[3] On appeal, the prosecution acknowledges that the trial prosecutor elicited his conversations with Elisa from "two months, two days before and the morning of trial", during which she had told the prosecutor she had "seen the defendant's tattoo '10458' on his arm and had even searched Facebook to find a photo of it" (RB. 63). This direct reference to his own witness's prior statements, even in the face of a "change of testimony" (RB. 64) was improper under C.P.L. §60.35(3), as it directly advised the jury of the substance of Elisa's prior statements. The prosecution's reliance on cases such as People v. Dann, 14 A.D.3d 795 (3d

[3]The prosecutor misstates the location of Mr. Hemphill's tattoo as being on his "right arm" (RB. 63). The record demonstrates it was on his right shoulder so far up that to display it he had to remove his shirt (431, 435).

Dept. 2005)and People v. Mills, 302 A.D.2d 141, 145 (4th Dept. 2002) (RB. 64) where the courts found no violation of C.P.L. §60.35, is misplaced.

Accordingly, as the prosecution concedes that any impeachment of its witnesses would have been improper (RB. 59, 63, fn. 44) and the record demonstrates repeated violations of C.P.L. §60.35(3), the only issue on appeal is whether this series of errors can be deemed harmless. As the evidence of guilt was insufficient, the error cannot be deemed such. Matthews' prior statement was particularly harmful as it suggested that Mr. Hemphill was armed on the date of the incident. The jury's first note requested to see Mr. Hemphill's tattoo, the sole issue about which Elisa testified, suggesting this subject was an area of concern during deliberations. Accordingly, the prosecution's consistent flouting of C.P.L. §60.35(3)'s prohibitions warrants reversal and a new trial.

POINT V

THE COURT'S RULINGS PRECLUDING EVIDENCE TO COUNTER THE EVIDENCE OF FLIGHT WHILE PERSISTENTLY ALLOWING THE PROSECUTION TO OFFER IRRELEVANT CONSCIOUSNESS OF INNOCENCE EVIDENCE RELATING TO MORRIS, UNDERMINED MR. HEMPHILL'S RIGHT TO PRESENT A DEFENSE AND THE FAIRNESS OF HIS TRIAL.

The prosecution concedes, as it must, that throughout the trial it argued that Morris was innocent because he did not flee, but rather acted like an innocent man in the wake of the shooting (RB. 73) (court properly admitted evidence that Morris

surrendered to police at News 12); (RB. 83)(court properly admitted Morris' consent to DNA swab). But the prosecution offers no authority that such self-serving consciousness of innocence evidence is relevant since a guilty person has every incentive to feign innocence. People v. Torres, 289 A.D.2d 136 (1st Dept. 2001).

Instead, the prosecution now argues –in direct contrast to its arguments throughout the trial–that this evidence was only relevant "to complete the narrative of the police investigation" (RB. 83). But the prosecution acknowledges that the evidence was not offered for this limited purpose at trial and no limiting instructions were issued (RB. 83). Indeed, throughout the trial, from openings where the prosecutor announced that Morris "came to the police. He invited them on air to come and arrest him" (RB. 90), through summation, the prosecution argued the consciousness of innocence evidence, not to explain the police investigation, but to argue that Mr. Hemphill was guilty. Even after the court warned the prosecutor not to make this consciousness of innocence argument on summation, the prosecutor proceeded to do so, as conceded on appeal (RB. 123)(court recognized that contrasting evidence of flight with Morris's not fleeing "was inappropriate," but prosecutor commented nonetheless that Morris "didn't run down to North Carolina like the guilty people do").

While the prosecution was given great leeway to inform the jury of irrelevant consciousness of innocence evidence with respect to Morris, the defense was not allowed to counter this evidence by alerting the jury that Mr. Hemphill also reached out to the police, through an attorney, during the early days of the investigation. According to the prosecution, this evidence was properly excluded as "double hearsay,"(RB. 73) but the prosecution itself recognizes that the defense sought to elicit it through Detective Jimick to explain the nature of the investigation and counter the consciousness of guilt flight evidence. See People v. Price, 135 A.D.3d 750, 751 (2d Dept. 1987)(court erred in precluding defendant's statements to arresting officer on hearsay grounds where they were offered to counter consciousness of guilt evidence).

The court also erred, contrary to the prosecution's arguments on appeal (RB. 74-78), in precluding the evidence recovered from Morris's apartment immediately after the shooting, such as a rifle, air gun and pictures of him brandishing weapons. This evidence, which suggested that Morris had easy access to weapons and enthusiasm for using them, was relevant to the jury's assessment of the third party defense and Morris's identity as the shooter. All relevant evidence is admissible unless its admission violates some exclusionary rule. People v. Scarola, 71 N.Y.2d 769, 777 (1988), People v. Alvino, 71 N.Y.2d 233, 241 (1987). Evidence is relevant "if it has any

tendency in reason to prove the existence of any material fact. . .[to make it] more probable or less probable than it would be without the evidence". People v. Scarola, 71 N.Y.2d at 777.

A person with easy access to weapons, a penchant for brandishing them and an enthusiasm for collecting them was more likely to engage in the reckless shooting described at trial than someone without such proclivities. Accordingly, the jury was entitled to learn of Morris's penchant for weapons. The Molineux cases relied upon by the prosecution on appeal (RB. 76, citing People v. Singleton, 139 A.D.3d 208 (1st Dept. 2016); People v. Smith, 192 A.D.2d 394 (1st Dept. 1993)), are designed to protect a defendant from being convicted based on criminal propensity. These principles have no applicability where the evidence is offered in support of a third party guilt defense.

In sum, the court consistently allowed the prosecution to make improper hearsay based, irrelevant consciousness of innocence arguments relating to Morris while precluding the defense to counter the evidence of Mr. Hemphill's consciousness of guilt. The prosecution's attempts to re-characterize the purpose of this evidence on appeal is directly contradicted by the record. The court also erred in precluding evidence relating to Morris's enthusiasm for weapons. As the evidence of guilt was dubious, this series of errors, which pervaded the trial and implicated Mr. Hemphill's right to present a defense, cannot be deemed harmless beyond a reasonable doubt.

Accordingly, the conviction must be reversed and a new trial ordered.

POINT VI

THE COURT'S CONSISTENT ADMISSION OF HEARSAY, OVER OBJECTION, DENIED MR. HEMPHILL HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

The court consistently admitted hearsay evidence such as Morris's News 12 videotape on which he declared his innocence and displayed the lack of tattoos on his arms, and William Gilliam's directing the police to the closet in which the blue sweater was found. On appeal, the prosecution now argues that all of these rulings were proper (RB. 86-103). These arguments reflect a misunderstanding of the rules prohibiting hearsay.

"Nonverbal conduct as well as oral or written declarations may fall within the hearsay prohibition. An act performed solely for the purpose of communicating, such as pointing or nodding, is equivalent to a verbal statement and thus clearly can be stigmatized as hearsay." Fisch, Fisch on New York Evidence, Hearsay, §759 at p. 450 (2d Ed. 1977); see also People v. Nieves, 67 N.Y.2d 125, 131, fn. 1 (1986)(hearsay included non-verbal assertions made by witness in pointing at defendant to identify him). Here, the prosecution acknowledges that Detective Jimick testified that "based on a conversation" with William Gilliam, he was "directed" to the black plastic bag containing the blue sweater (RB. 86). The import of William's conduct was to imply that the blue sweater was connected to the

shooting. Accordingly, this testimony violated the rules against hearsay, contrary to the prosecution's arguments that because Jimick did not recount his conversation verbatim the rules against hearsay were not violated (RB. 89).

The prosecution's alternative argument, that counsel did not object on hearsay grounds is belied by the record (RB. 86). As soon as Jimick testified that "based on conversations we had with William," -- counsel objected. The timing of the objection and its context made clear that counsel was objecting to the hearsay nature of this evidence and was sufficient to preserve the issue. See C.P.L. §470.05(2)(objection sufficient to preserve issue as a matter of law if it made protesting party's position known to the court at a time when the error could be corrected).

Similarly, the prosecution argues that the muted News 12 videotape in which Morris invited the police to arrest him and displayed his tattoo-free arms was also not hearsay (RB. 90-95). But the prosecution admits, as it must, that despite the court's earlier ruling that the videotape would be played without sound, the trial prosecutor advised the jury that Morris "invited" the police "on the air to come and arrest him" (RB. 90). Despite its earlier ruling, the court overruled counsel's objection that the prosecutor was disclosing the contents of the tape. The court then allowed the prosecution to play the portion of the videotape where Morris displayed his arms, also declarative

conduct which violated the hearsay rules. Compare Hairston v. Metro-North Commuter Railroad, 6 Misc. 3d 399 (Sup. Ct. 2004)(videotape properly admitted where it was silent and did not convey any testimonial hearsay actions).

Here, by allowing the prosecution to play a videotape in which Morris displayed his arms, the prosecution sought to prove Morris had no tattoos without ever calling him as a witness. That was the precise reason the evidence was admitted. The cases on which the prosecution relies to assert that these non-verbal statements did not constitute hearsay are inapt because in those cases the prosecutor did not advise the jury of the tape's contents (RB. 91) or the evidence was not offered for its truth (RB. 94, citing People v. Andrade, 87 A.D.3d 160, 162 (1st Dept. 2011)(video admitted to establish defendant's state of mind, not for its truth). The prosecution's argument that the court properly admitted the video "depicting Morris' lack of tattoo because of its probative value since eyewitnesses described the shooter as having a tattoo on his arm" (RB. 93), misses the point. It was not that the evidence was irrelevant, but rather a statement by a non-testifying witness that rendered it inadmissible, as counsel objected during openings when the prosecutor explicitly advised the jurors of the contents of the News 12 videotape. The court repeatedly ignored the rules of evidence in allowing the prosecution to offer inadmissible hearsay evidence. These errors, which undermined the third

party defense, cannot be deemed harmless and must result in reversal.

POINT VII

THE COURT DENIED MR. HEMPHILL HIS RIGHT TO BE PRESENT DURING THE RECORDING OF THE VERDICT, A MATERIAL STAGE OF TRIAL. (Responding to Point IX).

There is no dispute that Mr. Hemphill was removed from the courtroom prior to the verdict being recorded (RB. 129). Instead, the prosecution now argues that the removal was proper because: 1) the jury had announced the verdict and thus Mr. Hemphill's right to be present was not violated; and 2) the allegedly "violent outburst" warranted the court's response (RB. 129). None of these reasons excuses the court's conduct. The conviction must be reversed and a new trial ordered.

The prosecution's attempts to distinguish People v. Rivas, 306 A.D.2d 10 (1st Dept. 2003) are unavailing (RB. 130). The prosecution argues that in Rivas, the verdict had not yet been announced, but this distinction is legally irrelevant since the right to be present encompasses the "receiving and recording of the verdict." People v. Rivas, 306 A.D.2d at 12, quoting People v. Morales, 80 N.Y.2d 450, 455-45 (1992(emphasis added).

The prosecution's argument that Mr. Hemphill forfeited his right to be present by proclaiming his innocence and asking to be removed from the courtroom fares no better. In Rivas, the trial court sought to justify its actions in removing the defendant from the courtroom by explaining that Rivas's comments

created "pandemonium and chaos in the courtroom." Id. "Notwithstanding the explanation provided by the court," this Court held that the trial judge had acted improperly in expelling Rivas from the courtroom without providing him with an opportunity to heed a judicial warning that he would be removed if his misconduct continued.

That weeks earlier, the court had admonished Mr. Hemphill that he would be removed if he spoke another word during Gist's testimony, does not excuse the court's actions here. Such a warning, distant in time and context, was insufficient to justify the court's actions in ordering Mr. Hemphill removed from the courtroom. See People v. Burton, 138 A.D.3d 882 (2d Dept. 2016)(defendant's request to leave the courtroom and his outbursts did not justify his removal without further warning). Indeed, Mr. Hemphill's compliant behavior in the wake of the court's warning during Gist's testimony demonstrated that he was able to abide by such instructions and necessitated a similar approach following his emotional outburst at the time the verdict was rendered.

The prosecution's reliance on cases such as People v. Jackson, 16 A.D.3d 156 (1st Dept. 2005) is misplaced. In Jackson the defendant punched his defense attorney in the face and engaged in a violent struggle with the court officers, actions which this Court recognized warranted his removal from the courtroom. Mr. Hemphill's emotional outburst here,

unaccompanied by physical violence, was much closer to the defendant's actions in Rivas. Accordingly, because the court denied Mr. Hemphill his right to be present during a material stage of trial, the conviction must be reversed and a new trial ordered.

POINT VIII

THE DEFENSE WAS ENTITLED TO A HEARING TO CHALLENGE THE FALSE STATEMENTS MADE IN SUPPORT OF THE DNA SEARCH WARRANT (Responding to Point XI).

The prosecution's arguments that defense counsel "abandoned" his request for a Franks hearing to challenge the accuracy of Detective Ciuffi's warrant application is not supported by the record (RB. 140). In fact, on October 19, 2015, prior to trial and after receiving the Darden hearing minutes as Rosario material, counsel expressly renewed his request for a hearing into the warrant application, arguing that Ciuffi had misrepresented the facts in applying for the warrant. The court refused to conduct the requested hearing, ruling that the time at which Ronnell Gilliam came forward to cooperate with the police was inconsequential (JS2. 345). As such, counsel did everything he could to litigate this issue prior to the start of trial, contrary to the prosecution's arguments on appeal (RB. 140).

The prosecution concedes that the affidavit in support of the DNA warrant was not carefully drafted and falsely claimed that DNA evidence had been recovered from the victim's body

(RB. 143). According to the prosecution, these "drafting" errors, which rendered the affidavit in support inaccurate, are immaterial (RB. 143).

The prosecution's argument that there might have been another eyewitness who provided the information contained in the warrant application but did not testify at trial is baseless(RB. at 144). There would have been no reason for the prosecution itself to turn over the confidential Darden minutes as Rosario material, unless they related to a prior statement by a witness who testified at trial. A review of the Darden minutes reflects that the confidential informant was Ronnell Gilliam, the cooperator who testified at trial, and did not "just" come forward at the time Ciuffi swore out the warrant application. See Minutes of Darden Hearing, dated May 29, 2015.[4]

In sum, the prosecution concedes that portions of the affidavit in support of the DNA evidence were false but inaccurately argues that the defense abandoned the issue. As the record does not support the prosecution's claims, the appeal should be held in abeyance and the matter remanded for a Franks hearing.

[4] There could not have been "any number of eyewitness [sic] who may have identified defendant as the shooter" (RB. 145); this representation is itself false.

CONCLUSION

FOR THE REASONS SET FORTH IN POINT I ABOVE AND IN MR. HEMPHILL'S ORIGINAL BRIEF, THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; FOR THE REASONS SET FORTH IN POINT II-VII, ABOVE AND IN THE ORIGINAL BRIEF THE CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED; FOR THE REASONS SET FORTH IN POINT VIII, ABOVE, THE APPEAL SHOULD BE HELD IN ABEYANCE AND A HEARING HELD INTO THE FALSE STATEMENTS CONTAINED IN THE SEARCH WARRANT.

Respectfully submitted,

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RE: People v. Darryl Hemphill
APL-2019-00202
Rule 500.11 Submission

Clerk of the Court
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Your Honor:

Appellant submits this letter under Rule 500.11. Given the importance of the legal questions presented, appellant respectfully requests full briefing.

INTRODUCTION

In April 2006, two-year-old D.P. was killed by a stray bullet while riding in his mother's minivan. The shooting resulted from an earlier fight during which Ronell Gilliam a/k/a "Burger" and a black man in a blue top fought against others. The identity of the shooter was the sole issue at trial.

Within hours of the shooting, based on multiple witness interviews, the police

identified Burger and his best friend Nicholas Morris. When the police searched Morris's apartment they found guns and ammunition, including a .9mm bullet –the type used in the shooting. Upon arrest Morris had bruised knuckles, consistent with his having been in a fistfight. Three eyewitnesses identified Morris in a lineup. Another picked him out of a photo array.

The prosecution indicted Morris and proceeded to trial in 2008, before a mistrial was declared. In exchange for his immediate release, Morris pleaded guilty to possessing a .357 caliber gun at the time and place of the shooting.

In 2011, the prosecution obtained appellant's DNA to test it against DNA found on a blue sweater recovered from Burger's apartment shortly after the incident. While appellant's DNA was found on the sweater, not a single witness identified the sweater as the one worn by the shooter. At trial, not a single eyewitness identified appellant as the shooter, except for Burger, a cooperating accomplice who had initially named Morris and repeatedly lied to the police.

Despite the lack of sufficient evidence, the jury convicted appellant of murder. This case illustrates that when constitutional protections and evidentiary rules are disregarded, the verdict is unreliable.

STATEMENT OF FACTS

The Trial

Eyewitnesses Describe a Ten-Minute Altercation Culminating In the Shooting And Subsequent Identification Of Nicholas Morris.

On April 16, 2006, Brenda Gonzalez, her daughter, Marisol Santiago, and their

respective partners, Jose Castro and Juan Carlos Garcia, were returning home from shopping in the Burnside section of the Bronx. They were accompanied by Jon-Erik Vargas (A1023, 1572-1573, 1609, 1645-1646).[1] They encountered a thin black man, speaking on a cell phone, who wanted to fight Vargas. Burger, who Vargas knew, also approached and Vargas began to fight both men (A1645).

Gonzalez positioned herself between the thinner man and Vargas, trying to break up the fight (A1211, 1610). Vargas and the thinner man faced each other during this initial encounter. Milagros Pagan, her son Justin Bautista and Anthony Baez also witnessed the initial fight; Baez also tried to break it up (A1849, 1851, 1927, 1929).

Burger pushed Vargas into a car and Vargas hit Burger and the thinner man (A 1650). Castro tried to break up the fight and was punched, as was Garcia (A1028, 1575).

When the initial fistfight ended, Vargas unsuccessfully pursued the thinner man from Tremont Avenue towards University Avenue before Vargas returned to his friends (A.1651). Burger remained in the area and Vargas again confronted and spat on him; Burger responded that Vargas would get "shot for that" (A1652).

After this initial 10-minute encounter, the group returned to Gonzalez's building. Vargas was feeling faint and Garcia went to get him water (A1652). As Garcia crossed the street to bring Vargas the water, shots rang out (A1654).

The shooter was the thinner man, who had returned to the scene in a car and "opened fire" (A1928). One of the bullets hit Joanne Sanabria's minivan, striking D.P.

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[1]Citations are to appellant's appendix.

(A818-819).

The eyewitnesses all described the shooter as a thin black man wearing a blue top and a hat, but the description of the top varied from a short-sleeved golf shirt with buttons to a blue sweater (A1049-1050,1061-1062,1210-1213,1578,1579,1610, 1647,1649). Not a single eyewitness identified the sweater introduced into evidence as the one worn by the shooter (People's 98C).

Some of the witnesses described being able to see the shooter's forearm which had a tattoo, because the shirt he wore was short-sleeved (A1061-062). Appellant did not have a tattoo on his forearm; on his right shoulder there was one that said "D.A. 10453." None of the witnesses were asked to view the tattoo; appellant had to remove his shirt to display it to the jury (A1199,1202-1203).

The police canvassed the neighborhood and spoke with Michelle Gist, who told them that she recognized only two men from the initial fight, "Burg" and "Nick" [Morris] (A1512-1513,1565,1567). While years later, at appellant's trial, Gist would insist she had also mentioned seeing appellant, who she knew as "D," at the scene, this testimony was contradicted by the lead detective whose reports reflected that Gist only identified Morris and Burger (A1143,1512-1513).

The police searched Burger's apartment and recovered the blue sweater introduced into evidence. While the police were in the apartment Burger called his brother and told him to get rid of the "shirt" (A2266). At trial for the first time, the lead detective testified he smelled gunpowder upon recovering the sweater, an observation

not recorded in any contemporaneous record (A1436,1511). Forensic testing revealed no gunpowder residue on the sweater (A1890).

Based on Gist's identifying Morris, and his known association with Burger, the police searched Morris's apartment on University Avenue within hours of the shooting (A1437). Various types of ammunition were recovered including a .9mm bullet consistent with the type of weapon used during the shooting. Ammunition for a .357 revolver was also recovered (A1448,1519).

The police arrested Morris the following day. His knuckles were bruised, consistent with his having been in a fight (A1490,1521).

Two days after the shooting, Vargas, Gonzalez and Santiago identified Morris as the shooter in a lineup (A.1237,1623,1636,1656). Baez was shown a photo array the day after the incident and picked out Morris as looking "like" the shooter (A1933,1940). At appellant's trial, Santiago testified that although she had been certain of her identification at the time, she believed it might have been influenced through her exposure to media accounts, including a News 12 interview with Morris (A1623). Gonzalez insisted that she had not been wearing her glasses during the incident or lineup (A1216,1237).

The Accomplice Testimony

Burger also originally named Morris, his childhood best friend, as the shooter (A1782). By the time of trial, Burger had entered into a cooperation deal in exchange for his testimony against appellant (A1739). According to Burger's trial account, it was appellant who fought with the group before fleeing up University Avenue; Burger then

called Morris to ask for help (A1748,1763). Before Morris arrived, appellant returned and began shooting (A1749).

Burger and appellant then fled to Burger's apartment where they saw Morris, appellant's wife and Burger's brother, William (A1750). Appellant told Burger to take his gun; Morris had also brought a .357 gun which Burger took (A1750). Appellant changed out of the blue sweater he had been wearing; Morris also changed clothes (A1772).

Burger, appellant, his wife, and young son left for North Carolina. Within days appellant and his family returned to New York. Burger subsequently returned to implicate Morris at appellant's urging (A1776,1778). Appellant retained a lawyer for Burger prior to his police interviews (A1779, 1798).

During his first statement Burger named Morris as the shooter (A1782). Burger returned to the precinct two weeks later, spoke with Morris while there, and gave a second statement naming appellant as the shooter (A1785). Burger continued to lie about the guns and did not mention Morris possessing the .357 because he did not want to implicate Morris (A1786,1787). In his third statement, he continued to lie, mentioning that only appellant possessed a gun which was discarded in a park (A1807-1808).

Burger's grandmother, who also considered appellant her grandson, claimed to remember that appellant wore a blue sweater on Easter morning 2006 (A1370,1371). Neither Burger nor his grandmother identified the blue sweater in evidence.

Following Burger's testimony, the court allowed the prosecution to introduce,

over a defense Confrontation Clause objection, minutes from Morris's guilty plea, during which he admitted possessing a .357 caliber weapon at the time and place of the shooting (A1901-1904,1951-1955).

The Forensic Evidence

Appellant's DNA was recovered from the collar of the blue sweater (People's Exhibit 98C). It was impossible to determine when the DNA had been deposited (A1323-1343).

The Motion To Dismiss

At the close of the evidence, counsel moved to dismiss due to the prosecution's failure to prove appellant's identity beyond a reasonable doubt based on the prior identifications of Morris and Burger's unreliability. The prosecution opposed and the court denied the motion (A2096). The motion was renewed at the end of the case (A2495-2496).

Charge, Deliberations, Verdict and Sentencing

The court submitted intentional murder based on transferred intent (A2425, 2481). The jury deliberated three days before announcing its guilty verdict (A2557). The court sentenced appellant to 25 years to life although he had no criminal history (A2583, 2589, 2591).

Appellate Proceedings

The Appellate Division affirmed (A2). Justice Manzanet-Daniels dissented and granted leave to appeal (A1).

ARGUMENT

POINT I

THE EVIDENCE WAS LEGALLY INSUFFICIENT.

Appellant was convicted of murder despite compelling evidence implicating Morris. In determining whether the prosecution has presented legally sufficient proof, a reviewing court must consider whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). But the prosecution cannot satisfy this burden by producing some proof supporting guilt. People v. (Mary) Reed, 40 N.Y.2d 204, 208 (1976). Guilt cannot be established beyond a reasonable doubt by the testimony of a witness "who, is evidently, either from moral or mental defects, irresponsible." Id., at 209, quoting People v. Ledwon, 153 N.Y.10 (1897); People v. (Gregory) Reed, 64 N.Y.2d 1144, 1147-48 (1985).

Here, the evidence against Morris was strong. The eyewitnesses interacted with the blue-clad shooter for ten minutes, at close range, in broad daylight during the initial encounter, a substantial period of time. See People v. Berry, 27 N.Y.3d 10, 13 (2016)(describing 5 to 10 minute confrontation as "a considerable period of time"). The next day, Baez picked Morris out of a photo array. Within two days Vargas, Gonzalez and Santiago had identified Morris in a lineup. Gonzalez and Santiago subsequently testified in a grand jury that they were certain of their identifications. While at trial the witnesses expressed some doubt about their identifications, their certainty closer to the time, as opposed to years later, is compelling evidence of Morris's guilt.

Michelle Gist also identified Morris and Burger as being present at the initial encounter. Gist's mentioning Morris resulted in his coming under suspicion. While at trial, Gist insisted that she also mentioned seeing appellant during the original fistfight, contemporaneous police reports proved she mentioned only Burger and Morris.

The weapons seized from Morris's apartment and his bruised knuckles further supported the contemporaneous identifications. The police recovered a .9mm bullet from Morris's apartment, the same type used during the shooting, within hours of the incident. At the time of arrest, Morris's knuckles were bruised consistent with his participating in the fistfight.

In contrast to this strong evidence of Morris's guilt, Burger's testimony was inherently unreliable. Burger was the only witness to identify appellant as the shooter. The law views the testimony of an accomplice with a "suspicious eye." People v. Berger, 52 N.Y.2d 214, 218 (1980). Especially where the motivation behind an accomplice's testimony is the hope of leniency, his testimony lacks the inherent trustworthiness of a disinterested witness. Id. Not only was Burger an incentivized cooperator, he too named Morris as the shooter initially. He then changed his account to help Morris, his best friend, who called him at the police station to urge him on. At trial, Burger admitted that he lied to the police about the disposal of weapons throughout his three statements to protect Morris.

In light of Burger's highly questionable identification testimony and the compelling evidence of Morris's guilt, the forensic evidence did not sustain the

prosecution's burden of proving appellant's identity as the shooter beyond a reasonable doubt. Not a single witness identified the blue sweater introduced into evidence as the one worn by the shooter. The shooter's top was inconsistently described as a short-sleeved golf shirt with buttons, a "shirt," and a sweater. While a detective described smelling gunpowder during the sweater's recovery, that observation was not recorded in a single report, and no gunpowder residue was detected on the sweater. Also, the forensic testing could not determine if the DNA was deposited on the sweater years earlier and handed down to appellant's cousins.

The evidence of flight was ambiguous and was provided mostly through Burger's accomplice account. Even by that account, appellant returned to New York shortly after the incident, before relocating his family down south.

In rejecting appellant's sufficiency claims, the Appellate Division relied on the DNA evidence despite the variations in the descriptions of the top worn by the shooter, in light of the detective's testimony that the sweater smelled of gunpowder when recovered and because the police overheard Burger telling his brother to "discard the sweater" (A9). This reasoning is flawed. It was undisputed the sweater had no gunpowder residue on it. It was also stipulated that Burger told his brother to get rid of the "shirt" – not a sweater (A2266).

The majority cited the "overwhelming evidence demonstrating defendant's consciousness of guilt." (A9). But this evidence came almost exclusively from Burger and in any event "the limited probative force" of consciousness of guilt evidence has

long been recognized. People v. Yazum, 13 N.Y.2d 302, 304 (1963).

Next, the majority relied upon evidence that multiple eyewitnesses had described the shooter as having a tattoo on his right arm and appellant "did indeed have a tattoo on his right arm." (A10). This finding is wrong. Appellant had a tattoo on his right shoulder, making it physically impossible for the eyewitnesses to have seen it if he were wearing the long-sleeved sweater introduced into evidence. At trial, appellant needed to remove his shirt to display the tattoo.

The majority also deemed Burger's testimony reliable, finding it adequately corroborated, but ignoring that Burger was not just an accomplice, but admitted repeatedly lying to the police, initially named Morris and only recanted when urged by Morris to do so (A11).

The majority offered no explanation for why Morris would have had bruised knuckles upon arrest if he had not previously been in the initial fistfight.

The reasoning of the dissent, finding the proof insufficient, accurately reflected the record (A19-23). The dissent observed that appellant was not identified by any of the eyewitnesses to the shooting. The only witness to identify appellant was Burger, an accomplice who repeatedly lied to the police and was testifying in the hope of leniency (A21). Not a single witness identified the blue sweater in evidence as the one worn by the shooter, Justice Manzanet-Daniels observed, rejecting the notion that the sweater could have smelled of gunpowder when no gunpowder residue was detected on it and the detective's observations were not recorded in a single report (A21-22).

In sum, as Justice Manzanet-Daniels concluded, the evidence against appellant was insufficient to establish his identity beyond a reasonable doubt. The conviction should be reversed and the indictment dismissed.

POINT II

THE DEFENSE DID NOT OPEN THE DOOR TO TESTIMONIAL HEARSAY.

Relevant Facts

Before trial, the prosecution moved to preclude the defense from eliciting that a trove of weapons was recovered from Morris's apartment within hours of the shooting. Except for the .9mm bullet, any other weapons were irrelevant, the prosecutor insisted (A630). In addition to that bullet, .357 caliber ammunition, additional guns, and pictures of Morris brandishing guns were found (A631-632). The court ruled, over defense objection, that only the .9mm bullet would be admissible (A643-644,683).

Pursuant to this ruling, during openings, the defense alerted the jury that a live .9mm round, consistent with the type of weapon used during the shooting, had been recovered from Morris's apartment (A804). The prosecution did not object to this argument or suggest it was misleading in any way.

Following Burger's testimony, because Morris was not available to testify, the prosecutor sought to introduce Morris's plea colloquy where he pleaded guilty to possessing a .357 caliber gun at the time and place of the shooting (A1274-1281). The prosecutor argued that because the statements did not directly implicate appellant, their introduction did not violate the Confrontation Clause; the prosecutor never asserted that

the defense had opened the door (A1663-1666).

The court ultimately ruled, over counsel's Confrontation Clause objection, that while the statements were testimonial, the defense had opened the door to the evidence by simply presenting a third-party defense:

> It's apparent from the examination of witnesses thus far and from the defense counsel's opening that a significant aspect of the defense in this case is that Morris, who is originally prosecuted for this homicide, was in fact the actual shooter and that as such, [appellant] was excluded as the shooter. There is, however, evidence contrary to the argument presented by the defense in this case that [appellant] may have possessed a different firearm than Morris and that Morris's firearm cannot be connected to this shooting.
>
> Morris's allocution during his plea relates to his possession of a .357. The weapon that caused the death in the case was a nine millimeter.
>
> In my judgment, the defense's argument, which in all respects is appropriate, and under the circumstances of this case probably a necessary argument to make, nonetheless opens the door to evidence offered by the state refuting the claim that Morris was, in fact, the shooter (A1900-1901)(emphasis added).

At no point in articulating its door-opening theory did the court even suggest that the defense had misled the jury.

The prosecutor then called the court reporter who had taken the statements to recount that Morris had pleaded guilty, against the advice of his attorney because there was no evidence that Morris possessed the .357 gun (A1953). Morris pleaded guilty to secure his immediate release from prison, stating that on April 16, 2006 at approximately 2:00 p.m. in the vicinity of the shooting he possessed "a loaded operable firearm" (A1954). The prosecutor further elicited that the firearm was a " .357 "(A1954-1955).

On summation, counsel urged the jury to reject the guilty plea evidence because it "smells bad" and "should bother" the jurors (A2354,2357). The prosecutor, relying on Morris's plea statements, argued that Morris had taken responsibility for the crime that he had committed, "possessing the .357 that day" (A2442).

The Appellate Division ruled that although Morris's guilty plea minutes were testimonial hearsay, their introduction did not violate appellant's Confrontation Clause rights because "the defense opened the door to this evidence (*see generally People v. Reid, 19 N.Y.3d 382, 387 [2012]*." (A12). Unlike the trial court, the Appellate Division ruled that "the defendant created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct the misleading impression." Id. But the Appellate Division never explained how the defense created a "misleading impression." Id.

The Defense Did Not Open The Door.

The only issue before this Court is whether the defense opened the door to Morris's testimonial hearsay, as both the trial judge and the Appellate Division recognized that these statements would otherwise be barred by the Confrontation Clause. See C.P.L. §§470.15(1), 470.35(1). The trial court erroneously applied the governing legal standard in ruling that appellant had opened the door by advancing "appropriate" and "necessary" (A1901) arguments that did not mislead the jury, thus committing error as a matter of law. People v. Cargill, 70 N.Y.2d 687, 689 (1987)(the

failure to "apply the correct legal standard" constitutes legal error). Further, the Appellate Division's ruling, that the defense created a misleading impression by advancing evidence-based arguments consistent with the court's in limine rulings, is not supported by the record. Accordingly, the introduction of Morris's guilty plea minutes violated appellant's Sixth Amendment right to confront the witnesses against him. See People v. Hardy, 4 N.Y.3d 192 (2005); Crawford v. Washington, 541 U.S. 36, 65 (2004).

The open-the-door inquiry is two-fold: 1) whether and to what extent evidence or argument said to open the door is "incomplete and misleading"; and 2) what if any inadmissible evidence is reasonably necessary to correct the misleading impression. People v. Reid, 19 N.Y.3d 382, 388 (2012)(emphasis added). Reid held that the Confrontation Clause "cannot be used to prevent the introduction of testimony that would explain otherwise misleading out-of-court statements introduced by the defendant.." Id. (emphasis added). The Reid Court cited People v. Ko, 15 A.D.3d 173, 174 (1st Dept. 2005), which recognized that the defendant, by selectively revealing only helpful portions of a testimonial statement, opened the door to the remaining portions of the statement to place those offered by the defense in context. Id.

But this Court has never held that a defendant can open the door to inadmissible evidence, particularly testimonial hearsay, merely by advancing an argument that makes otherwise inadmissible evidence relevant. Reid, 19 N.Y.3d at 388. Thus, in People v. Maldonado, 97 N.Y.2d 522 (2002), defense counsel did not open the door to the admission of a hearsay composite sketch by merely mentioning the existence of the

sketch.

"Presenting a theory of the case that can be effectively rebutted by otherwise-inadmissible evidence" "does not by itself open the door to using such evidence; only partial, misleading use of the evidence can do so." United States v. Sine, 493 F. 3d 1021, 1038 (9th Cir. 2007). The doctrine "is not so capacious as to allow the admission of any evidence made relevant by the opposing party's strategy." Id. at 1037(original emphasis).

Instead, an affirmative attempt to mislead the jury must be found before the door can be opened to otherwise inadmissible evidence. People v. Rojas, 97 N.Y.2d 32, 38(2001). In Rojas the defendant "abused the initial favorable Molineux ruling" to advance "misleading contentions" that he had done "nothing wrong to deserve" solitary confinement; this misleading argument opened the door to evidence of his uncharged assault on another inmate. Similarly, in People v. Massie, 2 N.Y.3d 179, 184 (2004), the defense could not introduce evidence of a suggestive identification procedure without opening the door to a subsequent non-suggestive procedure to avoid creating a misleading impression. In People v. Mateo, 2 N.Y.3d 383, 427 (2004), the defendant converted a favorable ruling shielding the jury from learning of additional uncharged murders discussed during his confession, into a sword to argue that he confessed to the murder to cover for his wife. This misrepresentation of what transpired during the interrogation opened the door to admission of the other murders discussed. Id.

Here, as the trial court recognized, counsel's actions were "in all respects"

"appropriate" (A1901). There was nothing misleading about counsel's opening statement which adhered to the trial court's in limine rulings concerning the admissibility of the .9mm bullet recovered from Morris's apartment. The defense did not rely on inadmissible hearsay to advance its claims or create a misleading impression in doing so. To the contrary, it was the admission of Morris's highly questionable plea admissions which undermined the trial's truth-seeking function.

Tellingly, the prosecutor who had sought a ruling prohibiting the defense from mentioning any of the other weapons or ammunition recovered from Morris's apartment apart from the .9mm, never argued that the defense had done anything misleading to warrant the admission of Morris's guilty plea statements. Rather the prosecution argued that the plea minutes did not violate the Confrontation Clause because they did not mention appellant. Without any urging from the prosecution, the court ruled that appellant had opened the door merely by advancing a third party defense where there existed evidence "contrary to" (A1900) the defense arguments --adopting a pure "relevance" test.

The Appellate Division, implicitly recognizing the error in this analysis, then ruled that somehow "during the trial" the defense "created a misleading impression that Morris possessed a .9 millimeter handgun." (A12). But the Appellate Division's paying lip service to the idea that the defense had misled the jury was not supported by the record; the decision could not specify any argument or action that did so. Nor did any

exist. Instead counsel adhered to all the court's rulings and merely advanced a "necessary" (A1901) and obvious defense, known to all sides before trial and discussed throughout the pre-trial in limine proceedings.

The Appellate Division's analysis equates presenting a valid, evidence-based third party defense with misleading the jury, opening the door to testimonial hearsay. But that approach represents a radical shift never adopted by this Court and unjustifiably undermines the right to Confrontation. See Reid, 19 N.Y.3d at 388. The Appellate Division's analysis allows the prosecution to readily resort to inadmissible evidence whenever the defense advances its theory through effective cross-examination or pointed argument. As a practical matter, the approach creates a minefield for counsel in which the only way for the accused to rely on the rules of evidence or constitutional protections is to remain mute. Such an approach is absurd in the context of the Confrontation Clause, the purpose of which is to afford the accused the right to meaningfully test the prosecution's proof.

With respect to the second prong of the Reid test, admission of Morris's testimonial hearsay was not "reasonably necessary" to dispel any impression created by the defense. People v. Reid, 19 N.Y.3d at 388. As the defense did not introduce any testimonial hearsay to prove that Morris possessed a .9mm weapon, at most, the prosecution should have been permitted to elicit that other ammunition, including .357 bullets consistent with the gun Burger testified Morris possessed, was also recovered.

See, e.g., People v. Schlesinger Electrical Contractors, 143 A.D.3d 516 (1st Dept. 2016)(defense suggestion that defendants were being selectively prosecuted allowed prosecution to introduce evidence that others had been prosecuted, but did not open the door to the co-defendant's guilty plea statements). It is not as if the defense referenced Morris's hearsay admissions to possessing a gun, which could have properly been met with hearsay admissions about the caliber of the weapon. Instead, counsel relied exclusively upon physical evidence indisputably recovered from Morris's apartment shortly after his arrest to support a valid inference that Morris was the shooter. At most the prosecution should have been allowed to rebut this inference by admitting the .357 bullets they previously successfully sought to preclude.

There can be no finding that the error was harmless beyond a reasonable doubt given the dissent's conclusion that the evidence was insufficient. See Point I. Accordingly, the conviction should be reversed and a new trial ordered.

POINT III

THE COURT DENIED APPELLANT A FAIR TRIAL BY PRECLUDING THE DEFENSE FROM ESTABLISHING PRIOR INCONSISTENT STATEMENTS IDENTIFYING MORRIS.

Relevant Facts

During the cross-examination of Brenda Gonzalez, counsel asked if she remembered testifying in the 2006 grand jury that the skinny guy was "Mr. Morris" (A1247). Gonzalez responded that she "never said that." The prosecutor refused to stipulate to the accuracy of counsel's reading from the grand jury minutes (A1247). Gonzalez also denied ever testifying before the grand jury that she was certain of her identification of Morris. Again counsel read from the minutes and Gonzalez denied making the statements (A1256). She did not recall ever saying in the grand jury that the shooter was Morris (A1258). She insisted that somebody must have added Morris's name to the transcript because she never knew his name (A1265). She claimed that she had told the police during the lineup that Morris was "too big on the cheek" to be the shooter (A1268). Once again counsel attempted to confront her by reading from the transcript reflecting that she identified Morris as the shooter, but Gonzalez insisted she did not "say that" in the grand jury (A1268). Counsel asked the prosecutor to stipulate to the accuracy of the grand jury transcript from which he was reading, but the prosecutor refused (A1247).

Following Gonzalez's testimony, counsel objected to the prosecutor's refusal to stipulate to the transcripts' accuracy and the prosecutor said he needed to read them before stipulating (A1274). Ultimately the prosecutor refused to do so, arguing that counsel had mentioned the 2006 grand jury but had then read from minutes from a subsequent grand jury presentation in 2007 (A1351). Counsel responded that the difference in date was immaterial because he had alerted Gonzalez to her specific statements (A1354). The court disagreed, reasoning that there would have been "more publicity" that would have contaminated the witness by 2007, although Gonzalez had never stated she was exposed to any such publicity (A1355,1356).

The prosecutor was permitted to call the 2006 reporter to establish that Gonzalez had not made the statements attributed to her by counsel (A1382-1389). While initially the court recognized the unfairness in precluding counsel from calling the 2007 court reporter to establish the inconsistency, ultimately the court ruled that, because counsel's statements only referenced the 2006 grand jury proceeding when questioning Gonzalez, there was no basis for the defense to call the 2007 grand jury reporter to establish the content of Gonzalez's 2007 grand jury testimony (A1362,1364,1488). "I keep on coming to the conclusion that there is no basis for having the stenographer from 2007 testify when there was no impeachment regarding the 2007 minutes," the court explained, stating that it wanted to think about the issue further (A1486-1488).

On summation, the prosecutor argued that counsel "tried to get Brenda Gonzalez

to admit she said things before the grand jury in 2006 she never said" and that the prosecutor had to call the grand jury reporter "to prevent facts from being manipulated" by the defense (A2417-2418). During deliberations, the jurors repeatedly asked to rehear the testimony from the 2006 grand jury reporter (A2493,2507).

Counsel protested at length that he had been precluded from calling the 2007 grand jury reporter, leaving the jury with a misleading impression that Gonzalez had never identified Morris in the grand jury (A2499-2500). Neither the prosecutor nor the court disputed counsel's characterization; to the contrary, the court responded "I understand your position. You have an exception" and referred to "the ruling [it] made earlier" (2500, 2501).

On appeal, the majority found that appellant had failed to preserve and abandoned his request to call the 2007 grand jury reporter because the court "never actually ruled against defendant on the issue" (A15). The court deemed counsel's protest during deliberations a request to recall the 2007 reporter. (A15). In the alternative, the majority found the defense had never confronted Gonzalez with her 2007 statements before seeking to call the 2007 reporter (A15).

The dissent found that precluding the defense from calling the 2007 reporter "left the jury with the impression that the witness had never previously identified Morris as the shooter and that the defense was fabricating evidence." Combined with the prosecution's arguments which "were designed to mislead the jury to conclude that the

witness had never identified Morris as the shooter under oath," the preclusion ruling deprived appellant of a fair trial (A25-26).

The Foundation For Impeachment Was Sufficient As A Matter Of Law.

The court violated the state and federal constitutions, as well as New York evidence law, by blocking counsel's request to call the 2007 stenographer, because the foundation for that request was established as a matter of law. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986); People v. Hudy, 73 N.Y.2d 40, 56-57 (1988); People v. Dachille, 14 A.D.2d 554 (2d Dept. 1961)(court unduly restricted cross-examination of witness by precluding evidence that he had previously testified he was unable to identify the defendant's voice, contrary to his testimony at trial); People v. Bradley, 99 A.D.3d 934, 937 (2d Dept. 2012)(court improperly excluded evidence that wife previously stated her husband caused her injuries accidentally, where counsel never specified date of prior statement or to whom it was made); People v. Collins, 145 A.D.3d 1479 (4th Dept. 2016)(reversal due to court's precluding testimony that complainant told a defense witness she did not think defendant "did this"); Sloan v. New York Central Railroad, 45 N.Y. 125, 127 (1871) ("to lay the foundation for contradiction [by prior inconsistent statements], it is necessary to ask the witness specifically whether he has made such statements."); Larkin v. Nassau Electric R. Co., 205 N.Y.267, 269 (1912); People v. Wise, 46 N.Y.2d 321 (1978).

Here, by reading verbatim from the minutes and alerting Gonzalez that her

statements were made before a grand jury, counsel adequately laid the foundation to establish the inconsistencies by calling the 2007 court reporter. Counsel's brief confusion about the year of the grand jury presentation was immaterial in light of his quoting Gonzalez's statements by reading them aloud. Sloan, 45 N.Y. at 127. The court's insistence that the date mattered because Gonzalez was exposed to additional media accounts between the 2006 and 2007 presentations, was not supported by the record and was, in any event, irrelevant to the foundational analysis. Accordingly, as Justice Manzanet-Daniels found, the court's precluding the defense from calling the 2007 court reporter, combined with the prosecution's misleading arguments about Gonzalez's prior statements to the grand jury, which were seized upon by the jurors, denied appellant a fair trial.

The majority wrongly found the issue abandoned. The court precluded the defense from calling the 2007 court reporter and was fully aware of the defense's desire to call the witness. The court's suggestion that it had to think about the issue further, left the onus on the court to change its ruling precluding the witness, not on the defense to continue to assert its clearly articulated desire to do so. C.P.L. §470.05(1)(no duty to continue to protest once a party has expressly or impliedly requested a ruling and the court has denied the request or failed to rule on it).

That conclusion is supported not only by the trial court's denying counsel's requests, but by the exchange during deliberations. When counsel reminded the court

that it had precluded the defense from calling the witness, neither the court nor the prosecutor denied that the court had done so. Contrary to the majority's ruling, counsel was not seeking at that point to call the witness, but rather to clarify what had transpired. The court acknowledged it had precluded the defense from calling the 2007 reporter, by stating it understood the defense position and granting an exception to its earlier ruling. Accordingly, the record "taken as a whole" supports the dissent's view that the error was preserved and warrants reversal. People v. Le Mieux, 51 N.Y.2d 981 (1980); People v. Mezon, 80 N.Y.2d 155 (1992).

POINT IV

THE COURT APPLIED THE WRONG LEGAL STANDARD IN DENYING COUNSEL'S SINGLE ADJOURNMENT REQUEST TO FURTHER INVESTIGATE A C.P.L. §330.30 MOTION ALLEGING SERIOUS JUROR MISCONDUCT.

Relevant Facts

After the verdict, counsel learned that the jury foreman had an undisclosed relationship, and had, during the trial, spoken with one of the prosecution's witnesses, Elisa Hemphill, appellant's estranged sister-in-law (A2568-2569). Counsel sought a single adjournment to file a C.P.L. §330.30 motion, both in writing and when the matter was initially on for sentencing (A2569). The court refused to grant the request, ruling that although counsel was acting in "good faith," counsel could put in the "same claims" in a C.P.L. §440 motion (A2570). Counsel protested that the two motions were procedurally distinct and that he needed to file the C.P.L. §330.30 motion prior to

sentence (A2570). The court responded that the exact same claims could be raised via C.P.L. §440 (A2570).

Counsel protested he was not ready to proceed to sentence without a pre-sentencing submission (A2571-2572). Counsel sought a month to file the 330 motion, arguing that no one would be prejudiced (A2571). The court voiced skepticism of all claims involving allegations of juror misconduct and insisted the family of the deceased was entitled to "closure" (A2571-2572). After giving counsel "a couple of minutes" to prepare, the court sentenced appellant to the maximum sentence without the benefit of a defense pre-sentencing submission (A2575, 2589, 2591).

The Court Applied The Wrong Legal Standard In Denying The Defense Adjournment Request.

Counsel's request for a single adjournment to file a motion alleging serious juror misconduct implicated appellant's core constitutional right to be tried by an impartial jury. People v. Neulander, 34 N.Y.3d 110 (2019)(reversing where juror's texts and dishonesty during trial infringed defendant's right to a fair trial, reaffirming that "nothing is more basic to the criminal process than" "trial by an impartial jury")(quoting People v. Branch, 46 N.Y.2d 645, 652 (1979)). "When the protection of fundamental rights has been involved in requests for adjournment" a court's discretion to deny the request is more narrowly construed. People v. Spears, 64 N.Y.2d 689 (1984).

Here the court denied counsel's request for a single adjournment, despite finding he was acting in good faith, based on its mistaken view that motions made pursuant to

C.P.L. §§ 330.30 and 440 were essentially identical. But as counsel properly protested, there are important procedural differences between these motions. Claims raised via 330 are part of the record on appeal and are subject to review as a matter of right. In contrast, a defendant must petition for permission to appeal the denial of a C.P.L. §440 motion. C.P.L. §§450.15(1), 460.15. Additionally, while criminal defendants have a right to counsel on C.P.L. §330 motions, no such right exists for C.P.L.§440 motions. Coleman v. Thompson, 501 U.S. 722, 753 (1991). Moreover, C.P.L §440.10(3)(a) would have acted as a procedural bar to a post-verdict motion since the facts were known prior to sentence and therefore could have been placed on the record.

These distinctions were critical here where the court expressed skepticism of all claims involving juror misconduct. People v. McGregor, __A.D.3d__, 2019 N.Y. Slip Op. 08283 (1st Dept. 2019(reversing trial court's denial of C.P.L. §330 motion where juror developed a relationship with a prosecution witness during the trial). The court then forced counsel to proceed to sentencing without preparation, further compromising appellant's rights.

In any event, the court's belief that a C.P.L. §440.10 motion was available was irrelevant. Criminal Procedure Law §330.30(2) expressly authorizes a post-verdict, pre-sentence motion to "set aside the verdict" on the grounds of "improper conduct by a juror." That legislative determination is sensible because a court should not conduct a wasteful sentencing proceeding until it has first determined that the verdict itself is valid.

Appellant thus had an absolute right to pursue pre-sentence relief. The trial judge lacked the authority to shut the courthouse door simply because he preferred appellant to employ a distinct, post sentencing forum via C.P.L. §440.

As the court's decision was grounded in legal error, it was not an exercise of discretion. People v. Williams, 56 N.Y.2d 236, 239 (1982); People v. Aphaylath, 68 N.Y.2d 945, 947 (1986)(court committed legal error because its "ruling was not predicated on the appropriate standard"). Accordingly, the matter should be remanded for de novo sentencing proceedings.

POINT V

THE INTEGRITY OF THE GRAND JURY PROCEEDINGS WAS COMPROMISED.

Prior to trial, the defense moved to dismiss the indictment because it was undisputed that the prosecution had not presented or alerted the grand jury to any of the exculpatory evidence that resulted in Morris's indictment (A174-177). The court denied the motion, finding that the prosecution had broad discretion in presenting its case to the grand jury and did not have to present evidence to exculpate the accused. (A176, citing People v. Mitchell, 82 N.Y.2d 509 (1993)).

But a prosecutor's discretion in presenting his case to the grand jury "is not unbounded" because he "performs a dual role of advocate and public officer, charged with the duty not only to secure indictments but also to see that justice is done." People v. Lancaster, 69 N.Y.2d 20, 26 (1986). This Court has recognized that in order for the

grand jury to perform its proper functions of "both investigating crimes and protecting individuals from needless and unfounded prosecutions," the grand jurors "ought to be well informed concerning the circumstances of the case before" them. Id., at 25.

The prosecutor cannot procure an indictment he knows to be based on misleading evidence. People v. Thompson, 22 N.Y.3d 687, 697 (2014). His duties to deal fairly with the accused and of "candor to the courts" extends to the prosecutor's submission of evidence to the grand jury. Id.

As misidentification is a complete defense that would prevent an unfounded prosecution, the failure to submit the evidence that Morris had been identified -- where those identifications and other evidence supported Morris's indictment -- warrants dismissal of the indictment returned against appellant. See, e.g, People v. Lee, 178 Misc. 2d 24 (Sup. Ct. Nassau County 1998)(dismissing indictment due to prosecution's not disclosing that a witness had identified another); accord People v. Hogan, 144 N.J. 216, 236 (1996)(grand jury cannot be denied access to evidence that is credible, material, and clearly exculpatory).

POINT VI

THE COURT'S RULINGS SKEWED THE TRIAL IN FAVOR OF THE PROSECUTION AND DENIED APPELLANT DUE PROCESS.

With respect to remaining issues, appellant renews his claims and relies upon the arguments made in Points IV, V, VI, VII, VIII, IX, XI, and XII of his Appellate Division Brief. (A146-174, 180-193; 22 NYCRR §500.11 (providing that SSM appeals "shall be determined on the intermediate appellate court. . . briefs. . . and additional letter submissions on the merits")).

Respectfully submitted,

Claudia Trupp

cc: ADA Nancy Killian
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February 26, 2020

The Honorable Janet DiFiore
Chief Judge
Court of Appeals, State of New York
20 Eagle Street
New York, NY 12207

Re: People v. Darryl Hemphill
APL-2019-00202
Rule 500.11 Response Submission

Your Honor:

Respondent submits this letter on the merits (Rule 500.11[d]), and incorporates all responsive arguments presented in Respondent' Brief ("Resp.Brief") before the Appellate Division, First Department (Rule 500.11[f]).

The facts relied upon with this submission are contained on pages 4-18, of Respondent's Brief.[1]

[1] As in the brief below, numerals preceded by "PT," "VD," "T," and "S," refer to pre-trial proceedings between September 21 and October, 7 2015; voir dire, jury trial, and sentencing, respectively.

ARGUMENT

POINT ONE

DEFENDANT'S GUILT WAS PROVEN BEYOND A REASONABLE DOUBT.

The evidence presented to the jury was more than sufficient to prove that defendant, while intending to kill another, shot and killed the two-year-old victim, David Pacheco, Jr. The test for legal sufficiency is "whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307,319 (1979). Conspicuously absent from defendant's recitation of that standard is that "all of the evidence is to be considered in the light most favorable to the prosecution." Id.; People v. Lamont, 25 N.Y.3d 315,318-19 (2015). The court must then determine whether "any valid line of reasoning and permissible inferences" could have led the jury to its conclusion. People v. Bleakley, 69 N.Y.2d 490,495 (1987). While the trial court, in denying dismissal, and majority opinion on direct appeal applied these standards in finding the evidence sufficient, the dissent below and defendant now do not.[2] In that light, the evidence of defendant's guilt is particularly strong.

Initially, defendant's conviction required proof that he "[w]ith intent to cause the death of another person, [] cause[d] the death . . . of a third person" (T.1701-02,1708).

[2] Though framed in terms of "reasonable doubt," the dissent substituted its credibility judgment for that of the jury and weighed the evidence in a light not favorable to the People. Hemphill, 173 A.D.3d at 481-82. This Court lacks the broader weight of the evidence review authority vested with the Appellate Division to conduct such an analysis. People v. Danielson, 9 N.Y.3d 342,348-49 (2007).

Penal Law §125.25(1). The evidence proved that defendant intended to kill another—an individual from the earlier street fight—by shooting a 9mm firearm in their direction, and that he caused David's death. The People proved their case through twenty-nine witnesses, including: Ronnell "Burger" Gilliam, a cooperating accomplice who implicated defendant (his cousin); eyewitnesses, including Michelle Gist who implicated defendant from the earlier fistfight; experts; police officers, defendant's friends and family members, including defendant's "grandmother," Ardell Gilliam, who recalled him wearing a blue sweater that day; a medical examiner who confirmed the cause of death; exhibits including matching ballistics evidence from the scene and the body of the victim, a blue sweater containing defendant's DNA that matched the description many eyewitnesses said the shooter wore, recovered by police hours after the shooting at Burger's home and smelling of gunpowder residue; and, defendant's flight following the shooting.

The only disputed trial issue was the shooter's identity: defendant presented the theory that Nicholas Morris, rather than he, shot and killed David. Yet, far stronger eyewitness testimony, forensic and other evidence established defendant as the killer.

Initially, the jury found Burger's testimony reliable, and the Appellate Division majority affirmed that credibility determination. See People v. Hampton, 21 N.Y.3d 277,288 (2013)(courts assume fact-finder "credited the People's witnesses"); People v. Kennedy, 47 N.Y.2d 196,203 (1979). Since Burger identified defendant as the shooter, that alone would normally suffice to dispose of this sufficiency challenge.

Defendant now, and the dissent below challenges the weight accorded Burger's testimony (SSM.9). Hemphill, 173 A.D.3d at 481. They point to Burger's status as an accomplice and incentivized cooperator, and cite changes to his account and lies he told investigators pre-trial as a basis to discredit him. Yet, this is not the "rare case" where Burger provided "inherently contradictory" or "irreconcilable" testimony. People v. Delamota, 18 N.Y.3d 107,114 (2011); People v. Calabria, 3 N.Y.3d 80,82 (2004).

Initially, Burger provided "credible explanation[s] for [his only] discrepant testimony": his initial identification of Morris as the shooter. Delamota, 18 N.Y.3d at 114. Defendant, Burger said, directed Burger to return to New York to implicate Morris (after defendant was implicated). Burger explained defendant had falsely told him that Morris had implicated Burger. When Burger learned Morris had not identified him, and then spoke to the police—outside the presence of the attorney defendant had hired for him—he implicated defendant. That, Burger said, was the truth. Thus, the jury had "an objective, rational basis for resolving beyond a reasonable doubt the contradictory inculpating and exculpating versions." Delamota, 18 N.Y.3d at 115 (citation omitted).

Further, in his motions to dismiss, defendant did not dispute the sufficiency of the corroboration of Burger's "accomplice" testimony (T.1326,1723), rendering any such challenge unpreserved. People v. James, 75 N.Y.2d 874,875 (1990). Regardless, the People elicited testimony from Gist that defendant was involved in the initial

altercation,[3] and, as discussed infra, many other witnesses testified that the shooter wore the same blue sweater as the man in that altercation; then, the People provided additional evidence, including the blue sweater found in Burger's apartment, that contained defendant's DNA, fully corroborating Burger's testimony. People v. Besser, 96 N.Y.2d 136,143-44 (2001); CPL §§60.22(1),70.10(1).

Defendant's remaining challenges to Burger's testimony go to his general credibility. Burger's status as a cooperator is exclusively an issue for the jury to consider. His failure to mention Morris' possession of a .357 firearm until after Morris pled guilty had a simple explanation—Burger candidly admitted he did not want to implicate Morris in further criminal activity. And, this Court is not empowered to upset the conviction due to any other minor "differences between [Burger's other] pretrial and trial statements." Delamota, 18 N.Y.3d at 115. That is particularly true where, as here, the parties addressed these issues on summation, and the court properly charged the jury that it can credit all, some or none of Burger's testimony (T.1687).

Next, the recovered blue sweater containing defendant's DNA, and excluding Morris and Burger, constituted powerful evidence of guilt. Witnesses Marisol Santiago, Anthony Baez, Justin Bautista, Milagros Pagan, Brenda Gonzalez and Jose Castro identified the assailant as wearing a blue sweater; only one witness, Juan Garcia, said it was a short-sleeved shirt, a mistake easily attributed to the sleeves being rolled up.

[3] The jury had the right to credit Gist's trial testimony over contemporaneous police reports, which can be inaccurate (compare SSM.9).

Burger, defendant's "grandmother" and Gist, who knew defendant, likewise recalled defendant wearing a blue sweater. Mere hours after the shooting, the police recovered a blue sweater—a fungible item witnesses would reasonably be unable to identify in court—hidden in the apartment of the known accomplice. Burger testified defendant had asked him to get rid of it. An officer had overheard Burger call his brother, William Gilliam, and ask him to discard it. And, Det. Ronald Jimick smelled gunpowder on it, where, contrary to the dissent and defendant's claim (SSM.10; Hemphill, 173 A.D.3d at 482), he wrote that detail in his lab request for testing. Further, the inconclusive lab result did not mean the sweater had no gunpowder residue (compare SSM.10), where the lab did not conduct primer residue testing. This evidence provided strong, independent proof of defendant's identity as the shooter.

The Appellate Division also aptly found "overwhelming evidence demonstrating defendant's consciousness of guilt." Hemphill, 173 A.D.3d at 475. Contrary to defendant's claim (SS.10-11), the "probative weight" of flight evidence "is highly dependent upon the facts of each particular case." People v. Cintron, 95 N.Y.2d 329,332–33 (2000). Thus, "[i]n the absence of explanation, the fact of departure and absence may, in the light of surrounding circumstances, . . . be significant of consciousness of guilt." People v. Stilwell, 244 N.Y. 196,199 (1926). Here, the evidence of flight had no ambiguity. Defendant's flight with his girlfriend Aida Llanos and Burger—beginning at Burger's apartment, then bouncing around various apartments, and, finally, leaving for North Carolina that same night with only one of his children—

strongly supported his guilt. Upon arriving in North Carolina, defendant did not stay in one place, but moved to a different hotel or home each night, until eventually he leased a residence under the false name, "Darrel Davis." He sent Burger to New York to implicate Morris as the shooter. Defendant's continued presence in North Carolina, eventually being joined by his other child, was all the more suspicious because he owned a music studio in New York, his girlfriend had been employed there as a paramedic for nearly twenty years, and each forfeited those established positions and undertook this move without job prospects. Ultimately, he was apprehended in North Carolina. Though Burger was the source of many of these details, defendant did not rebut them at trial. Thus, these actions overwhelmingly demonstrated consciousness of guilt.

By contrast, the evidence against Morris was weak. Morris did not flee when suspected, but walked into the news station to offer evidence—he had no tattoos—to prove he was not the shooter. By contrast, defendant, who had tattoos, fled and had nine years to have the right forearm tattoo removed. And, three witnesses misidentified Morris. Notably, they were strangers, defendant wore a hat, and the case involved two fast-paced, stressful and chaotic events: a fistfight and shooting. See People v. LeGrand, 8 N.Y.3d 449,454 (2007). They all admitted they did not see the shooter's face, Santiago and Jon Vargas admitted they may have seen Morris in media coverage before their identifications, and Vargas and Gonzalez admitted they were influenced by a desire to "do justice" or "help." That they expressed confidence in their respective identifications of Morris earlier is of no moment. See People v. Santiago, 17 N.Y.3d 661,672

(2011)(recognizing eyewitness "confidence is a poor predictor of identification accuracy"). Further, Baez never selected Morris from a photo array, but said both he and another "look[ed] like the shooter" (compare SSM.8). The only evidence left of Morris' guilt, then, was his bruised knuckles on one hand, and that he had two types of ammunition—9mm, the type used in the shooting, and .357 caliber for the firearm he admitted possessing—in his apartment. Ultimately, counsel emphasized the theory that Morris had committed the shooting and the jury who, having the opportunity to observe witnesses and weigh alleged inconsistencies, properly rejected that theory. People v. Jackson, 65 N.Y.2d 265,272 (1985)(where conflicts or inconsistencies arise from many witnesses' testimonies, this "creates a credibility question for the jury").

POINT TWO

THE COURT PROVIDENTLY ADMITTED SELECT PORTIONS OF NICHOLAS MORRIS' PLEA ALLOCUTION.

Pre-trial, the prosecutor, based on prior conversations with counsel, moved in limine to preclude as irrelevant any reference to items recovered by police from Morris' residence save for one 9mm bullet; the other items included a starter pistol, an inoperable .22 caliber rifle, a photograph of Morris holding two firearms (.25 and .35 caliber), and three .357 caliber bullets (PT.103-11). Counsel asked to admit this evidence to show Morris' propensity to own firearms, and thus to shoot firearms (PT.117-18,119-20). The court decided it would admit the 9mm bullet because it had "some, although slight, connection" as the same form of ammunition as used in the shooting—no

evidence actually linked it to the murder (T.672)—but the remaining items, as misleading propensity evidence, would be inadmissible (PT.119,120-22,156-57).[4]

During the defense opening, counsel argued:

> [T]hey search [Morris'] apartment. And what do you think they find in [his] bedroom? They find a 9-millimeter bullet. A live round. And guess what kind of a gun killed David[] just a few hours before that? . . . And the ballistic people will tell you they recovered from David['s] body and find other evidence of at the scene? A 9-millimeter. So shortly after this shooting when they go to []Morris' apartment there is a bullet that's exactly the same kind of bullet as the one that killed the child. . . . [T]hey are putting this evidence together. . . . And there is a bullet that's the same as that. I think we got the right guy.

(T.42).[5] During direct-examination of Det. Jimick, the court, over a defense objection that it was irrelevant (T.647-48,673-74,676), granted the prosecutor's application to admit the .357 caliber bullets recovered from Morris' residence as relevant to Morris' conduct, since the defense had put them in issue (T.676-77). In cross-examining Det. Jimick, counsel then gave the jury the impression Morris actually possessed the murder weapon. He asked the following questions, and received affirmative responses: "[Y]ou

[4] By way of guidance, the court also cautioned counsel about opening the door regarding Morris—noting, without dispute, that it anticipated the defense to argue the People "had it right the first time" when prosecuting Morris—and offered to make advance rulings to prevent surprise (PT.182-83,185,187; see PT.191-93).

[5] Before counsel cross-examined Det. Jimick, the prosecutor sought to rebut counsel's opening statements by introducing Morris' plea allocution during which he pled guilty to possessing a .357 caliber firearm on April 16, 2006 (T.506-07,509-10). The court recognized that fact would be relevant and probative, and if Morris testified admissible, but expressed concern over the manner the prosecutor sought to introduce it (T.513-14).

also had some other evidence implicating []Morris, correct?" "And among that other evidence that you had, you had done a search of his apartment[?]" "And in his apartment . . . you recovered some ballistics evidence that you thought was significant[?]" "Among that evidence . . . was a 9-millimeter bullet[?]" "And that was significant in your investigation[?]" "So 12 hours after the shooting on a nightstand in []Morris's bedroom is the very same type of bullet that killed David[?]" and, "[W]ould you figure that somebody who has a 9-millimeter bullet on his night table might also have access to a weapon that can fire that bullet?" (T.748-51).

Later, the parties revisited the prosecutor's application to admit Morris' plea allocution (T.890-910). The court found the allocution constituted a declaration against penal interest given the consequences of a violent felony conviction, including Morris' deportation—he was later removed as an inadmissible alien, resulting in his unavailability—when he had no prior felony record and the People could not independently prove his crimes, and given its reliability where police found .357 bullets in Morris' apartment and Burger would testify that he disposed of Morris' .357 firearm (T.910-11). The court reserved decision after counsel noted he intended to challenge Burger's testimony (T.911-14). Counsel cross-examined Burger extensively about his failure to reference Morris' possession of a .357 caliber firearm until after he entered into a cooperation agreement (T.1032-35,1059-61). The court then heard further argument, acknowledged plea allocutions qualify as testimonial, but reasoned this allocution did not appear to implicate defendant (T.916-19).

The trial court, for reasons stated infra, then admitted into evidence Morris' plea allocution (T.1128-34), as redacted by the parties (T.1137-1153). The testimony began:

> [Defense Counsel]: [Morris] indicates that, over my strong advice, he will take the plea. . . . the nature of the proof that exist with respect to this gun count that my client is about to plead to is not sufficient for [the People] to obtain an indictment. The only way they will be able to make out the limits of this crime is through my client's admissions, which I suppose he will be willing to make, it seems, so that he can get out of jail today.

(T.1182-83). The testimony continued with Morris' admission that on April 16, 2006, around 2:00 p.m., near Harrison Avenue and Morton Place, he "knowingly possessed a loaded, operable firearm," a ".357" (T.1184-85).

Initially, contrary to defendant's claim (SSM.13,14), the trial court admitted this allocution under multiple theories. Having earlier found it "plainly" a declaration against penal interest (T.910), it found under People v. Reid, 19 N.Y.3d 382 (2012), defendant, in opening and cross-examination, opened the door to this partial allocution even if "presumptively testimonial" (T.1130-32). Alternatively, the court, addressing People v. Hardy, 4 N.Y.3d 192 (2005), found that with redactions its admission "would not give rise to error" under Crawford v. Washington, 541 U.S. 36 (2004) (T.1132, see T.916-19,1128-30). The Appellate Division unanimously affirmed that ruling, finding the "plea allocution would normally be inadmissible as testimonial hearsay," but "defendant opened the door to this evidence" under Reid when he "created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used

in the murder," and "the plea allocution was reasonably necessary to correct that misleading impression." Hemphill, 173 A.D.3d at 477.

Now, defendant, citing CPL §§470.15(1), 470.35(1), mistakenly argues the only issue this Court may review is whether he "opened the door" (SSM.14). Yet, as shown, the trial court found the evidence admissible, adversely to defendant, under every theory, providing this Court with jurisdiction to review them all. People v. LaFontaine, 92 N.Y.2d 470,474 (1998). Given the absence of any Crawford or declaration of penal interest merits analysis in defendant's submission, Respondent asks this Court to review pages 35-39, and 44 of its Brief in support of these arguments.

The nisi prius court also did not abuse its discretion as a matter of law in ruling that, under Reid, defendant opened the door to the admission of Morris' plea allocution. "A defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause." Reid, 19 N.Y.3d at 382-83. The fact-specific inquiry is "whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." Id. at 388.

In Reid, this Court held:

> [B]y eliciting from witnesses that the police had information that [a third person] was involved in the shooting, by suggesting that more than one source indicated that [said third person] was at the scene, and by persistently presenting the argument that the police investigation was incompetent, defendant opened the door to the admission of the testimonial evidence, from his non-testifying codefendant,

> that the police had information that [the third person] was not at the shooting.

Id. at 388-89. This evidence was necessary to "prevent the jury from reaching the false conclusion that [the third person] had been present at the murder by eliciting that a person with immediate knowledge of the situation—an eyewitness who knew exactly who was at the murder—had told the police [the third person] was not there." Id. Further, the Reid Court, while citing People v. Ko, 15 A.D.3d 173 (1st Dept.2005), did not limit this principle to correcting "misleading out-of-court statements introduced by the defendant," as defendant claims (SSM.15), but gave that as one example.

As the trial court and Appellate Division found, this case invites the same result as Reid. During counsel's opening and through his cross-examination of Det. Jimick, he presented the theory to the jury that since Morris had a single 9mm bullet on his nightstand, he must have had a 9mm firearm—the same type of firearm that killed David—and made it his trial defense that Morris used that firearm to murder David. For instance, he asked Det. Jimick, "So 12 hours after the shooting on a nightstand in []Morris's bedroom is the very same type of bullet that killed David[?]" and, "[W]ould you figure that somebody who has a 9-millimeter bullet on his night table might also have access to a weapon that can fire that bullet?" (T.748-51). This inquiry left the jury with the "incomplete and misleading" impression that Morris possessed the murder weapon (Reid, 19 N.Y.3d at 388) even though available, reliable evidence established that Morris had possessed a .357 firearm that day. Accordingly, admitting this plea

allocution was reasonably "necessary to correct the misleading impression," and Morris' plea allocution was the clearest and most concise evidence available to achieve that goal. Reid, 19 N.Y.3d at 382-83. Indeed, given the clear implication of those questions, nothing less—including admitting the .357 bullets recovered from Morris' residence (SSM.18)—would have dispelled that incorrect impression. See People v. Massie, 2 N.Y.3d 179,185 (2004)(evidence not "remote" or "tangential" to "subject matter defendant brought up," but "directly contradicted the impression given"); People v. Paul, 171 A.D.3d 1467 (4th Dept.2019)(defendant opened door to hearsay implicating him in crime to correct misimpression on cross-examination); People v. Santos, 150 A.D.3d 1270 (2d Dept.2017)(in opening, counsel opened door to admission of out-of-court statements made by assistant district attorney that certain codefendants had implicated defendant); People v. Taylor, 134 A.D.3d 1165 (3d Dept.2015).

Now, defendant wrongly claims he "advanced evidence-based arguments consistent with the court's in limine rulings" and his actions were "in all respects" "appropriate" (SSM.15,16-17). In fact, counsel took advantage of the court's initial and undisputedly correct ruling—it allowed the defense to address the recovery of the 9mm bullet, but prohibited the defense from introducing evidence of Morris' possession of unrelated firearms and paraphernalia to establish his alleged propensity to own and thus to shoot firearms—in order to mislead the jury in the manner discussed. And, while it was the prosecutor who "had sought a ruling prohibiting the defense from mentioning . . . the other weapons or ammunition recovered from Morris's apartment" (SSM.17),

that motion resulted from counsel's off-record discussions stating he intended to introduce that evidence for an improper purpose (PT.103-11). The misleading nature of counsel's position became clear when, mid-trial, he suddenly opposed the prosecutor's valid request to admit the .357 caliber bullets recovered from Morris' residence (T.647-48,673-74,676). The court, confused by that objection, issued a second proper ruling that the .357 caliber ammunition was now relevant and probative where testimony linked it to the aftermath of the crime and counsel had put what Morris possessed in issue (T.675-77).

At its core, defendant's complaint boils down to the fact that neither the prosecutor nor the court used the words, "misleading" or "incomplete" to describe counsel's actions. Yet, the court expressly relied on Reid (T.1077,1130-31), establishing that it applied the correct legal standard (compare SSM.14), and both discussed how counsel had created this misimpression. The court's off-hand remark that "the defense's argument" was "appropriate" and "probably a necessary argument to make," was either its reflection that defendant had no choice but to present its third-party culpability defense in this fashion—though doing so created this misleading impression—or the court merely sought not to impugn counsel.[6]

[6] Immediately following the court's remark that the defense argument was "in all respects [] appropriate," the court added that argument "nonetheless, opens the door to evidence offered by the state refuting the claim that Morris was, in fact, the shooter" (T.1131). Put another way, simply because an argument is "appropriate" and "necessary" does not mean that it cannot be voiced in a way that will fairly open the door to rebuttal evidence.

Ultimately, if the court abused its discretion as a matter of law in admitting the plea allocution, that error was harmless beyond a reasonable doubt. "There [was] no reasonable possibility that the error might have contributed to defendant's conviction." People v. Crimmins, 36 N.Y.2d 230,237 (1975). Critically, defendant successfully argued to include the fact that Morris entered the plea against his attorney's strong advice because the People could not prove the case and so he would be released from prison the same day. This fact allowed defendant to argue on summation that Morris "just enter[ed] the plea because he want[ed] to go home" (T.1581) and to "get out of jail" (T.1583), facts the prosecutor could not rebut, and that significantly weakened the impact of this evidence. Moreover, the jury did not request a read-back of Morris' plea allocution. These facts, combined with the powerful evidence of defendant's guilt (Point One), render any error harmless.

POINT THREE

DEFENDANT FAILED TO PRESERVE HIS REQUEST TO IMPEACH A WITNESS BY CALLING A GRAND JURY STENOGRAPHER AND HIS RELATED CHALLENGE TO THE PEOPLE'S SUMMATION.

The Appellate Division majority correctly ruled defendant "failed to preserve any claim that the court precluded him from calling the court reporter who transcribed the 2007 grand jury minutes of the testimony of Brenda Gonzalez, a witness to the incident who had attempted to break up the fight between the shooter and her friend." Hemphill, 173 A.D.3d at 477. Alternatively, it found the court's actions proper for two

reasons: defendant never properly confronted Gonzalez with her 2007 grand jury testimony before seeking to call the 2007 stenographer; and, "Despite being made aware that he mistakenly questioned Gonzalez about her 2006 grand jury testimony, []counsel never questioned Gonzalez about her 2007 grand jury testimony and never made an application to the court to recall Gonzalez to question her properly." Id. at 479. Instead, counsel, after examining Gonzalez with the wrong minutes from 2006, inappropriately sought to either have the court inform the jury that his questions related to 2007, or to call, sans foundation, the 2007 stenographer as an impeachment witness.

Briefly, after Gonzalez identified Morris in a lineup, she testified in two Grand Jury proceedings in 2006 (against Morris) and 2007 (against Burger). In the former, she did not mention Morris by name; in the latter, she mentioned both; though she did not know Morris' name, she explained at trial that "they put it there" (T.478-79,490-91,497). During cross-examination, counsel focused Gonzalez on her testimony "back in 2006," while asking questions gleaned from the 2007 transcript. Confusion ensued, with the prosecutor unable to follow (see T.505,506 [explaining why he refused to stipulate mid-examination]), and the witness answering as best as she could. Gonzalez' answers vacillated between denial of having said what was asked (T.479-80,487-88), that she did not recall (T.487,488-89,489,490,491), and that she did recall (T.489,490). Evincing his strategy, counsel's last questions were, "When you went into the Grand Jury that was back in 2006, was it not?" and "Back in 2006, your recollection of what happened, it

was fresher[?]" (T.493). Counsel—who had both transcripts identified with their different years (T.505-06)—never questioned Gonzalez about her 2007 testimony.

To correct this misimpression, the prosecutor sought to call the court reporter who transcribed the 2006 grand jury minutes (T.585-86). Counsel admitted his "possible" mistake, but said it was not "material" (T.586). The court disagreed, saying "2006 versus 2007 . . . is quite consequential" given how the defense utilized the 2006 minutes to suggest her memory would "have been extremely fresh shortly after the occurrence" whereas knowledge of his name may have come from "contaminat[ion]" a year later (T.587-88; see T.715-16).[7] After a recess, counsel asked for a stipulation to inform the jury the statements he attributed to 2006 were made by Gonzalez a year later. The prosecutor declined, saying Gonzalez was never properly confronted (T.592-94; see T.716-17). The court, recognizing defendant should not suffer due to his attorney's "mistake," offered a remedy—the opportunity to recall Gonzalez and then to call the stenographer (T.595).[8] Counsel desisted.

The 2006 stenographer testified about Gonzalez' 2006 testimony, stating, inter alia, Gonzalez did not name Morris (or defendant) as the shooter (T.613-20). Later, counsel asked that the court inform the jury that the transcripts he read were accurate,

[7] Contrary to defendant's allegation (SSM.21), the court did not limit the sources of contamination to "publicity," but included "more referenc[es] by name" (T.587-88).

[8] The prosecutor noted, in response, the use of the wrong Grand Jury minutes did not appear to be a "mistake," but a calculated decision; something the court recognized as possible. Counsel denied doing so. Still, the court said counsel would retain that remedy (T.596).

or for permission to call the 2007 stenographer, claiming he only mentioned 2006 in the first few questions (T.711-13). The court twice asked if counsel ever mentioned "2007" in any questions, and counsel admitted he did not (T.714). The court effectively admonished counsel, saying "if the jury, without knowledge that there were two presentations, were to take a reasonable interpretation of your inquiry, wouldn't it be implicit that the questions pertain to the grand jury proceeding in 2006?" Counsel admitted that is "possible," but asked for the same remedy (T.714-15). Still, the court remarked, "I think [counsel] might be able to call the stenographer"; noting the issue was "complicated," it explained its reasoning in support of both sides (T.715,717-18). Without ruling, it provided some initial thoughts and stated, "[T]he two of you can prepare to address this point and we will talk about it further" (T.719). Counsel did not raise the issue again until deliberations (T.1726-27).

This record fully supports the Appellate Division's conclusion that defendant abandoned and failed to preserve this claim. The court offered defendant a remedy that he failed to accept: recalling Gonzalez and then calling the court stenographer. Then, when defendant sought only to call the stenographer to impeach Gonzalez, the court never finally ruled on the issue. Instead, it asked the parties to prepare to address the issue again. Counsel failed to do so before the close of the defense case. See People v Alexander, 19 N.Y.3d 203,217 (2012); People v. Graves, 85 N.Y.2d 1024,1027 (1995); People v. Cobos, 57 N.Y.2d 798,802 (1982). Instead, he objected after deliberations

commenced, when the court had no "opportunity of effectively changing the same." People v. Cantave, 21 N.Y.3d 374,379 (2013); CPL §470.05(2).

Notably, the dissenting opinion below did not take issue with the majority's preservation analysis. It did not address the issue (compare SSM.24). To the extent the dissent also misquoted the trial court, saying, "The court was inclined to agree [with the People], noting that 'because the witness was not impeached by reference expressed to 2007 and because the questions could reasonably be interpreted as being 2006 grand jury testimony, there is no basis for calling the stenographer from 2007." Hemphill, 173 A.D.3d at 483. In fact, that remark began—just after the court had asked the parties to prepare additional argument—with the proviso, "I'll have to think about this further, but right now my feeling is that . . ." and ended with, "I have to think about that a little further" (T.719).[9]

Now, defendant suggests that under CPL §470.05(2) he had "no duty to continue to protest once a party has expressly or impliedly requested a ruling and the court has denied the request or failed to rule on it" (SSM.24). Yet, that is not what CPL §470.05(2) says. See CPL §470.05(2). Nor, as discussed supra, does this Court's precedent support

[9] The only ruling issued by the court took place during cross-examination when counsel asked, "[D]o you recall when you were testifying . . . you were asked these questions and giving this answer," "And who was the skinny guy? [] Morris" and Gonzalez responded, "I never said that." The court sustained the prosecutor's objection to counsel's attempt to refresh Gonzalez' recollection by handing her grand kury testimony (T.479-80). Though the court did not provide its reasoning (T.480), the reason for that ruling was obvious. Since the witness did not profess a lack of recollection, this attempt was improper. Richardson, Evidence (10th ed) §465.

such a theory. Regardless, this theory rests on a misreading of the court's position; it never "precluded the defense from calling the 2007" stenographer (SSM.24). Instead, it repeatedly sided with counsel. The court first offered defendant the opportunity to recall Gonzalez before calling the court stenographer, thereby correcting counsel's mistake. Counsel said nothing. Then, it stated three times that it would not allow counsel's mistake—or "devious" and "calculated" strategy—to hurt defendant's right to a fair trial (T.595,596,715). Thus, it was not a question of continued protest, but counsel's failure "to address the issue" before deliberations.

Alternatively, defendant claims that because he made the representation, during deliberations, that the court "precluded" him from calling the 2007 stenographer, and that neither the prosecutor nor the court corrected that misstatement, the issue was preserved (SSM.24-25). That claim fails. Cantave, 21 N.Y.3d at 379. And, defendant's reliance on the court's later statement referring to "the ruling [it] made earlier" (SSM.22,25)—to claim the court was referring to having rendered a prior ruling on this issue—rests on a misreading of those remarks. The court was, in fact, referring to a ruling it made "earlier" regarding "the portion of the testimony" that it will read back to the jury (T.1728; see T.1725 [counsel objected to court's ruling on scope of readback]), nothing more. Accordingly, this challenge is unpreserved.

Further, to the extent the dissent took issue with the prosecutor's summation comments that purportedly "were designed to mislead the jury to conclude that the witness had never identified Morris under oath to the grand jury," Hemphill, 173

A.D.3d at 484, that claim, too is undisputedly unpreserved, as the majority so found. Id. at 479. On summation, defendant never objected to this challenged remark (T.1644-45). Nor did counsel seek a mistrial after the People's summation (T.1676). As such, both aspects of this claim are beyond this Court's review. CPL 470.05(2); People v. Balls, 69 N.Y.2d 641 (1986); People v. Medina, 53 N.Y.2d 951,953 (1981).

As to merits, Respondent relies on the decision of the majority below, and the discussion in Respondent's Brief, pages 45-53 and 117-18. Briefly, the trial court cannot have erred when it suggested that it may grant the application if counsel met basic evidentiary requirements, like recalling Gonzalez to lay the foundation for impeachment. People v. Hayes, 17 N.Y.3d 46,53 (2011)(right to present defense "does not give criminal defendants carte blanche to circumvent the rules of evidence"); People v. Duncan, 46 N.Y.2d 74,81 (1978)(to lay foundation for introducing prior statement, witness "must first be questioned as to the time, place and substance of the prior statement"). Instead, counsel appears to have engaged in a calculated decision to trip up the witness, succeeded, and did not want to recall her. The court cannot be faulted for counsel's strategic (or mistaken) decisions. And, the prosecutor's isolated summation comment, in an otherwise lengthy summation (T.1604-75) responded to counsel's summation theme that the prosecutor had manipulated the evidence against defendant, and, though inartfully phrased, fell far short of a pattern of inflammatory remarks. People v. D'Alessandro, 184 A.D.2d 114,118-19 (1st Dept.1992).

POINT FOUR

THE NISI PRIUS COURT DID NOT ABUSE ITS DISCRETION AS A MATTER OF LAW IN DENYING COUNSEL'S LAST-MINUTE REQUEST TO ADJOURN SENTENCING.

The trial court "providently exercised its discretion in denying []counsel's request for an adjournment of sentencing to allow the defense to further investigate an alleged jury issue, and the ruling did not result in any prejudice." Hemphill, 173 A.D.3d at 480. "The granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court." Matter of Anthony M., 63 N.Y.2d 270,283 (1984); People v. Singleton, 41 N.Y.2d 402,405 (1977). That "action will not ordinarily be reviewed unless it appears that the refusal is so unreasonable as to be arbitrary and capricious as a matter of law." People v. Oskroba, 305 N.Y. 113,117 (1953). The court's denial of the last-minute adjournment request was sound given the "interests of judicial economy, the integrity of the criminal process," and the "skeptical" nature of the information counsel supplied. See People v. Tineo, 64 N.Y.2d 531,537 (1985).

Initially, the refusal to grant an adjournment does not "implicate[]" defendant's "constitutional right to be tried by an impartial jury" (SSM, 26). See People v. Spears, 64 N.Y.2d 698,700 (1984)(only "when the protection of fundamental rights has been involved in requests for adjournments" has this "discretionary power [] been more narrowly construed"). Defendant's trial already had concluded with the jury verdict. Thus, defendant was not seeking to proactively protect his right to trial by impartial jury, but to investigate allegations of past "improper conduct by a juror" . . . "which

may have affected [his] substantial right." CPL §330.30(2). Thus, this limitation on the trial court's discretion does not apply. See Spears, 64 N.Y.2d at 700; People v. Foy, 32 N.Y.2d 473,476 (1973); People v. Sanders, 31 N.Y.2d 463 (1973); People v. Matz, 23 N.Y.2d 196 (1968); People v. Ballot, 20 N.Y.2d 600,604-05 (1967); People v. Snyder, 297 N.Y. 81,90 (1947).

The court's decision to not delay sentencing for a potentially unlimited, complicated investigation and motion practice was not "so unreasonable as to be arbitrary and capricious." Oskroba, 305 N.Y. at 117. Counsel made the request last-minute. His delay, contrary to the defense claim, caused prejudice; David's mother had appeared, on notice to the defense, to make a victim-impact statement (explaining the court's comment regarding "closure"). Though counsel requested "like a month" (S.5), the court—recognizing these claims are "complicated" (S.8)—anticipated the adjournment would be for longer to allow for investigation, answer and decision. The court reasoned that counsel "can do [the] same investigation" and "put the same claims" in a CPL §440.10 motion (S.4,5), thereby erasing any prejudice. That rationale demonstrated the court's sound discretion in denying the adjournment application. See People v. Rivera, 157 A.D.3d 545,546 (1st Dept.2017); People v. Buari, 50 A.D.3d

483,483-84 (1st Dept.2008); People v. Lee, 155 A.D.2d 556,557 (2d Dept.1989); see also CPL §440.10(1)(f).[10]

Yet, the main reason the court denied the application, contrary to defendant's claim (SSM 26-27), rested on the insufficiency of counsel's allegations in support of the adjournment (S.4,7). Over four weeks had elapsed. And, counsel's investigation of the juror issue was complete; defendant's sister-in-law, he said, had provided an affidavit and he had communicated with the juror about the claims, though he had not filed because he wished to obtain an affidavit. He did not have to. See CPL §330.40(2)(a)("information and belief" allegations permitted). That he did not file evinced a lack "of diligence and good faith." Lee, 155 A.D.2d at 557.[11]

Further, the defense presented nothing to the court that would establish juror misconduct. That the foreperson knew a witness—here, a witness hostile to the prosecution—or that he had conversations with the witness during trial does not rise to the level of misconduct that would require juror disqualification. See People v. Brown, 47 N.Y.2d 388,394 (1979)("not every misstep by the juror rises to the inherently prejudicial level at which reversal is required automatically.... In each case the facts must

[10] Defendant's discussion of the differences between §330.30 and §440.10 are of no moment. Defendant had counsel available to file a §440.10 motion (S.16), and if he lost, could have sought to consolidate it with his direct appeal. People v. Evans, 16 N.Y.3d 571,574-75 (2011).

[11] The court noted that counsel had acted "in good faith" in his request to "disclose" his investigation ex parte, (S.4); the court did not, as defendant now claims, suggest the adjournment request was in "good faith" (SSM.25,26).

be examined to determine . . . the likelihood that prejudice would be engendered"). Of course, the most likely reason for counsel's failure to file that motion then—just as now—is that the court already had found Elisa may have engaged in perjury during her testimony to assist defendant (T.418-19), suggesting any juror communications would be to defendant's benefit. See People v. Clark, 81 N.Y.2d 913,914 (1993)(CPL §330.30 motion properly denied where "record suggest[s] that defendant was, if anything, aided by whatever misconduct took place"). Ultimately, the court promised to "keep an open mind" and reserved decision on the merits (S.5-6), until the 440 motion was filed, thereby erasing any concern under CPL §440.10(3)(a) (SSM.27).[12] Thus, the court did not abuse its discretion as a matter of law in denying the adjournment request.

POINT FIVE

THE NISI PRIUS COURT APTLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

The Appellate Division found the trial "court properly declined to dismiss the indictment based on the People's decision not to present evidence to the grand jury about Morris, the person who had originally been charged with the murder." Hemphill, 173 A.D.3d at 480. As both courts found, "The prosecution has broad discretion in presenting its case to the grand jury and is not obligated to present" evidence tending

[12] Counsel made no attempt to explain why he was unprepared for sentencing that day, but the court still granted him time in court to prepare (compare S.8, with SSM.27).

to exculpate the accused. Id., citing People v. Mitchell, 82 N.Y.2d 509,515 (1993). That principle controls.

Regardless, defendant claims only that the prosecutor erroneously handled an evidentiary matter, an issue that does not support the "exceptional remedy of dismissal." People v. Thompson, 22 N.Y.3d 687,699 (2014). Thus, it is hardly surprising defendant can identify no appellate decision from this State wherein the decision not to submit evidence that another individual had been identified, but against whom charges were later dropped due to the prosecution's determination that the identification was unreliable, warranted dismissal of an indictment against a subsequent defendant charged for the same offense. Indeed, "the Grand Jury proceeding is not intended to be an adversary proceeding" and "is not a mini trial," People v. Lancaster, 69 N.Y.2d 20,30 (1986), which is what defendant's position would have rendered it. And, just as in Thompson, "given that the petit jury heard from [the witnesses defendant claims should have been called] and concluded that [their] testimon[ies] did not create a reasonable doubt . . . it is hard to image that [their] testimony[ies] before the grand jurors would have altered their determination that the evidence met the less exacting standard of reasonable cause." Id. at 704.

POINT SIX

DEFENDANT PRESENTS NO ARGUMENTS IN SUPPORT OF HIS REMAINING ISSUES.

Defendant asks this Court to review all remaining claims, save for Point Fourteen, from his brief. Nearly all these challenges (Points Four, Five, Six, Eight, Nine, and Eleven) include unpreserved claims, and, with one exception (Point Twelve), all constitutional challenges are unpreserved. Defendant also challenges many trial court evidentiary decisions; claims that can only be reviewed by this Court to determine whether the trial court abused its discretion as a matter of law (Points Four, Five, Six, and Seven). Otherwise, defendant's brief presents many factual, rather than legal disputes that do not fall within the scope of this Court's review. Thus, for these reasons, and those set forth in Respondent's Brief, these claims should be denied.

Respectfully submitted,

Noah J. Chamoy
Assistant District Attorney

Word Count Certification

I hereby certify that this brief was prepared on a Microsoft Word processing system, in Garamond typeface, font size 14, and footnote font size 13. It contains 6993 words as counted by the Microsoft Word counting system.

SA443

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March 6, 2020

CLAUDIA TRUPP
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RE: People v. Darryl Hemphill
APL-2019-00202
Rule 500.11 Submission

VIA EXPRESS MAIL
Clerk of The Court
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Your Honor:

Pursuant to Rule 500.11(e), we respectfully request permission to reply to Respondent's submission to this Court, which this office received on February 27, 2020. We also renew our request for the matter to be put on full course briefing.

POINT I

RESPONDENT'S CLAIM THAT THE EVIDENCE WAS LEGALLY SUFFICIENT IS BASED ON ITS MISREADING OF CRITICAL PORTIONS OF THE RECORD.

Respondent argues that the blue sweater containing appellant's DNA fully corroborated Burger's accomplice testimony (Respondent's Submission "RS." at 5).

That is not true because not a single witness identified the sweater recovered from the apartment as the one worn by the shooter. The sweater's relevance therefore was extremely minimal. See People v. Dashawn Deverow,__A.D.3d __, 2020 N.Y.Slip 01359 (2/26/20)(error to admit gun recovered 5 to 7 blocks away within hours of the crime where no witness was ever asked to identify the revolver as the same one used in the shooting).

Contrary to Respondent's contentions, Jimick did not mention the smell of gunpowder in his request for laboratory analysis of the sweater. His testimony was precisely the opposite (A385).

Respondent also misrepresents that Burger asked his brother to get rid of the blue sweater (RS. at 6). The parties stipulated that Burger urged his brother to discard a "shirt" (of unspecified color), not a sweater, a fact Respondent is not free to disregard on appeal (A384).

Respondent unsuccessfully attempts to portray Burger as a credible, consistent witness, rather than what he was -- an accomplice cooperator receiving extremely lenient treatment who repeatedly changed his story (RS. 4-5). Burger did not provide a credible explanation for "his only" discrepancy during his testimony (RS. 4). Rather, Burger identified Morris, then changed his story to name appellant as the shooter; he failed to tell the police that Morris possessed a different gun, the .357; he lied when he said appellant disposed of the murder weapon in the river. He then insisted that he had

"come clean" during his third police interview, but then admitted on cross that he lied about throwing the gun in the river himself (A21). Such inherently contradictory testimony by an accomplice cannot support a finding of proof beyond a reasonable doubt.

Respondent's reliance on the flight evidence is also misplaced (RS. 7). Indeed, Respondent concedes that the details of the alleged flight were provided by Burger and cannot be divorced from his accomplice status. Id. (conceding that "Burger was the source of many of these details" concerning the alleged flight). Contrary to Respondent's claims, it was not appellant's burden to rebut the evidence of flight. Id.

Consciousness of guilt evidence has consistently been viewed as weak because even an innocent person might flee to avoid a wrongful conviction. People v. Bennett, 79 N.Y.2d 464, 470 (1992). This case is not one like People v. Cintron, 95 N.Y.2d 329 (2000), where appellant led the police on a high speed chase. Rather, some time after the incident, appellant drove his cousin out of town; he returned a short time later and retained an attorney to interface with the police. This evidence of "flight" was even less convincing than the jury was led to believe.

In comparison to Burger's contradiction-riddled testimony, the evidence against Morris was strong. Apart from the multiple eyewitness identifications, given after a prolonged encounter in broad daylight, Respondent has never been able to explain why Morris had bruised knuckles at the time of arrest -- if he had not participated in the fight

preceding the shooting (RS. 8). Even now, Respondent can offer no explanation for this compelling evidence inculpating Morris.

Respondent now concedes that appellant did not have a tattoo on his right arm, arguing that he had time to have it removed (RS.7). But Respondent expressly argued before the Appellate Division, contrary to the evidence, that appellant had a tattoo on his right arm (A276). Appellant, on reply observed this misstatement of the record (A399). But the Appellate Division was misled and found that appellant "did indeed have a tattoo on his right arm." (A10). Respondent has thus now conceded that the Appellate Division erroneously considered a critical fact in upholding this conviction.

In sum, while a rational person might believe that appellant is possibly guilty, it is irrational to conclude on this record that all reasonable doubt of appellant's guilt has been eliminated. Accordingly, the conviction should be reversed and the indictment dismissed.

POINT II

THE DEFENSE ARGUMENT CONSISTENT WITH THE COURT'S IN LIMINE RULINGS DID NOT MISLEAD THE JURY SO AS TO OPEN THE DOOR TO TESTIMONIAL HEARSAY VIOLATING THE CONFRONTATION CLAUSE.

As Respondent acknowledges, the prosecutor and the court agreed that the .9mm bullet recovered from Morris's bedroom within hours of the shooting was relevant to his identity as the shooter (RS. 8); see also People v. Negron, 26 N.Y.3d 262, 269

(2015)(evidence that third party arrested in close proximity to the crime "possessed weapons and ammunition including the type used in the shooting" was relevant to supporting third-party defense). Respondent suggests that there was something misleading about counsel's opening statement (RS. 9), but it did no more than properly alert the jury to inferences the defense sought it to draw from the evidence the court and prosecutor agreed was relevant. Nor was counsel's questioning of Jimick (RS. 10), in any way misleading.[1] The trial prosecutor never objected to either counsel's opening or any of the questions about which Respondent now complains. This silence is telling, for certainly if the prosecutor believed that the defense was unfairly exploiting a favorable ruling to mislead the jury, he would be expected to object.

Respondent urges this Court to adopt a door-opening doctrine based solely upon relevance (RS. 13-15 & fn.6). According to Respondent even "appropriate" and "necessary" argument can "fairly open the door to rebuttal evidence." Id. Thus, Respondent advances a rule that by raising a valid defense, a criminal defendant opens the door to inadmissible evidence if it is relevant to rebut the defense. Id. But that has never been the law in New York. See People v. Reid, 19 N.Y.3d 382 (2012); see also Crawford, 541 U.S. 36 (prosecution could not rebut self-defense claims through

[1]To the extent Respondent now attempts to argue that the admission of uncross-examined statements made during a guilty plea do not violate the Confrontation Clause those arguments have been squarely rejected by the United States Supreme Court. Crawford v. Washington, 541 U.S. 36, 64, 65 (2004)(ruling such statements to constitute testimonial hearsay). This Court has also directly addressed the issue in People v. Hardy, 4 N.Y.3d 192, 198 (2005)("there can be little debate over whether a plea allocution" is "testimonial").

testimonial hearsay of unavailable witness).

Tellingly, none of the door-opening cases upon which Respondent relies supports such a rule (RS. 14). In People v. Massie, 2 N.Y.3d 179, 185 (2004) counsel sought an in limine ruling about whether he could elicit a suggestive photographic array without opening the door to a non-suggestive lineup. The trial court's ruling, upheld on appeal, found that introducing only the suggestive procedure would provide an incomplete and misleading picture concerning what had transpired during the pre-trial identifications. Id. In People v. Santos, 150 A.D.3d 1270 (2d Dept. 2017), the contested statements were not admitted for their truth, but to explain the circumstances surrounding the confession. Finally, in People v. Taylor, 134 A.D.3d 1165 (3d Dept. 2015), the defense elicited favorable hearsay statements from a non-testifying co-defendant, opening the door to his inculpatory statements to prevent the jury from being misled. These cases do not involve fact-based arguments relating to the admission of physical evidence recognized as relevant by both the court and prosecutor pursuant to the court's in limine rulings.

As Respondent also concedes, prior to admitting the testimonial statements in Morris's plea allocution, the court had already reversed it prior ruling and allowed the prosecution to admit the .357 caliber ammunition recovered from Morris's bedroom (RS. 15). While Respondent characterizes the defense objection to this reversal as evidence of counsel's intent to mislead the jury (RS. 15), counsel was obviously upset that the

court's shifting rulings impeded his ability to chart the course of the defense and appear forthcoming with the jury.

Appellant's complaint does not "boil down" to the court's failure to mouth the words "misleading" prior to admitting the evidence, as Respondent contends (RS. 15). The complaint is that presumptively unreliable evidence was placed before the jury deciding appellant's fate. See Crawford v. Washington, 541 U.S. at 67 ("the Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we no less than the state courts, lack authority to replace it with our own devising"). While the court cited to Reid, it did so only to support the general proposition that a party could open the door to testimonial hearsay; the court did not invoke the operative aspects of the opening-the-door doctrine (RS. 15). Instead, as Respondent acknowledges, the court deemed counsel's actions "appropriate," not misleading (RS. 15). While Respondent argues that the court was merely being polite in describing counsel's actions, the court's statement and its ruling reflect a basic misunderstanding of the Reid doctrine. (RS. 15).

The error cannot survive constitutional harmless error analysis, contrary to Respondent's arguments (RS. 16). Respondent cannot and does not argue the proof of guilt was overwhelming, the first prong of any harmless error analysis. As the evidence was insufficient, there can be no finding that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and a new trial ordered.

POINT III

COUNSEL PRESERVED HIS REQUEST TO CALL THE 2007 GRAND JURY REPORTER AFTER ESTABLISHING THE FOUNDATION FOR IMPEACHMENT.

The record does not support that counsel abandoned his claim to call the 2007 court reporter after establishing the foundation for impeaching Brenda Gonzalez with her prior grand jury testimony identifying Morris as the shooter, contrary to Respondent's claims (RS. 19). Counsel specifically alerted the court that most of his questions relating to Gonzalez's testimony before the grand jury did not mention the year of the presentation (A1482). "All of the questions, other than the first one. . . do not refer to a date of the grand jury testimony," counsel stated (A1483). The court responded that there was an "implied sense that this all occurred in 2006, which is not the correct conclusion" (A1486). Counsel then requested that if the prosecutor refused to stipulate that Gonzalez had testified in 2007 before a grand jury, the defense be "given access to the reporter and ask and have her testify that she was the grand jury reporter in 2007 and there was a proceeding in regard to this case and that Ms. Gonzalez was asked the following, was asked these questions and gave those answers, similar to what the district attorney did"(A1485). The prosecutor opposed, objecting that the proper foundation had not been established to permit the impeachment (A. 1485).

The court then ruled:

> Counsel cannot impeach this witness by reference to the 2007 grand jury minutes or stenographer, because he did not present the question in a way that confronted the witness with 2007, identified as 2007 minutes, and, therefore, given the questions that pertain to 2006, the witness's answers would technically be correct and not impeachable.. . .I keep on coming to the conclusion that there is no basis for having the stenographer from 2007 testify when there was no impeachment regarding the 2007 minutes (A1487).

The court advised that it would think about the issue further (719).

Thus, contrary to Respondent's argument, the court did not "repeatedly side with counsel" on this issue (RS. 21). The record belies this claim.

That the court was open to reconsidering its ruling, did not mean that the preservation requirements were unmet. See People v. Cantave, 21 N.Y.3d 374 (2013)(to preserve an issue for review, counsel must register an objection and apprise the court of the grounds upon which such objection is based at a time of the erroneous ruling or when the court had an opportunity to change the same). Here, counsel made his position known to the court in plain terms–he sought to call the 2007 court reporter. The court ruled that counsel could not do so. Criminal Procedure Law §470.05(2) sets forth that "a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter. . .sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered." Given counsel's specific request to call the 2007 reporter and the court's

ruling on the issue, the court was apprised of counsel's request and the issue is preserved as a matter of law.

Respondent also incorrectly argues that the dissent did not "take issue" with the majority's preservation analysis in ruling that this error warranted reversal (RS. 20). To the contrary, the dissent specifically found that the court "prevented counsel from cross-examining a critical witness to establish that she had identified Morris unequivocally as the shooter in testimony before the grand jury" and that "the court's ruling left the jury with the impression that the witness had never previously identified Morris as the shooter and that the defense was fabricating evidence" (A23, A25)[emphasis added].

Respondent's argument that counsel engaged in "a calculated decision to trip up the witness" makes no sense (RS. 22). Counsel had every incentive to establish the impeachment clearly. It has never been disputed that counsel read the 2007 grand jury minutes to Gonzalez accurately and even attempted to show them to her so that she could accurately recall her grand jury testimony during which she repeatedly identified Morris as the shooter. It was the prosecution that objected to counsel's attempts to refresh Gonzalez's memory of her prior testimony. As the dissent correctly found, the prosecution's efforts "were designed to mislead the jury to conclude that the witness had never identified Morris under oath to the grand jury" (A25). Accordingly, as the dissent found, the error denied appellant a fair trial and warrants reversal (A26).

POINT IV

APPELLANT'S SINGLE REQUEST FOR AN ADJOURNMENT IMPLICATED HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO AN UNBIASED JURY AND THE COURT APPLIED THE WRONG LEGAL STANDARD IN DENYING THE REQUEST.

Respondent characterizes appellant's request for a single adjournment as "last minute" and argues that the court acted within its discretion in denying that request because it did not implicate any constitutional concerns (RS. 23). In all respects these arguments are wrong.

Regarding timing, the jury returned its verdict December 7, 2015 (A115). The court placed the matter on for sentencing January 6, 2016 (A116). Prior to that date, counsel learned of the juror misconduct and wrote to the court to apprise it of the issue (A. 2574). Because of the court's holiday schedule, it did not receive counsel's letter requesting an adjournment until the day before the scheduled sentencing date. Id. Accordingly, the request for adjournment was not "last minute," but made prior to the sentencing date as soon as counsel became aware of the issue (RS. 23, 24).

Respondent is also wrong that the request did not implicate appellant's right to a trial by an impartial jury (RS. 23). Most recently, this Court recognized that claims of juror misconduct implicate a criminal defendant's most "basic" constitutional right to an impartial jury. People v. Neulander, 34 N.Y.3d 110 (2019). Respondent simply ignores this authority.

Similarly, Respondent ignores the procedural distinctions between C.P.L.§330.30 and §440.10 motions and concedes the court's failure to recognize them (RS. 25, fn.10). But the court's erroneous equating of the two motions meant it applied the wrong legal standard in assessing counsel's request. As such, the court's denial was not an exercise of discretion but was grounded in legal error.

Respondent's argument that the court denied the single adjournment request because the motion lacked merit makes no sense (RS. 25). The court could not judge the sufficiency of the allegations prior to reviewing the motion.

There was no lack of diligence on counsel's part. Within a matter of weeks, during the holiday season, he had managed to obtain an affidavit from the witness and the contact information for the juror. Only the holidays had prevented counsel from completing the investigation. Respondent recognizes that the investigation was essentially complete and counsel simply needed time to draft the motion (RS. 25). Under these circumstances, it is unlikely that the defense would have sought additional delay, contrary to Respondent's suggestion (RS. 24).

As the request for adjournment was timely made, in good faith, and implicated appellant's fundamental right to a fair jury, the court's denial of the request based on its application of an erroneous legal standard warrants remanding the matter for de novo sentencing proceedings.

POINT V

THE PROSECUTION DOES NOT HAVE UNFETTERED DISCRETION TO WITHHOLD EXCULPATORY EVIDENCE FROM THE GRAND JURY.

Respondent urges this Court to adopt a standard that would allow the prosecution to withhold all exculpatory evidence from the grand jury, dismissing this claim as merely "an evidentiary matter" (RS. 27). This argument ignores that a prosecutor exercises a dual function before the grand jury, to secure indictments and "to see that justice is done." People v. Lancaster, 69 N.Y.2d 20, 26 (1986).

Respondent argues that there is no appellate authority on this issue, but does not dispute that the lower trial courts have dismissed indictments due to the prosecution's failure to disclose exculpatory eyewitness identification evidence (RS. 27). Given that the trial courts are called upon to decide motions to dismiss, without the guidance of "appellate decision from this State," full briefing should be ordered on this issue (RS. 27).

At the very least, where another grand jury has indicted someone else, making a finding of probable cause to believe that person committed the crime, the prosecution should be duty-bound to present exculpatory evidence to any subsequent grand jury considering the same charges. Such a rule is consistent with the prosecution's duty of fair dealing and candor to the courts. See People v. Thompson, 22 N.Y.3d 687, 697 (2014). The rule of unfettered prosecutorial discretion in evidentiary matters espoused

by Respondent undermines the grand jury's basic function to protect the individual from unfounded prosecutions.[2]

Respectfully submitted,

Claudia Trupp

cc: ADA Noah Chamoy
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[2]Appellant again asks to this Court to review all the issues mentioned in Point VI of his initial submission.