No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ of Certiorari
to the Court of Appeals of New York

JOINT APPENDIX

Noah J. Chamoy
Assistant District Attorney
OFFICE OF THE BRONX
COUNTY DISTRICT ATTORNEY
198 East 161st Street
Bronx, New York 10451
Telephone: (718) 838-7142
Chamoyn@bronxda.nyc.gov

Counsel of Record for Respondent

Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Counsel of Record for Petitioner

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RELEVANT DOCKET ENTRIES

Date Filed	Docket Description
04/23/2013	Information / Indictment filed
09/21/2015	Trial commences
12/07/2015	Jury verdict
01/06/2016	Judgment
01/08/2016	Notice of appeal to Appellate Division

IN THE SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT
People of the State of New York v. Darrell Hemphill
Indictment No. 1221/2013

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
01/08/2016	Notice of appeal filed
03/16/2019	Oral argument
06/11/2019	Judgment filed
06/17/2019	Application for review in the Court of Appeals

IN THE STATE OF NEW YORK COURT OF APPEALS
People of the State of New York v. Darrell Hemphill
APL-2019-00202

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
06/17/2019	Application for review filed
06/25/2020	Opinion issued

[148]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART T-11

THE PEOPLE OF THE STATE OF NEW YORK,
- against -
NICHOLAS MORRIS,
Defendant(s).

April 10, 2008

BEFORE:

HONORABLE MICHAEL GROSS, Justice

(Same appearances as previously noted.)

* * * *

[207:20]

THE COURT: So noted. Were the parties ready for the jury to be returned for the People's opening statement?

COURT OFFICER: All rise, jury entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seats.)

THE COURT: All parties may be seated. The record [208] will reflect all jurors are present and properly seated.

Good afternoon ladies and gentlemen of the jury. It's nice to see you after this two day break. At this time, as I indicated to you earlier in the week, we will be hearing the prosecutor's opening statement.

Mr. Karen, you may deliver your opening.

MR. KAREN: Thank you, Judge. Good afternoon. As the judge told you, it is the People's obligation to tell you in openings what we intend to prove and this is it.

On Easter Sunday, April 16, 2006, a bright, sunny Easter Sunday at about 1:45 in the afternoon on Tremont Avenue, a busy street with lots of people on the street and lots of cars going by, Joanne Cinabria, the mother of two-year-old David Pacheco Jr. was driving a Honda Odyssey van with her two-year-old baby strapped in the back seat and other family members. She was going to pick up her husband, David Pacheco Senior and they were going to church and to dinner. She was driving on East Tremont Avenue near Harrison Avenue in the Bronx when that man, Nicholas Morris, opened fire on a totally different group of people. A group of five young Hispanic men and women.

A bullet that Morris intended for that group of people, and there were several shots fired, went through the side sliding door of Ms. Cinabria's Honda and it virtually, instantly killed two-year-old David Pacheco, Jr. [209] You'll hear about the attempts to save him and to resuscitate him. But for all intents and purpose, he was dead when he was shot, as the medical examiner, Dr. Gill, will tell you when he testifies early next week.

Now, there were a group of five eyewitnesses who were being shot at and all of them will testify here, the intended target of the Defendant Morris, were Marisol Santiago, twenty years old, her boyfriend Juan Carlos

Garcia, 24 years old, her mother Brenda Gonzalez, 41 years old, Brenda's boyfriend Jose Castro, 27 years old, and their cousin John Eric Vargas, 24 years old.

You're going to learn that four of these eyewitnesses separately and independently viewed a lineup on April 18, 2006, the day of the arrest. Three of the eyewitnesses, Brenda Gonzalez, Marisol Santiago, John Eric Vargas, independently and separately identified that man, Nicholas Morris. The fourth witness, Juan Carlos Garcia did not identify anybody, did not identify anybody. And you will learn that several nine millimeter shell casings were recovered by the crime scene unit, and various pieces of ballistics, damaged bullets, bullets recovered from various areas and the bullet that actually killed the baby. And you're going to learn that there was a ballistics comparison made. And although no gun was recovered, the ballistics expert, Detective Fontanez can tell you all of [210] the ballistics could be matched, the casings and the bullets, with sufficient characteristics all came from the same gun, one gun.

Interestingly, what was used here was a nine millimeter gun. And you will learn that there was a search done of the defendant's bedroom and we recovered in that search, live nine millimeter ammunition in his bedroom. But aside from a live nine millimeter round, and some [.]357 ammunition, that's a different type of gun. You will learn that under his mattress we recovered an assault rifle and an eight millimeter prop or movie gun.

So, you're going to have a lot of eyewitness testimony and the ballistics evidence. And if you would like to hear the defendant's side of the story, because

we're going to be introducing different statements that the defendant made.

Now, some people might say if the statements are made —

MR. BARKET: Objection, Judge. I have an objection and an application.

THE COURT: Both Counsel may approach.

(Whereupon, an off the record discussion was held.)

THE COURT: The objection is overruled at this time[.] [211]

MR. BARKET: I'm sorry, Judge. I didn't state the basis of the objection on the record.

THE COURT: There will be a full record, I'm just not going to shuttle the jury in and out, but there be will be a full record as to the basis of the objection.

MR. KAREN: We're going to introduce three different statements made by Nicholas Morris. Only one of them was made to the police, and I'm going to be going through all of them in the opening. One was made to Channel 12 News. It was broadcast, I'm going to show it to you. No police there. One was made to another inmate. You're going to hear from that inmate. One was a written statement made to the police.

Now, you're going to hear from Anthony Gonzalez and he's going to tell you that he had a conversation with Nicholas Morris around July 4th of 2006 and that man, Nicholas Morris, told Anthony Gonzalez, who knows nobody in this case, no family members, no eyewitnesses, no defendants, no anybody and who will

tell you he had read nothing about the case. Morris admitted that he did the shooting. It was a revenge shooting, and Gonzalez will tell you this is what I was told by the defendant. And you'll hear that the information given to Anthony Gonzalez could only come from somebody who was present, could only come from somebody involved, from a shooter with [212] information that even the eyewitnesses don't know.

And Mr. Gonzalez, you'll hear about his background. He has a criminal record, but he will testify here and he will testify that he requested nothing from the prosecution to cooperate on this case.

Now, that man, Morris, tells Gonzalez that he opened fire on this group of Hispanics. Morris claims there were two other perpetrators involved, Ronell Burger Gilliam, who you will hear has been separately arrested and Darryl Hemple. According to that man, Morris, Morris claims that Darryl Hemple pulled a gun and Morris said to him, hell no, let me get that. And Morris told Gonzalez he took the gun and he opened fire, firing at least three shots at the group of Hispanics that had been involved in an earlier fight. Morris then tells Gonzalez, Hemple took the gun back and fired four more shots in the direction of one particular Hispanic, that according to Morris was running into or getting into a van. Morris doesn't say what bullet killed the baby or even that they were aware that a baby was killed. There is one eyewitness who will testify as to which bullet hit the van.

Juan Carlos Garcia had gone to a grocery store to get a bottle of water for John Eric Vargas, who had been injured in the earlier fight and we will talk about that. He was crossing the street when Morris opened

fire, and he [213] will tell you the first bullet fired is the bullet that hit the victim's van as it was going down Tremont Avenue. According to what Morris told Gonzalez, Morris Burger or Gilliam, and Hemple ran to Burger's apartment where they decided that Burger would get rid of the murder weapon. That's his story. It's interesting the eyewitnesses will testify and tell you that Morris is the shooter.

Everybody who testifies here and who's a witness will put Burger there. The evidence will show that Burger was a distinctive individual, weighing about 400 pounds, having one bad eye and long dreadlocks, but no eyewitness will place this Darryl Hemple at the scene. It is that man, Morris, who claims that he did the shooting with Darryl Hemple. Morris told another story.

He surrendered to Channel 12 News on April 18, 2006 and he gave them a long interview which you will see, I believe, next Thursday. No police were involved and you will see that the questions being asked were what one might call, to use a baseball phrase, softball questions. And you'll see that in that interview Mr. Morris places himself at the scene of the shooting. He never mentions this Darryl Hemple. The only person he mentions is Burger. And you'll also see that on April 18, 2006 Morris gave Detective Jiminick a written, signed statement and we will put that into evidence, and as you examine that statement [214] you will see there is no mention of Darryl Hemple.

What I'm going to do now is to go through the charges or some variation will be presented to you at the end of the case, and then I'm going to tell you specifically what the People's proof will be. The

charges are contained in an indictment. It reads as follows. Supreme Court of the State of New York, County of Bronx. The People of the State of New York against Nicholas Morris, Defendant.

First count, the grand jury of the County of the Bronx by this indictment accuses the Defendant, Nicholas Morris, of the crime of murder in the second degree committed as follows: The Defendant, Nicholas Morris, on or about April 16, 2006 in the County of the Bronx, under circumstances evincing a depraved indifference to human life, did recklessly engage in conduct which created a grave risk of death to another person, and thereby caused the death of David Pacheco Jr. by firing a loaded pistol in the direction of a group of people, and thereby shooting and killing David Pacheco Jr. That murder count is known as depraved indifference murder.

The second count is a different theory of murder, and in all likelihood one or the other will be submitted to you at the end. The second count is intentional murder. It reads as follows: The defendant, Nicholas Morris, on or [215] about April 16, 2006 in the County of Bronx, with intent to cause the death of a person, did cause the death of David Pacheco Jr. by firing a loaded pistol at a group of people, and thereby shooting and killing David Pacheco Jr.

The third count is another homicide count. It's called manslaughter in the first degree. And the charge is that Morris, on April 16th, Easter Sunday 2006 in the Bronx killed two-year-old David Pacheco while acting with intent to cause serious, physical injury to a person, and he did this by firing a loaded

gun towards this group of people who were on the street on Tremont Avenue.

The last charge involves the weapon. And it's charged that on Easter Sunday, '06 in the Bronx, Morris possessed a loaded gun with intent to use it unlawfully against another. Those are the charges. Let me give you who the key parties are, and then I'll tell you what the proof will be. The victim, as I said, is two-year-old David Pacheco Jr., his mother is Joanne Cinabria. She will testify here first. The assigned detective is Detective Ronald Jiminick of the 46 Precinct. It was his case. There are five eyewitnesses who will tell you they were fired at, and they are Brenda Gonzalez, Marisol Santiago. Marisol will likely be our second witness. We start testimony Monday, we will start with Ms. Cinabria, the mother of the deceased, and then an eyewitness, Marisol [216] Santiago. Brenda Gonzalez, Marisol Santiago, Jose Castro, John Eric Vargas, Juan Carlos Garcia. There are other witnesses. And Anthony Baez will tell you he observed the fist fight. There was a good samaritan, Angelo Cruz. He was an off-duty emergency medical technician who tried to save the life of the baby, and actually took the baby and the mother to the hospital, flagging down a cab. He's going to testify, I think, on Tuesday. The medical examiner is Dr. James Gill. The evidence will show that man, Nicholas Morris, is the killer. You'll hear about Ronell Burger Gilliam, Morris' good friend, a man about five ten to six feet, over 350 pounds who had been separately arrested. You will hear about Darryl Hemple, that's Gilliam or Burger's cousin. And you will hear from Anthony Gonzalez, the man who tells you Morris told him what happened in July of 2006.

So, let's start at the beginning. Here's what the testimony will show. It's a warm, sunny Easter Sunday just before two p.m., April 16, 2006. On East Tremont Avenue and Harrison Avenue there are a lot of people on the street and a group of five people who had just been shopping are simply walking on the street. Marisol Denise Santiago, her mother Brenda Gonzalez, Marisol's boyfriend, Juan Carlos, Brenda's boyfriend, Jose Castro and John Eric Vargas. They were walking down the street when that man, Morris, across [217] the street yelled, what is up, to them. John Eric Vargas responded back, what is up. But all the witnesses will tell you they didn't know this guy. There were some words exchanged and the group of five, two women and three men, kept walking. Shortly thereafter, Morris starts walking up the street behind this group with Burger, the 400 pound guy. You're going to learn that Morris is approximately six three, six foot four. Morris and Burger tower over the group that they are approaching, but they didn't win the fist fight. You're going to hear that Morris and Burger initiate a fight with John Eric Vargas and Juan Carlos Garcia. It's a fist fight, but at one point John Eric Vargas is pushed into the street and is actually hit by a passing vehicle and is knocked down, and he gets up and he continues fighting.

The fight ends when, according to the witnesses, Morris runs off being followed by John Eric. The testimony will be that Morris runs towards University Avenue, and you will learn that Morris lived at 1962 University Avenue. You're going to hear about the search of his bedroom. Burger never leaves the scene. So, you have the eyewitnesses at the scene and Burger at the scene.

About fifteen minutes later, the witnesses will tell you that man, Morris, comes walking back and he has a gun. And he pulls the gun and he fires, witnesses will [218] tell you, anywhere from five to seven shots at them. Now, the witnesses will tell you that they don't stick around watching every shot. Depending on who the witness is, they either see Morris fire one shot or two, and then they are scrambling. They ran into a building, I believe 1731 Harrison, but the witnesses will tell you they saw that man, Morris, fire. They'll tell you they saw only one man with a gun, the defendant.

Now, two days later Morris surrenders and he's taken to a lineup. You will actually see photos of the lineup, and you will hear that four of the eyewitnesses were round up and they were brought in one at a time to view the lineup. Three witnesses pick that Defendant, Morris, out of the lineup. The four witnesses. Juan Carlos makes no identification.

Burger will be placed at the scene by everybody. No eyewitness will place Darryl Hemple at the scene. Now, the circumstances of the arrest will be brought out. You will learn that Detective Jiminick went to the defendant's apartment or what he believed to be the defendant's apartment, looking for a picture of him from his mother. You will also learn about observations made in the bedroom, and a search warrant, and you will learn in the defendant's bedroom he had a live nine millimeter cartridge, at least three live 357 cartridges, an assault rifle under his [219] mattress, and sticking out from under his mattress, an eight millimeter prop or movie gun, which you will see looks exactly like a real gun.

Burger is arrested for this case several months later. Now, the defendant will surrender on April 18, 2006 and he'll have a full interview with Channel 12 News, which is where he's arrested.

Now, let me give you specific details of what you're going to hear from the witnesses and from the exhibits. Anthony Gonzalez will tell you that he was an inmate with Nicholas Morris in protective custody around July 4, 2006. He will tell you he knew nothing of this case. He didn't read about it. He will tell you that he had recently been brought down from upstate. He was in jail, and you're going to hear about his record, and he has a criminal record, there is no doubt about it. But he's going to say he met Morris when they were playing basketball in the prison yard at Riker's Island, and Morris basically asked Mr. Gonzalez to do him a favor, and Morris told his story to Gonzalez. Gonzalez is in his forties, he doesn't know the victim's family, he doesn't know any eyewitness. He didn't know Burger, he didn't know Hemple, he didn't know Detective Jiminick, he didn't know Morris. He didn't know anybody involved in this case. What he's told is this. Morris said on Easter Sunday 2006 he was [220] home, when he got a phone call from Ronell Gilliam. According to Morris, Gilliam says me and Darryl or Darryl Hemple were involved in a gang fight with Latin Kings over drug turf. This is Norris' story to Anthony Gonzalez. According to Morris, Burger said that he and Darryl left to get a black semi-automatic. Burger asks Morris to meet them at Tremont and Harrison Avenue. Then, according to Morris, he'll say he got dressed, he went down and now he's standing with Burger and Darryl Hemple. And he's asking who are the people you're hassling with? Then, according to

Morris, Darryl Hemple pulls a gun. Morris says to Hemple, let me do this, and he takes the gun and Morris will tell Gonzalez, he fired at least three shots at the group of Hispanics across Tremont Avenue. Then Morris says something interesting. He says that Hemple takes the gun back and fires four more shots at a Hispanic gang member getting in a van. According to Morris, he didn't know anybody was killed or a baby was killed until later.

Additionally, Morris told Anthony Gonzalez that Burger, Hemple and Morris ran up to Burger's apartment after the shooting, and that it was decided that Burger, Ronell Gilliam, would dismantle the gun and get rid of it. You're going to hear that Anthony Gonzalez wrote a letter to the district attorney that he came in, that he gave all the details, and that he never asked for anything in return [221] for his testimony on this case. You will be told that he was offered two things. That a letter would be written to the parole authorities on his case. He's currently in jail for a plea to grand larceny, and that when he gets out of jail, an attempt would be made to arrange to get him housing.

Now, you're going to get other evidence. You're going to hear from the medical examiner, Dr. Gill, the ballistics expert, Detective Fontanez, crime scene detective, Detective Cunningham, and you're going to learn interesting details. Every shot was fired from one gun, the same gun, a nine millimeter gun, and that matches the confession that Morris gave to Gonzalez and that matches the live nine millimeter round found in the defendant's bedroom.

Now, let's take a brief look at some of the other statements that you're going to hear from the

defendant. The Channel 12 News interview will be offered, there are no police there. He is not yet under arrest. He is arrested at the end of, or during the interview. During that interview, and it's somewhat lengthy, there is no mention of Darryl Hemple. According to Morris, when he speaks to Channel 12, it is Morris and Burger. Morris places himself at the scene. He said the night before he was partying and drinking. He was hung over, and he said that it's Sunday [222] and he was asleep at 1:30 when he got a wake-up call to come down and join Burger, who claimed that he had been jumped.

Morris claims that he went to the scene to back up Burger, and as he got to the scene, he heard shots, but saw nothing. In fact, when asked, Morris says and this is a quote, I have no theory about what happened, but he does admit meeting up with Burger and going up to Burger's apartment. You're also going to see a written statement that the defendant gave to the police after the Channel 12 interview. In that statement, Mr. Morris said that he was sleeping when Burger phoned him sometime around 1:30 on Sunday. Again, there will be no mention of Darryl Hemple, but Morris says Burger told him some dudes tried to jump him. Morris says I get dressed, I go to Harrison and East Tremont Avenue. When the shooting occurs, Morris says that he goes with Burger to Burger's apartment. What he says is I didn't see the shooting. I hear shots, we see Burger, we go up to the apartment and in Burger's apartment, which is and you'll hear, possibly a half block or so from the scene of the shooting. Morris says he asks Burger or actually Burger's brother for a change of clothing. And then Mr. Morris says he goes home.

When Detective Jiminick was talking to that man, Nicholas Morris, on April 18, 2006, Jiminick made an [223] interesting observation. It is the claim in all the statements you'll hear introduced by the People, that Morris denies being in a fight, being in a fist fight. However, Detective Jiminick observed on April 18, 2006 that Morris had bruised knuckles on his hands, as though he had recently been in a fist fight.

And so, you're going to get the five eyewitnesses, the intended target of this Brenda, Marisol, John, Eric, Jose, Juan Carlos, several other civilians who were present either where the baby ended up being shot or who were at the scene. The medical examiner, the crime scene detective, Detective Jiminick, the ballistics expert, the lineup testimony, testimony regarding search of the defendant's bedroom and what was found, and several police officers who had been at the scene. And you'll hear about that man's confession to Anthony Gonzalez, and when you add it all up, guilt of that man, Nicholas Morris, for murdering two-year-old David Pacheco Jr. Will be proven beyond any reasonable doubt, guilty of murder. Thank you.

THE COURT: Mr. Karen, thank you. [223:20]

* * * *

[1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART T-11

THE PEOPLE OF THE STATE OF NEW YORK,	x :	Indictment: 1674-2006
- against -	:	
NICHOLAS MORRIS,	:	Plea
Defendant(s).	x	

Supreme Courthouse
265 East 161st Street
Bronx, New York 10451
May 29, 2008

BEFORE:

HONORABLE MICHAEL GROSS,
JUSTICE

APPEARANCES:

ROBERT T. JOHNSON, ESQ.
For the People
District Attorney – Bronx County
BY: DANIEL MCCARTHY, ESQ. &
EDWARD TALTY, ESQ.
Assistant District Attorneys

BARKET, MARION, EPSTEIN &
KEARON, LLP
Attorney for the Defendant
666 Old Country Road, Suite 700
Garden City, New York 11530
BY: BRUCE BARKET, ESQ.

SHAMEEKA HARRIS, CSR, RMR, RPR
Senior Court Reporter

[2]

COURT CLERK: 1674 2006, Nicholas Morris.

MR. MCCARTHY: Daniel McCarthy.

MR. BARKET: Bruce Barket.

THE COURT: Mr. Barket, I understand you wish to waive your client's production for the limited purpose at this time.

MR. BARKET: I do indeed. We want to advise the Court as far as the status of the case.

MR. MCCARTHY: Your Honor, after some extensive conferences between myself and Mr. Barket, what we would like to do, with the Court's indulgence, Mr. Morris has agreed to speak with the office of the district attorney about the case and pending the outcome of the – those proceedings we would ask the Court to call the case again this afternoon at which time we will continue with the case.

THE COURT: So noted. Mr. Barket, anything you wish to add to the record at this time with respect to the request for a second call?

MR. BARKET: No, I think that makes a great deal of sense. I know Mr. Talty worked hard over the last, I guess, four or five weeks to get to the point where, hopefully, this matter will be resolved as it relates to Mr. Morris at the conclusion of business today.

THE COURT: The matter will be second call during [3] the afternoon session at which time Mr.

Morris will be produced in this part. Second call for more information in the part.

(Whereupon, there was a pause in the proceedings.)

COURT CLERK: This is a recall of indictment 1674 of 2006, People of the State of New York against Nicholas Morris.

Appearances.

MR. BARKET: For Mr. Morris, Bruce Barket. Good afternoon.

MR. MCCARTHY: Office of Robert Johnson by Daniel McCarthy and Edward Talty and Mr. Talty will be here momentarily.

THE COURT: Mr. McCarthy, good afternoon.

MR. BARKET: Judge, would you like us to approach?

THE COURT: I prefer to have all discussions on the record. Mr. McCarthy, are you prepared to state the People's position on the record?

MR. MCCARTHY: I prefer to defer to Mr. Talty on that because he is 100 percent speed on that.

THE COURT: What position are you?

MR. MCCARTHY: Seventy-five.

MR. BARKET: The application we made is dependent upon the Court's inclination to go on.

THE COURT: While awaiting the arrival of [4] Mr. Talty, both parties may be seated. Both counsel may approach. The record will reflect Mr. Talty has now entered the well area. Please approach.

(Whereupon, there is a discussion held off the record, at the bench, among the Court, both assistant district attorneys and Mr. Barket.)

(Whereupon, the following discussion takes place on the record in open court.)

THE COURT: This matter was second call from this morning when the parties indicated to the Court in the absence of the defendant, Mr. Morris, that further investigation was being undertaken by the People with respect to the viability of the homicide prosecution. The parties well remember that the matter was sent to this court for hearing and trial, that a hearing was conducted in March of 2000 and actually it was sent just for trial. There was a hearing ordered with respect to a Massiah issue that was continuing during trial but the jury selection was completed during a period late March of this year through April 4th and the trial actually commenced with opening statements on the 11th of April.

At that point, Mr. Barket had a meeting with the district attorney and ultimately was successful, apparently, in persuading the district attorney to take a second more detailed look at the proof in this case. [5] Accordingly, when the defense asked for a mistrial on April 14th of 2008, the district attorney – well, not joining in the motion – had no objection and a mistrial was declared and the matter has been now pending for the next approximately six weeks. Mr. Talty.

MR. TALTY: Your Honor, at this point, we have had the conference that I mentioned on the record earlier. We came to court this afternoon believing that there would be a disposition of this case.

THE COURT: Why don't you outline what your

proposed disposition is.

MR. TALTY: My understanding of the disposition was that the defendant would plead guilty to a class D violent felony specifically criminal possession of a weapon in the third degree for a gun that he possessed, for a loaded and operable gun that he possessed on the day in question, April 17th – April 16th of 2006. As a result of that application, should the court accept that plea of guilty, the People were prepared to dismiss the current indictment on the – currently before the Court.

THE COURT: And, perhaps, you can explain, Mr. Talty, why you prepared paperwork for a plea on a Superior Court Information involving the charge criminal possession of a weapon third degree notwithstanding the fact that the fourth count indictment against Mr. Morris [6] includes, as count four, criminal possession of a weapon in the second degree.

MR. TALTY: Your Honor, the proof before the grand jury, which resulted in the indictment currently before the Court, was proof relative to a .9-millimeter handgun. The grand jury heard evidence of that and indicted Mr. Morris based upon the strength of that evidence for a charge of 265.03. This charge 265.02 refers to a different gun, to a .357-magnum revolver that the People alleged the defendant possessed on that day.

THE COURT: And —

MR. TALTY: So I do not believe that we can enter into a plea of guilty to the current count of the indictment and, therefore, that count would be among the counts that we would be asking the Court to dismiss should the defendant plead guilty.

THE COURT: And what is the district attorney's position with respect to the viability or the possibility of prosecution of Mr. Morris for the other three counts in the indictment, the murder in the second degree under a both intentional and depraved indifference theory as well as manslaughter in the first degree?

MR. TALTY: Your Honor, I prefer to address the viability of all four counts following a plea of guilty by Mr. Morris. [7]

THE COURT: And were this proposed disposition to go forward, what would your recommended sentence be on a plea by Mr. Morris to the D violent felony of criminal possession of a weapon third degree related to a .357-magnum revolver?

MR. TALTY: At that point, we would recommend to the court a sentence of time served. Mr. Morris has been in jail for, I believe, 25 months since the day in question.

THE COURT: And you are persuaded that under the law in effect at the time of this incident that a D violent felony offense may lawfully have a sentence of time served?

MR. TALTY: I am.

THE COURT: Mr. Barket.

MR. BARKET: Well, Judge, let me put on the record Mr. Morris' position which controls but differs sightly from my own. He is willing to enter into this disposition today on the condition that he be released today now from this courthouse, not that he be brought back to River Bay and processed there for however how many hours or days until they figure out that he ought to be released, that he actually gets out now. That's his

primary motivation in pleading guilty to this charge in addition to, I think, admitting his criminal culpability for that day to a crime which he knows they otherwise, at this point, cannot prove. [8]

And he would do that with the understanding that the District Attorney's Office would dismiss the murder indictment permanently with prejudice under the provisions of Article 210 of the CPL. That would prevent pre-prosecution for the murder under any circumstances. It's my and Mr. Morris' position had been, since April 16th of 2006, that he was not the person who fired any guns that day let alone a gun that ended up taking the life of a two-year-old boy by the name of David Pacheco.

All along, we have maintained that the fatal bullet was fired by Darrell Hepel and to Mr. Johnson, Robert Johnson's credit, he aborted a murder trial in what was a relatively high-profile murder and reassigned the case and had it reinvestigated and there to be credited for taking on what prosecutors must take on to go through those steps.

But at this point, I don't want to leave the courtroom today or I should say the courthouse today without Mr. Morris being free and without the murder indictment being permanently and forever dismissed so that he no longer has to endure the burden of those allegations in the fear of that penalty.

THE COURT: Well, to the extent you are seeking some kind of guarantee from the Court, that guarantee cannot be had. I would, with the prosecutors' consent, [9] parole Mr. Morris or there to be a plea. I have no control over the Corrections authorities. So to the extent you are – you have placed your client's condition

on the record, that is a condition that is beyond this court's capacity to satisfy accordingly.

MR. BARKET: I'm sorry, Judge. You said beyond this court's capacity to satisfy. The Court can't order him released now.

THE COURT: I can order him released. Whether Corrections, in processing, you made the statement on the record that your client has to walk out of this courtroom today.

MR. BARKET: Courthouse. My understanding is that he be released from downstairs which is fine.

THE COURT: I have no control over the processing of the City Department of Corrections or given the unusual circumstance because of the apparent threat that your client – that caused his housing to be transferred from the New York City Department of Corrections system to the Suffolk County Corrections system. I am not the chief warden of either of those agencies. So to the extent you are requiring, as a condition of this disposition, a some kind of an order, that order is beyond this court's power to —

MR. BARKET: Can I have a moment. [10]

THE COURT: Certainly.

MR. BARKET: Can I have a moment with the prosecutor.

THE COURT: Certainly.

(Whereupon, there was a pause in the proceedings.)

THE COURT: Have you parties had ample time to continue their consultations?

MR. BARKET: I think we need another minute or two. I know the hour is running late.

THE COURT: There is no time limit at all.

Mr. Talty, just with respect to your claim that there is a sentence of time served is permissible under 70.02 for a violent felony offense, I've checked certainly under the current Penal Law. I don't see that as a permissible disposition. Perhaps, you can give me specific statute or the provision.

MR. TALTY: Your Honor, the defendant has served two years. I believe if he got a sentence of less than 25 months, he would, in effect, be getting a served sentence.

THE COURT: The question is what is the minimum mandated sentence that must be imposed under the Penal Law under 70.02. You have represented that your understanding of the law is that a sentence of time served is legally permissible. I am asking if you can refer me to the [11] provision of the Penal Law that supports that claim.

MR. TALTY: I will do my best to comply.

THE COURT: Because looking at 70.02 of the Penal Law subdivision (2) dealing with authorized sentences, (c), the statute seems to read for a class D felony under 70.02, the violent felony section, the term must be at least two years and must not exceed seven years. I am asking the parties to –

MR. BARKET: I think there is a – I hate to ramble on about the law with[out] having looked at it.

THE COURT: There is mitigation that the parties are, if, in fact, the parties are relying on the mitigation section, that should be placed on the record as well as

to a claim that somehow the crime is committed under circumstances in which the defendant's responsibility is somehow mitigated. I would want to hear what the parties deem to be appropriate mitigation if that is the People's —

MR. TALTY: We may come to that. As you can see, at this point, I don't even know if the defendant is pleading guilty. I've made the offer if he decides to plead guilty and ask the Court to accept it, then I may, in fact, make it a mitigation record for the Court to accept. It may not be necessary.

THE COURT: I understand. I would refer the [12] parties to Penal Law section 60.01 subdivision (2)(a). That may be the authority you were speaking to of the Court to exercise.

MR. BARKET: Judge, Sorry. 60.01.

THE COURT: (2)(a) subparagraph (i) with a further reference to Penal Law 65.05. Mr. Barket, while you and your adversary are checking the statute, you should be made aware of the fact that the sergeant in this part has undertaken to speak to the captain of Corrections to make further inquiry as to the processing to see if, in fact, if the Court orders release on his recognizances following a plea by Mr. Morris, whether Corrections will assure the Court that Mr. Morris would be released from this courthouse today without the necessity to return him to Suffolk County where he is now being housed. We do not yet have definite word on that.

Counsel, please approach. Perhaps, I can assist in this inquiry.

(Whereupon, there is a discussion held off the record, at the bench, among the Court, both assistant district attorneys and Mr. Barket.)

(Whereupon, the following discussion takes place on the record in open court.)

THE COURT: There has been a conference at the bench. The parties seem to be in agreement as to the [13] following. It is the position of the District Attorney's Office that the law, in effect, in 2006 – which is not now before court. I am reviewing the 2008 New York criminal statute and rules – the People have taken the position that a sentence of a conditional discharge is, in fact, a lawful sentence for the crime criminal possession of a weapon third degree.

If the Court makes certain findings – this court has not reviewed the statute that was governing the sentencing for CPW-3 during the time in question, April of 2006 – so if there is a plea at this time, at the time of sentence which would be some weeks from now after a pre-sentence report had been prepared, I would have to be fully satisfied by my own review of the statutes in effect at the time, that would be Article 60, 65 and 70 of the Penal Law that such a sentence were, in fact, lawful.

Mr. Barket, while we await word as to whether your condition will be satisfied and will be satisfied today and he be released from this courthouse today, if you wish to proceed with the paperwork on the Superior Court Information at this time, that's fine. If you wish to wait until —

MR. BARKET: Why don't we wait. You mean, have him waive the indictment.

THE COURT: Yes. [14]

MR. BARKET: Why don't we wait on that.

THE COURT: Mr. Barket, if I may make the following inquiry. In the event that your condition cannot be satisfied, what will the parties request then for this matter?

MR. TALTY: Your Honor, may I step outside the well?

THE COURT: You may.

(Whereupon, there was a pause in the proceedings.)

THE COURT: Mr. McCarthy, can you summons Mr. Talty in the courtroom? By the way, the record should reflect that upon further review of the sentencing provisions in 70.02, there is, in fact, an opt out provision in 70.02 of the Penal Law section (2), section (2)(c) for convictions of criminal possession of a weapon in the third degree as defined in subdivisions 4, 5, 7 or 8.

It specifically allows a deviation from either state prison or city jail if the Court, having regard to the nature and circumstances of the crime in extreme character of the defendant, finds on the record that such other sentence, either probation or the condition that such imprisonment sentence would be unduly harsh and that the alternative sentence that either probation or conditional discharge would be consistent with public safety and does [15] not deprecate the seriousness of the crime. So the People's proposed disposition is, in fact, lawful under 70.02 (2)(c).

MR. BARKET: Sorry, Judge. What were the subdivisions that were applicable to that under 265.02[?]

THE COURT: 4, 5, 7 and 8 and the SCI prepared, apparently, involve subdivision (4) of 265.02. The record should reflect that the sergeant has returned to the part and has brief counsel as to the position of the Department of Corrections. There seems to be no guarantees of release though it does seem to be much more likely than not.

Mr. Barket, how do you wish to proceed?

MR. BARKET: It's not a choice, Judge. Whether it was my choice, he wouldn't be taking this plea. It's his choice.

THE COURT: How does your client wish to proceed?

MR. BARKET: He indicates that, over my strong advice, he will take the plea. Just so the record is clear, it's my understanding that the district attorneys 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 them 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. [16]

And I actually think that as good as the district attorney has been about investigating and reinvestigating the murder to pursue the person who actually did the shooting, to hold up the dismissal of the murder indictment for which they know my client did not commit in order to extract the plea on the gun

charge which they know they can't prove, is not a course of conduct that I would recommend to my client. But I only get to recommend. I don't get to decide. He has decided to go forward.

THE COURT: Do you wish then to have the Superior Court Information paperwork, you have that before you?

MR. BARKET: I do, Judge. Mine does not or at least I can't see the subdivision of 265.02 which is why I asked. I could be missing it.

THE COURT: I was relying on the felony complaint which has been filed and assigned a docket number.

MR. BARKET: I haven't seen that, but I trust the Court that it[']s subdivision (4).

MR. TALTY: Your Honor, just so the record is clear, the district attorney's position here is that we have agreed to dismiss the murder indictment upon a plea of guilty to a crime that I'm sure the court will ask the defendant he actually committed. I know of nothing unethical in that.

Frankly, at this position, I resent the speeches [17] being made. What we are asking Mr. Morris to do is to admit to, frankly, what all the parties here know he did. Everything else is just making speeches. We've made our position clear to the Court without the district attorneys or my personal opinion of the case or of anything else. I don't think that the court is a proper place for Mr. Barket's opinion at this stage. As he says, it's his client's decision. His client is a grown man. His client is making a decision which, frankly, is probably in his best interest if not in the opinion of Mr. Barket.

Thank you for your immediate opportunity to at least clarify the record. I am ready to proceed.

THE COURT: Mr. Barket, have you had an opportunity to discuss the Superior Court Information documents with Mr. Morris?

MR. BARKET: Yes, Judge. You want him to stand for this.

THE COURT: After he signs, I will have an allocution.

MR. BARKET: Yes, Judge.

THE COURT: I will ask then both Mr. Morris and counsel to execute the waiver of the case's presentation to the grand jury and once that waiver has been executed, that is the second page of the packet, I will then allocute your client. [18]

Mr. Morris, please rise. Mr. Morris, do you know, if you can see from there, is that your signature on the line near the bottom of that sheet of paper right now where I am pointing?

THE DEFENDANT: Yes, it is.

THE COURT: Have you had an opportunity to speak with Mr. Barket about what signing that document means for you, Mr. Morris?

THE DEFENDANT: Yes, I have.

THE COURT: Mr. Morris, do you understand that by signing this waiver you are agreeing to be prosecuted at this time by a Superior Court Information. This means you are giving up your right to force the prosecutor to present this charge, this weapon possession felony charge, against you to a grand jury of your peers so that the grand jury might

then decide whether or not to vote an indictment as to this charge against you.

By signing this waiver, you're giving up your right to have the case – this charge be heard by a grand jury. Do you understand that, Mr. Morris?

THE DEFENDANT: Yes, I do.

THE COURT: Do you further understand you have a right, if you so chose, to testify in your own behalf before a grand jury with a view toward persuading the grand jurors not to vote any criminal charge at all against you [19] with respect to this criminal possession of a weapon allegation? By signing this waiver, you give up that right as well. Do you understand that, Mr. Morris?

THE DEFENDANT: Yes, I do.

THE COURT: The Court accepts for filing the waiver which has been executed in open court by Mr. Morris after consultation with his counsel in the presence of this court. Do you have an application at this time with respect to the charge on the SCI, Mr. Barket?

MR. BARKET: It's my understanding that Mr. Morris is prepared to enter a plea of guilty to the one count in the Superior Court Information charging criminal possession of a weapon in the third degree under subdivision (4) of section 265.02 of the Penal Law. He does this with the understanding that at the time of sentence he will be sentenced to a period of time already served and that the District Attorney's Office is going to dismiss the indictment number 1674 of 2006 with prejudice so that that indictment will be

dismissed permanently under the appropriate provision of CPL section article 210.

THE COURT: Are there not further conditions of the plea, Mr. Barket, concerning the release on his own recognizances?

MR. BARKET: Thank you, Judge. I also understand that the court is going to release Mr. Morris today on his [20] own recognizances on the Superior Court Information pending sentence.

THE COURT: As well as on the indictment.

MR. BARKET: Yes, as well as on the indictment.

THE COURT: And the, People, it is your request that Mr. Morris be released today on both assuming we proceed with his plea on both the indictment and the SCI?

MR. TALTY: That is correct, your Honor. As part of our agreement on this disposition, we made it clear that upon this plea of guilty to or we believe Mr. Morris is actually guilty of we would move to dismiss the current indictment. That being said, I cannot ask the Court to continue to hold him in jail. He has been in jail, as we said before, for 25 months which we believe is an appropriate sentence for the class D violent felony offense he is about to plead, he is about to allocute to.

THE COURT: Mr. Morris, your attorney has indicated that at this time you would like to enter a plea of guilty under the Superior Court Information which has been filed with this court to a class D violent felony offense criminal possession of a weapon under subdivision (4) of Penal Law 265.02. Is that what you

want to do, sir, plead guilty to a class D violent felony offense?

THE DEFENDANT: Yes, I do.

THE COURT: Have you had enough time to speak with [21] Mr. Barket about this plea?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the advice and counsel that you've received from Mr. Barket while he has been representing you both on the indictment as well as this new investigation leading to this plea?

THE DEFENDANT: Yes, I am.

THE COURT: Are you now taking any medication or drugs of any kind, Mr. Morris, that might affect your ability to think and concentrate in this courtroom today?

THE DEFENDANT: No, I am not.

THE COURT: Under the Superior Court Information, which has been filed with this court, Mr. Morris, the prosecutor has alleged that on the 16th day of April of the year 2006 at approximately two in the afternoon, further, it is alleged that this conduct took place in the vicinity of Harrison Avenue and Morton Place within Bronx County. It is alleged that at that time and place you knowingly possessed a loaded operable firearm and further that that possession was not in either your home or place of business. Is that allegation about you true, Mr. Morris?

THE DEFENDANT: Yes, sir.

THE COURT: What was the loaded operable firearm which you possessed on April 16th of 2006?

THE DEFENDANT: .357. [22]

THE COURT: Is that allocution acceptable to the People?

MR. TALTY: Yes, it is, your Honor.

THE COURT: Mr. Morris, do you understand that by pleading guilty to a crime as you are now doing you give up a number of rights. Among the rights you give up is the right to a jury trial. At that trial, the prosecutor would have the burden of proving your guilt beyond a reasonable doubt. Your attorney, Mr. Barket, would be by your side throughout any trial to confront every witness; that is, to cross-examine, to question closely every witness the prosecutor would bring in to testify against you.

Mr. Barket would also be there to help you put in any available defense. By pleading guilty at this time, you are giving up each of those rights. Do you understand that, Mr. Morris?

THE DEFENDANT: Yes, sir.

THE COURT: You also have a right to remain silent at trial at here in court today. By pleading guilty, you give up that right to silence as well. Do you understand that, Mr. Morris?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Morris, other than the promise that you will be released on both the indictment 1674 of '06 as well as o n this new weapon charge, other than the [23] promise you would be released on both and that if you meet the conditions that I am about to describe, that you will receive a sentence of time served plus a conditional discharge. Other than that, have any other promises of any kind been made to you

by anyone in connection with your plea in this courtroom today?

MR. BARKET: I believe, Judge, also that the indictment charging the murder, the '06 indictment, will be dismissed with prejudice.

THE COURT: And the People, you have —

MR. TALTY: Yes, I already indicated that.

MR. BARKET: That is also the condition.

THE COURT: Other than that, if you meet the conditions and t hat you will receive a sentence of time served and a conditional discharge and further the indictment 1674 of '06 will be dismissed with prejudice on the sentence date. Other than that, have any other promises of any kind been made to you by anyone in connection with your plea in this courtroom today?

THE DEFENDANT: No, your Honor.

THE COURT: Finally, Mr. Morris, do you understand that when you are sentenced upon this plea, at that point, you will become a predicate felony offender which means should you get into trouble with the law after sentence, if you are both accused and convicted of a new felony offense, [24] you will face a significantly harsher punishment on any new case because of the plea and sentence on this case. Do you understand that as well, Mr. Morris?

THE DEFENDANT: Yes, I do.

THE COURT: People, at this time, I will ask you to respond to the Court's inquiry from earlier as to your belief or your assessment of the viability of the prosecution of all four charges in the indictment.

MR. TALTY: Your Honor, since it is our intention to dismiss the four counts of that indictment on the day of sentence, I could say, at this point, that after an investigation it was the District Attorney's determination that we could not prove, beyond a reasonable doubt, any of the four counts of the indictment. We did that – we came to that belief based on a number of factors among which was Mr. Morris himself and his willingness to provide us with a truthful explanation of what happened including his own criminal conduct that day which he has just done in public in this courtroom.

That being said, the investigation did disclose that there is no proof, beyond a reasonable doubt, at this moment, that Mr. Morris fired the fatal shots that killed David Pacheco on April 16th and that is how the evidence, underlying this indictment, was presented to the grand jury. So on the day of sentence, we will recommend to the [25] Court that indictment 1674 be dismissed with prejudice.

THE COURT: Please arraign Mr. Morris upon the plea in the Superior Court Information.

COURT CLERK: Mr. Nicholas Morris, do you now plead guilty to criminal possession of a weapon in the third degree under SCI 184 9-2008? Is that what you wish to do?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Morris will be paroled both on the Superior Court Information 1849-08 as well as indictment 1674 of '06. This is with the consent of the People and really at their request.

MR. TALTY: This is the People's recommendation.

THE COURT: Mr. Morris, my promise of time served and a conditional discharge will be binding upon the court provided you meet the following conditions:

First, you must return to this courtroom for sentencing on the 28th of July if that day is acceptable to both sides.

MR. TALTY: It is.

MR. BARKET: What day of the week is that?

THE COURT: The last Monday in the month of July.

MR. BARKET: Could I have the 30th, please?

THE COURT: That day is also acceptable to the People? [26]

MR. MCCARTHY: Yes.

THE COURT: Mr. Morris, you must return to this courtroom for sentencing on the 30th of July. Second, you must cooperate with the Department of Probation in preparing a, before the court, a pre-sentence report. You will receive some paperwork, presumably today, perhaps, tomorrow, through your attorney. He will inform you as to your obligation to go to the Department of Probation so that the proper report may be prepared.

Beyond just going to probation, Mr. Morris, your obligation will be, if you choose to discuss the facts of this case – this case meaning the criminal possession of a weapon in the third degree – you must describe it to the Department of Probation your involvement in

this crime exactly as you have described it to the Court.

Third, you must stay out of trouble. There must be no new incidents with the law of any kind between today's date and the date of sentence. If you meet those conditions, Mr. Morris, you will receive the promised sentence of time previously served and a conditional discharge. Do you understand that, Mr. Morris?

THE DEFENDANT: Yes, sir.

THE COURT: On the other hand, sir, if you violate one or more – one of those conditions, you will not be permitted to withdraw your plea which has been lawfully [27] entered here today and in the event of such violation you will receive a sentence of jail or prison time depending upon the nature of the violation which is brought to my attention. Do you understand that as well?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Morris is paroled on both matters for sentencing in this courtroom on the 30th of July with a report from probation.

MR. BARKET: Thank you, your Honor. I want to express to the Court our appreciation to the Court for its courtesy today and in extending late into the day well past 5 o'clock to resolve this matter and the court staff which has been very, very good in following up a number of items for us during the course of the day. We do appreciate it. I don't want that to go unnoticed.

THE COURT: This proceeding is closed for the day.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK,	x :	INDICTMENT NO.
- against -	:	1221/2013
DARRYL HEMPHILL,	:	
Defendant.	: x	JURY TRIAL

265 East 161st Street
Bronx, New York 10451
September 21, 2015

BEFORE: HON. STEVEN L. BARRETT
Supreme Court Justice

APPEARANCES:

ROBERT T. JOHNSON, ESQ.
DISTRICT ATTORNEY OF BRONX COUNTY
BY: ADAM OUSTATCHER, ESQ.
Assistant District Attorney
- and -
BY: SUZANNE CARMODY, ESQ.
Assistant District Attorney

ERIC M. SEARS, ESQ.
Attorney for the Defendant
115 Broadway, Suite 1704
New York, New York 10006

ADRIANNE TIRADO, R.P.R.
Senior Court Reporter

(Whereupon, the following takes place on the record, in open court, in the presence of the Court, ADA Oustatcher, ADA Carmody, Mr. Sears, and the Defendant:)

THE CLERK: This is Calendar 14, Darryl Hemphill. Also appears under the motion calendar as Number 3. Appearances.

MR. SEARS: Eric Sears, 115 Broadway, Manhattan for Mr. Hemphill.

MS. CARMODY: Suzanne —

THE COURT: Can I go back and get appearances on the record?

MR. SEARS: I just put mine on.

THE COURT: You did?

MS. CARMODY: Suzanne Carmody for the People.

THE COURT: Can I get a spelling on that?

MS. CARMODY: Sure. Suzanne is S-U-Z-A-N-N-E. Carmody is C-A-R-M-O-D-Y.

MR. OUSTATCHER: Adam Oustatcher for the Office of Robert T. Johnson. Good afternoon.

THE COURT: Good afternoon. A couple of preliminary matters. I indicated to counsel the next adjourn date will be Thursday. We will pursue other preliminary issues.

With respect to the motions before, we had a chance to discuss those. I ask both of you to have your [3] comments on the record so that my – so that your

positions are known, both for the record, as well as to the Court.

There are two motions that are before me now by Mr. Sears on behalf of Mr. Hemphill. The first motion concerns the use of the opening statement of the district attorney in a related case, People versus Nicholas Morris, Indictment 1674 of '06. I have reviewed the statement as well as the authorities that have been cited.

Counsel, I will hear your argument.

MR. SEARS: I couldn't hear you, Judge.

THE COURT: I will hear your argument.

MR. SEARS: Judge, it's our position, as I think was made clear in the filing, in the submission, and as we discussed at the bench that we are addressing now the opening statement in the Morris case.

THE COURT: Yes.

MR. SEARS: That the opening statement from that case should be admitted in this trial as a party admission. The circumstances surrounding the application are that this homicide occurred on Easter Sunday back in 2006, and the person named Nicholas Morris was arrested and was prosecuted by the Bronx County District Attorney's Office. They chose to indict him, and they chose to bring him to trial, convinced that the proof against him was overwhelming and certainly beyond a reasonable doubt, or [4] they would not have moved the case to trial.

The district attorney made an opening statement to the jury in which the district attorney outlined the case that they were going to present, outlined the

evidence against Mr. Morris, and explained to the jury why that evidence would convince them beyond a reasonable doubt of Mr. Morris' guilt. In that trial there was a mistrial declared after opening statements, and Mr. Morris eventually was permitted to plead to an unrelated weapons charge.

It's my position, as I indicated in the papers, that that opening statement constitutes a party admission, and the cases that I cite in my submission I would suggest support the proposition that where a party in a litigation, and that party being the district attorney, the same party that prosecuted Mr. Morris and the same party that is prosecuting this case, where that party takes in the current trial a position that is entirely inconsistent and diametrically opposed to a position that that party took in the previous trial and made clear in the opening statement, that the opening statement is a party admission and should be admitted as evidence in this trial.

The courts frown on the practice of taking – of a party in a case taking inconsistent and opposing positions in two related litigations. That's exactly [5] what's happening here. I think the jury is entitled to hear that as evidence in this case.

THE COURT: Actually, wouldn't that be more applicable when the party is taking inconsistent positions simultaneously? I mean, isn't it quite distinct when the inconsistent positions are sequential so that it's at least explicable that the party has come in to information that has created a legitimate belief that their original position was incorrect and that their new position is correct, as opposed to inconsistent positions

simultaneously where it's evident that the party is taking positions that cannot be correlated?

MR. SEARS: Well, I – no. I don't think the case is – I don't think —

THE COURT: The cases don't address this issue.

MR. SEARS: — the cases require that the inconsistency need be in the same proceedings. In fact, I think they say other than that, it can be in a later proceeding in the same case or in a different case.

THE COURT: In what respect, what decisions are we talking about?

MR. SEARS: I believe the ones that I have cited in my submission.

THE COURT: Give me – I don't need you to give me the name of the case as much as the rationale or the [6] reasoning in the case. I know that you cited cases that suggest that there can be questions raised by inconsistencies, particularly in criminal proceedings, but I am not sure that any of these cases stand for proposition that that is a remediable situation.

MR. SEARS: Well, one of the cases, People against Brown, said that an informal judicial admission is a declaration made by a party in the course of any judicial proceeding, whether in the same case or another case, inconsistent with the position the party now assumes. Such an admission is not conclusive, but is merely evidence of the fact or facts admitted. I am not suggesting that it's conclusive or it bars the prosecution, but it is evidence of the facts that were admitted.

THE COURT: Well, I will come back to your comments in a moment. Let me hear from the People.

MR. OUSTATCHER: May I?

THE COURT: Yes.

MR. OUSTATCHER: I oppose this application on a few grounds. First, I would note, as I think was alluded to, if not stated, none of the authorities cited by defense supports the proposition that an opening statement is a judicial admission nor should it be admitted into evidence at a subsequent proceeding or trial.

I would note, embedded in the CJI preliminary [7] instructions for every jury trial in New York State is the following instruction to a jury, an opening statement is not evidence.

I would note that different than other judicial admissions is the relationship of a prosecutor to witnesses, and to that end, there is no formal relationship between a prosecutor to a witness. The witness is not his or her client. There is no agency relationship between a prosecutor and a witness as there is with a defendant or a client in a civil setting. So that distinguishes the case law that is at all favorable to the defendant that he relies upon in this case.

I would note at the prior proceeding, Allen Karen, the former ADA, spoke to witnesses, and based upon those witnesses and his conversations with them, he made an opening statement, which is a legally compelled statement in which a prosecutor forecasts, guesses what he thinks the evidence will prove at that

future proceeding. So there are multiple levels of hearsay embedded in the defense application, and to the extent this is a judicial admission, an extra judicial admission, there still is a level of hearsay which is a communication between the witnesses and Mr. Karen, and there is no exception for that level of hearsay.

THE COURT: Well, you are saying it's not an [8] admission?

MR. OUSTATCHER: It's – I am saying —

THE COURT: An admission is an exception to the hearsay rule. You are saying they are not admissions?

MR. OUSTATCHER: I think that what Mr. Karen said in open court in the opening statement is not an admission. But even if it were an admission, what the witnesses told Mr. Karen, that conversation that informs what he says to the jury, that is hearsay, and there is no exception to that hearsay, and there is a case I cite.

THE COURT: Because it's not an admission. I mean, I think one of my problems with counsel's position in this case is that he speaks of the importance of this as being an admission by the prosecutor rather than the underlying admission of the witness. I, first of all, do not believe it's an admission by the witness. I don't believe that that is a proper characterization of a victim of a crime or another witness to a crime, that anything they say to a prosecutor is an admission, but I also think it's more fundamentally problematic to speak of the prosecutor as making an admission. A prosecutor is not a fact witness, not merely because the rules say that he is not, because, in fact, a prosecutor does not have any personal knowledge of the events,

and for that reason any belief or anything he says or otherwise is a position taken [9] by an advocate, and it is not subject to a determination that it has factual relevance to a particular case and to the resolution of that case.

The fundamental flaw I find with the defense argument today is that it suggests that what a prosecutor says can at some point be taken for its truth and measured. Essentially, it's being characterized as evidence, and it is not evidence, not only because the jurors are told that it's not evidence, it's not only because we have historically said it's not evidence, it's not evidence because it does not come from a fact witness. It is a statement made by an advocate.

To allow this to be presented is, in my judgment, to elevate legal argument to the category of factual evidence and will mislead the jury terribly and have no proper relevance, and for that reason I am quite confident that this is not something that should be presented to the jury in any fashion whatsoever, particularly as an admission of a party which is, in effect, an invitation to the jury to consider it for the truth of the content. That is an exception to hearsay. I will not allow that [to] be presented to the jury in this case.

MR. SEARS: Judge, I would only add in response to what's been said that it's – I would make the analogy to when an attorney submits a motion, and it's clear that [10] statements made in a motion can be deemed to be party admissions in that litigation and in subsequent related litigations. The fact that the attorney is basing the motion on information given by his client is, in my opinion, analogous to the fact that

the district attorney in their opening statement is giving the jury information that is given to him by his witnesses. So I don't think a hearsay analysis is really a proper analysis.

THE COURT: That's the whole point of party admission analysis. Party admission analysis is fundamentally hearsay analysis.

MR. SEARS: That's right.

THE COURT: But I think the problem that you are making —

MR. SEARS: It's always hearsay.

THE COURT: I think that the problem you are presenting here is that you are drawing too many analogies to civil proceedings where there are two parties and where each one is in a comparable position so that statements by a lawyer that are representations of what their client has said can themselves be deemed admissions by the client. It's not the attorney whose credibility is being measured. It is essentially the inference that a statement by a lawyer of a type that can only represent an admission by the client is, in fact, an admission, even though it comes [11] out of the attorney's mouth. That would be applicable to a defendant and/or plaintiff in a civil action.

It also, I think, has bearing and is appropriate to utilize that analogy and that principle to a criminal defendant who is a party to the criminal action. I don't believe it's appropriate to characterize the district attorney as a party to a criminal action, however. I don't think that the analogy that you have drawn to

civil proceedings works with respect to the district attorney being a party.

MR. SEARS: I would just reiterate what I said in my submission where I allude to *Wigmore*. On page 2, I quote, "It may be added that, conformably to the general doctrine by which the rules of evidence are no different in criminal cases, the admission of an agent may equally be received in a criminal charge against the principal." So I would take exception to Your Honor's position that the rules of evidence are applicable in a civil case.

THE COURT: You have an exception to all the rulings I have made thus far, the basis of my rulings, but in any event I deny the application to present to this jury the district attorney's opening statement in the People versus Nicholas Morris, a prior prosecution.

I will say only the following. I am not barring you in an appropriate way from presenting to the jury in [12] this case information about the prior case in which somebody else was prosecuted. As to any witness, it is my understanding the district attorney is going to be presenting many of these witnesses in this trial. Those witnesses' exculpatory, either directly exculpatory or inferentially exculpatory, statements regarding your client will be before this jury.

Moreover, as to any witness who does not testify in that fashion, you will be permitted to introduce as to any prior statements by that witness their prior inconsistencies and present those for impeachment purposes. These, in fact, would seem to me to be, as any witness who testifies here, the very substance of what would be in the prosecutor's opening statement.

Of course, under the law, that kind of inconsistency by a fact witness is admissible for impeachment purposes, not for its truth, and that is a further reason why I think that your effort to use the prosecutor's opening to essentially elevate the value of a prior inconsistency, which properly is impeachment evidence into factual evidence that should be considered for its truth is an unacceptable argument on your part. You have an exception.

Let's move to the second motion. This has to do with a –

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[58]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK,	x	Ind. No. 1221-2013
- against -		
DARRYL HEMPHILL,		
Defendant.	x	

265 East 161st Street
Bronx, New York 10451
October 2, 2015

BEFORE: HON. STEVEN L. BARRETT
Justice of the Supreme Court

(Appearances same as previously noted.)

LAURA ROSEN
SENIOR COURT REPORTER

* * * *

[98:3]

[MR. OUSTATCHER]: * * * * That being said, I have no objection to it being elicited before this jury that the police, Detective Jimick specifically, arrested Nicholas Morris and charged him with the murder of David Pacheco, the child.

And at this point, Mr. Sears and I have had a conversation that I'm not sure what evidence he's seeking to elicit and I'd like to hear, but as far as the indictment of Mr. Morris for this crime and any legal proceedings, if Mr. Sears seeks to elicit that before this

jury, I do have a motion in limine because I think it is legally improper for that information to come before this jury.

THE COURT: Well, for what to come before this jury?

MR. OUSTATCHER: The fact that Nicholas Morris was indicted for the murder of the David Pacheco. The fact that he was prosecuted by Bronx DAs. The fact there was an opening statement. Really, any of the legal proceedings, to my mind. And I'll put forward my factual basis but I'm not sure to what evidence Mr. Sears would seek to elicit, so I'll make my motion in limine if there is a desire to elicit that information.

THE COURT: Counsel, do you wish to respond?

MR. SEARS: Well, yeah. I think that the jury is [99] entitled to know, and first of all, I appreciate that the DA is calling the witnesses, at least the three line-up witnesses that identify Nicholas Morris, so the jury's gonna hear their testimony. And and I think the jury's entitled to know through the law enforcement witnesses that Nicholas Morris was indeed arrested, what information or what evidence they had at the time that led them to arrest Nicholas Morris, and that he was indicted and brought to trial for this crime.

THE COURT: You've actually mixed two things in the same sentence and this is where I'd like to get a clarification. The fact that witnesses have identified Mr. Morris, witnesses allegedly to the events in question, is significant and it's totally relevant to the determination whether your client or Mr. Morris or somebody else committed this crime.

The fact of whether a deliberative body, whether it be the grand jury or the district attorney's bureau or anybody else evaluated that evidence in a particular way is not, at least not on a first glance, relevant in the same way as the findings and beliefs of the witnesses themselves. It's once removed. In other words, it's almost vouching, it's almost like trying to create a negative inference by vouching for mistakes.

I don't know if that makes any sense, but what I'm [100] trying to say is that whether the district attorney's office believes that there was any merit to this case, and I think we discussed that in connection with the discussion about the openings to the jury, whether the district attorney's office believes or whether the grand jury believes that there was any merit is sort of beside the point. Just as if the jury had, for example, heard the entire case before Morris and acquited [sic] him would have been, I think, beside the point too. I mean, they could be right, they could be wrong, but their judgment is sort of not the point. The point is the judgment and belief of the people who actually saw the events.

And so I have, I think there is a distinction that can be made between eliciting evidence. The fact that Morris was arrested I think I would have to acknowledge should be presented but that simply in order to put the entire point into context, and to allow the issue of Morris and his prosecution previously to be understood by the jury. The fact that witnesses identify him as the person who committed this crime totally is appropriate for you to elicit that into whatever ex tent you think is appropriate, but the indictment and the trial, those two things, I think, are

distinguishable. I'm not sure that they have any relevance to what this jury's being asked to do.

MR. SEARS: Well, putting aside for a moment the [101] question of the indictment and the trial, the jury's going to hear from witnesses that identified Mr. Morris and

THE COURT: They're going to hear from the district attorney's side, but if the district attorney wasn't calling those witnesses you could call them.

MR. SEARS: That's right, one way or another. And they are going to know that Morris was arrested for this homicide. I think part and parcel of that is I think the jury is entitled to know the basis upon which Morris was arrested, what led the police to arrest Morris.

MR. OUSTATCHER: That's fine by me.

MR. SEARS: What information they were crediting and what information they were not crediting.

THE COURT: Well, because then you're moving into the realm of what the police believed. And again, it doesn't matter what the police believed here. What matters is what this jury believes on the basis of what people with firsthand knowledge of the events, or allegedly firsthand knowledge of the events have presented. So you're right up to the point where you start talking about the basis for the police arresting him.

The basis of the police arresting him is essentially that these people made an allegation and whether every single police officer did or did not credit what

they've said. What put this prosecution in motion were the [102] statements by the witnesses, not the conclusions of the police.

MR. SEARS: Well, fair enough. I'm not sure we can address, you know, each and every potential line of inquiry that one is going to take during the trial. For instance, when detective, the case officer, Detective Jimick, he interviewed a number of witnesses who gave him conflicting stories, changed their version of events. And that is information which, perhaps, the district attorney's going to elicit on direct, I would certainly want to elicit on cross. And I think that, you know, that is certainly relevant information for this jury to know.

THE COURT: Absolutely, but his conclusion as to who to believe as to well, which account to believe is not evidence that which should come in. His opinion, in other words.

MR. SEARS: I understand the distinction your Honor's making and whether or not this jury's entitled to know there was an indictment and a trial as opposed to that Morris was arrested and what the jury does with that information, and when they're left to just, you know, wonder, well, Morris was arrested, charges people, you know, what happened to that? I mean, the jury's going to wonder about that and I fear that it's incumbent upon us to address that in someway.

[103]

THE COURT: Well, it's possible that there's someway to address it, but the only way I think is, the way I would think at first blush it should be addressed

is with an instruction to the jury that Mr. Morris was ultimately not prosecuted and convicted of this crime.

MR. SEARS: I probably wouldn't want that. If your Honor's going to go, you know, to give some sort of instruction —

THE COURT: Or a stipulation.

MR. SEARS: I'll probably request they be told they're not to speculate, you know, what happened to Morris.

THE COURT: I'd happily draft that application. I think the other way, of course, would include is also a stipulation between the parties, the language that you two agree to as to that point. I think that you're right, that the jury should be told not to speculate, but I can go further and invite you to agree on something.

MR. SEARS: We'll take that under advisement.

MR. OUSTATCHER: That sounds like a good idea. I hope to have a stipulation.

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[155]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013 JURY TRIAL

265 East 161st Street
Bronx, New York 10451
October 7, 2015

BEFORE: HON. STEVEN L. BARRETT
Supreme Court Justice

(Appearances same as previously noted.)

LAURA ROSEN
SENIOR COURT REPORTER

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(Whereupon, the following took place in open court in the presence of the defendant, defense counsel, and the assistant district attorneys.)

THE CLERK: This is calendar four, Darryl Hemphill. Appearances, please.

MR. SEARS: Eric Sears, 115 Broadway for Mr. Hemphill. Good morning.

MS. CARMODY: Good morning. Suzanne Carmody for the People.

MR. OUSTATCHER: Adam Oustatcher for the Office of Robert T. Johnson. Good morning all.

THE COURT: Counsel, of the issues that were [156] remaining for discussion and for ruling, the first pertains to the evidence that Morris was seen to be in possession of a number of guns and ammunition at the time of a search or an execution. The argument by the defense is that evidence of this nature suggests that Morris was more likely to be a shooter by reason of his possession of firearms.

Any further arguments by defense?

MR. SEARS: Well, no, your Honor. Just to emphasize again what I did the other day, we're not in a situation where we're concerned about protecting the rights of a defendant, which I think shifts the focus somewhat and makes this, it reinforces the application to admit this evidence for the reasons that I discussed the other day.

THE COURT: Anything further from the People?

MR. OUSTATCHER: Nothing further, Judge.

THE COURT: Okay, thank you.

All right. Ultimately, the determination along these lines, in my judgement, requires that there be some logical basis for the inference that is being presented. I don't think it's enough to say that this does not pertain to a defendant whose rights must be protected above all, and that with respect to any other witness there is no requirement to protect their rights.

The point here is not that the Court would seek to protect Mr. Morris' rights, in that point I might very well [157] agree with defense counsel's analysis, but the point is better made in terms of the relevance and accuracy of the inference than is being presented, and

the greater concerns that I have is that a jury not be asked to draw conclusions that are illogical and that are speculative.

In this instance, I consider the inference that is being offered, the underlying inference which is the basis for the offer of proof to be purely speculative and to be illogical with one exception, and that is with respect to the existence of the nine-millimeter bullet.

The existence of the nine-millimeter bullet does have some, although slight, connection to the crime committed in this case in so far as the weapon that was utilized appears to be one that uses that form of ammunition. And for that reason, the defense may elicit from an appropriate witness that a search of Morris' premises yielded a nine-millimeter bullet.

The existence of the other items; the rifle, starter's pistol, some other ammunition and I think maybe one other item, doesn't in any way logically connect Mr. Morris to this crime, but invites the jury to speculate and to guess and to play detective, all of which are consequences which I think are to be avoided in this case as in any case. So I do not grant the application to elicit the evidence of those other weapons or ammunition with [158] respect to Mr. Morris. An exception is granted to defense.

Another issue open has to do with the viewing of the television and statements by several witnesses regarding what they viewed on television the day before identification procedures were conducted. Specifically, the district attorney has indicated that they intend to present witnesses who were initially parties to present testimony regarding the prosecution

of Mr. Morris for this homicide. These witnesses do not appear to have any testimony that would incriminate Mr. Hemphill, and at least to this Court it's unknown whether they do or do not maintain the belief that Mr. Morris was in fact the perpetrator in this crime.

It is my understanding that the district attorney wishes to call these witnesses in order to ensure that there is no inference drawn by the jury that the People are seeking to mislead or withhold information relevant to the jury's consideration. I think that's an appropriate action by the district attorney.

I think the district attorney also is seeking to present evidence which pertains to the quality of the evidence against Mr. Morris so as to meet what is anticipated to be a claim of a defense that Mr. Morris is the correct target of this prosecution in lieu of Mr. Hemphill.

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[125]

V O I R D I R E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013 Jury Selection

265 East 161st Street
Bronx, New York 10451
October 16, 2015

BEFORE:

HONORABLE STEVEN L. BARRETT
Justice of the Supreme Court

APPEARANCES:

(Same as previously noted.)

Gladys Joshua
Senior Court Reporter

* * * *

[165:4]

[THE COURT]: In addition to the named witnesses or other names that I've given you, you will hear evidence at this trial concerning a person named Nicholas Morris. Including that three people identified Morris as the person who shot and killed David

Pacheco, Jr. on April 16th, 2006. I instruct you now and I will instruct you again later that you're not to speculate about the status of Nicholas Morris. That evidence is only being admitted for your consideration in determining the guilt or non-guilt of this defendant Darrel Hemphill as I have a further instruction for you.

* * * *

[1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013 Jury [Trial]

265 East 161st Street
Bronx, New York 10451
October 26, 2015

BEFORE:

HONORABLE STEVEN L. BARRETT
Supreme Court Justice

APPEARANCES:

(Same as previously noted.)

Gladys Joshua
Senior Court Reporter

* * * *

[THE PEOPLE'S OPENINGS]

[12:2]

MR. OUSTATCHER: Thank you, counsel, your Honor, members of the jury, good morning.

JURY PANEL: Good morning.

MR. OUSTATCHER: Joanne Sanabria dressed David up right that Sunday April 16th, 2006 Easter.

David had just turned two years old. Little David, David Junior actually, was her pride and joy. Her only son in a minivan full of children. He was handsome and he had that sparkle in his eyes that only little boys have. Joanne was doing that thing that we do on the holidays once we have kids. Up early they were visiting family. First her sister in Richmond Plaza. Joanne put David in the car seat in the back of a minivan and strapped him in, she made him safe.

And then she drove down to her aunt's place across town. She drove down Tremont a ride that she – a ride that most of us have driven on or walked down too many times to count. And as she crossed over Harrison she heard a sound. The kind of sound that many of us who have spent our whole lives in the Bronx are so used to hearing.

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: It's almost as if we don't notice it. You hear a pop, you hear a bang, it used to be a car backfiring but that doesn't happen anymore. A firecracker, [13] a rock being thrown, or something else. It's almost a reflex. You hear the pop, you look around briefly, everything is okay and you keep it moving. But everything wasn't okay. David, her child, was having trouble breathing after she crossed over Harrison.

Joanne looked back David looked shocked. That pop was something. Joanne didn't know it at the moment but a piece of lead, a 9 millimeter caliber bullet, had shot through her car. It went right through David's car seat and entered his little body. It pierced

his soft skin, entered the torso, went through the left lung, went through the heart. And as Joanne looked in her rearview mirror, as she looked over her shoulder as she had done hundreds of times to make sure David was okay, David was not okay. David was to[o] young to know what was happening he was fighting for his life. He was having trouble breathing because his lung had been punctured. That bullet had destroyed his vital organs in seconds. As Joanne pulled her car over David, her two year old, was bleeding out.

The bullet that entered David's body was meant to kill. It was fired at chest level, chest level for an adult male. The man who pulled the trigger on the that fired that bullet had murder on his mind. Bullets don't have names on them. And while that murderer didn't know David, the moment he pointed that gun and pulled the trigger, he [14] wanted a body. His intent was to murder. Not just to murder but to murder with depravity and utter indifference to human life.

And as Joanne drove through that intersection on Tremont and Harrison she drove right in front of a man she had never met before. A stranger standing right in the middle of the intersection. A man name Juan Carlos Garcia holding a bottle of water, looking straight at another man pointing a gun right at Juan Carlos, and poised to fire that gun just as the minivan, Joanne's minivan, drove right in front of Juan Carlos. Juan Carlos was unarmed. The man with a gun was wearing a bright blue sweater with a hat pulled low on his head. And that man with the blue sweater with the gun had a motive to kill Juan Carlos. To find out why that man wanted to kill Juan Carlos you have to go

back a short time, maybe 20 minutes maybe 30 minutes. A few car lengths up Harrison.

Juan Carlos was about to become a father. I'm not sure if he knew it on that Easter Sunday but it was in motion. He had just gone shopping at some stores on Burnside with the soon-to-be mother of his child Denise Marisol Santiago, her mother Brenda, Brenda's husband Jose, and a cousin of Juan Carlos named Jon Erik. They were walking back home. I'm going repeat those names because you're going to hear them often; Juan Carlos Garcia, Juan [15] Carlos' cousin Jon Erik Vargas, the mother of Juan Carlos then unborn son Denise Marisol Santiago, Marisol's mother Brenda Gonzalez, and Brenda's husband Jose Castro.

They lived on Harrison and Tremont a building on the southwest corner. They were walking home down Harrison on the west side of the street. There was a guy standing in the street, a stranger, on the phone. Someone looked at someone too long and made eye contact, nothing happened, but it was disrespect so there [w]as a fight. The usual stupidity that as we get older we learn to walk away from. But in this case it became a fistfight. This stranger, he had that blue sweater on – a bright blue sweater on and the fabric had a design on it. The sweater stood out. He had a hat pulled low. He was losing a fistfight. The fight spilled out into the street. Jon Erik and Juan Carlos was winning, Jose was nearby. Brenda and Marisol were a little further away. The guy in the blue sweater's friend joined in, shorter and heavier, braids, a lazy eye, no hat, but still they were losing. The guy in the blue sweater ran down Morton it runs parallel to Tremont.

Jon Erik chased the guy in the blue sweater across Morton over to Andrews when he lost him and then the fight ended. There were words exchanged but no one was hurt to badly only bruised egos, not broken bones or bloody noses —

Jon Erik came back and saw Juan Carlos, Jose, [16] Brenda and Marisol following the heavy guy on Morton, down University and back to Tremont almost where the fight started. The heavy-set guy stopped to cross the street and he made a phone call.

Juan Carlos, Jose, and Jon Erik and Marisol and Brenda started going into their building. Jon Erik felt weak and he sat down on the ramp outside his building. He thought it might be heart palpitations. Brenda, Marisol and Jose were near him on the southwest corner of Harrison and Tremont. Juan Carlos went diagonally across the street to the bodega to get a bottle of water.

The heavy-set guy was still on Tremont and a car pulled up. A guy got out. Same build as the guy who lost the fight. Same bright blue sweater with the fabric. He stood on the northwest corner of Harrison and Tremont and pointed a 9-millimeter pistol right at Jon Erik, Jose, Brenda and Marisol a distance across the street and he started shooting. Not just once he sprayed the block with bullets. Then Juan Carlos came out of the bodega and started across the intersection with a bottle of water for Jon Erik. He was walking diagonally across the intersection, so he was right in the middle of the street looking at the guy he had just beat up in the blue sweater, pointing a gun right at him. Juan Carlos was trapped and he thought he was going to be shot when that minivan, that [17] minivan

with Joanne's son little David strapped in the back seat, drove right in front of him.

So now that you know why and the who back to Joanne Sanabria. Maybe she knew. Maybe she knew her child was dead maybe she didn't. Or maybe something kicks in as a parent that tells you, no he's not, even though logic and common sense make it clear he is. A good samaritan, an off-duty EMT ran to the car. Angel Cruz he did what he could. He flagged down a livery cab, he tried to save the child's life, and got David to the hospital in minutes.

Even though she pulled the car over a few blocks away from Harrison and Tremont, word spread back to the neighborhood in minutes. This wasn't just someone firing a gun into the air on the corner to prove he's a man, a baby had been shot. A baby had been killed. The police were coming and they were going to shut down the block. The innocent stayed. Those who had nothing [sic] to hide, the guilty, fled. They changed their clothes, disposed of the murder weapon, and got as far away as The guilty grabbed what they could and left everything else behind. Some left their families and children and got out of the Bronx, out of New York City. They knew what they did and they were running from it. They ran down to North Carolina while Joanne Sanabria was at Bronx Lebanon praying, hoping against hope, the shooter was making arrangements doing what he had [18] to do to get away with murder.

And this wasn't your typical murder investigation. It wasn't two drug dealers or a couple of gang members fighting over turf on the corner it was an innocent child. So as afraid as people are and reluctant to come forward people came forward. The shooter wore a hat

low and the shooting happened quickly but names popped up. The heavy guy, the guy who helped out in the fight, who lost the fight – not the shooter in the blue sweater, but the guy who did wear a hat he let people see his face and he was easy to ID. His nickname is Burger. He Government name is Ronnell Gilliam.

The police went to an apartment on Harrison where he and his buddies hang out. His brother William was there. His brother let the police in and showed them to a closet. And even though Ronnell wasn't the shooter wearing the blue sweater the blue sweater was in that closet in that apartment on Harrison. Ronnell called to speak to his brother when the police were in the apartment. He spoke to a detective and Ronnell was gone. He was one of the people who went down to North Carolina.

Ronnell hung out with a group of people in the neighborhood. One of those people were Nick Morris. The police got a photo of Nick Morris. They went looking for Nick Morris. No one ever picked Nick Morris out of a six [19] pack of photo arrays and said that's the shooter. No one said that Nick Morris was the shooter, the man in the blue sweater. The closest they came was one witness thought Nick Morris looked like the shooter. But that witness refused to picks him out of a six pack of photos.

Now even though no one identified Nick Morris as the shooter, no one picked him out of a photo array, no one in the neighborhood where he lived said they saw him fire a gun, Nick heard the police were looking for him. He 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 Nick Morris in a line-up.

MR. SEARS: Objection we're getting into things that are not going to be testified to at trial, Judge.

THE COURT: The objection is overruled. No explanation just object.

MR. OUSTATCHER: The police showed it to four of the people involved in the fistfight and three of them picked him out, Marisol, Brenda, and Jon Erik just two days after the shooting. Three of them said, that's him, that's the shooter I'm certain one didn't. That was Juan Carlos and Jose couldn't make it to the precinct for the line-ups because he was working that day. But three people, Marisol [20] Santiago, her mother Brenda Gonzalez, and Jon Erik Vargas identified Nick Morris, picked him out of a line-up, five person line-up.

And then, a few days later, Ronnell Gilliam came back from North Carolina. He walked into the district attorney's office with a lawyer named George Vomvoulakis and made a statement to the police and to two district attorneys. Not to me not to Ms. Carmody but to two other district attorneys back in April of 2006.

Gilliam or Burger he was the other guy in the fistfight with a man in the blue sweater. He was a guy and he describes he didn't know the names they're all strangers, he described Jon Erik and Juan Carlos and the shooter. The guy with the gun. The guy in the blue sweater. Gilliam said it's Nick Morris and he's my friend. So that's it right? It's a wrap. Three people pick

him out of a line-up. Another guy, his friend, his life-long friend, implicates him. It's over. Five days after the shooting the case is closed, right?

It would have been back in the 80's, back in the 90's definitely, back in the 60's and 70's before we knew what we know now there would have been no doubt. But we're better than that. We're smarter than that. And sometimes you have to work a little harder to get to the truth. My grandfather had two favorite quotes. One was "if something [21] looks to[o] good to be true it probably is." And in no case is that statement more true than this one. My grandfather's other favorite quote was "don't trust anyone" and that really speaks to the kind of person he was more than anything else. But it serves jurors well and it will serve you well on this case.

The witnesses you will see over the course of the trial are all strangers to you. And no matter how nice they look or convincing the sound don't trust any one witness, even witnesses I call, until you've had a chance to kick the tires on their testimony. To look under the hood to see if what they say happened matches up with other evidence. To see if it's corroborated. Just because something sounds nice doesn't mean it's true.

And unlike what you see on T.V., D.N.A., doesn't happen just like this. It takes more than one day to test something, to see if there's D.N.A. on a piece of evidence. And it can take even longer, sometimes years, to find out whose D.N.A. that is. Especially when that person flees.

[B]efore I get to that let me take a step back. That lawyer that Ronnell Gilliam walked into the D.A.'s office with that wasn't really his lawyer. Ronnell didn't hire him, Ronnell didn't choose him, someone else chose that lawyer for Ronnell. Someone else paid for that lawyer to walk Ronnell into the D.A.'s office for Ronnell to say Nick [22] Morris was the shooter. The first time Ronnell ever met that lawyer was about 15 minutes before he walked into the D.A.'s Office on the corner of 161st and the Concourse just before Ronnell walked in the D.A.'s Office. And the man who chose that lawyer for Ronnell was Darrel Hemphill. The man sitting at that table.

And 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 expect 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.

Ronnell Gilliam went down to North Carolina with the defendant Darrel Hemphill and Darrel's then girlfriend Aida Llanos. They then met up at one of Darrel's friend's places in Brooklyn, a man named Vernon Matthews, and they drove down south to North Carolina. Darrel chose North Carolina Ronnell didn't know anyone in the state. They kept Ronnell in a room and they fed him information. They said Nick's snitching he's saying we shot the kid. You have to go back up to New York and tell the cops Nick did it. I'll get you a lawyer. The defendant Darrel Hemphill is Ronnell's cousin, his older cousin, they're blood. Ronnell trusted him.

So Ronnell me the lawyer on the corner of 161st [23] and the Concourse and did just what he was told. But a few days later he realized Nick didn't snitch. Nick wasn't there for the shooting. He was on his way to the location where the fight happened because Ronnell had called him but he never made to the corner of Harrison and Tremont. So Ronnell, on his own without an attorney, walked into the 46th Precinct – he actually wasn't alone he walked in with the defendant's brother Stephen Hemphill. And Ronnell Gilliam told the cops the truth. Nick Morris wasn't the shooter Darrel Hemphill was shooter, the man in the blue sweater. Darrel lost the fight. Darrel was the shooter.

And when Ronnell is in the precinct that lawyer, George Voumvalakis, called the precinct. He called the precinct because he got a call from the defendant because Ronnell stopping following orders. Because the truth was being revealed.

But no one believed Ronnell because he was acting in concert with the shooter because he fled. Because days earlier he had said something different. Because there was no evidence to corroborate his story.

Now you're going to hear from Gilliam. And not only going to hear from him you're going to see him. You're going to be able to eyeball him from that jury box. I spoke to most of you very quickly about a cooperator. The cooperator in this case is Ronnell Gilliam. Even though he [24] never pulled the trigger, even though he never touched a gun before the shooting happened, he plead guilty the Acting in Concert Attempted Murder of David Pacheco, Jr. Not only did he plead guilty but he did four years jail for

someone else's body – for a murder someone else committed. And his story is not yet finished. If he fulfills his agreement, if he testifies truthfully, he still has to do another year. And if he doesn't testify truthfully, if a judge – Judge Gross on the sixth floor of this building, finds out that Ronnell Gilliam lies in the smallest sense before any of you, Ronnell gets 25 years no questions asked for a murder in which he never touched the gun.

I'll get to the D.N.A. soon but one more thing about Gilliam. He did touch a gun that day. After the murder everyone met up at that apartment on Harrison I mentioned not far from the shooting. The defendant Darrel Hemphill had an argument with his girlfriend Aida Llanos and he took off his blue sweater and the guns were dropped off. Gilliam was the man who was supposed to get rid of the guns and the sweater. He took the guns but he forgot the sweater.

So now back to Nick Morris because he didn't just walk into the precinct and surrender. Before he did that he went to Bronx 12 and he gave an interview. He rolled up his sleeves during the interview, and this is taped, the people [25] involved in the fistfight they saw the forearms of the guy in the blue sweater, the shooter. And he had a tattoo on his forearm. A prominent tattoo. And this is back in the days before everyone and their grandmother had a tattoo. That tattoo stood out it looked like numbers. When Nick Morris was talking to News 12 he rolls up his sleeves and he shows the world that he didn't have the tattoos that the [g]uy in the blue sweater had and he didn't. An this was the day after the murder. So Morris didn't have the time to have his tattoos removed. I'm going to

play that video for you with the sound off. You'll see that video. You'll have the same view everyone who saw that video had and you'll see Nick Morris' face and you'll see his body.

That video is important for more than just that. It's not just what he displayed it's who saw it. Because everyone on the other end of the fistfight, everyone except for Jon Erik, saw that video the night before they saw the line-up in which Nick Morris was seated in Position Number 2. And each of them, Brenda, Marisol, and even Jose, thought that's not him. That's not the shooter. That's not the guy in the blue sweater. One day after the shooting happens this is their first chance to see the person who might have been the shooter and it's not Nick Morris. Nick Morris is black African American but his skin tone is lighter than the shooter. And Nick Morris has a scar, and [26] you'll see it a prominent scar under his right eye, it's pretty big. The guys in the fistfight saw him. She saw the shooter's face. Doesn't have the scar, it's not the shooter.

And the next day when they see the line-up Brenda, Marisol, and Jon Erik pick out Number 2 Nick Morris as the shooter. Juan Carlos looked at the line-up didn't pick anyone out. Realize, too, that Juan Carlos, because he was caught in the middle of the street, was closest to the shooter and had the best view of the shooter's face. Juan Carlos saw the line-up with Nick Morris in it. The shooter, the man in the blue sweater, wasn't in that line-up. And based on that evidence and nothing more the police arrested Nick Morris and charged him with the murder of David Pacheco, Jr.

So how could it be? How could these three people pick out someone from the line-up when the night before two of those people saw the T.V. and realized immediately that's not him that I can tell you. For the answer to that question you'll have to wait for Marisol, Brenda and Jon Erik to tell you themselves and in their own words. While these line-ups are happening that blue sweater has been vouchered. You'll see the sweater yourself. You'll see the big paper bag. Right there sitting in the precinct when Nick Morris is being arrested. [27] D.N.A. on that sweater will not begin until July 2006.

Three people have picked out Nick Morris in that line-up who cares what's on the sweater? But when you take a closer look at the witness and this evidence it might matter because Brenda Gonzalez she needed glasses to see distances. She needs glasses now. She needed them back in 2006. And when that shooting happened, when she saw the shooter from a distance across a very large intersection, she's not wearing her glasses. So how could she see the shooter? And her daughter Marisol, the shooter was wearing a hat pulled low. A shooter had a gun held straight out from the chest, right up front of the face. Marisol thought she might be shot and right then and there and she started running. She also didn't see the shooter's face. So how could she pick out the shooter if she never saw his face? And Jon Erik never actually saw the shooting. That ramp that he was on it's not outside the building it's actually internal it's inside the building. So when the shooting is happening he hears a popping sound but he never sees the shooter at all. What happens is after the shooting stops he comes out and he chases a guy with a blue sweater but that man in

the blue sweater never turns around. So it is unclear – it's actually impossible for Jon Erik Vargas to actually have identified the shooter in this case.

And even during the fistfight – when Jon Erik is [28] having the fistfight essentially almost like a one-on-one Jon Erik, for the most part, fighting Burger the heavy-set guy, he's focused on him he's not even looking at the guy in the blue sweater. The three people who picked out Nick Morris as the shooter never saw the face of the shooter and that's what the evidence will prove.

That blue sweater was tested and they got D.N.A. off that sweater. They got one person's D.N.A. off that sweater. A man's D.N.A. And after they got that D.N.A. they got Nick Morris's D.N.A. and put a fancy Q-tip inside of the mouth and developed his D.N.A. profile. And they compared Nick Morris' D.N.A. to the D.N.A. on that sweater and Nick Morris' D.N.A. was not on the blue sweater. There was one man's D.N.A. on that sweater and it wasn't Nick Morris. The D.N.A. evidence exculpated Nick Morris. It proved that he was not the man in the blue sweater who killed that child.

One more thing about Nick Morris, he wasn't guilty of this murder but make no mistake about it he was not some innocent man. He and the defendant and Burger before April 16th, and even up to April 16th that Easter Sunday, those three were a team. Burger and Darrel are blood. And Nick Morris was as close to them —

MR. SEARS: Objection.

THE COURT: Overruled. [29]

MR. OUSTATCHER: — as someone can be without being related. And when Burger was on that corner before the defendant came back with his 9-millimeter, Burger called Morris. And Morris was on his way with a gun, a .357 he just got there too late.

So after the D.N.A. evidence proved Nick Morris wasn't the murderer, the police went down to North Carolina. Because after that child was shot and killed Darrel Hemphill never came back to the Bronx. And the police went through Darrel's garbage and picked up some bottles they thought he might have drank from, but no one ever saw him drink from. That was worthless. But then the police got a search warrant to put a swab in Darrel Hemphill's mouth and in 2011 they pulled him over as he was driving. They showed him the search warrant, and they got his D.N.A. And wouldn't you know it, the D.N.A. on the sweater was Darrel Hemphill's D.N.A. The only D.N.A. on that blue sweater was Darrel Hemphill's D.N.A. Looks like Ronnell Gilliam was telling the truth.

You are going to hear from a number of witnesses over the course of the next month. Some saw a little, some saw a lot. Some saw the first fight, some saw the shooting. Some weren't even in the Bronx when this happened. Some will come before you because it's the right thing to do. Some will likely have to be forced to come into court. [30] Every witness who comes before you will give you a piece of information. And when you put this information together you will have a mass of evidence. And within that mass of evidence lies the truth of what happened on the corner of Tremont and Harrison that afternoon. And truth be told, there's just

too much evidence in this case for me to discuss this opening statement.

I want you to pay attention to all the evidence that comes before you. But I want you to pay special attention to these questions and the answers that follow.

Because each eyewitness will answer them differently. How close or how far away was the witness from the shooter? Was anything blocking the witness' view of the shooter's face? Was the witness under the influence of alcohol or drugs? Where was the witness looking at the gun or the shooter's face? Did the witness know the shooter or was the witness a stranger to the shooter? And what I mean by that is, was the witness familiar with the shooter's facial characteristics before the shooting? How long did the witness look at the shooter's face while the shooting was happening? What was the witness' state of mind during the shooting? Meaning was the witness being shot at or was the witness not being shot at? And so the witness had a chance to look at the shooter. And, finally, did the witness need glasses? And was the witness wearing those [31] glasses?

Because when you have the answers to those questions you will know not only what crimes were committed but who really committed that crime.

After all the witnesses have come before you and testified this case, jurors, will he yours. And as many witnesses as you will see and as much evidence as you will hear the question put to you will be quite simple, who shot and killed David Pacheco, Jr., on Easter Sunday 2006.

This case, as with every case, is about choices, conduct, and responsibility. One man introduced a gun to a fistfight. One man had a motive to kill. One man fired that 9-millimeter pistol. One man shot and killed David Pacheco, Jr., and one man bears responsibility for this murder. And when all this evidence is before you and all the witnesses have testified I'm going to come before you again and ask you for a verdict. And by this verdict I'm going to ask you to hold that man responsible for his choices and his conduct on that fateful day. Thank you ladies and gentlemen.

* * * *

[DEFENSE'S OPENINGS]

[32:1]

MR. SEARS: And when I talk about the extent, I want you to keep in mind what we spoke about.

Another thing we spoke about during jury selection which was this description, recognition. Remember when we spoke about that and how you may not be able to describe somebody so well, but you would certainly recognize somebody that you had spent some time with. And although Mr. Oustatcher wants you to concentrate on a few moments that the witnesses were looking at the shooter and getting a pretty good look at him, and you will see the view that they had. He wants you to concentrate on those few moments and suggest to you, well, that's the only time they had to see that person.

But you are going to learn that that's not true. You are going to learn that the same people that identified the shooter in that lineup because they could see the

shooter so well are the same people that were involved in the altercation with that shooter some 10 minutes earlier, and during that altercation they were very close to that shooter for a lengthy period of time and they interacted with that shooter and they spoke with that shooter and they had time to observe the body characteristics and the facial characteristics and all the things that you take in about a person that makes you able to recognize that same person 10 minutes later. [33] So when the shooting happens they are not just saying oh there is a stranger doing a shooting. They are saying that's the guy that I was just interacting with 10 minutes ago; that's how I know it's the same person; and that's Nicholas Morris; and that's powerful, powerful testimony.

You are going to hear during the trial from Jose Castro, one of the people whose name you heard, and he is going to tell you about the altercation he had with Burger and Nicholas Morris. He is going to tell you that Nicholas Morris hit him. He is going to tell you – that it was another person joined in the fight and he tried to stop it. He is going to tell you that Morris stumbled backwards. He's going to tell you a lot of details about the fight that he had and other people that he was with had with Nicholas Morris. Not with Darrell Hemphill.

Nobody. Not a single witness to this day, to this day, with all the investigations and everything that's been done and all the going back to people and talking to them about maybe you were wrong about that other thing and will you change your mind and all these other stuff that's happened in the last nine years, not a single witness other than Ronnell Gilliam, who we

will talk about, and who also said in his statement it was Nicholas Morris. Not a single witness has said that Darrel Hemphill fired that shot.[34]

So you are going to hear Jose Castro who is going to tell you how Morris stumbled backwards and ran and came back some minutes later and how Morris stood across the street, right across the street. It wasn't anything in between them. It was a bright, sunny, well-lit day. Castro is going to tell you, you could see straight across the street.

What was happening? The person across the street had a gun out, had a gun pointed directly in his direction and that he could see it clearly. It's his words 'cause he is asked about that. He says I can see it clearly, it was Morris, it was the same guy. And that's what Jose Castro is going to tell you.

You are going to hear from Marisol Santiago, another person who the DA mentioned, on whose identification they relied for years and now they are saying oh, wait a minute, that must have been mistaken.

She's also going to describe the fight, taller, skinny person with the gun, Burger. Burger. Ronnell is very different from Morris from Hemphill and his appearance. He is not somewhat shorter, but he is a huge 350, 400 pounds. He is a big guy. So everyone knows who Ronnell is, and Marisol is going to tell you about seeing Morris with a weapon, with a gun. That nobody else had a gun. The gun wasn't handed off or given to somebody else. There weren't [35] two shooters. There was only one shooter, Nicholas Morris.

And Marisol will tell you, she will tell you about the lineup. Saw him two days later in a lineup. And a lineup is not just a bunch of photos that they lay in front of you in a police precinct. A lineup is a carefully orchestrated procedure and the purpose of the lineup is to get a fair, accurate ID. That's why they have them, that's why they are permissible, and that's why they rely on them. It's the best way we know to get an accurate identification, and that's what happened here.

And you will hear about the lineup, and Marisol is going to tell you that she identified Nicholas Morris as the shooter, the guy that was right across the street when he fired the shots; that he was holding the gun in his right hand, which she could see that, and those are purple bruises on his face, and when she saw the lineup she recognized him as the shooter. She is asked if she was sure and she says I am sure, no one else out the way.

You are going to hear from Brenda Gonzalez. She is also involved in the initial altercation. She also gets plenty of opportunities to observe the person that comes back with the gun and does the shooting. She is going to tell you that Morris started talking to John Erik, another of the people involved in altercation. Morris threw a punch to John Erik, fight breaks out, Morris comes back. She sees him [36] standing on the corner, the same as the other witnesses say, during the shooting. She sees Morris take out a gun. They all describe a gun. A bright gun. A shiny gun. Maybe you can see the sun glinting off the gun. He was across the street, pointed it.

In her words, he was right there across the street, I saw him clearly when he took out the gun. She is asked because they want to make sure that if she got any doubt, talking in her criminal trial about reasonable doubt when a person is guilty, she is asked if she got any doubt two days afterwards that that guy in the lineup is the shooter and she says she has no doubt.

And you will hear from John Erik Vargas. He is going to tell you about the fight, about the shooting, about the lineup and about Nicholas Morris.

None of them. Not a single witness back then, and you can bet how many witnesses they spoke to, you know what kind of investigation they did. A shooting. It was a child. They are canvassing hundreds of people. Everybody in the neighborhood. Not an eye witness or anybody else at any time during the investigation then or now other than Burger says that Darrel Hemphill had anything to do with the shooting.

This was a terrible, terrible tragedy. You are going to see pictures. The District Attorney in his opening statement, in his first remarks, he is talking to you about [37] the emotional impact, about driving, it's Easter Sunday, the child is the backseat and all that. That's right. That's right. But this is not the person to be held responsible for that shooting, and that's what the evidence is going to show.

Now, why do I pick the same people the District Attorney picked to highlight my opening statement? Jose Castro and Marisol and John Erik, Brenda Gonzalez. Why do I talk about those people just like

Mr. Oustatcher did? For the same reason that Detective Jimick.

And you are going to hear him testify. He was the case detective. It was his case. He was in charge. For the same reason Jimick is going to tell you he picked those people to put in the lineup, and he is going to tell you that he picked those people to put in the lineup, and the District Attorney spoke about this and I am speaking about those people, because they were the best witnesses that he had. The best witnesses available.

They were the ones who interacted with the shooter, who were close to the shooter, the ones that had the opportunity to get the best look at who the shooter was, and that's why Jimick chose those people to put in the lineup. He is going to tell you.

So the best witnesses that they have, not nine years later, but two days later, put in a lineup. They seen the shooter and they identified the shooter and they choose [38] him. And think about that, at the end of the case, when you are considering whether you have a reasonable doubt that Darrel Hemphill was involved.

Now, I'd like you to just, as you hear the evidence, contrast – excuse me for a second.

As you hear the evidence – you already heard about the witnesses that identified Morris, picked him out of the lineup, witnesses who observed the events in question, witnesses who are not related to any of the parties, have no motive, no ax to grind, no cooperation agreement, none of that baggage that Gilliam brings

to court. Contrast those witnesses with Ronnell Gilliam.

He comes to let's see. Okay. Ask yourselves when you are listening to Ronnell's testimony – and, again, we discussed this in voir dire. Some of the things you would consider when you judging a person – whether he has said different things on different occasions; whether he has said this person in one occasion that person in another occasion and whether an outright lie; whether he has a motive to tell the truth; whether he has a motive to lie and wants this cooperation agreement that we talked about.

First of, you are going to find out when Gilliam's testifies that he is a liar, okay. Now, everybody lies, right? If you say something that you know – a child. You don't want to tell your child something or somebody telling a [39] story, a kid makes it up, or you don't want somebody to feel bad. You look okay and the person doesn't look okay.

Everybody lies. But that's not what we are talking about. What we are talking about is someone who lies about important events in this case and for his own advantage, and Gilliam those that over and over again. And that's the witness, the only witness to say that Darrel Hemphill is involved in the shooting, and that's the one that they are asking to you rely upon as oppose to the other witnesses that we've discussed.

And what kind of baggage does he bring?

You are going to hear that he makes three different statements about what happened and they are all contradictory. The first statement, which I submit is the best statement, he comes in with a

lawyer and he meets with the District Attorney. So it's all being formalize. That the lawyer is there to make sure that everything goes the right way, that words aren't put in his mouth, that what he is saying is the truth, that he discussed probably before with his lawyer before he talked to the police 'cause no lawyer brings a guys into the police unless they know what it is they are going to say.

And he describes what happens and he says that Nicholas Morris is the shooter. And then Jimick or the DA, I forget exactly whom, who is listening to him, are you just [40] saying that because you want to protect your cousin and so you are saying that Morris was the shooter? And Ronnell says, no, I wouldn't do that not in anything this serious. I am saying that because Nicholas is the shooter. And that's his first statement.

He comes back a couple of weeks later after Nick, who is his lifelong best friend, tells him, hi, Ronnell, you better get me out from underneath, I am in jail now, get me out from underneath.

How do we know that Morris puts Gilliam up to that? Because, get this, when Morris goes back – I am sorry. When Gilliam goes back to make that second statement, to change his mind, you know, to come clean and say Darrel did it, while he is at the precinct he gets a call from who? From Nicholas Morris saying, hi, Ronnell, are you at the precinct? Are you changing your story? Are you telling them?

So Morris not only knows that Gilliam is going to be changing his story, he knows when – he know when he is going to be at the precinct because from jail he

calls him, and make sure you get me out of this. Make sure you putting it on Darrel.

And nobody believes him. Jimick doesn't believe him. The DA doesn't believe him. And part of the reason they don't believe him is because they know he is lying. He [41] is not only lying about who did the shooting, he already told them the correct version, the version that's corroborated by all the witnesses that you rely on and made identification, but he lies to them.

And Jimick will tell you this. He lies to them about what he did with the gun. He makes up three different stories. He lies to them about how he got back from North Carolina. He lies to them about a variety of other things because he is a liar.

And when you go in and you say something that isn't true you can tell because it doesn't pan out. You contradict yourself. He is not smart enough to get your story together and do them the right way. So they arrest Morris. They charge Morris. They believe Gilliam's first statement. They don't believe his later statements when he changes his mind, and they believe his first statement because it corresponds and it's corroborated by all the all the other evidence that they have in the case. I just don't mean the other eye witnesses that we have spoken about, all of whom identified Morris, because there is other evidence. There is what I would call hard evidence, that you don't have, as oppose to what somebody says, okay.

When after the shooting happens the police are doing their investigation and they go to Nick's apartment because Nick is a suspect right off the bat,

and they go to [42] Nick's apartment and they search Nick's apartment. The District Attorney wants to talk a lot about a blue sweater, and I will come to that. But they go to Nick's apartment the same day. I think it's either 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 a 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-millimeter.

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. And so, yeah, you know, they are putting this evidence together. And our eye witnesses, you know, are they accurate? Well, yeah. And is Burger telling us the same thing initially? Yeah. And there is a bullet that's the same as that. I think got the right guy.

And when Nicholas Morris comes in and is arrested, you remember the shooter was involved in the initial altercation, right? He was involved in a fist fight which at least everybody tells about that. And when you are involved in a fist fight and you are punching, I don't know if anybody [43] has ever been involved in a fist fight, what happens is you get you get bruises on your hand, on your knuckles from that. And guess what? When Nicholas Morris gets arrested later that day or the next day, guess what Jimick and the police notice about his hand? He's got bruises on his knuckles.

Now, I guess he could like punch the wall or something and gotten bruised on his knuckles. I don't know many people that do that, but one of the ways you would get bruises on your knuckle is if you had just been in a fight with John Erik and Juan Carlos and all the other people who identified you as the guy they had a fight with and you happen to have bruises on your knuckles.

So they know he has been in a fight. They know he's got the same kind of ammunition that fired the bullet. He has been identified by reliable, independent people and they are convinced that he is the guy and there is plenty of good reason for believing that.

So think about those things when you hear the evidence, think about the witnesses who identified Nicholas Morris, compare them to what you are going to learn about Ronnell Gilliam and how reliable, unreliable you think he is, and about his lies and his different stories and him being the only person that you are going to hear say that Darrel Hemphill did the shooting. [44]

And on top of all that, the real kicker, when you hear Ronnell Gilliam, the District Attorney mentioned this, is this, you know, cooperation. What that cooperation agreement means to a guy like Ronnell Gilliam who will say anything for his own interest, protect somebody, not protect somebody, put this person in trouble, that person in trouble, who knows what he will say on any given day. That cooperation agreement is a get out of jail free card. Remember that Monopoly game, you get the card you get right out, okay.

So this guy who will say anything that suits his purposes. He is sitting in jail. The District Attorney will tell you, sitting in jail for four years. I don't know why. He didn't shoot anybody. He didn't have a gun. So what is he doing sitting in jail for four years, I don't know. But, anyway, he is offered this deal. If you say that Darrel Hemphill did the shooting you go home. If you say that Nicholas Morris did the shooting you do another 25 years.

So what do you think – I mean, maybe not, maybe not just Ronnell Gilliam given that choice. But what do you think Ronnell is going to do? Let's see. Nicholas Morris I get 25 years, Darrel Hemphill I go home. Okay.

Treat that cooperation agreement, you know. When the DA says he has this agreement, he is going to come in here and tell the truth, he is going to say whatever they [45] want him to say 'cause that's going to get him out of jail, that's going to save him 25 years. He ain't going to do 25 years for anybody.

So what does it boils down to? The District Attorney talked a lot about a blue sweater, okay. A blue sweater. There is a sweater. Where is it found? In Ronnell Gilliam's apartment.

And you are going to hear what happened after the shooting. You are going to hear that Darrel came there with his wife at about the time the shooting was happening. He got out of his car and he heard the shots and he knew these guys. He knows these guys. He knows Ronnell. He knows Nick. He grew up in the neighborhood and he hears shooting, and these guys are running and he runs.

And, you know, let's be grown ups about this, okay. The idea that somebody of color, in Bronx County, who knows the players that are involved and is running from the scene might get arrested and charged with, somebody who didn't do it, I mean, that is not such a strange idea in Bronx County unfortunately.

And he freaks out, and his wife Aida freaks out. They have been having some problems. They were planning to go down to North Carolina where he has family, still has family. Is this the time? Maybe we should go. This is really scary. You know they are asking questions about [46] everybody. Let's go out of here.

Is that the right thing to do, the wrong thing to do? I don't know. Is that an understandable thing to do? Do innocent people get charged? Isn't that what this very case is about? It's not just it's a crazy idea. So he goes with Aida and the kids. They go to North Carolina.

What does he do there? He doesn't change his identity. Does he hide away? Does he get a new name? He goes down there and they get a place to live under their own names. He has a business. He comes to New York any number of times to do business. He is not running away. He is not hiding. They know where he is.

His – when I say they, them, they, the law enforcement knows, knows his address. They know how to reach him the whole time. If they want to take a swab, they go down there. They know where he is living. He had – he gives them the swab. This is the – not a person, quote, running away from committing

murder in the days after the crime when he is concerned about, you know, what's going to happen to him.

And he gets a lawyer, and the lawyer contacts the police, and this is on the same day or the next day. And you will hear this from Jimick, the case detective. He says, Detective Jimick, if you want – do you want to talk to Darrel about this? Do you want to interview Darrel? Jimick [47] says, no, that's not necessary. And the lawyer says, well, look, if you want to talk to him, if you ever want to talk to him about the case, interview him or whatever I will make him available, okay.

So when the District Attorney suggest to you this is a murderer running from a homicide, you know, just consider the fact that he stays put, he has his business, he has his family, he takes care of his kids, they know where is he, he has the same identification. He comes to New York on business. He has his own driver's license. And he got his lawyer, if you ever want to talk to him he is available, okay. So just see that for what it is.

So let's go back to the sweater which the shooter, the shooter in all likelihood was not even wearing the sweater like the one they got from Gilliam's apartment. And why do I say that? Because the many of the witnesses that you will hear talk about being able to see the right forearm of the shooter.

Now, some of them will say that the shooter had a tattoo, a number of tattoos, Oustatcher did, on the right forearm, okay. They may or may not be correct about that. They're probably wrong about that which

is – by the way, you will see the District Attorney is going to show you some video of Nicholas Morris. He apparently doesn't have – I've never met him, but he apparently doesn't have a tattoo on his [48] right forearm, but you're also going to see Mr. Hemphill's right forearm and he doesn't have a tattoo on his right forearm either. So to the extent that the shooter may or may not have a tattoo it certainly doesn't point to Mr. Hemphill.

If you are wearing the sweater that they are going to show you, it's big, loose, kind of long sleeve sweater, you are not even going to see the person's forearm anyway. So that's an indication that if they are saying forearm that the shooter is not wearing that kind of a sweater.

And you are going to hear people, some of the same witnesses we have talked about, yeah, some of the people, some of the witnesses are going to say shooter was wearing a sweater like that, but some of them are going so say that he was wearing a t-shirt and some of them are going to say he was wearing a golf shirt. And the evidence, like a lot of evidence in this case, is going to be conflicting on it.

And these are issues, all these issues are things to consider when the Judge tells you about reasonable doubt and what kind of a verdict you have to bring in if you have doubts about the evidence.

And then you are going to find out why I say that that sweater probably had nothing to do with this case is that when they find the sweater one of the things that you want to look for, and the police will tell you about this, if you are a shooter and you are shooting a

9-millimeter, right, [49] and you are firing five, six, I don't know exactly how many shots the witnesses are going to say they heard, there is going to be what they call gunshot residue.

Gunshot residue is like stuff that gets emitted from a weapon when you fire it and gets on you. Maybe you can't necessarily see it unless you are an expert and know what you are looking for, and that's what happens and the police are aware of that.

So when they get the sweater they know that's something significant to look for and so they send the sweater – they have some suspicion that there may be gunshot residue. It turns out they are wrong. They send to the police lab and they get a report back from the lab, and you will see the report or you will hear it, excuse me, and the report says there is no indication that this sweater was involved in a shooting. That's what the reports says. And that's the sweater that they're kind of hanging their hook on.

So when I say this sweater probably wasn't even involved in the shooting, it appears that it was not because you are not going to see forearms, you are not going to think there is a tattoo. There is no gunshot residue. There is no connection.

And when you listen – and then you are going to hear about DNA and, you know, you got to be really careful [50] about that because – I am getting mess[ed] up here.

Okay. You are going to hear about DNA, and DNA is a big catch word now. Oh, DNA, wow, it must be a real case because they have DNA. Well, just listen carefully to the DNA evidence because DNA can

establish certain things and certain things it doesn't establish, okay.

If – you are going to hear this from the DNA person. If you wore a sweater like ten times, right, and I wear it once then they do a swab, guess whose DNA they are going to find? Yours. 'Cause you worn it so many times. They are not going to find mine. I don't know where it goes.

So DNA really doesn't tell you whose worn that sweater. All it tells you – the DNA in this case, all it's going to tell you is at some point, they can't say when you've heard of DNA, you know, they get it 20 years later, 10 years later, right? Innocent. That's what he was talking about.

All the DA is going to tell you is that at some point, we can't say when, Darrel Hemphill wore a sweater found in Gilliam's apartment that probably had nothing to do with the shooting, and you will hear that that was his sweater and he gave it to him, and he wore it many number of times. I am sure you can find his DNA on it.

So that DNA, all it tells you is that at some point he wore that sweater and they can't say whether it was [51] the day before or the week before or the year before or 10 years before, and they can't say whether that sweater was worn at a shooting or it was just worn by somebody sitting in the closet. The DNA doesn't tell you anything that adds to the proof in this case. That's significant.

So just in closing, I have to, please, you know, keep an open mind after you hear all the evidence in this case. Again, we are just lawyers. If I make a suggestion

to you that you don't think makes any sense, just reject it. You are the folks that count. If I say something that does make sense then, you know, you can use that argument and apply it when you hear the evidence in this case.

You are going to have witnesses that positively identify somebody other than Darrel Hemphill in the days after this shooting happened, and the memories and recollections and ability to recognize were fresh. Not nine years later.

You are going to have ballistic evidence from Morris' apartment, you are going to have bruises on his knuckles, you are going to have substantial, substantial reasons to question the proof in this case, you know.

It's – we talked about this in jury selection. It's a hard thing to be a juror in a case like this, but the fact of the matter is some cases simply aren't proven. In some cases the person sitting at that table is not the person [52] to be held responsible.

You are going to hear some things about Darrel Hemphill during this trial, and they are significant things. You are going to hear a little bit about who he is and his life and his children that he takes care of. He is one of the good guys. He works. He comes home. He is not a killer. He is not a shooter.

Some cases, as I said, never get proven. It's nobody's fault. It's not Mr. Oustatcher's fault. It's not your fault. Not the Judge's fault. Some cases never get proven and that's very frustrating, and it's awful for the People involved, for the family, but it's no reason to convict an innocent person.

Ladies and gentlemen, this case is riddled with mistakes for nine years. Witnesses that believed, that not believed, witnesses that have believed, not believed. All sorts of questions. Legitimate, legitimate questions that you can have about the proof. And that's – it's just not the way we do justice. We don't guess. You don't do what's convenient. You just don't choose what you think may have happened.

A tragedy occurred on April 16, 2006. A young innocent child was killed. A mother who is from a community, from our community, and that's a tough thing. Our guts tell us somebody has to pay for it. That's a powerful, powerful [53] feeling, but it's a dangerous feeling. And you can't let that feeling affect your view in this case.

You can't convict Darrel Hemphill of this crime, I submit to you, and I will again at the end of the trial, but don't add to the ongoing tragedy of what happened on that day in April. Thank you.

THE COURT: Ladies and gentlemen, you heard the openings by counsel. I remind you, you have not heard any testimony, you have not heard any evidence and don't make any speculations about any relevant facts on this case. Our projections are not the same thing as evidence. You will have to hear the evidence to determine whether any of the allegations have been proven.

* * * *

[398]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013 Jury Trial

265 East 161st Street
Bronx, New York 10451
November 5, 2015

BEFORE:

HONORABLE STEVEN L. BARRETT
Supreme Court Justice

APPEARANCES:

(Same as previously noted.)

Gladys Joshua
Senior Court Reporter

* * * *

[506:1]

MR. OUSTATCHER: The date of grand jury testimony.

THE COURT: What he needs is the name of the reporter.

MR. OUSTATCHER: What I will do, I will make the reporter available to him and I will stipulate. We can do it that way.

THE COURT: That's fine.

MR. OUSTATCHER: In fact, I may stipulate once I read the transcript, see if what's appropriate and legal grounds as such. So I would address, on my own, by way of e-mail, to Mr. Sears over the weekend once I see the transcript.

MR. SEARS: That's fine. I think there are two different dates that she testified.

MR. OUSTATCHER: And one more thing, I am not sure how we want to do it. I have informed Mr. Sears of this previously by way of e-mail. I am not sure if you want to do it tomorrow by way of arguments. I don't want to delay trial testimony, but based upon the nature of openings I have decided that I am going to seek to introduce the allocution of Mr. Morris regarding the gun he possessed.

Defense has the transcript. I can come in whenever and discuss it and get a ruling before I try to do it. Tomorrow or whenever.

THE COURT: Just give me a highlight of what this [507] pertains to.

MR. OUSTATCHER: So Mr. Morris ultimately pleads guilty in this case, not as on the murder indictment, but an SCI because the charge he plead guilty to was not contained on the murder indictment. The initial murder indictment, I think, had Murder 1, maybe two counts, as well as a weapon possession count, CPW 2 or 3, the time confuses me. I think two as to a 9 millimeter. Ultimately, Mr. Morris plead guilty to another weapon charge, the .357 charge.

THE COURT: That's on the indictment?

MR. OUSTATCHER: Well, it was an SCI. So they're consolidated.

THE COURT: Separate matters though?

MR. OUSTATCHER: Separate instrument. SCI consolidated with murder indictment. He plead guilty to the possession on August 16, 2006 of a .357, and we had the case on before.

It's statements against penal interest. This is a – he had no prior record. He suffered a felony conviction, was put on parol[e], ultimately he was deported because of this.

And I would note this, the transcript is against the advice of counsel that he plead guilty, and as well as in the transcript no independent evidence by which he could be convicted of .357. [508]

So I can address it at length further. There is case law on point as to this.

THE COURT: I apologize. Again, this was not a proceeding before this Court; am I correct?

MR. OUSTATCHER: Judge Gross.

THE COURT: And the .357 did it exist? I mean, we are talking about a weapon that exists in the real wor[l]d?

MR. OUSTATCHER: Yeah. He was bringing the gun, as indicated in openings, to this fight and there will be further testimony about the .357.

THE COURT: What I mean to say, was he arrested in possession of that gun?

MR. OUSTATCHER: No. He plead guilty —

THE COURT: Was that gun ever recovered?

MR. OUSTATCHER: No.

THE COURT: Okay.

MR. OUSTATCHER: So it's the kind of case no evidence that could prove him guilty or even charge by way of indictment, yet he walks into court, puts his hand up in the air and swore, plead guilty to a felony that put him on post release and ultimately got him deported.

THE COURT: Post release?

MR. OUSTATCHER: Supervision.

THE COURT: Post release of what? Did he also get a determinative sentence? [509]

MR. OUSTATCHER: He did. Ultimately it turns out something of time served. He was in jail for about two years. So it did allow – he was released by way of corrections after he plead guilty. So I will address it further. As he plead – I will read the transcript and case law.

THE COURT: Are you the Assistant who offered the plea?

MR. OUSTATCHER: It was Dan McCarthy, Ed Talty. I am not sure who took the plea. I was not present in court.

MR. SEARS: Judge, first of all —

THE COURT: I am sorry. Before I get to hear from you, okay.

So what is the offer of proof here?

MR. OUSTATCHER: It establishes what firearm Mr. Morris possessed on August 16, 2006.

MR. SEARS: Judge —

THE COURT: I see. So you are asking – what does this have to do with the opening?

MR. OUSTATCHER: There was, and I will read them again, there was much talk about Mr. Morris possessing a 9 millimeter, and I will note —

MR. SEARS: The bullet. The bullet recovered from his apartment.

MR. OUSTATCHER: I will open the door to this as [510] well. There was a .357 bullet in his home recovered too. And I am– 'cause I read Mr. Sears' opening earlier as to the earlier application, but it was the possession of the firearm in the area for the purpose, and what Mr. Gilliam will say, as indicated in opening, is that he called Nick Morris to come after the defendant left, ran, while on University and Nick Morris did come. Everyone meets up. The defendant, Aida Llanos, his then girlfriend, Gilliam as well as Nick Morris, and both guns are dropped off in the apartment and Gilliam disposes —

THE COURT: They meet up after or before the shooting?

MR. OUSTATCHER: After the shooting they all —

THE COURT: What happened before the shooting?

MR. OUSTATCHER: Before the shooting Morris comes from a different direction.

THE COURT: But is he coming to the same location?

MR. OUSTATCHER: And that's what Gist said. I think I saw Nick Morris in the area after the shooting, yes.

THE COURT: So the notion here is that Morris is coming to assist, but he is not the actual shooter and then ultimately the guns are surrenders, guns are hidden at the location?

MR. OUSTATCHER: It establishes that; what gun he possessed on that date. [511]

THE COURT: Your offer of proof is offer testimony through who?

MR. OUSTATCHER: I will call the court reporter down in Manhattan as to the allocution. It's a certified court transcript as a statement against penal interest. I prefer to address it formally when I have the transcript and case law in hand. I prefer to give notice.

THE COURT: Yes, counsel.

MR. SEARS: I am not saying address it at all, but I will, and it's – first of all, let me note something I think inaccurate. I don't think Morris was deported. I think he made – the year he got out, left the country and not able to get back in because of – excludable because of his conviction.

But in any event, you know, I am really at a lost here as to understanding the basis upon which the District Attorney is seeking to do this. Number 1, given the fact that he – that they argued at length and ultimately successfully comes out the evidence concerning Morris possession of a .357 is not only

irrelevant with this case, and your Honor agreed with that and prevented me from bringing that out. I see no basis for admitting Morris plea to possession of a .357 weapon. It's not probative of anything. Plus the fact —

THE COURT: Well, it's probative of one fact. [512] Whether or not admissible is a different question, but it is probative of the fact that counsel alleges that you put at issue. I don't know that's so, but counsel's allegation —

MR. SEARS: I know —

THE COURT: Excuse me. Excuse me. Let me finish my statement.

Counsel's statement is that you put in play the question of whether or not Morris was in possession of a 9 millimeter; and therefore, is in fact the responsible party for shooting. And counsel says that Morris acknowledgment of possessing a .357 refutes what he says you put in play. So as far as the subject it may very well be in play. As to the manner in which it can be presented, that may be a different question.

MR. SEARS: No. My concern is my – what I call putting in play about Morris being the shooter. As I said in opening statements it's based on testimony of the eye witnesses, it's based on the fact that he had bruised knuckles in the fight and based on the fact that a 9 millimeter live round was recovered from his apartment.

I was precluded from saying anything about .357 because your Honor ruled that it was irrelevant, whether or not he possess a .357 was not relevant. And

question whether he did the shooting in this case, that's where we are on that issue. [513]

And so it seems to be entirely irrelevant whether or not he says that he possessed the .357. The District Attorney says even in the allocution there is no evidence that he did that. Just makes a deal so he can get out of jail. So not even a statement against penal interest. It's clearly hearsay and deprived of an opportunity of cross-examination, and any number of reasons why the application should be denied.

THE COURT: Well, there are certain exceptions. But what occurs to me, unfortunately, is that these are statements that would be testimonial in nature, and under *Crawford* would present confrontation problems whether or not they satisfy hearsay exception. At least on the first question that we see *Crawford* was precluded from these motions.

Is this statement in colloquy?

MR. OUSTATCHER: I will take it further once I have the proper authority on this point. I just want to bring it to the Court's attention and defense. I will e-mail —

THE COURT: Was it *Crawford*?

MR. OUSTATCHER: I believe so, yes.

THE COURT: You have to look very closely. Rules of the game have change.

MR. OUSTATCHER: Perpetually. [514]

THE COURT: And what was once would need to be appropriate under hearsay exception and

contemplating confrontation issues no longer are necessarily so.

MR. OUSTATCHER: I will e-mail Mr. Sears my authority, I will give the Court my authority, we can address it.

THE COURT: The question is, I think as I said, to think at this point, as I said to Mr. Sears now, I think the issue is relevant. Just I don't think the way in which you propose to prove is proper.

The fact that there is an issue in the case doesn't mean you can prove it any way possible. I still think that it is conceivable that the evidence, should there be a way of proving the evidence that Morris was in possession of a .357 not a 9 millimeter is relevant in the case.

So, for example, if Mr. Morris were available and was called as a witness I will not preclude his testimony on the ground of immateriality. I find it is probative to call and introduce that evidence. The problem arises because you don't have a constitutional language in which to offer that evidence. It's really academic as to whether it's relevant and —

MR. OUSTATCHER: I think under the authority it is. So I guess at the appropriate juncture. [515]

THE COURT: Sorry, again?

MR. OUSTATCHER: I think based on the authority I have, I have to gather, there's a constitutional way of doing it. It's allowed and proper.

THE COURT: I think you do, I think, but it's not for me to tell you how to do it.

MR. OUSTATCHER: Understood. I will give authority to everyone and we will argue at the appropriate time if that's okay with the Court.

What time Monday morning?

THE COURT: 10:15 I ask the jurors to be here. You can be here at the same time.

MR. OUSTATCHER: Thank you. And a full day?

THE COURT: Mostly. Couple of things in and out, but I think I can handle them appropriately.

MR. OUSTATCHER: Thank you.

(Whereupon, Court is recessed and the case adjourned to Monday, November 9, 2015 at 10:15 a.m.)

[624]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
November 12, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[645:8]

[MR. OUSTATCHER]: And the last point is this. We have had arguments about, and I'm thinking now I won't do it right now, but later, to put in Morris's allocution about the .357 based upon statements made by counsel in his opening statement.

Earlier in the case, I received a ruling from this Court about the non-admissibility of certain ballistic evidence recovered from Mr. Morris's home, specifically .357 ammo, an inoperable .22, a starter pistol and certain photos.

Based upon arguments advanced in opening statements, I'm seeking to give up a small piece of that beneficial motion and I am going to seek to put into evidence the fact that three rounds of ammo, the .357, should come into evidence at this trial, and the reason I do that is because they are now under *Primo* and its progeny linked to this case because the .357 is a gun that Morris was bringing to the scene that Mr. Gilliam will testify [646] that he threw away after the fact, so I'm going to, on my case, give up a small piece, without giving up everything, regarding the three .357 ammo rounds, and I would note —

THE COURT: Respecting again testimony of this witness?

MR. OUSTATCHER: Yes, yes, because he actually — I have told counsel the crime scene cop is retired. He's not coming in. The vouchering cop is retired. He's not coming in, so I'm seeking to open up the envelope right here in which both the .9, the round of 9-millimeter that is live and the three rounds of .357 are included, and that's what I seek to introduce.

THE COURT: Do you have any objection to that?

MR. SEARS: Well, yes, of course. The district attorney wants to have it both ways. Whatever suits his case at the moment in a ruling he seeks. We litigated this issue —

THE COURT: But you were in favor of admitting the .357?

MR. SEARS: Judge, it's irrelevant to the argument now. Your Honor ruled evidence concerning

the .357 was not relevant to this trial. Okay? That is the ruling Your Honor made.

THE COURT: Does it become relevant when there's a change of circumstances? [647]

MR. SEARS: There has not been any change of circumstances.

THE COURT: Counsel says there has been on the basis of your opening.

MR. SEARS: I don't know what in my opening indicates a change of circumstances with regard to the .357. Whether – whether – there's a whole bunch of issues that have to do with the allocution and the admission of the allocution, and we can address all of those issues now or we can do it at a later time, but there are numerous reasons why Mr. Morris's plea allocution should not be admitted in this Court and why – and that Your Honor's ruling on the .357 is correct.

THE COURT: Well, I'm just – I'm a little confused.

MR. SEARS: If you want to address all these issues now, I'm happy to do it, but it's a long conversation.

THE COURT: Well, we're not having a long conversation. I agree with you on that. I don't believe there has been a ruling on the allocution, and I think —

MR. SEARS: That's correct.

THE COURT: I'm not even going to get to the merits at this point. I'm getting to the point that the

district attorney – I guess I'm just a little confused by [648] the topsy-turvy nature of the position taken by counsel.

The district attorney wants now to admit something that you wanted to admit before, and now you're objecting. I guess that's what's throwing me.

MR. SEARS: That's right. That's right. That's right.

THE COURT: I understand it's right. I just don't understand it.

MR. SEARS: Number one, the situation has changed. And, number two, it's being offered for different reasons, and I think those reasons are inappropriate. They're not probative and, you know, so that's my position, and I'm happy to make clear what my position is on the allocution.

THE COURT: I don't know we have gotten to the point that we are going to be talking about the allocution.

MR. SEARS: Well, I don't know what's coming up in Jimick's direct testimony.

THE COURT: All right. I'll tell you what. Let's start the testimony now, and when we have a break we will deal with this at a break, but this is an awful lot to discuss while the jury is sitting there and actually waiting.

MR. SEARS: I do have my one issue that I wanted to address.

* * * *

* * * *

[650:10]

THE CLERK: Case on trial, People of the State of New York versus Darrel Hemphill. All counsel and defendant are present. All sworn jurors are present and properly seated.

THE COURT: Good morning, ladies and gentlemen.

Proceed with trial. People call the next witness.

MR. OUSTATCHER: The People call Detective Ronald Jimick.

* * * *

[DIRECT EXAMINATION OF DETECTIVE RONALD JIMICK]

* * * *

[BY MR. OUSTATCHER]:

Q. And was Mr. Morris, Nicholas Morris, present inside the apartment when you gained entry?

A. No, he was not.

Q. Who was present? What people were present in that apartment when you gained entry?

A. His mother was inside the apartment, his brother, a cousin and, I believe, his brother's girlfriend.

Q. And did they allow you to look in the apartment?

A. Miss Morris did, yes, she did.

Q. Specifically, where did you look in the apartment?

A. I requested a current picture from Miss Morris of Nick or Nicholas, and she let us into his bedroom, which was the first as you proceeded down the hallway.

Inside the bedroom on the back far wall there were several pictures located there, and she was trying to locate a current photograph.

Q Did you recover any ammunition, ammunition from that bedroom?

A. Yes.

MR. SEARS: May we approach, Judge?

THE COURT: Yes.

(Whereupon, the following discussion is held, at the side bar, among the Court, Mr. Sears and Assistant District Attorneys.)

THE COURT: Okay. [670]

MR. SEARS: We're at that point.

THE COURT: What items are you seeking to offer through this witness?

MR. OUSTATCHER: Four items of ammunition in the little envelope.

MR. SEARS: Keep your voices down.

MR. OUSTATCHER: Four items of ammunition in the envelope. There is one nine-millimeter round, and there are three .357 rounds I seek to put into evidence.

THE COURT: A prior ruling was made with respect to an application in limine by defense counsel, strike that, by the prosecutor, to limit the items that were recovered from Morris' apartment to consist entirely of a —

MR. OUSTATCHER: Just the nine.

THE COURT: One nine-millimeter round and to exclude the three .357 rounds on the grounds that at the time the .357 rounds were irrelevant because the shooting was attributed to a nine-millimeter firearm. The Court granted that application.

At this time, the People have amended their request, withdrawn, in fact, actually affirmatively sought the introduction of the .357 rounds. I'll ask you for an explanation of why when you previously moved to preclude that evidence why you're now moving to include the .357 [671] rounds.

MR. OUSTATCHER: It's really two reasons. A lot is based on the nature of the opening statements, which is still in play, based on my motion to strike, attribution of defense to the value of these nine millimeters as well as to second issue, which is now in play, which is the admissibility of the allocution by Nick Morris as to his guilty plea to the .357.

You told me when you said at first blush you were not favoring my motion for .357, that I was open, I could put in other evidence of his possession of the .357. And this ammunition links to that evidence as well as William Gilliam will testify after the shooting he meets up with Nick and Darrel and Bill and ultimately after, under his mattress takes the .357 and nine and disposes of them.

THE COURT: Gilliam is going to testify there were two firearms, nine and .357, and he disposed of both?

MR. OUSTATCHER: Correct. The .357 from Nicholas Morris, the nine from the defendant.

THE COURT: Okay. The reason why it's important to attribute a .357 to Morris is what, in light of the fact that is not the murder weapon?

MR. OUSTATCHER: It shows what weapon he possessed on that day. [672]

THE COURT: Why is that relevant?

MR. OUSTATCHER: Well, because he also has the nine here. And in the opening statement, it was he had the nine ammo in his room is the same ammunition as the gun that killed the child, which is conceded, but I would note nine are the most popular weapons, illegal weapons, in New York City. This ammunition was never linked and cannot be linked to the gun that fired the murder shot of the child.

THE COURT: .357 or nine?

MR. OUSTATCHER: Nine, itself. Defense said he had nine ammo in his room. That's the same ammunition. That's the gun used in the murder.

Under that same logic, the possession of .357 establishes what weapon he actually had.

THE COURT: Why is his weapon relevant?

MR. OUSTATCHER: It shows, it actually counters the defense argument.

THE COURT: Remind me of the argument made, counsel made you are attributing to him in opening.

MR. OUSTATCHER: In the opening, they found a nine-millimeter round of ammunition in Nick Morris' apartment and that the murder weapon is a nine. He had same the ammo that killed the child.

THE COURT: Right. And so now you wish to show [673] that Morris, in fact, was in possession of a .357 on the basis of the allocution as well as on the basis of the —

MR. OUSTATCHER: Possession of the ammo as well as Gilliam's testimony.

THE COURT: I'll hear, counsel, your opposition. You had at one point wanted this evidence in to support the claim that Morris was more likely than not to be the shooter, because he had a particular relationship with the ballistics materials. And now your position is what?

MR. SEARS: My position is that the – it's his – the fact that he has a .357 recovered in his apartment some time after the incident is not relevant to whether he fired the fatal shot that killed David Pacheco, as your Honor found and in the previous ruling.

The district attorney's application is based on part on his intention to link up in some fashion this evidence with Morris' plea allocution, which he at some point intends to offer and will be my position for a number of what I consider to be very powerful reasons concerning the law in regard to that, as well as the circumstances under which that allocution was

taken, under which that plea was entered that this court will preclude the introduction of Morris' plea allocution.

THE COURT: We haven't reached that point yet, though. [674]

MR. SEARS: I know that, but I have to – you're asking me for a position.

THE COURT: Position as to the ammunition. In other words, at this point —

MR. SEARS: So my position —

THE COURT: Other than the fact that you will be arguing against the allocution, what's the basis for arguing against these bullets alone?

MR. SEARS: I only mention that because of the district attorney's statement that he intends to link this evidence

THE COURT: That's what he's hoping is —

MR. SEARS: – with the allocution and my position is he's not going to be able to do that.

THE COURT: What's your opposition, notwithstanding the fact you still have the opportunity to be heard fully on the allocution issue? What is your opposition to the admission of these bullets, particularly given the fact that you previously had no opposition to them? Where is the harm to you? I mean, obviously, if there is evidence that counsel successfully presents to the jury pertaining to the allocution, he does take away an argument that you made, at least in part, at least answers an argument that you made

that Nick Morris is the shooter with the nine-millimeter. [675]

And it seems to me that although there may be formal issues with respect to the propriety of introducing the allocution, which I have not yet made a ruling on, certainly, if that were admissible, the argument by the district attorney would be appropriate to meet argument that you've made and that you've indicated previously that you will be making that Morris is the right person as the shooter, and your client is the wrong person.

That being said, presentation of evidence establishes that Morris was in possession of a different type of firearm, two firearms used, would at the very least refute your position in part and would allow for the possibility that there were two weapons at the scene, one possessed by Morris, but not the weapon that resulted in the death of the child. So it seems to me to be relevant as an issue.

Whether or not it can be established through the allocution is something that we're going to have to discuss, and that will introduce questions of an evidentiary nature, bullet as an issue.

If the People can in that fashion or some other fashion prove that Morris was in possession of the .357, seems to me to be a perfectly relevant issue to this case, in light of the argument that you have made, which in all respects are fair argument, nonetheless, are arguments [676] that go to the heart of this case and the district attorney, I believe, has an opportunity to at least try to meet them.

MR. SEARS: Okay. It's my position, make it clear, at this point in the trial, before there has been any ruling with regard to admission of the allocution, it's my position that whether or not Morris, in Morris' apartment at some time after the homicide the police recovered, I think you said under the mattress or some place like that, a .357, is not relevant to the issue as to whether – as to who Morris or whomever shot Dave Pacheco with a nine millimeter, as evidence stands now. It's my position that the recovery of that item in that location is not relevant.

THE COURT: Okay. I would make the following ruling on the basis of arguments that we have heard as to the position you've taken and position that you've taken expressly in the presence of the jury, the existence of this evidence. The .357 is relevant in this case and is relevant to the question of what Morris' actual conduct was in this case.

And even if the allocution doesn't come in, although the argument the district attorney has been making is substantially weakened, at the very least, he has the . claim that Morris was not exclusively in possession of the [677] nine-millimeter ammunition and can at least refute any arguments that you make that Morris was necessarily a person in possession of the nine-millimeter gun because of the nine-millimeter ammunition. So I have to grant you exception, and I will allow the district attorney at this time to introduce this evidence.

MR. SEARS: I want to add that I believe the Court's position, with due respect, the Court is now taking, given the state of the evidence, a position that

I am – opposite to the position that the Court took with regard to the prior applications on this issue.

THE COURT: As are you. As you are. And that's because both of us are operating on a different application. It's a very different issue now, and my position is based on the application that's made as to a different principle and different point, as is your application, as well.

MR. SEARS: It's my position that absent the plea allocution, the position and situation with regard to this evidence has not changed.

THE COURT: Okay. You have an exception.

(Whereupon, the following takes place on the record, in open court in the presence of the jury, among the Court, Mr. Sears, the defendant and Assistant District Attorneys.)

[678]

MR. OUSTATCHER: Can I have this item marked as 111 for ID?

(Whereupon, the item previously referred to is received and marked People's Exhibit Number 111 for identification.)

THE COURT OFFICER: People's 111 is marked for ID.

DIRECT EXAMINATION (Cont'd)

BY MR. OUSTATCHER:

Q. Show it to the witness, please.

(Whereupon, the item was handed to the witness)

Q. We're going to leave it in a sealed envelope in front of you.

Before I ask you questions about 111 for ID, about what time on what date did you first gain entry into Mr. Morris' apartment on University Avenue?

A. We arrived there in evening time hours of the 16th and gained entry to the apartment just around midnight or little bit thereafter.

Q. Did you ultimately secure a search warrant to search the apartment?

A. Yes, we did.

Q. And about when did you, do you recall, do you leave the apartment, if you remember?

A. After we contacted uniformed officers to respond and [679] secure the apartment, we left there. I'd have to venture a guess. I don't want to do that, but it was at least an hour or so after our arrival.

Q. Does that bring you into the 17th now?

A. Yes.

Q. I'm going to ask you just about ammunition. Did you observe any ammunition inside that apartment?

A. Yes, I did.

Q. And how many pieces of ammunition did you recover from the apartment?

A. Four.

Q. And what was the caliber of the four pieces of ammunition you recovered from the apartment?

A. .357 caliber and nine millimeter.

Q. How many nine millimeters were there?

A. There was one nine millimeter.

Q. And how many .357s were there?

A. Three.

Q. And did you, yourself, observe these four pieces of ammunition?

MR. SEARS: Objection to this. I have an objection to the testimony for reasons discussed at sidebar.

THE COURT: Noted.

* * * *

[708]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
November 13, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[CROSS-EXAMINATION OF DETECTIVE JIMICK]

[BY MR. SEARS]

[742:3]

Q. So this smell that you told the district attorney about yesterday, did you consider that to be significant?

A. I did.

Q. Okay. And, generally speaking, I would think as a careful detective who has been on the force for a

long time, you would note significant things in your DD-5s? That's what they're for; are they not?

A. They are.

Q. Yet you failed to note this significant thing in any of the paperwork on this case; correct?

A. That's correct.

Q. And the laboratory analysis that you just referred to did not find anything to suggest that; correct?

A. That's correct.

Q. What is it that first led you to consider Nicholas Morris as a suspect in this case?

A. His association with Ronnell Gilliam and his physical characteristics that matched the descriptions that were initially put out through the 911 system.

Q. Well, you recall interviewing a person by the name of Michelle Gist?

A. I do.

Q. And you recall – and was that interview of her in her [743] apartment? Do you recall where that was?

A. I believe it was in her mother's apartment on Harrison Avenue.

Q. What day was that?

A. That was the day of the incident.

Q. Right. And do you recall when you spoke to Miss Gist on that day that she told you that she had seen the initial argument, fight?

A. That's correct.

Q. And did she describe to you the two male blacks that she said were in that fight?

A. She did.

Q. And did she say that she knew those two male blacks from the neighborhood for 15, 20 years?

A. She stated to me pretty much that she had known one of the people as Burg and that she had known him for close to 20 years, that she had seen him in the neighborhood, and described another person, an associate of Ronnell's, and described him as a tall male black and having the first name, I believe, of Nick.

Q. Nick, isn't that correct?

A. That's correct.

Q. Right. So when you spoke to Miss Gist on the day that this happened in the apartment there, the two names that she gave you as being involved in the initial altercation, people that she had known from the neighborhood for years, were Burger [744] and Nick; is that correct?

A. Burg.

Q. Burg and Nick?

A. Burg and Nick, yes, correct.

Q. And she did not give you the name of Darrel Hemphill or Dee when she spoke to you that day; correct?

A. That's correct, no, she did not.

Q. And as a matter of fact, your arrest of Nicholas Morris was based upon this identification by Miss Gist; isn't that correct?

A. No, that is not correct.

Q. Okay. Do you recall testifying at a hearing in this case a long time ago?

A. I do.

Q. Okay. And at the hearing you were testifying. You were under oath; correct?

A. That's correct.

Q. And you were being asked questions by an attorney; correct?

A. That's correct.

Q. And you were telling the truth; correct?

A. Yes, sir.

Q. Okay. Do you recall being asked this question and giving this answer, or these questions and giving these answers?

"QUESTION: Detective," that's you, "what was the [745] basis for arresting Mr. Morris?

"ANSWER: We had an eyewitness that had identified him.

"QUESTION: Who?

"ANSWER: That would be a person we know as Michelle Gist."

Do you recall being asked that question and giving that answer —

Q. Yes, I do.

A. — in that hearing?

Okay, so at least when you testified back at this hearing, on 10/29/07, a long time ago, you told the Court that the arrest was based – the arrest of Nicholas Morris was based upon the eyewitness identification by Miss Gist; correct?

A. I don't know that you're interpreting

Q. Would you like me to read that again?

A. No, I don't need you to read it again. Thank you, though, counselor.

Q. Were you asked those questions and did you —

MR. OUSTATCHER: Judge, can the witness be allowed to answer?

THE COURT: You have a question before you. You may answer it.

A. I don't believe you're interpreting that answer in the whole context of the hearing. Miss Gist's statement at the [746] scene was a brief statement that led us to Mr. Nicholas Morris.

Q. Okay.

A. The probable cause that we developed to arrest him —

MR. SEARS: Judge, please.

A. — to arrest him and charge him with murder —

MR. SEARS: Judge, may —

A. — was based upon three eyewitness identifications.

MR. SEARS: — we ask the witness to stop lecturing to the jury?

THE COURT: Let's wait for a question.

THE WITNESS: Okay.

Q. I don't want to parse words, but in this brief interview you had of Mr. Gist – Miss Gist that day, she gave you two names. One was Burg and one was Nick; correct?

A. That's correct.

Q. And neither person that she named was Darrel Hemphill, or Dee; correct?

A. That's correct.

Q. And you told the hearing people that that was important in your reasoning for arresting Nick; correct?

A. That's correct.

Q. Now, in your initial investigation you spoke to a number of people who had witnessed what occurred, correct, various parts of what occurred?

A. I spoke to several detectives who had done interviews [747] with people that had witnessed what had happened.

Q. All right. Did you come to understand that there were a number of people who had observed the initial fight and also the shooting?

A. That's correct.

Q. Okay. Do you recall the names of those people that you came to understand as witnesses to that?

A. I do.

Q. Who were they?

A. I'm going to have to refer to my notes.

Q. Yes, that's fine.

A. Jon Erik Vargas, Jose Castro, Brenda Gonzalez, Juan Carlos, Marisol Santiago.

Q. Anyone else?

THE COURT: Who was the third that you just named?

THE WITNESS: Oh, I'm sorry, Judge. We had Jon Vargas, Jose Castro, Brenda Gonzalez.

THE COURT: Thank you.

THE WITNESS: Okay.

Q. Okay. And Juan Carlos, what's his last name?

A. Juan Carlos Garcia.

Q. And a number of those people you asked to look at lineups, to look at a lineup; correct?

A. Yes, sir. [748]

Q. And who did you ask to look at a lineup?

A. We attempted to get all of them to look at the lineup, but we were only able to get four.

Q. Which four were those?

A. Again referring to my notes, Juan Carlos Garcia, Jon Erik Vargas, Brenda Gonzalez and Marisol Santiago.

Q. I think you told the district attorney that Jose Castro was working or something that day and so he couldn't do it?

A. I believe that was the understanding I had that day; he was unable to be there to view the lineups because of work.

Q. And would you say that those witnesses were chosen to look at the lineup because you considered them to be the best witnesses that you had available to what occurred?

A. That's correct.

Q. And before these people and before that determination was made, those witnesses you say were interviewed by detectives that were participating in this investigation?

A. That's correct.

Q. And then a determination was made that these are the people that we are going to ask to come and look at the lineup; correct?

A. That's correct.

Q. Now, in addition to these eyewitnesses, you also had some other evidence implicating Mr. Morris; correct? [749]

A. That's correct.

Q. And among that other evidence that you had, you had done a search of his apartment; did you not?

A. Yes, I did.

Q. And you participated in that?

A. I did.

Q. And in his apartment you told the district attorney you recovered some ballistics evidence that you thought was significant; is that correct?

A. I did.

Q. Among that evidence that you recovered was a 9-millimeter bullet; correct?

A. Correct.

Q. And where was that in the apartment?

A. It was on like a nightstand next to the bed area.

Q. Whose bed area was that?

A. Nicholas Morris.

Q. So on – next to his bed there's a little nightstand, and on that nightstand is a 9-millimeter bullet; correct?

A. Yes.

Q. And that was significant in your investigation; was it not?

A. It was.

Q. All right. Was it your understanding that the round that was recovered from the hospital and that killed David [750] Pacheco, Jr. was a 9-millimeter bullet?

A. That's correct.

Q. And so on the nightstand, Nicholas Morris's nightstand, which, by the way, when did you execute this warrant?

A. That was executed in the early morning hours of the 17th.

Q. So that would be some 12 hours or so after the shooting, approximately?

A. That's correct, approximately.

Q. So 12 hours after the shooting on a nightstand in Nicholas Morris's bedroom is the very same type of bullet that killed David Pacheco?

A. Same caliber bullet, yes.

Q. Same caliber bullet, capable of being fired from the same kind of gun?

A. Correct.

* * * *

[751]

Q. And would 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? Does that make sense?

A. That would be a reasonable conclusion, yeah.

Q. Okay. I think you also was it your understanding that from the witnesses you spoke to – I'm sorry, excuse me. I know I do this a lot. Just no choice – that this incident began with an altercation that led to a fistfight?

A. That's correct. That was my understanding.

Q. And from your discussion with Miss Gist, you told us that she had told you, when you interviewed her, that the two male blacks involved in the fight were Nick and Burg, correct?

A. She identified Burg as being involved in the fight. She identified Nick as being there.

Q. Okay. Well, was it your understanding that, from the witnesses that you spoke to, that Burg was a big, heavy guy; was he not? Like 350, or a big, heavy guy.

A. Yes, he was.

Q. Okay. And then the second male black was supposed to have been a taller, thinner guy than Burg, correct?

A. Correct.

Q. And was it your understanding that the taller, thinner sorry – the taller, thinner guy had been involved in a fight at some point during the incident?

A. That's correct. [752]

Q. All right. Now, when was it that you – when was it that you first met Nicholas Morris?

A. At the News 12 in Soundview.

Q. All right. And what day was that? was that the 17th?

A. That was the 17th, correct.

Q. The day after the incident?

A. That's correct.

Q. And did you notice anything that you noted, because you felt it was significant, about his hands?

A. Yeah. He had bruising on his knuckles.

Q. And did that suggest to you that he had been in a fight recently?

MR. OUSTATCHER: Objection.

THE COURT: Allowed.

A. It would be reasonable to conclude that, that yes, he was in a fight recently.

Q. All right. Now, in your investigation, were you – one of the things you were looking for, based upon your investigation, was somebody with a letter tattoo on their right forearm; is that correct?

A. I believe one of the witnesses or two of the witnesses had stated that one of the people involved in the fight had a tattoo on his inner left forearm.

Q. Well, would it be a letter tattoo on the right forearm?

A. I believe it was a numerical tattoo, as a matter of [753] fact. I believe it may have even been a zip code.

MR. SEARS: May I have a moment?

* * * *

[835]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
November 16, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[889:16]

(Whereupon, there is a discussion held off the record, at the bench, among the Court, Mr. Sears and the Assistant District Attorneys.)

* * * *

[890:2]

THE COURT: The jury has left. At this time we'll proceed with any further legal argument.

Before we get to that, anything you need to raise? Mr. Oustatcher?

MR. SEARS: I had one thing.

THE COURT: You wanted to go first.

MR. SEARS: It may be what your Honor was talking about. It's just we left off in terms of I read portions of the hearing transcript with Detective Jimick, and the district attorney was going to review that and see if he was going to stipulate on the transcript. I'm following up on that.

THE COURT: Okay.

MR. OUSTATCHER: I need to review. I got the transcript this morning. My inclination is to stipulate. I just want to give it a look.

MR. SEARS: That's fine.

MR. OUSTATCHER: I'll do that this afternoon.

THE COURT: Anything further, counsel?

MR. SEARS: I don't have anything further.

THE COURT: Do you have anything, Mr. Oustatcher?

MR. OUSTATCHER: I do. As noted, I'm still looking to put into evidence the allocution of Mr. Nicholas Morris when he pled guilty to the possession of the firearm [891] in this case, possession of a firearm, .357 on April 16, 2006, as a statement against penal interest.

I would note I'm really relying at this point on the defense's memo of law, because the elements are pretty simple for a statement against penal interest.

We both concede that Mr. Morris, by the nature of his allocution, the fact that he was, I think it's

deported, he had no prior felony conviction before he allocuted to the conviction I seek to present.

He went back to Barbados, to my understanding, for a family matter, possibly a funeral , and when he tried to come back into the country, he was stopped and ultimately, he was deported back to Barbados. So he's unavailable.

So that I think to put in the portion of the allocution sufficient to give this trial jury understanding of where Mr. Morris was, that being in a courtroom under oath, he was advised of his rights, that he was present and admitted to possessing a firearm on April 16, 2006, that being a .357.

I think we, as we addressed before, it's been to a degree found that is relevant, that which the issues that this jury will confront.

So as I see it, the issue is really one of *Crawford*, which is what the Court brought up when I first [892] raised this issue.

In looking at *Crawford*, I looked at *People versus Thomas*, *People versus Hardy* and even most recently, 2013 case out of the First Department, which is *People versus Soto*.

I would note that I think we can't agree on much, we can agree this is a very, very unique fact pattern of the case. It presents many, many unique issues of law and facts for us and for the jury.

The most normal – the only other kind of instance in which I've seen a prosecutor try to introduce an allocution as a declaration against penal interest is a case in which you have codefendants in a certain

action, a rob two, which is robbing another without another person, actually, person, or murder cases where people are acting in concert in which the allocution of a codefendant not on trial is sought to be introduced by a prosecutor to establish either that a crime was committed, that a robbery, acting with another was committed, or by way of the allocution, to elicit the name of the trial defendant as a person who committed the crime with the witness who was unavailable.

And in those cases, those violate *Crawford* and that has been found in *People versus Thomas*, *People versus Hardy* and number of other cases. Because in those cases, [893] you have an individual who can't be crossed who is incriminating a defendant on trial by the nature of his plea and allocution.

The fact pattern we have here really stands apart, because Nicholas Morris is not alleged to be a co-conspirator with the defendant in this case. In fact, there really is no evidence in this case in which – unless Mr. Sears calls Anthony Gonzalez, the jailhouse informant who is available to him, but at this juncture, by the People's presentation of evidence, there is no evidence that Mr. Morris was acting in concert with the defendant in the murder of David Pacheco, Jr. There is one shooter in this case. It is the man in the blue sweater, and it is my theory the man in the blue sweater is Darrel Hemphill.

So this is a unique fact pattern where an allocution of someone who is unavailable for trial is presented to a jury not to incriminate a defendant, therefore, not violate a *Crawford*, but to establish a fact that is an issue before this trial jury, which is what weapon was

Nicholas Morris possessing on April 16, 2006 at the time this murder was committed. So this allocution establishes all the elements of a declaration of penal interest. It does not violate *Crawford*. Mr. Morris, as conceded, is unavailable, and that is my basis for seeking [894] to present this evidence before this jury.

THE COURT: Was a .357 recovered from Morris' apartment when it was searched?

MR. OUSTATCHER: No. That's interesting, because if you did read the allocution, I have it here, there is .357 ammunition recovered from the apartment as Detective Jimick testified to. Mr. Gilliam will testify that he disposes of both the nine and the .357. And both those items are surrendered at the apartment on Harrison Avenue from which the blue sweater is recovered. Mr. Gilliam takes those items and disposes of them with some help.

So that is also part of the strength of the allocution, because at the allocution, it was admitted by the prosecutor, who wasn't me, it was Mr. McCarthy, as well as Mr. Talty present in court, that Mr. Morris could not allocute to any of the charges contained in the indictment against him, that being the murder of David Pacheco, manslaughter of David Pacheco or the possession of the nine-millimeter firearm that killed Mr. Pacheco and as well, there was no evidence that the People could present to a jury by which an indictment could be secured against Mr. Morris for possession of the .357.

The sole basis for proving the .357 was Mr. Morris' is the allocution. He chose to admit a crime to the

commission of the felony for which there was no other [895] evidence against him.

I would note Mr. Morris' attorney, Mr. Bruce Barket, at that allocution saying he's doing it against my advice, because there is no evidence against him. There was to be an SCI, which was consolidated with the murder indictment, to allow Mr. Morris to plead in the case. That speaks to the nature of the strength of the statement by Mr. Morris.

He had no felony convictions. There was no evidence against him. It was only by his admission in court under oath, the commission of a crime arising from the possession of the .357 from which he could suffer his first felony conviction and suffer the consequences of a felony conviction that ultimately led to his being kicked out of this country where he has family and children.

THE COURT: Have you ever been in touch with Mr. Morris?

MR. OUSTATCHER: I have. I spoke to him about two months ago.

THE COURT: Is he willing to come to court and testify?

MR. OUSTATCHER: A, he's not willing and B, the Department of Justice, there's a special visa that the Department of Justice can grant to certain individuals to allow them to come back to court and to testify. And that [896] visa is granted sparingly, especially to state prosecutors, because the concern, as has been told to me by members of the Department of Justice, is that a person can be allowed to return to the U.S. who has

been deported for the commission of a violent felony, this being a violent felony, and even though they're in the custody of NYPD detective or other law enforcement, while on U.S. grounds, they can then declare that they are somehow the victim of political wrongdoing. Politically wrongdoing in their home occurred in seeking asylum here. If that is not granted by the relevant judge, it will keep him in this country in a facility for months or for years.

So I spoke to Mr. Morris. He would not come back to the country, and it's not clear that I could even bring him back to the country if he was so inclined.

THE COURT: Counsel, your response.

MR. SEARS: First of all, I think I take exception with the district attorney's representation that he's not offering this evidence to incriminate Mr. Hemphill. That's the sole reason he would be offering any evidence during this trial.

That being said, I do want to focus on the standards for admission of this type of evidence and the rules that apply to statements against penal interest.

And I have a number of cases. And as the district [897] attorney quite rightly pointed out, there are no cases that I have found where the fact pattern is analogous to this case. I've just given peculiarities of this case. There's probably no case where the facts are analogous. So the Court can't look at precedent factually similar to this case and say okay, I'm relying on that.

The cases do talk about the standard which the Court should apply and emphasize how careful, careful the Court should be in applying these standards because of the significance of the right that is being taken from the defendant, probably the most fundamental right an accused perpetrator has in a criminal trial, which is to confront and cross-examine his accuser.

And, for example, in *People against Blades*, 93 NY2d 166, the analysis of admissibility calls for a case-specific examination of the particular guilty plea allocution statements. The statement, meaning the allocution statement, must establish that a declarant, in making the statement, compromises an interest that is of sufficient magnitude or consequence to the declarant to all but rule out the motive to falsify.

It's a very high standard that the courts apply, given the importance of the right that is being surrendered.

THE COURT: How would you characterize this one? [898]

MR. SEARS: Sorry?

THE COURT: How would you characterize acknowledgment of possession of a .357 magnum firearm, which is a violent felony offense that results in not only punishment but deportation?

MR. SEARS: It doesn't result in deportation. He left the country and was denied re-entry. And to answer your Honor's question, the best way is to go to the transcript, itself, because the transcript, itself, makes quite clear the motivation of Mr. Morris in

entering a plea to a crime for which there was no evidence of his commission and against the advice of his attorney was anything but against his penal interest. It was opposite of that, and the allocution makes that clear.

I'm quoting now from the allocution. First of all, it was clear that upon the plea to the Supreme Court Information that was going to be filed on this case for which there was no evidence and which the, which the prosecution could not even present to a Grand Jury. This is all confirmed in the allocution.

The first thing is that it's clear that upon entry of that plea, the homicide indictment, much more serious indictment pending against Mr. Morris, was going to be dismissed.

On Page 5, Mr. Talty, who is one of the district [899] attorneys says: ["]As a result of that application, should the Court accept the plea of guilty, the People were prepared to dismiss the current indictment.["]

THE COURT: Does that necessarily establish that if the defendant had not pled to that charge, the People would have proceeded with the indictment?

MR, SEARS: I have no idea. I'm just reading from the transcript. I don't know what the district attorney's intent.

Assistant district attorney goes on to say in regard to the murder indictment that's currently before the Court that the proof relative to the nine-millimeter handgun, the assistant district attorney heard evidence that entitled Mr. Morris, based upon the strength of that evidence, charged with 265.03, talking

about the weapons charge that was contained in the murder indictment.

In regard to the plea, that Mr. Morris was going to enter to the unrelated and unprovable weapons count, the district attorney, this again, Mr. Talty, we recommend to the Court a sentence of time served.

His, Mr. Morris's attorney, Mr. Barket, wants to make clear that his client is getting the benefit that he is seeking by entering this plea.

And Mr. Barket says he is willing to enter into [900] this disposition today on the condition that he be released today now from this courthouse. That's his primary motivation in pleading guilty to this charge, admitting his criminal culpability and which he knows otherwise at this point they cannot prove. So it's clear

THE COURT: What was that last few words?

MR. SEARS: Admitting his culpability to something which he knows they cannot prove.

THE COURT: Thank you.

MR. SEARS: So it's clear, at least in terms of his own attorney's evaluation, that Mr. Morris' primary motivation in entering this plea is the promise that he would be released from custody that day.

THE COURT: That's counsel's opinion.

MR. SEARS: Sorry?

THE COURT: That's counsel's opinion.

MR. SEARS: Yes, that's counsel's opinion.

THE COURT: It's an opinion of somebody – I mean, even though in close relationship, opinion of

someone other than the individual who is entering the plea.

MR. SEARS: Yes. I have no reason to think that what Mr. Barket is saying about what he's trying to get for his client doesn't also apply to the client. I think that would be something, inappropriate interpretation, but that's just my reading of the transcript, Judge. That's [901] what it says, that's what his lawyer is saying.

THE COURT: Again, I have a different question for you. That is —

MR. SEARS: Can I just continue on with the rest of this?

THE COURT: Sure.

MR. SEARS: The district attorney confirms or it's confirmed with the understanding that the district attorney's office will dismiss the murder indictment permanently, permanently with prejudice.

This is later on in the colloquy where they're talking about dismissing the murder indictment. Again, Mr. Barket, Mr. Morris' attorney:

Just so the record is clear, it's my understanding that the district attorneys – the nature of the proof that exists with respect to this gun count that my client is about to plead is not sufficient for them to obtain an indictment. The only way they will be able to make out the limits of this crime is with my client's admission, which I suppose he would be willing to make, it seems, so he could get out of jail today.

There's a lot of colloquy between the Court and parties to make sure that that release today is from

the courthouse, that Mr. Morris does not even have to go back to Riker's to be released. [902]

THE COURT: Nonetheless, there are consequences, right?

MR. SEARS: The consequences are he's going to be released from custody.

THE COURT: And he's going to have a violent felony conviction and that he may very well deny, subject to deportation, whether or not he was deported or deportation followed a period of time that he left the country voluntarily and sought re-entry is sort of besides the fact. He had – he did face the possibility of deportation.

MR. SEARS: What he may have faced is consequences is a different issue than what is motivating. The important thing for, I would suggest for the Court to consider is what is motivating the person who is making the statement. And it seems clear what's motivating Mr. Morris in making the statement is a positive for him. The murder indictment is going to be dismissed for all time, and he's going to go home. It seems to me clear that that's his motivation. Whatever collateral consequences may attach to a criminal conviction, it seems clear to me from the allocution that that is what is motivating Morris, is the fact that he's going to win the murder indictment, that's going to be dismissed and he's going to go home. Those are his two primary concerns, and that's what the colloquy [903] addresses.

The second —

THE COURT: Is it not evident that the assistant district attorney was ultimately going to dismiss the murder charges against him?

MR. OUSTATCHER: That's what it says.

MR. SEARS: That's the condition upon which the plea is entered.

THE COURT: No. Is it independently of the plea not evident that the district attorney was not going to proceed against Mr. Morris because they had made the determination after having commenced that trial that they had the wrong guy?

MR. SEARS: I'm only going by what's contained in the allocution. That is not a fair reading of the allocution.

THE COURT: What you're trying to do is read in part on the basis of a third party's statements what was in the head of Mr. Morris. And if you're going to try to discern what was in his mind based on, for example, statement by his lawyer, is it not also appropriate to try to discern what's in his mind on the basis of other information available, for example, whether or not it was evident that the murder charge was about to be dismissed against him as he was the wrong individual? [904]

MR. SEARS: Well , I think that if we're going to – what we're talking about is what's motivating Mr. Morris to enter the plea that we're talking about. I think we're on a lot safer ground, a lot firmer ground, a lot more proper ground to the allocution surrounding the plea and not speculate about other things he may or may not have had in mind. That's my —

THE COURT: I understand your position, but you're looking beyond the allocution. You're looking at statements made by the lawyer. The lawyer is not being allocuted during the plea. You're making statements made by the individual not bound by the allocution and not participating in the allocution, rather than as an attorney representing the individual who is allocuting.

You feel the allocution is a place to begin the analysis of what was intended, what was in the mind of Mr. Morris, but it would seem to me that you're not on particularly good ground when you identify statements by another person as being the insight that is necessary but – and disregard other information that's available to try to make a determination as to what Mr. Morris was thinking.

MR. SEARS: All right. It's my position —

THE COURT: Let me just — Mr. Oustatcher, do you have any information? [905]

MR. OUSTATCHER: This is Page 23 of the proceedings. During the course of the plea, Judge Gross, who took the plea, turns to the People, who at that time were represented in court by Edward Talty, who was then and is now the chief of homicide in the Bronx district attorney's office, and Judge Gross says:

> "Finally, Mr. Morris, do you understand that when you are sentenced upon this plea, at that point, you will become a predicate felony offender, which means should you get into trouble with the law after sentence, if you are both accused and convicted of a new felony offense, you will face a significantly

> harsher punishment on any new case because of the plea and sentence on this case? Do you understand that as well, Mr. Morris?
>
> "THE DEFENDANT: Yes, I do.
>
> "Judge Gross: People, at this time, I will ask you to respond to the Court's inquiry from earlier as to your belief or your assessment of the viability of the prosecution of all four charges in the indictment."

Parenthetically, that is the murder indictment with charges to possession of the nine-millimeter weapon.

Back to the transcript, Page 24, line nine Mr. Talty says:

> "Your Honor, since it is our intention to dismiss [906] the four counts of that indictment on the day of sentence, I could say at this point that after an investigation, it was the district attorney's determination that we could not prove beyond a reasonable doubt any of the four counts of the indictment. We did that – we came to that belief based on a number of factors, among which was Mr. Morris himself and his willingness to provide us with a truthful explanation of what happened, including his own criminal conduct that day which he has just done in public in this courtroom.
>
> That being said, the investigation did disclose that there is no proof beyond a

> reasonable doubt at this moment that Mr. Morris fired the fatal shots that killed David Pacheco on April 16, and that is how the evidence underlying the indictment was presented to the Grand Jury."

That is the statement made before the Court during the course of the plea by Mr. Talty on behalf of the Bronx district attorney's office about the nature of the against – proof against Mr. Morris and reason for the dismissal of the murder indictment.

THE COURT: So viewing that, counsel, it may very well be that the attorney's comments give some insight into what Mr. Morris was thinking, but isn't it also the case that Mr. Talty's comments give some insight into what he [907] must have been thinking and what he must have been thinking, I'm not going to be convicted of any of the charges in this indictment, People have indicated that they cannot prove it beyond a reasonable doubt and notwithstanding my pleading guilty to a VFO and making statements that implicate me in this crime, it is a violent felony offense and present me with potential issues of deportation and possibly enhanced punishment in the future as a predicate and any other number of consequences?

MR. SEARS: Judge, it's my – I think the cases make clear that if what your Honor is suggesting, then any guilty plea would automatically qualify, it seems to me, as a declaration against penal interest because the person would be facing the consequence of the criminal conviction.

The cases make clear, I can quote, that that's not the case, that there is no per se rule that because a

person is entering a plea of guilty which has consequences of the guilty plea that the statement qualifies as declaration against penal interest.

I think my position, I think it's reflected fairly in the transcript, that the primary motivation of Mr. Morris is to go home and get out of jail.

THE COURT: No, no. Let's go back.

MR. SEARS: If I could finish. [908]

THE COURT: I know. You said this five times. I know what your position is. You repeatedly cited the statements by the lawyer as your indication of what you believe is insight into Mr. Morris' thinking. I understand that position. You've said it.

I'm asking you a different point you just made, another point, that is, that there is significant authority or at least what I understand you to say, there's authority that establishes that a plea allocution whereby an individual admits their guilt of a particular crime does not constitute a declaration against penal interest. I'm wondering what distinguishes those admissions of guilt of a crime that are declaration against penal interest from those that are not.

MR. SEARS: Well, it's the factors that I'm quoting, again, just so you don't have to seem like it's my word, this is from *People against Thomas*, 68 NY2d 194, where the Court makes clear, quote, not all plea allocutions or statements contained in plea allocutions meet this criteria, meaning the criteria for admissions against penal interest.

THE COURT: Explain it. What do they say? Do they explain what they mean by that?

MR. SEARS: Yes, they do.

THE COURT: Explain it to me. [909]

MR. SEARS: Okay. What they mean by that is the Court has to be, has to be careful and before this important right of sacrifice —

THE COURT: Which important right? You're talking about confrontation?

MR. SEARS: Right to confront.

THE COURT: You're talking about confrontation. We haven't reached the point of confrontation yet. I'm asking preliminary question, repeatedly asked.

Before we get to confrontation, *Crawford* issue, before we get to the *Crawford* issue, we got to first make a determination of whether this satisfies a traditional exception to the hearsay rule.

MR. SEARS: That's right. The requirements or declaration against penal interest, four requirements, the two that I think we're focusing in on, number one, whether it's against his penal interest, that's one I was discussing up to this point.

And second requirement is that there be other indicia of reliability concerning the statement. In this case, we have no other indicia of reliability concerning the statement. As a matter of fact —

THE COURT: What about .357 bullets?

MR. SEARS: If could I just finish.

THE COURT: Sorry. Excuse me. [910]

MR. SEARS: My position is the allocution makes clear there is no evidence against Mr. Morris underlying this plea that he's admitting, so that there's no other evidence that, to support what he's admitting to. That's made clear in the allocution. And there's no testimony from any witness that there are two guns involved or acting in concert or passing of guns. The testimony from all the witnesses is there was one gun, and it's a nine-millimeter.

THE COURT: Are you finished now?

MR. SEARS: I think the statement fails, number one, because it's not declaration against penal interest and two, because there are no reliability, other indicia of reliability to support the statement, itself.

THE COURT: With respect to your first point, I have already spoken at great length about the fact that a plea to a violent felony offense certainly has significant both direct and collateral consequences to an individual. And I reject the notion that it's not against penal interest to admit that he was guilty of a violent felony offense.

With respect to your second point, there's indicia of reliability. I believe that there's two significant points of reliability, one is presence of the .357 bullets in his home and the second is the statement by Burger that [911] he disposed of the .357 magnum firearm in conjunction with also disposing of the nine-millimeter.

Now, I don't disagree – wait. Remember respecting the point that you make that there's no indication here that there were two guns involved in the shooting or that there's no indication of an acting in concert plan

here, you might very well be correct in that point. I'm inclined to believe that you're right.

I believe there may have been the thought that, that there was a second gun that could be summoned by the perpetrators of this crime in addition to the nine millimeter. There was the guy they knew and were friends who had a .357 who was subject to being brought into the frame. Doesn't mean that he was. It just means that there was this very sort of loose association or potential association. I don't think that matters one bit in this case.

I think that the important fact, I think that the absence of evidence that they were acting in concert is actually a point in favor of its admissibility and a representation of the Crawford point, which I think we can turn it now having found or you – my finding is this, that this is plainly declaration against penal interest in this particular case.

The *Crawford* point may implicate questions about [912] the acting in concert. And in point of fact, I agree with you that there is no indication that the parties were acting in concert, that there was evidence here that the other gun was on the street ready to go, it was fired, perhaps, or anything else like that. I think that would be speculative and is not established by any of the evidence that I've heard about.

But, again, I think that that may also indicate why there's no *Crawford* problem in this case.

I'll hear you on that point now if you wish.

MR. SEARS: Well, firstly, in regard to Burger, who hasn't testified yet, we don't have – we don't know

how that's going to go or what exactly he's going to say in regard to what assumptions are being made during this discussion.

I would also like to point out that in terms of the .357, that Burger made at least three conflicting statements in which he referred to getting rid of the gun, meaning the nine-millimeter, in various places, all different, from places where he said he had done that time before, version of events are all different on three different occasions.

And on all three occasions when he speaks to Jimick, he doesn't mention a .357 and doesn't mention a .357 until much later on in the case when he's being [913] prepared for the events of this trial, I believe.

So there are, there is at least substantial reason not to credit Burger's statement with regard to the .357, because he makes three previous statements, two of which the district attorney is relying on in which he doesn't refer to that weapon or disposing of it in any way.

THE COURT: So you believe that after his testimony is presented, we might be in a better position to assess that particular point?

MR. SEARS: I mention that only because —

THE COURT: No. I am – it's not a trick question. I'm asking, do you feel after I hear his testimony and his cross-examination that I'll be in a better position to determine whether or not he corroborates or does not corroborate the notion that there was a .357 that was possessed by what's his name? Morris.

MR. SEARS: Right. Well, number one, yes and number two, I want to make clear, because there have been references to Burger's testimony, I don't want to have the Court deal with this issue under the impression that there's consistent reliable testimony from Burger on this issue, because the fact that is it's otherwise —

THE COURT: Was it your understanding that or was it your intention to cross him on this point so that I [914] would have an opportunity to make any assessment of his reliability?

MR. SEARS: It's my, it's my intention to cross-examine Burger on every single inconsistent statement he ever made. There's many, many in this case, some of which have to do with disposing of weapons, yes.

THE COURT: Well, then, that being so, I do, I do think that Burger's account of disposing of the .357 in the event this does hold up is an important factor in determining that there is indicia of reliability with respect to the statements against penal interest. So at that point, I'm willing to hold my final resolution of the – at this point pending his testimony. That settled that. Sorry.

That raises the question about whether or not it is a declaration against penal interest. I do think we should go forward, arguendo that this is declaration against penal interest and address the *Crawford* issue or whether *Crawford* is an issue in this case.

And, again, I offer you the opportunity to add anything to what you've already said or rest on the arguments that you already made, likewise, Mr.

Oustatcher, whether anything else you want to make as far as argument about *Crawford*. Are you satisfied you made your statements? [915]

MR. SEARS: I just would add it's not exactly in response to that, but I think it's relevant. I don't know at this point how your Honor is going to resolve this issue, but in the event that your Honor does find that the district attorney can bring the statement out as declaration against penal interest, then I think we're going to have substantial issues to address as to how much of the allocution should be admitted, because the cases do make clear that there's, that there's a serious context question to be addressed.

And, you know, if your Honor were going to rule in that fashion, then I would want to include in what's being offered much of what I have described indicating what his motivations were and statement made in the allocution to that effect.

THE COURT: I imagine you have the right to have that included.

MR. SEARS: So in any event

THE COURT: I think that, I think you're also right this would be a matter for you and Mr. Oustatcher to at least initially try to work out together and see if perhaps you're not going to be – there wouldn't a dispute.

I want to go back to the *Crawford* issue, unless you weren't finished with your argument about *Crawford*. [916]

MR. SEARS: I don't – I don't want to suggest what I just said I'm in any way conceding it's —

THE COURT: I appreciate that. I'm not making a ruling. I'm saying arguendo if the finding of the Court, based on hearing the testimony of Burger, do you have any further points that you wish to make about *Crawford*?

MR. SEARS: Well, I think it is *Crawford* violation. I think the evidence is being offered to incriminate Mr. Hemphill. I'm being deprived of the opportunity to examine Mr. Morris, and I don't see how it would not be a *Crawford* violation.

THE COURT: Mr. Oustatcher, anything else you want to add?

MR. OUSTATCHER: I just reiterate briefly, nowhere in the allocution does anything Mr. Morris say incriminate or point a finger at all against Mr. Hemphill. Nothing in the allocution establishes a single element nor single fact that proves that Mr. Hemphill committed this murder. So I don't see how it could violate *Crawford*.

THE COURT: My initial feeling is as follows, I will put it in the form of final determination. Again, I still do have to make a determination after hearing Burger's testimony about the issue regarding declaration against penal interest.

This is my view: In the event that, that Burger's [917] testimony does establish a basis for finding indicia of reliability with respect to the admission made by Morris in his plea allocution, I do not think that this is *Crawford* case. And that's because I think that *Crawford* requires that there be a confrontation question, in other words, a statement made by a witness that implicates a defendant and by which his

right of confrontation is effected [sic] and compromised.

This is, as far as I'm concerned, at least first blush, simply a statement that pertains to his own criminal liability for a particular violent felony offense. And in this respect, in no way does it implicate the defendant's right of confrontation.

Now, that's not to say it's not relevant to this case. Point of fact, the district attorney, but also particularly defense counsel, we have been addressing in your examination of the People's witnesses the question of whether Mr. Morris is in fact the shooter. And your position is I don't think you question this conclusion that Mr. Morris is the right man, as opposed to your client being the right man to have been the gun wielder that resulted in the death of the child.

So I don't deny in any respect that a statement by Morris admitted to the jury that he was in possession of a gun that could not be linked to this shooting is not a [918] relevant – it is not relevant to the very issues that's been litigated. It is central to the issue, to the issue being litigated in this trial. However, I do not – and this is the point I will have to think about more but at first blush, it does not occur to me that that makes this a confrontation question. That does not make this a *Crawford* question. In form, this is the kind of statement that is testimonial.

And there's no question that *People versus Hardy*, Court of Appeals made quite clear that the type of statement made in a plea allocution qualifies as a testimonial statement and, therefore, one that is within the purview of *Crawford* but that suggests that

the statement by its content raises confrontation questions.

Aside from issues of relevancy, a statement made in a plea allocution that does not pertain to a defendant, and I imagine we can hypothesize a statement that deals with an ancillary issue in that no way implicates the defendant does not become a confrontation issue simply because it's contained in the plea allocution.

The point of *Hardy* and ultimately of *Crawford* is that the types of statements that are precluded are those which directly relate to matters the defendant has a right to cross-examine on and for which the failure to have that opportunity violates his right of confrontation. [919]

And I would imagine, to use an extreme example of what the individual in allocution stated, that on the date in question it was raining out and perhaps that would be relevant to the ability of other people to make identifications, but if that was the statement made in plea allocution, I am hard pressed to say that that is the kind of confrontation question that *Crawford* concerns with.

Again, you have correctly stated that this case is entirely sui generis and hard cases may lose sometimes. And I reserve decision on that point, as well.

And we'll take this up again later. See you at 2:25, please, counsel.

* * * *

[944]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
November 18, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[967:7]

MR. OUSTATCHER: The People call Ronnell Gilliam.

THE COURT: Did you send somebody to get him, the officer?

MR. OUSTATCHER: The sergeant knows where he is.

THE COURT: Thank you.

THE SERGEANT: Witness entering.

(Whereupon, the witness enters the courtroom.)

THE COURT OFFICER: Remain standing. Raise your right hand. Face that way.

R O N N E L L G I L L I A M, a witness called on behalf of the People, after having been first duly sworn and having stated his county of residence as Bronx County, took the witness stand and testified as follows:

THE CLERK: Please be seated. Sir, in a loud clear voice please state your name, spell your name and then just give us the county of your residence.

THE WITNESS: Ronnell Gilliam, R-0-N-N-E-L-L, G-I-L-L-I-A-M, Bronx, New York.

THE COURT: Good morning, sir. [968]

THE WITNESS: Good morning.

THE COURT: Direct examination.

DIRECT EXAMINATION

BY MR. OUSTATCHER:

Q. Good morning, Mr. Gilliam.

A. Good morning.

Q. How old are you?

A. Thirty-five.

Q. How far did you go in school?

A. I graduated out of DeWitt Clinton and a semester of Bronx Community College.

Q. Are you employed?

A. Yes.

Q. What kind of work do you do?

A. A super for AAC Management.

Q. Are you single or married?

A. Single.

Q. Do you have any children?

A. No.

Q. Have you ever testified for a judge or a jury trial before like this?

A. No.

Q. Are you here today of your own free will?

A. Yes.

Q. That is pursuant to a cooperation agreement? [969]

A. Yes.

Q. What do you understand that agreement to be?

A. I testify and I have to do five years.

Q. If you testify truthfully?

A. Truthfully, yes.

Q. What happens if you do not testify truthfully?

A. I receive 25 years.

Q. In what courtroom is your cooperation agreement in your case pending?

A. Judge Gross.

Q. That is in this courthouse?

A. Yes.

Q. Who in the end will decide if you testify truthfully or not?

A. Judge Gross.

MR. SEARS: Objection.

THE COURT: Counsel, just briefly step up.

(Whereupon, there is a discussion held off the record at the bench among the Court, defense counsel and the assistant district attorneys.)

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

MR. SEARS: Actually, can we approach again?

(Whereupon, there is a discussion held off the [970] record at the bench among the Court, defense counsel and the assistant district attorneys.)

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

Q. So if you testify truthfully you get five years; correct?

A. Yes.

Q. How much time have you done in this case?

A. Four years and I think two months.

Q. So even if you testify truthfully and Judge Gross finds you do, you still step back in jail; correct?

A. Yes.

Q. For how much time?

A. Eight months and 13 days.

Q. Right now you're at liberty, you're not in jail; correct?

A. No, sir.

Q. Tell the jury why you're at liberty.

A. Well, if I get locked up, I'm a rat. I'm a snitch, and I'd be – what's the word?

MR. SEARS: Objection.

THE COURT: Overruled. You may answer.

THE WITNESS: Excuse me, sir?

THE COURT: You can answer the question. [971]

A. Well, if I'm in jail when I testify against somebody, you're basically the lowest form, so you're in jeopardy of something happening to you.

MR. OUSTATCHER: This is premarked. I showed it to counsel this morning. Its People's 118 for ID.

MR. SEARS: May we have a side bar, Judge?

THE COURT: Can I see the document first? Come to the side for the record.

(Whereupon, the following discussion takes place on the record, at the bench, in the presence of the Court, the defense counsel, the assistant district attorneys and out of the hearing of the jury.)

THE COURT: Yes, counsel.

MR. SEARS: It's my position that the witness can testify as to what his understanding is in terms of

the conditions under which he is testifying here today. I believe he's already done that.

The cooperation agreement itself is a self-serving document prepared by the district attorney. It basically vouches for the witness, and it's not proper as evidence in this case.

THE COURT: Counsel.

MR. OUSTATCHER: I don't see it as self-serving or vouching. It's actually the best evidence. This is the actual contract entered into by which his testimony was [972] secured in this case, so I don't see how it's self-serving in any way or vouches in any way.

THE COURT: Give me a second. Stay at the side bar.

MR. OUSTATCHER: I'm not going anywhere.

(Whereupon, there is a pause from the record.)

THE COURT: Counsels, I reviewed this document. It is as far as I can tell consistent with his testimony as to the agreement that he reached and, as such, does not present any issues or statements from out of court that are offered for their truth that are not available through his testimony and not available for confrontation purposes. It has its independent value as to demonstrating the formality and obligation upon which the witness testifies. For that reason, I'll admit it in evidence.

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

Q. Mr. Gilliam, look at all three pages of the document, first, second and third. Read it.

(Whereupon, there is a pause from the record.)

Q. Did you recognize the document?

A. Yes.

Q. What is that?

A. It's a cooperation agreement. [973]

Q. Is that your cooperation agreement in this case?

A. Yes.

Q. Is that a photocopy of the original?

A. Yes.

Q. The original being up in Judge Gross's courtroom?

A. Yes.

MR. OUSTATCHER: I would move it into evidence as People's 118.

THE COURT: Anything you wish to say? Any questions?

MR. SEARS: I have nothing to add to what we said at the side bar.

THE COURT: Thank you, counsel. It's admitted as People's 118 in evidence.

(Whereupon, the item previously received and marked for identification is received and marked in evidence as People's Exhibit 118.)

THE COURT OFFICER: People's 118 now in evidence.

MR. OUSTATCHER: I will put it on the monitor. I'm going to put it on the monitor, if I can.

Judge, can I approach the screen?

Q. I'll come back to this later, Mr. Gilliam. I just want to show the jury what we are talking about briefly at this point.

* * * *

[1026:8]

[CROSS EXAMINATION OF RONNELL GILLIAM]

[BY MR. SEARS

Q. So sometimes you told us you lie in order to protect people, and sometimes you lie in order to do the opposite; correct?

A. Yes, sir.

Q. And sometimes you lie because it's good for you; correct?

A. Yes, sir.

Q. You mentioned to the district attorney that you have this cooperation agreement; right?

A. Yes.

Q. And do you know what date you signed that cooperation

A. I think it was 11/22, if I'm not mistaken, 11/23.

Q. What year?

A. 2010.

Q. 2010, so that was about four years after this happened; right?

A. Yes, sir. [1027]

Q. And when you – back in 2006, you told the district attorney you made certain statements. You went in and you spoke to the district attorney, you spoke to Detective Jimick; correct?

A. Yes, sir.

Q. Okay. And you did that three different times; did you not?

A. Yes.

Q. And that was back in 2006; correct?

A. Yeah.

Q. And that was when Nicholas Morris was in jail —

A. Yes.

Q. — for this; right?

A. Yes.

Q. And after those three conversations that you had, Nicholas Morris stayed in jail; correct?

A. Yes.

Q. And they didn't arrest Mr. Hemphill until 2013; correct?

A. Yes.

Q. So it wasn't as though you went back in on your second or third statement, whichever it was, and you said, hey, it wasn't Nick, it was Darrel, they didn't go right out and arrest Mr. Hemphill and let Nick go; did they?

A. No, sir. [1028]

Q. All right. Now, when you went in and you spoke to the district attorney and to the detectives those three times, did you tell different stories when you did that?

A. Yes, sir.

Q. And the first time you went in, the first time you went in, that was I think April 26th of 2006; correct?

A. If you say so, sir.

Q. Well, I do say so. Would you like to check that or do you want to take my word for it?

A. No, sir, I will take your word for it.

Q. Okay. And you went in with an attorney; correct?

A. Yes.

Q. And you brought the attorney with you, I assume, because you felt it was the right thing to do at the time; is that right?

A. Yes.

Q. You're a pretty big fellow. You can take care of yourself; can't you?

A. Yes, sir.

Q. You can think for yourself; right?

A. Yes, sir.

Q. You don't impress me as a guy that just does what somebody else tells him to do; right?

A. No, sir.

Q. Right. So you went in with an attorney because you [1029] felt you should go in with an attorney; right?

A. No, sir, I felt that I was scared and —

Q. You were scared.

A. And Mr. Hemphill told me that Nicholas was telling the police that I did the shooting.

Q. Well, you're laying a lie, it seems, of things that you did, decisions that you made on Mr. Hemphill. Is that what you're doing?

A. No, sir.

Q. Okay. You have a mind. You can think for yourself; can't you?

A. Yes, sir.

Q. And back then you were what, 26 years old? You were a big boy.

A. Yes, sir.

Q. Okay. And when you went in to make that first statement, that first statement had to do with your best friend that you grew up with; right?

A. Yes, sir.

Q. And was that a hard thing for you to do, to go in and say that your best friend that you grew up with for 20 years was a shooter? Was that a hard thing for you to do?

A. Yes.

Q. You bet.

MR. OUSTATCHER: Objection to the colloquy, [1030] Judge, the commentary.

THE COURT: Yes. After the answer, no comments.

Q. As a matter of fact, in that first statement that you made you were asked are you just saying that to protect your cousin, and you told them how you would never do that because this is such a hard thing for you to do, to say something about Nick; right?

A. Yes.

Q. And that was a hard thing for you to do; was it not?

A. Yes.

Q. And at that time you knew that Nick was in custody and had already been arrested; correct?

A. Yes, sir.

Q. As a matter of fact, when you went in to make that second statement without your lawyer, Nick had told you that he wanted you to go in and clear him; right?

A. No, sir.

Q. Well, when you were at the precinct, you went in without your lawyer for that second statement; right?

A. Yes.

Q. And you're at the precinct; right?

A. Yes.

Q. And was it just a coincidence that Nick called while you were at the precinct, or did he know when you were going to be there? [1031]

A. Coincidence, sir.

Q. Just a coincidence?

MR. OUSTATCHER: Again, objection to the commentary.

THE COURT: Counsel, stop it.

Q. And he called from prison; did he not?

A. Yes, sir.

MR. SEARS: Excuse me, Your Honor.

Q. And he spoke to you on the phone to make sure that you were there getting him out from under; right?

A. No, sir.

Q. Well, he spoke to you on the phone; did he not?

A. Yes, sir.

Q. And he knew when he spoke to you on the phone where you were; correct?

A. Yes, sir.

Q. And he knew what it was that you were supposed to be doing there; correct?

A. No, sir.

Q. Well, what did he say to you?

A. He called me – actually, he called on Stephen's phone, and Stephen handed me the phone, and I say, yo, Nick, I'm sorry for what I just did to you, I'm going to make it right.

Q. Right, okay. And I guess Nick was happy to hear that; was he not? [1032]

MR. OUSTATCHER: Objection.

THE COURT: Overruled.

A. I guess so.

Q. I guess so. And Stephen, you used Stephen's phone because, as you say, you didn't have your phone anymore; right?

A. Yes, sir.

Q. So if Nick wanted to call you, he couldn't do that; could he?

A. No, sir.

Q. So when he called on Stephen's phone, he knew that you were with Stephen and where you **were;** did he not?

A. No, sir.

Q. Right. Did he ask to speak to you?

A. Yes, sir.

Q. Now, I might have already asked you this. Do you have any idea, can you tell the jury if you have any idea how many lies you have told during the nine years or ten years of this investigation?

MR. OUSTATCHER: Objection.

Q. Do you have any idea how many lies you have told?

THE COURT: Objection sustained.

MR. SEARS: Can we approach?

THE COURT: No.

Q. During this investigation you have lied repeatedly to the district attorney and detectives; correct? [1033]

A. Yes.

Q. And as you sit there now, can you tell us all the things that you lied about or is it too many?

A. I lied about what happened to the gun, sir, and I lied about who was the shooter.

Q. Well, when you say you lied about – let's take one of those. Okay?

You say you lied about what happened to the guns. Did you tell the district attorney this morning – withdrawn.

How many different stories have you told about what happened to the guns?

A. Two.

Q. And did you say at one point to the detectives – do you remember the name Detective Jimick? Is that a name you know?

A. Yes.

Q. He was the investigating officer?

A. Yes.

Q. He was there when you spoke to the DAs?

A. Yes.

Q. And when you went to the precinct?

A. Yes.

Q. Okay. Do you remember what you first told them about the guns?

A. Yes. [1034]

Q. Or the gun?

THE COURT: Excuse me one second. I apologize for interrupting you. Just bear with me.

Craig, can I see you?

THE CLERK: Yes.

(Whereupon, there is a pause from the record.)

Q. When you say – did you say the guns or the gun?

A. Guns, sir.

Q. Plural?

A. Yes, sir.

Q. Well, when did you first – isn't it a fact, Mr. Gilliam, that in the three statements you made on April 26th, on May 9th and May 10th of 2006, you talk only about one gun? Isn't that a fact?

A. Repeat the question, sir.

Q. Yeah. In the three statements that you made, the original three statements you made, on April 16th, on May 9th, when you go to the precinct by yourself, and on May 10th, when you go and you make another statement with your lawyer, in those three statements you only mention one gun?

A. Yes.

Q. Okay. And that this second gun, this .357 or whatever it is, you didn't mention until at least 2010 with your agreement; isn't that correct?

A. I want to say yes, sir, but I'm almost positive I [1035] came – once I came in the second time, sir, I told everything that was truthful. Like there was nothing else to lie about.

Q. Oh, really? The second time, you mean on May 9th?

A. When I walked in by myself, sir.

Q. Well, okay. On May 9th, let's see, is it not a fact that on May 9th, when you walked in by yourself to come clean, that what you said about the gun is that Darrel threw it in the East River? Does that ring a bell?

A. No, sir.

Q. You don't remember saying that?

A. I don't remember say it. I'm not saying I didn't say it, sir. I don't remember saying it, sir.

Q. You might have said that?

A. I might have said that, sir.

Q. And this is the day when you went in yourself and you just told us you're going to come clean and tell the whole truth; right?

A. Yes, sir.

Q. Well, if you said that, that would be another lie; would it not?

A. Sir, I said I don't know if I said that, sir. If it's on the papers, sir, I said it.

Q. You said you might; right?

A. Yes.

Q. You might have said it? [1036]

A. Yes.

Q. It might have been another lie?

A. Yes, sir.

Q. You can't remember; right?

A. No, sir.

Q. Okay. Well, look at this. I'm just going to show you this, and take a look at it and read the section toward the middle. You can see it's kind of highlighted. Just read through that and tell me when you're done. Okay?

(Whereupon, there is a pause from the record.)

Q. Have you read that?

A. No, sir – I read it.

Q. Does that refresh your memory as to whether on the 9th you said that Darrel threw the gun in the river? Does that refresh your memory?

A. No, sir.

Q. You don't remember that. You might have said it, but you don't remember; is that right?

A. Yes, sir.

Q. Well, let me ask you this. Was it true that Darrel threw the gun in the river?

A. No, Darrel did not throw the gun in the river.

Q. Well, sir, why would you have said that if it wasn't true?

A. I lied, sir. [1037]

Q. Oh. I thought you told us that you came clean and said everything true that day. Isn't that what you just said a few minutes ago?

A. Sir, you showed me a piece of paper stating my statement, and I'm telling you I'm almost positive I did not say that. It makes no sense.

Q. You're almost positive?

A. It makes no sense, sir.

Q. Well, that's correct. I agree with that a hundred percent.

THE COURT: Counsel, don't do that anymore.

Q. You went back in on the 10th, right? There was more talk. That's the following day. There's more talk about the gun; right?

A. Yes.

Q. Did you tell them the truth on the 10th about the gun?

A. My lawyer told me not to speak about the gun, sir.

Q. Your lawyer told you not to speak about the gun?

A. Yes.

Q. Did you speak about the gun?

A. No.* * * *

[1076]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
November 19, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[1128:13]

THE COURT: All right. I want to return to the issue of the Morris plea allocution. We have been discussing that in terms of a number of points. One of the points is whether or not it is or is not covered by *Crawford*.

As noted, the *Hardy* case establishes as a general proposition the fact that a plea allocution is, generally speaking, the testimonial statement that falls within the rules articulated in Crawford versus Washington, however, the *Hardy* case involved a

statement and allocution that by reason of the extent of detail and particularity of detail corresponded to other testimony in the trial in such a way as to, in effect, implicate the defendant on trial even [1129] though the defendant on trial was not identified in the allocution that was admitted. And for that reason, error was found in admitting the plea allocution. I'll read a few excerpts from *Hardy*.

The only evidence directly inculpating the defendant was the testimony of Robert Quarrels, who had a long criminal history, regarding defendant's alleged admission. Other than the victims, there were no eyewitnesses to the shooting. Moreover, Mrs. Garcia never identified the defendant as her assailant. In fact, her initial description of the assailant conflicted with defendant actual's appearance.

It is obvious that Gennaro's plea allocution was used precisely to stitch all the evidence together, both direct and circumstantial, in order to secure a conviction and compel the jury to convict. The allocution corroborated most of the People's evidence, including the date and chronology on the Beaver Dam shooting.

The redacted allocution submitted to the jury described the robbery in great detail. According to Gennaro's recitation, he was wearing a mask when he, along with another individual, robbed an elderly couple on Beaver Dam Road. His account was nearly identical to Mrs. Garcia's description of the robbery. Gennaro described grabbing Mrs. Garcia, pushes her and the other [1130] individual confronted Mrs. Garcia. Strike that. Mr. Garcia.

He also claimed that after the robbery, he and the other individuals retreated to Daisy's house where they split the money.

The Court went on to observe how important this allocution was to the People's case.

Now, acknowledging this was part of the harmless error analysis, nonetheless, is instructive in looking at the redacted allocution of Morris in this case, and that is relevant here because under the *Reid* decision, even an allocution, which as I said, presumptively testimonial, can be admitted and notwithstanding *Crawford*'s rule on the following principle. I'll read from *Reid* now: This appeal raises the question of whether a defendant can open the door to admission of testimony that would otherwise be inadmissible under the confrontation clause of the United States constitution. We hold that he can and in this case did.

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, the defendant, Hemphill, was excluded as the shooter. There [1131] is, however, evidence contrary to the argument presented by the defense in this case that Hemphill may have possessed a different firearm than Morris and that Morris' firearm cannot be connected to this shooting.

Morris' 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.

I will note that the district attorney's office is relying on evidence that has not been published to this jury or made determination after the opening of the Morris trial that Mr. Morris was not, not responsible for the shooting. The Court is not privy to the conversations that were conducted in the district attorney's office that led to that conclusion, nonetheless, a determination was made that Mr. Morris was not involved in the shooting.

Additionally, the testimony we heard yesterday of Burger indicates that Mr. Morris' involvement was one of a potential assistant but one who did not effectuate any actual participation in this instance and that he, in fact, [1132] provided a .357 weapon for disposal when defendant Hemphill provided a nine millimeter weapon for disposal.

In my judgment, there is a reliable basis for concluding, as per the testimony we heard yesterday, that Mr. Morris' allocution was a reliable statement, one that reaches an appropriate threshold of reliability for admissibility in this case.

Further, the defense arguments in this case that we heard and arguments I anticipate, open the door to the admission of Morris' allocution or, at least a portion of Morris' allocution, to the extent that it acknowledges that he was in possession of a weapon

but that that weapon was a .357 magnum and not a nine millimeter.

And finally, that under the analysis that I have made reference to in the *Hardy* case, to the extent that Morris' allocution can be redacted in a way that does not constitute the level of particularity and significance that was present in *Hardy*, any *Crawford* considerations would not give rise to error.

For that reason, I invite the attorneys to review Morris' allocution and to see if they can agree on portions of the allocution that can be presented to this jury.

I will note that in anticipation and in discussions, defense counsel has made reference to the fact there's certain portions of the allocution that he wished [1133] to have included and, therefore, I think I indicated to him that was proper and that those portions of the allocution that he thought were necessary for a fair assessment should be included.

If that is your position still, counsel, I will endeavor to include those portions of the allocution in conjunction with other portions. At this point, however, I ask the attorneys to see if they can in some way offer a redacted portion of the plea allocution that satisfies both, recognizing, of course, that defense has an exception to this ruling.

I do want to incorporate one other thing into this ruling. This is something that we discussed on a prior occasion and which was the predicate for reaching the *Crawford* confrontation clause question, and that was whether or not this was a statement that satisfied a traditional hearsay exception and that is

that this be declaration against penal interest. Of course, that does not establish admissibility under *Crawford*, but I believe it is an important component in determining a predicate basis for even reaching the *Crawford* issue in this case. And I incorporate by reference my comments with respect to Morris' statement, that being that it was under the circumstances a declaration against penal interest.

Counsel, we'll adjourn until tomorrow and, again, [1134] I ask that the two of you at least make an effort to reach an agreement as to the portions of the Morris allocution that will be admitted, recognizing that you're not conceding any points by participating in this effort.

Mr. Sears, nonetheless, I think since you have previously indicated that there's portions you do want to include, it would be helpful to the Court to know which portions of the allocution you're asking for.

We are finished with Mr. Hemphill for today. Thank you.

MR. SEARS: Your Honor, two other things.

THE COURT: We're not finished.

MR. SEARS: Mr. Gonzalez is a witness that's being held in custody. I want an update on his status, since I will be seeking to make him available, have him available.

MR. OUSTATCHER: He's available Monday. He should be produced Monday, so if I rest, even in that order, he can testify after the jury visit. I'll confirm it. I filed that order to produce a couple of weeks ago. I'll confirm this afternoon. He has been

produced in this courthouse on prior occasions on my order, so I will e-mail counsel , but —

THE COURT: May I ask the People whether they expect to finish their case tomorrow or Monday?

* * * *

[1136]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
November 20, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[1137]

THE COURT: At this time, I think we are still awaiting jurors. Is that right, Sergeant?

THE SERGEANT: Correct. We're missing alternates 4 one and two.

THE COURT: Alternates one and two. Well, that gives us a few minutes to discuss the issues that we started to discuss yesterday, and I was advised before the record opened that there are some issues between counsel.

MR. OUSTATCHER: So, I have three witnesses today. Two are here. My first is Mr. Anthony Baez. My second is court reporter Shameeka Harris regarding the allocution of Nicholas Morris.

Yesterday, in court, I told Mr. Sears the portions of the allocution that I thought were relevant. I have a copy for Your Honor, if you would like.

I think it is page 20, line 17 to page 24, line four, so I offer to Mr. Sears, based upon issues raised earlier in the case about the jury not knowing what happened to the —

THE COURT: Page 17 was that?

MR. OUSTATCHER: Page 20.

THE COURT: Page 20.

MR. OUSTATCHER: Line 17, ending page 24, line four.

THE COURT: Okay. Before you go any further, [1138] Mr. Sears, is your objection that it's under or over-inclusive?

MR. SEARS: Both. I've said to the DA – I've prepared – I sent a copy to the District Attorney. I have a copy for the Court – the parts of the Morris – if, Your Honor, over my objection admits the Morris allocution, which I understand the Court to do, I have the lines – the pages and the lines that I am suggesting —

THE COURT: Before I hear your points, let me just review these pages.

(Whereupon, there is a pause from the record.)

THE COURT: So the People want I see where you start, which I think makes sense, but do you want to go beyond page 20, line four?

MR. OUSTATCHER: Well, what I offered to defense if he wanted —

THE COURT: Well, my sense is that the meat stops on page 22, line three.

MR. OUSTATCHER: Judge, when you say "meat," you're correct, because that is the strict statement against penal interest. You're correct.

Giving more would give context, but I have no problem stopping at line 20 – page 22, line three. Page 22, line three.

THE COURT: Okay. Let's assume we are going to [1139] stop there. Now, counsel, are there additional lines you would like to include, and, if so, may I ask you to state them?

MR. SEARS: I will state them. I would like to give a printed version to the Court and have it marked as a court exhibit.

THE COURT: That is agreed.

MR. SEARS: And I will read them for the record.

THE COURT: We already have a court exhibit. This should be number II.

THE CLERK: Yes.

THE COURT: Thank you.

MR. SEARS: I think the transcript itself might have been the Court Exhibit I.

MR. OUSTATCHER: The stipulation is Court Exhibit I. There was a suggestion that this transcript be a court exhibit. I think there was an agreement, but it was never actually marked as an exhibit.

THE COURT: This will be a court's exhibit then, and your notes will also be a court exhibit.

MR. SEARS: So the transcript and the —

THE COURT: Exactly.

MR. SEARS: "Should the Court permit the district attorney over defense objection to offer into evidence the plea allocution of Nicholas Morris entered on May 29, 2008, [1140] defense requests the following portions of the allocution be read. Page seven, line 17, beginning with 'he is willing', to page seven, line 25. Page 15, line 18, beginning with, 'Just so the record is clear,' to page 15, line 25. Page 19, line 24 beginning with, 'I also understand,' to page 20, line two. Page 20, line 17 through 24, page 21, lines 12 through 25, page 23, line 14, beginning, 'You will receive,' to line 15 ending with, 'conditional discharge,' and page 23, line 21 to page 24, line four."

It's my position, and I think the cases make clear, that when a declaration like this is being admitted that it should also – parts of the allocution that are relevant to the context and motivation should also be admitted in fairness, and I believe the sections that I quoted are necessary so that the jury understands the context and the motivation underlying the plea that was entered.

THE COURT: Thank you, counsel. All right, you have requested line – page 20, line 17 to 24. That is within the request of the district attorney.

MR. SEARS: I believe so, but I think the district attorney requested more of that same part.

THE COURT: Right.

MR. SEARS: I'm only requesting the part that — [1141] I think it's only appropriate the part that I put in my submission should be read.

THE COURT: I think that the portions that you've excluded in that group should be included. I don't see any appropriate basis for excluding them from a continuing portion of allocution which I have characterized before as being the meat of the allocution, so you have indicated 17 to 24 on page 20. That is included in the request of the People.

Page 21, lines 12 to 25, that is included in the request of the People. The People have originally asked for page 23. I have indicated that I don't see any reason to have that, but I will read your request. My indication was that this should stop on page 22, line three. You included page 23, line 14.

MR. SEARS: Yes, where it says, "... you will receive a sentence of time served and a conditional discharge." That is the section that I want read so that the jury understands.

THE COURT: I don't know that that is necessary in light of the other portion of the allocution, where the agreement is stated.

Additionally, you asked for line 21 to 24.

MR. SEARS: On what page?

THE COURT: Page 23, line 21. [1142]

MR. SEARS: That's correct.

THE COURT: And, again, just as I indicated when Mr. Oustatcher had requested the allocution, I see no reason, unless we are going to include the entire recitation of rights, to include a portion on page 23, line 21 to page 24, line four.

MR. SEARS: Okay, then I'll withdraw that.

THE COURT: Okay, so you also asked for line page 15, line 18.

MR. SEARS: That's correct. 15, line 18, "Just so the record is clear," that should be – after "clear" should be a close quote – I omitted that on the submission – to page 15, line 25.

THE COURT: Yes. This is includable. This is appropriate and consistent with defense, I think with the essential part of the defense request, so I grant that application.

Page 19, line 24 —

MR. OUSTATCHER: Can I have that again, Judge? You granted?

THE COURT: I'm granting his request page 15, line eight to page 15, line 25.

MR. SEARS: I believe it's line 18, Judge.

THE COURT: I'm sorry. You're absolutely right, line 18. [1143]

MR. SEARS: Now, we're going to which one?

THE COURT: Now we're going to page 19, line 24.

MR. SEARS: Right, or we could stop on page 20, line one after "recognizances."

THE COURT: Give me a second.

(Whereupon, there is a pause from the record.)

THE COURT: All right. First of all, it's somewhat repetitive on the request for page seven, line 17 to page seven, line 25. My inclination is that that is not going to be included, and that being said I'm inclined to grant your request for page 19, line 24 to page 20, line two.

MR. SEARS: It's —

THE COURT: So, let me reiterate my judgment as to the appropriate inclusion. I think that for – I think I'm going to authorize the following: 19, line 24, then continuing – we haven't discussed previously the first part of page 20, but I think for purposes of putting the page 19 to 20 that I have just authorized into context and to have a smooth transition into the other portion that I have authorized, we will read through page, and inclusive, to line 22 – to page 22, line three.

MR. SEARS: I'm sorry. Can I —

THE COURT: And then with respect to the first part we are going to read — [1144]

MR. SEARS: Can you just say that again, page 19, line —

THE COURT: The first thing we will read would be – let me just review this to see that this works.

MR. SEARS: Judge, the problem is that references to dismissing the indictment are problematical, because that is the murder indictment, and I don't think that this jury should be given information that the murder indictment against Morris is being dismissed.

THE COURT: I don't see why. It's part of the agreement.

MR. SEARS: I specifically – that is why I excluded those portions from the parts that are going to be read.

THE COURT: No, I think it's part of the understanding in the agreement, so we will start with page – okay, let me just tell you so you can then make your record and state your objections, but we would start with page 15, line 17.

MR. SEARS: 15, line 17.

THE COURT: We will continue to read it to page 15, line 25.

MR. OUSTATCHER: Can I get the ending point again, Judge, if you could?

THE COURT: 15, 17 through 25. [1145]

Do I assume that neither of you feel that line one through nine of page 16 should be included in that reading?

MR. SEARS: What page?

THE COURT: Page 16, continuing from what I have just authorized, from page 15 continuing for the next paragraph that is actually the continuation of the lawyer's statement.

MR. SEARS: Yes, I certainly think that —

THE COURT: You do or do not want that in?

MR. SEARS: I'm sorry?

THE COURT: You do or do not wish that in?

MR. SEARS: Page 16, lines one through which?

THE COURT: Nine.

MR. SEARS: I do not want that in.

THE COURT: Okay. People, do you have any strong objection to leaving that out?

MR. OUSTATCHER: I will concede to defense wishes, that's fine.

THE COURT: Okay, so it will be restricted to page 15, line 17 to 25, and then we will pick it up on page 19, line 24, and read inclusively to page 22, line three. That will be the entirety of the reading.

People, any comments, any objections?

MR. SEARS: Can I just have a moment to review? [1146]

THE COURT: Yes. DA, anything?

MR. OUSTATCHER: The People have no comments, no objections.

THE COURT: Very well. May I ask somebody to have a copy of the transcript available so that we

can mark it as a court exhibit, and I have defense counsel's request. I will make that a part of the court exhibit as well.

MR. OUSTATCHER: I have a photocopy. I can get the original.

THE COURT: No, we don't need the original for a court exhibit. Do we have all our jurors now?

THE COURT OFFICER: Yes.

MR. SEARS: Judge, so you're in effect denying the remainder of my requests?

THE COURT: I am, sir. As I indicated, I'm not actually denying all of them. Some of your requests are included in the reading that I have authorized, although if you wish to make the request that you have made as exclusive then I have in fact authorized other portions, but your requests for portions of line 20 and 21 are granted, and I believe your request for page 23 has been withdrawn. The two requests on page 23 have been withdrawn. I've denied your request on page seven. I granted your request for page 15. [1147]

MR. SEARS: The request on page 23 has not been —

THE COURT: Do you have an extra copy of that so I can write on it?

MR. SEARS: Yes.

THE COURT: Okay, so let me just recite from your papers.

MR. SEARS: Okay.

THE COURT: Page seven, denied. Page 15, the second line that you requested, granted.

MR. SEARS: Right.

THE COURT: Page 19, granted. Page 24 in effect granted.

MR. SEARS: I'm sorry. I don't see page 24 at all.

THE COURT: Page 20. I'm sorry. I apologize. Page 20 granted in effect, and page 21 —

MR. SEARS: When you say "granted in effect," you mean it's included in what the DA is asking?

THE COURT: It's included in what I'm authorizing, yes.

MR. SEARS: Okay.

THE COURT: Page 23

MR. SEARS: What about page 21?

THE COURT: Page 21 is granted in effect. [1148]

Page 23, withdrawn.

MR. SEARS: It's not withdrawn.

THE COURT: You just said it was withdrawn.

MR. SEARS: I don't believe so.

THE COURT: I heard the words from your very articulate mouth. If you wish to withdraw that, withdraw your withdrawal, I'll consider it, but I believe you said you withdrew your request.

MR. SEARS: Maybe there was a misunderstanding. I didn't. I didn't think I had withdrawn that. I don't see why I would.

THE COURT: You would because, as we indicated —

MR. SEARS: Unless it was included in what the Court was already reading.

THE COURT: No. What I said, and I'll refresh your recollection, I said that there was no necessity of isolating that one particular portion of the allocution.

This is – the section of the allocution on page 23, which was part of the DA's request that I asked them to withdraw, simply included the allocution as to rights. I felt that allocution as to rights was not necessary with respect to the – what I call the meat of the allocution.

Thereunder, I also indicated that your request simply to have a portion of the warnings read, which is on page 23, was unnecessary in light of the fact that I took [1149] out all the other portions of the district attorney's request as to the defendant's right. That's the form in which I understood you to say you withdraw the request.

MR. SEARS: Well, if that's it, I might have misunderstood it. I mean, I don't recall it exactly that same way, but, in any event, just so the record is clear, the portion on page 23, line 14 wherein – to line 15, the portion that says, "... you will receive a sentence of time served and a conditional discharge," that's the section that I want read. I don't withdraw that request.

I don't think it goes to the rights. It goes to the nature of the bargain, and I think it's appropriate.

THE COURT: So that's the portion of line 23 – of page 23 that you want?

MR. SEARS: There are two portions on page 23.

THE COURT: Right. So that portion you wish for the reason you stated?

MR. SEARS: Yes. Just on line 14 to line 15 is the part that says, "... you will receive a sentence of time served and a conditional discharge." That's one section of page 23 that I'm requesting.

THE COURT: Let me take a look. If it's not redundant, I'll grant your request.

MR. SEARS: Okay. And the other section of page 23 that I was requesting is line 21 to page 24, line four. [1150]

THE COURT: That was the portion that I focused on earlier saying that I wasn't going to isolate that single indication of rights without going through all the other rights that had been excluded.

MR. SEARS: I believe it's that part that I said that I withdraw.

THE COURT: Exactly, right.

MR. SEARS: Not the previous.

THE COURT: So that you will withdraw?

MR. SEARS: The line – page 23, line 21 to page 24, line four.

Let me take one second, so I can just read it again.

(Whereupon, there is a pause from the record.)

MR. SEARS: Yes, I withdraw the request on page 23, line 21 to page 24, line four.

THE COURT: Thank you.

MR. SEARS: So —

THE COURT: Let me just read this over one more moment.

(Whereupon, there is a pause from the record.)

THE COURT: Okay, I will include page 23, line 14 to line 15. That's granted.

MR. SEARS: So, in effect, if I'm correct, my last request on page 23 is withdrawn.

[1151]

THE COURT: And your first request with respect to line – page 23 is granted.

MR. SEARS: That's right. And all the other requests are in effect being granted, other than the page seven – the first one, page seven, line 17 to page seven, line 25. That is being denied.

THE COURT: Exactly.

MR. SEARS: And specifically with regard to that section on page seven, which I think is particularly important, that's the part where Mr. Morris's attorney is stating and making clear to the Court that Mr. Morris is willing to enter the disposition today on condition that he be released today now from this courthouse, and he goes on to say

that that is his primary motivation in pleading guilty to this charge and admitting his criminal culpability for that day to a crime that he knows that they otherwise at this point cannot prove.

I think that's essential for the jury to understand the nature of the bargain. That part of the allocution should be included.

THE COURT: I've already approved page 19 on the bottom where it indicates that he will be released today on his own recognizance.

With respect to the other stuff, I consider that attorney spin and I do not regard that, as it's not coming [1152] from Mr. Morris's mouth, to be reliable and to be appropriate for the jury to hear, so I deny that application. You have an exception.

MR. OUSTATCHER: Just on that point, I ask for some clarification from the Judge. I agree with the Court. I know Mr. Sears omitted the fact that in that portion Mr. Barket says that I think, which means that it's his opinion. He also notes that his opinion differs from his client's, so it's clear that what he's saying on page seven is not Mr. Morris's statement, it is Mr. Barket's statement, which is contrary to Mr. Morris's position.

If I can just get – there was a lot of back and forth. I have one civilian witness here. I'm going to ask for 15 minutes to bring my two witnesses down.

Can I just get from the Court what Ms. Harris is going to read to this jury one more time?

THE COURT: Sure.

MR. OUSTATCHER: I had it, and there was a back and forth.

THE COURT: It's going to go in the following order.

MR. OUSTATCHER: Thank you.

THE COURT: We're going to start off on page 15, line 18 to page 15, line 25.

MR. OUSTATCHER: Okay.

[1153]

THE COURT: Then page 19, line 24 to page 20, line two. Then we're going to do page 20, line 17 to page 22, line three, as I recall, and let me just confirm that. Page 22, line three. And then ending with page 23, line 14 to line 15.

I'm going to reiterate the following in the fashion of first the page, then the line: 15/18 to 15/25, 19/24 to 19 – to 20/2, 20/17 to 22/3 and 23/14 to 23/15.

One further note with respect to defense counsel's last request regarding statements of the attorney. I have, pursuant to defense counsel's objections, not included page 20, line eight through line 16, which is the district attorney's spin, so I have tried to keep the attorney spin out of the read back.

Okay, thank you.

MR. SEARS: Also, to the extent that Your Honor is not reading portions that I requested and is reading portions that I specifically did not request, I take an exception. And I just want to note again with regard to the portions that Your Honor is allowing to be read, parts that refer to dismissal of the underlying

murder indictment, I reiterate my objection to those parts.

THE COURT: Thank you, sir .

* * * *

[1181]

THE COURT: Good morning. Raise your right hand, left hand on the bible.

SHAMEEKA HARRIS, called by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your name for the record, occupation and county of residence.

THE WITNESS: Shameeka Harris, Senior Court Reporter, county of residence, Manhattan.

THE COURT: Good morning, ma'am. Direct examination.

DIRECT EXAMINATION

BY MR. OUSTATCHER:

Q. Good morning, Miss Harris.

A. Good morning.

Q. How long have you been a court reporter?

A. Since 1996.

Q. And back in, back on May 29th, 2008, where were you working?

A. You said where?

Q. Yes. What county?

A. Bronx Supreme Court.

Q. And were you taking a transcript of proceedings in court in the case of the People versus Nicholas Morris on that day? [1182]

A. Yes.

Q. I'm going to ask the witness be shown what is Court Exhibit Number II.

(Whereupon, the document was handed to the witness)

Q. Please look at the first page of that document, if you could.

Who was the judge who heard the case for People versus Nicholas Morris on May 29th, 2008?

A. Michael Gross.

Q. And who were the two assistant district attorneys who appeared on that case on that day?

A. Daniel McCarthy and Edward Talty.

Q. And who was Mr. Morris' lawyer on May 29th, 2008?

A. Bruce Barket.

Q. I'm going to direct you to specific portions of the transcript that you made from the proceedings on that day.

Can you please read the transcript starting at Page, on Page 15 from line 17 to line 25.

A. You said line 17?

THE COURT: Starting at line 17 on Page 15 with Mr. Barket ending on line 25.

A. "MR. BARKET: He indicates that, over my strong advice he will take the plea. Just so the record is clear, it's my understanding that the district attorneys – the nature of the [1183] proof that exist with respect to this gun count that my client is about to plead to is not sufficient for them 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."

Q. That was made by Mr. Barket, Mr. Morris' lawyer, correct?

A. Yes.

Q. Page 19, starting at line 24 through Page 20, line two, starting with the defense, Mr. Barket.

A. "MR. BARKET: Thank you, Judge. I also understand that the Court is going to release Mr. Morris today on his own recognizance on the Supreme Court Information pending sentence."

Q. Page 20, that same page, line 17 through Page 22, line number three.

A. "THE COURT: Mr. Morris, your attorney has indicated that at this time you would like to enter a plea of guilty under the Superior Court Information which has been filed with this court to class D violent felony offense, criminal possession of a weapon under subdivision (4) of Penal Law 265.02. Is that wat you want to do, sir, plead guilty to a class D violent felony offense?

"THE DEFENDANT: Yes, I do. [1184]

"THE COURT: Have you had enough time to speak with Mr. Barket about this plea?

"THE DEFENDANT: Yes, sir.

Q. Continuing through line —

THE COURT: Page 22, line three is the ending. Keep reading.

A. "THE COURT: Are you satisfied with the advice and counsel that you've received from Mr. Barket while he has been representing you, both on the indictment as well as this investigation leading to this plea?

"THE DEFENDANT: Yes, I am.

"THE COURT: Are you now taking any medication or drugs of any kind, Mr. Morris, that might affect your ability to think and concentrate in this courtroom today?

"THE DEFENDANT: No, I'm not.

"THE COURT: Under the Superior Court Information, which has been filed with the Court, Mr. Morris, the prosecutor has alleged that on the 16th day of April of the year 2006 at approximately two in the afternoon, further, it is alleged that this conduct took place in the vicinity of Harrison Avenue and Morton Place within Bronx County. It is alleged that at that time and place you knowingly possessed a loaded operable firearm and further, that that possession was not in either your home or place of business. Is that allegation about you true, Mr. Morris? [1185]

"THE DEFENDANT: Yes, sir."

THE COURT: Keep going.

Q. Continuing.

A. "THE COURT: What was the loaded operable firearm which you possessed on April 16th of 2006?

"THE DEFENDANT: .357."

Q. On to the next page.

A. "THE COURT: Is that allocution acceptable to the People?

"MR. TALTY: Yes, it is, your Honor."

Q. The last portion of your transcript, Page Two starting at line 13.

THE COURT: Not Page Two.

Q. Page 23. I apologize, Page 23, line 13. Ending – that starts at the word "if," ending on line 15 of that same page, ending with the word "discharge." Who was speaking, this one sentence?

A. "THE COURT: If you meet the conditions and that you will receive a sentence of time served and a conditional discharge."

THE COURT: Thank you, ma'am. further questions by the People?

MR. OUSTACHER: Nothing.

THE COURT: Cross-examination?

MR. SEARS: No.

* * * *

[1489]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
December 2, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[1499:3]

[THE COURT]:

We now turn to the summations, as I have said, defendant's summation first.

Mr. Sears.

MR. SEARS: Thank you, Your Honor. I just need a minute or so to set up.

(Whereupon, there is a pause from the record.)

MR. SEARS: If it pleases the Court, Your Honor.

THE COURT: Sir.

MR. SEARS: Counsel, Members of the Jury, first off, I want to thank all of you for your willingness to participate in this trial and be jurors. It is a difficult thing to do. It takes a lot of your time, delays, things like that, and we all appreciate people who will, you know, agree to help us out in this difficult process and reach a fair judgment, and all of us who do this on a regular basis appreciate and continue to appreciate the cooperation of folks like you in helping us do this work.

Before I get into my prepared remarks, I do want to say a few words about, you know, what occurred yesterday in regard to Mr. Owusuafriyie, Nana, and, you know, he certainly paid a price, you know, for taking leave and saying the few things that he did.

Mr. Oustatcher was very thorough in peppering him [1500] with question after question, you know, about what occurred to him some 15 or 16 years ago, when he was a much younger man, and, you know, he — I'm the first to admit, he did get thrown by a lot of those questions.

He didn't handle a lot of those questions very well. He wasn't prepare for a lot of those questions. And when I asked him in my examination have you ever been convicted of a crime, he interpreted that to mean a civilian criminal record, which is — that was his interpretation of my question, as opposed to his criminal court-martial situation, and he said no to my question. I should have made that more clear. I should

have prepared him better to handle that question, but, you know, blame me for that oversight and not so much him.

But, you know, because of what happened 15 years ago, you know, and I don't mean to minimize it, he is what he is. It is what it is. He did something wrong, but because of that does he deserve to just be kind of written off? I don't think so.

How much of us honestly don't have something in our pasts that, you know, we are ashamed of? But look at the 15 years — before you judge the man, look at the 15 years since then in which he has served our country, in which he has fought overseas in two wars, in which he has risked his life many times. He's been promoted. He's been [1501] decorated. He works now in a hospital, a military hospital clinic tending to the wounds of veterans, and that's who he has been for the last 15 years, so I don't think he is just somebody to be written off.

In any event, if you look at his testimony, he, you know, he didn't come here to say, you know, to exonerate his friend Darrel. He didn't say I saw the shooting, Darrel didn't do it. He didn't say I was there, Morris, you know, Morris is the shooter.

He was honest and straightforward. He wasn't there. He doesn't know who the shooter was, and he said that he saw Darrel earlier in the day wearing some jeans and a T-shirt and, you know, so what?

And the district attorney cross-examined him at length about how do you remember, you know, nine years ago, you know, jeans and a T-shirt, but bear in mind that the district attorney didn't have any

problems with all of his witnesses when they came in and described various clothing that the people involved in this incident were wearing, so people can remember things like that.

This was a day that kind of sticks out. You know, a two-year old got killed, so when he says this is what he was wearing, it's not terribly different from other witnesses in the case that the DA called and credited who described what people were wearing that day.

[1502]

And what else, you know, did he testify to? He said nothing — he sees Darrel earlier in the day. He says nothing about the rest of the day, nothing about the shooting until later on in the day when he meets up with Gilliam and drives Gilliam someplace else. I forget exactly where he said, and that's exactly what Gilliam told you.

Gilliam, in his testimony, and, you know, it's in the transcript on page 982, where Gilliam says, he said this is afterwards, you know, after the incident. They sat there like 10, 15 minutes and then a friend of ours, Nana, came to get me, so the testimony that he gives about doing that is kind of the same thing that Gilliam says.

And the only other thing he says of any significance is that he saw that Morris had some bruises on his knuckles, which is exactly the same thing that Detective Jimick told you, if you recall Jimick's testimony, and I'll come to it later on in the remarks.

Jimick said when he arrested him on the 17th that he had bruises on his knuckles, so everything that Nana says about his interaction with Gilliam and Morris is corroborated both by Gilliam and by Jimick, so, you know, just consider that.

You know, I'm sorry he looked so bad trying to say those few things which aren't really in dispute, but [1503] I'm asking you not to let that stuff detract from what are the real issues in this case, which I'd like to come to now.

This case is a mess. It was a mess before Darrel Hemphill got arrested and it's a mess now, and I think you all know why I say that after you've heard the evidence, and now I'd like to talk about some of that.

And, you know, I'm very grateful for this opportunity, because I am, you know, disturbed, and maybe some of you are too, by what we have seen take place in this courtroom over the last bunch of weeks by the way in which, as I suggest to you, and, again, the Judge is absolutely right, it's your view of the evidence that counts, not mine, not Mr. Oustatcher's, but what I would suggest to you is that what we have seen is how evidence over time can be changed and manipulated to try and get a certain verdict, and you have to be really careful about that.

And I don't mean necessarily the witnesses themselves. I believe some of the witnesses testified intentionally false and I'll talk about that, but a lot of the witnesses were just kind of regular folk doing their best and, you know, basically good people.

What I mean is the manner in which the evidence was presented to you during the trial, not, I would

submit, [1504] to get to the truth, but to get to a certain particular verdict, and those are two very different things, particularly, particularly in this case.

Witnesses that were believed and credited and found to be reliable and truthful back in 2006, 2007 and 2008, when this was a Morris case, identifications that they obtained in lineups, the best way we know of to get accurate reliable identifications were relied upon in 2006, in 2007 and 2008, and now, because they want some other verdict, now that there is a new person being charged, those witnesses that were perfectly credible back then on whose identifications an arrest was made, charges are brought, now they say, hey, those witnesses really aren't believable, those witnesses really didn't see what they said they saw and believed they saw back then, those witnesses are all making mistakes and that evidence and those identifications that we relied upon, you should ignore those now because it's a new game. Don't be taken in by that.

I'm sorry. I have to have some water from time to time. I apologize.

They bring in Ronnell Gilliam, and I'm going to talk about him later on, but whose lie, you know, upon lie, upon lie led the detectives and the District Attorney's office back then when he made those statements, when he [1505] first came in and he said Nick's the shooter, and then later on, a couple of weeks, he said Darrel is the shooter, and he went back and forth, those detectives found him back then, after he said Darrel was the shooter, to not be believable.

Did they go out and arrest Mr. Hemphill back then because Gilliam said he was the guy? Of course not, because they didn't think he was a reliable witness.

Now, those lies, all those lies that Gilliam told back then and his unreliability, you know, just kind of fades into the background. It's a new world, new case. He signs a cooperation agreement, and all of a sudden, jurors, listen to Gilliam, he's trustworthy now. He is believable now.

And he is the only witness, and this is important, he is the only witness to this day, in all these years, that has identified or said that Darrel Hemphill fired the shots. He is the only guy, you know, new, reinvented trustworthy Ronnell Gilliam saying, you know, what works now.

Now, let's take a specific example of what I am talking about about how evidence changes and gets manipulated, you know, for your benefit, and I could pick many of them, but here is a couple. Just imagine the pressure. I mean, it's understandable. Imagine the [1506] pressure on these people, on the police, the prosecutors. It's nine years later. There's a family grieving. You know, they want, you know, someone to pay, so imagine the pressure to build a case.

So, let's look at the testimony surrounding Michelle Gist. She's a key witness. You remember, she's the first witness — Jimick told us this. She's the first witness, the first person to put the detectives on to Nick and Burger.

She's a key witness because she knows or she says she knows the players for 15, 20 years. You remember that part of her testimony? I know Burger. Grew up in

the neighborhood. Nick I know, and D. I don't know where she got that name for him. But, in any event, she's a witness who says that I know these people, so we are not relying on somebody who is, you know, looking at somebody for the first time or who is identifying a stranger or whatever problems you might find with some other witnesses. We are looking at somebody who says I know these people, I'm not making any kind of mistakes.

And let's see how when she first says that it's Burger and Nick who are involved in the fight, how that changes over time, so that by the time we're in this trial it's not Burger and Nick involved in the fight like she said in 2006, now it's Burger and D. Let's see how that [1507] happened, because it's characteristic of the evidence.

You know from the start there's something wrong with the testimony, because she says that Darrel Hemphill on that day had long hair and braids. You remember that? She said she could see the braids coming out of the hat. This is from the transcript of her testimony. Indeed, Darrel, he had long hair and it was braided.

Now, you know something's not right, because no other witness in the case says that, that any of the people involved in the altercation had long hair and braids.

But, you know, and while we're on that, I just want to show you People's — I'm sorry — yeah, People's 102 and 103 in evidence.

That's a picture of Darrel Hemphill, and there has been testimony from a number of witnesses that's how

he looked back in 2006, and that's a picture of Nicholas Morris, how he looked in 2006.

You know, you can look at these. I think we passed them around, and, you know, I don't want to offend anybody, but we are way, way past the time when all people of color look alike. And you look at these photos, okay? And you decide whether these people look alike, whether two days after this happened you're going to mistake that guy for that guy. I don't think so. But, you know, you take a look at those.

[1508]

So, but more important than, you know, the braids thing, and this is key with this, she tells you on direct examination that there were two guys in the fight with the Spanish folks. Remember that? She doesn't see the shooting. She's gone by then or whatever, but she sees the initial altercation, and the testimony is clear from everybody that one of the people involved in the fight is the guy who is the shooter, and she tells the district attorney on direct examination — this is before I had a chance to question her — that Burger and D, she knows him 15 or 20 years from the neighborhood, that they're the two guys that are involved in this altercation. And, you know, when she says that, you know, it sounds good, she knows them from the neighborhood, and that's how the DA leaves it in his examination of Ms. Gist.

Only we find out later, when I question Jimick, okay, and Jimick is pretty good at trying to wiggle out of things when he knows it's not going to help the case, but some things he can't wiggle out of because he's testified previously to certain things and there's a

transcript and so certain things he's got to admit. So I questioned Jimick, and he can't wiggle out of it because it's from an earlier transcript that he said, that he testified to, and the DA concedes in the record that it was accurately being read by me, you know, what do we find out that Gist [1509] actually said back in 2006, that same day that this incident happened, and this is the transcript.

"QUESTION: So when you spoke to Ms. Gist on that day this happened in the apartment there," I think she was in her mother's apartment, "the two names that she gave you as being involved in the initial altercation, people that she had known from the neighborhood for years, were Burger and Nick; is that correct?

"ANSWER: Burg."

And then the question: "Burg and Nick?"

And then the answer: "Burg and Nick, yes, correct."

And then there is some followup again. This is by me in cross-examination after the DA left it that it was D and Burger.

Do you recall testifying at a hearing in this case a long time ago?

Again, this is Jimick. And he says, I do.

And at the hearing you were testifying. You were under oath. And he says yes.

You were being asked some questions, and he says yes. And you were telling the truth? And he says yes.

And do you recall being asked this question and giving this answer or these questions and answers:

Detective, what's the basis for arresting Mr. Morris? And [1510] this is back on the 17th, the day afterwards.

Answer: We had an eyewitness that had identified him.

Answer: Who?

That would be a person we know as Michelle Gist.

Do you recall being asked that question and giving that answer? And he admits that he did.

So, now, we are getting the truth, not the updated version, but the truth of what Michelle Gist had to say back in 2006 about who was involved in the altercation.

And, again, this is Jimick.

I don't want to parse words, but in this interview of Gist she gave you two names.

That's correct.

And you told the hearing people and the person that she — I'm sorry. She gave you two names; correct? One was Burg and one was Nick.

Answer: Correct.

And neither person that she named was Darrel Hemphill or D?

And answer: Correct.

And you told the hearing people that that was important in your reasoning for arresting Nick?

And answer: That's correct.

So, that's how it changes. That's how it [1511] happens. In 2006, Gist knows the players for 20 years and in no uncertain terms tells Jimick in her mother's apartment that afternoon, hey, the guys in the altercation, one of whom we know, turns out to be the shooter, Burger and Nick. There's no mention of Darrel and D until nine years later, and we get a different version for you folks. You decide which version is more accurate.

Just to bring home this point now, and this is a very important point, how evidence gets changed to try and make a case, I want to talk about something that Jimick said, and, you know, Jimick, again, he knows that — he's aware by now that this is not good if Gist is saying that it was Burger and Nick, so, you know, characteristically he tries to worm out of it and, you know, there are some questions and answers where he begins to say, you know, she said he was there, but she didn't say he was in a fight and, you know, he tries to worm out of it.

I don't know if you folks recall that, but, you know, I could read it to you. It goes on for some pages, but in the end, again, I pin him dawn with the — with the transcript and he has to admit, yes, back in 2006, when I interviewed Gist, who is an eyewitness and probably the best eyewitness because she knows the players, said it was Burg and Nick involved in the fight and not Darrel and not D.

[1512]

MR. SEARS: So that's an important example of how we get from where we were in 2006 to where we are in this trial.

Little housekeeping here.

So just think about that when you deliberate and you talk amongst yourselves and you say to yourselves who was involved in the initial fight? Who can we look at to tell us that? We — the eyewitnesses, we have all but, you have Gist in 2006 saying I know these guys, it was Burger and Nick.

Let me give you another example of how evidence gets manipulated and changed over the years to something that it never was and never should be. And, again, I'm talking about case officer Jimick.

And, you know, maybe this jumped out at you when he testified to this, because it sure jumped out at me. This is the transcript. He says, he's talking about when he's up in the apartment and the bag with the sweater.

Initially when I removed the bag from the closet and opened it, I got an overwhelming smell of gunpowder from inside the bag.

Do you remember when he testified to that? Because it really just stuck with me. An overwhelming smell of gunpowder from inside the bag.

Now, is Jimick saying that in 2015 in this trial [1513] for you folks because it's true, or is he saying that because he wants to say something to make the case better because he knows the other evidence on the sweater from the lab and the witnesses and all, that is all over the place and suggested that sweater was never in the shooting so he's got to do something about this, so he makes this up. How do you know that he makes it up? You know, man, you know, overwhelming

smell of gunpowder. There must have been an awful lot of gunpowder on that sweater to have that overwhelming smell.

Only Cunningham — remember Detective Cunningham, first guy? He was on the stand for a long time? Yeah, he's a pretty savvy guy. He knows about stuff like this. He knows about guns and ballistics and gunpowder. And Jimick gives him the sweater for vouchering, and he doesn't notice any smell, any overwhelming smell of gunpowder.

You would think that Cunningham, who is in the business of knowing about that, if that were true, he would notice it. And the reason he doesn't is because there ain't any smell, and there ain't any gunpowder. That's just made up, man, just made up for your benefit, okay, for this trial for you, to fool you, and don't let them do that. And don't just take my word for it that it's a lie.

You know that Cunningham didn't pick it up. [1514] Cunningham says, here's Cunningham:

Well, you sent it to the lab, right? You sent the sweater to the lab to be analyzed, did you not?

I did.

Question: The ballistics, the NYPD ballistics' lab, correct?

Answer: I don't know it's the ballistics' lab, but it was sent for possible gun, gunshot powder residue testing.

And as the case officer, I assume you followed up and you got the results?

I'm talking to Jimick about the lab work.

So you are aware that that examination did not show any gunpowder, any gunshot residue or any other evidence that that sweater was involved in the shooting or any other evidence that that sweater was involved in the shooting? You're aware of that, are you not?

Yes, I am.

So, you know, and if that's not enough to show that Jimick was lying, the fact that the lab does not find any of this stuff produced, this overwhelming smell, and if you think that, that police officers don't stretch the truth to get a conviction, you're not living in this world.

He told you about DD5s. DD5s are important things [1515] in the investigation. He's the case officer. And he told you that, you saw, he had a stack of stuff, it's DD5s, police reports. DD5s is another word for police report. And he told you what the DD5s are for. And what those DD5s are for are to record significant information that you develop during the investigation, like, for instance, the sweater had an overwhelming smell of gunpowder.

So I ask him, you know, because I'm curious, okay, show me the DD5 where you entered, you know, nine years ago this key observation of yours that you made about the sweater, which any detective worth his salt is going to put in the DD5 because it's important, right, to prove — show me the DD5 from 2006 to prove that you didn't just make it up in 2015. Only there ain't no DD5. Never mentioned before anywhere in the history of this case. And here's what he says:

Question: Generally speaking, I would think as a careful detective who's been on the force for a long time you would note significant things in your DD5s. That's what they're for, are they not?

He says, "They are."

Question: Yet, you fail to note this significant thing talking about overwhelming smell of gunpowder in any of the paperwork in this case, correct?

Answer: That's correct.

[1516]

And the laboratory analysis that you just referred to did not find anything to suggest that, correct?

Answer: That's correct.

So think about that, not only for what it says about a detective's willingness to say something that isn't true, but what it says about how evidence and, again, going back to the Gist evidence that Jimick tried to foist on you, what it says about evidence that gets manipulated to make a case against Darrel Hemphill when there never, never was one and shouldn't be one now.

Another way of being manipulated, I think, and again, if you guys disagree with me, that's your call, but this is just my thoughts.

Another way of being manipulated, how many photos, this is a sensitive thing, I apologize, but how many photos of David Pacheco, Jr.'s dead, injured body did the DA put into evidence and put up on the screen and show to the mom and people crying? One? Two?

Or I think it was 20 is the number. Admitted into evidence.

Now, this is a case about who fired the shots, it's not a case about did the child get shot. Of course, the child got shot. It's not a case about did the child have a gunshot wound. He had a gunshot wound. It's not a case about mechanism of death, died of gunshot wound.

Medical examiner testified about all that. No mystery. I [1517] had no cross-examination for any of that evidence.

So, you know, why do you need 20 pictures or so of the child with the stitching and the inside of his body and the blood and all that? You know, what's the point? What's the point of that?

And I would suggest, I'm sure the DA has a different take, it's for you to decide, but I would suggest that, that the point of that is to appeal to your emotions, but none of that is in dispute, and none of that is a real issue in this case. To appeal to your emotions and get you to bring in a verdict based on your emotions, which is exactly what the judge instructed you at the beginning of the trial and will instruct you again you shouldn't do. Okay?

And that's another way, I would suggest, in which you're being manipulated toward a certain verdict in this case.

So when you view the evidence and you think about Gist and think about Jimick and any, about the extent to which things have changed dramatically, witnesses who were believed and witnesses not

believed and now just keep in kind that it's not your job as jurors to fill gaps. That's not what you are here to do. You're not here to fill gaps in the district attorney's case. That's not your job.

It's not a question, the judge will tell you, he's [1518] already done it, what might have happened, could have happened, may happen, which side is more probable. It's a question of if there's been proof beyond a reasonable doubt, and we're not even close. We're not even in that ballpark.

So what does the prosecution's case really boil down to? As I see it and as you see it, it boils down to Ronnell Gilliam, again, the only person in all this time to say that Darrel Hemphill is the shooter. They have never in all these years — back then after Gilliam changed his mind said Darrel is the shooter, all these years never put him in a lineup or photo array. Never asked anybody is that the guy who did this, either back then or now. I mean, think about that in a case where you're being asked to convict somebody of murder.

So the case basically boils down to who lied all over the place and had this 25 years hanging over his head if he doesn't tow the party line and a blue sweater concerning which the lab found that there was no evidence that that sweater was involved in the shooting.

It seems to me hardly the stuff of proof on which you can convict another human being of a serious crime and that against the evidence, which there is a lot of, that somebody other than Darrel Hemphill is the person that fired that shot.

[1519]

And keep in mind as you, please, that it's not my job, it's not my function. I don't have to prove who is guilty. I don't have to prove who fired those shots.

Is there evidence that Morris fired the shots? There's evidence that, plenty of evidence Morris fired the shots. Is there some evidence that Hemphill fired the shots? Yeah, that's what Gilliam says. Is there some evidence some guy with a lettered tattoo we talked about fired the shots? Yes. There's evidence some guy like that fired the shots.

The point is you don't know for sure, you can't know for sure based upon what we have heard in this courtroom.

Now, I would submit as far as who fired the shots, the best evidence, mostly likely evidence, easier evidence we have is that Nick fired the shots. Was I there? Was I a witness? Do I know? I don't. But if you believe that that's what happened, then you have to find Mr. Hemphill not guilty, If you believe it's even reasonably possible that Nick or someone else fired the shots, then you have to find Mr. Hemphill not guilty.

So there's some evidence, as I said, that Nick fired the shots, some evidence that somebody with forearm, lettered forearm tattoo — witnesses were quite specific about that, which Hemphill doesn't have, Morris doesn't [1520] have.

There's evidence that somebody in a shirt, and I'll come back to that stipulation, about there was evidence that Morris changed his shirt when he got up to the apartment afterwards. And you know that there's a telephone call from Gilliam to his brother saying get rid of the shirt, get rid of the shirt.

There's evidence about an embroidered sweater from Baez. He was quite specific, remember, about the embroidery going down there. There was evidence about long hair and braids. There's evidence from Baez that the shooter got out of a car and immediately started shooting. None of the other witnesses see anything like that, see the guy coming down the block, no getting out of a car.

Gilliam says he was standing next to the shooter and I told him not to shoot and then the shooting happened, and it was like a couple of feet from the shooter when the shooting happened. No other witness says somebody, sees anybody standing next to the shooter. I don't know where that's coming from.

As I said, there's a lot of different versions here. Can I prove to you which one is the correct one? I don't know, but that's not my job. Can they prove to you which one is the correct one? Absolutely not. And that's what you have to find.

[1521]

We do know, I mentioned this before, sorry to repeat, in nine years of investigation, not a single witness other than Ronnell, who they never believed before, and even his own lawyer didn't believe, took a cop to that later.

Remember Vomvolakis testified he didn't even believe Gilliam when he changed his story?

Nobody says that Darrel Hemphill fired that shot. All of these witnesses were known back in 2006. If they had any suspicion even that Darrel Hemphill, even after Gilliam came in, why didn't they put him in the

lineup? Because they didn't believe what Gilliam was telling them.

Now, I'd like to review some of the other evidence in the case. I'm going to read from some of the transcript. I ask you to bear with me. It's going to take some time. There's a lot to say. I don't want to leave anything out that is important. So just stay with me and we'll get through it.

There are, as far as Morris is concerned, three types of evidence that implicate Morris, eyewitness testimony, lineup identification, there's ballistics evidence, nine millimeter, and there's physical evidence. Remember the bruise on his knuckles? Let's talk about each one of those. Because each one of those reinforces the other.

[1522]

So when you evaluate the evidence against Morris, again, I don't have to prove he did it. If it's reasonably possible Morris did it, you have to find Mr. Hemphill not guilty, but there's a lot of evidence against Morris, and each piece of evidence that supports the other. It's not just lineups, it's not just ballistics evidence, it's not just bruises, it's all of those supporting the other and indicating to you that that's how you know he could be the guy.

Let's talk about the lineups. Again, this has to do with, you know, being manipulated and being careful about that. The DA wants to undercut, you know, his own witnesses. They testified to this, they identified this, and then the district attorney wants to spin that around and okay, but you're really not a reliable witness. And, you know, he wants you to believe the

testimony that they give that helps their case, but he doesn't want you to believe the testimony they give that hurts their case. And don't let him parse it out. You know, don't fall into that trap. These identifications were reliable enough nine years ago based on arrest and prosecution. That's pretty darn reliable.

You don't go out and arrest somebody because lineup witnesses say I think that's the guy or no, that doesn't really look like the guy, he was heavier or [1523] something. They arrest people because they get positive IDs. That's what happened in 2006, not in 2015.

And Jimick told you that an interesting thing. He told you that he chose these witnesses to view the lineup because they were the best witnesses he had available. These are the eyewitnesses. These are the people that saw what happened. That's why he chose them.

His testimony concerning the lineup:

When you say those witnesses were chosen to look at the lineup because you considered them to be the best witnesses that you had available to what occurred?

Answer: That's correct.

And before those people, before these people and before that determination was made, those witnesses were interviewed by detectives participating in this investigation? Correction. That a determination was made that these are the people that were going to come look at the lineup, correct?

Answer: Correct.

So Jimick is picking the best witnesses that he has available to look at the lineup.

And then there was a lot of testimony about all the pains they take to make sure the lineup is fair. They don't let the witnesses come together beforehand or after [1524] this or witness can't say hey, it's number two, when you go in there, just say number two. They all look at it different. The lineup is made so it's fair to the accused, people that look the same so nobody jumps out and they interview the person, make the lineup as fair as possible and they do that to get, you know, an accurate, reliable identification.

This is Jimick on the lineup:

Because we want to keep that lineup as fair as possible. We want fair viewing of the lineup without them believing that either we have the person that's under arrest or that they should be picking somebody out of the lineup. It's done as fair as possible for the lineup.

Again, talking about the lineup:

You want to make viewers look at a person's face, not hairstyle, correct?

Answer: That's correct. We want identification being based on them being able to recognize face, not clothing or hair.

So a lineup, the people are right there, they're close. Look at the faces. What happens? Not one, not two but three witnesses separately and independently identify Morris.

And let's not kid ourselves, okay, the witnesses are intelligent people. They know why they're there, They [1525] know it had to do with what happened two days before. They know they're going to a lineup that has to do about the shooting.

When they identify Morris, in their minds, they're saying that's the shooter, they're not going to identify somebody in a lineup that they just happened to see on TV or down the block or whatever. They know what they're doing. These are intelligent people. They know what the lineup is about. It's about the shooter.

And so what happens? All three of them independently pick the same guy as the person that was in the altercation and was the shooter. And that's important that all three, that they do it independently because what are the odds that three people see an event all make the same mistake and go in and identify number two? What are the odds of that? Million to one? That's never going to happen. Each independently identified the same person, because that's the right person. That's the only reasonable explanation.

And based upon their identifications, Morris gets formally arrested and charged.

Now, a whole lot of time was taken by the district attorney with the Bronx 12 video, the video looked like the shooter.

Now, none of us really know what's going on when [1526] they look at the video. You've all looked at the TV and, you know, news, TV sometimes you're paying attention, half paying attention.

One of the witnesses, I think, Brenda Gonzalez, said she wasn't paying much attention, just saw somebody in the car.

You know from your own experience that what you catch on TV is completely different than being face to face and in person like you are in a lineup like maybe this far away. So what you might think is on TV is completely different that the impression that you already have when you look at somebody in person. When you look at somebody in person, you get a feel for that and you make identification. Don't get bogged down with the Channel 12 video.

You know, whatever the impressions were in looking at the video, again, when they went to the lineup, they knew what it was about. They knew. And they said number two that they are identifying the man from the altercation and the shooting.

And, again, it's important when you think about the identifications that we're talking about an incident that has two parts. Okay? There's the initial words are exchanged and altercation and that takes place about, according to the witnesses, estimate, about ten minutes.

[1527]

And then the shooting later on, no matter how much the district attorney wants you to focus on the moments of the shooting, you know, he suggests the shooter was all the way over there, and we were concerned and looking at the gun. They didn't get good a look. And you really can't make an identification.

The identifications are not based entirely or even maybe not very much on the momentary opportunity to view the shooter but the fact that the shooter is the same person involved in the ten-minute altercation during which these people were face to face.

One of the witnesses got in between, tried to stop the fight, argue, all that. So the witnesses had ten minutes close up with the person they said was the shooter. So don't, don't let it be suggested to you that this identification is based on seeing him down the block or across the street firing a gun. That's the guy from the fight, and we know it's him, we saw him for ten minutes, and that's what our identification is really based on.

So when they pick number two, what they're really saying is I know him, because he is, he's the shooter, and because I really know him because I got a good look at him during the ten minutes that I spent fighting with him.

So here's Jose Castro. Yeah, of course, watching somebody, you're going to actually look at their face. [1528] That makes sense. He shouldn't — the sweater, can you say this is the exact sweater worn by the man? And there's a lot of testimony that the shooter was wearing something other than the blue sweater. He's shown the sweater in evidence. He says I couldn't remember. It's light blue sweater. I don't know if that's the exact one, just a light blue sweater. It's similar, it's similar.

There are many sweaters like this, correct?

Yes.

So and about how long was it from the time you first saw the tall, slimmer person, Burger, until the altercation, initial altercation was from when the fight was finished, was that about ten minutes?

Answer: Yes.

So there's a long opportunity for these people to observe who they're dealing with.

And when the person came back, you recognized that person as being the person within the altercation and the fight?

Answer: Yes.

The same person you had seen for about ten minutes or so before he ran off?

Answer: Yes.

You remember in the Grand Jury presentation, again, this is still Castro, when Grand Jury testimony [1529] being asked questions about Nicholas Morris:

Do you remember in the Grand Jury testimony referring to the name Nicholas Morris?

Yes.

Did you do that throughout your testimony?

Yes.

They kind of know who they're dealing with. Again, these aren't — they're not stupid people. They know what they're doing, who they're identifying and what's at stake.

Jon-Erik Vargas did testify in the Grand Jury on the lineup.

Did you pick anyone out of the lineup?

Yes, I chose number two, same number.

At the time, what did you say number two did, if you remember?

Number two.

You picked out number two?

Yes.

Did you tell the police — did you tell the police he did something?

I said that's the guy that I was fighting.

So, again, that's who they're really identifying is, they're identifying somebody that they got plenty of time to get a good look at.

[1530]

Again, talking about the lineup, Jon-Erik Vargas: And right to say you wanted to do the right thing in terms of what happened?

Yes.

When you looked at the lineup, you identified number two? You told the district attorney it's the guys that you had been fighting with on Easter Sunday?

Yes.

And when you identified that guy, number two, as the guy you had been fighting with, I assume you do not mean Burger, you meant the other guy, the guy that came back shooting?

His answer is yes.

Brenda Gonzalez, she's not your best witness. She got a problem with her eyesight. She can see well enough to get around, go shopping, do the things she has to do but, you know, she had some trouble seeing. She also sees the whole ten-minute altercation. At one point, she gets in between Jon-Erik and the person he's fighting, which is very close. She wasn't paying much attention to the Bronx 12 video.

And even when you look at her testimony, again, this is how things change years and years later, she was a lot more confident when she said nine years ago than what she's saying now.

[1531]

When you looked at the lineup, it was about the shooting?

Yes.

Detectives told you that?

Yes.

You went down to the precinct? Could you see the people sitting there?

That's — you were about as far as me and you. Before you viewed the lineup, you were given some instructions.

Take a careful look at the people sitting, something like that. Tell us if you recognize anybody.

And then they said, do you recognize somebody?

And they didn't tell you the number to pick, and you picked number, you picked the number you recognized?

She said yes.

So even Brenda is recognizing, you know, from the ten-minute altercation who it was that she was involved with.

She's asked about her Grand Jury testimony, what did you see happen. Then all of sudden, I seen more. I was standing in the corner, and he was shooting.

So these witnesses, you know, again, they're good people. They're doing their best.

And it's at the time when all this happened and [1532] that's their best shot at making accurate identification in a situation that they know the person.

Did you actually look at the people who were sitting there in the lineup, and did you understand this was an important event?

Yes.

You looked at those people, and you said you recognized number two?

Number two we know was Morris.

And, again, you know, can I prove Morris did the shooting? I don't know. I think I'm doing a pretty good job. I don't have to do that. It's possible he did the shooting. If that's a reasonable explanation, then you know what your verdict has to be.

Marisol Santiago, she's a pretty good witness. She knows what's she's doing. I don't know if you have recollection of her. She knows what's she saying, talking about. She's referring to a person not to be fed words on or manipulated. She's asked these questions:

Do you recall, about her Grand Jury testimony, being asked some questions, and did you see him, meaning, in response to the questions, did you say, sorry, where it — did you see him with the weapon?

Yes.

What kind of weapon?

[1533]

It was a silver gun. That's all I seen. He cocked it.

Other than seeing the skinny man with the silver gun, did you see anybody else with a weapon?

No.

Had you previously identified the skinny man in the lineup?

Yes.

Answer: Yes.

Did you identify him as being Nicholas Morris?

Answer: Yes.

Again, with Marisol — I'm little a bogged down. I apologize for that.

Marisol Santiago, another witness, good witness, asked questions back then.

Answer: Yes.

And do you recall being asked these questions and giving these answers?

She says, yes.

Talking about the skinny man:

And are you sure he was the man you saw firing the shots?

Yes.

Did you see anybody else with him?

Nobody else was with him.

[1534]

So Burger is not standing next to him. None of the witnesses say that.

Then she goes on in her testimony:

Did you identify him as Nicholas Morris?

Answer: Yes.

That's a long time before you met Mr. Oustatcher about this case?

Answer: Yes.

So the point is that these are good witnesses with plenty of opportunity to see what happened. And don't let it be suggested that these are just unreliable witnesses to be written off. They're good witnesses. They all, were not all making the same mistake when they picked Morris out of the lineup.

Getting there.

I want to talk about Jon-Erik Vargas. I'm sure you have a distinct image of him. He was a witness later in the case, one of the DA's last witnesses, kind of stocky guy, not heavy, tough, firm. Doesn't get pushed around. No one puts words in his mouth. If you want someone you can rely on, I suggest that he's the guy.

Did you pick anyone out of the lineup?

Yes, I chose number two.

At the time, what did you say number two did, if you remember?

[1535]

Number two did?

You picked out number two, right?

He says, yes.

Did you tell the police number two did something?

Yes. I said that was the guy I was fighting with.

He's a good witness and he knows, you know, what he's talking about and who he was fighting with.

Later on in the transcript, talking about some questions from the district attorney, some questions about when you looked at the lineup:

By that time, you knew that a child had been killed?

Yes.

And you wanted to do the right thing in terms of what happened?

Yes.

When you looked at the lineup, you identified number two, you told the district attorney it's the guy that you had been fighting with on Easter Sunday?

Correct.

When you say you identified number two as the guy you had been fighting with, you do not mean Burger, you mean the other guy?

Yes, the guy that came back and started shooting.

So that's, that's Jon-Erik.

[1536]

This is all powerful evidence, which I think fairly should in your minds create at least reasonable doubt and probably a lot more than that.

So just recap on the identification points, you have three positive identifications independently made by people. You have, Gist, who knows the players 15 to 20 years, telling Jimick that day that it's Burger and Nick. You have Baez, Mr. Baez testified later on who looks at an array. This is Defendant's E. Looks at a photo array that has Morris, number five. He doesn't identify him, but he says that looks like the guy. This is in evidence. You can look at it.

You know, you just decide for yourself. These people, you know, zeroing in on somebody. He could have picked somebody else. He's zeroing in on number five. Happens to me all the time.

(Whereupon there was a telephone interruption)

MR. SEARS: He's zeroing in on number — he says he looks like the shooter and, again, you just decide for yourselves if number five — you know, we know Morris looks like the shooter and, you know, I think you're going to agree that this picture which is in evidence People's 103 really doesn't.

So the evidence, I'm pointing to Nick Morris, Nicholas Morris, suggesting Mr. Morris is the shooter. [1537] Again, I'm not there. Doesn't end there.

There's some hard evidence. And you know, hard evidence is good because you didn't have to rely on anybody's memory or take Nick's words for it. It is what it is. And it's not subject to human error. And just see if the hard evidence supports and reinforces the identification of Morris or whether it contradicts them.

I think when you look at the hard evidence, you're going to see that it reinforces the identifications. I'm talking about two things that were discovered in the initial investigation. This, again, is Jimick.

Question: So in addition to the eyewitnesses, you also had some other evidence implicating Mr. Morris, that, among your other evidence you had, you had done a search of his apartment?

That's right.

And you participated in that search. And in his apartment, you told the district attorney you recovered some ballistics evidence that you thought was significant; is that correct?

I did.

And among the evidence that you recovered was a nine-millimeter bullet, correct?

Correct.

And where was that in his apartment?

[1538]

It was like on the nightstand next to his bed.

Whose bed was that?

Nicholas Morris'.

So next to his bed there's a little nightstand and on that nightstand is a nine-millimeter bullet, correct?

Yes.

And that was significant in your investigation, was it not?

It was.

All right. Was it your understanding that the round that was recovered from the hospital that killed baby

David Pacheco Jr., was a nine-millimeter bullet?

That's correct.

So on the nightstand, Nicholas Morris' nightstand, when you execute this warrant in the early morning hours of the 17th, some 12 hours after this incident, on a nightstand in Nicholas Morris' bedroom is the very same type of bullet that killed David Pacheco?

Answer: Same caliber.

Same caliber capable of being fired by the same gun?

Correct.

And would you think that somebody who has a nine-millimeter bullet on his night table might also have [1539] access to the weapon that fired a bullet? Does that make sense?

Answer: That would be reasonable conclusion, yeah.

So I mean, just step back for a second. This is 12 hours after a nine-millimeter bullet kills David Pacheco, and what's sitting on the nightstand, it's not

even packed away somewhere. I don't know. It's in a closet. It's on his nightstand where he can just pick it up, the same kind of bullet that killed the child. I mean, is that like a coincidence? I don't think so. I mean, that would be stretching, stretching, stretching your imagination too much to think it's just coincidence that when they immediately go over it's shortly after the incident, there's a shooting with a nine millimeter, that on the suspect, the same person that Gist says is the guy, the guy was involved in the fight, I know him 20 years, that same guy just happens to have a nine-millimeter bullet on his nightstand. That is too much of a coincidence.

The only reasonable explanation is that what Jimick said, yeah, he's got a gun that can fire that bullet. That's what he did.

What else do we find out about Nick, other than that nine-millimeter ammo? Let's go back to the fact that this incident starts with a fight.

[1540]

And you folks know that when you have a fistfight, you can get bruises on your knuckles, right? You don't have to be a genius to know that. And this tells you something.

Let's see what we have before we get to the knuckles, you know, the nine millimeter and being on his nightstand in that close to where, you know, Nick has things. It tells you something about Nick, I think, what kind of guy he is.

And bear in mind or you remember that this, during the incident when there's a spitting — you

know, Burger testified there's a spitting — you know, who is the first person who he calls when mention of guns? Nick. The guy with the nine millimeter close at hand.

This is questioning of Jon-Erik:

At some point during the events that you described, you say you spit on Burger?

Answer: Yes.

He said something at that point?

Yes.

What did he say?

He said, I will shoot you.

So that's what Burger says. And this is Gilliam referring to that same spitting thing:

He called me a couple of names, tried to spit on [1541] me.

I said listen, go get your gun, I'm going to kill you. So I called Nick. I call Nick.

This is more questioning of Gilliam:

One of the people you were fighting with spit at you or tried to spit at you, and you didn't like that? You didn't like that?

No, sir, I didn't.

As a matter of fact, you didn't like it so much that you said, I'm going to kill you?

Yes.

You said something like I'm going to get my gun or go get your gun, right? You brought guns into the conversation?

Answer: Yes, sir.

Because you had got spit at?

Answer: Yes.

(Continued on the next page)

[1542]

MR. SEARS: Well, as soon as he said what's the first thing you did when you said let's do guns or get your gun or I'm going to kill you, what's the first thing, who's the first person you called?

Answer: Nicholas Morris.

And the reason you called Nick is that you knew Nick was a guy who had weapons?

Yeah, and I knew he had weapons.

But it was the gun got mentioned or killing somebody got mentioned, the first thing you do is call your best pal Nick; correct?

Yes, sir.

And you know that Nick has guns, because you have seen them?

Yes, sir.

And you know he has ammo because you've seen that?

Yes, sir.

So 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.

That brings me to where I was before, so which is what Jimick notices when he arrests Nick on the 17th.

Do you observe any bruising anywhere on [1543] Mr. Morris's body?

Yeah, his right hand had bruising on it, the knuckle area.

Um, he meets him at News 12.

Did you notice anything you noted because you felt it was significant about his hands?

Again, this is Jimick. Yeah, he had bruising on his knuckles.

And did that suggest to you that he had been in a fight recently, like maybe the day before?

And he answers: It would be reasonable to conclude that, yes, he was in a fight recently.

And, by the way, that's what I said before about Nana. Those are the same bruised knuckles that Nana testified he saw on Nick later on the day of the shooting, so bear that in mind when the DA suggests that Nana is just crazy and coming in here to lie about things.

So just, you know, when you think about whether Nick might be the shooter, again, I don't have to prove that, just think about how the lineup identifications are reinforced by the 9-millimeter and the bruising on the knuckles and those things. Think about whether

that can all be a coincidence, that three people coincidentally pick out the — the same guy they pick out coincidentally just happens to have bruises and a 9-millimeter. It cannot just [1544] be a coincidence, so I suggest to you that the evidence suggesting that Nicholas Morris is the shooter, again, it's not my job to prove that, is stronger, much stronger, much more reliable and much closer in time to the incident than any of the evidence that you heard suggesting that Darrel Hemphill was the shooter.

Okay, about halfway done. Just bear with me. Obviously, this is — there is a lot at stake. It's just important that I cover what I think is important, even if it takes a bit of time. I'm sure you all appreciate that.

Now, I'd like to talk to you about sweaters, shirts and tattoos, and what the testimony was about those things, and whether it supports the prosecution case or, as I suggest, undercuts the prosecution case, or just like many things raises more questions in this case than answers. I think at the end of this case, we are all going to be left with questions. That sometimes happens.

So, let's see if we can figure out, okay, when you go into the jury room you might say — somebody might say, okay, well, what was the shooter wearing, so let's see if we can figure out with any degree of certainty what the shooter was wearing. This is a big part of their case, because this is the sweater.

The sweater and Burger is pretty much what their case is about, so let's see if there's any certainty on [1545] that key issue, because if you can't say for sure then that is, you know, that's important. If you can't

say for sure that the shooter was wearing People's 98C — it's in a bag somewhere. I could hold it up, you know, and no witnesses said that that is the sweater that the shooter was wearing. You know, if you can't say for sure that that's what the shooter was wearing, then the testimony about the sweater and the DNA and all that is basically a distraction and is meaningless, and let's talk about that.

So, was the shooter wearing the sweater that is People's 98C? Okay. Let's see what we have. You know from what I have read before, this is Castro, and Castro basically says that he saw, you know, just a blue sweater, you know, and similar, there are many sweaters like that, he can't say, you know, if that's the one or not. So that's, you know, it's a fair summary from Mr. Castro. Maybe, you know, the shooter was wearing something like that, maybe not, lots of those, I mean, blue sweaters around.

What else do we find out about the shooter and what the shooter was wearing? This is again later on with Castro.

Do you remember in the grand jury presentation that — do you remember in the grand jury presentation — no, this is actually a piece of paper that doesn't go [1546] anywhere. That happens sometimes.

Okay. There's a suggestion from one of the witnesses, and I don't have it in front of me, but you will recall testimony about — this had to do with tattoos and things like that, that the garment, whatever — oh, yeah, this paper does fit — that the garment was short sleeves. Again, this is Castro.

Do you recall whether the garment that was allowing you to see the right forearm tattoo, and we will come back to that tattoo, because that is important, was a short-sleeve garment, and he says yes, so now we are starting to get an indication that it's not that sweater that is in evidence. That sweater that is in evidence is kind of a loose sleeve falling down, long-sleeve garment that's not going to allow anybody to see any — probably not going to allow anybody to see any forearms, so we're getting an idea that it's a short-sleeve garment.

Just bear with me. And you will recall that Gilliam testified — I had to pull it out of him, that Nick was wearing a shirt and changed when he got to the apartment. This is Gilliam.

And when you went after the — and when you went — and when you went after the shooting had taken place and you went up to the apartment, Nick asked to change clothes, did he not?

[1547]

He asked for a T-shirt. I gave him a white T-shirt.

So, Nick changed clothes when he goes up to the apartment, and that's really important because we have this stipulation because that becomes a concern.

The stipulation I think is someplace. I'm sorry about this. I could use a bigger place to spread, out. I hate to take the time doing this, but — do you have a copy of the stipulation?

In any event, I just read it. It's People's — it's Court Exhibit V. I'll find it at some point, hopefully, in my stack of papers.

The stipulation I just read to you this morning in which Vasquez, the cop who was Jimick's partner, he's in the apartment and a call comes in that he overhears. Vasquez overhears the call, and the call is from Ronnell to his brother William, who is in the apartment with the cops at that time, and Ronnell is calling and he says: Are the cops there? Did you get rid of the shirt? And he says that twice. He emphasizes it. Did you get rid of the shirt? And that's so significant that he puts it in a police document. It's all in the stipulation.

So the — so you have testimony from Gilliam about Nick changing his shirt, and you have a telephone call that the police substantiate that's part of the [1548] stipulation that Gilliam is concerned that his brother William get rid of the shirt. It's got nothing to do with any kind of sweater. He doesn't say in the phone call, yeah, William, get rid of the sweater. He says get rid of the shirt, and that's an important piece of evidence for you to consider.

So, none of the eyewitnesses identify that sweater. There's testimony that the shooter wore short sleeves. And what else do we find out from witnesses about that sweater? We find out a lot. I shouldn't say about that sweater, but about what the shooter is wearing. And this is, again, Juan Carlos Garcia, who is a pretty good witness. He's a careful witness.

And he's asked about this. The other guy you initially were about — initially you were about to get in a fight with, describe him as you remember him to the jury.

Answer: He was wearing a blue shirt and a blue cap.

Okay, a blue shirt which corresponds to Gilliam calling up and said, Did you get rid of the shirt?

He goes on to say, describe the blue top that the not Burger guy wore, as you remember, to the jury.

You're asking about the skinny guy?

Yes.

Answer: He was wearing a golf shirt, a blue golf [1549] shirt.

And you all know that blue golf shirts are way different than that sweater that's in evidence. Nobody, especially a careful observer like Garcia, is going to look at that sweater and mistake it for a blue golf shirt.

He was wearing a golf shirt, a blue golf shirt.

Why do you recall it was a golf shirt?

Because I remember it was a golf shirt and it had three buttons on top.

I mean, look at People's 98, if you want to, and, you know, hold it up and see if you can in any way square it with this description.

It was a golf shirt. It had three buttons on top. It was a short shirt.

Short sleeve?

Answer: Short sleeve.

And, again, this is Castro.

When you look at him, tell the jury who you are looking at.

At the shooter.

And how was the shooter dressed?

A blue shirt and blue cap.

And when you think about this blue baseball cap, also that a number of witnesses I think they said blue Yankee cap or blue baseball cap, when you looked at the [1550] Channel 12 video of Morris, I mean there wasn't any sound at all, but you could see, and what is he wearing on his head? Is that another coincidence, I guess, like the 9-millimeter and bruised knuckles? He's wearing a blue Yankee hat just like witnesses say the shooter was wearing.

So, you know, I pick up on that with Mr. Garcia, because, you know, as I see it, and you judge the witnesses, but I sense from his appearance and his demeanor on the stand that he is a really good witness. You know, he knows what he saw, he speaks his mind. Nobody is putting words in his mouth. So I follow up on this, because it's important.

You impress me as somebody that does his best to remain calm.

Remember, he said he was trying to calm everyone down?

Yeah, that's fair.

And during this incident you described for the district attorney, you were doing your best to remain calm, keep everybody calm?

That's correct.

You didn't want to — you didn't want anything bad to happen?

No.

And it was Easter Sunday.

[1551]

And you're pretty observant, pretty careful about what you know, what you see?

That's correct.

And he talks about that he's wearing reading glasses, he didn't need them then, his eyes were fine.

The incident that you described, did you have any trouble seeing what it was that was happening?

No, I had no trouble.

And you described some people that were involved, a group of people, and then there were two people.

Burger was about 400 pounds, and then there was a skinnier person.

And you had a pretty good look. Did you have an opportunity to get a pretty good look at both those people?

That's correct.

And you impress me as being a fairly observant person, pretty much remember what you see?

Correct.

And for the taller guy, you got to see what that person was wearing?

That's correct.

You had a good look at that?

That's right.

And you remembered that?

Yes.

[1552]

And it made an impression on you?

Yes.

And you described what he was wearing on top as a blue golf shirt?

That's correct.

Short sleeve?

Yes, with buttons, three buttons, that's correct. Now, Marisol Santiago, another pretty good witness.

Do you recall when you spoke to the police describing the taller person, the skinnier person, that he was wearing, saying that he was wearing a hat and a blue shirt and blue jeans?

Answer: Yes.

And that was the same day that this occurred that you gave that description?

Answer: Yes.

So none of the eyewitnesses say that the shooter was wearing the sweater that's been marked as evidence. There are descriptions, detailed descriptions from people that say they saw and remember what the shooter was wearing, that it was a shirt. There is very specific information about the type of shirt and the buttons, things that stick in the person's mind as he says he remembers and that links up with the phone call where Gilliam says get [1553] rid of the shirt.

You have Anthony Baez. Here's another, you know, in a case where you're trying to find — someone is asking you to convict beyond a reasonable doubt, Anthony Baez gives yet another description of what the shooter was wearing.

He's the guy, you remember, that looks at the photo array, says it looks like Nick, looks like number five.

Baez talks about a sweater that's completely different from the one that's in evidence. He's questioned.

You mentioned a bluish sweater with, I think you said, some sort of embroidery going down.

Yeah, design, embroidery going down.

Going down both sides of the front of the sweater?

You're indicating down your chest towards your waist?

Yes.

And do you remember it going down both sides, this embroidered design?

Yes, sir.

Do you recall whether this garment was short sleeve or long sleeve?

[1554]

Long.

And did you see, for instance, the shooter's forearm?

Answer: No.

So you get a description from Baez of an entirely different kind of sweater than the one in evidence, and the description from Baez that contradicts the three witnesses that say it was a short-sleeve shirt and all that, and just, you know, your mind begins to wander in all the problems and all the different questions that are unanswered in this case.

Baez also tells you, while we are on him, the shooter gets in a car after the shooting and disappears, which would mean the shooter never ran up into Gilliam's apartment and all the other evidence that Gilliam testified to.

He tells you that in his testimony, you recall, he describes the heavyset gentleman.

And you say the heavyset gentleman told him to hold up, meaning the shooter. He did not listen. He just opened fire, and as soon as he finished the car started leaving him. He went into the car and he disappeared.

So, you know, it's — you have so many different versions of what occurred here that the district attorney is asking you to somehow figure out and come up with a way [1555] to convict Darrel Hemphill, and, you know, you just can't do that. It wouldn't be right. It wouldn't be fair and it's not your job to resolve all those questions.

So, you know, if during your deliberations one of you asks, you know, another one of you, so what was the shooter wearing, was the shooter wearing that sweater that's in evidence, the best you can say is I don't know. The best you can say is I don't know, and the probable answer, given the testimony of the

witnesses and the description of the shirt and the telephone call from Gilliam, is he probably was not wearing that sweater.

And that links up with the police lab evidence that tells you in so many words there ain't no gunshot residue, there ain't no gunpowder, there ain't no overwhelming smell. There's no evidence, no evidence suggesting that the sweater was involved in the shooting, so let's put that aside.

And, you know, another thing, if you look at the sweater, this is curious. You know, it's an old dirty sweater. It's got a hole in it. It's — they say they find it up in a bag in a closet. It's exactly, you know, Mr. Gilliam's testimony, and I think Ardell's testimony that Ronnell used to stay there a lot, you know, put clothes and things there from time to time.

This is exactly the kind of sweater up in the bag [1556] in the closet that is going to be laying there for years that nobody is going to wear, especially on Easter Sunday. And a very curious thing about that sweater, I don't know if any of you picked up on this, in the bag when they send it to the lab it had those metal fragments.

Do any of you remember that? Metal fragments in the arms and in the bag, in the sleeves and in the bag. And so, you know, the thought immediately is, well, metal fragments must be gun bullet stuff, but the guy from the lab told you no, no, no, it's got nothing to do with bullet stuff.

He said, you know, it's got nothing to do with bullet stuff, because bullet stuff is going to be either lead or copper jacket stuff or something. That was some kind

of aluminum stuff, so it had no ballistics evidence. It's just metal stuff. How it got there, what it is, nobody knows. But the point is, who is going to wear that sweater?

If that sweater had just been involved in a fight and running and all of that, you know, what is that stuff going to be doing in a sleeve, or is it more likely that that sweater has got nothing to do with the shooting, which is what a lot of the witnesses say and what the lab report indicates, and it's just sitting up in that closet for who knows how long.

[1557]

Now, I want to talk about tattoos. This is another important part of the evidence.

Many, many of the witnesses spoke about tattoos.

We even had a display. Remember when Mr. Hemphill sat over here? And it's another part of the evidence that makes you stop and say, you know, hey, you know, just wait a minute. This is important.

THE COURT: Counsel, may I interrupt you?

MR. SEARS: Yes, sure.

THE COURT: Ladies and gentlemen, we are going to continue this morning, but I understand that somebody needs a break.

Any jurors who need to take a break right now, you can step out. We'll resume in five minutes. Would that be okay?

THE COURT OFFICER: Jury exiting.

(Whereupon, the jury exits the courtroom.)

(Whereupon, there is a recess taken.)

(Whereupon, the following takes place on the record, in open court, in the presence of the Court, the assistant district attorneys, the defense counsel and the defendant.)

THE COURT OFFICER Jury entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Case on trial.

[1558]

THE CLERK: This is the case on trial. The record should reflect the presence of all counsel, the defendant, and all jurors properly seated.

THE COURT: Ladies and gentlemen, good afternoon. We are going to resume summations now. Just so you know the plan — well, first of all, is anybody here, by reason of blood sugar levels or anything like that, does anybody here have to have food now or in the next hour?

Everybody okay?

A change of plan, and that is we are going to finish the summation now. It should be within the hour, and then we're going to go home.

We're going to come back tomorrow, the DA summation and my charge, so it's a slight change of plan but not a major one.

Right now, we are on a parallel track of what we planned. We're not on a totally different track, so I ask you to give your attention to counsel and we will finish up.

MR. SEARS: Thank you, Judge.

The stipulation that's in evidence that I read before, I did locate it, so that is available. That's the one about the phone call from Ronnell Gilliam, I should say.

Okay, if you guys can't hear me or if my voice [1559] drops, just raise your hand or indicate some way. I do —I am run down like everybody, but I will do my best.

Okay, so I want to talk about tattoos, another important part of the evidence, another part that makes you stop and say, you know, hey, wait a minute, what's going on here, you know, how does this fit into, you know, this case?

The witnesses say that the person that they argued with, the person that they fought with, the person who did the shooting had a lettered, and they're quite specific about this. It's not me. It's the transcript. He had a lettered tattoo inside of the right forearm, and that's — you know, that's not something that they're going to make up.

Nobody is going to, you know, make up that kind of evidence. They're saying that because, you know, it made an impression on them at the time. It's not something that anybody is going to tell you to say. You know, they didn't all get together at a meeting and say let's say tattoo. They each say it independently, so it's believable.

And, you know, what does it mean? You know, I'm not sure. But, again, it's one of the questions in this

case. There's a lot of things that we are just not sure of where you have to be sure.

[1560]

Castro. Okay, this is Castro again. This is at the beginning of the argument.

I tried to grab his arm. I was trying to calm him down. I noticed — I noticed that he had a nice tattoo. That's his words, a nice tattoo, at the time. I didn't have any. I was thinking it's a nice tattoo, that would be a good tattoo to have. I would like that tattoo.

Okay? So, that's Castro, a pretty good witness, and, you know, this tattoo makes an impression on him, because he says I'd like to have a tattoo like that also. So, and, you know, it's on, you know, his forearm.

And what does that also tell you in that there was testimony — you remember that, you know, Mr. Hemphill, and you saw on the video, that Morris showed his forearms. He didn't have a tattoo, so this is all kind of curious. And you recall that Mr. Hemphill came up and sat in front of you in a chair and he showed his forearms, and he didn't have any kind of lettered tattoo.

He does have a tattoo, as you learned, up around the top of his shoulder that says DA, like a nickname, and then the zip code, 10457 or 10458. I forget exactly what it is, but it says DA and it's not anything anybody would see if you're wearing even a short-sleeved shirt, because it would be covered, and it has a zip code.

And the thing to keep in mind is that when Castro [1561] says he saw the tattoo, he thinks that's a nice tattoo, that would be a good tattoo to have, he's not

going to be seeing a tattoo that has a zip code and somebody else's initials and say to himself, hey, that's a nice tattoo, I wish I had a tattoo like that, so you know that the witnesses aren't talking about the tattoo that Mr. Hemphill has on his upper shoulder and that is — that should be clear.

And I asked, you know, he's asked where the tattoo was, and he says it's on the forearm. Okay.

Castro again, he says: A taller slimmer person who had the gun, were you able to see his forearm?

Yes, he had a tattoo on his forearm.

And you were — what the tattoo looked like, you were able to see that he did have a tattoo on his forearm?

Answer: Yes.

Whether the tattoo is on the right forearm or the left forearm, he is even specific about that, it's on his right forearm.

And he's asked about the garment that the person was wearing, was that a short-sleeved garment, and he says if I saw the tattoo it should have been, yeah, a short-sleeved garment.

So, again, we're getting further and further away also from the sweater that's in evidence.

[1562]

This is Juan Carlos Garcia, and he also talks about that.

Do you recall whether the garment that was allowing you to see the forearm tattoo was a short-

sleeved garment, and he says yes, and that is on direct examination from the district attorney.

Did you see any scars, tattoos, et cetera, et cetera?

He had a right tattoo written on it. It was a script.

Okay, very different kind of tattoo than Mr. Hemphill has on his shoulder, right arm, forearm, tattoo. It was written in script.

This is Garcia later on.

You described the person. Were you able to observe a tattoo?

Yes, on his right forearm.

Forearm?

Yes, forearm.

Okay. Were you able to read it?

No, it was just script. I seen it was script.

And you were able to see that and you remember that?

Answer: Correct.

Then you have Marisol. She also talks about a [1563] tattoo.

Do you recall whether during this incident the taller person, not the heavyset one, the taller person having a tattoo?

And she says yes.

And you were able to see that, were you not?

And she says yes.

And that's Marisol, so you have three. Again, it's not just one. It's three witnesses describing a lettered tattoo on the forearm of the person they had the fight with. And, you know, what are the odds again that all three witnesses are making the same mistake independently about what they saw? Again, not very great.

So, you have three witnesses. Again, just like with the identifications, all saying the same thing. They're not all making the same mistake. They're all independent, reliable witnesses seeing a person that they say had a short-sleeved shirt, not that sweater that is in evidence, and a lettered tattoo.

And so if the shooter — if the shooter, the person they were fighting with who comes back and does the shooting, had a lettered tattoo on his right forearm, it ain't Darrel Hemphill.

Again, this is something to consider when you're thinking about whether the proof convinces you beyond a [1564] reasonable doubt of what they're saying.

So, you know, where does that leave us? You know, where does that put us? If someone said to you, you know, and you sat through a long trial, there is some conflicting evidence, what do you know for sure about the shooter, if you were listening to that testimony you would say, well, one thing I know for sure is he had a lettered tattoo on his right forearm. It ain't Darrel Hemphill.

What else might you say? Well, I'm pretty sure that he was wearing a short-sleeved shirt. Three

witnesses described that. You know, again, that is — it wouldn't be Mr. Hemphill.

It's — you know, you saw again, you know, the Bronx 12 thing and Morris doesn't have a lettered tattoo, so what does this mean? You know, who is the shooter? What did he really look like? Did he have a lettered tattoo? I don't know.

Was it Morris? Yeah, maybe. A lot of witnesses say that. I don't know.

Is it Hemphill? It doesn't seem like it. There ain't any much evidence against him.

Was it some lettered-tattoo guy? I don't know.

But the point is you don't have evidence on which you can reliably convict another person of murder. You just don't have it.

[1565]

Again, you know, I just want to remind you, and the Judge will give you a charge on the law, it's never a question in a criminal case with so much at stake about guess work or what is possible or likely or could have been. It's about, you know, beyond a reasonable doubt. Eliminate every reasonable possibility of innocence, and you can't just do that based on the kind of evidence that we all saw in this courtroom.

Now, I want to talk about DNA. Okay? Because that's another thing that you can get misleaded about, misled about, like with the sweater.

Now, on what DNA is and what it isn't, what it can tell you and what it does not tell you, and I want you to put out of your mind all the CSI stuff and everything

else, you know, where they do magic science and, you know, whatever they do and they pull solutions out of a hat.

DNA in the right situation can be a handy thing. It could tell you who the parents of a child are. It could tell you if you're going to be susceptible to some disease in the future. That could be useful to know. In a case, it can identify a suspect or it can eliminate a suspect. It can be a good thing, but you have to see it in the context of each individual case and what it contributes or doesn't contribute to that case.

All the DNA in this case can tell you, and [1566] Yanoff, I think, was the person who testified about the DNA. Anyway, whoever the criminalist was, maybe it wasn't Yanoff, was quite candid about this, because, you know, the science people, they know what they can say and what they can't say is. All the DNA can tell you in this case is that at some point in the life of that sweater that is in evidence and at some point in the life of Darrel Hemphill the two came in contact. That is all it can tell you.

It can't tell you when that happened, or how many years ago it happened, or how long the sweater had been laying in that closet before it was recovered, or the circumstances under which that happened. It can't even tell you who the last person that may have worn that sweater is, so, you know, don't, don't, you know, just be carried away by just the words DNA.

And bear in mind, again, that we have already seen from the lab evidence and the testimony of the witnesses about what the shooter is wearing, that the

sweater that is in evidence, the one with the DNA, probably has no connection to this shooting anyway.

This is — it is Ms. Yanoff from the — who did the DNA.

One of the things that she told the district attorney that DNA cannot tell you is when a particular DNA sample got deposited on items.

[1567]

Is that correct?

That's correct.

As a matter of fact, there have been cases where DNA got examined from many, many years ago?

Yes.

So if the DNA, for example, is found on a sweater, you can't say whether that DNA was deposited a week before you got the sweater, or a year before you got the sweater, or ten years before you got the sweater or 20 years before you got the sweater; correct?

Answer: That's correct.

So just to clarify from the DNA analysis that you did, you're not able to say when the DNA on the sweater got deposited?

That's correct.

And you're not able to say the circumstances under which the DNA got deposited?

Correct.

And you cannot even say the last person to handle that sweater or wear that sweater?

I cannot.

Okay. As I say, she's pretty candid about that, so the bottom line on — oh, and another thing. She doesn't — she can't even say whether there was not other DNA on the sweater. That's an interesting point.

[1568]

When you say on the sweater, you're talking about the one sample that you examined; correct?

That's correct.

But it may have been on all the rest of the sweater?

I'm talking about DNA.

But DNA may have been on all the rest of the sweater? You cannot say. You only examined that one sample.

Answer: Correct.

So with all that other stuff that the DNA can't tell us, it can't even tell us if there is other DNA from somebody else on the sweater, because she only examined the one sample.

So, the bottom line on the DNA is that, I submit — you make your own evaluation — it tells you very little about the sweater, concerning which all the other evidence, the lab report, the witnesses, the descriptions suggests that that sweater had nothing to do with the shooting.

I have a note here about aluminum fragments being on the sweater, but I think I already discussed that.

Just to pin that down, this is Berger, who did the work at the lab.

They didn't contain the element composition we [1569] expect to see from a possible bullet fragment.

So, again, the stuff in the sleeves, that had been accumulating in the sleeves who knows for years, has nothing to do with ballistics or bullet fragments or anything else, and just think about whether that's the sweater that somebody had just worn that had been in a fight.

Now, I want to talk about Burger. I'm sure you all figured I'd probably do that at some point, because, you know, if you didn't — if you don't swallow what Ronnell is selling hook, line and sinker there is really no case here, because, like I said, he is the only guy in nine years, ten years, however long it is, to say that Darrel Hemphill was involved here as the shooter.

No witness has come forward then or now to say he is the shooter. He's never put in a lineup or photo array and asked if he is the shooter.

Even after Gilliam changed his story and said, no, it's not Nick, it's Darrel, back in 2006, they didn't buy it. They didn't arrest him. They didn't want him. They didn't put him in a lineup. They weren't interested in asking anybody if he was the guy.

And, you know, it's interesting that not even his own lawyer, the person that they're asking you to believe as their primary witness, the only one to say that Darrel [1570] is the shooter, is not even believed back then by his own attorney. And there's questions about this.

You remember Vomvolokis testified and he said:

You said that when you first — and you recall he had his first meeting with Mr. Gilliam, with Burger, was on the steps of the other courthouse. Remember, he came up and that was his first meeting before the first time that Burger meets with the DAs and the detective, where Burger goes in and says Morris is the shooter, and that is where Vomvolakis meets him and he's talking about:

You said when you first — there was a time when you first met Gilliam. I think you said near the old courthouse?

Answer: Yes.

And that was prior to his initial meeting with any law enforcement. That is the meeting in which he says Morris did the shooting?

Correct.

And I think you said that you spoke to him and that you had became comfortable with his honesty at that point?

Answer: Yes.

So, here is Vomvolakis. He's meeting with Burger. It's before Burger goes in, and he's talking about what he's going to tell the police when he goes in for his [1571] first meeting, that he's going to say that Morris is the shooter, and he's talking about that with his lawyer and his lawyer is comfortable with his honesty at that point.

And then it goes on:

All right. Is it fair to say at some point later in the series of statements you became uncomfortable with his honesty?

And he says yes.

And I assume that was a result of the varying statements and the inconsistencies that he was giving? Answer: Correct.

So, his own lawyer, when he initially meets him and Burger is saying Morris is the shooter, his lawyer is comfortable with his honesty, and he's an experienced lawyer. You ask questions. You make judgments like that.

But later on, when they go in and for the other meetings and he changes the story to Hemphill, he becomes uncomfortable with Burger's honesty, just like you should be uncomfortable with his honesty. That tells you a whole lot. That's his own counsel.

When you think about Burger, you know, just, you know, step back a minute. You know, sometimes in a long trial and all, we get a little caught up in the process, you know, and a lot of this just has to do with common sense and what you guys do in your everyday life, and don't [1572] lose, you know, sight of that.

When you think and you ask yourselves whether Burger is somebody you can trust and whether you can make an important decision like you're going to have to make in this case based upon what he says, I think it fair that you ask yourselves, you know, if I had to make an important decision, and we spoke about this in jury selection, if I had to make an important decision in my own life that would have a profound

effect on my future, you know, if I want to move to this location, take this job, have a child, marry this person, whatever, buy this property, you're going to make an important decision like the decision you're going to make here and you're being asked to make that decision based upon information given to you by Gilliam, who is going to feel comfortable making that decision? Anybody? I don't think so. Not based upon what we know about Ronnell. Just think about that. It's common sense.

So, let's start off and see if Gilliam is someone you should believe, someone that earns your trust. I asked him some questions.

Have you told lies during this investigation of this case? And I'm not asking him about lies out on the street or white lies that he's going to tell his, you know, his partner or whatever. Lies during this investigation.

Yes.

[1573]

When you told those lies, did you tell some of those lies to people from the DA's office?

Yes.

And did you tell some of those lies to detectives that were investigating the case?

Yes.

And sometimes you tell lies to protect people, don't you?

Yes.

Sometimes you told us you lie in order to protect people and sometimes you lie in order to do the opposite, to hurt people; right?

Yes, sir.

And sometimes you lie because it's good for you; correct?

Yes, sir.

So, for starters, when you're thinking is this the guy I'm going — whose information I'm going to rely on in this important decision, that he tells lies during the investigation, he lies to the DA, he lies to cops, he lies to help people sometimes, he lies to hurt people sometimes and sometimes he lies because it's good for him, and this is their main guy, you know, the pillar of their proof.

So, let's see what's good. Sometimes he lies when it's just good for him. Let's see what is good for [1574] Ronnell.

Well, he's got this cooperation agreement. Okay? Now, you guys, you're smart people. You know, we were careful about choosing you folks because you are savvy. You know, you've been around. You've lived in the Bronx. You know, you're smart people. You know what's happening. And I probably don't have to lay this out for you, but, anyway, here is a guy who tells you he lies, tells you he's lied all over the place about this case and sometimes he does that when it's good for him.

It's back — you know, back in 2010, he is doing time. He's in jail. I'm not sure why, but, you know, he's in jail. He's been in there, you know, a zillion time out

at Rikers. Nobody wants to be out at Rikers. We understand that, and I don't know why he's in jail.

He tells you, and we'll come back to this when he talks about his plea, he didn't do anything. You know, he was in a fight, so something's not right. What's he doing in jail? He's not a shooter. He didn't kill anybody.

Anyway, he really, really wants to go home, and all he's got to do is make a deal, just come on, you know, what you said back in 2006 when you changed your story, you said Darrel, you know, you said Darrel did — we didn't believe you back then, your lawyer didn't believe you back then, but if you say that now you go home.

[1575]

Now, that's a powerful incentive, especially for a person who is in the habit of kind of lying if it's in his best interest. So, Ronnell, he's no fool. He weighs his options, and he says to himself, well, if I go back to my original story that I told my lawyer and we went in and I said that it's Nick, I do 25 years. If I stay with my Darrel story, which nobody really took me seriously about back then, you know, then I go home.

You know, I mean is that going to be a hard choice for Burger? It would take a stronger person than him to stand up to that kind of pressure.

And this, you know, this tell the truth stuff, you know, I only get the deal if I tell the truth, you know, it's all up to the judge or whatever, that's nonsense and I'm sure you all understand that. You know that's nonsense.

The truth, you know, the quote truth is what is good for the prosecutor at the moment, and we know from the history of this case that that truth changes over time, so what was the truth when they were prosecuting Morris is not the truth now. Now, the truth is what works for this case.

And if you want a really big example of this, of how the truth gets manipulated to whatever is good for Ronnell Gilliam, just take a look at his guilty plea which he's got to do in order to get the deal. If he doesn't do [1576] that, he doesn't get the deal, boom, 25 years, good-bye Ronnell.

Okay. I'm asking him questions.

Have you ever in the various lies that you told in this case, have you ever lied in court to a judge?

No, sir.

I think you told the assistant district attorney in your questioning this morning, first of all, you never had a gun; right?

No, sir.

That day? And you never — it was just a fight as far as you were concerned; right?

Yes, sir.

And it was pretty much kind of over with; right?

Yes, sir.

And you didn't shoot anybody; right?

No, sir.

And you didn't want to kill anybody?

No, sir.

You just wanted to kind of keep it at what it was without getting worse; right?

Yes.

And I think you said when you saw a gun you said first it was Nick, then it was Darrel, whatever. When you first saw a gun, whoever had it, you said don't do that?

[~~1577~~ 1576A]

Answer: Hold up.

Hold up, don't shoot?

Yeah.

(Continued on the next page . . .)

[1577]

MR. SEARS: And you didn't intend for anybody to get shot?

No.

And you certainly didn't intend for anybody to get killed?

No.

But you took a plea, did you not? You took a plea?

Yes.

That was back around the time of this cooperation agreement?

Yes.

When you took that plea, did the judge ask you did you intend to cause the death of David Pacheco?

Now, bear in mind he just told you he didn't intend to kill anybody, he didn't shoot anybody. He told the shooter to stop. Okay?

When you took the plea, did the judge ask you did you intend to cause the death of David Pacheco, Jr.? The judge asked you that?

I'm not sure, sir, if the judge did.

He's kind of hedging, getting a little worried here. He's pressed on this.

Well, I'm going to show you this. I will show him — I get out his plea transcript. Okay. And I'm reading [1578] from the transcript.

Referring to when you entered the plea to Attempted Murder in the Second Degree, do you recall when that happened?

Yes.

Do you recall the judge asking you and you giving this answer: Under that count of the indictment, Mr. Gilliam, it's alleged on the 16th of April 2006 here in the Bronx you, acting in concert with another, Nick, whatever, with the intent to cause the death of another person did in fact cause the death of David Pacheco?

The Court goes on to say: With the intent to cause the death of another person, you, acting in concert with another person, caused the death of David Pacheco, Jr.?

And all this acting in concert talk, there's no mention of Darrel Hemphill he's acting in concert with. The judge is questioning about his intent to

cause the death of David Pacheco, Jr., but he just told you he had never intended to do that.

Do you recall being asked that by the judge?

Yes.

Is that allegation against you true, Mr. Gilliam?

And you answer yes.

And when you gave that answer about intending to [1579] cause the death, that's a different answer that you just gave me when I asked you questions about whether you intended to kill anybody or not. That's a different answer?

Yes.

And did you do that, did you have to do that, take that plea and say what I just said in order to get your cooperation agreement?

Yes.

Now, before you signed your agreement, where were you living?

In Riker's Island. I've been in Riker's for four years.

And I assume, like most people, you wanted to get off Riker's?

Yes.

You wanted to go home?

Yes.

And when you took the plea and gave those answers to the judge so you could get that plea and you

signed your cooperation agreement, that you get out of jail?

Answer: Yes.

You went home?

Yes, yes.

You've been out of jail ever since?

[1580]

Yes.

So here's a guy who would say anything, anything to a judge, just goes through I didn't do anything. I didn't shoot anybody. I told the shooter to stop. I didn't want anybody — I didn't have any intent to kill anybody. He enters a plea in which he tells the judge, this court, under oath, yeah, I intended to do all that. He takes that plea. Why does do it? Not because it's the truth, he does it because he wants to go home.

That's the guy you're being asked to rely on in this case, the only person that says Darrel Hemphill was the shooter.

Another way you know that he's lying, I mentioned this before, he tells you he's standing next to the shooter when the shooter shoots. And this is a big, you know — you know Burger, everybody knows Burger, all the witnesses, some of them even know him by name, 400-pound guy with the braids and bad eye or something like that. Okay,

He says I'm standing next to the shooter when the shooter fires. Okay. You know that's a lie, because no witness, none of the lineup witnesses, anybody else,

says that standing next to the shooter when he was shooting was 400-pound Burger.

Another example, there's so many to choose from. [1581] There's the .357. He talks about .357 gun that now in this version for you he says Nick had it, as opposed to the nine millimeter. He knows he can't say the nine millimeter, because that's the shooting gun, the one that Nick has the ammo for. We'll come back to Nick in a minute.

So Nick at some point enters a plea, we'll talk about this, to possession of the .357, plea that's entered against his lawyers advice for which there was no evidence. Nick ends up pleading to possession of the .357 for which there was no evidence, that the district attorney couldn't prove the case. He just enters the plea because he wants to go home. We'll come to that. Whole thing kind of just smells bad.

So you would think, anyway, if Nick really did have the .357 back on April 16th of '06 and not nine millimeter for which he just happened to have the ammo, Ronnell Gilliam, having mentioned that somewhere in the three different statements that he gave back in April and May, especially when he says he's trying to get his — you know, you got Nick arrested, now he's trying to get him unarrested, only he never did mention that.

In all the lies about the nine millimeter and the different things he said happened and different people he said got arrested, nine millimeter, it never — remember, [1582] at one point he says — he put the — took the nine millimeter to Clemente Park and threw

it in the water. At some point, he said somebody else got rid of it.

No, I used — took it where I used to deal drugs. In all of that he never mentions, by the way, Nick had a .357. Okay. And he was asked about that. This is Gilliam on cross:

You mentioned a .357. The first time that you mentioned a .357 and Nick as being any way involved in this case, I meant .357 with Nick, was in 2010, around the time of your plea and cooperation agreement; is that right?

So he said, typical Burger: On paper, yes.

You know, he's hedging, suggesting yeah, I said that but none of the cops wrote it down. As if that's likely, he says yeah, it's the first time I stated on paper.

So I asked him:

Question: On paper? And in your three original statements you gave, including the two where you said you were coming clean, there was no mention of a second weapon?

Answer: No, sir.

Correct?

I made sure his answer is what I think it is.

[1583]

I am correct, right?

He says, yes, sir.

Okay. There was no mention of a second gun, no mention of a .357, because it didn't exist, not until this trial.

Morris pleads to .357, kind of hooks up with that, what Gilliam is making up, pleads to .357 against the advice of his lawyer and knowing that there's no evidence to prove it for the same reason that, that Ronnell makes his deal, and that's to get out of jail.

Okay. Let's take a look at that and see if there are any resemblances. Okay.

This is questioning from the transcript of the plea that can you please read from the transcript, etc., etc. This is his lawyer. This is when Morris is taking his plea. He indicates that: Over my strong advice, he will take the plea. Just so the record is clear, it's my understanding that the district attorneys — the nature of the proof that exists with respect to this gun, supposed .357, never mentioned by Burger, proof that exist with respect to this gun count that my client is about to plead to is not sufficient for them to obtain an indictment.

You can't even be charged with, never mind a conviction.

[1584]

The only way they will be able to make out the limits, hope he doesn't mean limits, elements of this crime, my client's admission, which I suppose he will be willing to make, it seems, so that he can get out of jail today.

So Morris to get out of jail is entering a plea to a gun against his lawyer's advice and for which there is no evidence that the DA has that he ever possessed.

And the Court says — his lawyer goes on:

Thank you, Judge. I also understand that the Court is going to release, Morris, today on his own recognizance.

That's what's going to happen. So he's not even going to have to go back into prison, get checked out or whatever, he's going to just walk out by admitting a plea that is nonexistent weapon, for which there was no proof and against the advice of his attorney, just like Ronnell enters his plea so he can go home.

And this kind of evidence, I submit should really, really bother you. I mean, it should be offensive to you, pleading to things there's no evidence, other pleas with deals in the offering. You know, whatever it takes.

Luckily, we have jurors that can sort this out and make a determination as to what's reliable and what's not.

[1585]

And you know, by the way, while we're talking about Nick, if he's such a big part of the DA's case, why ain't he here, you know?

And what about William?

MR. OUSTATCHER: Objection.

THE COURT: Sustained.

MR. SEARS: What about William?

MR. OUSTATCHER: I request a curative.

THE COURT: Yes. Disregard. Disregard that comment. Counsel.

MR. SEARS: Well, what —

THE COURT: Counsel, no. Come up.

(Whereupon, there is a discussion held off the record, at the bench, among the Court, Mr. Sears and the Assistant District Attorneys.)

THE COURT: Ladies and gentlemen, disregard the argument regarding Nick and whether or not Mr. Morris is or is not available in this case. That is not your concern whatsoever. Disregard the argument.

MR. SEARS: That's fine. It's withdrawn. If I said something I shouldn't have said, I apologize, but I think you get the point that I'm making about the plea and the .357 and the rest of the things that I've said to you. Again, it's your view of the evidence that counts, it's not mine.

[1586]

And so coming back again to Gilliam, he makes this statement implicating Nick to the detectives, and DA's first statement of his lawyer, and he's asked about whether he's just protecting his cousin by implicating Nick. And, you know, he described how painful it is for him to actually do that and how hard it is for him.

As a matter of fact, in the first statement that you made, you were asked, are you just saying that to protect your cousin, meaning, Mr. Hemphill?

And you told him how you would never do that, because this is such a hard thing for you to do, to say something about Nick, right?

Answer: Yes.

And that was a hard thing for you to do, was it not?

Answer: Yes, yes.

At the time, you knew Nick was in custody, already been arrested?

Answer: Yes, sir.

What does he say? His hard thinking, giving up his lifelong best friend, his initial statement which his lawyer credits. And what does Ronnell say the reason for doing such a hard thing? He says, I did that because Darrel told me to do that.

Well, you just make an evaluation as to whether, [1587] whether Ron Gilliam is going to give up his lifelong best friend because Darrel said to do that.

And, you know, his best friend Nick, he ain't very happy about his giving up, because he's sitting in jail. And he tells Burger, you know, you better fix this, man, get me out.

So two weeks later, Burger goes and makes the second statement where he says Mr. Hemphill. And by then, Mr. Hemphill is in North Carolina. You know, he probably figures, well, Darrel is in North Carolina, if I say something about him, he'll be okay. I got to get Nick out.

So he goes to the precinct to make that second statement and implicate Hemphill, and that's going to

be okay with Nick. Only Nick wants to make sure that that's what's happening.

And this is another incredible thing. Ask yourselves if this is coincidence. The witness and ballistics evidence and everything else about Nick, while he's asked at the precinct — okay. This is from the transcript:

In the second of those conversations, that would be on May 9th of 2006, while Ronnell was — this is Jimick. While Ronnell was at the precinct, while Ronnell was at the precinct, he was talking to you and talking to you about [1588] this case, was he not?

Yes.

While that was happening, you said you received a telephone call from Nicholas Morris, did you not?

That's what he informed me.

Did he have a conversation with Nicholas Morris in the phone call?

He had a conversation, never identified himself as Nicholas Morris.

But he was saying it was Nicholas Morris, he had a conversation with that person?

Correct.

And do you know where that person was calling from?

Well, if it was Nicholas Morris, it would have been from Riker's Island but depending on who it was.

Okay. But that's what you were being told who it was?

Answer: That's correct.

And as a matter of fact, I think you said, the district attorney, based upon that assumption that's Morris calling, said I can't talk to Morris, he's got to go through his lawyer?

That's correct.

So I mean, is that just another coincidence? [1589] While I mean — think about this. While Burger is making the first statement, actually his second statement, with the first one where he says it's not Nick and it's Darrel, Nick calls him. He knows he's at the precinct. What's going on? Obviously discussed this. Because he wants to make sure that Burger is getting him off the hook.

Now, is that just a coincidence, or does that phone call tell you what's going on between the two of them? So how many lies did Gilliam tell us? Not even he knows.

I can read pages and pages of the transcript, but I'm not going to. I got to move along. You can ask to have it read back, cross-examination. I'm sure you remember it.

He lied about what happened with the gun, lied about how he got rid of it. He lied about how he got back from North Carolina. He lied about who did the shooting. He lied about his conduct to the judge when he took the plea. He lied about not lying. He lied to help other people, hurt other people, help himself.

In the end, what can you say about Gilliam? Exactly what he says about himself.

It's fair to say based upon the discussion that we have been having that your idea of the truth in this case has changed from time to time and statements that you have [1590] made?

Answer: Yes.

So that's the guy that you're being asked to rely upon in making a decision.

Like I said before, imagine you're making an important decision in your own life. He's the guy you're being asked to rely upon.

Before we leave Ronnell, I want to talk a moment about his grandmother, Ardell. Remember Ardell Gilliam came in?

Now, the DA is a powerful fellow. They can bring in whoever they want. They want to bring in Ardell Gilliam, that's fine.But I mean, how much confidence do you think they have in their case? This is a woman, I forget how old she is, she's suffering from cancer at a time that all this happened. You know, there's testimony about that. You know, is their confidence in Ronnell's testimony so fragile to bring this woman in and, you know, what is it that she has to say?

Do you really think the recalling back nine or ten years ago, she's sick, medication, whatever, she describes where she is in the apartment, which is a different area, you know, that she's really remembering, you know, what occurred that day or if she's just kind of saying what her grandson is saying. [1591] You know, so I asked her at one point, she seemed a little confused:

The district attorney asked you a question about what Darrel may have been wearing that day. Do you remember him asking you that question?

And she says no.

Just a few minutes ago asked that.

Do you, as you sit here now, do you remember what Darrel was wearing that day back in 2006?

She says no, I don't.

Now, you know, in fairness, the DA comes back and asks her questions and in response to the DA's questions few minutes later she says yeah, I do remember, He was wearing a sweater.

Again, this is a sweater that the witnesses do not say he was wearing, that the forensic evidence say wasn't involved in the shooting.

But anyway, she comes back and district attorney asked, she says yeah, I remember now, he was wearing a sweater, which consider whether she really remembers and how reliable she is or if she's just a nice woman, you know, coming in and saying what her grandson says.

Where she was in the apartment, she probably couldn't really see.

She says in her testimony: I didn't see Nick come [1592] to my apartment.

You know, there's testimony from Ronnell that Nick, was in the apartment, so she's not seeing really much about what's going on.

Question: Is there a particular room or area in the apartment that you would stay because you weren't feeling well?

My bedroom that's facing Harrison Avenue.

Ronnell and William's bedroom where most of the stuff took place is facing Tremont. Okay.

I'm in the front, they're in the back. Okay.

I don't really have to say anymore. I don't think about Ardell. Nice woman.

I'm getting toward the end. I want to thank you guys for hanging in with me and paying attention.

I want to say a few words about flight. The district attorney mentioned that in his opening; I'm sure he will again in his closing remarks. The judge is going to give you a specific instruction about, instruction consciousness of guilt and how you can consider that and what kind of weight you should give that. I ask you to listen to that instruction.

I want to caution you lots of reasons why people you know, go places, do things, why people want to be around someplace and may not want to be around someplace.

[1593]

So when you have on that, you know, from Jimick and, you know, from McSloy, McSloy didn't have much to say. He was the guy that went and took the swab in 2011. He goes and takes the swab, stops the car. Darrel is in the car with his wife, his children, you know.He hasn't disappeared from the face of the earth. Talking about some person that doesn't want to be found, he's

not hiding out, hasn't changed his ID, not under a different name. He's in North Carolina. They know where he is.

Jimick told you he has his information in his memo, memo pad. They know where to find him. They have his phone numbers.

His attorney speaks to the police with Jimick in days after the investigation. They want a DNA swab, they know where to go.

They stop his car, he cooperates, gets out of the car. He's with his family. When they want to arrest him in 2013, they know where to go to do that.

Just, you know, consider is this a person who's fleeing? If that's what he's trying to do, he ain't doing a very good job. You know, if he's trying to hide, he's doing it like kind of in plain sight.

And even, you know, even after 2011 when they take the swab, he cooperates, so he knows hey, they took my swab, I'm a suspect. Why else they taking my swab? Does [1594] he run away? Take off? Change his name? Nothing. He's at the same place in 2013 when they go to arrest him two years later. He's not hiding out, etc., etc.

Another thing you should consider is what Ronnell tells you, and I think it was that night that Darrel – down in North Carolina, he said Darrel came to me like yo, listen, I'm going to leave. This is Gilliam, obviously.

Me, Aida, his then wife and my son, we going to go back to New York, You going to stay here. I'm going to

find out what's going on up there. And you going to be a'ight.

So, you know, just ask yourself if this is somebody, like a few days after the shooting, he's in North Carolina, he can stay there if he wants, whether somebody who is fleeing from a homicide is going to go back up to New York where with, you know, his wife and kid, to quote, find out what's going on? I think you will conclude this is not a person who is running from a murder case.

Well, okay, I've spoken for a long time. I'm concluding.

I'm wrapping up now, Judge.

Maybe too long. I apologize. It's great for you guys staying with me. There's a lot to say, long trial [1595] and, you know, awful lot a stake. A man's future.

I tried my best to talk about what parts of the evidence I think are important. And I ask you to take those into the jury room with you. And if those arguments make sense, just talk about that. You know, I hope some of what I said helps you to reach a fair verdict. I tried to focus now and during the trial and, I think, on the important issues.

I didn't spend a lot of time with medical examiners and crime scene guys. I tried to focus on the heart of the case, whether there's proof reliable beyond a reasonable doubt, proof that Darrel Hemphill did this shooting. I hope I managed to get the points that are important in that consideration across to you.

And the truth is, I would submit to you, you know, whether it's popular or not, whether it's going to sit

well with people or not, that the evidence in this case, in this case, is just not convinced, not the DA's fault, it's just the way it is, the way some cases that happens.

The law requires proof beyond a reasonable doubt, and there are good reasons for that. We just don't have that in this case, not even close.

Now, the district attorney is going to go last. He's going to talk tomorrow right before the judge instructs you, so what he says is probably going to be [1596] fresher in your mind when you deliberate. I just ask you to try and remember tomorrow when you deliberate some of the things that I said.

And going last is a big advantage. Mr. Oustatcher can talk about things that I said and say that stuff Sears said about this, hey, what about this, here's another way to look at that. He can do that. I won't have that opportunity.

So in fairness, I ask you when you hear Mr. Oustatcher and you think about things that he says, ask yourselves, well, if the defense lawyer got up, you know, would he have some reasonable response to what's been said. I think that's only fair.

But, you know, nothing the DA says can change the evidence. He wants you to believe everything that helps his case, disregard the things that don't help his case and, you know, you can't do that. Don't be taken in by that. The evidence is inconsistent as it is.

If there's evidence that someone other than Darrel Hemphill did the shooting, which this case is full of, so be it.

If the evidence from Ronnell Gilliam is not credible and something you're comfortable relying upon, so be it.

If a witness is not worthy of your trust, then [1597] he's not worthy.

If there are conflicts and unanswered questions and things remain unresolved and things you can't square in the testimony, tattoo stuff, did he have, did he not have, so be it.

It's not your job to, you know, fix things that can't be fixed. It's not your job to clear up discrepancies that are there in the evidence.

The DA's case, as I tried to talk about the sweater, Ronnell, heart of their case is not just reliable. Ronnell is certainly not somebody you're going to bet your house on. The sweater is beside the point, basically. There's no evidence it was involved in the shooting, and the reliable witnesses described the shooter wearing some other kind of garment.

Those photos which I suggested to you, those two people simply don't look alike.

Every criminal case, particularly in a murder case, jurors have a right to insist, insist that before you're asked to convict another person of a serious crime that you have reliable, consistent proof so that you're comfortable that there's no reasonable possibility that this man is not guilty.

I submit there's no way you can come to that conclusion in this case. The evidence is not just, isn't [1598] good enough.

What I said at the beginning, this case is a mess. It's not your job to clean it up. There's a tragedy here, tragedy for the family, these people, for the community. Young child died. And we all, you know, we all suffer a bit when something like that happens in your midst, but to convict somebody on this kind of evidence, you just add to the tragedy. It wouldn't solve it.

I ask you on behalf of the family and behalf of Mr. Hemphill to bring in a verdict of not guilty, not because I want you to give him a break or sympathy. We're not asking for that. We're asking for fairness, your fair evaluation of the evidence. And if you give us that, I'm sure that that's going to be your verdict.

I thank you again for paying close attention for all this time.

THE COURT: Thank you, counsel. Ladies and gentlemen, we'll break for the day. I'm going to ask you to be back tomorrow. I know I brought you in at ten and kept you waiting. It's sort of necessary, but I'll give a little extra room.

Is there a hardship for anybody coming in at ten tomorrow? I'll try to get started a little earlier than we did today, depends little bit on, unfortunately, other cases that I have to do, but if you all wander in here

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[1600]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM:
PART 60

THE PEOPLE OF THE STATE OF NEW YORK, - against - DARRYL HEMPHILL, Defendant.	INDICTMENT NO. 1221-2013

265 East 161st Street
Bronx, New York 10451
December 3, 2015

BEFORE: HONORABLE STEVEN L. BARRETT, ESQ., Justice of the Supreme Court (and a jury)

APPEARANCES:

(Same as previously noted.)

* * * *

[1604]

MR. OUSTATCHER: May it please the Court, counsel, members of the jury. Good morning.

We are here today and we have spent the last two months in this very courtroom because of one person and one person only. It never should have come to this, never.

If someone, if one person had taken a breath, if one person had said, you know, it's Easter Sunday, it's a beautiful day, I'm going to keep walking, if one person, if one man, had just walked away we wouldn't

have spent the last two months together in this courtroom.

If one man had said, if one man had just thought to himself, I got in a fistfight, I didn't win, I'm an adult, I'm going home, it's not worth it, there would not have been any of the agony, the pain and the horror occurring over a period of years that you witnessed in this very courtroom, but that didn't happen.

One man was not content to walk away. One man was disrespected. One man was slighted. One man was angry. For one man, it wasn't enough to be able to walk away from a fight without a broken nose or a broken arm. One man, for reasons only he knows, would not let it lie. For one man, what happened to him on that corner was worth killing for, so one man got a gun, not just a gun, but a loaded semi-automatic 9-millimeter pistol, the kind of gun you use when you want to kill someone as quickly and [1605] efficiently as possible, and that one man went back to the scene of the crime, the scene of the fight with one thought on his mind.

By his conduct that man was showing everyone in that neighborhood that he was not one to be trifled with, he's not someone to be disrespected in the street, in his neighborhood, where he has a music studio. If you do, there are consequences.

There are men of words and there are men of action and that man, that man in the blue sweater, in that baseball hat, he was going to show everyone on Harrison, in his neighborhood, that he was not going

to take getting beat up on the street, that he was a man of action.

So, he went back to Harrison and Tremont. He kept his hat on, because he's not stupid. He pointed that gun straight out from his chest and he unloaded his clip. He wanted a body and he was going to get a body. Someone, anyone, was going to pay. There would be blood on the street, and he saw the man he got in the fight with, a stranger named Juan Carlos Garcia, right in the middle of the street, caught in the intersection, and that man in the sweater, he pointed the gun at Juan Carlos as Juan Carlos ran across the street and scurried for cover, as that man, Juan Carlos, with nothing but a bottle of water in his hand ran across Tremont, and that man in the blue sweater [1606] trained his gun on Juan Carlos. He didn't just squeeze the trigger once. He didn't point the gun in the air and fire a shot or two to scare people. He squeezed that trigger over and over and over, spraying the block with bullets, not caring that there was a church nearby, children and mothers and fathers and innocents all over that block, on the sidewalk, in their cars, in their homes. It didn't matter to that man in the blue sweater with the baseball hat on.

At that moment, he had one thing and one thing only on his mind, murder, plain and simple. He wanted a body in the worst way. It didn't matter who, someone would pay for damaging his ego, for punching him in the street, someone, anyone. And that man in the blue sweater, he got a body. Yes, he did.

This isn't just a murder, no, no, no, not by any means. There are murders and then there are murders. This was an execution, a cold-blooded,

premeditated, well-thought execution, nothing less. And the man in the blue sweater executed his plan perfectly. He got just what he wanted. No one would ever mess with him again, and he walked away from that murder scot-free.

That bullet accomplished just what the shooter intended. It tore through the body of a human being, at chest level for an adult, into the lung, through the spleen [1607] and it severed the spinal column of the victim. It caused an excruciating death within moments of 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 and over intends to, happen.

I don't often respond to what other attorneys say in their summations. I let them do their job and I do my job, but I was actually struck, a little bit stunned, yesterday, when I heard Mr. Sears make a comment about sympathy.

You know, we spoke of sympathy during jury selection, before any witness testified, and I thought we got it out of the way, but defense counsel brought it up in his closing argument yesterday, so I will touch on it again.

As I've said throughout this trial, and from the first moment we ever spoke, this case has nothing to do with sympathy. I don't need your sympathy. I don't want your sympathy. Mind you, I'm not too proud to take your sympathy if it would bring back that little boy from the cemetery and into his parents' arms, but that is not going to happen in this world.

And the reason I don't need your sympathy is because I've got the evidence. I have got his DNA. I've [1608] got a woman who knew him since he was a kid, who saw him in the fistfight in the blue sweater before the gun came out. I walked his cousin into this courtroom, and I haven't just proven the murder, I've exposed the well-planned coverup, the Manhattan lawyer he hired to pin this crime on someone else, the lifelong friend he got to lie in front of you and say he was wearing a white T-shirt, earlier this week, and not a blue sweater, and his mentee in Brooklyn, who saw him and Burger off before they fled to North Carolina. The defendant's own grandmother walked onto that witness stand and told you that he's the man in the blue sweater.

This case was never about sympathy and it is not about sympathy, and the way defense counsel used it in his closing argument yesterday, it's as if he's using sympathy to get you to ignore the evidence implicating the defendant in this murder, as if this child is being used, the murder of this child, as if the defendant is hiding behind that baby, as if calling this case 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.

That argument, by the defense invoking sympathy, is an act of desperation. Don't fall for it.

This murder, this execution, this intentional murder of an innocent, it's not just a single solitary act that can be excused. This murder tore the fabric of this [1609] community. This murder changed the fate of everyone who was on the street that day, all these strangers, Nick Morris, Ronnell Gilliam, Brenda

Gonzalez, Marisol Santiago, Joanne Sanabria, David Pacheco, Sr., the father, Anthony Baez, Milagros Pagan and their families and people who weren't even near the corner of Harrison and Tremont that day.

The moment the defendant fired those shots the dye [sic] was cast. And the effects of this crime didn't last for just one day. Those effects have been far reaching, reverberating over time and space to this very moment, all because of one man and one man only, one man in a blue sweater and a baseball hat, one man's choices, one man's conduct, one man's murder. And now it comes to you, the jury, to hold that man responsible for the choices he made and for his conduct on that faithful day.

Twenty-nine witnesses, 120 plus pieces of evidence and over 1,500 pages of trial transcript, you might not appreciate it at this moment, but over the course of these last two months, as you sat as jurors in this very courtroom, you haven't just fulfilled your civic duty, you've received an education, an education in real crime.

Whatever you thought you knew before you walked into this courtroom, based on what you saw on TV, you can forget it. You can wipe that clean. This is reality. [1610] This is how it goes down in the street.

These are the witnesses, the people, the real people who witness crimes. Some of them just happened to be walking by or sitting in a car when what went down went down, and some had a role in what took place. Some had knowledge that something was going to happen before it happened.

And this is the science. This is the science, the forensic science, what it can tell you and what it can't tell you. It's not like you see on TV. And what you saw here in this courtroom over the last few weeks, this is how it plays out in the courts in real life, years later, when those same people who witness a crime are brought in, some willingly, some forced into a courtroom to say what they saw, what they remember, what they knew.

Some are honest and open and some are hiding something to this day, years later, and this is how a murderer tries to cover up his crime.

This is not a pretty case. You were never promised an easy case, wrapped in a pink bow, presented neatly inside a gift box. This is real, nothing more, nothing less.

What you have before you at this moment, all of this evidence, is a great mask, a big ball of information you will take with you into that jury room, and within that [1611] mass of information lies the truth, the truth of what happened on Harrison and Tremont on that sunny Easter Sunday day.

And as much testimony as you have heard, as much evidence as you've seen, the question put to you in this case, the main question, the only real question put to you is very simple: Who did it, Nick Morris or Darrel 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 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.

We will talk about the ammunition in his room later, but what evidence links Nick Morris to this crime? The only evidence that links Nick Morris to this crime is the word called a positive – defense called it a positive identification, whatever that means, of three people, Marisol Santiago, Brenda Gonzalez and John Erik Vargas, inside a lineup room on April 18, 2006, so it comes to you, [1612] the jury, to determine if these people were picking out the actual shooter or were they picking out the face of the man they saw on television, that they saw on the newspaper just before they walked into that room and looked at the lineup, because there is no other evidence linking Nick Morris to this crime.

Before I speak about what they saw and what they did, Brenda, Marisol, Jon Erik, Jose and Juan Carlos, let me say this. During jury selection we spoke about fairness, fairness to the People, fairness to the defendant, fairness to yourselves and fairness to the witnesses.

When we – when I spoke of being fair to the witnesses, these are the people I was referring to. They didn't ask for this. They were walking home on Easter Sunday minding their own business. They were approached, they were assaulted and they ended it.

They ended the fight. They could have kept going on. They could have beaten the defendant and Ronnell Gilliam to a pulp, because they were winning. Ronnell and the defendant were outnumbered. But Jose, Juan Carlos, John Erik, they didn't.

As if that weren't bad enough, after the fight is over, when everything is quashed, when mature adults would go home, get an ice pack and try to enjoy Easter, they – [1613] they got shot at by someone who was trying to kill them over what, a look, a punch? They were unarmed. They were sitting outside their building, catching their breath. It was over.

And then a child dies. A child dies because of a fight they got into. They didn't pull the trigger. They didn't have a weapon. They didn't run from the police, but they have it on their conscience. Because of their fistfight, a child died. And then they're pulled into this chaos of the news on television and in the papers, and the police, and so many statements to so many people, and lineups and going into grand juries and courtrooms for years, upon years, upon years. No one could be prepared to go through what they were put through, and all because of something over which they had no control.

They never asked for this. They didn't do anything wrong. They weren't invited to this. They were forced into this.

We expect so much of our witnesses. Television and the movies have heightened our expectations of what witnesses should see, how they should look, how they should talk, what they should remember, and if they are anything less than perfect, if these people who

are plucked from their everyday lives and walked into a courtroom in Supreme Court in New York State, the highest trial court in the [1614] state, if they make a single mistake, if in the innumerable statements they made to God knows how many cops and prosecutors and grand juries, if they make a single mistake, if they can't remember every single word they used almost ten years ago, well, then they're liars, they're not believable, they're wrong, there's reasonable doubt, so let's all go home. They get scoffed at and insulted publicly.

Is that how it should be? Is that fair? Is that just? Is that right? Not one of these people chose to be here. Not one of these people volunteered and said let me be shot at, let me be a witness.

The truth of this trial, the truth of every trial in this courthouse, and it applies not just to Brenda and Marisol and Jon Erik and Jose and Juan Carlos, but every witness you saw during the course of this trial, is that I don't get to choose my witnesses. I don't get to sit back in an easy chair and look at a menu of witnesses and say, well, on this case I want a school teacher, a nurse and a Boy Scout.

You know who chooses the witnesses on my cases? The criminal, the person who commits the crime, the person who chooses that very moment, on that day, at that corner, to pull out his gun and to open fire. That's the person who chooses the witnesses to the crime. And it falls to me [1615] to find those witnesses, whether they be strangers on the street, people sitting in cars or members of the defendant's family, people he trusted, people to whom he revealed what he did, people in whom he confided. It falls to me

to find these people and to bring these people into court by saying please, serving a subpoena, entering a cooperation agreement or having them arrested to be brought into this courtroom, like Vernon Matthews.

Understand this as well, while these witnesses, the group of five, Brenda, Marisol, Jon Erik, Jose and Juan Carlos, while they testified in the relative calm of a courtroom years after this incident, these people, these citizens, were subjected to two very quick violent acts.

It's easier now to sit back and describe a fistfight calmly, but when you're getting punched in the head and defending yourself, when you're not sure who is going to come after you next with what weapon, it's not so easy to pay attention to and remember every single detail of what happened, so appreciate what these people went through when you evaluate what they told you from that witness stand. Give them a fair shake.

And appreciate also that these differences in what these people saw, in what they remembered, in what they have said about what happened as they've been questioned over the years, that which defense counsel spent [1616] yesterday morning discussing and calling a mess, these are differences in memory and perception. And you can call them whatever you want, the fact that people saw things differently and remember things differently does not mean that the incident never happened. I'm sure David's mother and father wish that it were so.

These differences in what people remember and what they say, these differences are what you as

jurors or what we as people should expect when different people with different vantage points and different memories and different eyesights honestly retell what they saw to a jury at a trial years later.

These differences in memory and perspective and recollection are the hallmark of honest testimony. This is what you should expect when different people tell the truth as best they can, in their own words, both inside a courtroom and in your everyday life.

Let me put it to you this way. You, the jury, every single one of you sat in this same courtroom, in this same jury box over the last two months, and each of you saw the exact same witnesses testify to the exact same things at the exact same moment it happened. Right?

Not one thing happened at this trial without all of you being here and having a front row seat to the witnesses and seeing it together.

[1617]

When you walk back into that jury room, when the Judge gives you this case, and you start discussing what each of you saw and remembered over the course of this trial, I guarantee that you will remember things differently.

Understand this as well, you guys didn't have a gun being pointed at you and fired at you while you sat in this box. You're not being asked to remember what you saw when you could have been killed.

Also, and this applies to every civilian on that block, Anthony Baez, Justin Bautista and Milagros Pagan, you guys had the benefit of opening

statements. You knew what was going to happen before it happened. These people didn't know what was going to happen on that corner until the shots rang out.

After the fistfight, it was peaceful. It should have remained peaceful. These people, these witnesses, were caught by surprise. No one knew what the defendant was going to do until the very moment that it happened.

So, back to you. Who was the fourth witness at this trial? What happened on the fifth day of testimony? What's the 119th piece of evidence? If you don't know the answer to those questions, if when you walk into that jury room and start discussing this case, if one of you has a different memory than the other, does that mean that you [1618] weren't present in the courtroom when that witness testified? Does that mean this trial didn't happen? Does that mean that you couldn't have seen what you claim to have seen? Does that mean the witness never came before you? Does that mean you're a liar?

Under the logic you heard yesterday, that is exactly what it means. To me, well, I submit to you, it just means that you're human beings, just like Brenda, Juan Carlos, Jon Erik, Marisol and Jose, and that's how I ask you to treat them, as human beings. Don't expect them to be perfect, to be robots or computers. Simply give them, give all the witnesses, a fair shake, nothing less, nothing more.

Appreciate this as well, because this is very, very important. Over the last two months, if you think about it, you actually saw two trials in one. You saw

the trial of Nick Morris and you also saw the trial of Darrel Hemphill. I didn't have to, but I brought in Brenda, Marisol, Jon Erik, the —

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: — witnesses who positively identified Nick Morris in that lineup back in 2006. I did that because it was important that each of you saw these people for two reasons.

[1619]

Firstly, it goes to fairness, fairness to you, fairness to the process and fairness to the defendant. That evidence, what they saw, what they heard, who they picked out of a lineup, who they didn't, that should not be hidden from you. No jury should make a determination about the guilt of anyone charged with this crime without knowing that someone else was identified. That's why I did it. It goes to fundamental fairness.

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: No matter how horrific the crime, every defendant deserves a fair trial.

And, secondly, you, the jury, should also be allowed to evaluate those witnesses. Look at these witnesses with your own two eyes. Listen to what they have to say. Reach your own determination as to if you think they're right.

No trial should ever be as simple as reading from a piece of paper the witness said it's number two,

that ends it, number two did it, or hearing a detective say the witness positively identified number two without letting the witness tell you, in his or her own words, what they meant when they said number two. To not let you see the witnesses with your own eyes doesn't let you do the job you swore to do.

[1620]

And if you find those witnesses credible and 2 accurate, if you find that Marisol and Brenda and Jon Erik, that they got a good enough look at the shooter's face that they accurately picked him out of that lineup on April 18, 2006, if you find that Nick Morris, the man sitting in position number two, really is the shooter, if you find that Brenda and Marisol and Jon Erik got it right, you should walk the defendant. It's that simple, and it goes to fairness.

Let me say that again, so I can make sure you heard it. The Judge is going to read you an instruction about identification. Listen to it carefully. It includes all the factors you should consider in determining if a witness accurately identifies the perpetrator of a crime.

If when you all get together in that jury room, if you all think, if you all agree, hey, Brenda Gonzalez, Jon Erik Vargas, Marisol Santiago, they got a good look at the shooter's face as the shooting happened and they got it right when they positively identified number two in that lineup, then I want you to walk the defendant right out of the courtroom doors. That's why I brought those witnesses in, to let you see them with your own eyes, to let you make that very important decision.

But, appreciate this as well. Because this was two trials in one, as you take a broad view of the [1621] evidence, as you evaluate the evidence that came before you, the witnesses, you can actually divide the witnesses into two groups, those who know and those who don't know, those who are safe and those who weren't safe. And what I mean by that is that one group of witnesses were strangers to the shooter. They didn't know him. And another group of witnesses knew the shooter before the shooting happened. They weren't strangers to him. And one group of witnesses were safe. They weren't being fired at. They weren't running for their lives. And the other witnesses, even though they might have been on the block that day, they were in cars or bodegas. They weren't being fired at.

So, if you look at the evidence in that manner you have the group of five, Brenda, Marisol, Jose, Jon Erik and Juan Carlos, in the group that doesn't know and that weren't safe. Everyone else is in the group that knows and was safe.

And while we're on this point, let's talk about the tattoo on the forearm or on the arm, the numbers, the numerals.

Let's get this out of the way quickly. This is what came before you at this trial. On April 16, 2006, some people involved in the fistfight saw a tattoo on the forearm of the man in the blue sweater.

[1622]

On April 17, 2006, the day after the murder, Nick Morris walked into Bronx 12, lifted up his sleeves and showed the world that he had no tattoos on his

forearms or on his arms, either right or left. You saw that on the television. It's in evidence in the photo, too.

And when the defendant showed you his right arm in this courtroom in October of 2015, over nine years later, he had no tattoo on his right forearm, but what you saw in court was that the defendant had the initials DA and the numbers 10453 on his right arm. And if you didn't see it because of where you were situated or because of the lighting in the courtroom, ask the Judge in a note to see it again or for the information or clarification as to what was on the defendant's arm. But the tattoo, it's right there on his arm; DA 10453, his zip code in the Bronx.

Now, the defendant's sister-in-law, Lisa Hemphill, she was subpoenaed to be here. She didn't want to be here, and when she was on the stand she got a quick case of amnesia when I called her.

And when I say "got a quick case of amnesia," let me be clear. Some witnesses can't remember details of what happened years ago. That should be expected. But some witnesses, and you saw this happen more than once at this trial, fake not remembering so they can get out of answering a question that they don't want to answer, [1623] because it would be harmful to someone they're looking out for.

You actually saw Vernon Matthews catch the same amnesia when he couldn't remember hearing the defendant say that earlier in the day on April 16, 2006, in the Bronx, some guys tried to rob the defendant and the defendant fought them off, got his gun and was airing it out.

MR. SEARS: Objection.

THE COURT: The objection is overruled. Proceed.

MR. OUSTATCHER: Page 1304 in the transcript, my question to him, Mr. Matthews:

"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?"

Mr. Matthews' answer: "Is that in my statement?"

My question: "I'm asking you."

Mr. Matthews: "I don't recall that. I don't remember that. That was very long ago."

That's a case of fake amnesia.

But back to the defendant's sister-in-law. After Ms. Hemphill caught that quick case of amnesia, she then blamed me for telling her what to say. And then as soon as Mr. Sears got up and questioned her, her memory got much [1624] better immediately.

Her whole demeanor changed, and she said the tattoo was on the defendant's arm, maybe his right forearm, maybe his right upper arm. She said it had the numbers 10458 on it, but she didn't know what that meant. It's curious how her memory became so much better so quickly, but how she still wouldn't honestly admit to what was really on the arm of her husband's brother.

Here's the thing about the tattoo, not the tattoo, but the location of the tattoo. Does it really

matter? If the tattoo is on a different part of the defendant's arm, does it mean the defendant isn't the shooter? No. And if the tattoo was on his right forearm, does it mean the defendant must be the shooter? Also, it's not true.

This case is not about picking out where the tattoo was on someone's body. This case is about accurately identifying someone who is a shooter.

And, appreciate this as well. The witnesses that confused the tattoo, Jon Erik, Marisol, Brenda, Jose, Juan Carlos, the only witnesses who mention the tattoo, the witnesses who say they saw a tattoo on the man in the blue sweater's arm, on a place where the defendant doesn't now have such a tattoo, these are the witnesses the defendant is asking you to believe, you to find credible and [1625] reliable.

These are the witnesses the defense is asking you to say they got it right when they identified Nick Morris, even though they weren't wearing their glasses.

And, beyond that, yesterday, in court, Mr. Sears wasn't sure if the tattoo on his own client's arm was a 10458 or a 10457. It's 10453. And Mr. Sears was standing right next to the defendant, inches from his arm, when the defendant showed you his tattoo. Mr. Sears wasn't being punched or shot at. If Mr. Sears and the defendant's own sister-in-law can't get the tattoo right, how can you expect anyone in that group of five to get it right?

That being said, let's take the defense argument to its logical conclusion; if these witnesses are so unreliable as to not be able to properly identify

the location of a tattoo, how can you rely on them to accurately identify someone who is a stranger to them in a lineup?

Do you know what the tattoo establishes? It proves to you beyond a reasonable doubt that you can't rely on these people the defendant is asking you to rely on when it comes to identifying Nick Morris as being the man in the blue sweater. The tattoo testimony proves beyond a reasonable doubt that Nick Morris is not the shooter.

And then the lineup, you know, you can't crawl [1626] into someone's brain. You can't tell exactly what Brenda and Marisol were thinking after they saw Nick Morris's face on the television, on that Bronx 12 interview. You can't tell what effect seeing that interview so soon after the fight and before they saw a lineup had on their brains, whether they're conscious of it or not.

No one can say what effect seeing Joanne and David crying on TV, holding that SpongeBob doll, had on these people who looked at the six pack of photos and the lineups. Did it make those witnesses try harder, try to do something they couldn't really do?

There isn't a scientific test to determine what emotions were coursing through their veins, what thoughts were running through their heads when they positively identified number two. There's no scientists we can call to give you that information. We just don't have that capability in this day and age. But you, the jury, you know because you saw it here before you, because witnesses to the shooting testified to it.

Anthony Baez told you as much when he said why he came into the precinct after seeing the parents with that doll. He never saw the man in the blue sweater's face, but he was trying to do – he was trying to help when the cops put that array in front of him.

And please understand, I'm not judging them. I [1627] can't say I wouldn't have done the exact same thing in their shoes. All I can tell you is that which is so obvious based upon their testimony; you can't rely on their lineup identifications of Nick Morris. It's simple. It's obvious. It's logically irrefutable. You don't need me to tell you, Brenda, Marisol and Jon Erik are just not reliable, and it's not me saying so. They actually told you themselves in this very courtroom.

And think of it this way, can you imagine if Nick Morris was convicted of this murder based upon the testimony and just testimony of Marisol, Brenda and Jon Erik?

Brenda Gonzalez wasn't wearing glasses when the fight happened, couldn't see the face of the guy in the blue sweater, because he had a hat on, and she couldn't see beyond her arm even during the fistfight.

She never saw the shooter's face. She wasn't wearing her glasses during the fistfight. She wasn't wearing her glasses during the shooting, and she wasn't wearing her glasses when she saw the lineup. In her own words, she is almost blind without her glasses.

Jon Erik, who never saw the shooting, was hit by two cars, was feeling dizzy and wasn't wearing glasses that he needed to see distances back on Easter Sunday 2006.

Then you have Marisol, who saw one shot, never [1628] saw the shooter's face and turned her back to the shooter to save her own life.

Can you imagine if any jury convicted Nicholas Morris based on the testimony of these three people, because that's the only evidence linking Nicholas Morris to this crime.

And years ago, in the '60s, '70s or '80s, that would have been enough. Nicholas Morris would have been done. Three people positively identified number two, it's over, two-day trial. No DNA. No second thought, and it would have been over. He wouldn't have had a chance. But we're smarter now. We're better now.

MR. SEARS: Objection.

MR. OUSTATCHER: At least I hope we are.

THE COURT: Overruled.

MR. OUSTATCHER: It's not just enough to hear what number someone picked out of a lineup and convict someone just based on that. You need to ask a few more questions, like: Did you really see the crime or are you just picking out the face you saw on TV? Were you wearing glasses?

These questions, fairness and justice demand that they be asked, and they were asked, finally, in this courtroom, and you heard the answers.

And while we're talking about Nick Morris, I'm [1629] not going to use this monitor because of logistical issues. He has this scar running all the way down his face, from his right eye, just under his right

eye down to his jaw. It's clear as day. You can see it in both of these arrest photos taken on April 18, 2006.

No one describes the man in the blue sweater as having a scar. Not one person describes the man in the blue sweater as having this prominent scar. Why is that? What does that tell you about whether or not Nick Morris is the shooter?

And there's something else, and this is important, very, very important. This is why we went on that bus trip to the crime scene.

This is not some small intersection. If you look at this diagram, it looks like you cross the street in one step going from the south side of Harrison over to the north side of Harrison over Tremont.

You all stood right in front of the ramp where Jon Erik was standing. You all stood on the corner where Marisol was standing when the shooting happened, before she turned around after the first shot. You all looked across the street where they said the shooter was standing when he fired these shots.

This is a wide, irregularly-shaped intersection, and there is no way Brenda or Marisol or Jon Erik could [1630] have seen anyone's face from where they were standing, especially if he's wearing a hat, especially if he has a gun pointed out from his body. It's just impossible.

And there's something else, and it's just as important. They're wrong. Every single one of them is wrong, not just Marisol and Brenda and Jon Erik, but Jose and Juan Carlos, too.

Look at this diagram. This cluster of circles, and it's hard – you've got the initials – but this cluster on the northwest corner of Harrison and Tremont, this is where they all said, all five of them said the shooter was standing the moment he fired those shots, right here (indicating).

You walked from the corner of – not just the corner of Harrison and Tremont from the southwest to the northwest, but you walked up to Morton, and those shell casings, this is a long walk. It's not as easy as it seems in this diagram. The shell casings, and Ronnell Gilliam actually put his initials over the box where the crime scene officer put the arrow pointing to the casings. All five .9-millimeter casings are all up here all towards Morton. They're nowhere near the location of where everyone says the shooter was standing.

And, it's not just that. That location where those casings were found, that's right where Milagros Pagan [1631] said she parked her car, and I'll come to that again, when Justin Bautista, her son, saw the man in the blue sweater. That's right where Anthony Baez said he was in his car right by those casings, and that's right where Ronnell Gilliam said the shooter was, the defendant was, when the shooting happened.

The shooting never happened on the corner where all those five people said it happened. It happened halfway up Harrison, almost on Morton.

And it's not just one or two casings that ended up back up by Morton on the grass, that bounced there. Every single casing that came out of the murder weapon ended up in the grass up by Morton.

And then there's this, these bullet fragments. These are important. This is the bullet at the hospital that killed the child. This is the bullet, the bullet fragment, that was taken out of the utility box that Detective Valenti said matched this bullet fired from the same weapon, and that is the second piece of lead that is recovered from the box.

I'm going to show you these photos, because you haven't had a chance to put this all together.

This is the utility box from where these casings, these two bullet fragments were recovered, right here, right by the number six (indicating).

[1632]

Where is that? When you put these together, the bullets are recovered up on Harrison. The shooter could not have been standing where all five said he was, because how can you fire a bullet into a utility box if you're standing in front of the utility box?

It's not just me saying it. It's actually impossible, so it tells you that all five of those people, they all got it wrong, and I can't explain to you why they all think they saw what they saw. I can't put my finger on it psychologically, what was going through their minds, how their memories have been affected, how often they thought about it and now they view the shooter as closer than he actually was.

All I can tell you is that the physical evidence proves that the witnesses the defendant is saying picked out the right guy, it proves they couldn't have seen what they claim they saw, that Nick Morris never stood on the corner firing the gun that killed that child.

That man on that corner doesn't exist. Never happened. That's what the evidence proved to you.

So, if you can't trust them to be accurate as to something as easy and simple as where the shooter stood, how can you trust them, how can you rely upon them to be accurate in picking out the face of a stranger they saw for a few moments during a fistfight? The answer is you can't.

[1633]

And even if they were wearing their glasses, to expect anyone to be able to see, to be able to look at, to be able to recognize a stranger's face from across a big street when that person is wearing a hat, how big is a face? When that face is blocked by a big gun, in the movies it would be easy, because they zoom in on the face and make everything go in slow motion. In reality, it's impossible.

And each of them saw the news. For Brenda and Marisol it was television, for John Erik it was the newspaper, in which Nick Morris's face was displayed to them just before they saw the lineup. He was the man who was arrested. You saw cuffs being placed on him on the same news programs they all saw.

To the extent it affected what was going through their minds, we will never know. But we do know that it was going through their minds.

And, please, don't misunderstand me. That doesn't mean they're bad people. It doesn't mean they're not trying their best to do the right thing. It does mean that they're victims in this case, too.

We spoke back during jury selection about three types of witnesses you see at a trial, honest and accurate, honest and wrong and those trying to get over on you. You don't need me to tell you what type of witnesses Brenda and [1634] Marisol and Jon Erik are. They told you themselves in their own words. They got it wrong. I'm not sure how long it took them to realize it, but they know it and they have admitted it to you from the witness stand.

MR. SEARS: Objection.

THE COURT: Argument, it's allowed.

MR. OUSTATCHER: And they told you as much in their own words.

It's hard to admit you're wrong on the best of days. It's even harder to walk into a public courtroom, in front of strangers, take an oath and say out loud that you were wrong. Don't take what they told you for granted.

But Jose and Juan Carlos are different. They're different than Brenda and Marisol and Jon Erik. Jose wasn't involved in the fistfight as much as Jon Erik and Juan Carlos. Jose was holding the bags. He wasn't getting hit by the cars. He didn't need glasses that day. He doesn't need them now.

He had the best view of the man in the blue sweater from a safe distance before he got involved in the fight.

Jose is the person defense counsel said was very observant and got a good view of the man in the blue sweater's face in the fight.

Jose saw that television interview on Bronx 12 [1635] the day after the shooting. Jose never got to go to the lineup because he was working that day, but as soon as Jose saw that interview he knew, and this is what he testified to, he knew that Nick Morris was not the man in the blue sweater. That's what he told you.

Then you have Juan Carlos Garcia, Juan Garcia. He was the man in the middle of the street when the shooting happened. Juan Carlos wears glasses now for distance and for reading, but back in 2006 he just needed glasses for reading. He was the closest to the shooter before the shots rang out. He was right in the middle of the intersection.

He is the man defense counsel also said was very observant, calm and collected. He was the intended target. He was the man who was supposed to take the bullet that killed the baby. He had the best vantage point to see the shooter's face.

Juan Carlos never saw TV, didn't see anything on the news or in the newspapers before he looked at the lineup. He took his time looking at the lineup. He looked at the lineup with Nick Morris sitting in position number two, and he knew the shooter, the man in the blue sweater, was not in that lineup.

That's what he said back in 2006. That's what he said before you during this trial. So, if Juan Carlos [1636] Garcia is as good a witness as defense says he is, it's impossible for Nick Morris to be the shooter.

I want to take a moment to address a very important point defense counsel made yesterday. He said that the evidence presented to you at this trial was, and I quote, "manipulated."

Understand what that means. Who presented the evidence to you at this trial? I did. He's pointing the finger at me. By this argument, he's accusing me of manipulating the evidence that came before you.

This accusation came in two different points in his summation.

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: The first accusation of me manipulating was when he spoke of showing photos of the baby.

Those photos were shown because this child was murdered. They were taken by the medical examiner and the crime scene detective. That's the evidence in this case as much as any witness. I wish it weren't so. I wish I never had to see those photos, and I can't unsee those photos, but I had to show them to you because that proves that a murder occurred in this case.

And the second accusation made against me was [1637] that I didn't trust evidence that someone else trusted back in 2006. And the thing about this accusation is I can't respond to it. The law does not allow me. I can't tell you what I did or didn't do, what I was thinking. I can't tell you what my opinion is, because that would make me a witness, not a lawyer, and that comes straight from the Court of Appeals, so this is what I'm going to ask you to do.

This is how I propose that you address the allegations defense made against me, because they are serious and they go to the essential fairness of this

trial, the process of this trial. I ask that you, the jury, judge me. You decide —

MR. SEARS: Objection.

MR. OUSTATCHER: — if I manipulated the evidence like defense counsel said I did.

MR. SEARS: That is not the district attorney that I was referring to.

THE COURT: I'll allow the argument.

MR. OUSTATCHER: Since the first moment I met you, way back in jury selection, the first question I asked you, really the only question I asked you was can you be fair, can you be fair to each other, can you be fair to the witnesses and can you be fair to the defendant. That's really all I asked of you, nothing less, nothing more.

[1638]

I hold myself to that same standard. Not only that, but you, the people of the Bronx, should hold me, as an assistant district attorney in the Bronx, you should hold me to that very same high standard, so this is what I ask you to do. If you have seen me do something, do anything by way of a 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.

You're not going to hear the Judge tell you this. It's not the law, but I want you to hold me to a higher standard than the law because that's only fair and that's only just, and if I am guilty of —

MR. SEARS: Objection.

MR. OUSTATCHER: — asking questions —

THE COURT: No, I'll allow it.

MR. OUSTATCHER: And if I am guilty of asking questions no one else asked, if I am guilty of asking witnesses questions that should have been asked of these witnesses years ago, hang me high.

If I'm guilty of asking people to give thought to what they said in the past, if I'm guilty of not taking things at face value, if I'm guilty of not saying number two was positively identified, case closed, let's go home, [1639] so be it. What happens on my side of this courtroom, in every courtroom in this courthouse, with lawyers across the country, it shouldn't simply be about winning. It should be about doing what's right.

No one knows how many innocent men have been jailed because no one thought to ask these questions, because no one thought to look a little harder at what a witness said, because a lawyer just wanted to win at the cost of doing what was right.

Some people might call questioning the reliability of the 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 in the office.

So, I submit myself to you, the jury. If you think I fixed the evidence, if you

MR. SEARS: Objection.

THE COURT: I don't believe counsel made the argument that you fixed the evidence, Mr. Oustatcher, but I'll allow you to make the argument.

Ladies and gentlemen, I just want you to understand that you should not attribute any ill motives to defense counsel either.

Continue.

MR. OUSTATCHER: So I submit myself to you, the [1640] jury. If you think I fixed the evidence, if you think I manipulated it, made witnesses change testimony, if I planted DNA evidence, if you think I convinced the defendant's grandmother to walk into a precinct in May of 2006 and say that 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. It's only fair.

Let's talk about manipulating evidence. Let's talk about what defense counsel said to you yesterday.

Defense counsel said that Mr. Baez testified that he picked out number five in the array, this array, right here, Mr. Morris, because Nick Morris's face looked like the face of the shooter.

Let's see what Mr. Baez actually said. This is page 1163 of the transcript.

"QUESTION: When you saw the six pack, tell this jury what you were thinking."

Mr. Baez: "I was hoping to remember most of the guy's face, but, again, I told the police officer at that moment that I cannot remember his face. I can just remember his physique, his, you know, being tall and the sweater and stuff like that.

"QUESTION: After you told the officer this, did that officer tell you anything else?

"ANSWER: He told me to pick out the one that I [1641] think most resembles the young man I saw.

"QUESTION: And of those six photos, were you able to narrow it down?

"ANSWER: I narrowed it down to four and five," number four and number five.

"QUESTION: And what about four and five let you believe that looked like the shooter?

"ANSWER: Body type.

"QUESTION: But those photos are just head shots; correct?

"ANSWER: Right.

"QUESTION: So just tell this jury what about the body type you saw let you narrow it down to four or five.

"ANSWER: He was lanky, skinny. The rest of the other guys look a little too heavy for what I saw.

"QUESTION: So because you saw a lanky person, you were looking for a thin face; correct?"

Mr. Baez, "Right."

"QUESTION: Were you ever able on the day after the shooting to say that guy number five, he is definitely the shooter?

"ANSWER: No."

So it turned out, Mr. Baez didn't say what Mr. Sears claimed he said yesterday.

MR. SEARS: Objection.

[1642]

THE COURT: Overruled.

MR. OUSTATCHER: And Mr. Sears also told you that Miss Gist testified that Nick Morris was involved in the fistfight before the shooting. This is what Miss Gist actually said, page 354.

"QUESTION: Just going back to what happened when you went down to the street after the gunshots, did you see Nicholas anywhere?

"ANSWER: I seen him coming down Morton Place when I went to go back to my car, 'cause I was so very nervous. When I went to jump back in the car with my grandson I seen him coming down Morton Place and I got in the car and I just jetted off."

That was on direct. And this is what she told Mr. Sears on cross. This is page 375.

"QUESTION: And when you spoke to Jimick did you tell him that the two people that you had seen in the altercation were Burgos and Nick, did you tell him that?

"ANSWER: I told him – I told him that the person that – it was Burgos and Nicholas and Darrel. I told him three people.

"QUESTION: Oh, you told him three people. And these three people you told him were involved in the altercation with the other group; is that correct?"

Miss Gist: "Yes, but only two was involved with [1643] the fighting. I didn't tell him Nicholas was

involved in the fighting because I didn't see Nicholas there at the beginning."

"QUESTION: Did you ever tell Jimick – did you ever tell Jimick that the two people involved in the altercation, not the Spanish, but the male blacks – was it two male blacks?

"ANSWER: Yes, sir

"QUESTION: All right. Did you ever tell Jimick that these two male blacks were Burger and Nick? Did you ever tell that to Jimick, yes or no?

"ANSWER: No, I did not. I told? No, I did not."

So, Ms. Gist never said what Mr. Sears said she said yesterday. Again, not the truth.

And Mr. Sears again said yesterday that no one placed Burger, Ronnell Gilliam, near the shooter. No one, of course, except for Mr. Baez, the witness Mr. Sears likes so much.

Page 1175, Mr. Anthony Baez.

"The fight broke up after a little while. I went back to my car. I see a black vehicle, a third vehicle cruise right up by me with a black female driving."

(Continued on the next page...)

[1644]

The car went up a little bit on the block. A lanky black male came out. While he was coming out of the car, the heavyset black male came out of the building on the right-hand side and said to him, "That's them over there, hold up." The lanky young man went across the street and opened fire.

So Mr. Baez places Ronald Gilliam right next to the man in the sweater seconds before the shooting happened.

Again, not the truth.

Mr. Sears said he had no idea why Ronald Gilliam was in jail. You all know that because Jimick told you and Ronnell Gilliam told that you he was in jail because he had been arrested for the acting in concert murder in this case.

So, again, not the truth.

Mr. Sears commented on how the first time Ardell Gilliam said the defendant was wearing a blue sweater was during this trial, when the truth is that she, of her own free will, walked into the 46th Precinct on May 9, 2006 to tell Ronald Jimick, Detective Jimick, the same information.

Again, not the truth.

And you saw what happened during this trial when Mr. Sears tried to get Brenda Gonzalez to admit she said things before a grand jury in 2006 that she never said. That's why I had to call the grand jury court reporter to [1645] prevent the facts from being manipulated.

I am not the lawyer in this courtroom trying to manipulate the evidence. Do not be misled.

So let's now talk about or Ardell Gilliam and Michelle Gist. Before we pivot away from Brenda and Marisol, and the rest of the group of five, and go into the defendant's grandmother and Ms. Gist, one simple fact should be noted. It's so simple, it's so obvious, but at the same point there is no more important fact in

this case. Both Ms. Gilliam and Ms. Gist knew the defendant before April 16, 2006. Unlike Brenda and Marisol, and even Anthony Baez, and Milagros Pagan, and her son Justin, the defendant's grandmother and Ms. Gist both new the defendant. And that is so important because, when you're identifying someone's face, it's much easier to accurately identify someone that you've known for years than a complete stranger. And that's why the defendant was never placed in a lineup. His own family told the police he did it.

MR. SEARS: Objection.

THE COURT: The jury's recollection will prevail in this particular matter.

If counsel's arguments are consistent with your recollection of the evidence, you may accept those arguments. If they are not consistent, you may reject those arguments.

[1646]

Otherwise overruled.

MR. OUSTATCHER: Let's talk about the defendant's grandmother first.

You don't need me to tell you this. This was obvious the moment when she took the stand. When the overriding issue in your murder trial is whether or not you were the guy in the blue sweater who fired the gun that murdered the baby on Easter Sunday, 2006, and when your very own grandmother, of her own free will, walks through the courtroom doors, puts her hand on the bible and swears to tell the truth, looks all around the courtroom, picks you out, and says that you were the guy on Easter Sunday, 2006, who wore that

blue sweater, this trial could have ended right there and then, without DNA, without Ronnell Gilliam, without any other evidence. I submit to you that at that very moment everyone in this courtroom knew the defendant was guilty.

And that moment that happened at the end of defense counsel's questioning of Ms. Gilliam that defense commented on yesterday, that happened because defense counsel lowered his voice. It wasn't intentional, but that's —

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: That's what Ms. Gilliam said, "I [1647] couldn't hear what you said." He called him Darrell, not Darryl. And once she heard the name of the person she was being asked about, the defendant, she said that of course the defendant was wearing the blue sweater, blue like her coat.

So the question put to you is this:

Is Ardell Gilliam a liar?

Because, of her own free will, on May 9, 2006 she walked into the 46th Precinct and spoke to Detective Jimick.

Was she lying then and is she lying now?

Is that what you saw in this courtroom with your own eyes?

And if she is lying, why would she lie?

I'll come back to that in a second, because that topic, that absence of evidence, that black hole in this

case is very important for all the witnesses, a motive to lie or an absence of a motive to lie.

Let's move to Michelle Gist for a second.

Ms. Gist's testimony is important, not just for what she said, but because of what happened in this courtroom during her testimony.

Before I speak about Ms. Gist, I want to speak about common sense; if not common sense, I guess you can call it common experience, for those of us who've spent our lives in the Bronx. I'm not sure where you all grew up, but [1648] in my neighbored, on my block, people sort of new each other, if not by name, by nickname, or because you were the son or daughter of someone, or the kid that lived in that building or that house. Things have changed since I was a kid in the Bronx, but that's how it used to be. And when you were bagging groceries in the supermarket in high school, it wasn't uncommon to have someone call you by your name, and for you to look up and have no idea who they were, only then to find out later they were someone's parents from the block who saw you grow up, knew your face, knew who you were, even though you didn't know them.

So now Ms. Gist, she saw what happened during that fistfight before the shooting. Her testimony is consistent with every single other witness who saw that fistfight up close and personal, right on top of her car. She saw the fist fight. She knew the players from the neighbored. She saw them all grow up with her son, and she knew it was going to happen before it happened. She knew the defendant. She knew a gun was going to come out after the fistfight. That's

why she hussled [sic] her grandchild up to the apartment. She saw the defendant, "D," to her, in that blue sweater in that fistfight on Easter Sunday just like the defendant's grandmother. She saw the face of someone she's known in her neighbored for years, as close as could be, before any guns came out.

[1649]

And you know what? She was right. She said the guns were going to come out and they did. Looks like she knew the defendant better than he thought she knew him.

Now, we can quibble over what she said to Jimick or didn't say to Jimick in the moments after the shooting. Understand that the statement defense counsel spoke of yesterday was what someone else said at a legal proceeding years ago, not what Ms. Gist herself said. If this case comes down to someone's memory of what was said or not said in the quick conversation over nine years ago in the very start of a sprawling investigation, so be it. As I just read to you, Ms. Gist told Mr. Sears what she told Jimick years ago, and it's the same exact thing she testified to at this trial.

But the question I ask you again is this:

Is Ms. Gist lying?

Is that what you saw her do in this courtroom one month ago, put her hand on the bible and lie, perjure herself?

Because that's the only logical conclusion to the defendant's argument, right?

Because, if she's not lying, then the defendant is the man in the blue sweater, right?

So then the next logical question is this:

Why would Ms. Gist lie at this trial?

[1650]

And this is very important. Don't take it from me. You're going to hear the Judge read to you an instruction on this. In law we call it a motive to lie.

What reason would Ms. Gist have for walking into a courtroom, putting her hand on the bible, and saying the defendant was the man in the blue sweater, and I saw him in the blue sweater in the fistfight moments before the shooting, unless he actually was the man in the blue sweater?

Why would she do that, unless it was the truth?

Did she have a beef with the defendant?

Does he owe her money?

Did they have some ongoing feud?

You didn't hear any evidence as to why Ms. Gist would falsely identify the defendant as the man in the blue sweater, and that's because no such evidence exists.

Ms. Gist didn't need glasses. She also [k]new Ronnell Gilliam—although she called him "Burgos," not Burger—well enough to pick him out of an array. She knew Nick Morris by "Nick," and she knew the defendant by "D." If she is able to accurately identify Gilliam as the perpetrator, then she's able to

distinguish between Morris and the defendant, and accurately identify the defendant as a perpetrator of this crime.

You can call her a liar, call her inconsistent, [1651] you can misstate her testimony while on the stand, you can even yell at her while she's testifying, but the truth of what she revealed to you, the jury, can't be ignored. There is no reason for her to lie. She is corroborated. She is corroborated by the defendant's grandmother, she is corroborated by the DNA evidence. And once you, the jury, go back in the jury room and determine she's correct, then you've also determined who the man who murdered the baby is.

Ms. Gist's testimony is revealing for another reason, too. Ms. Gist is not related to the defendant. She didn't view him as a mentor. She couldn't hire George Vomvolakis to represent her. You couldn't try to hide what she saw in a closet or throw it in a river. Her testimony was revealing. Her testimony revealed the defendant to be the man in the blue sweater.

And in this very courtroom the defendant revealed himself to you to be a man with a short fuse, who will do what he has to do to control a witness, in court or out of court, to control a situation when things don't go his way. I submit to you that's why he yelled at Ms. Gist on the witness stand.

Ms. Gift and Ms. Gilliam, these two women, these two strangers, standing alone, taken together, or viewed in the context of the other evidence at that trial, provide you with irrefutable evidence of the defendant's guilt. That's [1652] why the defense called Nana Owusuafriyie, because they needed someone,

anyone, to say the defendant wasn't wearing that blue sweater before the shooting. They needed to make the testimony of Ms. Gift and Ms. Gilliam disappear, truthful as it was.

And if you walk Mr. Owusuafriyie into a courtroom with his uniform, who wouldn't believe him, right? He has all the medals from the Navy.

Mr. Sears can apologize for what happened earlier this week any way he wants, but don't mistake what happened with the last witness to appear before you. The defense presented you with false testimony. That man was lying to you as he lied in the past. He was trying to help out his friend get away with murder. If I didn't find out about his criminal record, he would have gotten away with it.

So now Ronnell Gilliam. Let's talk about Burger.

Before we do, understand this:

You all, you can ignore Ronnell. When you go back into that jury room, you can ignore every single thing he told you. You can throw out every piece of information, big and small, everything he told you, and there is still more than enough evidence before you to convict the defendant, to prove that the defendant is the man who murdered that baby, even without Ronnell Gilliam's testimony. You have Ms. Gist's testimony, the defendant's grandmother; Milagros [1653] Pagan; her son, Justin; Anthony Baez; the DNA; the ballistics; Dr. Gill, the medical examiner. You have the defendant at the scene during the fight; you have the defendant in the blue sweater before the fight; you have the gunman in that same blue sweater

halfway up the block; and then you have a fight and the coverup that only someone who committed this crime would have undertaken.

I have proven all the elements to convict the defendant guilty of murder in the Second Degree even before Burger walked onto that witness stand. So you don't even need his testimony. But I called him. I called him for the same reason I called Brenda and Marisol, and every other witness, cooperative and uncooperative, throughout this trial. Because you needed to see him with your own eyes; you needed to hear what he had to say with your own ears. It's one thing for someone to write a statement, or for someone to write down what someone else said on a notepad or police report hours later, it's another thing for you, the jury, to get that information straight from a witness' mouth, right in front of you. Because there is information that you, the jury, get from a witness beyond the words that come out of his or her mouth. And Ronnell has information that no one else involved in this incident, no one else in the world has, and that's why I called him.

What happened inside that apartment on Harrison [1654] Avenue in the moments after the shooting?

What happened that led the defendant to run to North Carolina?

What happened in the weeks after the shooting?

Only Ronnell Gilliam had this information. Only Ronnel Gilliam experienced this. The truth had to be revealed to you in whatever form, in whatever

fashion. And even in the lies that Ronnell told you, there is truth that bears upon who committed this murder.

And appreciate this as well:

I don't like Ronnell Gilliam, never have, never will.

MR. SEARS: Objection.

THE COURT: Sustained.

MR. OUSTATCHER: I didn't ask for him to be my witness. I didn't ask for him to get rid of the guns in this case. He was the defendant's younger cousin before I called him at this trial, and he will be the defendant's younger cousin after this trial ends. I called him because, if there is one incontrovertible fact in this case, it's that Ronnnell was there for the fight, it's that he was there for the shooting. He had a front-row seat to the shooting, he knew the shooter, and he was the one person on the street that day at the time the shooting happened who knew the shooter and who knew there was going to be a [1655] shooting, even if it was only a moment before the shooting happened. You needed to see him. You needed to hear what he had to say in order to determine what really happened on Harrison that Easter Sunday.

Understand this as well:

I'm going to be the person standing before Judge Gross on the sixth floor of this courthouse, asking, demanding, that Gilliam go back to jail. If it's for five years or 25 years, in which case Gilliam gets out of jail in his fifties—if he can last that long in State prison as snitch—that's on Judge Gross. If you want to

read the agreement, it's 118 in evidence. It's right here.

I'm also the person that told you that Gilliam was a liar. I told you as much during jury selection; I told you in my opening statement; and I brought it out when I questioned him. He lied. He lied more than once. But just because he's lied before doesn't mean you should ignore everything he told you at this trial.

I'm going to come back to this one in a moment, but as you evaluate his testimony, think of it this way:

These court reporters here are fabulous at catching every word every witness or lawyer says, no matter how quickly I talk or how much I mumble, and they create these transcripts, records of what is said and done in this courtroom. But you, you, the jury, are so important because [1656] for you, you sit here 5 feet, 10 feet, 15 feet from the 2 witnesses. You get to eyeball the witnesses. For you it's not just words on a page, the way someone speaks. Their posture, their bearing, can reveal as much about themselves to you as what they say; it can reveal their actual truthfulness. For you it's not just words on a page.

What do you see here in court with Gilliam?

Was he evasive?

Did he say one thing to me and change his testimony halfway through to defense counsel like Vernon Matthews?

Did he blame someone else for his conduct like Vernon Matthews?

Did he deny making prior statements even though they were right in front of him in his own handwriting like Vernon Matthews?

Everything Gilliam said, everything he did, he owned, good, bad or indifferent. He's never been arrested for dealing drugs, never been convicted. He wasn't proud of it, but he walked in here, in open court, put his hand on a bible, and admitted his choice that he dealt drugs in the past. He didn't have to.

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: He could have lied and no one [1657] could have proved him wrong. He called himself a liar. Whether or not he did that has nothing to do with who shot the child in this case.

And why did he do that? Why was he so honest?

I submit to you because he had to, because he has nothing left to lose.

Compare his testimony to what you saw with Nana Owusuafriyie. He was great when defense counsel was asking him questions, straight-backed, firm and concise in his answers. But when the truth was revealed about who he was and why he came into this courtroom, his body language changed. He started looking all around the courtroom. He needed help and he knew it. He was looking for help. Who he was, what he was doing on the witness stand had been exposed to you and he knew it.

The measure of a man, of a witness, is not if he's done something wrong in the past, if he's lied or

not, but how he answers for it. We've had presidents, leaders of our country who've lied to us; Richard Nixon, "I'm not a crook," Bill Clinton, "I never had sexual relations with that woman, Monica Lewinsky." Those things turned out to not be true. More recently, George Bush refused to answer questions about past drug use; he took the Fifth.

It's hard to admit you did something wrong, hard to admit you did something embarrassing to another person. [1658] Forget being in a room full of strangers and a judge at trial under oath.

Gilliam came before you and he was an open book. He held nothing back, both in this courtroom and beyond what he said in this courtroom. He pled guilty to a murder that he did not commit. He never pulled the trigger.

Do you know why he pled guilty to that crime?

It's not that he was lying to a judge. He was taking responsibility for his conduct. He didn't intend for this to happen, but he was taking responsibility for his conduct that led to the death of that baby. He put himself in jail, no one made him, for years.

And now defense says that makes him a liar. I submit to you that's wrong. You make up your mind.

What you saw Burger do in court two weeks back, was that some master class in acting or was that some poor kid from the street, put in a position he never wanted to be in, giving it up, stopping the lies, stopping the running, hiding, stopping the code of the street and just giving it up?

Understand, also, that Burger gained nothing by telling the truth.

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: He gained nothing by saying the [1659] defendant was the shooter, and he lost everything. His life will never be the same. If he kept his mouth shut, and kept saying it was Nick Morris, or if his lawyer told him to take the Fifth, he is still walking on the street today, no cooperation agreement, no four years of jail in the past, no 25 years hanging over his head. He signed up for a cooperation agreement that will mark him every day on the streets of the Bronx for the rest of his life.

That was his choice. So if you want to call him a liar and dismiss him so easily, you can, or you can do something else. You can be fair and impartial. You can listen to what he said with an open mind. You can size him up and give him, give this case a fair shake, nothing more, nothing less.

And here's another thing you'll see just by looking at him. He's soft. He's a patsie. He's not a criminal mastermind. He's the kind of person who, if you want to control him, you could.

When Mr. Sears was cross-examining him, Ronnell didn't fight back. Even when he was being called a liar and insulted, and even with all the comments defense counsel was making about him, after Gilliam answered every question put to him, he still called defense counsel "Sir." He is the kind of person who can be controlled by someone stronger

than him. And when the shooting went down, as the news came [1660] over the radio and television that Joanne and David were burying their child, Burger was in over his head, and he was ripe for the picking by someone with power over him, like an older cousin who owned a music studio and had money.

Now is the time to talk about George Vomvolakis. Because, as quickly as he passed before you, you cannot underestimate the importance of him to you as a witness at this trial. Despite everything, despite his best efforts, he, Mr. Vomvolakis, a professional lawyer, also revealed to you more than he intended to.

And that's why, I submit to you, he also conveniently got amnesia on the witness stand as to when he called the 46th Precinct, or who called him to tell him to stop Gilliam from telling the truth to Jimick on May 9, 2006, the day Ronnell went off-script and walked into the precinct and admitted that the defendant was the actual shooter.

The way it's supposed to work, under the constitution, is a lawyer represents the person he is defending and isn't controlled by the person paying his fee. But Mr. Vomvolakis has a mortgage to pay. That's what he told you. And that's why he really wasn't acting in Ronnell's interest, not at all, not by a long shot, not from the moment he met him in the park up the street, not when Vomvolakis testified at the trial.

[1661]

Vomvolakis was working for Joe Tacopino back in 2006, Bernie Kerik's lawyer. Burger couldn't afford him. On the day that Burger met him in the

park, Burger had no wallet, had no phone, didn't have two nickels to scratch together. Only someone with real money, with real power, could afford Vomvolakis. Gilliam had nothing.

And they met far from Vomvolakis' office on Madison Avenue.

Why is that?

I submit to you that Vomvolakis had them meet so far from watching eyes so no one can see what you Vomvolakis was going to do with Gilliam.

If Vomvolakis really were acting as Gilliam's lawyer, he would have walked, actually ran, to the 46th Precinct doors to protect his client's rights when he got a phonecall from someone, not Gilliam, that Gilliam decided to walk into the precinct to tell the truth. The only other person who knew what Burger was doing on that day and saying that Hemphill, the defendant, was the actual shooter was the defendant's brother, Stephen Hemphill, who was sitting right next to Burger with a phone as Burger was implicating the defendant.

But instead of going to the precinct to protect his client, Vomvolakis just called the precinct, found out what was up on behalf of the person, the defendant, who paid [1662] him.

And once Vomvolakis found out —

MR. SEARS: Objection.

THE COURT: Ladies and gentlemen, you will consider the evidence that you've heard and make a determination whether that argument's based on the evidence or not.

MR. OUSTATCHER: Once Vomvolakis found out the jig was up, that Gilliam, Burger, couldn't be controlled, Vomvolakis covered up the coverup.

And that's why Vomvolakis is having such trouble remembering anything, and that's why Vomvolakis has no notes, not a single piece of paper on a murder case, and that's why Vomvolakis can't find any 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 a 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.

So when defense counsel said yesterday, "Even Vomvolakis thought Burger wasn't telling the truth," That's right. That's because the defendant paid Vomvolakis to make sure Gilliam didn't tell the truth.

[1663]

MR. SEARS: Objection.

THE COURT: Same ruling.

MR. OUSTATCHER: Vomvolakis was paid by the defendant, or his wife, possibly through Adam Mayfair, the attorney, for this case for one reason and one reason only, to walk Ronnell Gilliam into the arms of the police, to frame Nick Morris for a crime Nick Morris didn't commit once the defendant got a phonecall from Vernon Matthews. As much as any other witness, Vomvolakis implicates the defendant in this crime, because the only person who would go

through such lengths to frame someone else for this crime is the actual murderer.

Understand, too, that before Gilliam was my witness, he wasn't just the defendant's cousin, he wasn't just the defendant's partner in crime, they didn't just go on the run together. Gilliam was the defendant's witness, bought and paid for. It was only after Burger went rogue, after Burger saw what Nick Morris said on those News 12 interviews, after Burger saw Nick Morris didn't snitch, it was only now that they, the defendant and his attorney, call him their witness, their blood, a liar.

They sacrificed Ronnell. He was garbage to them. He was a pawn in their game. He trusted them, and they walked him into the arms of the police. They walked him into jail with a fake lawyer. They didn't care about him. [1664] Ronnell trusted him and they paid him back.

Ronnell trusted him and they paid him back.

And now he's a snitch. And that will follow him every waking moment of every waking day as he looks over his shoulder when he goes back to jail, when he walks the streets of the Bronx, always looking over his shoulder.

Vomvolakis walked out of this case when it went south. He took money when he could no longer control Gilliam and protect the defendant. And he let some poor court-appointed lawyer clean up his mess.

And now they call him a liar after they've made him a liar. This is the final piece of their plan, a plan hatched after the defendant ran from the corner

with the murder weapon in hand, while Joanne drove to the hospital in the back of that cab with Angelo Cruz, trying to bring her baby back to life.

This coverup played out over years. And now, yesterday, you heard the last gasp act of desperation from the defense, a get-out-of-jail-free card. Because if Gilliam told you the truth, if Gilliam is corroborated, it's over for the defendant. No more running, no more hiding, no more lawyers to pay. It ends here, it ends now, it ends with you.

So why should you believe Burger?

Why should you believe any witness in a trial?

There's only one reason you should believe any [1665] witness at a trial, because he or she is corroborated. Corroboration is a magic word in every courtroom in this courthouse. Because no matter how nice someone looks, no matter how handsome or pretty they are, no matter how soft their voice, everyone can be wrong. Anyone can be mistaken. And the way you tell if someone is right is if they are corroborated. If other evidence, other witnesses, other forensic evidence, other evidence that the witness has no idea exists, proves what the witness is saying is true, it's correct.

Who corroborates Burger, Ronnell Gilliam?

Just about every other witness at that trial.

Ardell Gilliam puts Burger in the apartment where he said he was Easter, that morning, with the defendant. Ardell Gilliam puts the defendant in the blue sweater just like Burger said. Michelle Gist calls him "Burgos," but she puts Burgos and the defendant

in the fight just where Burgos said he was in the fight. And she puts the defendant in a blue sweater with the baseball hat on his head, too.

Then you have the location where the shooting happened. The group of five all incorrectly put the shooter on that corner.

You know who doesn't? Justin Bautista, Anthony Baez and Burger. And those shell casings are all up the block. Gilliam actually [1666] wrote his initials over the box, showing where those casings are on the diagram, right by where Milagros Pagan said her son was sitting. Remember, Justin was younger then. You have to look very closely. Milagros Pagan put an "MP" right here, very small, where her car was parked, where her son Justin was sitting, where he said the shooter was right next to him. Burger right here, Anthony Baez right there.

These witnesses, Baez, Bautista, Pagan, Burger has no idea they exist. They all corroborate him.

Even Baez, and I read it before, he heard Burger say the exact same words to the defendant before the shooting happened, "Don't do it. Stop." Anthony Baez further corroborates Burger.

Even Vernon Matthews,before he got amnesia, corroborated Burger. Matthews said Burger and the defendant went home to Brooklyn that night, the night of the shooting, Page 1259 of the transcript.

"Question: Who was in your home in Brooklyn that evening?

"Answer: "D."

"Question: Who else?

"Answer: And Burger.

"Question: And before they came over, who was in your apartment, your home?

"Answer: My fiance at the time. Well, a female [1667] at the time."

So even the defense mentee corroborates Ronnell Gilliam.

And what did that tell you?

Whether you like him or not, whether you approve of the choices he made or not, it tells you that Ronnell Gilliam told you the truth, nothing less, nothing more. And it's not me telling you this, it's the evidence.

You know what else corroborates Ronnell Gilliam?

The forensic evidence, the DNA.

Let's talk about the DNA for a moment. But before I do that, let's talk about the other forensic evidence, the ballistics and the gunshot residue analysis of the sweater.

The thing about forensic evidence is that everyone thinks they know what it is based upon what they see in movies and television. The reality is much different.

The gunshot residue analysis of the sweater, the scientific test done on the sweater is used to determine muzzle to target distance. That test is used on pieces of clothing to determine how far away a

shooter is when they are firing at someone, a target, a victim. It is used on clothing, victims' clothing, victims who are being fired at. This test does not determine if someone fired a gun.

NYPD, the lab, looked at the sweater to determine if any of the explosives that come out the front of the gun [1668] was found on the sweater. And, as you'd expect, there was no evidence of that material that comes out of the front of the gun on the sweater. So the test they did on the sweater revealed that no one fired a gun at the defendant when he wore the sweater, nothing more, nothing less.

The test that might help determine if the person who wore the sweater fired a gun, the NYPD lab is not allowed to do that test. It's called a primer residue analysis. They're not allowed by law. And, even if they could do a test, no scientific tests actually exist today to definitively determine if someone wearing a piece of clothing actually fired a gun. That's fake science. That's what criminalist Jason Burger told you. That's fiction. That's what you see on T.V., not reality. So if the defense needs to resort so to fiction, so be it. I prefer to stay with the truth and reality.

The ballistics evidence, five shell casings all from a 9-millimeter semiautomatic pistol. Two pieces of ballistics, one from the child's body, one from the utility box fired by the same 9-millimeter semiautomatic pistol. The other evidence was pulled from the apartment, in the wall of the building, too fragmented to do any meaningful comparison from. So there's evidence of just one gun, one murder weapon, a nine.

And, yes, Nick Morris had one 9-millimeter round [1669] with ammunition in his apartment. That is true. I told you that. I put that piece of evidence before you. But he also had three rounds of 357 ammunition, a separate gun. You can't fire 357 ammunition from a 9-millimeter pistol.

And also appreciate that these men, Gilliam, the defendant and Morris, they were acting·as a team that day on Easter Sunday, 2006. Morris was coming to aid Gilliam in the fight Gilliam got into with the defendant by his side. Morris lived up University. You heard John Eric Vargas say he chased the man in the blue sweater running up University before that man came back with the 9-millimeter pistol.

Do you think it's a coincidence, the fact Nick Morris had a 9-millimeter in his bedroom?

It shouldn't surprise you, because he lived in the same direction the defendant went before he came back with the murder weapon. It doesn't exculpate the defendant. It actually corroborates the fact these three men were working together.

And in the end, Nick Morris, against the defendant's attorney's advice, admits to possessing the 357 that day.

Do you know why?

Because that's the crime he actually committed on April 16, 2006. He didn't get time served. He spent over two years in jail for a crime he didn't commit, for a crime [1670] the defendant framed him for. He didn't have to plead guilty. He took responsibility for the crime he committed.

And now we come to the DNA. The defense is right. Not just in this case, but in almost every case. DNA by itself never solves a crime. That's something you only see on television. Invariably, in this courthouse and in courthouses all over the country, DNA is just one piece of the puzzle.

But do not, under any circumstances, underestimate the strength, the power of DNA on this case. Because, while every witness gave you what they remembered from their perspective, in their own way, every.single person gave you a blue top. One called it a golf shirt, one said it has an alligator on it, which the sweater does. Everyone said it was a blue sweater, some with a design, some with a pattern. This is the sweater that the shooter wore. This is a light blue sweater with a design on it.

It's impossible for anyone to accurately say, "Aha, that's the sweater. That's got to be the sweater the shooter wore," and that's why I didn't show it to every single witness.

Ms. Gist said it was periwinkle. Ardell Gilliam said it was blue like her coat. Some people said it had a pattern on it, some said it was embroidered. But, make no mistake about it, based on where it was found and when it [1671] was found, and the path the shooter fled in, this is the sweater the shooter, the murderer, wore.

And the sweater has one person's, and only one person's DNA on it, Darryl Hemphill, the defendant. It took a while to get that DNA, because the defendant fled and was using a fake name, Darryl Davis, the alias, Darryl Davis, when he fled to North Carolina.

MR. SEARS: Objection.

THE COURT: Overruled.

MR. OUSTATCHER: If you need to hear that again, Detective Modesto Asevato is the person, the investigator who went down to North Carolina trying to get the DNA out of the garbage, the wrong DNA.

And Mr. Sears brought out – not me, but Mr. Sears brought out that in the computer checks based on leases, the defendant was living with Aida Lanese under a fake name, Darryl Davis. If you need that read back, ask for it.

But that's the thing about DNA. You can change your name; your DNA doesn't change. You can't hire a lawyer for DNA. DNA won't get amnesia on the stand or change the story.

The DNA evidence in this case points to one person and one person only. You can think of DNA as a silent witness on this case, sitting next to Ronnell Gilliam and Ardell Gilliam, and/or Michelle Gist on that witness stand, [1672] and pointing the finger right at the defendant as the murderer. What DNA does, and DNA does best, is it reveals what was intended to be concealed.

And, if nothing else, the defendant has made every effort to conceal his role in this murder. He had everything in the Bronx, a girlfriend who was an EMT, a studio on the side of a building on Andrews Avenue, a family in the Bronx, and he had a zip code right on his arm where it still is. From the evidence before you, as of 1:30 on Easter Sunday, 2006, the defendant had every reason in the world to stay in the Bronx.

So what caused him to run so far so fast?

It must have been something big, right, something scary hanging over his head that made him run down to North Carolina and to never come back. He actually abandoned their daughter, left her, took just the son down to North Carolina.

Why is he using a fake name down in North Carolina?

When he wasn't coming out of his house, when the police had to go through the garbage, what could have made him abandon everything he knew in the Bronx in the middle of the day on Easter Sunday?

What spooked him so?

What was he running from?

[1673]

Why was he never ever coming back?

This isn't some simple young kid running from the cops because he is scared. This a man of means, a man with a studio, a man with the money to hire a high-priced lawyer for his coconspirator, a man who is smart enough to know you can't run forever. Let Nick Morris take the heat for my body. This is a man who knows that in the end his family will protect him and give him the testimony he needs on the stand, and his mentee, Vernon, will hold strong.

The evidence before you reveals what he was running from. A murder. That's it. There is no innocent explanation for what he did on April 16, 2006. This is a coverup, a well-thought, well-planned coverup. This is a coverup that began on April 16,

2006, and continued in this very courtroom until two days ago, the kind of coverup that only a very guilty man would undertake.

But the defendant has been revealed by his DNA, by his family, by his conduct. The running stops, the hiding stops, the truth has been revealed. The defendant, Darryl Hemphill, is a murderer, a cold-blooded murderer of a child.

Again, that's why they called Nana. That's why he was flown in from California. Because when all the evidence points to you, when the elaborate coverup to frame an innocent man has been revealed, what do you do? You call your good childhood friend in the military to walk into the [1674] courtroom and to try to make all the evidence go away. That was the final act, and it failed. It failed quickly.

But Nana did give you one piece of valuable information, that bruise on Nick Morris' hand. If Nana saw that bruise on Nick Morris' hand right after Nick allegedly got in a fight with a group of five, there's no way a bruise would have become visible within minutes after a fist fight, especially on the hand of an African American man. So Nana actually provides information to you that proves that Nick Morris could not have been in that fist fight.

So now we come to you. At some point in this trial you've heard me referred to as "the People." I am not the People. My name is Adam. You are the People.

I've been carrying this case, this child, David Pacheco, Jr., for years, for too many years. As soon as I sit down I will have given this case to you, the People, and you will take this case. You will take little David

with you into that jury room. And what I ask of you is simple. I ask you to give this case what it deserves. I ask you to be fair. I ask you to do what's right. I ask you to do what's just. I ask you to hold the defendant responsible for the choices he made and for his conduct on that corner back in 2006. And the way you, the jury, do that is by your verdict.

How often do you see something in the news, on [1675] television, that you think to yourself, "That's not right. That's not fair. If I were in charge..."

You all have before you an opportunity, a rare opportunity. You have a rare opportunity to do justice. You can't undo the pain. 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.

But you can stand up in this courtroom, and you can give a verdict that is righteous. You can look at the evidence, listen to the law, and with one word, just one word, you can do justice. You can call this case what it is. You can call the defendant what he is.

It's not enough to simply convict the defendant. With one word, with one simple word, as calmly and coolly 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 world, and start a new life for himself down south, you can come out of the jury room and, with one word, and with one word only, you can give him the verdict he so badly deserves. I asked 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. And that one word is guilty.

[1676]

Thank you.

THE COURT: Counsel?

Ladies and gentlemen, I'm going to give you a five-minute break, then I'm going to bring you out and do the charge.

Do not discuss the case. The case has not yet been given to you.

(Whereupon, the jury exits the courtroom.)

THE COURT: Let's take five minutes.

Thank you.

MR. OUSTATCHER: Thank you.

(Whereupon, a brief recess is taken.)

* * * *

COURT'S EXHIBIT III

November 20, 2015

Should the Court permit the District Attorney, over defense objection, to offer into evidence the plea allocution of Nicholas Morris entered on May 29, 2008, the defense requests that the following portions of the allocution be read:

Page 7, line 17, beginning with "he is willing" to page 7, line 25

Page 15, lines 18 beginning with "just so the record is clear["] to page 15, line 25

Page 19, line 24, beginning with "I also understand" to page 20, line 2

Page 20, lines 17-24

Page 21, lines 12-25

Page 23, line 14, beginning "you will receive" to line 15, ending with "to conditional discharge"

Page 23, line 21 to page 24, line 4

COURT'S
EXHIBIT NO. III
Identification /
Evidence
Date: 11/20/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER 1

COMMUNICATION: We the Jury:

Request to view Cooperation Agreement, street diagram, DNA comparison sheet, photo of nicholas mugshot, grand jury testimony from Brenda Gonzalez read by court reporter, view Darryl the defendants tatoo

TIME: 2:01

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12/3/15

DO NOT WRITE BELOW THIS LINE (COURT USE ONLY)

RE: _____ v. _____

PART: 60

JUDGE: Hon. S. Barrett

INDICTMENT/INDEX NUMBER: 1221-13

COURT'S EXHIBIT NO. 7

COURT'S EXHIBIT
NO. VII
Identification /
Evidence
Date: 12/3/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER 2

COMMUNICATION: We the Jury:

Request ~~instruction~~ Ronell/Burger testimony, and Adell grandmother's testimony, crossexamination of Brenda Gonzalez specific to previous testimony at Grand Jury

TIME: 4:05 pm

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12/3/15

DO NOT WRITE BELOW THIS LINE (COURT USE ONLY)

RE: _____ v. _____

PART: 60

JUDGE: Hon. S. Barrett

INDICTMENT/INDEX NUMBER: 1221-13

COURT'S EXHIBIT NO. 8

COURT'S EXHIBIT
NO. VIII
Identification /
Evidence
Date: 12/3/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER 3

COMMUNICATION: We the Jury:

Request Ms. gist testimony, + lawyer volvokes(?), pictures of street, sweater

TIME: 1:30 pm

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12-4-15

DO NOT WRITE BELOW THIS LINE (COURT USE ONLY)

RE:_____v._____

PART: _____

JUDGE:_____

INDICTMENT/INDEX NUMBER:

COURT'S EXHIBIT NO._____

COURT'S EXHIBIT
NO. IX
Identification /
Evidence
Date: 12/4/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER [4]

COMMUNICATION: We the Jury:

Request a repeat of Instructions to evaluate evidence + testimony, Baez testimony

TIME: 11:12

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12-7-15

DO NOT WRITE BELOW THIS LINE (COURT USE ONLY)

RE:_____ v._____

PART: _____

JUDGE:_____

INDICTMENT/INDEX NUMBER:

COURT'S EXHIBIT NO._____

COURT'S EXHIBIT
NO. 10
Identification /
Evidence
Date: 12/7/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER 5

COMMUNICATION: We the Jury:

request the photo line up where baez named 4 or 5, separate head shots of nicholas and darrell

TIME: 1247

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12/7/15

DO NOT WRITE BELOW THIS LINE (COURT USE ONLY)

RE:_____v._____

PART: _____

JUDGE:_____

INDICTMENT/INDEX NUMBER:

COURT'S EXHIBIT NO._____

COURT'S EXHIBIT
NO. 11
Identification /
Evidence
Date: 12/7/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER 6

COMMUNICATION: We the Jury:

have come to a verdict and need instruction on completing the sheet that statess murder 2 Guilty or not guilty

TIME: 2:15 pm

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12/7/15

DO NOT WRITE BELOW THIS LINE
(COURT USE ONLY)

RE:_____v._____

PART: _____

JUDGE:_____

INDICTMENT/INDEX NUMBER:

COURT'S EXHIBIT NO._____

COURT'S EXHIBIT
NO. 12
Identification /
Evidence
Date: 12/7/15

SUPREME COURT
STATE OF NEW YORK
BRONX COUNTY

JURY NOTE NUMBER 7

COMMUNICATION: We the Jury:

are ready to submitt verdit [sic]

TIME: 2:42

SIGNED BY FOREPERSON: /s/ Parris Hancock

DATE: 12-7-15

DO NOT WRITE BELOW THIS LINE (COURT USE ONLY)

RE: v.

PART:

JUDGE:

INDICTMENT/INDEX NUMBER:

COURT'S EXHIBIT NO.

COURT'S EXHIBIT
NO. 13
Identification /
Evidence
Date: 12/7/15

CENTER FOR APPELLATE LITIGATION
120 WALL STREET –
28TH FLOOR, NEW YORK, NY 10005
TEL. (212) 577-2523 FAX 577-2535

ATTORNEY-IN-CHARGE
ROBERT S. DEAN

ASSISTANT ATTORNEY-IN-CHARGE
MARK W. ZENO

SENIOR SUPERVISING ATTORNEYS
CLAUDIA S. TRUPP
BARBARA ZOLOT

MANAGING ATTORNEY
DAVID J. KLEM

SUPERVISING ATTORNEYS
ROBIN NICHINSKY
ARIELLE I. REID
BEN A. SCHATZ
MOLLY SCHINDLER
KATE SKOLNICK
MARIANNE C. YANG

ASSISTANT MANAGING ATTORNEY
BRITTANY N. FRANCIS

CLAUDIA TRUPP
ctrupp@cfal.org
extension 512

December 12, 2019

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 fist-fight. 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

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[1] Citations are to appellant's appendix.

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. (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 pre-

vent 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 mislead-

ing 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,

/s/ Claudia Trupp
Claudia Trupp

cc: ADA Nancy Killian
Bronx District Attorney's Office

CENTER FOR APPELLATE LITIGATION
120 WALL STREET –
28TH FLOOR, NEW YORK, NY 10005
TEL. (212) 577-2523 FAX 577-2535

ATTORNEY-IN-CHARGE
ROBERT S. DEAN

ASSISTANT ATTORNEY-IN-CHARGE
MARK W. ZENO

SENIOR SUPERVISING ATTORNEYS
CLAUDIA S. TRUPP
BARBARA ZOLOT

MANAGING ATTORNEY
DAVID J. KLEM

SUPERVISING ATTORNEYS
ROBIN NICHINSKY
ARIELLE I. REID
BEN A. SCHATZ
MOLLY SCHINDLER
KATE SKOLNICK
MARIANNE C. YANG

ASSISTANT MANAGING ATTORNEY
BRITTANY N. FRANCIS

CLAUDIA TRUPP
ctrupp@cfal.org
extension 512

March 6, 2020

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, NY 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.[2] 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

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[2] 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").

U.S. 36 (prosecution could not rebut self-defense claims through 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.[3]

Respectfully submitted,

Claudia Trupp

cc: ADA Noah Chamoy
Bronx District Attorney's Office

[3] Appellant again asks to this Court to review all the issues mentioned in Point VI of his initial submission.