SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM

----------X

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOHN RAMSEY,

Defendant.

----------X

NOTICE OF MOTION

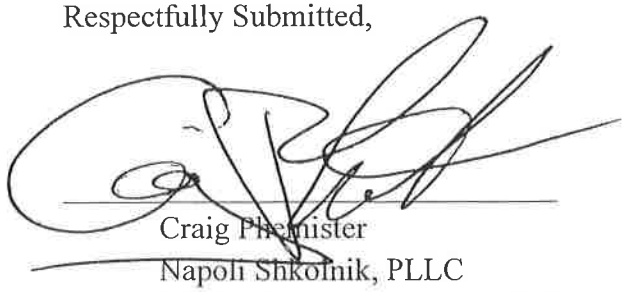
Ind. No.: 1251/1982

COUNSEL:

PLEASE TAKE NOTICE, that upon the annexed affirmation of CRAIG PHEMISTER, ESQ. dated February 7, 2019, and upon all the prior papers, pleadings and proceedings herein and the exhibits annexed hereto, the Defendant, John Ramsey, shall move this Court, at the Courthouse located at 320 Jay Street in Brooklyn, New York, on the 7th day of March, 2019, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to section 440.10 of the Criminal Procedure Law setting aside his conviction and granting a new trial, or in the alternative—for an evidentiary hearing on the instant motion—and for such other relief as this Court deems just and proper. In the event that this Court does not feel that it can either grant the relief requested or order an evidentiary hearing on the moving papers alone, the Defendant respectfully requests the opportunity for oral argument on the request for a hearing.

Dated: February 7th, 2019
New York, New York

Respectfully Submitted,



Craig Phemister
Napoli Shkolnik, PLLC
360 Lexington Avenue – 11th Floor
New York, New York 10017
212-397-1000

Of Counsel:
Jonathan Edelstein
Robert Grossman

TO: Motion Clerk
Supreme Court, Kings County, Criminal Term
320 Jay Street – 13th Floor
Brooklyn, New York 11201

Office of the District Attorney, Kings County
350 Jay Street
Brooklyn, New York 11201

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X

PEOPLE OF THE STATE OF NEW YORK

Ind. No. 1251/1982

AFFIRMATION IN SUPPORT

-- against --

JOHN RAMSEY,

Defendant.

----------X

CRAIG PHEMISTER, an attorney admitted to practice in the courts of the State of New York, affirms under penalty of perjury pursuant to CPLR § 2106 that the following is true and correct to the extent of his knowledge:

1. I am the attorney for the defendant in the above captioned matter and as such am fully familiar with the facts and circumstances thereof. I make this Affirmation in support of defendant's motion to vacate his conviction pursuant to Section 440.10 of the Criminal Procedure Law. The sources for the allegations of fact made herein include conversations with my client, review of the case file, review of the investigative material provided by the Conviction Review Unit of the Kings County District Attorney's office and review of other pertinent documents.

PRELIMINARY STATEMENT

2. At the heart of this motion lies the strong likelihood that John Ramsey is actually innocent of the crime of murder for which served over 33 years in prison. At a minimum, defendant has discovered evidence that strongly demonstrates that somebody else committed the crime and thus defendant was wrongfully convicted.

3. Defendant was accused and convicted of murdering Vernon Green with an

accomplice, Cole Coleman, in a botched robbery in an abandoned drug den. After his release from prison, however, defendant uncovered an Arrest Report of an arrest from the night of the shooting that demonstrates that Coleman and his brother DeWayne were initially identified by an anonymous 911 caller as the perpetrators and arrested for the murder within an hour of the crime. This report was never disclosed to defense counsel prior to trial. When the undersigned requested that the People review the case, the Kings County District Attorney's Conviction Review Unit (CRU) agreed to do so. During their investigation, the CRU acknowledged that the arrest report had never been disclosed to defendant.

4. The CRU investigation produced more startling evidence pointing to a miscarriage of justice in this case. First, and most importantly, the CRU was able to interview Cole Coleman who not only confirmed that his brother was his accomplice during the murder of Vernon Green, which corroborates the undisclosed arrest report, but emphatically stated that defendant was not present and had nothing to do with the murder. Moreover, the CRU interviewed another witness who provided devastating impeachment material concerning the only identifying witness in this case, information that was not presented at trial.

5. The CRU ultimately declined to overturn the conviction, using a justification that defendant submits was fundamentally flawed and illogical. Nevertheless, defendant submits that all of the evidence that has been uncovered since his release, both alone and in combination, provides a compelling reason for this Court to grant an evidentiary hearing so that the full factual background underlying defendant's suspect investigation and conviction can be explored and most importantly, that a fundamental miscarriage of justice can be corrected.

6. Defendant acknowledges this is an old case, but that only underscores the unfairness that that is at issue here if he does not receive a hearing so that he can at least present

his evidence. Indeed, Ramsey has presented a *prima facie* case that the co-defendant's brother was responsible for the role in the crime that he was convicted of and the People have further acknowledged that information that would have brought this evidence to light was not disclosed.

7. Moreover, the need for a hearing is especially compelling in light of the weakness of the original case against Ramsey, which consisted of one dubious eyewitness identification who admitted to being high on angel dust. The scientific evidence casting doubt on the accuracy of eyewitness testimony, especially during stressful events such as a late night shooting, have advanced since 1981, and place the People's case in serious doubt.

8. This Court should note that Ramsey is not filing this motion in order to get out of prison early. He has done his time. The only reason he is filing this motion is to prove his innocence and clear his name after more than three decades in which he has been wrongfully branded a murderer.

9. Accordingly, the mountain of evidence submitted in this motion surely raises disturbing questions about whether an innocent man was incarcerated for the best years of his life, and warrants relief or at minimum full exploration by the Court. Defendant thus submits that this Court should vacate his conviction and either order a new trial or dismiss the indictment entirely, so that his long nightmare can finally be put to an end.

STATEMENT OF FACTS

10. The evidence at trial showed that during the evening of October 30, 1981, at a then abandoned apartment located at 540 East 22nd Street in Brooklyn, which was used as a drug den, Vernon Green was murdered during a robbery gone wrong. There were two robbers: Cole "Coke" Coleman, who entered with a gun, and an accomplice who grabbed the gun when Mr. Green offered resistance, and shot Mr. Green, causing his death. At trial, the People contended

that this accomplice was defendant John Ramsey. However, although there were multiple witnesses in the room, only one witness, who was admittedly under the influence of angel dust and other drugs, identified Ramsey as one of the participants in the robbery.

A. The Evidence at Trial.

11. The incident began after a group of female friends, subsequently identified as 16 year old Nicol Carter, 15 year old Cherise Smith, and their friend Nilsa Crosby met three male acquaintances (Thomas Dale, Glenn Anderson, and Vernon Green) in lower Manhattan after disembarking from the Staten Island Ferry. (T. 42-44, 141-43, 202-04, 246-47). After meeting, the group went on a city-wide journey that took them from Times Square to the Bronx, eventually arriving by subway after midnight at Newkirk Avenue and East 22nd Street in Brooklyn. (T. 48-49, 146, 206-07, 250).

12. Vernon Green and Thomas Dale went into a nearby bar while the others from the group went into a grocery store. (T. 48-49, 146-47, 207-08, 250). At the bar, Mr. Green spoke with two men whom he called "Coke" and "Ramsey." (T.251). At trial, Tomas Dale identified defendant as the man referred to as "Ramsey." (T.251). Their conversation concerned angel dust and lasted for about 10 to 15 minutes. Dale further stated that Vernon Green gave "Coke" one or two bags of angel dust. (T.251-52).

13. After the men left the bar, Dale got into an argument with Coleman and the man called Ramsey. They accused Dale of saying something about Ramsey, although Dale testified that he had never met either Coleman or Ramsey before that night. (T.253). At a nearby public telephone, Nicole Carter and Cherise Smith also got into a disagreement with Ramsey about how long they were using the phone. (T.49-50, 62, 89, 210-11). However, neither Carter nor Ms. Smith identified defendant as the man at the telephone.

14. Soon thereafter, Vernon Green led the young women and Dale and Anderson to an apartment on the second floor of 540 East 22nd Street. (T.51, 94, 153, 254, 292). The door to the apartment was partially off its hinges. (T.133-34, 297). A man named "Bing" was in the apartment. (T. 96, 292). The group walked into a room in the apartment, which contained one or two beds, a chair and was illuminated by one candle. (T. 99-100, 153-54, 174, 293). In this room, the group all sat down and smoked marijuana and angel dust. (T. 51-52, 101, 145, 154-58, 205-06, 213.)

15. About 10 to 15 minutes later there was a knock at the door. Vernon Green went to the door and asked who it was and two voices replied "Coke" and "Ramsey." (T. 53, 58, 213, 255). The two men then pushed their way in. (T. 255). According to Carter, Smith and Dale, they were the same two men who the group had encountered earlier in the bar and on the street. (T. 62, 214, 256). Cole Coleman, who had called himself "Coke," was holding a gun. (T.59, 105, 155). These two men announced that this was a stick-up and ordered the group to turn over their property.

16. Carter testified that when the men entered they told "Bing" that he was not involved and that he should leave, and "Bing" promptly left the apartment. (T. 125). Carter further testified that after Anderson and Dale had handed over their property, she asked the robbers whether they wanted anything from the women and they replied that they did not and told her to "sit down and be quiet." (T. 60).

17. Vernon Green, however, resisted the robbers, saying in sum and substance that he knew the two men and that he did not know why they were doing this. (T.60, 214, 256). Mr. Green then grabbed and pulled the end of the gun. (T. 156, 256). Carter testified that the man called Ramsey then stated "We are going to have to have to kill one of them to show that we

mean business." (T.60). The man who called himself Ramsey then grabbed the gun from Coleman and shot Vernon Green in the chest. (T. 60, 156, 214, 256).

18. Carter hid under the bed while Anderson and Dale jumped out the window onto a fire escape. (T. 61, 157, 178, 257). The assailants ran out of the apartment. (T. 61). Anderson and Dale climbed up to the third floor, and asked the occupant of the apartment to call for help. (T. 157, 180, 257-58). Ms. Smith ran downstairs and called the police. (T. 216). Dale and Anderson then went back downstairs to check on Green. After they determined that he was dead, they left again through the window and escaped through the yards in the back of the building. (T. 157, 180, 259).

19. Police Officer William Wagner responded to Apartment 23 at 540 East. 22nd Street at approximately 2:45 A.M. on October 31, 1981. (T. 20-22). The body of Vernon Green was on the floor of the first room in the apartment. (T. 22-23). According to Wagner, candles provided the only light in the apartment. (T. 31-32). There was at least one woman present when he arrived. (T. 34).

20. Dale and Anderson stopped at a house and asked a lady inside to call the police. When the police came to the house, they took Anderson and Dale to the precinct where they were interviewed. (T. 157-58). When Dale first spoke to the police, he told them that he could not describe the assailants and did not know their names. (T. 259-61). He testified at trial that this statement was a lie and that he considered "handl[ing] it in a different manner" and first went to see Mr. Green's brother. (T. 261). Later, he went back to the precinct and identified defendant John Ramsey as the shooter. (T. 261).[1]

21. Tomas Dale was the only witness at trial to identify defendant as not only the

[1] See photographs of John Ramsey's scar at Exhibit "W". It is important to note that no witness ever mentioned that the perpetrator of this crime had a 6 inch scar on his forehead.

shooter but one of the participants in the crime. (T. 255-59, 308-09, 313). On cross-examination, Dale admitted that he had smoked angel dust and marijuana that evening shortly prior to the assailants entering the apartment. (T. 270, 298-99). He further testified that during the incident he was six feet away from the assailants and that he was looking at the gun. (T. 301-02).

22. None of the other witnesses identified John Ramsey as one of the participants in the crime. At defendant's trial, Ms. Smith stated that she did not recognize anyone in the courtroom as the shooter. (T. 215-16).[2]

23. Detective FOGARTY testified that he had investigated the death of Vernon Green and arrested Cole Coleman on December 1981 and defendant on March 3, 1982. (T. 220-22). He did not testify regarding any alternative suspects or whether anybody else had been identified or interviewed as a suspect in the case.

24. Defendant did not testify or call any witnesses on his behalf.

25. The jury returned a verdict of guilty of all three counts of the indictment. (T. 387). He was sentenced to concurrent terms of imprisonment of 25 years to life for murder, seven and a half years for attempted robbery, and one year for possession of a weapon.

26. Ramsey's conviction was affirmed on direct appeal, see People v. Ramsey, 131 A.D.2d 891 (2d Dept. 1987), lv. denied, 70 N.Y.2d 803 (1987). He completed his prison sentence and was released on parole on February 4, 2015, after serving 33 years.

B. Cole Coleman Steered the Police Toward John Ramsey as a Suspect.

27. John Ramsey has always maintained his innocence in this case. In fact, he was not arrested until March 3, 1982 – over four months after the murder of Vernon Green – and he then agreed to speak with an assistant district attorney investigating the case. In that interview,

[2] Although the People claimed that Ms. Smith subsequently identified defendant after she left the stand, the Court denied their request to recall her. (T. 238-39).

he denied knowing who Vernon Green was or even being in the Flatbush area at the time of the murder and only acknowledged a passing acquaintance with "Coke" Coleman from running into him in bars in the area. See MP4 copy of 1982 John Ramsey interview and accompanying transcript annexed as Exhibit "A" and Exhibit "B" respectively.

28. However, Cole Coleman was arrested within an hour of the murder and questioned by the police. See Wade Hearing Minutes attached as Exhibit "C", at 10. It was established at the pre-trial Wade hearing that it was at this time where Cole Coleman, and not any of the victims or witnesses, was the first person to implicate defendant in this case. In fact, the lead investigator assigned to the case – Detective John Fogarty of the 67th precinct – testified that he only included John Ramsey's photographs in the arrays that were shown to witnesses after speaking with Cole Coleman. Specifically, Detective Fogarty testified that after he described the person the police were looking for, Coleman said "that the fellow's name was John Ramsey" and that, as a result, Fogarty put defendant's photo in the array. See Exhibit "C" at 10, 18-19. This testimony is corroborated by an October 31, 1981 police report titled "Interview of Cole Coleman," where Detective Murphy wrote that he interviewed Coleman and that Coleman stated that he knew a man named Ramsey and that he saw him around 1 A.M. on October 31, 1981. See Police Report, dated October 31, 1981, attached as Exhibit "D". Coleman, however, did not implicate himself in the crime at this time.

29. Cole Coleman was released on October 31, 1981 and eventually was re-arrested on December 7, 1981 and gave an inculpatory statement, admitting his role in the murder/robbery and again implicating defendant. See Police Report, dated December 11, 1981, attached as Exhibit "E". Cole Coleman was not tried with Ramsey, nor did he appear as a witness at Ramsey's trial. Indeed, Cole Coleman was allowed to accept a plea on July 14, 1983,

several weeks after Ramsey's conviction on May 26, 1983.

C. Previously Undisclosed Evidence Comes to Light.

30. John Ramsey was released from prison after serving 33 years. He maintained his innocence from his grand jury testimony through his first parole hearing in 2007. After realizing he would only be released if he falsely admitted his guilt – given that even his pre-sentence report / parole status report falsely states that there were SIX people who identified defendant AS THE SHOOTER – making it impossible for him to try disputing it to the parole board. Ramsey realized he had no choice and therefore told the parole board that he was responsible for the murder of Vernon Green in an attempt to secure his release and prove his innocence.

31. After several denials by the parole board, defendant was finally granted parole and was released from prison on February 4, 2015 and soon thereafter sought the representation of the undersigned, who was able to obtain an Arrest Report from Cole Coleman that he had in his file.[3] The report was never disclosed to defendant's counsel prior to his trial and its contents significantly advances defendant's longstanding claim that not only was his trial unfair but that he is actually innocent of the charges that cost him 33 years in prison.

---

[3] In 2006, through a FOIL request, Ramsey had obtained a redacted copy of this arrest report. See Redacted Copy of Police Report, attached as Exhibit "F-2". However, because all of the pertinent information was redacted he was unable to identify who the arrested individual was and assumed it to be his co-defendant Cole Coleman. However, he noticed that the report referred to "PERPS" in the plural several times. Knowing that he himself had not been arrested on the date listed on the report, "10-31-81", he realized that there must have been more than one person arrested that night – fitting the description and location given by the anonymous 911 caller.

In 2015, when Ramsey was released from incarceration and hired the undersigned, our office requested the arrest report through FOIL and again obtained only the redacted one. It was not until August, 2016, through our investigation, that we were able to finally obtain an un-redacted copy of the arrest report through an acquaintance of Coleman and Ramsey and could see that it was, in fact, Cole Coleman's brother, DeWayne Coleman who had also been arrested within an hour of the murder.

32. The arrest report, attached as Exhibit "F" to this motion, is dated October 31, 1981, the date of the crime, and demonstrates that within an hour of the shooting, the police received an anonymous description of the *two* perpetrators of the murder of Vernon Green. Officer Plunkett of the 67th precinct was advised that the perpetrators of Green's murder were in Boni's Bar calling a cab. Plunkett then apprehended the two suspects at Boni's Bar who fit the description he had been provided. The report states the facts as follows:

> Deft arrested at Flatbush Ave. and Newkirk Av. Deft was exiting bar [...] entering a livery cab. AO had been advised the perps of a homicide are in Boni's Bar calling a cab, unk informant also gave description of the Perps. Above deft fit the description and was at the location given. Deft released as per C.P.L. Sec. 140.20 Sub 4 after witness failed to ID perps.

See Exhibit "F".

33. The undersigned's investigation uncovered that the perpetrator subject of the newly uncovered arrest report is none other than DeWayne Coleman – the brother of John Ramsey's eventual co-defendant, Cole "Coke" Coleman. First, although the name of the arrest subject is mostly illegible, a diligent reader can decipher a "D" "W" and a "Y" from the first name. More significantly, the date of birth of the subject is listed as 5-8-60, which investigation has uncovered is the same day and only one year off of the date of birth of DeWayne Coleman himself. See copy of DeWayne Coleman's arrest record attached as Exhibit "G" and compare with Date of Birth listed on Exhibit "F". Finally, Cole Coleman, DeWayne's brother and John Ramsey's codefendant, is listed as the subject's associate. See Exhibit "F".

34. As noted above, the record of this case makes clear that Cole Coleman had been involved in a verbal altercation with Mr. Green at a bar before the shooting and was arrested within an hour of the shooting a short distance away from the crime scene. Thus it is clear that this newly uncovered Arrest Report refers to Cole Coleman's brother's arrest in this case.

35. Ramsey's trial counsel, Michael F. Vecchione, Esq. has provided an affidavit attesting that he had never seen the October 31, 1981 Arrest Report demonstrating that another suspect had been arrested for the shooting within an hour of the crime and fitting the description until he was shown the report by defendant's current attorneys. In his affidavit, Vecchione states that "[t]his is the first time that this report has ever been shown to me. I certainly did NOT have this report at the time of trial, despite the District Attorney's obligations under Brady to turn over this report." See copy of Affidavit of Michael Vecchione, dated August 18, 2016, attached as Exhibit "H", ¶ 4.[4]

36. The significance of this previously held report cannot be overstated. Indeed, Vecchione in his affidavit attests to the materiality of the report and further affirms that he would have utilized it substantially in Ramsey's defense had it been available to him at the time of trial. He states that:

> Had this report been turned over by the District Attorney's office, it certainly would have changed the entire trial, and likely its outcome. We had no idea until recently that there was another suspect who was arrested on the night of the murder, who fit the description of the person who committed the homicide, who was at the location given by an informant, and who was a known associate of Ramsey's codefendant Cole Coleman.

See Exhibit "H", ¶ 5.

37. Moreover, it is clear from the review of the record in this matter that the defense was never apprised of the fact the both Cole and DeWayne Coleman had been arrested at the same time, within an hour of the murder, at the scene of an earlier altercation between Cole and the victim and that *they both matched the description of the perpetrators* provided to the police directly following the shooting. As argued below, the failure to disclose this critical piece of

[4] As the People are well aware, Mr. Vecchione had a long and distinguished career as an assistant district attorney with their office after he left the defense bar.

evidence was a clear Brady violation that mandates vacatur of defendant's conviction.

D. The CRU Investigation.

38. After the discovery and investigation of this report, defendant's counsel approached the Kings County District Attorney's Conviction Review Unit (CRU), urging them to review defendant's case in order to ascertain if defendant had been wrongfully convicted. In a letter dated September 13, 2016, counsel contended that the discovery of the undisclosed police report, along with other inconsistencies in the evidence, and combined with the overall weakness of the case, merited a full review of defendant's conviction. See defense counsel letter to the CRU, dated September 13, 2016, attached as Exhibit "I". The next day, the CRU sent the undersigned a letter requesting a meeting and agreed to review the instant case. See letter annexed at Exhibit "J".

39. Near the end of the first meeting with the CRU, the undersigned showed Assistant District Attorney Lisa Perlman the DeWayne Coleman arrest report, which has his name mostly illegible and asked her "this is DeWayne then isn't it?" – to which Ms. Perlman responded "yes". – thereby confirming the identity of the person in the report. Moreover, during one of the initial meetings with the Conviction Review Unit, the discussion centered on DeWayne Coleman's arrest within an hour of the murder, and defendant's claim that there was a *Brady* violation for failing to turn over the arrest report created by Officer Plunkett. The undersigned stated that not only was the arrest report withheld from Ramsey, but that DeWayne Coleman's name and arrest that night was purposely avoided at trial. In response, Ms. Perlman stated that "it was definitely held back."

40. On May 2, 2018, Assistant District Attorney Lisa Perlman and Detective Robert Zuffi of the CRU first attempted to interview Ramsey's co-defendant Cole Coleman about the

instant case at his scheduled appointment at the U.S. probation department. Coleman was surprised and agitated, complaining "why do you want to talk to me about that case, it happened so long ago, I did my time. I have my own problems now, this judge may put me back in." See copy of Kings County District Attorney's Office Investigative Report, prepared June 15, 2018, attached as Exhibit "K". But a few seconds later, Coleman added "why are you looking into this again, *everyone, even the cops know Ramsey wasn't there*." Id. (emphasis added). Coleman agreed to meet with the CRU again after he met with the judge on his probation case. See Id.

41. On August 1, 2018, Assistant District Attorney Lisa Perlman and Detective Robert Zuffi of the CRU finally interviewed Cole Coleman. See audiotaped copy of CRU's interview with Cole Coleman, dated August 1, 2018 and accompanying copy of transcription of August 1, 2018 interview, attached as Exhibits "L" and "M" respectively. Although Coleman made clear throughout the interview that he would prefer not to have agreed to it, telling the CRU interviewers at various points that "I didn't want to come here," that "I'm about to leave," and that he "didn't trust y'all people at all," see Exhibit "M" at 3, 4-5, 6, 7, 16, his answers were still direct and provide clear evidence that defendant was not involved in the murder of Vernon Green.

42. In the interview, Coleman stated unequivocally that it was *his brother who accompanied him to the scene of the robbery* and murder of Vernon Green, and *not, as he had originally stated to the police, John Ramsey*. Although initially reluctant to name his brother as the actual co-perpetrator, he quickly volunteered that it was his brother DeWayne who accompanied him to the apartment on October 31, 1981 in the following exchange:

> Lisa Perlman: Um, that night it's ... I understand that you feel that you're coming forward now to say that you had somebody else with you but if you ... If that person isn't here, then you have to give us something to investigate-

> Cole Coleman: I, it was me and my brother, me and my brother were together. I didn't want my mother to lose both of us and then find out that I plead guilty, my brother gets killed. You know what I'm sayin'? It was a hard blow. Now I'm goin' through all this. I just lost my only child and you want me keep ... I don't wanna go through all this. I don't even wanna talk to y'all.

See Id. at 2-3.

43. Later in the interview, Cole Coleman stated that his brother was either "with me" or "standing there next to me" during the shooting and its aftermath. See Id. at 3, 6. Additionally he admitted that he was the person who stated that it was "Coke and Ramsey" when announcing their presence outside the apartment door before the crime occurred. The reason he said Ramsey's name originated out of some resentment Cole Coleman felt over a woman named Michelle Wallace, whom Ramsey and Coleman had both previously dated. According to Coleman, Ms. Wallace lived on Ocean Avenue and was "my first girl" and whom "Ramsey eventually got her." See Id. at 1. Coleman then explained that it was this underlying bitterness towards Ramsey that led him to bring up defendant's name when perpetrating the crime in the following statement during the interview:

> This was my problem with him. So we came home, we was beefin' hard about it. And that's what happened, transpired that night. *He came to my mind during this incident, you know what I'm sayin'? We had just had a beef. When I went and knocked on the door, I brought up his name*. I had somebody else with me. I'm not gonna tell you who it is 'cause the person who went with me, they not here no more. You know what I'm sayin'? So I'm not even gonna bring that up. I just don't want y'all to keep comin' at me with this situation. Really, when we was in prison, me and [inaudible 00:01:52] had plenty beef about this and Attica and Shawangunk, they were tryin' to get me to come about forward and do the right thing. I don't give a fuck about it. Understand? I just got every friend now comin' to yo you like. No, me and him got a beef from childhood about the girl Michelle.
>
> I'm gonna keep it real with you. At the time it happened I was

> smokin' Angel Dust, seemed like a good thing to do. I'm, I'm a kid, I'm wild, I'm smokin' Dust, I'm shootin' people. You know what I'm sayin'? That's what I do.

See Id. at 1-2 (emphasis added).

44. Coleman further explained that the reason he used his own name at the door of the apartment was because he knew that it was the only way he and his brother would be allowed in. See Id. at 4-6. Ms. Perlman questioned him regarding this aspect of the incident in the following exchange:

> Lisa Perlman: All right. Um, I just want, what I, I understand how you wanted to put Ramsey there, I do. Over the girl, over hating him, whatever it was, I understand that you put him there. But I don't know why you say your own name. You put yourself there too.
>
> Cole Coleman: Because that was the only was we was gonna get in the door. He didn't know, know my ... Dude don't know nobody but me.

See Id. at 6.

45. In the interview, Cole Coleman stated that he shot Vernon Green, and not his brother. See Id. at 2, 14, 15. Specifically, Coleman stated that "I pulled the trigger" and added later that he did so after Mr. Green "try to pull the gun," and "that's how he got shot." See Id. at 2, 4, 15. He said that his brother "wasn't really expectin' me to do what I did." See Id. at 14.

46. Although his recollection differs from the witnesses' testimony at trial that his co-perpetrator pulled the trigger, many other aspects of his testimony comport with the original witnesses' testimony and the other records in this case. For instance, Coleman confirmed that the apartment was dark and that after the shooting, the "dudes was jumpin' out the window," see Id. at 14, 16, 17-18, which is corroborated by witness testimony that the apartment was illuminated by candlelight and that Dale and Anderson fled through a window after the shooting.

47. Moreover, Coleman stated that after the shooting, the police "caught us [meaning he and his brother DeWayne] at the bar." See Id. at 5. Significantly, this specific recollection is corroborated by the undisclosed Arrest Report previously discussed above that established that DeWayne Coleman and Cole Coleman were apprehended outside of Boni's Bar within an hour of the shooting.

48. Additionally, Coleman told the CRU interviewers that defendant John Ramsey was not present at any time during the incident on October 31, 1981. In fact Coleman stated unequivocally than Ramsey was not only not present at the apartment during the shooting but was not present beforehand at the bar prior to the shooting in the following exchange:

Lisa Perlman:	Before you went over to that apartment, you were at Boney's Bar, right?
Cole Coleman:	I was in the area, I was in Flatbush.
Lisa Perlman:	Okay so from what I understood, you saw Ice in Boney's Bar with two of his friends and maybe Ramsey was there maybe he wasn't.
Cole Coleman:	**No Ramsey didn't come through that night.**
Lisa Perlman:	Ramsey wasn't even at Boney's Bar?
Cole Coleman:	No, Me and Ice were smokin' Dust.
Lisa Perlman:	You and Ice together were? How do you know Ice?
Cole Coleman:	From smokin' Dust.
Lisa Perlman:	Just buddies from that? Where were you smokin' Dust, in Boney's or outside of Boney's?

Cole Coleman:	No, no, you can't smoke Dust in Boney's man. I think it was on Newkirk.
Lisa Perlman:	Outside?
Cole Coleman:	Yeah.
Det. Zuffy:	Somewhere outside the bar basically.
Cole Coleman:	It was on Newkirk.

See Id. at 13-14 (emphasis added).

49. In sum, the CRU's interview found that Cole Coleman retracted his original statement to police that defendant John Ramsey was implicated in the murder of Vernon Green and instead admitted that his brother DeWayne was his co-perpetrator and that defendant was not present either before, during or after the crime. As argued extensively below, this information constitutes newly discovered evidence that should mandate the vacatur of defendant's conviction.

50. On February 13, 2018, the CRU interviewed Nicole Carter, who was a witness at the original trial. Her statements during the interview by and large were consistent with her trial testimony, with a few exceptions that are not relevant to the issues at bar.[5] See audiotaped copy of CRU's interview with Nicole Carter, dated February 13, 2018 and copy of accompanying

[5] For instance, Nicole Carter stated that after the shooting, two Puerto Rican neighbors came into the apartment and threatened to kill her and Cherise Smith because they though the girls had set up the murder. Once the Puerto Rican men were dissuaded the Carter and Smith did not have anything to do with it, they left before the police arrived. See Exhibit "O" at 2, 14-15. Additionally, she mentioned that before the perpetrators entered the apartment, the lights went out and Bing said that it must be the circuit breaker, and that someone then lit a candle to illuminate the room. See Id. at 8. Carter's statements both about the Puerto Ricans and the lights going out are the first time these aspects of the incident have been mentioned and do not appear in the record of the case. Although peripheral to the issue of whether defendant was actually present at the scene, it certainly demonstrates that the police investigation was underdeveloped and thus supports defendant's claim that other leads were not investigated.

transcription of February 13, 2018 interview, attached as Exhibits "N" and "O" respectively.

51. For the first time, however, Carter added certain statements about the case that would have raised doubt about Thomas Dale, the only identifying witness at trial, and thus constitutes newly discovered evidence in this case. First, Carter stated that Dale and Anderson approached her at the precinct and told her not to speak to the police and told her "Let us take care of this. We know people." See Exhibit "O" at 19. In fact, Carter had already spoken to the police when this conversation occurred. Although Dale testified at trial that he was initially reluctant to cooperate with the police until he discussed retribution with Vernon Green's brother, the fact that he attempted to interfere with the investigation and tamper with witness testimony would certainly have put his testimony in a different light and been fodder for cross-examination.

52. On this note, Carter also shed light on Dale's conversation with Vernon Green's brother. She stated that she, Nilsa Crosby, Glen Anderson and Thomas Dale were driven in a police car back to Staten Island when they were released from the precinct in the early morning hours after the shooting. When they were dropped off, they went to Vernon Green's brother's building and told him about the murder. Carter then stated "his brother right away said 'Tom, I wasn't there, *I know you had something to do with this.*'" See Id. at 21 (emphasis added). As argued below, the fact that Vernon Green's brother accused Dale of being an accomplice in the robbery and eventual murder would have put Dale's testimony that he wanted to consult with the brother about retribution before cooperating with the police in a less credible light and thus constitutes newly discovered evidence.

53. Additionally, on June 11, 2018, the CRU interviewed defendant John Ramsey himself. See audiotaped copy of CRU's interview with John Ramsey, dated June 11, 2018 and copy of accompanying copy of transcription of June 11, 2018 interview, attached as Exhibits "P"

and "Q" respectively. Ramsey was forthright that, before his arrest in the instant case, he was 21 years old and made a living by stealing cars and often trafficked his wares in Boni's Bar, where the Colemans were arrested. See Exhibit "Q" at 1-2, 4. However, defendant denied any involvement in the murder of Vernon Green. See Id. at 1-2.

54. Defendant additionally stated that although he was acquainted with Cole Coleman, he "really never hung out with Cole [Coleman], I never really knew Cole like that. See Id. at 2. Ramsey stated that they knew each other through a woman named Michelle Wallace. He stated that:

> [Cole] use to like her. This was back in 1979. She used to live on Ocean and Newkirk, it was a corner building. She used to live there. He used to like her. That's how I got to know him. But I never hung out with him at all. We never did nothing together, we was in two different lifestyles period.

See Id. at 5.

55. Significantly, John Ramsey's recollection of Michelle Wallace as the connection between him and Cole Coleman corroborates Coleman's statement *later* to the CRU that Michelle Wallace was the cause of Coleman's resentment towards defendant which resulted in Coleman using the name "Ramsey" for his co-perpetrator.

56. During their investigation, the CRU additionally interviewed police officer Plunkett, who wrote the undisclosed October 31, 1981 Arrest Report that revealed that Cole Coleman was arrested along with his brother DeWayne for the murder of Vernon Green at a nearby bar shortly after the shooting. According to the handwritten notes of the interview, after 37 years, Officer Plunkett remembered no details of the description of the perpetrators or of the arrest of DeWayne or Cole Coleman. See copy of CRU Handwritten Notes of Interview with Officer Plunkett, attached as Exhibit "R".

E. The CRU Determination.

57. After the Conviction Review Unit completed their investigation, the undersigned was informed that they did not believe that the missing arrest report related to DeWayne Coleman's arrest was Brady material because none of the witnesses identified him as the perpetrator at the precinct shortly after the murder. I explained to the CRU that, based on the arrest report, the person who called 911 could reasonably be presumed to have been in the room where the shooting occurred and witnessed the murder or otherwise would not have been able identify the true perpetrator's description and location within an hour of the murder. Moreover, I reminded the CRU that Officer Plunkett's arrest report indicated that, in fact, the two individuals arrested (Cole Coleman and DeWayne Coleman) were at the location identified and also fit the description. I reiterated that having this information over 35 years ago would have been of extreme importance in the defense of John Ramsey. Significantly, Ms. Perlman even agreed with me that the information would have been useful to have back then.

58. The CRU supported their argument by indicating that Officer Plunkett could not offer any further details on the identification of the two men he arrested that night. The undersigned pointed out that this was not surprising given the time that has passed. Moreover, the undersigned indicated that if Michael Vecchione had this information prior to trial, he could have obtained the 911 records and could have spoken to Officer Plunkett – whose memory would have been fresh at that time. The fact that the CRU even went to interview Officer Plunkett indicates the importance of the previously undisclosed Arrest Report – CRU tried to do what Vecchione could have done over 35 years ago.

59. Sometime, thereafter, upon conclusion of their investigation, the undersigned was informed by Lisa Perlman of the Conviction Review Unit that there simply wasn't enough

evidence to overturn John Ramsey's conviction and that she would be submitting this recommendation to the "Independent Board" for review. To date, we have not yet been given anything from the Board indicating their final determination, but were informed that their decision would almost certainly be consistent with the recommendation of the CRU. Despite this conclusion, the undersigned affirms that on several occasions, Lisa Perlman expressed her opinion that although there was insufficient evidence for CRU to overturn the conviction, she doesn't understand how Ramsey was convicted in the first place given the lack of evidence against him.

60. After the undersigned's conversation with CRU, the undersigned retained an expert to opine on the identification issues in this case. Jennifer Dysart, PhD, who's full report and CV are annexed hereto at Exhibit "V", has been admitted as an eyewitness expert approximately 60 times in various pre-trial hearings, trials, post-conviction hearings, and civil cases in California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and St. Thomas, USVI. She has also testified at a jury trial in Federal Court in New Jersey. Dr. Dysart has never been not qualified as an Eyewitness Identification expert in a criminal or civil case. In addition to testifying, Dr. Dysart has consulted in numerous other criminal and civil cases including a post-conviction case where she worked for the Kings County (Brooklyn, NY) Conviction Review Unit in 2017 in the wrongful conviction case of Mr. Mark Denny. As extensively detailed below Dr. Dysart explains that the combination of factors concerning the identification of Mr. Ramsey decreased the likelihood that an accurate identification could have been made by the witness in this case.

61. In light of the fact the CRU has indicated that it will not move to vacate defendant's conviction, despite the fact that ample evidence supports the conclusion that not only was defendant denied a fair trial but that he is actually innocent of the crime that he was imprisoned over thirty years of his life for, Ramsey himself now moves to vacate his conviction. Defendant does so on the grounds that (1) a profoundly serious Brady violation occurred when an Arrest Report was not disclosed that showed that another suspect was arrested who fit the description of one of the perpetrators within an hour of the shooting and thus deprived him of his right to a fair trial by preventing him the opportunity to present this evidence to the jury, (2) newly discovered evidence has been uncovered by the CRU investigation that, had it been known at the time of trial, would have resulted in a more favorable verdict and (3) that defendant has met the burden to show that he has a freestanding claim of actual innocence and that, he is in fact innocent of the crime. This motion demonstrates that a grave injustice has occurred in this case and for the reasons set forth below, this court should correct this injustice and the motion should be granted.

POINT I

DEFENDANT SUFFERED A DUE PROCESS VIOLATION WHEN THE PEOPLE FAILED TO DISCLOSE MAJOR EXCULPATORY MATERIAL CONTRARY TO THEIR DUTY AS DEFINED BY BRADY V. MARYLAND AND ITS PROGENY AND AS A RESULT DEFENDANT WAS UNABLE TO INVESTIGATE THE PROBABILITY OF ANOTHER SUSPECT BEING THE SECOND PERPATRATOR AND PRESENTING A STRONG DEFENSE

62. In this case, a glaring Brady violation occurred that was only brought to defendant's attention by pure happenstance. As explained above in the Statement of Facts, after

defendant was released from prison after 33 years, he soon sought out the undersigned's previous firm, who approached Cole Coleman through a mutual acquaintance and obtained a copy of a police report that he had in his file. See Exhibit "F". The police report, however, was never disclosed to defendant's counsel prior to trial and its contents are both explosive and tragic, as they posit that an entirely different suspect had been arrested for the crime defendant served the majority of his life for and defendant never received the opportunity to demonstrate that there was another plausible suspect at his trial 37 long years ago.

63. In sum and substance, the police report, which is dated October 31, 1981, the date of the crime, demonstrates that within an hour of the shooting, the police received an anonymous description of the *two* perpetrators of the murder of Vernon Green. Officer Plunkett of the 67th precinct was advised that the perpetrators of Green's murder were in Boni's Bar calling a cab. Plunkett then apprehended the two suspects outside of Boni's Bar who fit the description he had been provided. Furthermore, the undersigned's investigation uncovered that the perpetrator subject of the newly uncovered arrest report is none other than DeWayne Coleman – the brother of John Ramsey's eventual co-defendant, Cole "Coke" Coleman. First, although the name of the arrest subject is mostly illegible, a diligent reader can decipher a "D" "W" and a "Y" from the first name. More significantly, the date of birth of the subject is listed as 5-8-60, which investigation has uncovered is very similar to the date of birth of DeWayne Coleman himself. See copy of DeWayne Coleman's criminal record, listing a date of birth as 5-8-61, attached as Exhibit "G" and compare with date of birth listed on Exhibit "F". Finally, Cole Coleman, DeWayne's brother and John Ramsey's codefendant, is listed as the subject's associate. See Exhibit "F".

64. Moreover, the undersigned affirms that near the end of my first meeting with the

CRU, the undersigned showed Assistant District Attorney Lisa Perlman the DeWayne Coleman arrest report, which has his name mostly illegible and asked her "this is DeWayne then isn't it?" – to which Ms. Perlman responded "yes". – thereby confirming the identity of the person in the report. Thus, it is clear that not only that this undisclosed police report is associated with the investigation into the murder of Vernon Green, the crime that defendant was later arrested for and stands convicted, but that *DeWayne Coleman was initially arrested* along with his brother Cole for the crime *months before* Ramsey was arrested.[6]

65. The impact of this information for the defense of this case is obvious and profound. The People's theory of the case was that Cole Coleman, armed with a rifle and John Ramsey entered the apartment on 540 East 22nd Street, demanded money and the possessions of the occupants, and when Vernon Green offered some resistance, Ramsey supposedly grabbed the rifle and shot Mr. Green. The People presented no evidence that a third perpetrator existed, and indeed witness testimony established that Cole Coleman was accompanied by only one other perpetrator. Thus, the fact that the police had been advised by an informant that two perpetrators of Vernon Green's murder were at Boni's bar and that that the two perpetrators, who turned out to be Cole Coleman and his brother, who fit the description given by the informant, were arrested within an hour of the crime points to the strong likelihood that *the People's theory was wrong* and that Cole Coleman's co-perpetrator was his brother DeWayne rather than defendant John Ramsey.

---

[6] Moreover, if any more evidence is needed to show that this report is associated with the investigation of the murder of Vernon Green, this Court should consider that, as explained in the Statement of Facts, above, the record of this case make clear that Cole Coleman had been involved in a verbal altercation with Mr. Green at a bar before the shooting and was arrested within an hour of the shooting a short distance away from the crime scene. Thus it is now clear that the bar mentioned in the record is indeed the bar referred to in the undisclosed report, which list the address as Flatbush and Newkirk, not far from the scene of the crime.

66. It is clear that this police report was not disclosed to defendant prior to his trial. This is demonstrated by the fact the defendant's trial counsel, Michael Vecchione, Esq, has attested in his affidavit that the first time he saw the report was when the undersigned showed it to him and that he is certain that he did not have this report at the time of trial. See Exhibit "H". As the People are certainly aware, Vecchione had a long and distinguished career at their office and it is doubtful that the People would assail his credibility on this matter. Moreover, the undersigned affirms that during a meeting with the CRU, Assistant District Attorney Lisa Perlman stated that the arrest report "was definitely held back." This statement corroborates Vecchione's affidavit and confirms beyond doubt that a serious failure to disclose occurred in this case.

67. The significance of this failure to disclose cannot be overstated. As noted in the Statement of Facts, former defense counsel Michael Vecchione immediately recognized the materiality of the report and attested in an affidavit about the impact it would have had if it had been available at defendant's trial. In fact, Vecchione stated that had he known that another suspect had been arrested the night of the murder, at the location and matching the description given by an informant, it "certainly would have changed the entire trial, and likely its outcome." See Exhibit "H" ¶ 5.

68. To elaborate, because the information concerning this other suspect was not disclosed, defendant was deprived of the opportunity to use the information and present a strong defense of misidentification. As outlined by Vecchione, defendant could have countered the People's presentation and presented an entirely different theory of the case – that Cole had a different accomplice other than Ramsey who had been identified earlier than Ramsey was – a theory that was not only plausible but was corroborated by the police report itself.

69. The damage did not stop there. Had this report been disclosed prior to trial, defendant's attorney could have demanded and/or investigated further information about the arrest. For instance, he could have requested 911 phone logs and transcripts and additional information regarding the 911 caller and his or her description of the perpetrator. With this information, he may have been able to investigate the specific details of the actual description and even discovered the actual caller. It is certainly possible that Vecchione could have then called whoever the informant was to the stand to testify that the actual co-perpetrator was DeWayne Coleman and not defendant. Unfortunately, because of the grave misconduct in this case, instead of being available at a time when it could have been fresh and useful, this information is lost forever.[7]

70. Even if the informant was unavailable, defense counsel could have, at very least, called Officer Plunkett and other officers or detectives who were involved in the arrest and interview of DeWayne Coleman concerning whether there was any further investigation regarding an alternative suspect. Defense counsel could have contended that the police investigation of the case was not exhaustive and undermined the People's case against defendant.

71. Indeed, the fact that this report was not disclosed, makes it clear that, whether

[7] If, indeed, further information regarding the DeWayne Coleman arrest exists, or any other exculpatory information, and was not disclosed to defendant's present counsel during the CRU investigation, defendant submits that this Court has inherent power to order discovery in pending C.P.L. 440.10 actions. For instance, in Dabbs v. Vergari, 149 Misc. 2d 844, 849 (Sup. Ct. Westchester County. 1991), the court reasoned that the fundamental due process right to a fair trial entitled a defendant to the post-conviction discovery of exculpatory evidence. Additionally, in People v. Callace, 151 Misc. 2d 464 (Suffolk Co. Ct. 1991), the court held that Judiciary Law 2-b (3) authorized judicial creation of post-judgment discovery procedures in criminal cases even where not specifically provided for by the Criminal Procedure Law. Thus, this Court should order the People to turn over material that defendant submits would bolster his instant claims. Moreover, defendant suggests and fully expects that the People go through their file and contact the investigative officers in this case in order to locate any DD5s or other notes the police took in relation to the arrest of DeWayne Coleman to the extent they have not done so already.

through oversight or malfeasance, a grave due process violation occurred in this case. In Brady v. Maryland, 373 U.S. 83, 87-88 (1963) itself, the Supreme Court recognized that "a prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." Consequently, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*" Id. at 87 (emphasis added); see also People v. Vilardi, 76 N.Y.2d 67, 77-78 (1990); People v. LaValle, 3 N.Y.3d 88 (2004) (holding that Brady requires the People to turn over any material to the defense that is favorable to the defense, and entitles a defendant to a new trial where such material was not disclosed and the defendant was thereby prejudiced. Moreover, pursuant to Giglio v. United States, 405 U.S. 150 (1971), the Government's disclosure obligation extends to evidence that would materially impeach the credibility of prosecution witnesses. Id. at 154; see also United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002) (evidence that has the "potential to alter the jury's assessment of the credibility of a significant prosecution witness" must be disclosed).

72. It is well settled that a Brady/Giglio violation requires "that the evidence at issue must be favorable to the accused... that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Moreover, the prejudice is material when there is a "reasonable probability" that undisclosed evidence "would" have altered the outcome of the trial. United States v. Bagley, 477 U.S. 6622, 682 (1985). In the instant case, these elements are satisfied.

73. The Supreme Court has stated that a prosecutor "*has a duty to learn* of any favorable evidence known to the others acting on the government's behalf in the case, including

the police.'" Kyles v. Whitley, 514 U.S. 419, 438 (1993) (emphasis added); see also United States v. Chalmers, 410 F. Supp. 2d 278, 288 (S.D.N.Y. 2006). As a result, "prosecutors can 'suppress' evidence [within the meaning of Brady] by *failing to search for background information*, such as a witness's criminal history, that is readily available through routine investigation of the prosecution's files *or the files of other government agencies*." Chandras v. McGinnis, 2002 U.S. Dist. LEXIS 25188, *7 (E.D.N.Y. 2002) (emphasis added). "[D]ocuments that the Government has reviewed *or has access to* must be provided to aid a petitioner in preparing his defense." United States v. Giffen, 379 F. Supp. 2d 337, 342-43 (S.D.N.Y. 2004). Hence, where the Government is on notice that specific Brady and/or Giglio material may exist in files to which it has access, it has an obligation to obtain those files and disclose their contents. Moreover, it is immaterial if it was the police and not the prosecutor that withheld evidence from the defense and the prosecutor's good faith was thus frustrated by the lack of police department cooperation. People v. Jackson, 237 A.D.2d 179 (1st Dept. 1997).

74. Furthermore, "[w]here the defense itself has provided specific notice of its interest in particular material, heightened, rather than lessened prosecutorial care is appropriate." People v. Vilardi, 76 N.Y.2d at 77. Thus, where a specific discovery request has been made for evidence, putting the People on notice that the defense considered the material important, the standard is whether there is "a 'reasonable possibility' that the failure to disclose the exculpatory report contributed to the verdict." Id.; People v. Giuca, 158 A.D.3d 642, 646 (2d Dept, 2018).

75. In this case, defendant's initial counsel Peter Mitro, Esq. (Vecchione was assigned after pre-trial motions were filed) made a discovery motion wherein, *inter alia*, he requested that the People disclose "[n]ame or names of any person(s) alleged to have acted in concert with defendant in the commission of the with-in crime, whether or not such person(s) has been

arrested, apprehended, or indicted or prosecuted for this crime." See defendant's pre-trial Notice of Motion, dated May 2, 1982, ¶4(h), attached as Exhibit "S". The People replied to this request simply by stating "Cole Coleman." See People's Bill of Particulars, dated May 25, 1982, ¶ 4(h), attached as Exhibit "T". This was obviously untrue, as it is now known that DeWayne Coleman was also arrested in relation to the murder of Vernon Green after being identified by an informant as one of the perpetrators of the crime.

76. Defendant submits that his discovery request was specific and merited the true response, but at the very least, it was the type of "broadly worded" request that New York Courts have found sufficient to trigger "the reasonable possibility" standard where the People fail to disclose reports in response. See People v. Sibadan, 240 A.D.2d 30, 33-34 (1st Dept. 1998) (applying the "reasonable possibility" standard where the defense's "broadly worded request" included "any and all records, memorandum and correspondence" which might reflect on a witness's motives and relationship with the prosecution, and the People failed to disclose the witness's prior history as a cooperating informant for the District Attorney).

77. The New York Court of Appeals has characterized the "reasonable possibility" as "essentially a reformulation of the 'seldom if ever excusable' rule" so that it "properly encourages compliance with these [the People's] obligations, and that therefore it is preferable as a matter of State constitutional law to the Federal standard of reasonable probability. Vilardi, 76 N.Y.2d at 77. In this case, it was clearly not excusable that important exculpatory information was not disclosed to the defendant and there is at very least a reasonable possibility that the failure to disclose DeWayne Coleman's arrest report contributed to the verdict.

78. However, even if this Court finds that the slightly stricter "reasonable probability" standard should apply, defendants can also clearly meet that burden of proof as well. Although

reasonable probability is greater than reasonable possibility, it is still "a fairly low threshold." Riggs v. Fairman, 399 F.3d 1179, 1183 (9th Cir. 2005), citing Sanders v. Ratelle, 21 F.3d 1446, 1461 (9th Cir.1994). A reasonable probability may be less than fifty percent. Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002); United States v. Bowie, 198 F.3d 905, 908-09 (D.C. Cir. 1999) (same); United States v. Vargas, 709 F. Supp. 2d 48, 50 (D.D.C. 2010) (same); United States v. Nelson, 921 F. Supp. 105, 120 (E.D.N.Y. 1996) (finding that 33 percent chance amounted to a reasonable probability). Indeed, it has been held that a reasonable probability exists whenever the chances of a different outcome are better than negligible, United States ex. rel. Hampton v. Leibach, 347 F.3d 219, 246 (7th Cir. 2003), or put another way, if they are more than mere speculation. United States v. Berryman, 322 Fed. Appx. 216, 222 (3d Cir. 2009).

79. In this case, had the arrest report been disclosed to defendants' counsel in enough time that he could investigate the information and utilize it on his direct case or cast doubt on the diligence of the original investigation, there is clearly a reasonable probability that the verdict would have been different. It is indisputable that evidence that DeWayne Coleman was identified and arrested as his brother Cole's accomplice in the robbery would have seriously contradicted Thomas Dale's sole testimony that defendant Ramsey was Cole's accomplice and concomitantly the actual shooter of Vernon Green. As it was, Dale had major credibility problems of his own and information that another suspect had been identified and arrested shortly after and at a location close to the shooting with this case's eventual co-defendant would have fatally undermined his testimony.

80. First of all, Dale admitted that he had smoked angel dust and marijuana shortly before the incident. It should be beyond dispute that this type of drug intoxication can call into question Dale's ability to recall the events at issue. Cf. People v. Perez, 18 Misc. 3d 752, 758

(Sup. Ct., N.Y. Co. 2007) (denying newly discovered evidence claim, *inter alia*, because *defendant's* witnesses' ability to perceive the events at issue was inhibited by marijuana use.)

81. Second, Dale admitted that he lied to the police when he initially spoke to them and told them that he could not identify the shooter. This, according to Dale, was untrue, as he testified that he wanted to speak to Vernon Green's brother to see if he should exact street justice. Based on his trial testimony, he decided otherwise and later went back to the precinct and identified defendant as the shooter. Obviously, however, the fact that Dale had admitted being untruthful when first speaking to police bears on his overall credibility as a witness. See People v. Fuller, 50 N.Y. 2d 628, 639 (1980) (jury should be instructed that it could consider prior inconsistent statements on witness's credibility); People v. Islam, 22 A.D.3d 599 (2d Dept. 2005) ("Extrinsic proof tending to show a witness's bias, interest, hostility, or reason to fabricate should not be deemed collateral"). Moreover, Dale had an extensive criminal history and it is well-settled that a witness's past criminal history can be considered "as it implicated his general credibility." People v. Jackson, 74 N.Y.2d 787, 790 (1989).

82. New York Courts allow an appellate court to "substitute its own credibility determinations for those made by the jury in an appropriate case" when assessing weight of the evidence on direct appeal. People v. Carter, 158 A.D.3d 1105, 1112 (4th Dept. 2018), quoting People v. Delamota, 18 N.Y.3d 107, 116-17 (2011). Although this is not a direct appeal, defendant submits that, in light of the evidence now presented, this is an appropriate case for this Court to consider Dale's credibility issues when assessing the merits of this claim against the weight of the evidence at the original trial.

83. Finally, Thomas Dale testified that during the incident he was at least partially focused on the gun held by the perpetrator. Furthermore, like the other witnesses, he testified

that the room was lit by candlelight and that the incident only lasted "a few minutes" (T. 302). The problems of Dale's brief and drug-riddled identification of the defendant becomes even more focused now that recent research into the eyewitness identification has cast grave doubt on its reliability, especially in circumstances of stress and violence like those involved in the instant case. See, e.g., Thompson, Beyond A Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony, 41 U.C. Davis L. Rev. 1487 (2008) (explaining how eyewitness identifications are often subject to error); R.S. Schmechel, et al., Beyond the Ken? Testing Jurors Understanding of Eyewitness Reliability Evidence, 46 Jurimetrics J. 177, 195 (2006) (explaining that the characteristics of human memory "have profound implications" on the reliability of eyewitness identifications.)

84. This rising tide of development in science has led to better understanding of the topic of false identification and has been recognized by various courts both in this state and federally. See Perry v. New Hampshire, 132 S. Ct. 716, 737-39 (2012) (Sotomayor, J., dissenting) ("Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures." (internal citations omitted)); Young v. Conway, 698 F.3d 69, 78-85 (2d Cir. 2012) (drawing on social science literature to affirm grant of habeas relief for conviction obtained through unreliable eyewitness identification), *reh'g en banc denied*, 2013 U.S. App. LEXIS 8271, (2d Cir. 2013); State v. Henderson, 208 N.J. 208, 231, 27 A.3d 872 (2011) (acknowledging that "'[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in

this country'" (quoting State v. Delgado, 188 N.J. 48, 60-61, 902 A.2d 888 & n.6 (2006))); People v. LeGrand, 8 N.Y.3d 449, 452 (2007) (finding that, as a rule, "where [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications.)

85. On this note, defendant directs this court's attention to the case of People v. Abney, 2011 WL 2026894 (Sup. Ct., N.Y. Co. 2011), where a sister court conducted a Frye hearing and qualified experts on the reliability of eyewitness identification. The Abney case contains a comprehensive summary of the issues that compromise the reliability of eyewitness identification under circumstances like that of the instant case. Particularly relevant to the instant case, the court discussed the area of "weapon focus," which "is the phenomenon which occurs when, during the course of a crime, a witness is exposed to a weapon, and the witness focuses his or her attention on the weapon and not on the perpetrator's face, which impairs the ability of the witness to make a subsequent identification of [a] perpetrator." Id., *6 (quoting People v. Banks, 16 Misc. 3d. 929, 931, n.4 (Westchester Co. Ct. 2007; citing N.M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413 (1992).

86. The court also discussed the relevance of "event duration," which proposes that an identification is likely to be less accurate if the perpetrator is viewed only for a brief period of time. Id. (citing B.L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327 (2006). Included within this phenomenon is the idea that concomitant with a "particularly stressful event, we all tend to overestimate how long we were exposed to something." Id. at 6 n.10 (citing J. Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of*

Cross-Examination, 36 Stetson L. Rev 727, 754 (2007).

87. All of these factors play a role in the instant case, where the eyewitnesses viewed a violent, stressful situation where "weapon focus" and "event duration" all could have played a role in the reliability of their identification. Indeed, the New York Court of Appeals has recently noted that it was proper for a trial court to allow expert testimony on witness confidence - the lack of correlation between certainty and accuracy by identifying witnesses- and weapon focus in a case that involved a short, violent shooting like the incident at bar. People v. Berry, 27 N.Y.3d 10, 20-21 (2016).

88. Defendant submits that the expert report by Jennifer Dysart, PhD on the identification issues in this case highlight the fact that Dale's identification of Mr. Ramsey was unreliable based on the now-prevailing scientific evidence.

89. As stated below in Point IV in great detail, in her annexed report Dr. Dysart explains in great detail the widely accepted scientific basis for her final conclusion that:

> In this particular case, there exist several factors that could have affected witness accuracy: the witnesses had been smoking PCP prior to the witnessed event, there were poor lighting conditions, the effects of stress/arousal on memory, the presence of a weapon, the seeming mismatch between the witnesses descriptions of the perpetrators and the appearance of the defendant (e.g., scar), co-witness contamination, viewing mug-shots prior to viewing a non-blind photo array that had no pre-lineup warning that the actual perpetrator may or may not be there and where the quality of the fillers is unknown, the possibility of commitment effects for the identification of Mr. Ramsey in the lineup and at trial. In addition, the only witness to positively identify Mr. Ramsey from the photo array (and at trial) did not identify Mr. Ramsey in the first identification procedure in which Mr. Ramsey was shown (i.e., it was a repeated identification procedure). In summary, the combination of all these factors significantly decreased the likelihood that an accurate identification could have been made by witnesses in this case. (See Exhibit "V")

90. Based on the case law in New York State combined with an expert opinion directly concerning this case, it is thus clear that Dale's fleeting identification was riddled with all the problems that both science and courts have identified as problematic with eyewitness

identifications, such as weapon focus, event duration, and witness confidence, occurring during an event of extreme violence. Thus, it is also clear that this Court should consider this rising tide of scientific consensus regarding identification evidence in one witness cases such as this in analyzing the prejudice that the failure to disclose the arrest report had on defendant's trial. For all the reasons stated above, Dale's testimony was flawed and uncorroborated and evidence that a third party suspect had been identified and arrested at the very beginning of the investigation would have been the final nail in the coffin that would likely to have caused the jury to finally reject his credibility as a witness.

91. In fact, People v. Robinson, 133 A.D.2d 859 (2d Dept. 1987), relying on United States v. Bagley, 473 U.S. 667 (1985), the Second Department vacated a defendant's conviction under very similar circumstances where it found that the People had failed to turn over a statement of an exculpatory eyewitness. The defendant submits that the reasoning of the appellate division governs this case as well. In Robinson, it was established during a C.P.L. § 440.10 proceeding that during the investigation of the murder where both defendants were ultimately convicted, the police obtained a statement from a witness who implicated three other men as the perpetrators, and that the prosecution failed to disclose this information. Despite the fact that three other witnesses, including two who had known the defendants from prior interactions, identified the defendants as the perpetrators of the murder, the court ruled that:

> Nevertheless, we find that there is a reasonable probability that the result herein would have been different if the jury had heard testimony from a witness who, in effect, would have identified three other men as the actual perpetrators. At the very least, the defendants in this case, who were evidently unaware that this witness had given such exculpatory information, were "deprived of the opportunity to make an informed decision regarding the trial strategy that would have been in [their] best interests to pursue."

Robinson, 133 A.D.2d at 860.

92. Likewise, in the instant case, there is also a reasonable probability that the result of the trial would have been different since the jury would have heard that the co-defendant's brother was initially identified by an informant who would have also "in effect, would have identified [another assailant] as the actual perpetrator[]" of the murder. Indeed, the instant matter presents an even more compelling case in meeting the standard for reasonable probability as there was only one witness who identified defendant as participating in the robbery and as the actual shooter.

93. Thus, this Court should follow the ruling set forth in Robinson and find that Ramsey suffered from an inexcusable Brady violation and was unconstitutionally convicted because of it. Defendant submits that it was inexcusable for the prosecution or the police to withhold this statement where defense counsel asked for this type of information in his pre-trial motion and that the "reasonable possibility" standard articulated in Vilardi should apply at any eventual hearing. See also People v. Daly, 57 A.D.3d 914 (2d Dept. 2008) (applying "reasonable possibility" standard and finding that defendant was entitled to a new trial based on Brady/Rosario violations where the undisclosed notes of a witness's interview contained details about a robber's description that were missing from the witness's disclosed statement, closely mirrored part of another witness's description, and significantly varied from defendant's actual appearance). However, as detailed in Robinson, even if the Court utilizes the "reasonable probability" standard, defendants will still prevail on their claim. See also People v. Lumpkins, 141 Misc. 2d 581 (N.Y. Sup. Ct. 1998) (applying "reasonable probability" standard and holding that prosecution had duty to disclose information that a witness called police and reported that individuals other than defendant were the murderers and vacating conviction).

94. The People may contend, as was indicated to the undersigned by Lisa Perlman of

the CRU, that the arrest report is not Brady material because Officer Plunkett could not now offer any details about the description and identification of the two men he arrested outside of the bar after the incident. It does not matter, however, what Officer Plunkett says now *37 years after the fact*; rather, the issue is what information Officer Plunkett could have provided at the time when his memory would have been fresher.

95. Moreover, this contention ignores the fact that the failure to disclose the arrest report precluded defense counsel from conducting his own investigation. For instance, he could have requested that the 911 logs and transcripts be disclosed, which may have had the informant's original call and description of the perpetrator. Furthermore, defense counsel could have requested information that may have led to discovery of the actual informant, who could have been interviewed and his or her testimony presented to the jury. Indeed, there are a myriad of possibilities of what the result of a proper investigation could have revealed had the arrest report been disclosed. Any of these investigatory leads, however, have been lost to history due to the blatant and inexcusable denial of due process inflicted on defendant.

96. In short, the CRU's claim that Officer Plunkett's almost four decade lack of memory precludes a finding in defendant's favor is an absurd contention that has no bearing on whether a Brady violation occurred prior to the actual trial. Even if Officer Plunkett testifies under oath that he can't recall or offer any further details regarding the arrest report at this time, this Court must still find that a Brady violation occurred as "it can hardly be doubted that the requirement of due process underlying the Brady rule includes disclosure of exculpatory leads." People v. Lumpkins, 141 Misc. 2d 581, 588 (N.Y. Sup. Ct. 1988) (citations omitted). Indeed, in Lumpkins, the court held that prosecution had a duty to disclose information that a witness called police and reported that individuals other than defendant were the murderers and vacated the

conviction even though the witness did not appear at the hearing or did not provide an affidavit. Id. at 591.

97. The conclusion in Lumpkins is the same in this case, where it is impossible that the actual informant can be called at an evidentiary hearing as either the police or the People made sure of by failing to disclose the arrest report prior to trial and any leads have been lost with the passage of time. Furthermore as noted above, in Robinson, supra at 860, the court also found that defendants were "deprived of the opportunity to make an informed decision regarding the trial strategy" and the same is true in this case.

98. As evidence of a further effort to hide the fact that DeWayne Coleman had been arrested within an hour of the murder, Detective Sultan – who is listed on the previously withheld Arrest Report as interviewing DeWayne Coleman after his arrest, informed an attorney from the undersigned's office in a recorded telephone call that there would not only be the Arrest Report, but several other documents generated as a result of his arrest and subsequent interview. This exchange was as follows: See transcription at Exhibit "U".

Attorney:	The one ah regard, assisted by PO McInerney and you're listed as ah the detective who interviewed the prisoner.
Det. Sultan:	Ah yeah. Go ahead.
Attorney:	Would there've been other supporting documentation to go along with this?
Det. Sultan:	Of course.
Attorney:	'Cause we only…
Det. Sultan:	There has to be. There has to be. Do I have it? No. But there has to be. Because um, you know, he would do his DD5 and I would do my DD5 and mine would co-coincide with his.
Attorney:	OK yeah 'cause there, I mean, there's nothing else on this arrested individual.
Det. Sultan:	Right. Well, then there's documents that are, I wouldn't say missing but you don't have them.

Defendant in this case was not only deprived of the opportunity to learn about DeWayne Coleman being arrested within an hour of the crime, but was also deprived of the opportunity to learn what statements he gave to the officers who interviewed him.

99. Moreover, in People v. Roberts, 203 A.D. 2d 600 (1st Dept. 1994), the court reversed defendant's conviction where the People did not disclose a statement by a potential witness until the eve of trial. The statement by the witness Chapman contradicted the testimony of another witness named Pierre, who testified at trial for the prosecution. The court found that there was "no doubt that the People violated the principles of Brady v. Maryland by waiting until the eve of trial to disclose the content of the statement since the statement both contradicted Pierre's testimony and had direct bearing on his credibility." Id. at 602. The court further noted "that the delay in disclosing Chapman's statement deprived the defendant of a fair opportunity to locate the witness and *conduct an adequate investigation of the facts she recounted* to the prosecution." Id. (emphasis added). See also United States v. Washington, 294 F. Supp. 2d 246 (D. Conn. 2003) (holding, *inter alia*, that the prosecution's failure to disclose impeachment evidence resulted in "[d]efense counsel's inability to *investigate the circumstances* of this conviction for false reporting before the start of trial, plan his overall trial strategy based on the investigative results," and was thus prejudicial to this defendant and mandated reversal of his conviction).

100. As in Roberts, defendant in the instant case was deprived of a fair opportunity to conduct an adequate investigation to locate the informant and "conduct an adequate investigation" of the information that may have been derived from the report. In fact, the deprivation was even more acute since the report was not discovered until over thirty years after

the trial and was only discovered through pure happenstance when defendant's new attorneys were able to obtain them.

101. Thus it is clear that defendant suffered a severe Brady violation when the People failed in their solemn duty to disclose exculpatory information in all likelihood would have led to an acquittal. This Court should first order the People to finally disclose any other exculpatory information they possess regarding the arrest of DeWayne Coleman or other evidence favorable to defendant. Upon review of the documents and any other information made available by the People, this Court should then vacate defendant's conviction, or, in the alternative, order an evidentiary hearing, so that the full facts surrounding the People's failure to disclose exculpatory material can be explored.

POINT II

DEFENDANT SHOULD RECEIVE A NEW TRIAL DUE TO NEWLY DISCOVERED EVIDENCE

102. If the foregoing Brady issue raises serious doubt about the People's theory at trial that defendant Ramsey was the second perpetrator and the actual shooter during the October 31, 1981 murder of Vernon Green, then the newly discovered evidence presented in this motion blows a hole into the entire theory. This evidence consists first and foremost of the CRU's interview of the co-defendant in this case, Cole Coleman, who now states unequivocally that it was *his brother who accompanied him to the scene of the robbery* and murder of Vernon Green, and *not, as he had originally stated to the police, John Ramsey.* Not only does this corroborate the arrest report that indicated that DeWayne Coleman had been identified and arrested as one of the perpetrators of the murder, but it provides solid evidence that Ramsey had been wrongly identified in the first place and would surely have resulted in a different verdict at trial had it been introduced. Indeed, it is doubtful that defendant would have been tried at all.

103. Secondly, the CRU's interview of one of the original witnesses Nicole Carter, revealed information that significantly impeaches the testimony of the sole, identifying witness Thomas Dale – that he first tried to stop her from speaking with the police and that he was later accused of being an accomplice by the victim's brother – that would surely have discredited his testimony at trial and cast doubt on the original verdict.

104. CPL § 440.10(1)(g) contemplates statutory relief in situations exactly like the instant case. The statute provides that a court may vacate a defendant's judgment of conviction upon the ground that:

> New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

105. Traditionally, New York courts have applied a six-factor test to determine whether newly discovered evidence requires vacatur of a conviction:

> (1) It must be such as will probably change the result if a new trial is granted; (2) It must have been discovered since the trial; (3) It must be such as could have not been discovered before the trial by the exercise of due diligence; (4) It must be material to the issue; (5) It must not be cumulative to the former issue; and, (6) It must not be merely impeaching or contradicting the former evidence.

People v. Tankleff, 49 A.D.3d 160, 179 (2d Dept. 2007), citing People v. Salemi, 309 N.Y 208, 215-216 (1955).

106. However, as the Second Department recently held in People v. Hargrove, 162 A.D.3d 25, 2018 WL 1833080, 19 (2d Dept. 2018), not all these factors are of equal weight, because "only the first three criteria... have any explicit basis in the statute." The court noted

that application of the remaining three factors, particularly the "impeaching or contradicting" factor, produced contradictory results, and that "[i]ndeed, it has been observed that any evidence that would warrant a new trial would almost necessarily tend to impeach or contradict the evidence presented by the People at trial." Id., 22. Therefore, "the courts should only construe the core elements of the statute as strict legal requirements," and "the remaining three criteria should be used to evaluate the ultimate issue of whether the new evidence would create a probability of a more favorable verdict." Id. Thus, whether new evidence is material, non-cumulative, and/or "merely impeaching or contradicting" should be used "in assessing the probable impact of the new evidence" rather than as a condition in itself. Id.

107. Additionally, in Tankleff, supra, the Second Department ruled that the inquiry into whether the newly discovered evidence would have created the probability of a more favorable result a trial is "dispositive" of the hearing court's determination of a CPL § 440.10(1)(g) motion. Id. at 180. The Tankleff court also emphasized that the hearing court is "obligated to conduct a critical analysis of the evidence" and cannot "merely engage in the mechanical exclusion of such evidence." Id. Moreover, the court held that any examination of diligence must be sensitive to the fact that defendants often have to investigate their case over time and that, in some cases, evidence may be considered "new" if it was known to the defense but unavailable. See id.

108. Furthermore, the court "must view and evaluate all of the evidence in its entirety." Id. Thus, the court further emphasized that "[i]n its determination as to the impact of evidence unavailable at trial, a court must make its final decision based on the likely cumulative effect of the new evidence had it been presented at trial" Id. (citation omitted).

A. The Cole Coleman Interview.

109. Here, the Cole Coleman interview clearly meets the Hargrove/Tankleff standard. As to the most important of the statutory factors, there can be no doubt that Coleman's testimony, if offered at a new trial, would likely change the outcome. As the Hargrove court stated, assessment of this factor must be weighed against "the relative strength of the People's evidence of guilt," see Hargrove, 2018 WL 1833080, *26, citing People v. Rensing, 14 N.Y.2d 210, 214 (1964), and in this case, the proof against defendant Ramsey was far from overwhelming.

110. To begin with, Ramsey was identified by one and only one witness – Dale – who saw him only for a brief time[8] and had admitted to smoking angel dust and marijuana shortly before the incident. Dale's identification is also compromised by the well known "weapon focus" effect, in which strangers faced with a weapon-wielding assailant focus on the weapon rather than the assailant's face, see People v. Banks, 16 Misc. 3d 929, 931 n.4 (Co. Ct. 2007), and by recent scientific literature bearing on the unreliability of stranger identifications in general, see id. and cases cited therein. As explained in Point I above, these and other factors cast doubt on Dale's overall credibility as a witness and when combined with the new evidence contained in this motion, this court can "substitute its own credibility determinations for those made by the jury in an appropriate case" when assessing weight of the evidence, see People v. Carter, 158 A.D.3d at 1112, and thus should consider defendant's new evidence in light of Dale's dubious credibility.

111. Dale's testimony represents the sole identification evidence against defendant

[8] Dale's testimony was that his encounter with Ramsey lasted only a few minutes (T. 302) and he and the other witnesses testified that the room was lit only by candlelight, perhaps only a single candle.

Ramsey. For sure, other witnesses testified concerning the terrifying details of the robbery and murder, but none of them identified Ramsey as being one of the perpetrators, or even present in the bar beforehand when the group initially was introduced to Cole Coleman and his accomplice and discussed procuring angel dust.

112. The remainder of the evidence against defendant consisted of testimony from three witnesses that the attackers identified themselves as "Coke and Ramsey" when they announced themselves at the door of the abandoned apartment before entering. However, the new evidence of Coleman's interview undermines this aspect of the People's case as well, as Coleman admitted that he was the one who stated the name "Ramsey" at the door and that he did so because of some simmering resentment over a woman whom Ramsey wooed over from Cole.

113. Although it may seem illogical to implicate someone in this type of terrible crime because of such a seemingly petty reason, Coleman stated that "[a]t the time it happened I was smokin' Angel Dust, seemed like a good thing to do. I'm, I'm a kid, I'm wild, I'm smokin' Dust, I'm shootin' people. You know what I'm sayin'? That's what I do." See Exhibit L at 1-2. In light of this explanation, this Court should find that logic is not the best lens to judge the mindset of what was clearly a desperate and drug-addled mind. Moreover, it has been recognized that "the co-conspirator exception to the hearsay rule rests upon the shakiest of theoretical foundations" and that its reliability "is in no way assured by the nature of the declarations falling within the exception.' People v. Persico 157 A.D.2d 339, 347 (1st Dept. 1990). Thus, this remaining evidence can only be considered weak and certainly not sufficient to maintain the conviction.

114. Moreover, the prosecutor's theory in this case originated from Cole Coleman's drug-addled accusation after he was first arrested with his brother soon after the incident. It was established at the pre-trial Wade hearing that it was at this time where Cole Coleman, and

not any of the victims, was the first person to implicate defendant in this case and led to defendant's photograph being included in the photographic arrays shown to the victims. Thus the entire genesis of the case against defendant came from the actual perpetrator of the crime who was trying to protect his brother. The result was that rather than follow investigatory leads pointing towards DeWayne Coleman, the police were directed away from those leads by the suspect who had the most interest in steering the police away.[9] The entire core of the case against defendant was therefore rotten, and had the jury known about this manipulation at the start of the investigation, the entire tenor of the case would have changed and the result would have likely been an acquittal for the defendant. See e.g, People v. Cosey, 54 Misc.3d 1208(A), *21 (N.Y. Sup. Ct. 2016) (finding *Brady* violation where evidence that perjured grand jury testimony of one eyewitness may have led jury to believe that another eyewitness lied as well in the grand jury and changed in testimony at trial as "coincidence of these events *looks* suspicious, and it would have provided fodder for the defense.")

115. Consequently, in light of both the weakness of the affirmative proof against Ramsey and the existence of the manipulation at the very initial stages of the investigation casting doubt on the prosecution's narrative, testimony or other evidence that the co-defendant's brother was the actual co-perpetrator of the robbery and murder at 540 East 22nd Street and exonerating defendant would have had a powerful effect on the jury and would, if credited, have likely led to acquittal.

116. Furthermore, the Hargrove court's admonition that the final three Salemi factors are to be used in assessing the impact of the new evidence, see Hargrove, supra, at *22, also

[9] Indeed, in his interview with the CRU, Cole Coleman indicates that his interest all along was to protect his brother's reputation, stating "I didn't want my mother to lose both of us and then find out that I plead guilty, my brother gets killed. You know what I'm sayin'? It was a hard blow. See Exhibit L at 2-3.

militates in favor of vacating defendant's conviction. Plainly, eyewitness testimony identifying Cole Coleman's accomplice as someone other than Ramsey is material to the issues before the jury, and such testimony is also not cumulative to any proof presented at trial given that no defense case was put on and no exculpatory testimony was offered. Moreover, Cole Coleman's statements to the CRU – made at a time when he had not seen Ramsey in decades and had no reason to lie for Ramsey – are new, directly exculpatory testimony rather than merely evidence that impeaches a trial witness.

117. Notably, in this regard, it is not this Court's role to pass on Cole Coleman's credibility as a witness at this time, but instead to consider whether, in light of the weak case against defendant to begin with, a reasonable jury would *probably* find the witness' testimony to be of sufficient weight to constitute proof beyond a reasonable doubt.[10] "The credibility of a witness and whether his testimony is to be believed was not a matter for the [440.10 motion] court but is for the jury on retrial." DeCanzio v. Kennedy, 67 A.D.2d 111, 119 (4th Dept. 1979). Indeed, courts have consistently held that even the testimony of flawed witnesses is sufficient to require CPL § 440.10 relief where, if those witnesses are believed by a jury, their testimony will result in acquittal. See People v. Bryant, 117 A.D.3d 1586, 1589 (4th Dept. 2014); People v. Wong, 11 A.D.3d 724, 725-26 (3d Dept. 2004); People v. Maynard, 183 A.D.2d 1099, 1103 (3d

---

[10] Indeed, much of Coleman's recollection of the events is consistent with the trial testimony in any event. Although Coleman's statement that he was in fact the actual shooter differs from the witnesses' testimony at trial that his co-perpetrator pulled the trigger, many other aspects of his testimony comport with the original witnesses' testimony and the other records in this case. For instance, Coleman confirmed that Vernon Green was shot after he pulled the gun, see Exhibit L at 2,4,15, which is consistent with trial testimony that Green grabbed the gun while resisting and was then shot. Coleman also recounted that the apartment was dark and that after the shooting, the "dudes was jumpin' out the window," see id. at 14, 16, 17-18, which is corroborated by witness testimony that the apartment was illuminated by candlelight and that Dale and Anderson fled through a window after the shooting.

Dept. 1992). For instance, in People v. Bryant, 117 at 1588-89, the court found that where, as here, "the identification evidence against defendant was weak," the testimony of a newly discovered witness warranted a new trial despite the existence of considerable "issues concerning [her] credibility." Likewise, in Maynard, even though the dissenting judge characterized the newly discovered evidence as "replete with inconsistencies, errors, vagaries and speculation" and although that evidence contradicted the testimony of other disinterested witnesses, the majority found it sufficient to satisfy Salemi, noting that the witnesses for the prosecution at trial were also flawed. See Maynard, 183 A.D.2d at 1103.

B. The Evidence was Unavailable at Trial and Could Not Have Been Presented at Trial with Due Diligence.

118. Finally, as to the remaining two Salemi factors, it is plain that Coleman's interview was discovered since the trial, and additionally, that his testimony could not have been presented at trial via the exercise of due diligence. To begin with, Cole Coleman was only allowed to accept a plea several weeks after Ramsey's conviction. Not only was it impossible for Ramsey to know what Cole Coleman knew about the incident prior to trial, there is no way he could have found it out. It is well settled that the rubric of "newly discovered evidence" extends not only to evidence that was actually unknown but to evidence that was *unavailable* at trial due to Fifth Amendment privilege.

119. In People v. Beach, 186 A.D.2d 935, 936 (3d Dept. 1992), for instance, the Third Department found that an affidavit from a witness who had exercised his Fifth Amendment privilege against self-incrimination at the time of trial could constitute newly discovered evidence. The Fourth Department echoed that holding in People v. Staton, 224 A.D.2d 984 (4th Dept. 1996). Likewise, in People v. Stokes, 83 A.D.2d 968, 968-69 (2d Dept. 1981), the court

found that a witness affidavit was newly discovered evidence even though the defendant's attorney knew of and spoke to the witness before and during trial, because he was unable to obtain a statement from the witness until afterward. Critically, the court in Stokes said that "it is not that the 'witness' is newly discovered, but it is the fact that since the trial, the witness has, for the first time, made statements which makes such evidence newly discovered." Id. at 969; accord People v. Rivera, 119 A.D.2d 517, 520 (1st Dept. 1986).

120. Here, it is clear that Cole Coleman at the time of Ramsey's trial was still under indictment and would have asserted his Fifth Amendment privilege if called to testify. Therefore, under Beach and the other cases cited above, his statements are "newly discovered" even though Coleman's existence was known. Moreover, given that defendant's trial was fully complete before Coleman pled guilty to the murder of Vernon Green and lost his Fifth Amendment privilege, no amount of diligence could have secured Coleman's attendance at trial.

121. To the extent that the People may claim lack of due diligence *since* the trial, defendant notes that a CPL § 440.10 motion cannot be denied on the ground of laches unless the People are able to prove both *unreasonable* delay and prejudice. See People v. Bell, 179 Misc. 2d 410, 416 (Sup. Ct., N.Y. Co. 1998) (reaching the merits of a challenge to a 23-year-old conviction); see also People v. DiPippo, 82 A.D.3d 766 (2d Dept. 2011) (vacating 15-year-old conviction as a result of defendant's fourth 440.10 motion). Here, there is no prejudice to the People, nor is any delay "unreasonable" in light of (a) the fact that defendant's direct appeal was pending until June 29, 1987 and might have rendered any need for post-conviction relief moot; and (b) the fact that defendant as well as Coleman were incarcerated, making it prohibitive for Ramsey to contact him before he was released in 2015 and retained counsel some time thereafter. Even then, Coleman was uncooperative and would not speak with the undersigned. Indeed, even

in his interview with the CRU on August 1, 2018, Coleman made clear that he would have preferred not to speak about the incident, stating at various points that "I didn't want to come here," that "I'm about to leave," and that he "didn't trust y'all people at all," see Exhibit L at 3, 4-5, 6, 7, 16. Thus it is clear that this new evidence from Cole Coleman could not have been procured even with due diligence since the trial and only was obtained with the intervention by the People, through the work of the CRU, themselves.

122. Courts have repeatedly held that when addressing the due diligence requirement, it is necessary to keep in mind "the practicalities of the situation" and the "limited resources generally available to defendant." People v. Hildenbrandt, 125 A.D.2d 819, 821 (3d. Dept. 1986); People v. Tankleff, 49 A.D.3d 160 (2007); see also People v. Chi Keung Seto, 162 Misc.2d 255, 260 (Sup. Ct., N.Y. Co. 1994) (defining due diligence as "[s]uch a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; *not measured by any absolute standard*, but depending on the relative facts of the special case") (emphasis added). Moreover, Tankleff, supra, emphasized that it often takes time to locate and gather evidence of innocence. See Tankleff, 49 A.D. 3d at 180 (finding defendant did not act with lack of due diligence as it took time to get enough witnesses to come forward); accord People v. Lemus, 234 N.Y.L.J. 80 (Sup. Ct., N.Y. Co. 2005) (In a 15 year old case, due diligence requirement was met where new evidence included witness testimony that was unavailable at the time of trial; People v. Bermudez, 2009 WL 3823270, 10-11 (Sup. Ct. N.Y. Co. 2009) (finding due diligence requirement was met in 18 year old case where, *inter alia*, witness had moved out of state). Accordingly, this Court should reject any timeliness challenge that may be asserted in the People's opposition papers and should thus find that Cole Coleman's interview with the CRU

constitutes newly discovered evidence and accordingly vacate his conviction on those grounds.

C. The Nicole Carter Interview.

123. Finally, the same holds true concerning Nicole Carter's statements regarding Thomas Dale that she volunteered during her interview with the CRU. These statements obviously could not have been discovered either before or even since the trial since she added information that she had not mentioned before in any of her previous statements or trial testimony. First, she stated that both Dale and Anderson approached her in the precinct that night of the shooting, and essentially told her not to speak with the police and that they would take care of it. See Exhibit "O" at 19. Although technically not constituting an offense of witness tampering in the fourth degree pursuant to P.L.¶ 215.10(a) since, at the time, an action or proceeding had not commenced yet against either defendant, see People v. Hasan, 185 Misc 2d. 301, 305-06 (N.Y. Crim Ct. 2000), Carter was clearly an important witness in any potential proceeding. Thus, Dale's words to her are tantamount to witness tampering. He had testified at trial that he was initially reluctant to cooperate with the police until he discussed retribution with Vernon Green's brother, but the fact that he was discouraging other people from cooperating before he even spoke to the brother puts his explanation in a different light and would have been fodder for cross-examination.

124. This different light comes into focus as Carter additionally volunteered to the CRU that when she and Dale went to see Vernon Green's brother to tell him about the murder, the brother immediately accused Dale of being involved in some fashion. See Id. at 21. Based on this new information, it is clear that Dale was suspected by Green's brother of playing a role in the murder and thus had an incentive to identify someone in order to clear himself of that cloud of suspicion. At very least, defense counsel could have argued that Dale had an incentive

to lie and concomitantly to get Carter to lie as well and this dual impeachment material would have devastated what was left of Dale's remaining credibility. As argued extensively above, Dale was the only identifying witness and his credibility rested on the thinnest of reeds and thus further information undermining his testimony was clearly not collateral to main issue in this case, i.e, whether his identification was true and trustworthy. See People v. Islam, 22 A.D.3d 599 (2d Dept. 2005) ("Extrinsic proof tending to show a witness's bias, interest, hostility, or reason to fabricate should not be deemed collateral"). Thus it is clear that there would probably have been a different verdict had this information regarding Dale been available to the jury.

125. It is thus clear that these new revelations from Carter constitute significant impeachment of Dale's trial testimony. As explained above, the Second Department in People v. Hargrove, supra, at 19, has now definitively ruled that the last three Salemi factors, including the criteria that the evidence not be "merely impeaching," should be used "in assessing the probable impact of the new evidence" rather than as a condition in itself. Id. Even before Hargrove, it was settled law that a 440.10 motion court could only deny relief on the basis of "merely contradicting or impeaching" where the newly discovered evidence "merely impeaches or contradicts [a trial witness] *on a nonmaterial point*." See People v. Welch, 281 A.D.2d 906 (4th Dept. 2001) (emphasis added). Where, as here, new evidence "suggests that the victim's testimony, which is the only evidence supporting the... convictions, may have been fabricated or, at the very least, mistaken," it cannot be considered merely impeaching. People v. Madison, 106 A.D.3d 1490, 1493 (4th Dept. 2013); see also People v. Lackey, 48 A.D.3d 982, 983-84 (3d Dept. 2008) (a victim's confession to having filed a false complaint of a sexual assault in another case "would not *merely* impeach the victim, but might well have altered the focus of the entire case") (emphasis added); People v. Gurley, 197 A.D.2d 534, 535-36 (2d Dept. 1993) (police report

showing that the victim was shot by a different caliber bullet than was testified to at trial was not merely impeaching).

126. Thus, it is well settled that relief on the ground of newly discovered evidence is warranted where, "while [the new evidence] may be said to be impeaching and contradictory, it is not merely so." Bernstein v. Schneider, 72 Misc. 479, 480 (City Ct. 1911). And that is certainly the case here. Moreover, it is certainly material to the main issue in the case – whether the sole identifying witness was truthful in his testimony and is not cumulative to any evidence presented at trial – as there was no suggestion that Dale tried to prevent others from cooperating or was suspected of being involved himself at trial. Thus Carter's new statements to the CRU amply clears the Salemi threshold and renders it more likely than not that the outcome of a new trial featuring these revelations would be more favorable to Ramsey.

POINT III

THIS COURT MUST HOLD AN EVIDENTIARY HEARING ON BOTH THE BRADY CLAIM AND THE NEWLY DISCOVERED EVIDENCE CLAIM

127. At minimum, this Court cannot summarily dismiss this motion or make credibility determinations without conducting a hearing. First, it should be noted that this is defendant's first C.P.L. § 440.10 motion and thus none of the procedural bars that normally apply to successive post-conviction litigation pertain to the instant motion. Moreover, the governing statute, CPL 440.30, specifically requires an evidentiary hearing where, as here, defendant's allegations are not insufficient as a matter of law to establish the alleged violation (CPL 440.30 [4] [a],[b]); are not "conclusively refuted by unquestionable documentary proof" (CPL 440.30 [4] [c]) or "contradicted by a court record or other official document," or "made solely by the defendant and... [without support] by any other affidavit or evidence" (CPL 440.30 [4] [d] [i]);

and where "there is *no reasonable possibility* that [they are] true." (CPL 440.30 [4] [d] [ii]). See People v Baxley, 84 NY2d 208, (1994) (emphasis added).

128. Thus, courts have repeatedly held that it is error to deny a CPL § 440.10 claim without a hearing where the defendant's evidence is facially plausible and establishes a *prima facie* entitlement to relief. In People v. Sherk, 269 A.D.2d 755 (4th Dept. 2000), for instance, the court held that the defendant's "sworn statement raise[d] a factual issue that requires a hearing" despite the absence of other record support. see also People v. Coleman, 10 A.D.3d 487 (1st Dept. 2004) (finding that summary denial of defendant's motion to vacate a conviction was error where the motion was fully supported by affidavits of alibi witnesses which defense counsel allegedly failed to call, which contained substance of the witness's proposed testimony); People v. Shields, 205 A.D.2d 833, 834 (3d Dept. 1994) (although motion was supported only by affidavits of defendant and co-defendant, "it cannot be said that this alone is sufficient, in view of all the attendant circumstances, to support a finding that there is "no reasonable possibility" that defendant's claims are true"); People v. Beach, 186 A.D.2d 935, 936 (3d Dept. 1992) (where affidavit was not contradicted by the record and "it cannot be said that "there is no reasonable possibility that [it is] true,", County Court was not permitted to reject the affidavit as facially incredible").

129. More recently, in People v. Jenkins, 84 A.D.3d 1403, 1407 (2d Dept. 2011), the Court held that it was error to deny a CPL § 440.10 motion based on a witness recantation without an evidentiary hearing where the recantation "is not incredible on its face." Furthermore, the Jenkins court ordered a hearing since the record did not indicate that the recanting witness "had a motive to lie in his recantation or that he had any relationship with the defendant which would cause him to change his testimony." Id. at 1408.

130. In the instant case, none of the evidence presented by defendant is incredible on its face. The arrest report is obviously genuine - Mr. Vechhione has attested it was not disclosed to him and Lisa Perlman herself told the undersigned that it was not disclosed. Moreover, Cole Coleman's admission that his brother, and not Ramsey, was his accomplice is similarly not incredible on its face. Indeed, this admission is corroborated by the undisclosed arrest report itself, which demonstrates that his brother was arrested along with Cole after being identified as the perpetrators by an informant. Moreover, as the Tankleff court explicitly found, the mere fact that Cole Coleman has a criminal record does not and cannot warrant the summary rejection of his testimony. See Tankleff, 49 A.D.3d at 181 (noting that "[a] witness's 'unsavory background[]' does not render his or her 'testimony incredible as a matter of law' and further noting that the People 'use [such witnesses] all the time'") (citations omitted).

131. Moreover, Nicole Carter's interview is similarly sufficient in order to merit a hearing. It is clear from the record that Carter does not know Ramsey and thus has no motive to lie or doesn't have a pre-existing relationship with defendant that would influence her decision to testify now. In fact, since Carter is a disinterested witness, her affidavit and potential testimony is even more credible and deserving of consideration than another witness who might be more emotionally invested in the outcome. See Pavel v. Hollins, 261 F.3d 210, 224, quoting Williams v. Washington, 59 F.3d 673, 862 (7th Cir. 1995) ("In a credibility contest, the testimony of neutral, disinterested witnesses is exceedingly important").

132. It is clear that the mountain of evidence defendant has presented would have provided a powerful counterpoint to the prosecution's case that was based on the thinnest of reeds – one drug-addled eyewitness who had lied to police. Given the stakes in this case, where a man has been imprisoned for the best years of his life and still suffers from the burdens

attendant with being a convicted murderer, this court should hold a hearing where the credibility of both the Brady issue and the newly discovered evidence issue can be examined and the truth of what happened so many years ago may finally be determined.

POINT IV

DEFENDANT IS ENTITLED TO A HEARING ON ACTUAL INNOCENCE

133. Finally, even if this Court were to find that the evidence attached to this motion either does not constitute a Brady violation or is not newly discovered – which it is, see Point I-III above – it should nevertheless determine that Ramsey is entitled to a hearing on the issue of whether he is actually innocent of murdering Vernon Green.

134. In People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014), the Second Department took the heretofore unprecedented step of holding that a defendant may present a freestanding actual innocence claim under the New York State Constitution pursuant to CPL § 440.10(1)(h), despite the fact that some or all of the evidence presented to support the claim may have been subject to a procedural bar. Writing for the unanimous majority, Hon. Hinds-Radix thoroughly examined the trend in Federal, sister state and lower New York courts allowing free-standing actual innocence claims and justly concluded that:

> The Due Process Clause in the New York State Constitution provides "greater protection than its federal counterpart as construed by the Supreme Court" (*People v LaValle*, 3 NY3d 88, 127, 817 N.E.2d 341, 783 N.Y.S.2d 485; *see People v Harris*, 77 NY2d 434, 439-440, 570 N.E.2d 1051, 568 N.Y.S.2d 702). Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution (*see* NY Const, art I, § 6; *see People v Cole*, 1 Misc

> 3d at 541-542). Moreover, because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments (*see* NY Const, art I, § 5; *People v Cole*, 1 Misc 3d at 541-542). Thus, we conclude that a freestanding claim of actual innocence may be addressed pursuant to CPL 440.10(1)(h), which provides for vacating a judgment which was obtained in violation of an accused's constitutional rights (*see People v Caraway*, 36 Misc 3d 1224[A], 960 N.Y.S.2d 51, 2012 NY Slip Op 51466[U]; *People v Wheeler-Whichard*, 25 Misc 3d at 702).

People v. Hamilton, 115 A.D. 3d at 26.

135. In Hamilton, the court further found that "[at] [a] hearing, all reliable evidence, including evidence not admissible at trial based upon a procedural bar [...] should be admitted. Id. at 28-29. Furthermore, in Hamilton, the court established that the appropriate standard of proof to establish an actual innocence claim is clear a convincing evidence. Id., at 27. Moreover, the Hamilton court concomitantly found that "a prima facie showing of actual innocence is made out when there is "a sufficient showing of possible merit to warrant a fuller exploration"' by the court. Id. at 27-28, citing Goldblum v Klem, 510 F3d 204, 219 (3d Cir. 2007); Bennett v United States, 119 F3d 468, 469 (7th Cir. 1997). Finally, Hamilton was cited with approval by the Fourth Department in People v. Conway, 118 A.D.3d 1290 (4th Dept. 2014) when it found that an actual innocence claim was cognizable under C.P.L. 440.10(h)

136. In the instant case, defendant respectfully submits that the weakness of the trial evidence, the exculpatory evidence that was not disclosed to defendant's counsel, and the new exculpatory evidence discovered in the CRU investigation – all of which are detailed above and which defendant will not belabor the record by repeating at length here – are sufficient to "warrant a fuller exploration" on the issue of whether defendant is actually innocent.

137. In addition to the aforementioned Brady material and newly discovered evidence,

defendant has recently obtained a report by identification expert Dr. Jennifer Dysart that puts the final nail in the coffin regarding the identification of John Ramsey as the perpetrator of this crime. Annexed hereto at Exhibit "V" is the expert report of Dr. Dysart, who casts grave doubt on the identification of John Ramsey as the perpetrator of this crime. Dr. Dysart bases her conclusions on the following summary of the facts relevant to the eyewitness evidence:

> In the early morning hours of October 31, 1981, Mr. Vernon Green was shot and killed in his former apartment in Brooklyn. There were five witnesses to shooting inside the apartment: Thomas Dale, Glen Anderson, Nicole Carter, Cherisse Smith and Nilsa Crosby. Of these witnesses, only one witness, Mr. Dale, identified Mr. Ramsey from a photo array and at trial. None of the other witnesses identified Mr. Ramsey as one of the shooters from photo arrays that were conducted in this case. Further, none of the witnesses, including Mr. Dale, were shown a live lineup in relation to this case.
>
> The circumstances surrounding the witnesses' opportunity to view the two perpetrators were less than ideal. All of the witnesses had been smoking PCP prior to the two perpetrators, who announced themselves as "Coke" and "Ramsey", coming into the apartment that was either dark or dimly lit by a candle. None of the five witnesses had seen the two men before this evening, where they possibly interacted with the two perpetrators at a different location approximately 15-40 minutes before the shooting.
>
> On the morning of the shooting, the witnesses went to the precinct and were shown photographs at the Catch Unit. It is unclear how many photographs and which photographs were viewed by witnesses in this procedure. It is possible that Mr. Ramsey's photograph was viewed by one or more witnesses at the Catch Unit. According to the Pretrial Hearing Testimony of Detective Fogarty, only one witness, Cherisse Smith, selected Mr. Ramsey's photograph from the Catch Unit however there are no records available regarding the details of this procedure or the alleged selection of Mr. Ramsey. Further, Ms. Smith did not identify Mr. Ramsey from the photo array (later that day) and testified at trial that the person alleged to be Ramsey was ***not*** in the courtroom.
>
> According to Detective Fogarty's testimony, he selected photos from a file where the individuals depicted in the photographs had last names that started with "R" and other photos were selected from the Catch Unit. It is not clear whether the names of the individuals were visible to the witnesses. It also appears that there was no attempt to select fillers that matched the witnesses' description of the perpetrator they saw or to match the other individuals with the actual appearance of Mr. Ramsey. Further, no DD5 is available to review that would have the information about the fillers (age, race, height, weight, scars, etc.) and thus the suitability of the fillers is unknown.
>
> Neither Nicole Carter nor Glen Anderson was asked about any of the identification

procedures they participated in, nor were they asked to make an in-court identification of Mr. Ramsey at trial.

138. Dr. Dysart systematically laid out the following eyewitness factors that she has identified as being relevant to the facts of this case involving the identification of Mr. Ramsey by Mr. Dale: (Below is a synopsis with some citations footnotes removed – see full analysis of Dr. Dysart at Exhibit "V")

1. Effects of limited opportunity to observe during the crime

During his trial testimony, Mr. Dale on cross-examination (TT. P 309) was asked about his in-court identification of Mr. Ramsey:

Q: Then you looked over and you said Mr. Ramsey is the guy who did it, correct?
A: Yes.
Q: Okay. That's based upon the fact you saw him after smoking reefer and angel dust that night; isn't that correct?
A: Yes.

On page 254 of the Trial Transcript, Mr. Dale confirmed that the entire group (of witnesses) were smoking PCP in the apartment just before Mr. Green was shot. In addition, Mr. Dale testified that he was looking at the gun when the two perpetrators entered the dimly lit apartment.

Common sense might suggest that even a brief opportunity to view someone allows us to form a mental snapshot of someone, but research shows that the amount of time that a witness views a perpetrator is positively associated with the witness's ability to subsequently identify him. Further, what is critical with respect to accuracy is the witness' opportunity to see the perpetrator(s) *at the time of the event*. Factors such as poor lighting and weapon focus, both of which are relevant to this case, during an event can also serve to reduce the opportunity to view a perpetrator's face and features. In fact, multiple witnesses and Mr. Cole Coleman in an interview with CRU in 2018 stated that at the time of the shooting that the apartment was pitch dark, dark or was lit by perhaps a single candle. Thus, the ability for witnesses to be able to distinguish the details of a person's face given these witnessing conditions would have been significantly reduced.

With respect to the effects of exposure length on eyewitness accuracy, Shapiro and Penrod (1986) found a systematic relationship between exposure time and identification accuracy. Since this meta-analysis, others (e.g., Bornstein, Deffenbacher, Penrod, McGorty, & Kiernan, 2012; Memon, Hope & Bull, 2003) have replicated the positive correlation between the amount of exposure to a person's face and identification accuracy.

To my knowledge, there are no scientific studies using human subjects on the effects of smoking PCP on memory for faces, as PCP experiments are typically conducted using animal subjects. Nonetheless, in humans PCP is a known hallucinogenic and mind-altering drug that can distort a person's sense of reality and perception. It is considered to be a dissociative drug that can lead to distortions in vision, colors,sounds, etc. Therefore, it is certainly possible, and probably likely, that the witnesses' abilities to perceive and encode the events of the shooting accurately were (significantly) diminished by having smoked PCP before the shooting.

From the description of events listed above, it is obvious that witness Mr. Dale's opportunity to clearly see the faces of the perpetrators was extremely limited. Coupled with the additional factors and issues below, these conditions likely significantly impaired his ability to observe and encode the details of the event and persons involved.

2. The effects of stress/arousal on memory

It stands to reason that the intrusion, argument and struggle between the victim and two perpetrators, followed by a gunshot, would have been a stressful or arousing event to witness. In fact, Mr. Dale and Mr. Anderson jumped out of the apartment window as soon as the gun was fired.

On page 304 of the Trial Transcript, Mr. Dale was asked the following:

Q: Okay. But the reason that you went out that window was because the gun was pointed in your direction; is that right?
A: It was coming back toward us.
Q: You were frightened? A: At the time, yes.
Q: Did you think you were going to be killed or shot? A: Yes. It didn't make no sense both of us getting shot.

Other witnesses immediately hid or tried to hide after the gun was fired, and Mr. Anderson fled out of the 2nd story window as well, just prior to Mr. Dale fleeing through the window. (TT. P. 257)

In summary, based on Mr. Dale's testimony and the facts of the case, the effects of stress/fear/arousal/ trauma likely further reduced his ability to observe and encode the details of the event and the perpetrator's faces.

3. Effects of weapon presence

Mr. Dale testified that he looked at the gun during the short time the two perpetrators were in the dark apartment, TT. P 302:

Q: Were you looking at them at the time or were you looking at the gun?
A: I was looking at them.
Q: Even though you told –
A: and the gun.

Q: Even though you told detectives all you looked at was the gun; isn't that right?
A: Yes.

The phenomenon where witnesses look at a weapon during an event is referred to as the "weapon focus effect". As the witness focuses on the weapon, his ability to adequately remember and later recall details such as characteristics of the perpetrator is lessened. Researchers have assessed the ability of eyewitnesses to recall various crime details in an attempt to establish the parameters of weapon focus effects on perception and memory. This research was first reviewed in a meta-analysis published by Steblay in 1992. The review included 19 studies with a total sample of 2082 participants. The weapon focus effect was statistically significant and demonstrated impairment of identification accuracy. A more recent meta-analysis confirms the findings of the Steblay 1992 report (Fawcett et al., 2012). In summary, although it can certainly be true that a witness pays close attention to a *weapon*, the research results indicate that attending to the weapon impairs memory for the characteristics of the person(s) wielding the weapon(s) and reduces eyewitness description and identification accuracy, especially when the opportunity to see the perpetrator is short or limited (e.g., due to poor lighting conditions or a short amount of exposure to the perpetrator).

4. Description "accuracy"

In the files I received, there are two DD5s that describe Mr. Ramsey's appearance and physical characteristics at the time of his arrest. Of particular note is that both documents describe in detail under the "Physical Peculiarities" section a large (5.5"-6") scar on Mr. Ramsey's forehead. Yet ***none*** of the witnesses in this case described either of the perpetrators as having a 6" scar on his forehead. The lack of mention of a scar on one of the perpetrators by five separate witnesses, including Mr. Dale, would be extremely unlikely if one of the perpetrators actually had this characteristic. In addition, Mr. Dale testified at the Grand Jury that he had interacted with the individual alleged to be Mr. Ramsey for approximately 10-15 minutes at a bar before the shooting. And so the question remains as to why, during these observations, he did not notice a 6" scar on the alleged perpetrator's forehead.

In the early hours of the investigation, Detective Fogarty had a description of the person they were looking for, however it is unclear what this description was. In his interview with Cole Coleman in the morning of October 31, 1981, Detective Fogarty testified to the following (Pretrial Hearing Transcript, P. 10-11):

Q: Prior to his arrest being voided, did you have a conversation with Mr. [Cole] Coleman?
A: Yes, I did.
Q: Were you provided any name that you used during the course of your investigation in this homicide?

A: After describing the person that we were looking for, he told me that the fellow's name was John Ramsey.

Further, there are gross discrepancies in the descriptions of the *actions* of the two individuals when they entered the dim apartment. In 2018, however, Cole Coleman admitted to the CRU team to being the person who took the gun from the "first" perpetrator who entered and then shot Mr. Green. This is consistent with Cherisse Smith's interview with law enforcement where she said that the first perpetrator (through the door) was "Ramsey", meaning the shooter would be Cole Coleman. In addition, from Nilsa Crosby's interview with law enforcement, the other perpetrator (not Cole Coleman) would have been a black male Rasta with light skin, 5'6" in height. Nicole Carter told law enforcement that one of the perpetrators had a Jamaican accent. According to police records, Mr. Ramsey is 6'1" tall, a full 7 inches taller than what was described by Ms. Crosby. In addition, Cole Coleman told law enforcement on October 31, 1981 that John Ramsey was dark skinned, which can be confirmed by viewing his photograph. Thus, a mismatch of skin tone was another obvious inconsistency between the description of the "first" perpetrator and Mr. Ramsey. Finally, it is my understanding that Mr. Ramsey does not have a Jamaican or Rasta man accent, as was described by several witnesses in this case, yielding another obvious inconsistency between the "first" perpetrator and Mr. Ramsey. Further, Mr. Dale testified to the Grand Jury that Cole Coleman was the first person through the door and that Ramsey was the shooter (Transcript P. 21). Not only was this description contrary to the other witnesses, it is contradicted by Cole Coleman's 2018 admission that he in fact was the shooter.

5. Co-witness contamination

Glen Anderson told ADA Anderson and Detective Puglisi that the witnesses had decided not to tell the truth about recognizing Cole Coleman at the police station on the morning of the shooting and to not tell the truth about recognizing Mr. Ramsey from the CATCH unit photos. If this conversation occurred at the precinct either before or during the identification procedures (in the early morning hours), it means that the witnesses were not separated (sufficiently) and/or not instructed to speak with each other about the events they witnessed. In other words, there is evidence that co-witness contamination could have occurred in this case.

Research shows that people can incorporate into their memories information that they have learned from other sources, including co-witnesses. For example, Hope and her colleagues conducted research where participants viewed a video of an event and then discussed what they saw with a stranger, a romantic partner or a friend. The manipulation in the study was that the researchers presented different videos to members of each pair so only one person actually saw a theft take place during the video. The results showed that all co-witness pairs, regardless of the prior relationship status, were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate accounts of what happened than participants who did not interact with another witness.

The concern here is that it can be difficult to accurately remember the *source* of our memories and, thus, information learned from others is likely to contaminate our "original"

memory for a person or event. For these reasons, almost two decades ago the National Institute of Justice recommended that witnesses be separated when being interviewed and when viewing an identification procedure.

6. Mug-shot searching

Mr. Dale testified to the Grand Jury that he viewed "a lot of pictures" (Transcript P. 25) at the police station in the morning of October 31, 1981. Specifically he was asked:

Q: Now, when you looked through the pictures did you recognize anyone's photograph in connection with this particular incident?
A: I noticed Ramsey's
Q: Did you indicate that to the police officers at the time?
A: No.

Detective Fogarty testified at the pretrial hearing about the photographs that witnesses viewed, Hearing P.5:

Q: Can you tell us the make-up of the photos that were first viewed? In other words, did you first show them an array or shown other photographs first?
A: They were shown photos in the precinct Detective Unit, and also were shown pictures in the Catch Unit which houses all of our photographs; both in black and white and in color.

In circumstances where law enforcement do not have a particular suspect in mind yet have a witness who was able to describe the perpetrator, they sometimes turn to a tool known as mug-shot searching. In this procedure, a witness is asked to look through a (large) number of arrest photographs in the hopes that 1) the perpetrator has been arrested before, 2) his photograph is among the photos the witness is shown, and 3) the witness will recognize the perpetrator in the photographs. Nationally, mug-shot searches are not conducted with great frequency but they are commonplace in New York City.

7. Filler selection bias

From my professional experience, the manner of selecting photo array fillers in this case was unusual. In his Pretrial Hearing testimony, Detective Fogarty stated that he took out the "R" index and gave more than 14 photos to Mr. Dale from which he selected John Ramsey. It is unclear whether the names of the individuals were visible to the witnesses who viewed the array. The photo array that was admitted into evidence at the pretrial hearing included only 14 photographs but there were additional photographs that Mr. Dale had actually viewed. It is unclear what physical characteristics these individuals shared with the then suspect John Ramsey (e.g., did they all have large scars on their forehead?).

Referring to his second (afternoon) discussion with Mr. Dale, Detective Fogarty testified to the following during his Pretrial Hearing Testimony, P. 12:

Q: Okay. Now, after hearing that statement from Mr. Dale, did you have occasion to exhibit photos to him?
A: Yes, I took the – these photos in the Rs. I took the index R out, handed it to him. He went through maybe 12, 15 of the photographs and says, "This is the guy", and he picked out John Ramsey.

In addition, it is possible that the photograph of Mr. Ramsey's that was placed in the Oct 31, 1981 afternoon photo array was the same exact photo that was (possibly) viewed by Mr. Dale earlier that day. This information comes from Detective Fogarty's Pretrial Hearing Testimony, P. 8:

Q: Did there come a time you assembled a photographic array?
A: Yes.
Q: When?
A: Later on in the afternoon, say one, two o'clock in the afternoon.
Q: Where did you cull these pictures from, from where did you take them?
A: Took them from the Catch Unit and our own PDU files.

Lineup fillers are the known-innocent individuals who are selected to be put in a lineup along with the suspect. There are many choices law enforcement needs make when deciding which fillers to select for a lineup including: how many should be used, and how similar should they be to the suspect and/or the description the witness provided. Regardless of the answer(s) to these questions, the general principle in lineup construction is that no person should stand out, especially the suspect.

8. Pre-identification instruction bias

There is no evidence in the materials I reviewed that the witnesses were informed that the actual perpetrator may or may not be present in the identification procedures they viewed (Catch unit photos, identification procedure with Cole Coleman, or photo array containing Mr. Ramsey). In fact, Detective Fogarty testified at the Pretrial Hearing about what he said to Ms. Smith before he handed her the photos. He testified, P. 29-30:

A: I don't remember exactly what I said to her. I just handed the photographs, "Take a look, see if there's anybody in here you can identify."

With regard to what he said to Mr. Dale before showing him the photographs, Detective Fogarty testified
"I don't remember exactly what I said to him." (P. 28).

Informing the witness that the police have a suspect or failing to tell a witness that the actual perpetrator may or may not be present in a lineup is suggestive because it implies that the

perpetrator is in the identification task. Implying in any way to eyewitnesses that the perpetrator is in the photo array (or that their task merely is to find the perpetrator among the set) encourages witnesses to make a selection from the array. Instead, eyewitnesses should be told explicitly that the person in question might not be in the photo array and that they should not feel compelled to make an identification. This pre-lineup instruction follows from decades of empirical data showing that eyewitnesses are less likely to identify an innocent suspect when they are warned that the actual culprit might not be present. Further, witnesses should also be told that the person administering the photo array does not know which person is the suspect in the case (i.e., that the photo array is double-blind).

9. Use of non-blind lineup rather than a double-blind lineup

Detective Fogarty testified at the Pretrial Hearing that, to the best of his recollection and knowledge, he was the only person who showed photographs to the five witnesses in this case. (P. 17) Detective Fogarty knew that John Ramsey was the suspect in this case.

Contemporary guidelines (e.g., IACP), and in some states (e.g., CT, NC, TX) the law, for conducting identification procedures states that the police officer conducting the proceedings should not know who the suspect is—this completely eliminates the possibility that the officer can influence the witness to pick the suspect. We need not assume that a lineup administrator's influence is conscious or deliberate in order to see the value of the "double-blind" procedure. In other words, the influence by the administrator may be unintentional and it may be outside of the officer's awareness (for example, nodding and smiling), or it may be purposeful and explicit. We know that police sometimes conduct lineups in a manner that clearly shows how their knowledge of which person is the suspect can lead them to say things that focus the eyewitness on the suspect. We also know that what the person administering the lineup says to the eyewitness at the time the eyewitness makes a selection has strong effects on the confidence of the witness, easily leading a "tentative identification" eyewitness to become positive in their identification, even when the identification is of an innocent person (Luus & Wells, 1994; Wells & Bradfield, 1998).

10. Non-identifications of the suspect

Other than Mr. Dale, none of the witnesses positively identified Mr. Ramsey from a photo array or at trial as being involved in the shooting death of Mr. Green. During the pre-trial hearing, Detective Fogarty was asked about the identification procedures used in the investigation. During his testimony, Detective Fogarty stated that Ms. Smith had selected Mr. Ramsey's photograph from the CATCH unit photographs (although no DD5 with this information was provided to me). Whether Ms. Smith was later shown the photo array containing Mr. Ramsey's photograph is unknown to me. However, Detective Fogarty was asked about the other three witnesses in this case, Hearing transcript P. 8:

Q: By the way, the other three witnesses that you named; did they view the photographic array that you assembled?
A: Yes, sir; they did.
Q: What, if any, results did you get?
A: No results at that time.

The lack of identifications of Mr. Ramsey are probative. In a 2007 meta-analysis of 94 eyewitness identification experiments by Clark, Howell, and Davey, eyewitnesses gave non-identification responses far more often in target-absent lineups (.52 probability) than in target-present lineups (.33 probability).

11. Repeated identification procedures

Mr. Dale alleges that he viewed Mr. Ramsey's photograph from "a lot of pictures" in the early morning of October 31, 1981. At this time he did not tell law enforcement that Mr. Ramsey looked familiar. Later that same day, Mr. Dale returned to the precinct and was shown a large photo array containing Mr. Ramsey's photo. Months later, during his Grand Jury testimony, Mr. Dale was shown a single photograph of Mr. Ramsey and asked if he recognized the individual. In effect, Mr. Dale was shown a photo show-up at the Hearing, which is a highly suggestive identification procedure.

The concept of eyewitness commitment is also relevant to the facts of this case. If an individual has been identified in one identification procedure, he is considerably more likely to be identified in a subsequent procedure regardless of whether or not he is the actual perpetrator (Behrman & Vayder, 1994; Brigham & Cairns, 1988; Deffenbacher et al., 2006; Dysart, Lindsay, Hammond, & Dupuis, 2001; Gorenstein & Ellsworth, 1980; Haw et al., 2007; Steblay & Dysart, 2016); this is known as "commitment". Identification of an individual from a mugshot (Brigham & Cairns, 1988; Deffenbacher et al., 2006; Dysart et al., 2001; Gorenstein & Ellsworth, 1980), as well as from a showup (Behrman & Vayder, 1994; Godfrey & Clark, 2010; Haw et al., 2007), has been found to increase the probability that witnesses will make a positive identification of the individual from a subsequent lineup. Thus, the question remains as to whether Mr. Dale identified Mr. Ramsey from the in-court identification procedure because he had selected him in the photo array. Psychologists view in-court identifications as mere theatre and not as independent tests of a witness' memory or ability to identify perpetrators (see Steblay & Dysart, 2016). Of note here is the fact that none of the other four witnesses to the homicide made an out-of-court or in- court identification of Mr. Ramsey.

12. Witness confidence and the post-identification feedback effect

In the materials I reviewed in preparation of this report, I found no contemporaneous recording of Mr. Dale's level of confidence from the non-blind lineup except where he allegedly stated "it looks like the guy" (Pretrial Hearing Testimony of Det. Fogarty, P. 6). That is, it appears he was not asked how confident he was in his identification of Mr.

Ramsey on October 31, 1981. When Mr. Dale made an in- court identification of Mr. Ramsey, he did not state his confidence nor was he asked how certain he was in his decision.

Decades of research now show that there is a moderate to strong relationship between the accuracy of an eyewitness' positive identification and his confidence in that identification *when certain conditions are met* (Wixted & Wells, 2017) and this relationship can be significantly affected by pre- and post- identification factors. Expressions of confidence *at trial* are relatively **meaningless** (Wixted & Wells, 2017).

Unfortunately, the problems relating to witness confidence in the accuracy of their identifications and the actual accuracy of those identifications are manifold. Some of these problems relate to jurors' reliance on witness confidence as a guide to witness accuracy and some relate to the tenuous association between confidence and accuracy *at trial.* In addition witness confidence can be strongly influenced by suggestive procedures and post-identification factors such as repeated questioning, briefings in anticipation of cross examination, and feedback to the witness. The most useful expression of confidence is one made at the time the ***initial*** *unbiased/non-suggestive double-blind* identification procedure - this is the first identification procedure with a particular suspect that the witness views. Confidence can be a better expression of accuracy under these conditions because there has been no opportunity for a witness' memory to be influenced by previous identification procedures.

Another important consideration in the area of confidence is *confidence malleability*, which refers to the tendency for an eyewitness to become more (or less) confident in his or her identification as a function of events that occur after the identification decision. Confidence malleability is particularly important because actors in the legal system can contaminate the confidence of an eyewitness in ways that can make an eyewitness's in-court expression of confidence a meaningless indicator of the eyewitness's memory.

An eyewitness who expresses high confidence in their identification is expressing a strong belief that the identified person and the culprit are the same person. An eyewitness's belief that the identified person is the culprit can arise out of pure memory judgments (i.e., a perception of remarkable resemblance between the identified person and the eyewitness's memory of the culprit, Leippe, 1980; Wells, Ferguson, & Lindsay, 1981). But, significantly, an eyewitness may believe that the identified person is the culprit for reasons other than the eyewitness's memory (Leippe, 1980; Wells, Ferguson, & Lindsay, 1981; Luus & Wells, 1994; Wells & Bradfield, 1998). For example Hastie, Landsman, & Loftus (1978), in an early demonstration of confidence malleability, found that witnesses who were questioned repeatedly grew more confident about the accuracy of details in their reports (see also Shaw, 1996; Shaw & McClure, 1996; Turtle & Yuille, 1994).

These facts underscore the importance of having a "pristine" (Wixted & Wells, 2017) first identification procedure where the lineup fillers are fair (and the suspect does not stand out), pre-lineup warnings have been given, a double-blind administrator runs the procedure, and

the witness' level of confidence is taken immediately after any and all identifications have been made. If these specific procedures are not followed, the criminal justice system is structured in such a way that the vast majority of witnesses and victims who identify the defendant at trial will do so with the utmost of confidence. But these in-court expressions of confidence are meaningless when it comes to assisting the trier of fact when it comes to the issue of witness accuracy (see Steblay & Dysart, 2017; Wixted & Wells, 2017).

Even stronger and broader effects of confidence malleability have been shown to emerge when eyewitnesses are told or led to believe that they identified the suspect (versus being told nothing about the alleged accuracy of their decision).

In their research, Wells and Bradfield (1998) found that eyewitnesses who received confirming feedback ("Good, you identified the suspect") were not only much more confident than the witnesses with no feedback and witnesses with disconfirming feedback - the confirming feedback witnesses also distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit, how much attention they paid to the culprit's face while observing the event, and so on. The results of this study have been replicated many times in research labs and also with real witnesses in real ongoing criminal investigations (Wright & Skagerberg, 2007). The most effective method of eliminating police suggestion is to have an officer who does not know the identity of the suspect conduct the identification procedure (i.e., a double-blind administrator; Kovera & Greathouse, 2009). This procedure was not used in this case.

139. Again, Dr. Dysart explains in her summary the multiple problems with the sole identification that caused John Ramsey to be identified, arrested and convicted.

In this particular case, there exist several factors that could have affected witness accuracy: the witnesses had been smoking PCP prior to the witnessed event, there were poor lighting conditions, the effects of stress/arousal on memory, the presence of a weapon, the seeming mismatch between the witnesses descriptions of the perpetrators and the appearance of the defendant (e.g., scar), co-witness contamination, viewing mug-shots prior to viewing a non-blind photo array that had no pre-lineup warning that the actual perpetrator may or may not be there and where the quality of the fillers is unknown, the possibility of commitment effects for the identification of Mr. Ramsey in the lineup and at trial. In addition, the only witness to positively identify Mr. Ramsey from the photo array (and at trial) did not identify Mr. Ramsey in the first identification procedure in which Mr. Ramsey was shown (i.e., it was a repeated identification procedure). In summary, the combination all these factors significantly decreased the likelihood that an accurate identification could have been made by witnesses in this case.

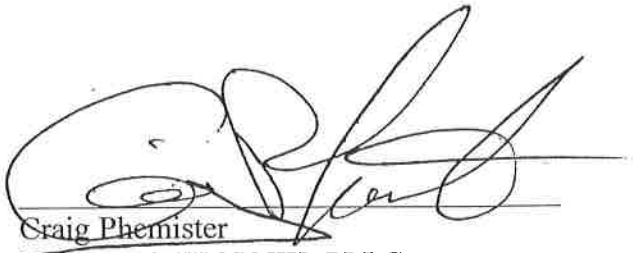
140. This report therefore eviscerates the last remaining remnants of the People's

original case at trial. Thus, Defendant submits that he has made a prima fascia showing of actual innocence that merits a full exploration by this Court. This Court should therefore schedule an evidentiary hearing on this motion to include that issue.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should issue an Order vacating defendant Ramsey's conviction, dismissing the charges or ordering a new trial, or scheduling an evidentiary hearing on all the issues raised in the instant motion, and granting such other and further relief to Ramsey as it may deem just and proper.

Dated: New York, NY
February 7, 2019



Craig Phemister
NAPOLI SHKOLNIK, PLLC
360 Lexington Avenue – 11th Floor
New York, New York 10017
212-397-1000

SUPREME COURT – NEW YORK COUNTY - IND #: 1251/1982

PEOPLE OF THE STATE OF NEW YORK,

- against -

JOHN RAMSEY,

Defendant.

MOTION PURSUANT TO §440.10

NAPOLI, SHKOLNIK, PLLC
Attorney for Defendant
360 Lexington Avenue – 11th Floor
New York, New York 10017
212-397-1000

Pursuant to the CPL, the undersigned, an attorney admitted to practice in this Court, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: February 7, 2019

Signature *Craig Phemister*
Print Signer's Name: JAMES HENNING, ESQ.

Service of a copy of the within is hereby admitted.
Dated:

Attorney for .

Sir:–Please take notice
☐ **Notice of Entry**
that the within is a (certified) true copy of
duly entered in the office of the clerk of the within named court on

☐ **Notice Of Settlement**
that an order of which the within is a true copy will be presented for settlement to the HON.
One of the judges of the within named court, at
on At M.
Dated,

Yours, etc.
NAPOLI, SHKOLNIK, PLLC
Attorneys for Defendant
360 Lexington Avenue – 11th Floor
New York, New York 10017
212-397-1000