DISTRICT ATTORNEY
KINGS COUNTY

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REPORT ON THE CONVICTION
OF
SHELDON THOMAS

By: The Conviction Review Unit

March 2023

THE CRIME

According to the People's theory at trial, on the evening of December 24, 2004, defendant Sheldon Thomas and Dalton Walters, acting in concert with uncharged others, shot from a car at a group of six people at the corner of East 52nd Street and Snyder Avenue. One bullet struck 14-year-old Anderson Bercy ("the deceased") and killed him. Another bullet struck Kadeem Drummond, who survived his injury.[1]

Defendant is currently incarcerated. He will be eligible for parole in 2031.

OVERVIEW OF THE ERRORS

CRU discovered the following errors in this case, which undermine the integrity of the conviction: (1) the police investigation was improper and resulted in the wrongful arrest of defendant even after the police had learned defendant was not the individual the initial eyewitness identified; (2) the hearing court wrongly determined that probable cause existed to arrest defendant, in that the court (a) credited the testimony of a detective, who unbeknownst to the court, falsely testified, and (b) based its decision, in part, on material misstatements of fact; (3) the prosecution (a) may have failed to disclose false police testimony to the hearing court, (b) presented an individual as an identification witness despite serious problems with that witness's credibility, and (c) elicited testimony from that witness at trial that a particular individual was in the car, despite that individual's case having been dismissed in large part due to the People crediting his alibi and the witness's failure to identify the individual; and (4) defense counsel exacerbated these and other errors in myriad ways.

THE POLICE INVESTIGATION[2]

Det. Robert Reedy of the 67th Precinct Detective Squad was the lead detective, assisted by numerous squad detectives, including Manuel Katranakis, James Nash, and Carlos Padro, and Brooklyn South Homicide Squad Det. Michael Martin.

On December 24, beginning at 9:18 p.m., multiple 911 calls reported a shooting in the vicinity of East 52nd Street and Snyder Avenue. Many reports stated that a child had been shot. Freddy Patrice was one of the first callers. He reported that he was "just passing by" and "didn't know who shot."[3] The operator asked for a description, and Patrice stated that he did not have one.[4]

At 9:25 p.m., Police Officer Robert Dombi and his partner, of the 67th Precinct, received a radio run of a male shot at the corner of Snyder and Utica Avenues.[5] Upon arrival, they observed that the deceased and Kadeem Drummond had both been shot. The deceased was barely breathing. The

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[1] Defendant and Walters were tried jointly. Walters was acquitted. Walters is discussed herein only to the extent necessary.

[2] Unless otherwise stated, the police investigation account is obtained from the documents in the People's trial file. Numbers in parentheses preceded by "H." refer to the pages of the pretrial hearing transcript; those preceded by "T." refer to the pages of the trial transcript; and those preceded by "S." refer to pages of the sentencing minutes.

[3] Sprint report.

[4] Patrice's 911 call was played at trial. (T.1154) CRU could not locate the recording.

[5] Utica Avenue is two blocks west of East 52nd Street.

deceased and Drummond were transported by ambulance to Kings County Hospital ("KCH").[6] Drummond was treated and released.[7] The deceased was pronounced dead on arrival.[8] A .22 caliber bullet was recovered from his body.[9]

Dets. Nash, Reedy, and Padro then responded to the scene. They observed numerous spent shell casings on the street and parked cars with bullet holes.[10] Padro notified Det. Martin about the shooting.[11]

At 10:15 p.m., Emergency Service Unit Officer Michael Rosati responded to the scene and recovered five 9-millimeter shell casings and seven .22 caliber shell casings.[12] It was later determined that two guns were used: the 9-millimeter shell casings were ejected from one gun, and the .22 caliber shell casings were ejected from a separate gun. At 11:30 p.m., the Crime Scene Unit ("CSU") arrived and vouchered the ballistic evidence.[13] CSU photographed and sketched the scene, which included four cars parked along the north curb of Snyder Avenue west of East 51st Street, all of which had been struck by bullets.[14]

Kadeem Drummond Interview

On December 24 (time not stated), at KCH, Det. Martin interviewed Drummond. Drummond stated the following:

He and the deceased were walking back from the store on Snyder Avenue when he heard gunshots, and they started running. Drummond was hit in the shoulder. The deceased collapsed on Utica and Snyder Avenues in front of a store.

When asked why this might have happened, Drummond stated that two days ago "Yellow" (later determined to be Walters) approached him and the deceased. Walters "mushed" Drummond. Drummond was going to "cut" Walters, but the deceased and others stopped him. Walters told Drummond and the deceased that they were hanging around the wrong guys and to watch themselves.[15]

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[6] Martin DD5, "Interview of First Officer."

[7] Martin DD5, "Interview of attending physician."

[8] FDNY Ambulance Call Report.

[9] Reedy DD5, "Confer[r]al with Kings County Mor[gu]e"; Cohen DD5, "Ballistics delivered to Lab."

[10] Nash DD5, "Response to the Scene."

[11] Padro DD5, "Notification to Brooklyn South Homicide."

[12] Padro DD5, Response of ESU; Unusual Occurrence Report.

[13] Padro DD5, "Response of Crime Scene."

[14] CSU Supplementary Report.

[15] Martin DD5, "Interview of Kadeem Drummond." Drummond referred to Walters as Yellow throughout his statement.

Canvass Interviews

On December 24, from about 9:45 to 11:30 p.m., detectives canvassed the buildings around the crime scene location for witnesses.[16] Many witnesses heard gunshots but had no relevant information, other than seeing male blacks running, cars with bullet holes, and the deceased being carried to a bodega, and then laying on the ground.[17] One witness saw a white car double-parked across the street from her building a few minutes before the shooting. She did not see the occupants or plate number.[18]

Det. Katranakis's Interviews at Kirk LaPaix's Second-Floor Apartment at 5122 Snyder Avenue

Ann-Marie Candillo

Ann-Marie Candillo stated she heard gunshots from her apartment. The deceased was close friends with her son (Kirk LaPaix), who lived with her.[19]

Rodney LaPaix (Kirk's brother)

Rodney LaPaix stated that he heard gunshots, looked out the window, and saw the deceased and Drummond. A double-parked white car drove off. LaPaix knew the deceased and Drummond. They had been to LaPaix's apartment and hung out in the summertime. LaPaix ran downstairs and saw that his car had at least three bullet holes in it.[20]

Aliyah Charles

Charles stated the following:

She knew the deceased for about two months. Prior to the shooting she was in LaPaix's apartment. She was waiting for the deceased, whom she had asked to pick up something from her workplace, a Subway fast food restaurant.[21] While waiting, Charles looked out the window and noticed a white car, possibly a Maxima.[22]

Charles saw the white car come around a second time, and the deceased and Drummond walking (south) down East 52nd Street from Church Avenue toward Snyder Avenue. As they neared the corner, Charles heard gunshots from the white car, which was double-parked across the street. The deceased and Drummond ran (on Snyder Avenue) towards East 51st Street.

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[16] *See*, *e.g.*, Padro DD5, "Cavass Regarding Homicide #25"; O'Rourke DD5, "Canvass of 5122 Snyder Ave Bklyn."

[17] Padro DD5, "Canvass Regarding Homicide #25"; O'Rourke DD5, "Canvass of 5122 Snyder Ave Bklyn." Padro DD5, "Interview with Murray Angela." Reedy DD5, "Canvass of East 52 and Snyder to East 53 and Snyder." Nash DD5, "Interview of Abdul Mozeb."

[18] O'Rourke DD5, "Canvass of 5122 Snyder Ave Bklyn."

[19] Katranakis DD5, "Canvass of Surrounding Area."

[20] Katranakis DD5, "Canvass of Surrounding Area."

[21] Although the relevant DD5 states that Charles was waiting for the deceased, it seems likely that she was waiting for her boyfriend, Kirk LaPaix, as the testimony suggests. Subway was on Church Avenue between 51st and 52nd Streets.

[22] LaPaix's building is located on the southwest corner of Snyder Avenue and East 52nd Street. It has several windows overlooking the northwest corner—where the deceased and Drummond were when the shots were fired. Snyder Avenue has two lanes of traffic running east/west, with parking lanes on both sides.

Charles ran downstairs to see what had happened. The white car was gone. Except for the fact it had tinted windows, Charles was unable to provide additional details about the car.[23]

Precinct Interviews

Michael Barnwell

On December 24, at 11:30 p.m., at the 67th Precinct, Det. Reedy interviewed Michael Barnwell. Barnwell stated the following:

He was with the deceased, Freddy Patrice, Kirk LaPaix, Drummond, Daymeon Smith, and two others he did not know. They ran errands for LaPaix's mother and girlfriend. As they walked on East 52nd Street from Church Avenue to Snyder, Barnwell heard two gunshots and ran toward East 53rd Street on Church Avenue to the bodega, where he asked the owner for help. Barnwell did not look back when he ran and did not see who fired the shots.

Charles's Sworn Audiotaped Statement

On December 25, at 12:30 p.m., Charles telephoned Det. Reedy (at the 67th Precinct). She said she was friends with the deceased and wanted to know how the case was going. Reedy asked her to come to the precinct and speak to him in person. She agreed to do so but did not show up.[24]

On December 26, at 10:50 p.m., at the 67th Precinct, Charles gave a sworn audiotaped statement to an ADA of the Gangs Bureau. Reedy was present. Charles stated the following:

On December 24, at approximately 9:00 p.m., she was waiting for LaPaix in his apartment, wondering why he was taking so long. He had agreed to go sneaker shopping with Charles and her sister, who was at the apartment. Charles looked out the window and saw a white car double-parked in front of LaPaix's building. She did not think it was unusual because cars often double-parked there.

She then observed LaPaix, Barnwell, Smith, Patrice, and the deceased walking toward the building. As they got closer, "Yellow" and "Kerns"—who were in the white car—spotted them. Charles did not "really see the driver's face." Charles did not know Yellow's true name. She had seen Yellow at her job once or twice. She had seen Kerns once and was told, "That's Kerns."

The white car's window was halfway open, and she could see in. She saw Yellow and Kerns pull out guns and start shooting at LaPaix and his friends. Bullets went through a milk bottle and a ham LaPaix was carrying, and he fell. The deceased, Drummond, and some others ran towards East 51st Street and Snyder Avenue. The deceased and Drummond were struck by bullets, and the deceased fell. Charles said, "That's all I saw." She did not see where the white car went.

[23] Katranakis DD5, "Canvass of Surrounding Area." At 11:10 p.m., Katranakis interviewed Subway employee Anthony Francis, who stated that two teenagers came in about two hours ago to pick up some gifts that the supervisor left for Charles. *Id.*

[24] Reedy DD5, "Phone call from Ali[y]ah Charles."

Charles did not mention what she saw to anyone except that she told her sister that she recognized Yellow, and she knew this would happen because Yellow had a beef with Patrice because "he set up 'Shaggy.'" Charles told her sister that anyone who hung out with Patrice would be shot.

At the end of the ADA's questioning, Reedy asked Charles whether she saw "who the driver of the car was." Charles replied, "No." She said Yellow was in the back seat, and Kerns was in the front passenger seat. She recognized them, but she did not know the driver "like that." She knew Yellow because he always wore a blue or black hat with a yellow "P" on it.[25]

Kadeem Drummond Reinterview

On December 26, (time not stated), at the 67th Precinct, Dets. Martin and Reedy reinterviewed Drummond. Drummond "reiterated" what he had stated before. He said that he could not identify anyone in the car that shot at him and his friends. He heard that "Yellow" shot him.[26]

Daymeon Smith

On December 26, at approximately 10:30 p.m., at the 67th Precinct, Det. Martin interviewed Smith, who stated the following:

He was walking with LaPaix, Patrice, Drummond, and Barnwell down East 52nd Street toward Snyder Avenue. When they reached the corner of East 52nd Street and Snyder, Smith saw a small white car with the right rear window down and a gun coming out of the window. A dark-skinned black male wearing a dark blue "muffin" hat was firing a gun. Smith ducked down and started running on Snyder towards East 53rd Street. He hid on a porch until an ambulance arrived. At least four males were in the white car. Smith did not know the shooter's name but could identify him if he saw him again.[27]

The Request for an Unsealing Order for Defendant's Prior Arrest in the 67th Precinct

Det. Martin asked the prosecution to obtain an unsealing order for defendant's prior arrest.[28]

On December 27, the People prepared a motion to unseal defendant's file[29] The file was not unsealed because Martin generated a photo array using PIMS. (*see* below; H.285, 299-300)

Regarding defendant's prior case, on April 23, 2004, (eight months before the deceased's murder), in the 67th Precinct, an officer observed defendant show a "gold item" to his friend and then place it in his "waistband." The officer approached defendant to question him. Defendant pulled out a gold painted gun, pointed it at the officer and two other officers, and said to "back the fuck up." Defendant

[25] Audiotape A04-0589 and accompanying transcript.

[26] Martin DD5, "Reinterview of Kadeem Drummond." The DD5 does not provide an account of the "reiterated" statement.

[27] Martin DD5, "Interview of Damien [Daymeon] Smith." In the DD5 account of the statement Smith is referred to as "Damien White."

[28] (H.299)

[29] Trial ADA Affirmation in Support of an Ex-Parte Motion to Unseal.

dropped the gun and fled. The gun was recovered, and defendant was apprehended after resisting arrest.[30]

Charles Identified a "Sheldon Thomas" in a Photo Array
(A copy of the photo array is attached as CRU Exhibit 1A)

On December 27, Det. Martin created a photo array with "Sheldon Thomas" as the subject. Martin created the photo array using PIMS, which also generated the positions of the photos.[31] "Sheldon Thomas" was in position number five.[32] This "Sheldon Thomas" was not defendant.

At 8:20 p.m., at 5122 Snyder Avenue, apartment 2A (LaPaix's apartment), Charles viewed the photo array.

According to Reedy's DD5, he showed Charles the photo array. "She ID Sheldon Thomas as being in the car."[33]

According to Martin's DD5, he showed Charles the photo array. "She picked out number five and stated it looks like him, but she is not totally sure, she would have to see him in person." When asked for a percentage of her certainty, Charles said she was 90 percent sure. "She also stated that he was one of the guys in the white car."[34]

The I-Card

On December 27, (time not stated), Det. Martin prepared and submitted an I-card (wanted card) for "Thomas, Sheldon," including the NYSID number for the "Sheldon Thomas" in the photo array, but with defendant's address. The I-card included the nicknames Smokey, Shelley, and Loc.[35]

Defendant's Apprehension

On December 28, at around 4:00 a.m., Sgt. Murphy, Det. Patrick Henn, and several other officers arrested defendant at his home.[36]

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[30] Complaint Room Screening Sheet (which was provided to defense counsel and is contained in the trial file in this case). The gun was determined to be inoperable. CRU has concluded that defendant was targeted because of this incident. (*see* below, CRU Analysis) On May 4, 2004, defendant pleaded guilty to Resisting Arrest (P.L. § 205.30) and was sentenced as a youthful offender to three years' probation. It appears that the case was ultimately dismissed.

[31] The "Sheldon Thomas" selected by the PIMS system and included in the photo array was not the defendant.

[32] Martin DD5, "Preparation and showing of photo arrays."

[33] Reedy DD5, (#35) "Viewing of photo array by Alialh [sic] Charles."

[34] Martin DD5, "Preparation and showing of photo arrays."

[35] Martin DD5, "Submission of I Cards"; Investigation Report Worksheet for Sheldon Thomas I-card. The DD5 states that the I-card was submitted on 12/28, and the DD5 for the I-card cancellation states that the card was submitted on 12/27. (*see* below) Logically, the I-card was submitted after the photo array identification on 12/27, and not on 12/28 when defendant was arrested in the early morning.

[36] (H.570) Reedy lost the DD5 detailing defendant's apprehension. (H.632 [Stipulation]) The hearing court determined that the warrantless arrest of defendant in his home violated his Fourth Amendment rights. (*see* below)

Defendant's Statement

On December 28, (no time indicated), at the 67th Precinct, defendant gave a *Mirandized* statement to Dets. Reedy and Martin. Defendant stated the following:

On December 24, at approximately 11:30 p.m., defendant and his friend and neighbor, Keith Mitchell, drove to Springfield, Queens in "his" green Nissan. They stayed in Queens playing PlayStation 2, ate dinner, and left at 3:00 a.m. on December 25. Defendant described that the Queens house was brick, but defendant could not provide an address or street. "[A]fter he realized that the murder occurred at 9:20 p.m.," defendant changed the time he left for Queens.[37]

Defendant was shown a photo of "Dalton Walters AKA 'Yellow.'" Defendant said he did not know that person and never saw that person before. Defendant denied knowledge of the homicide or ever being in a small white Nissan.[38]

Defendant's Lineups

On December 28, at the 67th Precinct, Dets. Reedy and Martin conducted three lineup procedures with defendant as the subject. Defendant was in position number six in each lineup.

At 5:30 p.m., Charles viewed the lineup and identified number six saying, "He was in the car." Charles signed the lineup report.[39]

At 7:45 p.m., Smith viewed the lineup. None of the fillers were the same as the prior lineup. Smith identified number six as the shooter from the car. Smith refused to sign the lineup report.[40]

At 7:50 p.m., Patrice viewed the lineup. The fillers were the same as the second lineup. Patrice recognized number six from "in the car shooting." Patrice refused to sign the lineup report.[41]

Walters' Apprehension and Statement[42]

On December 28, at 2:30 a.m., Dets. Walker and Torres, and Sgt. Murphy, arrested Walters at his home. When asked if he had any guns he said, "no" and the officers could "go look."[43]

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[37]The DD5 does not indicate the changed time defendant left his house. Martin testified that he told defendant he had a problem with his timing, and defendant stated that he meant he left at 11:30 a.m. (H.321)

[38] Martin DD5, "Interview of Sheldon Thomas [Defendant]." The DD5 made no mention of defendant viewing any other photographs, including the photo array containing the other Sheldon Thomas.

[39] Reedy DD5, "Viewing [o]f lineup by Alialh[sic] Charles"; Defendant's Lineup Report viewed by Charles.

[40] Reedy DD5, "Viewing of lineup by Damien Smith"; Defendant's Lineup Report viewed by Smith.

[41] Reedy DD5, "Viewing of Lineup by Freddy Patrice"; Defendant's Lineup Report viewed by Patrice.

[42] On December 27, at 8:20 p.m., Dets. Martin and Reedy showed Charles a photo array with Dalton Walters as the subject. Charles identified Walters as Yellow—the one in the white car firing the gun. *See* Martin DD5, "Preparation and showing of photo arrays."; Reedy DD5, "Viewing of photo array by Alialh [sic] Charles."

[43] Walker DD5, Apprehension of Subject [Walters]." Contrary to the DD5, Murphy testified there was no consent to search. Nevertheless, he opened a drawer in Walters' bedroom and recovered a shotgun, a handgun, and ammunition. The hearing court determined that this was an unlawful search and seizure and suppressed the evidence recovered. (Decision at 5, 14)

On December 28, (time not indicated), at the 67th Precinct, Walters gave a *Mirandized* statement to Dets. Martin and Reedy. Walters provided an alibi. He acknowledged that he warned the deceased a few days before the homicide that the deceased was hanging out with the wrong crowd. He admitted that he "mushed" Drummond but denied that he had threatened Drummond.

Martin showed Walters a picture of defendant. Walters said he never saw that person before.[44]

The I-Card Is Cancelled

On December 29, Det. Martin cancelled the I-card submitted on December 27, "for Sheldon Thomas."[45]

Ernesto Sergeant "Kern"

Ernesto Sergeant was known to the 67th Precinct as "Kern." On January 20, 2005, Det. Martin composed a photo array with Sergeant as the subject.[46]

Charles Identifies Ernesto Sergeant as "Kern" in a Photo Array

On January 21, at 1:20 p.m., at Charles's home, Martin showed her Sergeant's photo array. Charles identified Sergeant as "Kern," one of the persons firing a gun at her friends from the car. Charles asked to view the profiles of the participants when she viewed the eventual lineup.[47]

Smith Recognizes Ernesto Sergeant as Kern in a Photo Array

On January 26, at 4:05 p.m., Martin showed Sergeant's photo array to Daymeon Smith. Smith identified Sergeant as "Kern" and said he knew him from a fight they had in school. He did not say that Sergeant was in the white car.[48]

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[44] Martin DD5, "Interview of Dalton Walters." Walters was shown a Polaroid picture of defendant which was taken after defendant's arrest. (H.393) On December 28, Reedy and Martin conducted three lineup procedures with Walters as the subject. Charles, Smith, and Patrice viewed the lineups. Charles identified Walters as the shooter from the white car. Smith identified him as Yellow, who Smith knew from the area, and did not see him in the car. Patrice identified him as shooting from the car. Smith and Patrice refused to sign a lineup report. *See* Reedy DD5s, "Viewing [o]f lineup by Alialh [sic] Charles," "Viewing of lineup by Damien Smith," and "Viewing of lineup by Freddy Patrice"; and the respective lineup reports.

[45] Martin DD5, "Cancellation of 'I' cards."

[46] Martin DD5, "Composing of photo array." Martin testified at the pretrial hearing that the date on the DD5 was wrong; it should have been January 21. (H.403)

[47] Martin DD5, "Showing of photo array to Aliyah Charles."

[48] Martin DD5, "Showing of photo array to Daymeon Smith."

THE GRAND JURY PROCEEDINGS[49]

December 30, 2004, the grand jury presentation commenced. The presentation was withdrawn shortly thereafter because the grand jury term was ending.

On January 18, 2005, the trial ADA (*see* below, The Pretrial Hearing, the People's Case, Martin's testimony, section 7) presented the case to a new grand jury panel under the same grand jury number.

On February 8, 2005, defendant, Walters, and Sergeant were charged, under an acting in concert theory, with one count of Murder in the Second Degree (P.L. § 125.25[1]); five counts of Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]); five counts of Attempted Assault in the First Degree (P.L. §§ 110.00/120.10[1]); one count of Assault in the Second Degree (P.L. § 120.05[2]); four counts of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[2]); two counts of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]); and three counts of Firearms/Possession of Ammunition (Admin. Code § 10.131[3]).

SERGEANT'S POST-INDICTMENT ARREST AND DOUBLE-BLIND LINEUP

On February 18, 2005, Sergeant was arrested at his home.[50] On May 13, 2005, Det. Reedy arranged a "double-blind" lineup with Sergeant as the subject. Det. Peter Manceri, who was not involved in the investigation, conducted the lineup. Charles viewed the lineup and did not identify anyone. Smith viewed the lineup and recognized Sergeant but did not say where he recognized him from.[51]

THE PEOPLE'S NOTICE OF DEFENDANT'S PHOTO ARRAY IDENTIFICATION

On March 11, 2005, the People served and filed a Voluntary Disclosure Form ("VDF").[52] The VDF notified the defense, in pertinent part, that on December 27, 2004, at 8:20 p.m., confidential witness #1 (Charles) identified defendant in a photographic procedure. The officers listed were Martin and Reedy.

The VDF further indicated that the People "are not currently aware" of any *Brady* material.[53]

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[49] Because grand jury proceedings are secret (C.P.L. § 190.25[4][a]), discussions of the proceedings are redacted. Notably, the presumption of secrecy can be overcome by demonstrating "a compelling and particularized need" for access to the grand jury material. *Matter of District Attorney Suffolk County*, 58 N.Y.2d 436, 444 (1983). If that threshold is met the court must then balance various factors to determine whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure. *James v. Donovan*, 130 A.D.3d 1032, 1039 (2d Dep't 2015) (refusing to release the grand jury transcripts in the investigation into the death of Eric Garner in Staten Island, citing the strong presumption in favor of grand jury secrecy and the "chilling effect" that a release of transcripts would have on witnesses before such a tribunal).

[50] Burns DD5, "Apprehension of Subject."; Reedy DD5, "Apprehension of Ernesto Sergeant."

[51] (H.129-30) Reedy lost the DD5 regarding Sergeant's lineup. (H.555-56)

[52] *See* C.P.L. § 710.30(1)(b).

[53] The notice switched the times of Charles's viewing of defendant's and Walters' lineup identifications.

THE PRETRIAL HEARING

On June 5, 2006, defendant's *Dunaway/Wade/Payton/Huntley* hearing commenced.[54]

The People's Case[55]

The Photo Array (the probable cause issue)

Det. Reedy

Reedy testified as follows:

1. Defendant Was Arrested Pursuant to Photo Array Identifications

On December 27, 2004, at 8:20 p.m., at a residence, Reedy separately showed a photo array to Charles and Smith. (H.8, 13-14, 21)[56] Det. Martin was present. (H.14) Sheldon Thomas was the subject of the photo array. (H.9, 11 [People's Ex. 1, photo array; CRU Exhibit 1A]) During his testimony, Reedy viewed the photo array and confirmed that it was the same one shown to Charles and Smith. (H.10-11) Reedy identified defendant in court as the Sheldon Thomas in the photo array. (H.12-13)

When Charles viewed the photo array, after "[l]ike ten seconds" she identified number five—the defendant. (H.14-15) Her identification of defendant was "pretty quick." She said she recognized defendant as one of the guys in the white car, which she viewed from the window. (H.15) Charles also said number five looked like defendant, and that she needed to see him in person. When asked for a percentage of her certainty, she said 90 percent. (H.144-45)

Two or three minutes later, Reedy showed Smith the photo array. (H.21) In "less than 10, 15 seconds" Smith identified number five as the person in the white car, but Smith did not attribute any actions to him. (H.16-17) The prosecutor asked, "are you sure that [Smith] said nothing else regarding Mr. Thomas [defendant]?" Reading a DD5 (number 34), Reedy then testified, "[Smith] stated that male black was firing a gun from the white car." The prosecutor asked, "So that was number five [in the photo array], which would be Mr. Thomas [defendant]; is that correct?" Reedy agreed. (H.17) Reedy acknowledged that Smith's viewing of the photo array was not memorialized, but Reedy specifically

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[54] The purpose of a *Dunaway* hearing (*People v. Dunaway*, 442 U.S. 200 [1979]) is to determine whether probable cause existed for a defendant's arrest. The purpose of a *Wade* hearing *(United States v. Wade*, 388 U.S. 218 [1967]) is to determine whether an identification procedure was improperly suggestive. The purpose of a *Payton* hearing (*Payton v. New York*, 445 U.S. 573 [1980]) is to determine whether a defendant's right to be secure against a warrantless arrest in his home was violated). The purpose of a *Huntley* hearing (*People v. Huntley*, 15 N.Y.2d 72 [1965]) is to determine the voluntariness of a defendant's statement.

[55] The trial ADA was not available to conduct the hearing. (H.3) Defendant's hearing was jointly conducted with Walters' and Sergeant's.

[56] Pursuant to a protective order, Charles and Smith were referred to as CW1 and CW2, respectively. Two photo arrays were shown: the Sheldon Thomas photo array was the first array shown to both witnesses. Walters was the second array. (H.9) Only the Thomas array ("the photo array") is discussed herein.

recalled that Smith viewed the photo array and identified number five as the shooter from the car. (H.154-55)[57]

Reedy acknowledged that defendant was arrested as a result of being identified in the photo array. (H.134)

2. Reedy Admits That He Knowingly Testified Falsely

On cross examination, defense counsel asked, "Isn't it true that none of the people in this photo array is [defendant]?" (H.133)[58] After the prosecutor's objection was overruled, Reedy said, "I'm trying to recall my memory. Just give me a second." (H.133-34) Reedy said as far as he knew Det. Martin obtained the photos from the PIMS system, and Reedy was told that defendant was number five. Reedy denied that he ever saw defendant before, either in person or in a photo, before he saw the photo array. (H.134)[59]

At a side bar, the prosecutor informed the court for the first time that defendant's photo was not in the photo array. (H.148) Reedy then testified that he no longer believed that defendant was number five. (H.160) Reedy admitted that he knowingly falsely testified about the photo array and falsely identified defendant in court as the person in the photo array. (H.168)

Reedy explained that they had information that the "perpetrator" was "Smoke," who was "Sheldon Thomas." (H.149) Both the Sheldon Thomas in the photo array and defendant were nicknamed Smoke. When the detectives asked defendant for his nickname, he said it was Smoke. This statement was not documented. (H.150-51, 170-71)

They realized after defendant was arrested that he was not in the photo array. (H.168) Reedy knew his testimony was false. Reedy "got confused with the lineup." The court asked, "What confused you? What could possibly confuse you whether or not that photograph was the person who was on trial in front of me." Reedy said, "It was a mistake." (H.169)

To be "perfectly clear," the court asked Reedy whether he knowingly falsely testified about the photo array and did so knowing that the court would rely on the testimony for its decision. Reedy repeatedly said, "Yes." (H.171-72) The court suggested that Reedy obtain counsel and adjourned the hearing for a couple of days. (H.174)

3. Reedy Learned Around the Time of the Lineup that Defendant Was Not in the Photo Array

When the hearing resumed, the prosecutor said, "In light of the thing that happened," she was investigating and was not prepared to present the testimony of the other witness (Martin). (H.179)

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[57] Reedy testified that he showed Walters' photo array to Charles and Smith, and they both identified him as a shooter in the car, and they both said they knew him as "Yellow." (H.18-20) However, as with the photo array (Sheldon Thomas), Smith refused to view the Walters array. (*see* below)

[58] Defendant told CRU that, during the hearing, he saw the photo array on the defense table, realized that his photo was not in the photo array, and told his attorney.

[59] As discussed below (CRU Investigation), CRU credits defendant's account that Reedy knew defendant, and on a prior occasion attempted to force his way into defendant's home. Counsel erroneously cross-examined Sgt. Murphy about the prior incident instead of Reedy. (H.605)

Reedy (now represented by counsel) recalled that Martin had told him that defendant was not in the photo array when they were either preparing to get lineup fillers, or after the lineup. Reedy did not recall this before because it had not been documented. (H.187-88, 231)

After repeatedly sustaining the prosecution's objections to counsel's attempts to elicit whether Reedy notified anyone when he learned defendant was not in the photo array, the court asked the prosecutor for the basis of her objections. She said it was a legal issue as to whether Reedy was required to notify anyone. (H.189-91) The court said that it was an ethical obligation, and an issue of "fundamental fairness," which raised a "whole host of issues," including that the defense had been "misled" by "false" notice of a photo identification, it affected plea negotiations, and there was an issue as to whether the People knew about the photo array during direct examination, and if not, when did they find out. (H.193-94)

4. After Discussing His On-Going Testimony with Martin, Reedy Changed His Account and Added That an Anonymous Caller Provided Information.

When the hearing resumed, Reedy changed some of his prior testimony. First, Reedy had twice testified that he specifically recalled that Smith viewed the photo array and identified number five as the shooter. (H.17, 154-55) Now, Reedy did not recall whether Smith viewed the photo array at all. (H.204) In reviewing the DD5s during his prior testimony, he confused the photo array and lineup DD5s, and attributed Smith's statement at the lineup to Smith's statement when viewing the photo array. Reedy now recalled that when Smith looked at the photo array, he "mumbled something." (H.206-10) Now Reedy recalled that Smith did not identify number five. Also, although Reedy repeatedly testified that he showed the photo array to Charles and Smith, he now said Martin showed them the photo array. (H.237)

Reedy also changed his previous testimony that both the Sheldon Thomas in the photo array and defendant were nicknamed "Smoke." (H.150) Reedy was no longer sure if the photo array Sheldon Thomas was called Smoke. (H.212) During the past weekend (when the hearing was adjourned), Reedy spoke to Dets. Martin, Nash, and a "couple of others" from the squad. (H.241) Martin refreshed Reedy's recollection about an anonymous caller who said that "Sheldon Thomas" lived on East 48th Street (defendant's address) and was nicknamed "Shellie, Lock, Smoke." (H.214-15) There was no documentation about this. (H.215) The other detectives he spoke with had no recollection about it. (H.242)[60]

The prosecutor asked, "So you have no idea whether Sheldon Thomas in People's 1 [the photo array] even goes by street name Smoke, do you?" Reedy replied that after defendant's arrest, he learned that the Sheldon Thomas in the photo array had that nickname. The prosecutor said, "Let's try again." (H.236) (emphasis added) Reedy then testified that he did not know whether the photo array Sheldon Thomas had a nickname. (H.236-37)

[60] The defense moved to strike Reedy's testimony about an anonymous caller, because it violated a court order not to discuss his on-going testimony, he had no independent knowledge about it, and it was not documented. (H.137, 242-45) The court denied the motion saying the testimony was relevant to credibility and the court would give the testimony "the weight it deserves." (H.245)

Next, Reedy changed his prior testimony that he had knowingly testified falsely about the photo array. Reedy testified that he had truly believed defendant was in the photo array, and his memory was refreshed when he was cross-examined. At that time, "the light bulb went on." (H.222-23, 227) He "made a big mistake" and did not intentionally lie. (H.235)

Reedy said Martin also told him that when Martin questioned defendant, defendant said his photo was not in the photo array. This statement was not memorialized. Reedy did not recall defendant saying that, but Reedy was in and out of the room during the questioning. (H.220, 222-23) Martin also told Reedy that Martin discussed the photo array with an ADA, maybe the trial ADA. (H.228-31) Reedy did not recall whether he was present during the discussion; Reedy would not agree with the prosecutor that he was not present during any alleged discussion. (H.230)

As case detective, Reedy was responsible for all documentation. He told Martin to prepare a DD5 about defendant's statement regarding the photo array. That was never done. Reedy did not follow up because there were "other things going on." (H.239-40) Reedy acknowledged that before he testified, he reviewed the photo array with the trial ADA and never mentioned that defendant was not the Sheldon Thomas in the photo array. (H.257-58)

(Retired) Det. Martin

Martin testified as follows:

1. After Discussing the Photo Array Issue with Reedy, and Reading a Portion of Reedy's Testimony, Martin Testifies About Anonymous Caller(s) and Undocumented Conversations with Charles.

Martin admitted that, prior to his testimony, he spoke to Reedy about Reedy's testimony. (H.389) Reedy was wondering "what went wrong." Martin told Reedy that Reedy did not "read the fives [DD5s]," and "All the answers are in the 5s." (H.390) Martin then admitted that there was no DD5 documenting that defendant was not the Sheldon Thomas in the photo array. (H.398)

Prior to his testimony, Martin also reviewed "a section" or "one page" of Reedy's testimony but did not recall which part. The testimony was on a table in the DA's office. Martin testified both that he did not believe it was accidentally left out, and that it was not intentionally left out for him to see. (H.391, 397)

Martin learned information about defendant, which had come from an anonymous caller and Charles. Contrary to Reedy's testimony that Martin reminded him about the anonymous call, Martin testified that Reedy mentioned the anonymous call to him when they discussed Reedy's testimony. (H.390-91)

The detective squad received the anonymous call, which provided an address that "came back" to "Sheldon." (H.290) The caller gave Sheldon's full name as Sheldon Thomas, and said that Sheldon Thomas went by Shelly, Loke, and Smokey. (H.296-97, 349) Martin testified, "That made the person sound credible." (H.349)

Martin was not sure, but he believed the anonymous call came in on December 26, sometime in the afternoon. He guessed that it came in around 1:00 p.m. (H.377, 379) Martin did not speak to the caller. (H.376) He also did not know "[t]he exact tip." (H.447) Martin did not prepare a DD5 about the caller. He wrote the information in his spiral. (H.377) Martin read the spiral notes aloud, which stated,

"Smokie/Sheldon/Shelly/Loke, 384 East 48th Street, then Sheldon once again. Yellow with a slash Dalton Walters, Kurn and Haus." (H.447)

Although Martin testified about only one anonymous caller, when questioning Martin (on redirect examination), the prosecutor recounted that Martin had testified that he "had information from other officers regarding anonymous phone calls." Martin agreed. (H.466) Martin now testified that there was more than one anonymous call, but he did not know how many. (H.479) The information in his spiral came from one call, but the other calls "combined basically rehashed the same information." (H.480)

Martin spoke to Charles in person. He did not think it was at the precinct. (H.483, 501-02)[61] Charles provided the nicknames Yellow, Shelly, Sheldon, Hoz, and Kern. (H.289-90) Charles overheard these nicknames from the deceased's friends, and "heard names to the [e]ffect of Sheldon as being one of the individuals in the car." (H.466-68)

Martin believed he spoke to Charles on December 26. (H.483) On that date, she told him she saw "Yellow" in a white Nissan firing a gun. (H.490, 492)[62] Martin then testified that it was not December 26. He repeatedly stated he could not be "exact," but they probably spoke on December 27. (H.496-97) He had a "few" conversations with Charles, which probably started anywhere from December 27 on. (H.500-01) All of Charles's information was based on what she overheard. (H.501, 503) Martin did not memorialize any of his conversations with Charles because she reiterated information he already had. (H.502)[63]

Both the anonymous caller and Charles said defendant was a known associate of Yellow. Charles heard that "in the street." (H.348) Martin first heard the nickname Yellow when he interviewed Kadeem Drummond at the hospital. (H.375)

2. Martin Did Not Obtain an Unsealing Order for Defendant's Prior Arrest.

After Martin received information about Sheldon Thomas, he asked the prosecution for an unsealing order to obtain his (arrest) photograph. (H.299)[64] The file was never obtained because Martin discovered a photo of "Sheldon Thomas" in PIMS. (H.299-300) Martin obtained the photo by inputting "Sheldon Thomas, male, black, and age range from teens to early 20's." (H.300) Martin did not enter the address provided by the anonymous caller (H.451).[65]

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[61] The court instructed Martin that if it was not in the precinct to say, "outside the police station." (H.483)

[62] December 26, during her sworn audiotaped statement to the ADA, Charles stated she saw Yellow in the car. Reedy, and not Martin, was present during the statement. (*see* above)

[63] The court sustained the prosecutor's objection to counsel asking whether another officer was present. (H.502)

[64] The prosecutor stated at the hearing that the application for an unsealing order was prepared but not signed by the court and the file was never obtained. (H.285) (For unexplained reasons, the trial file contains an undated signed order for the sealed case. CRU obtained that file and discovered that it contains the complaint room screening sheet and complaint for this case.)

[65] The court sustained the prosecutor's objection when counsel asked whether the computer allowed for the input of an address. (H.451-52)

Martin saw that the address of the Sheldon Thomas in the photo generated from the computer was different from the address he had obtained, but both addresses were in the confines of the 67th Precinct. (H.300-01) Nevertheless, Martin believed that the photo was of the person he sought. (H.301)

Prior to preparing the photo array, Martin did not confirm that defendant resided at the address provided by the anonymous caller. (H.449) Martin first learned that the address was defendant's when defendant was taken into custody. (H.448-49)

3. Martin Conducted the Photo Array Identification Procedure

On December 27, Martin and Reedy went to show the photo array to Charles and Smith. (H.305-06) Contrary to Reedy's testimony, Martin testified that he conducted the identification procedures, not Reedy. (H.305) Charles viewed the photo array (People's Exhibit 1; CRU Exhibit 1A) and identified "Sheldon Thomas" in position number five, "as the shooter inside the car." (H.307-08)[66] Charles stated she was not 100 percent sure. Martin asked her about her certainty, and she said it was 90 percent. (H.308)

Martin next attempted to show the photo array to Smith, but Smith turned away and said he did not want to look at it. Smith never viewed the photo array. (H.308-09)

4. Defendant Informs Martin that the Photo in the photo array Is Not Him

On December 28, at about 7:00 or 8:00 a.m., Martin arrived at the precinct, and sometime thereafter defendant gave a *Mirandized* statement. (H.311-13) Reedy was "in and out of the room" during the statement. (H.312) Martin testified about the substance of defendant's statement, which was exculpatory. Defendant denied knowing Walters or Yellow. (H.320-22)

As a "bluff" Martin told defendant that "numerous" witnesses had identified him in a photo array. (H.322) On direct examination, Martin testified that defendant said that was not possible. On cross examination, Martin insisted that defendant did not say anything. When confronted with his prior testimony, Martin was forced to admit that defendant said it was not possible that he was identified. (H.440-43)

Martin showed defendant the photo array, saying, "There you are in position number five." (H.322-32) Defendant "studied it for a second" and said, "That's not me." (H.323) Martin was surprised and looked at the photo array and defendant for about a minute or two to see the similarities. (H.323) Martin determined that photo number five was "a likeness to [defendant], but it was not [defendant]." (H.323) Martin believed that the noses and eyes were similar, and the hair "could be similar" except that only defendant's hair was braided. Also, the skin complexion was "somewhat the same." (H.324)

Reedy was not present when defendant said he was not the person in the photo array. (H.327) Martin prepared a DD5 memorializing his interview of defendant, but he did not memorialize defendant's

[66] Charles identified number five in the photo array as being in the car. (*see* above, Police Investigation, photo identification)

statement concerning the photo array, or the fact that defendant's photo did not appear in the photo array. (H.445-46)

During his testimony, Martin viewed defendant's arrest photo in this case. (People's Exhibit 9, attached hereto as CRU Exhibit 1B) Martin testified that the arrest photo fairly and accurately reflected how defendant looked when Martin interviewed him. (H.325, 326)[67]

5. Martin Did Not Provide the Anonymous Tip Information to His Supervisor, Who Determined to Arrest Defendant

Contrary to Reedy's testimony (H.134, 154-55), Martin testified that defendant's arrest was not based on Charles's photo array identification. (H.419-20) Martin presented the information he had to his supervisor, who made the ultimate decision to apprehend defendant. (H.460) The supervisor was probably Lt. Palmeri, but Martin did not "recall exactly" what information he provided to Palmeri. Martin had no notes to refresh his recollection. (H.461) When asked if he told Palmeri about the anonymous tip, Martin said he "did not." (H.462) When asked if he told Palmeri about the photo array, Martin replied, "As I stated before, I don't recall what was told to him." (H.462)

6. Martin Believed They Had the Right Person Based on His "Gut Feeling"

Although defendant was not the person in the photo array (whom Charles identified), Martin believed that defendant was the right person. The information they had from one anonymous caller and Charles "was very detailed," and defendant's demeanor during the interview and his statements also caused Martin to believe he "had the right guy." (H.347) Martin believed he had the correct Sheldon Thomas based on his "gut feeling" and on defendant's answers and evasiveness. (H.473-74)

Upon learning that defendant was not the person in the photo array, Martin did not contact KCDA or his legal department because he believed they had the right Sheldon Thomas. (H.479, 473) He thought it was a problem, but not "a big problem." (H.474)

7. Martin Told the Grand Jury ADA About the Photo Array Issue

Three weeks after defendant's arrest, Martin testified in the grand jury. At that time, Martin personally told the grand jury ADA that the Sheldon Thomas in the photo array was not defendant. (H.400, 423) Martin did not memorialize this conversation. (H.401) Martin then testified that he was not 100 percent sure he spoke to the grand jury ADA. It could have been another ADA, whose name Martin did not recall. But Martin was certain he told some ADA about it. (H.473, 505) It was stipulated that Martin testified in the grand jury on January 20 and 27, and on both dates, the grand jury assistant was the trial ADA ("the trial ADA"). (H.508, 510) Martin still maintained he did not recall which ADA he told. (H.512)

Martin did not notify anyone about the photo array issue prior to his grand jury testimony because he was home sick with strep throat. (H.470)

[67] *See* CRU Exhibit 1C for a side-by-side comparison of subject array photo, and defendant's arrest photo.

Defendant's Apprehension (*Payton* issue)

Sgt. Michael Murphy

Murphy testified as follows:

Murphy, of the Brooklyn South Fugitive Apprehension Team, was assigned to apprehend Sheldon Thomas for the homicide. He did not have a warrant. (H.561-62, 598)[68] He was provided with a photo, the nickname Smoke, and the address 384 East 48th Street in the confines of the 67th Precinct. (H.562-63, 568-69)

The photo of Thomas was a single arrest photo. Murphy no longer had the photo. (H.592-93)[69] During his testimony, counsel had Murphy view defendant in court and asked whether the photo looked like defendant. Murphy said, "it resembled him." (H.593)

Sometime after 2:30 a.m., possibly 4:00 a.m., Murphy and Det. Henn arrived at defendant's front door, and a detective was in the back with uniformed officers. (H.569, 594-96) Henn banged on the door. It took a long time before someone appeared. Murphy saw "someone that look[ed] like Sheldon Thomas on the other side of the door." (H.570) He appeared shocked. (H.570-71) Thomas ran towards the back of the house, and Murphy heard "a loud commotion in the back," and "screaming." (H.571-72) They "kicked in the door," and apprehended Sheldon Thomas. (H.572) He did not struggle or attempt to escape. Murphy did not check on the people who had been screaming. (H.614)

Murphy "made sure it was the individual [they] were looking for, Sheldon Thomas," by asking his name. (H.572-73)

Murphy denied that the man who answered the door repeatedly asked who was there, demanded to see their badges, and called 911. (H.597-98) He also denied that they placed that man against the wall, pushed an older woman aside knocking out her tooth, and held another woman and two young girls in the living room. (H.602-04)

1. Defense Counsel Questions Murphy About his Prior Contact with Defendant

On cross examination, counsel asked Murphy if, at a prior time, Murphy drove up to defendant, took his cellphone, and put defendant in his car.[70] Murphy replied, "Me? No." Counsel then asked, "Do you recall then going to defendant's house and telling his grandmother that you wanted to search the house?" Murphy replied, "That wasn't me, sir." Counsel asked if Murphy recalled that when defendant's grandmother tried to close the door, Murphy placed his foot in the door, preventing it from closing. The court interjected, "He said it wasn't him on that date, so there is no sense in making these questions. There is no jury here." (H.605)

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[68] Murphy identified defendant in court as Sheldon Thomas. (H.562) Throughout his testimony Murphy referred to defendant as Sheldon Thomas.

[69] Murphy was apparently given the photo from the photo array since a photo of defendant was not obtained from the unsealing order, and a Polaroid photo was taken of defendant after his arrest to show Walters. (*see* above)

[70] Counsel appears to have mistaken Murphy for Reedy. (*see* below, IAB Investigation, Defendant's Complaint and Defendant's Motion to Vacate)

Ernesto Sergeant's Lineup

Reedy

Reedy testified as follows:

On May 13, 2005, he assembled Sergeant's "double-blind lineup" and photographed the lineup. Det. Manceri conducted the lineup. Manceri had no knowledge of the case and did not know that Sergeant was the subject. Sergeant's attorney was present. (H.69-73)

Charles and Smith viewed the lineup. (H.66-68, 111, 115) Manceri later informed Reedy that Charles did not identify anyone. (H.75) Smith said he knew Sergeant but did not say where he knew him from. (H.129-30)

Manceri

Manceri testified that Charles did not make an identification. Smith said he knew the person, but Manceri did not recall what else Smith said. Manceri memorialized the lineup in a DD5, which he gave to Reedy (H.551, 554-55), but the DD5 was lost. (H.632 [Stipulation])[71]

The Defense Case

Pauline Williams

Williams testified as follows:

On December 28, at about 3:30 a.m., she was home with defendant (her son), her fiancé, Jarrett, her mother, Lurline Coke, and her two young daughters, when there was knock on the door. (H.337-40) Jarrett asked who was there and someone said they wanted to speak to Sheldon Thomas. Jarrett asked two more times and received the same response. Williams looked out the window and saw three white males, who were not in uniform. Jarrett told her to call 911. (H.640, 646-47)

Williams called 911 and reported what was happening. The men continued to bang on the door, saying they needed to speak to Sheldon Thomas. They said they were from the 67th Precinct, but when Jarrett asked to see their identification or a warrant there was no response. (H.641-42, 667)

Williams' young daughters were now screaming and crying. Her mother woke up defendant and asked him what was going on. He said he did not know. At least six to eight officers then stormed in. One placed Jarrett in a chokehold and pushed him against the wall. The officers barred Williams and the young girls in the living room. They pushed Williams' mother to the wall causing her dentures to come out. They would not allow defendant to put on shoes and brought him outside, barefoot, in the snow. (H.642-45)

Oral Arguments

On June 26, the court heard oral arguments (H.768) Defense counsel argued, among other things, that there was no probable cause to arrest defendant based on an unreliable anonymous call and information Charles heard on the street. Furthermore, there were no DD5s or police reports

[71] In its decision (*see* below), the hearing court erroneously stated that Smith identified Sergeant in the lineup (Decision at 13).

concerning the information. Moreover, defendant did not look like the Sheldon Thomas in the photo array, and Reedy may have committed perjury. (H.796-97, 804-06)

The People assailed Reedy's credibility, arguing, among other things, that "New York's Finest did not enter this courtroom" when Reedy walked in. He was "a pathetic figure," "sloppy," he lost DD5s, and it was known by other officers that "Reedy was not capable of doing this job." (H.809, 811, 815, 825, 844) The People maintained, however, that Reedy's misconduct was not intentional, or criminal, and did not warrant suppression of all the evidence in this case. (H.810)

The People argued, "we have the testimony of Detective Martin," which established probable cause, and there were "many similarities between" the Sheldon Thomas in the photo array and defendant. (H.831)[72] Furthermore, there were anonymous tips, which alone did not establish probable cause, but which were corroborated by Charles. (H.834-35)

The case was adjourned to July 13, 2006, for the court's decision. (H.846)

Defendants' Motion for a Special Prosecutor Before the Administrative Judge

In undated papers to the Administrative Judge the defense (all defendants), through counsel, filed a motion seeking appointment of a special prosecutor on the basis that the prosecutor on this case has "a demonstrable conflict of interest." ("Motion for Spec. Pros.") The defense argued, among other things, that the prosecutor knew about the photo array issue and committed a *Brady* violation.

In opposition, the hearing ADA submitted her own affirmation, dated June 29, 2006, and an affirmation from the trial ADA.

The Hearing ADA's Affirmation

In pertinent part, the hearing ADA stated, "there was no 'misidentification' of Sheldon Thomas." (Aff. at 3) (emphasis added)[73] Martin's hearing testimony established that when Confidential Witness #1 (Charles) viewed the photo array with the photograph of "an individual named 'Sheldon Thomas' whom the police believed to be defendant," Charles "pointed to the photograph and stated she was not a 100 percent sure." Martin asked, "How positive would you be?" She replied, "90 percent and would have to see the individual in person to be 100 percent sure." (*id.,* citing Martin's testimony at 308, which was annexed to the opposition)

The hearing ADA wrote:

> That the person in the photo array was not the defendant but someone who looks remarkably similar to him does not turn the witness' statement into a misidentification.

(*id.*) (emphasis added)

[72] The prosecutor did not cite any specific similarities.

[73] Neither the pages nor paragraphs in the hearing ADA's affirmation are numbered.

Regarding the *Brady* issue, the hearing ADA maintained that although the People are presumed to know what the police know, there is no evidence to support the defense accusation of "'a cover up or failure to disclose.'" Referring to the trial ADA's annexed affirmation, the hearing ADA stated that:

> the first time [the trial ADA] learned that the 'Sheldon Thomas' in the photo array may not be the defendant was on June 6, 2006, after it was discovered in open court.

(*id.*) (emphasis added)[74]

The hearing ADA asserted that the People had "no legal or ethical obligation" to disclose that the person in the photo array was not defendant because "the first person" to discover it was defendant himself. (*id.* at 4) (emphasis added)

The Trial ADA's Affirmation

In pertinent part, the trial ADA stated that on December 29, 2004, she spoke with several members of the NYPD and was informed that defendant was taken into custody the previous evening "based on the photo array identifications done by [Charles], and other information known to the NYPD. (Aff. ¶ 3) (emphasis added)

She wrote,

> At no point was I told that during his statement defendant Sheldon Thomas was shown the photo array and told Det. Martin that the 'Sheldon Thomas' in the photo array was not him.

(Aff. ¶ 4)[75] She further stated that she first learned on June 6, 2006, that "Sheldon Thomas" in the photo array "may not be" defendant. And on June 16, after a fingerprint comparison, she learned that the photo in the photo array was not defendant. (Aff. ¶¶ 16-17)

The trial ADA stated that prior to the grand jury presentation, she reviewed the "NYPD case folder." None of the DD5s indicated that the person in the photo array was not defendant. She noted that Reedy's DD5 indicated that on December 27, 2004, he showed Charles the photo array, and she "ID Sheldon Thomas as being in the car." Martin's DD5 of defendant's statement to him does not mention that he showed defendant the photo array or that defendant indicated that the person in the photo array was not him. (Aff. ¶ 6)

The trial ADA stated she filed the VDF believing that "Sheldon Thomas" in the photo array was defendant. (Aff. ¶ 10)

On September 21, 2006, the Administrative Judge denied the motion, stating:

> The hearing court subsequently ruled on the motions to suppress and, in the course of a comprehensive decision in which specific findings

[74] There is no evidence that the hearing ADA informed the hearing court that Martin falsely testified that he told the trial ADA about the photo array. (H.400, 423)

[75] There is no evidence that the trial ADA informed the hearing court that Martin falsely testified that he told her about the photo array. (H.400, 423)

> of fact were made, found no misconduct on the part of the Assistant District Attorney. As such, the instant motion is denied.[76]

The Hearing Court's Decision

In a written decision dated July 13, 2006, the court held that probable cause existed to arrest defendant. The court found a *Payton* violation regarding the police entry into defendant's residence and suppressed defendant's statements as fruit of the violation. However, the court did not suppress the lineup identifications (which the court said were not suggestive) because there was probable cause.

The court credited Det. Reedy regarding the identification procedures "only as corrected by [Reedy] upon his explanation that, in his initial testimony he had confused the facts of the lineup identification procedures with the facts of the photo array identification procedures."[77] The court credited all the People's witnesses, as well as defense witness, Pauline Williams. (Decision at 1-2)

Clearly crediting Det. Martin's testimony (*see* above, Martin's hearing testimony section 1), the court determined that:

> On December 27, 2004, the police had probable cause to arrest defendant based on information from Kadeem Drummond, [Charles], as well as verified information from unknown callers, identifying him as one of the perpetrators. Specifically, the police had information that one of the perpetrators was a young male black known as 'Shelly,' 'Sheldon', 'Loke' or 'Smoke', and 'Kurn' (phon.). The police also had information from one unknown caller that one of the perpetrators, identified as 'Sheldon', lived at 384 East 48th Street. Utilizing computer checks by name, address and description, Detective Martin confirmed that defendant Thomas Sheldon known as 'Smoke' and 'Kurn,' (phon.), indeed lived at the reported address.

(Decision at 16) (emphasis added)[78]

The court held that it was "of no legal consequence" that the photo of another Sheldon Thomas was generated that "resembled defendant Thomas and may have been relied upon by the apprehension team." (Decision at 16) The court noted that before defendant's arrest, Charles was not 100 percent

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[76] The decision is worded in a way that makes it appear the hearing court made an affirmative finding that there was no misconduct by the ADA. While CRU believes that the prosecutor did not learn of the photo array issue until the hearing—and thus did not engage in intentional misconduct—it should be noted that the hearing court did not make an affirmative finding to that effect.

[77] When Reedy testified to this confusion, the court asked, "What could possibly confuse you whether or not that photograph was the person who was on trial in front of me." Reedy said it was a mistake. (H.169)

[78] This was incorrect. Martin testified that he did not input the address into the computer or confirm that defendant resided at the address provided by the anonymous caller. (H.449, 451) Martin first learned that the address was defendant's when defendant was apprehended. (H.448-49) Furthermore, Sergeant, not defendant, was known as Kern.

sure of her identification of the other Thomas, and Sgt. Murphy viewed a mug shot photo of defendant Thomas. (Decision at 16-17)[79]

Defendants' Motion for Re-inspection of the Grand Jury Minutes

Also on July 13, the hearing court declined to entertain a motion the defense (all defendants) had filed on June 27, through counsel, for re-inspection of the grand jury minutes. ("Motion to Re-Inspect") The defense argued, among other things, that the prosecution failed to present to the grand jury the exculpatory evidence of Charles's misidentification.

The hearing court referred the motion to the judge who had conducted the original inspection of the grand jury minutes ("the grand jury court").

The Trial ADA's Affirmation

By opposition dated July 31, the trial ADA submitted an affirmation, which reiterated much of her prior affirmation (*see* above) and, in relevant part, added that there was no truth to Det. Martin's hearing testimony that he told a grand jury assistant about the photo array issue. Specifically, the trial ADA stated the following:

Martin testified at the hearing that he told "some Assistant District Attorney" at the grand jury about the photo array issue. (Aff. ¶ 9) At no time before, during, or after Martin's grand jury testimony, did he inform the trial ADA or anyone, to her knowledge, that there was an issue with the photo array. (Aff. ¶ 10)

On August 3, 2006, the grand jury court denied the motion stating, in relevant part, that Charles's identification of another individual was not exculpatory because she was not 100 percent certain, and she identified defendant in a lineup. And in any event, the failure to inform the grand jury of the photo array misidentification would not have materially influenced the grand jury's decision.

SERGEANT'S CASE IS DISMISSED

By memorandum dated August 18, 2006, to the then-Rackets Division Chief, the hearing ADA asked to dismiss Sergeant's case.[80] The hearing ADA explained that Charles had identified Sergeant in a photo array and failed to identify him in a post-indictment (double-blind) lineup. Charles was the only witness who implicated Sergeant.

The hearing ADA noted that Sergeant had maintained his innocence, had a believable alibi, and passed an agreed upon polygraph test.

On August 22, the District Attorney (Charles J. Hynes) approved the dismissal.

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[79] CRU does not believe there is any resemblance between the other Thomas and defendant. Moreover, Murphy—who was on the apprehension team—did not view defendant's mug shot before the arrest. Indeed, the court acknowledged that fact in its prior sentence that the apprehension team relied upon the other Thomas' photo. As previously discussed, defendant's prior arrest photo in the sealed case was never obtained, and a Polaroid photo of defendant after his arrest was taken to show to Walters during Walters' statement. (H.336, 393)

[80] At the time, the Gangs Bureau was part of the Rackets Division.

On August 23, the hearing ADA, Sergeant, and his attorney appeared before the hearing court. The People moved to dismiss the indictment against Sergeant, reiterating the reasons stated in the hearing ADA's memorandum. The court granted the motion.

THE TRIAL

On October 17, 2006, defendant and Walters were tried jointly (before the same judge, who conducted the hearing).

The People's Case

Daymeon Smith

Smith testified as follows:

Smith, Freddy Patrice, Kirk LaPaix, Michael Barnwell, and Kadeem Drummond were Blood members. (T.597-600) The deceased, Smith's best friend, intended to join the Bloods. (T.656, 742) The Bloods and Crips were rivals. (T.743)

Yellow (Walters) was a member of the "Outlaws." Outlaws and Bloods were not rivals. (T.649, 772)[81] A month or two before the shooting, Walters told Smith, the deceased, and other Blood members to stay away from Patrice. Smith understood that to mean Walters was going to come after them and Patrice. (T.656-57)

Smith knew defendant for a year before the shooting. Defendant was a Crip gang member. When Smith rode the bus through the forties to pick up his girlfriend twice a week, he saw defendant on 46th or 48th Streets with other Crips. (T.651-54, 670)[82] Smith did not know defendant's name or nickname. (T.775-76, 778) Smith did not know anyone nicknamed Smoke. (T.803)

On December 24, 2004, Smith was with the deceased, LaPaix, Patrice, Michael Barnwell, and Kadeem Drummond at LaPaix's house on East 52nd Street between Snyder and Tilden Avenues. They left to get groceries for LaPaix's mother. (T.662-64) LaPaix's girlfriend, Aliyah Charles, was at the apartment and stayed behind. (T.664) While they were out, they went to Subway, where Charles worked, to pick up something for her. (T.665)[83]

At around 8:00 or 8:30 p.m., the group headed back to LaPaix's. It was dark out. They walked down East 52nd Street toward Snyder Avenue. Smith and LaPaix were in front of the group as they approached Snyder. (T.666-67)

As they neared Snyder Avenue, Smith saw a white car drive by, and the front passenger side window roll down halfway. (T.667, 669) Smith admitted that when first interviewed, he said the right rear passenger side window rolled down, but he then denied that he said that. (T.724-25) Defendant,

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[81] Smith identified Walters in court as Yellow. (T.649-50) Smith did not know Yellow's true name (T.650) and referred to Walters as Yellow throughout his testimony.

[82] Smith identified defendant in court. (T.655)

[83] Counsel elicited that LaPaix spoke to Charles on the phone and then went to Subway. The court sustained the prosecutor's objection about the phone call. (T.666)

wearing a "muffin" hat, leaned out of the window holding a gun. (T.668-70)[84] Smith was about five feet away and nothing blocked his view. The car windows were tinted, but he was able to see inside the car. (T.668-70) Smith admitted that the car interior lights were not on. (T.728)

The white car pulled up on Snyder Avenue across the street from LaPaix's house. The lighting conditions were "good." There was a light on the sidewalk on the other side of the street from Smith. (T.669, 729) Also, a firehouse on the same block as Smith had its light on. (T.669, 753) Smith then admitted that the firehouse was in the middle of the block and not near the car. (T.762)

When Smith saw defendant with the gun, Smith ran to the left. A bullet went through LaPaix's grocery bag. LaPaix hid behind a tree. (T.670-71, 675) The deceased and the others ran to the right, the same direction as the car went. (T.674) Smith heard two guns being fired. (T.672-73) When the shooting stopped, the car drove off on Snyder Avenue. (T.675)

On December 26, at LaPaix's apartment, Det. Reedy showed Smith a photo array.[85] Smith looked at it and did not identify anyone. (T.782-84, 787-88) On December 28, at about 7:40 p.m., two detectives picked up Smith, drove him to the 67th Precinct where they placed him in a room. They then brought him out to view a lineup. He identified defendant in the lineup as the shooter. (T.670-81)[86] One of the detectives then told him defendant's name. (T.769)

Smith then viewed another lineup. He told the detectives that he recognized Walters in that lineup from the neighborhood. (T.684-85, 732)[87] Smith testified that he did not see Walters in the car. (T.732)

Counsel's Cross Examination Regarding Kern

Smith denied that he had previously stated that the shooter was dark-skinned. He then admitted that he testified to that in the grand jury, and that his grand jury testimony was correct. (T.799-802) Smith acknowledged that defendant was <u>not</u> dark-skinned. He testified that he no longer knew the skin tone of the shooter. (T.802)

Smith acknowledged that prior to the shooting (did not say when) he saw a similar model white car. Counsel asked Smith whether "Kern," whose name was "Ernesto Sergeant," was driving that car. (T.803) Smith did not know Kern's full name but said he saw Kern driving the "same model car" on a prior occasion. (T.803, 810) Smith acknowledged that he testified in the grand jury that he had seen Kern driving the same car, and that his grand jury testimony was correct. (T.805-06, 811) Smith agreed

[84] Smith described the muffin hat as "something you wear in the wintertime to keep your ears warm." (T.668)

[85] The defense admitted the photo array into evidence. (T.788-89)

[86] During his testimony, Smith identified photos of defendant's lineup. They were admitted into evidence, without objection. (T.682-83)

[87] During his testimony, Smith identified photos of Walters' lineup. They were admitted into evidence, without objection. (T.685-86)

that Kern had very dark skin. Smith viewed a third lineup, which had Kern in it.[88] Smith testified that he did not see Kern in the car during the shooting. (T.808-09)

Aliyah Charles

Charles testified as follows:

Charles's Knowledge of Defendant and Walters

On direct examination, Charles testified that, at the time of the shooting, LaPaix was her boyfriend. (T.918-19) The deceased was "like a little brother" to her. (T.919) Charles knew Walters by the name Yellow.[89] She had seen Walters in the neighborhood, and about once or twice a week at her job at Subway, on Church Avenue, between East 51st and 52nd Streets. (T.917, 920-22)

Charles knew defendant from seeing him around the 48th Street and Church Avenue for about two years. (T.923, 926) Defendant was a Crip. (T.924) Charles once saw defendant and Walters hanging out. That was in the summer of 2004. She noticed them because she thought it was unusual to see an Outlaw (Walters) and a Crip together. (T.927) On cross examination, Charles said that she did not know anyone named Smoke (T.1149)

Charles Had Seen Defendant Driving the White Car with Scratches on the Back

On direct examination, Charles testified that she had seen defendant before December 24 (she did not say when or where), driving a white car, maybe a Maxima, with "black scratches on the back." (T.926)

On cross examination, without mentioning defendant, Charles testified that she first saw the white car in summer 2004, on 48th Street and Church Avenue. She noticed the car because it had "scratches in the back." Charles admitted that there was nothing unusual about seeing a white car with scratches in that location. (T.979)

The People Elicit that Charles Observed Kern Driving the Same White Car with Scratches Shortly Before the Shooting

On direct examination, Charles testified that the evening of the shooting she left work (at Subway) between 5:30 and 6:00 p.m., stayed in front of the store talking for about 20 minutes, and then walked to East 52nd Street and Snyder Avenue. (T.928-29)

The People then elicited that Charles saw Kern driving the "same white car with scratches on it, going up to 52nd side." (T.929) (emphasis added) The prosecutor asked, "Who is Kern?" Charles testified that she had seen Kern hanging out in the 50s and hanging around Walters. (T.929)

The People asked, "And when you saw Kern driving that white car with scratches in the back, did you see what direction he was going?" Charles testified that the car went "down 53rd past 52nd." The People asked, "How many times did you see that car at that point?" Charles said "twice." She first saw the car drive to East 53rd Street and Church Avenue, and when she headed to LaPaix's house the car

[88] At a sidebar, it was discussed that Ernesto Sergeant was the subject of the third lineup, and that Smith did not identify Sergeant. (T.807)

[89] Charles identified Walters in court. (T.920) She referred to him as Yellow throughout her testimony.

was going in the opposite direction. (T.930) (emphasis added) The People asked, "Was Kern still driving it?" Charles said, "Yes." (T.930) (emphasis added)

Charles arrived at LaPaix's apartment at 6:30 or 7:00 p.m. She then went out with LaPaix, Smith, the deceased, Patrice, and her friend Shantel to meet Barnwell. While out, Charles saw the same white car going down toward the 40's (referring to Street numbers). And when they headed back to LaPaix's, Charles saw it again going towards East 53rd Street and Church Avenue. She did not look to see who was driving either time. (T.930-33) At East 52nd Street and Snyder Avenue, LaPaix told Charles to go inside to "make sure [she was] safe." (T.935)

The People Elicit that Charles Observed Kern in the White Car During the Shooting[90]

On direct examination, Charles testified that she looked out the window in LaPaix's room, which had a view of Snyder Avenue and East 52nd Street. (T.936) Charles saw the same white car with the scratches on the back, parked in front of the building on Snyder off East 52nd Street. (T.937, 939) It was on the building's side of Snyder facing East 53rd Street. (T.937)

The People asked, "Who was driving?" Charles said defendant. (T.937-38) The prosecutor asked, "Who else?" was in the car, Charles said, "Yellow, Kern, and I don't know the other person." (T.937-38) (emphasis added) After eliciting that Yellow was in the back behind the passenger's seat (T.937), the prosecutor asked, "And who was in the front passenger seat?" Charles replied, Kern. (T.938) (emphasis added) Charles viewed the car for a minute or less. (T.939)

Charles went to the kitchen for a while. She returned to LaPaix's room, called him to see where he was, and looked out the window again. The People asked, "How much time had passed from when you saw that white car with [defendant and Walters] and Kern and another person inside of it in front of the building?" Charles said it had been about five minutes or less. This time, Charles did not see anything. (T.939-40) (emphasis added)

Sometime after (she did not say when), Charles saw the white car on Snyder Avenue, across the street, facing East 51st Street. Charles did not see anyone in the car. LaPaix then called to say they were on their way back to his apartment. (T.940-41)

Three to four minutes later, Charles saw LaPaix, the deceased, Patrice, Barnwell, and Smith walking down East 52nd Street from Church Avenue. The white car was still across the street and had not moved. (T.941) As LaPaix and the rest neared the building, "shots started coming from the white car." (T.942-43) There were about 16 overlapping gunshots from more than one gun. The People asked, "Could you see at that point who was in that car?" Charles said, "Yes." The People asked, "Who did you see?" Charles saw defendant in "the front seat," Kern in the passenger seat, and Walters in the

[90] Except Charles, none of the canvass witnesses who heard the shooting saw any occupants in a white car around the time of the shooting. Some witnesses saw black males fleeing. One witness saw a white car before the shooting but did not see the occupants. LaPaix's mother (Candillo) and his brother, Rodney, who were in the apartment with Charles, heard the shooting, and Rodney looked out the window and saw a double-parked white care drive off. (*see* above, Canvass Interviews)

back seat. (emphasis added) The People asked, "[C]ould you tell what part of that car those shots were coming from?" Charles said the front and rear passenger windows. (T.943)[91]

1. Charles's Ability to See Inside the White Car

On cross examination, Charles testified that she did not see defendant shooting; Kern and Walters were the shooters. (T.1122) When she looked out the window and saw the white car, she did not consider whether it was the same car defendant or Kern had been driving before. (T.987) Contrary to Smith's testimony that defendant was wearing a hat (T.668-70), Charles testified no one in the car was wearing a hat. (T.1138-39)

As she looked out of the window, it was "open wide" about a foot, and she had her head out. (T.986-87) She saw into the white car, because the car windows were not "really tinted." (T.987) She admitted that she had previously said the car windows were tinted, (T.1095-96), but now stated they were lightly tinted enabling her to see even at night. (T.1136-37)

Charles also testified that she could see into the car because all four windows were down, the car interior lights were on, and there were streetlights. (T.1137-38) The car windows were more than halfway down. (T.1098) The car interior lights were on for 20 minutes. (T.1096-97) She first saw the car for eight to 10 minutes. (T.1098) She did not look out the window again until LaPaix called to say he was on the way home. The car was double-parked across the street. Although she did not see the passenger side of the car (the driver's side faced her), she saw all the occupants. (T.1009-101) The car was parked when the shooting started. It had been parked for probably two minutes. All four windows were open. (T.1159)

The People Elicit that Charles Did Not Identify Anyone in the Photo Array, She Just Thought Number Five Looked Like Defendant

The People showed Charles the photo array and asked whether she had seen it before. Charles testified that Dets. Reedy and Martin showed it to her, and she told them she did not recognize anyone. Charles told them that it "looked like him," but she was not sure and needed to view a lineup. (T.946-47) The People asked, "who did you think that looked like?" Charles replied, "Sheldon." The next day, December 28, Reedy and Martin drove her to the precinct to view a lineup. Charles identified defendant in a lineup. (T.947)[92]

[91] Counsel never objected to Charles's testimony about Kern.

[92] Charles testified about the procedure of her viewing the lineup and photos of defendant's lineup was admitted into evidence, without objection. (T.947-51)

On cross examination, Charles revealed that prior to her testimony, the People told Charles that the person she had identified in the photo array, number five, was not defendant. (T.1139-40)[93] Charles denied that she identified number five. She told the detectives that she needed to see a lineup. (T.1140-41) She denied that she said she wanted to see number five in person. She never viewed a lineup before but knew about them from TV. (T.1145) She denied that the detectives pointed to number five or suggested that she identify defendant in the lineup. (T.1150, 1153)

Counsel asked Charles if she was so familiar with defendant prior to the shooting, how did she believe he looked like number five in the photo array with 90 percent certainty. The court interjected and said "Sustained. Don't answer that." (T.1168)

Both Martin and Reedy showed her the photo array. (T.1140-42) She viewed the photo array on December 27 in LaPaix's home. Only LaPaix's mother was home. Smith was not there. Smith did not view the photo array. (T.1142-44)

Charles's Prior Statements

1. The Initial Interview

On direct examination, Charles testified that the police questioned her for about 30 minutes after the shooting. She did not tell them anything, because she was upset the deceased had died and did not want to speak to anyone. (T.945-46)

On cross examination, Charles admitted that she told the police she saw the car and did not see any particulars about it other than it had tinted windows. She testified that her prior statement was not true and maintained that the windows were tinted. (T.1119)

2. The Sworn Audiotaped Statement

On cross examination, Charles admitted she told the ADA during her audiotaped statement that Kern and Yellow were in the car, and that she did not see the driver's face. She explained that she did not name defendant as the driver at that time, because "[she] didn't feel like [she] had to tell them everything." (T.1124-26)

a. Defense Counsel Elicits that Charles was Afraid of Defendant

Regarding why Charles did not mention defendant during her audiotaped statement, counsel asked, "Are you especially fearful of [defendant]." She replied, "A little bit." Counsel asked, "Among the people you saw in that car, are you especially fearful of [defendant]?" Charles replied, "More than everybody else was in the car, yes." Counsel asked "Why" and then withdrew the question. (T.1160)

[93] Counsel argued that it was improper for the prosecution to tell Charles that defendant's photo was not in the photo array. Counsel maintained that the information was "significant" and gave Charles "an unfair advantage on cross examination" and requested a sanction. (T.1186-87) The prosecutor responded that counsel "had a full opportunity to cross-examine" Charles, and faulted counsel for not asking Charles if the prosecution showed her the photo array—because it had not done so. The prosecutor maintained that, while preparing Charles for trial regarding the photo array and lineup, Charles "figured out" that the person in the photo array was not defendant and the prosecution "confirmed that for her." The court denied counsel's application but stated it would revisit the issue if counsel found New York law to support his argument. (T.1188)

Later, counsel asked Charles what "about [defendant]" made her more fearful of him than the others. She replied, "Because he beat[s] people up for fun. And shoot[s] people for fun." Counsel asked if Charles observed that, and she said "Yes." Counsel asked when the shooting occurred. Charles replied, "I don't think I have to tell you that." (T.1162) After the court instructed Charles to answer, she said July 2004, at 48th Street and Snyder Avenue around 6:30 p.m. (T.1163) Defendant was with Misha. (T.1164)[94] Counsel asked Charles when defendant beat up people. She said April 2004, in the afternoon, after school, around 3:30 p.m., defendant and Misha beat someone up. (T.1165-67)

Kirk LaPaix

LaPaix testified as follows:

Aliyah Charles used to be his girlfriend and in 2004 stayed with him for a while. (T.1353-54) At the time of his testimony, LaPaix had been a Blood member for nine years. (T.1352) Freddy Patrice was an Outlaw member and then became a Blood member. They became friends when Patrice joined the Bloods. LaPaix knew Walters. They never had any problems with each other. (T.1355-56)[95]

LaPaix did not know anything about the relationship between Walters and Patrice. He never saw them together. (T.1356-57) In November 2004, Walters and Patrice were not speaking to one another, and LaPaix did not care to know why. Walters warned LaPaix to be careful hanging out with Patrice because Patrice "gets people in a lot of trouble." (T.1357-58)

The police did not attempt to interview LaPaix, and he did not speak to the police at that time or any other time about the shooting. (T.1375-76)

Counsel asked LaPaix to look at defendant in court and asked whether LaPaix recognized defendant. LaPaix said that he did not know defendant and had never seen defendant before. Counsel showed LaPaix the photo array. LaPaix was never shown the photo array before and did not recognize anyone. LaPaix did not know anyone with the nickname Smoke. He knew "a Smoky" who was "really young" and whose real name was Jamal. (T.1383-84)

Freddy Patrice

Patrice testified as follows:

He was never a Blood member. Although he had "Outlaw" tattooed on his neck, he was never an Outlaw gang member. (T.1432-33) Patrice knew Walters for a long time. They had gone to the same school and were "very much" friends. They did not have a "beef." (T.1434)[96]

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[94] Counsel asked Charles if she told anyone about the shooting, the court interrupted, "Sustained. Don't answer the question." (T.1665) CRU investigated all shootings reported to have occurred at 48th and Snyder Avenue in July 2004 and found no basis for Charles's claim. Notably, while Charles mentioned in the grand jury having previously seen defendant beat someone up, she did not say anything about this alleged shooting. Nor did the People raise this purported shooting, nor any shooting, at the *Sandoval* hearing regarding defendant's prior crimes and bad acts. (T.122) Also, when CRU interviewed defendant, he was forthcoming about his prior crimes and did not mention a shooting.

[95] LaPaix identified Walters in court. (T.1356) The prosecutor did not ask LaPaix if he knew defendant.

[96] Patrice identified Walters in court. (T.1434) He was not asked whether he knew defendant.

Prior to the shooting, Patrice was walking with the deceased, ahead of the others. When the shooting started, he and the deceased ran in the same direction. Patrice did not look back. He did not see who was shooting, or a white car. (T.1437-39) Patrice carried the deceased to a store at Utica and Snyder Avenues and called 911. (T.1439) He left the scene before the ambulance and police arrived. (T.1432)

During his testimony, the prosecutor played Patrice's 911 call. (T.1430-31) He told the 911 operator that he did not have a description of the shooter. (T.1455)[97]

Patrice went to LaPaix's apartment to find the rest of the group. The police were there, and he told them what happened. (T.1440-41)

On December 28, he "[m]ight have been" at the 67th Precinct, adding, "I'm there a lot." (T.1441, 1454) He did not view any lineups. (T.1441)[98] The People attempted to refresh Patrice's recollection by showing him photos of the lineups (defendant's and Walters' lineups were in evidence). Patrice did not recall viewing either lineup. (T.1446) He also insisted that the lineups "never happened." (T.1449)

The Defense Case

The Defense Strategy and Court Ruling

The defense intended to show, through Det. Martin, that the police failed to investigate the real killer—the photo array "Sheldon Thomas" whose name and nickname were given to the police, and whom Charles identified with 90 percent certainty. (T.1558-59, 1566) The court held that if counsel questioned Martin about what he did to "find this guy," it would allow the prosecution to elicit that Martin "didn't do anything because next day he got a [lineup] identification that was 100 percent sure." The prosecution added, "by more than one witness." (T.1566-69)

Det. Martin

Martin testified as follows:

Counsel showed Martin the photo array, and Martin said he did not know number five. Counsel asked, "You don't know? Isn't that Sheldon Thomas?" (T.1552) Martin replied, "It is a Sheldon Thomas. At least that's the name that was given by the person in the photo." Martin then acknowledged that number five was another Sheldon Thomas. (T.1552-53) To Martin's knowledge that person "possibly" exists. (T.1553) Martin only recalled that number five lived closer to the Brownsville section in the 67th Precinct. (T.1560)

Martin had showed the photo array to Charles, and she said number five "looks like the individual," but she was not sure and would have to see him in person. Charles was 90 percent sure that number five was "the individual." (T.1563) He next showed the photo to Smith who refused to look at it. (T.1561) Det. Reedy was present at the time. (T.1565)

[97] The entire substance of the call was not stated on the record, but the defense elicited that Patrice did not provide a description.

[98] At a side bar, the court held that Patrice was a hostile witness. (T.1444)

Martin composed the photo array by entering the name "Sheldon Thomas" and a description into the computer system which automatically generated photos, without names. Martin explained that anywhere from five to hundreds of photos could be generated. Martin then physically goes through them and finds individuals "matching that likeness." (T.1573) That is the procedure Martin used here. Martin agreed that he did not know about "the mistake"—that defendant's photo was not in the photo array. (T.1573)

Counsel asked whether Martin did anything to find the person Charles had identified. Martin replied, "nothing for starters" and it was not his job to "give orders." His job was to first fill out an identification card (I-card) for "Sheldon Thomas" which was entered into the system.[99] Martin would then be notified if Sheldon Thomas was arrested for another crime. (T.1574)

Martin admitted that after obtaining the photo identification from Charles, he did not go to the address for the Sheldon Thomas in photo array. He did not know whether any officer went there. (T.1581)

Counsel asked, "Isn't it true that you held lineups on the 28th; didn't you?" Martin agreed. Counsel then elicited that Charles and Smith identified defendant in a lineup and asked whether Patrice viewed a lineup. Martin said, "Yes." (T.1574) Counsel asked if Patrice identified Sheldon Thomas. After reviewing the lineup sheet, Martin said that Patrice identified Sheldon Thomas, in position number six. Martin acknowledged that defendant was the in same position in each lineup. (T.1575)

Counsel admitted into evidence the lineup report pertaining to Patrice's viewing. (T.1583-85) Counsel did not question Martin about the report because the report "speaks for itself." (T.1586)

On cross examination, the People elicited from Martin that Charles, Smith, and Patrice all identified defendant as present in the car, and that Smith and Patrice said that they had seen defendant shooting. (T.1593)

On redirect examination, Martin admitted that he did not go to the address of the photo array Sheldon Thomas, that his team went to defendant's address, and that they subsequently placed defendant in the lineups. Martin never checked the address of the photo array Sheldon Thomas. (T.1594-95)

Counsel asked Martin about the lineup form for Patrice. Martin admitted that Patrice refused to sign it. (T.1595-97)

Summations

<u>The Defense</u>

Counsel maintained that the People's acting in concert theory was that defendant was a Crip gang member, who drove Outlaw gang member Walters to kill Patrice, a Blood gang member. But there was only innuendo that defendant was a Crip. (T.1739-45) And, in any event, as the court has, and will, instruct, "being a gang member is not a crime." (T.1745) There was also no proof that defendant and Walters were friends, or that defendant had any Crip loyalty that would require him to avenge a beef for Walters. (T.1749-51)

[99] The I-card listed the NYSID number for the photo Sheldon Thomas, and defendant's address. (*see* above, I-Card section)

Counsel stated that identification was the main issue. (T.1731) He discussed the witnesses who did not place defendant at the scene, Drummond and LaPaix. (T.1758-59) He attacked Smith's and Charles's credibility, and their conflicting accounts of defendant's location in the car, and who wore a hat. (T.1801) Counsel argued that Smith's initial description of the shooter was that he was dark-skinned, and that the other Sheldon Thomas and Kern were dark-skinned. (T.1799-1806) Charles's accounts were inconsistent, including her claims about the tint of the car windows. (T.1801) Counsel maintained that Charles's 90 percent certainty of the other Sheldon Thomas in the photo array, "in the real world" is a "positive id." (T.1771)

Regarding the damaging evidence counsel elicited, counsel argued that Charles's testimony that she saw defendant shoot and beat up people was "convenient" and incredible. (T.1773) It did not make sense that Patrice, a Blood, would cover for defendant, a Crip, or the person who shot his friend. Patrice reported to 911 that he could not identify the shooters, and he refused to sign the lineup report. (T.1778-81)

The People

The People argued that Walters and Patrice had a "beef." Walters warned Smith and the others, "run with Freddy Patrice" and "I'm coming for you." (T.1812, 1815) Walters needed allies, and "chose to align himself with the most notorious enemy of the Bloods, the Crips. Most importantly, he turned to the one Crip, that Crip, [defendant], the Crip who shoots people for fun." (T.1817) (emphasis added)

The People maintained that Walters and defendant planned the shooting together, basing this conclusion on the claim that Charles saw defendant with Walters once in the summer (although Charles was not privy to the substance of whatever transpired between them). (T.1818)

The People used Kern to connect defendant and Walters by arguing that hours before the shooting, Charles saw Kern driving a white car with the scratches on the back, which Charles had seen defendant driving before. "[Charles] knows Kern. Kern's a friend of Dalton Walters." Charles "definitely" knew that Kern was Walters' friend, and he was driving "defendant's car." (T.1818)[100] Charles also saw Kern driving "defendant's car" on a prior occasion.[101] This showed that defendant and Walters were aligned well before the murder. (T.1819)

The People stated that Charles identified defendant because she knew him, "better than she'd like to—she's afraid of him. She saw him shoot someone else a few months before."[102] Charles was asked (on cross examination), "Why didn't you name him sooner? What was it about [defendant]? Charles replied, "[D]efendant shoots people and he beats them up for fun." (T.1825) Two days after the murder, Charles told the police that Walters and Kern were the shooters. She did not mention defendant, who was not a shooter, because she was "terrified" of defendant. But, despite her fear, she found the strength and told police about defendant. (T.1831-32)

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[100] The prosecutor concluded that the car belonged to defendant, presumably based on Charles's statement that she once saw defendant driving the car.

[101] There is no testimony or any evidence of this.

[102] As detailed above, other than Charles's testimony, there is no independent evidence that this shooting ever happened.

The People repeatedly maintained that Charles did not identify anyone in the photo array. The People argued, "[The] defense stood here and repeatedly, throughout this trial" said that Charles was 90 percent sure number five was in the car. (T.1832-33) The People stated, "That's not her testimony."[103] When Charles viewed the photo array, she said, "I'm not sure. No. 5 looks like him." Charles "wasn't sure if that was [defendant's] picture or not." (T.1833-34) "[S]he did not say it was him." (T.1850) The People noted that Smith looked at the photo array and did not recognize anybody, Smith had "No idea who No. 5 is." (T.1850)

The People urged the jury that defendant and number five in the photo array looked alike:

> I submit to you, they have similar noses. They have similar eyebrow structure, the bone under there, they have similar faces and similar lips. I submit, there is a similar resemblance with the person in the picture and the person [defendant] sitting over there. It looks like him. That's what she said. And I submit to you that it does look like him. (T.1850)[104]

The People argued that <u>defendant</u> was the suspect, and not number five in the photo array. Det. Martin put the name in the computer and that picture came up. Number five was a suspect "because they thought it was [defendant]" from 48th Street "who is a Crip and was a suspect." (T.1851) "After [Charles] said I need to see him in person, <u>this is how you know for a fact that they thought that was him. What do they do? They did go to 48th Street. They get the defendant and put him in a lineup</u>." (T.1851-52) (emphasis added)

Regarding Smith's conflicting accounts—that he told the police defendant was shooting from the back passenger side but testified that it was the front passenger side—the People stated there was "no evidence" that Smith ever told the police it was the back window. (T.1838)[105]

Regarding Smith's initial description of the shooter as dark-skinned, and his admission at trial that the defendant was not dark-skinned, the People asserted, "[Smith] never told the police it was a dark-skinned <u>black</u> male. What he said was a dark-skinned male," and "defendant is a dark-skinned male." (T.1838) (emphasis added)[106]

The People also argued that Smith was credible because Smith knows Kern and did not identify Kern in a lineup, as being in the car. (T.1843)

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[103] Charles admitted on cross examination that before she testified, the People told her that the person she had <u>identified</u> in the photo array, number five, was not defendant. (T.1139-40) Charles then reverted to her direct testimony denying that she identified number five.

[104] As mentioned above, the People had served C.P.L. § 710.30 notice that Charles identified defendant in the photo array.

[105] Martin's DD5 reflects that Smith said the right rear window. *See* "Interview of Damien [Daymeon] Smith." (Police Investigation, Precinct Interviews)

[106] Martin's DD5 reflects that Smith said, after the right rear window came down, "a dark-skinned male <u>black</u> was firing" from the window. *See* "Interview of Damien [Daymeon] Smith." (Police Investigation, Precinct Interviews) (emphasis added)

Regarding Patrice, the People emphasized that the defense elicited from Det. Martin that Patrice identified defendant in the lineup as a shooter from the car. Patrice did not sign the lineup report because he did not want to snitch. He had to protect himself to survive on the streets. (T.1846-49)

Last, the People argued, "The two of them [defendant and Walters] acting together, and the other people in that car put that .22 caliber bullet into [the deceased's] body." (T.1862) (emphasis added)

The Verdict and Sentence

On November 1, 2006, defendant was convicted of one count of Murder in the Second Degree (P.L. § 125.25[1]); five counts of Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]); five counts of Attempted Assault in the First Degree (P.L. §§ 110.00/120.10[1]); one count of Assault in the Second Degree (P.L. § 120.05[2]); and two counts of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[2]). (T.1948-52)

On January 30, 2007, before the court imposed the sentence, defendant said that he was innocent. (S.6)

Defendant was sentenced to concurrent prison terms of 25 years to life on the murder count, 10 years for each of the five attempted murder counts, five years for each of the five attempted assault counts; five years for the assault count; and five years for the two weapon possession counts. Each of the prison terms were to be followed by a concurrent term of five years post-release supervision. (S.8-11)

INTERNAL AFFAIRS BUREAU ("IAB") INVESTIGATION INTO REEDY

In August 2007, IAB completed an investigation into separate complaints made by the Kings County Supreme Court Administrative Judge and defendant about (then retired) Det. Reedy.

The Administrative Judge's Complaint

After Reedy's testimony at the pretrial hearing, the Administrative Judge reported that Reedy testified that defendant was identified in a photo array and later recanted his statement under oath and said it was false. IAB noted that Reedy had no prior allegations of perjury, but he had a substantiated complaint for abusing his authority in searching a premise in 1997.

IAB reviewed Reedy's testimony and DD5s and conducted numerous interviews. The Administrative Judge had referred IAB to the hearing judge, who allegedly witnessed the misconduct. The hearing court said it did not believe that Reedy intended to perjure himself, but the hearing court was compelled to report the incident. The hearing ADA said that Reedy made a mistake and was inarticulate. Det. Martin stated that Reedy was probably "too dumb to lie." The Rackets Bureau ADA, who supervised investigations of police corruption and abuse, represented that the KCDA believed Reedy made a mistake and did not commit perjury.

IAB interviewed Reedy, who said Martin told him about the photo array issue when Martin showed it to defendant. It had slipped Reedy's mind because it was not documented.

The Department of Advocate's Office advised that perjury could not be proved under these circumstances. IAB determined that the perjury allegation was unsubstantiated, but there was other

misconduct—Reedy failed to ensure the preparation of a DD5 documenting the "photo array mix up." IAB issued a command discipline.

Defendant's Complaint

After the verdict, by letter dated November 26, 2006, defendant raised several claims, many of which were related to the Supreme Court's perjury allegation. One other claim pertained to an incident that defendant stated occurred about a week before defendant's arrest date.[107] Reedy approached defendant in the street, searched him, and took his phone. Reedy saw a photo of a handgun in the phone that defendant had downloaded from the internet. Reedy placed him in a car and drove to defendant's home, where Reedy attempted to push his way in past defendant's grandmother. Defendant alleged that his arrest for the homicide was not a mistake with a wrong photograph, but rather that Reedy was very familiar with him and targeted him.

IAB addressed defendant's other claims but did not investigate the cell phone incident. During IAB's interview of Reedy, Reedy denied, as he did at the hearing, that he had ever seen defendant before the arrest in this case.

THE POST-CONVICTION PROCEEDINGS[108]

The Direct Appeal

Defendant appealed, through counsel, to the Appellate Division, Second Department ("Appellate Division"). In pertinent part, defendant claimed that there was no probable cause to arrest him. The Appellate Division affirmed the conviction. *People v. Thomas,* 65 A.D.3d 1170 (2d Dep't 2009).

The Appellate Division held that Charles was reliable and had some basis of knowledge for the information she provided to the police, since she witnessed the shooting. Addressing the fact that she identified another individual in a photo array, the Appellate Division observed that that person "had the same name as defendant, looked like defendant, and lived in the same general area as defendant." The Appellate Division concluded, "[t]he arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought." 65 A.D.3d at 1171.

The Motion to Vacate Judgment

By papers dated December 11, 2011, defendant moved, through counsel, to vacate the judgment, pursuant to C.P.L. § 440.10, claiming, in pertinent part, that: (1) Det. Reedy lied at the hearing that he never met defendant prior to his arrest; (2) trial counsel was ineffective for, among other things, eliciting trial testimony from Det. Martin that Patrice identified defendant in a lineup; and (3) newly

[107] Defendant was mistaken about the date of the incident. As set forth in the affidavits in support of his motion to vacate (*see* below), and as established by CRU's interviews of Oneil and Coke, who both witnessed the incident (*see* below), the incident occurred in September, three months before defendant's arrest.

[108] Defendant filed myriad motions and sought leave to appeal from each filing. Only those claims relevant to CRU's issues and analysis are discussed.

discovered evidence shows it was unlikely that Charles identified the other Sheldon Thomas in the photo array based on a purported resemblance to defendant.

Newly Discovered Evidence

Defendant claimed that new evidence demonstrated that the case detectives likely influenced Charles to identify "Sheldon Thomas" in the photo array. Specifically, defendant submitted a double-blind identification study commissioned by the defense and conducted by Professor Brian Sheppard, J.D., S.J.D., an Associate Professor at Seton University School of Law ("Sheppard Study").[109]

A group of 32 law students of color participated in the study. They first viewed defendant's photo for 30 seconds—not knowing anything about him, including whether he was involved in a crime, or whether a positive or negative identification would affect an exoneration. The group then viewed the photo array for 25 seconds. They were asked to decide if the first person they viewed was in the photo array, and if so to indicate which person.

Of the group, 27 concluded that defendant's photo was not in the photo array. Of the five who determined that defendant's photo was in the photo array, only one concluded that the other Sheldon Thomas was the defendant.

Defendant's Prior Encounters with Reedy

In support of his claim that Reedy lied at the hearing when he testified that he never met defendant before, defendant submitted his own affidavit, and affidavits from Lurline Coke and Pauline Williams.

Defendant

Defendant stated the following:

In April 2004, he was arrested for threatening to shoot three police officers. (*see* above, unsealing defendant's prior arrest) The officers had stopped him and his fellow Crip members and attempted to search them. Defendant possessed what he claimed was a "toy" pistol.[110] In a panic, he pointed the pistol at the officers, threw the pistol down, and ran. He was apprehended and placed in the holding cell in the 67th Precinct detective squad office.

Detectives saw his tattoo and gang colors and questioned him about the Crips. Other detectives cursed him and said they would have killed him if defendant pointed a gun at them. They refused to let defendant call his family. Defendant yelled obscenities and caused a scene.

Over the next several months, a black detective, whom defendant later learned was Reedy, repeatedly stopped him and his gang friends, at gunpoint, patted them down, and asked them where they lived and what they were doing on the block.

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[109] *Report: Empirical Analysis of Photographic Identification*, Professor Brian Sheppard, Esq., Seton Hall Law School, Newark, NJ, Dec. 9, 2011.

[110] The "toy" pistol was later determined to be an inoperable handgun.

On other occasions, Reedy handcuffed defendant and drove him around questioning him about the Crips' criminal activity. Defendant refused to "snitch." This angered Reedy, who on at least one occasion told defendant to "get lost" and dropped defendant off far from home.

In September 2004, Reedy stopped and searched defendant. He took defendant's phone and saw a photo of a Glock pistol on the screen. Reedy handcuffed defendant, drove him home, and demanded to know where defendant kept the gun. Defendant told Reedy he downloaded the photo from the internet. Reedy and his partner left defendant in the car and rang defendant's doorbell. Defendant's grandmother, Lurline Coke, came to the door holding defendant's baby sister. Reedy tried to force his way in, but Coke blocked him. Defendant's friend "Chris" Oneil Bradshaw approached, told Reedy he lived there, and to leave unless they had a warrant.

Lurline Coke

Coke, defendant's grandmother, stated the following:

In September 2004, a "black" and a "white" plain-clothed officers came to her door looking for defendant. The black officer said he wanted to search the house. She stood in his way and told him he could not enter. He tried to push his way in, knocking her off her balance. He warned her not to touch him because he had a gun. Defendant's friend "Chris" (Oneil) came running up to the house and shouted to the officer to leave his "aunt" alone. The officers backed off. Oneil then told Coke about the cell phone incident. Coke told her eldest granddaughter to call her mother to say what happened.

Coke attended defendant's pretrial hearing. When Reedy entered the courtroom, she immediately recognized him as the officer who attempted to search her house.

Pauline Williams

Williams, defendant's mother (and Coke's daughter), stated the following:

One day in September 2004, she received a call from her eldest daughter saying that an officer tried to force his way into the house. Williams went home and Coke told her what had happened. During a court proceeding in defendant's case, Coke pointed out that Reedy was the black officer who had come to the door.

The Supreme Court's Decision

By written decision dated June 5, 2012, the Supreme Court (the trial court) summarily denied defendant's motion. It held, in pertinent part, that defendant's claim that Reedy lied about his prior knowledge of defendant was barred on procedural grounds (Decision at 5-6); trial counsel provided meaningful representation (*id.* at 8-10); and the Sheppard Study was not newly discovered evidence but "newly created evidence." (*id.* at 10-12)

The Appellate Division's Decision

The Appellate Division granted defendant leave to appeal and affirmed the Supreme Court's denial of the motion to vacate. *People v. Thomas*, 131 A.D.3d 551 (2d Dep't 2015). The Appellate Division agreed that the new evidence was not newly discovered. *Id.* at 552. Furthermore, defendant's claim that the alleged errors violated his due process rights were not properly raised in a C.P.L. § 440.10 motion. *Id.* Moreover, defendant's ineffective of counsel claim had no merit because he failed to show the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct. *Id.*

The Federal *Habeas Corpus* Petition

Defendant, through counsel, sought a writ of *habeas corpus* in the U.S. District Court for the Eastern District of New York ("District Court"). Defendant claimed, among other things, that trial counsel was ineffective for numerous reasons. The District Court denied the petition. *Thomas v. N.Y. Dep't Corr.,* 2017 U.S. Dist. LEXIS 199481 (E.D.N.Y. Nov. 28, 2017).

The District Court determined that defendant failed to meet the "exacting" standard required to demonstrate ineffective assistance of counsel on either the state or federal level. *Id.* at *39-*49. The District Court noted that "counsel elicited testimony that was objectively unfavorable, including Charles'[s] claim that she had seen [defendant] engage in violent acts, and Martin's testimony that Patrice identified defendant in a line-up." However, "counsel considered these risks when he made the strategic decision to attack the identification evidence and the police conduct, and counsel decided that the downside of attacking the identification evidence and the police investigation was outweighed by the benefits." *Id.* at *45.

THE CRU INVESTIGATION

CRU reviewed the entirety of the People's files, and visited the crime scene, including LaPaix's apartment. CRU interviewed myriad witnesses—the relevant ones are as follows:

Defendant

Defendant gave a sworn audiotaped statement to CRU at KCDA in the presence of his attorney. Defendant stated the following:

Defendant provided an account of his April 2004 prior arrest. (*see* above, Police Investigation, Unsealing Order; Motion to Vacate, defendant's affidavit) As stated in his affidavit, defendant told CRU that he possessed a "toy" pistol. Defendant believed that because of this incident where he pointed the gun at a police officer, the 67th Precinct detectives later repeatedly harassed him, and violated his rights.

CRU confronted defendant with evidence that his gun was real. Defendant conceded that it was a real firearm but insisted that it was inoperable. (The NYPD Firearms Analysis Section report confirmed that the gun was inoperable.)

Defendant told CRU about the September 2004 incident with Reedy, as set forth in defendant's affidavit in support of his motion to vacate. (*see* above) Defendant added that as Reedy tried to force

his way into the house, Oneil approached and told Reedy he lived in the basement (although he did not live there). Reedy returned to his car, let defendant out, and gave defendant back his phone.

Defendant provided an account of why the Crips wanted to kill Patrice, and he admitted his own involvement in tracking Patrice's movements earlier in the day on December 24.

Lurline Coke
(A copy of Coke's audiotaped interview is attached as CRU Exhibit 2)

CRU interviewed defendant's grandmother, Lurline Coke, at her home. She was consistent with her 2011 affidavit about the Reedy incident, adding the following:

She was making lunch for the children. The doorbell rang and she went to the door holding the baby. Two men were there, one "black" and one "white." She asked, "Can I help you?" and they said, "Open the door." She said, "No, I don't know who you are." One of the men showed her defendant's phone with a picture of a gun on the screen. She asked, "Where is Sheldon? You have his phone." She was very angry. Another male approached the porch and said to her, "Don't open [the door], you don't know who it is." Coke did not recall knowing who this person was. The black detective, who had initially approached, tried to push the door open.

Coke later recognized the black detective when he testified in court, and the judge told him to get a lawyer.

Oneil Branford

CRU interviewed Oneil Branford near his place of employment. He stated the following:

He was defendant's friend. In September 2004, he was standing on the corner of 48th and Church and saw Det. Reedy driving down the block. This was a routine occurrence "when they do their usual rounds." The car stopped in front of defendant's house and Reedy, who was "tall and dark-skinned," and another officer got out. Reedy knocked on defendant's door, and defendant's grandmother answered. Branford ran towards the house and said, "Don't let them in." Reedy "tried to push the grandmother away to get in that apartment."

Branford stated that, at the time, the police considered the block part of a "hot zone." The police, including Reedy, routinely searched and frisked everyone without reason. Reedy regularly "tormented" Branford and defendant. Branford did not attend defendant's trial but saw a newspaper article about "crooked cops" investigating defendant's case. He recognized Reedy in a photograph in the article.[111]

Pauline Williams

CRU interviewed Pauline Williams (defendant's mother and Coke's daughter) at her residence. Williams provided an account about defendant's apprehension at home. Her statement was consistent with her hearing testimony—which the hearing court fully credited. (*see* above, Hearing Court Decision)

[111] On June 12, 2006, an article appeared in the New York Post about Reedy's testimony at the pretrial hearing, entitled "*Bungler Cop Red in Face.*" The article included a picture of Reedy.

Her statement was also consistent with her affidavit, in support of defendant's motion to vacate, regarding the incident involving Reedy, and added the following:

Williams' daughter called her at work one day saying, "Grandma [Coke] says you have to come home now. There are people trying to get into the apartment." When Williams arrived home, Coke told her that a tall dark-skinned male attempted to get into the apartment claiming that defendant had (a picture of) a gun on his phone.

Williams and Coke attended defendant's trial. When Det. Reedy testified, Coke told Williams that he was the one who tried to push his way into their home. The judge told Reedy that day that he needed to get a lawyer.

Defendant told Williams that Reedy had repeatedly harassed him, including driving up to defendant, placing defendant in his car, and driving around while questioning him about others.

Aliyah Charles

CRU interviewed Charles at her home. She stated the following:

She "blocked everything out" and did not recall much. She only remembered the deceased, and that Dalton Walters was "Yellow." She knew the name Kadeem Drummond. She did not remember Daymeon Smith, or Freddy Patrice.[112] Sheldon Thomas sounded familiar.

When the shooting occurred, Charles was looking out of a window in LaPaix's apartment. She saw LaPaix and his friends outside talking and heard gunshots. The group scattered. Some ran over to the deceased. She knew something was wrong. Charles saw a white car parked across the street. She did not mention to CRU anything else about the car.

Charles viewed photos at the precinct but did not recall identifying anyone. She wanted to leave after viewing the photos, but the detectives made her stay to view the lineup. She recognized someone in a lineup from the shooting, but she did not recall that person's role. She was not pressured to identify anyone in the photos or the lineup. The ADA did not pressure her. Charles did not recall testifying at trial.

Charles moved several times to avoid the detectives and the ADA finding her. Two places where she stayed were ransacked. She heard people say, that it was "for Smoke." After the trial, she left the country.

Kirk LaPaix

CRU interviewed LaPaix at his place of employment. He stated the following:

Charles was his girlfriend at the time of the shooting and staying with him. The police did not interview Charles in his apartment. Charles told him that she did not see the shooting, but she heard gunshots while in the kitchen with LaPaix's mother. The police stopped her a couple of times on the street to

[112] CRU was unable to locate and interview Drummond. CRU repeatedly tried to interview Smith, but he refused.

speak with her. She told them she was in the kitchen at the time of the gunshots. Charles repeatedly asked LaPaix what he knew about the shooting.

Charles also told LaPaix that she went to the precinct. She did not mention viewing any identification procedures. She gave LaPaix the impression the police were harassing her.

LaPaix saw a dark, black, heavy-set detective and others interviewing witnesses about 20 minutes after the shooting. He did not recall the black detective returning to LaPaix's apartment. The police took LaPaix's grocery bag because it had bullet holes and bullets in it. They never pressured him to identify anyone.

Smith told LaPaix he saw "a kid named Dalton" shooting from a car that was driving by. LaPaix then wanted to testify that Dalton Walters was not the shooter. LaPaix believed that Smith had problems with Walters. There were no problems between Walters and the deceased.

The police did not pressure him, but the prosecution did. While preparing him to testify at trial, the prosecutor urged him to say Walters was the shooter. The prosecutor also repeatedly asked LaPaix about "some kid named Sheldon." The prosecutor told him that Smith and Drummond said defendant and Walters were the shooters. LaPaix thought he was being pressured because he was in the best position to see the shooters (he was in front of the group). He told the prosecutor the same thing he told CRU, that he did not see who was in the car or who did the shooting.

Freddy Patrice

CRU interviewed Patrice in prison where he was incarcerated for robbery and burglary convictions in Queens County. Patrice stated the following:

A couple of days after the shooting, in the doorway of LaPaix's apartment, the police showed him photos of suspects. The photos were displayed on cardboard, in rows. The police asked, "Do you know this person? Do you know this person? We know you know who did it." He did not identify anyone. Patrice told CRU that:

> The detectives kept trying to, like, force [Drummond] to pick a picture, . . . a certain row. 'You sure he's not in this row? [Pointing] You sure he's not one of these guys?'. . . They were calling us one by one out in the hallway. [Drummond] came back and he was telling me, 'They trying to make me pick this guy, this guy, this guy.'. . . I remember him—them kind of doing that to me, too. . .. They'd come across a certain picture and say, 'Are you sure? Look at that picture again.'. . . They would point to a certain picture like, with his thumb, he'll have his thumb on a picture saying, 'Freddy, man. These guys are trying to kill you. They killed your friend. Look at this, look at this face again.' And then I'm like, no man. Go to another picture, and [they'd] say, "Sure? Look at this guy again. He's from the forties. [Defendant lived on East 48th Street]

Patrice denied viewing any lineups. If he had any information about the shooting, he would have told the police. He did not have a beef with Walters.

Patrice did not know defendant but had seen him around, because his grandmother lived near defendant. He did not believe defendant was involved in the shooting because neither Patrice nor his friends had problems with defendant.

The Trial ADA[113]

CRU interviewed the trial ADA, who told CRU the following, in pertinent part:

The hearing ADA—the bureau chief at the time—volunteered to do the hearing because the hearing ADA wanted the trial ADA to work on something else. The hearing ADA said, "They're just hearings."

When the hearing ADA returned from court, she was extremely angry with the trial ADA about the photo array issue. The trial ADA calmed the hearing ADA down, saying, "Do you think I would send you into the hearing knowing about the photo issue?" The hearing ADA subsequently told the trial ADA not to come to court because the hearing ADA "might put her on the stand."

The trial ADA pointed out that both of her affirmations were addressed to "Part 25" (the hearing court). Although the hearing court issued an order stating it refused to consider the defense motion to reinspect the grand jury minutes on ground the motion was not properly before it, the trial ADA stated that she believed that the hearing court read her affirmations.

The trial ADA stated that, based on off-the-record conversations at trial, the hearing court "definitely knew" that the trial ADA denied Martin's testimony that he told her about the photo array issue.

In a pre-hearing conference with the court and counsel, counsel, discussing probable cause, stated, "This case is different." The trial ADA believes that counsel was referring to the photo array issue, which would indicate that defendant told counsel about the issue before the hearing.

The trial ADA did not recall any conversation or evidentiary ruling as to whether the People could elicit testimony about "Kern" being in the car at the time of the shooting.

In a follow-up email to CRU, the trial ADA noted that the hearing court's decision did not include any finding regarding who, if anyone, Martin told about the photo array issue. The trial ADA's recollection was that the court did not consider it relevant to the probable cause issue before the court.

CRU ANALYSIS

Defendant was denied due process at every stage of this case such that his conviction was fundamentally unfair. Understandably, the police quickly focused on defendant—a known gang member with a prior gun charge, who had previously pointed a loaded firearm at police officers—as a suspect. But almost immediately, case detectives began conducting an improper investigation and violated defendant's constitutional rights to get the result they wanted, including influencing a photo array identification procedure, arresting the defendant with no probable cause, and then lying on the stand to conceal their wrongdoing.

[113] CRU did not interview the hearing ADA, because she is deceased.

The hearing court's determination that probable cause existed to arrest defendant was based on misstatements of material fact.

Furthermore, the prosecution's missteps compounded the problems. Upon learning that Charles initially identified someone other than defendant, the prosecution should have reevaluated its case. Instead, the prosecution, among other things: (1) maintained that Charles did not identify anyone in the photo array, even though the prosecution had served identification notice to the defense pertaining to Charles's photo array identification; (2) elicited testimony from Charles that she observed Kern, whom the People knew to be Ernesto Sergeant, in the car during the shooting, even though the People had dismissed Sergeant's case because Charles could not identify him in a lineup, and because the People found his alibi credible; and (3) in summation, misstated material facts in evidence.

Finally, counsel made egregious errors, which included undermining favorable evidence for the defense, which compounded the police misconduct and prosecutorial errors.

The Police Investigation

The Police Violated Defendant's Constitutional Rights

CRU fully credits defendant's claim, which he has consistently maintained, that the 67th Precinct detectives, particularly Reedy, repeatedly harassed him and violated his rights. Defendant first raised this assertion to trial counsel. At the pretrial hearing, counsel sought to elicit testimony about the incident where Reedy confiscated defendant's cell phone, placed defendant in the back of his car, and attempted to force his way past defendant's grandmother to enter and search defendant's home. (*see* above) (Unfortunately, counsel cross-examined Sgt. Murphy about this incident instead of Reedy [H.605])

Next, defendant informed IAB about the incident. However, IAB chose not to investigate defendant's claim. (*see* above)

Defendant then raised this and other encounters with Reedy in a motion to vacate the judgment. (*see* above) Defendant submitted supporting affidavits from witnesses, whom CRU subsequently interviewed. The witnesses were consistent, credible, and compelling. Notably, based on Pauline Williams' account of defendant's apprehension, the hearing court found a *Payton* violation and suppressed defendant's statement. Williams' account of the Reedy incident was just as credible. Lurline Coke was also a compelling witness. She was spontaneous, detailed, angry, and palpably distressed—nearly two decades after the incident. As she related the incident, Coke credibly mentioned that when the man she later learned was Reedy showed her defendant's phone with a picture of a gun, she became concerned about defendant's whereabouts. She stated that a "guy" (Oneil Branford) approached the front door and told her not to let the men in, and she candidly admitted that she did not recall who that person was, or whether he was defendant's friend. (*see* above, CRU recorded interview of Coke, CRU Exhibit 2)

Against this backdrop, it is apparent that the police were intent on arresting defendant for this crime regardless of the lack of evidence pointing to defendant's participation. Det. Martin requested that defendant's prior arrest be unsealed to obtain defendant's arrest photo to use in a photo array. The

prior arrest, which involved defendant pointing a loaded gun at three 67th Precinct officers, was eight months before the murder and presumably gave rise to Reedy's harassment of defendant, which commenced soon thereafter.

This was likely the reason Martin requested the unsealing order. While the detectives were justified in seeking to place defendant's photograph in an array, it is worth noting that they had nothing of substance suggesting defendant's involvement in the murder. There was no eyewitness identification, nor any credible and reliable information that defendant was involved in the crime. The only documented information Martin allegedly had was in his spiral notebook, reflecting the name "Sheldon," nicknames, and an address (defendant's). (H.447) The notation was undated, appeared on the otherwise blank back of a memo book page, listed no source for the information, and did not explain its significance. While the address was defendant's, Martin testified that he did not check to see if it was. (H.449) That is likely because Martin and Reedy already knew that it was. (*see* below, There Was No Probable Cause to Arrests Defendant)

Moreover, Martin cancelled the unsealing request because he believed he had obtained defendant's photo through PIMS. Martin did not know about "the mistake"—that defendant's photo was not in the photo array. (T.1573) Martin noticed the address of "Sheldon Thomas," in the photo array, was not the address in his spiral, but it did not concern Martin because both addresses were in the confines of the 67th Precinct (which covers an extensive area with a large population). (H.300-01) After Charles identified the Sheldon Thomas in the photo array Martin issued an I-card for that Sheldon Thomas, but rather than listing the address associated with the Sheldon Thomas in the photo array, Martin listed <u>defendant's</u> address on the I-card. (*see* above, I-card section) Clearly, that was because defendant was the subject whom the detectives were intent on arresting.

In summation the People confirmed that there was no question the police were intent on arresting defendant, even arguing that Charles never identified the other Sheldon Thomas in the photo array. The People argued that Det. Martin put the name Sheldon Thomas in the computer and that picture came up. The Sheldon Thomas in the photo array "was a suspect because they thought it was [defendant]" from 48th Street "who is a Crip," and whom they had already decided "was a suspect." "After [Charles] said I need to see him in person, <u>this is how you know for a fact that they thought that was him. What do they do? They did go to 48th Street. They get the defendant, Sheldon Thomas, and they put him in a lineup</u>." (T.1851-52) (emphasis added) Had the People adopted this argument in the pretrial suppression hearing, the court would likely have suppressed all three lineup identifications of the defendant on grounds the detectives did not have probable cause to arrest defendant.[114]

Sgt. Murphy, on the apprehension team, was provided with defendant's name and directed to <u>defendant's</u> address, even though he was provided with a photo of the Sheldon Thomas in the photo array, and not defendant. At this point, there was no photo of defendant. His prior arrest was never

[114] Without probable cause, the court should conduct a hearing to determine whether an independent source existed for an in-court identification of defendant by the witnesses who identified him in a lineup. *See People v. Gethers*, 86 N.Y.2d 159, 163 (1995); *People v. Dodt*, 61 N.Y.2d 408, 417 (1984).

unsealed. (H.285, 299-300) (After defendant was brought to the precinct, a Polaroid picture was taken of him to show to Walters [H.336, 393, 435, 439])

Leaving no doubt that the police were set on arresting defendant for this murder, following defendant's apprehension Martin cancelled the I-card issued for the Sheldon Thomas in the photo array. (*see* above, Police Investigation, I-Card Cancelled) The People were right in their summation; the photo array procedure had been merely a formality.

Furthermore, when Martin discovered while interrogating defendant that defendant was not in the photo array, Martin intentionally disregarded that information and did not memorialize it anywhere. Clearly demonstrating that defendant was always the intended target, Martin was not concerned that Charles identified some other person; Martin believed they "had the right guy." (H.347)

Finally, Martin did not alert the People or contact NYPD's legal bureau to say that Charles had identified some other Sheldon Thomas. In fact, Martin hid the information. (*see* below) Despite there being no probable cause for defendant's arrest (*see* below), Martin continued with the investigation and had three different witnesses view defendant in lineups.

The Identification Procedures

Under the circumstances presented here, CRU has concluded that Charles's identifications of defendant were prompted by the detectives.

As discussed above, the detectives were intent on arresting defendant before Charles even viewed the photo array. It is not a coincidence that she selected the other Sheldon Thomas in the photo array. And it is not another coincidence that Charles identified the defendant Sheldon Thomas in a lineup. The repeated reason given to explain these coincidences away was that the photo array Sheldon Thomas and defendant looked alike. At the pretrial hearing, the detectives testified that they looked alike, the People argued that to the hearing court, the hearing court stated that in its decision, and the People spent a great deal of time on summation urging the jury to accept the claim that they looked alike. CRU strongly disagrees. Contrary to the People's remarks on summation, these two individuals do not have "similar eyebrow structure," or "similar faces." (T.1850) In fact, the eyebrows and the jaws are strikingly different. Additionally, the skin tone and hair are different. The probability of them being mistaken for the same person is very low. *See* CRU Exhibit 1A-C.

Moreover, this purported likeness cannot be reconciled with Daymeon Smith's testimony that he knew defendant, he viewed the photo array, and he did not identify anyone. (T.782-83) Nor did the People attempt to explain how Charles identified number five, whom she thought was defendant, while noting that Smith knew defendant and had "no idea who No. 5 is." (T.1850)

The only reasonable conclusion is that Charles was guided to pick out the Sheldon Thomas in the photo array. Although the court refused to consider defendant's submission of the Sheppard Study in his motion to vacate based on technical grounds (*see* above), this study is informative. Out of 32 law students of color, 27 concluded that defendant's photo was not in the photo array.[115] Of the five who

[115] Aliyah Charles is black.

determined that defendant's photo was in the photo array, only one concluded that number five (Sheldon Thomas in the photo array) was defendant. (*see* above) These findings sharply belie the contention that the Sheldon Thomas in the photo array and defendant looked alike. They did not.

Moreover, it is reasonable to conclude that Charles was prompted to identify defendant in the lineup and prompted to identify Ernesto Sergeant in a photo array. It is remarkable that in every identification procedure she participated in—defendant's photo array, defendant's lineup, Sergeant's photo array, and Walter's photo array and lineup—Charles identified the police subject, except for Sergeant's "double blind" lineup, which neither Reedy nor Martin conducted.[116] It is also remarkable that, as the prosecution concluded, Charles's identifications of two of the subjects—number five in the "Sheldon Thomas" photo array, and Sergeant in his array—were simply wrong.[117]

In addition, Reedy and Martin, who conducted defendant's lineups, were anything but trustworthy. Reedy lied to the hearing court and IAB that he had never seen defendant before this arrest. (*see* above) He also testified falsely at the hearing about the photo array identification. He stated that Charles identified defendant who was number five in the photo array, and then he identified defendant in court as number five in the array.

Martin hid the fact that Charles identified an individual who was not defendant in the photo array. Martin testified at the hearing that during his interrogation of the defendant, when he showed defendant number five in the photo array, defendant said it was not him. Conspicuously, Martin memorialized in his DD5 that he showed defendant a photo of Walters (*see* above, Police Investigation, Defendant's Statement), but he did not memorialize the critical discovery that defendant's photo was not in the photo array, and Charles had identified someone other than defendant. (H.445-46) Nor did Martin follow Reedy's purported instruction to prepare a separate DD5 about defendant's statement regarding the photo array. (H.239-40)[118]

Martin also claimed under oath that he told the prosecution about the photo array issue right before he testified in the grand jury. (H.470) Martin testified that he told the grand jury ADA, "in person," that the Sheldon Thomas in the photo array was not defendant. (H.400, 423) He also testified that it could have been another grand jury assistant he told. (H.473, 505) It was stipulated that the trial ADA was the grand jury assistant when Martin testified. (H.508, 510)

The trial ADA submitted affirmations in opposition to two separate defense motions. In one affirmation she stated that she did not learn about the photo array issue until June 6, which was the first day of the hearing (when Reedy falsely testified). (*see* above, Trial ADA Aff. ¶ 4, Motion for Spec.

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[116] Walters was acquitted.

[117] Sergeant was indicted based on Charles's identification of him in a photo array. Partly as a result of Charles's failure to identify Sergeant at a lineup, his case was dismissed. The People also determined that his alibi was credible, and he passed a polygraph test.

[118] Given the incontrovertible fact that Reedy and Martin perjured themselves on the stand, CRU does not credit Reedy's claim that he instructed Martin to prepare a separate DD5. Martin prepared a DD5 memorializing his interview with defendant, including the fact that he showed defendant the Walters photo array. If the detectives intended to memorialize the fact that defendant told them he was not in the photo array, they would have done so in the DD5 Martin prepared after the interview with defendant.

Pros.) In her second affirmation, the trial ADA specifically addressed Martin's testimony and said it was not true. (*see* above, Trial ADA Aff. ¶¶ 8, 9, Motion to Re-inspect)[119]

Moreover, both Reedy and Martin brazenly violated the rule (and the court's admonishments [H.35, 137]) that witnesses should not discuss their ongoing testimony with future witnesses. Here, in attempting to repair Reedy's damaging false hearing testimony, Reedy and Martin discussed the problem with each other and other detectives during an adjournment. As a result, among other things, Martin subsequently testified about anonymous information from an unknown caller or callers, which he received from unknown detectives. Notably, none of the other detectives with whom Reedy and Martin conferenced the issue recalled these anonymous tips. (H.242) These purported tips were clearly questionable (or nonexistent), such that Martin did not provide the information to his supervisor as a basis to arrest defendant. (H.462)

The prosecution did not have Reedy or Martin testify at trial about the lineup identifications, presumably because the detectives were unreliable and could not be believed. To be sure, Reedy's and Martin's false accounts and misconduct undermined not only the reliability of Charles's lineup identification, but also raise questions about Smith's and Patrice's. Regarding Smith, Reedy testified that Smith viewed the photo array and identified number five. By sharp contrast, Martin testified that Smith refused to look at it. (H.308-09) Smith, however, testified that he viewed the photo array and did not "pick" out anyone. (T.782-84) Curiously, there was no documentation regarding the showing of the photo array to Smith. Notably, when the People relied upon Smith's testimony that he viewed the photo array, they made clear that Martin was not credible. (T.1843) Given these facts, Smith's refusal to sign the report of the lineup stating that he identified defendant is concerning.

Regarding Patrice, on his 911 call, which was played in court, he said he did not have a description of the shooter. (T.1455) The prosecution did not ask him to identify defendant in court, and he insisted that he did not view defendant's lineup. (T.1441) He, too, refused to sign the lineup report. (T.1583-85, 1595-97) Patrice told CRU, credibly, that the detectives tried to push Drummond to identify certain people or groups of people.

There Was No Probable Cause to Arrest Defendant

Contrary to standard procedure, both Dets. Reedy and Martin wrote DD5s regarding Charles's photo identification of the other Sheldon Thomas. Reedy's DD5 says he showed the photo array to Charles, and unequivocally states that Charles identified "Sheldon Thomas" as being in the car.[120] Martin's DD5, however, reflects that he showed the photo array to Charles, and she was not certain. According to Martin, Charles said, with 90 percent certainty, that number five "looks like" one of the guys in the white car.[121] Regardless, considering either DD5, Charles's identification established probable cause

[119] CRU credits the prosecutor and not Martin. It strains credulity that the prosecutor would learn this information at the grand jury, and then serve false notice of an identification. It is apparent that Martin did not want to reveal that he never told the prosecution about the photo array.

[120] Reedy DD5, (#35) "Viewing of photo array by Alialh [sic] Charles."

[121] Martin DD5, "Preparation and showing of photo arrays."

to arrest the Sheldon Thomas in the photo array.[122] But it did not provide probable cause to arrest defendant.

The hearing court mistakenly determined that probable cause existed. The court held that probable cause existed to arrest defendant based on information received from Kadeem Drummond, Charles, and "verified information from unknown callers, identifying him as one of the perpetrators." (Decision at 16). The court stated:

> Specifically, the police had information one of the perpetrators was a young male back known as 'Shelly', 'Sheldon', 'Loke' or 'Smoke', and 'Kurn' (phon.). The police also had information from an unknown caller that one of the perpetrators, identified as 'Sheldon', lived at 384 East 48th Street. Utilizing computer checks by name, address and description, Detective Martin confirmed that defendant Thomas Sheldon known as 'Smoke' and 'Kurn,' (phon.), indeed lived at the reported address.

(Decision at 16) (emphasis added)

The court's finding of fact and legal conclusion here relied upon and credited Det. Martin's testimony about his conversations with Charles about what she heard, and information he claimed to have received from unnamed officers regarding anonymous phone calls. (*see* above, Martin's hearing testimony, section 1)

However, as discussed below (*see* The People Likely Failed to Disclose False Police Testimony to the Hearing Court), the hearing court was apparently unaware of Det. Martin's false testimony—that prior to his grand jury testimony he told the grand jury ADA or some unnamed assistant about the photo array issue. This false testimony was serious enough that both the trial and hearing ADAs submitted affirmations refuting Martin's claims. Had the hearing court known about this false testimony, it is difficult to believe it would not have addressed it in its decision. Rather, it is likely, if not certain, that the court would not have credited Martin, as the People urged it to do during oral argument.

The court's reliance on the information Martin obtained—"one of the perpetrators was a young male black known as 'Shelly', 'Sheldon', 'Loke' or 'Smoke', and 'Kurn' (phon.)"—related to Martin's purported conversations with Charles. Martin testified that he spoke to Charles, in person, and she provided the nicknames Yellow, Shelly, Sheldon, Hoz, and Kern. (H.289-90), which she overheard from the deceased's friends, and "heard names to the [e]ffect of Sheldon as being one of the individuals in the car." (H.466-68) But—like his testimony about telling an ADA at the grand jury about the photo array issue—Martin did not document his conversations with Charles. Moreover, he was not certain where, or even when, the conversations occurred. (H.483, 496-97, 501-02)

[122] *See People v. Pelzer*, 115 A.D.3d 573, 573 (1st Dep't 2014) (identification of defendant from a photo array need not be made with complete certainty to give rise to probable cause); *People v. Rhodes*, 111 A.D.2d 194, 194 (2d Dep't 1985) (same); *see also Keith v. City of New York*, 641 Fed. Appx. 63, 66 (2d Cir. 2016) (probable cause provided where victim said defendant "looked like" the attacker).

Similarly, had the court known that Martin falsely testified at the hearing, it probably would not have credited his testimony about "information from an unknown caller that one of the perpetrators, identified as 'Sheldon', lived at 384 East 48th Street." Although Martin suggested that this was documented in his spiral notebook—there is nothing to suggest that this brief notation came from any anonymous caller, as opposed to being information Martin already had because defendant was known to the police. Indeed, Martin did not know if there was one or more callers, he did not know when the calls came in (he simply guessed at the time), he did not speak to any of the callers, he did not know "the exact tip," and he could not name one detective who allegedly spoke to any caller and relayed the information to Martin. (H.377, 379, 447, 466, 479; Martin's hearing testimony, section 1)

Moreover, had the court known about Martin's false testimony it probably would have considered it suspect that Reedy, the case detective, had none of the information regarding Charles or the callers, to say nothing of the troubling fact that this information only came to light at the hearing after it was discovered that defendant's photo was not in the photo array.

In any event, even if Martin testified truthfully about the information from Charles and the anonymous caller(s), the information the court relied upon was not corroborated. There was no testimony that Drummond provided any information about defendant.

To the extent that the court considered testimony that, according to an alleged anonymous caller and what Charles claims to have heard on the street, defendant and Yellow were known to associate with each other (H.348), it constituted unknown levels of hearsay and with no evidence that it was from anyone involved in the incident. "[H]earsay-upon-hearsay" can establish probable cause only "if there is good reason for believing it."[123] Here, the record is devoid of any good reason to credit either any anonymous caller or Charles's purported claims to Martin.

Notably, it was not established that defendant went by any alleged nicknames quoted by the court—'Shelly', 'Sheldon', 'Loke' or 'Smoke', and 'Kurn' (phon.).[124] Furthermore, the court erred in finding that Det. Martin confirmed by "[u]tilizing computer checks by name, address and description" that defendant lived at the address reported by an unknown caller. Martin testified that he did not input the address into the computer or confirm that defendant resided at the address provided by the anonymous caller. (H.449, 451) Martin claimed that he first learned that the address was defendant's after defendant was apprehended. (H.448-49)

Finally, it seems that Martin, himself, did not deem the anonymous caller information reliable. He testified that the decision to arrest defendant was made by his supervisor, and that he did not provide the anonymous caller information to his supervisor to support that decision.

The court further held that it was "of no legal consequence" that the photo of another Sheldon Thomas was generated that "resembled defendant Thomas and may have been relied upon by the apprehension team." (Decision at 16) The court noted that before defendant's arrest, Charles was not

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[123] *People v. Parris*, 83 N.Y.2d 342, 347-48 (1994).

[124] Kern was Sergeant's nickname. And at trial, Smith, LaPaix, and even Charles testified at trial that they never heard of Smoke. (T.8-3, 1149, 1183-84)

100 percent sure of her identification of the other Thomas, and Sgt. Murphy viewed a mug shot photo of defendant Thomas. (Decision at 16-17)

However, as discussed above, defendant and the Sheldon Thomas in the photo array do not resemble each other. In addition, Sgt. Murphy—who was on the apprehension team—did not view defendant's mug shot, or any photo of defendant, before the arrest. Indeed, the court acknowledged that fact elsewhere in its decision where it noted that the apprehension team relied on the photo of the Sheldon Thomas in the photo array. (Decision at 16) Despite initial efforts to unseal the file in defendant's prior arrest, defendant's prior arrest photo in the sealed case was never obtained. (H.336, 393)

The Appellate Division's finding that there was probable cause to arrest defendant was also incorrect. At the outset, the Appellate Division did not rely on the anonymous callers. Instead, and without further discussion, the Appellate Division held that "the People adequately demonstrated that the citizen informant [Charles] was reliable and had some basis of knowledge for the information given to the police. [Charles] came forward as a person who allegedly witnessed the shooting that formed the basis for the prosecution of the defendant." (*People v. Thomas*, 65 A.D.3d at 1171). As discussed above, a review of the record does not support this holding.

Addressing the fact that Charles identified another individual in a photo array, the Appellate Division also mistakenly determined that the other Sheldon Thomas in the photo array "looked like defendant." For the reasons stated, CRU has concluded that the Sheldon Thomas in the photo array and the defendant do not look alike. (*see* CRU Exhibit 1)

The Appellate Division further held, "[t]he arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought." *People v. Thomas,* 65 A.D.3d at 1171, citing *People v. Tejada*, 270 A.D.2d 655, 657 (3d Dep't 2000).

That is not what happened here. There was no so-called mistaken belief (or reasonable belief) that defendant was the Sheldon Thomas in the photo array. The only mistake made was that the wrong Sheldon Thomas was in the photo array. The photo array Sheldon Thomas was not "the person sought." *Id.* The People made that abundantly clear arguing on summation that the Sheldon Thomas in the photo array "was a suspect because they thought it was [defendant]" and "how you know for a fact that they thought that it was [defendant]" is that they go to his home, "get the defendant, and put him in a lineup." (T.1851-52) "There is not a shred of evidence that No. 5 in this photo array did anything. . .." (T.1853) Thus, the Appellate Division's reliance on *Tejada* was misplaced. What the Appellate Division did not know was that the police were seeking to arrest <u>defendant</u> from the outset. (*see* above) But because the Sheldon Thomas in the photo array was identified, the police did not have probable cause to arrest defendant. Rather, they had probable cause to arrest the Sheldon Thomas in the photo array—whom the police neither sought nor ever intended to arrest.

This case is readily distinguishable from *Tejada. Tejada* involved a car stop where the occupants failed to produce identification. The police determined that there was an outstanding warrant for defendant Tejada based on his name. Before learning that they arrested the wrong Tejada, the police searched him and recovered a quantity of cocaine. The arrest was valid because there was probable cause to

arrest the subject of the warrant, and the police "reasonably believed" they arrested the person sought—in that the person arrested had the same name as the person sought, among other similarities. 270 A.D.2d at 656-67.[125]

The circumstances here are not at all similar. To the contrary, there was no probable cause to arrest defendant—only the photo array Sheldon Thomas. The police did not arrest defendant because they mistook him for the photo array Sheldon Thomas—in fact, it is of no import whether the two individuals looked alike. The police arrested defendant because he was the subject sought, not because of any purported resemblance. In other words, this is not a case where the police had probable cause to arrest an individual for a certain crime but ended up arresting another individual for a different crime, based on a belief the arrested individual was the original suspect.

Notably, *Tejada* observed that "the reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest."[126] Even considering *Tejada*—which is not applicable here—there was nothing at all reasonable about the police conduct under the circumstances surrounding the defendant's arrest.

Defendant's arrest was based on a presupposition that defendant was guilty of the murder in this case. The police obtained an identification of the wrong Sheldon Thomas, ignored that identification, went to defendant's house, kicked in his front door, and arrested defendant—the Sheldon Thomas they sought from the outset.

Accordingly, there is no support for the claim that defendant's arrest was based on probable cause.

Prosecutorial Error

<u>The People's Acts and Omissions Denied Defendant Due Process</u>

The People are required to disclose exculpatory and impeachment evidence that would be material to the outcome of the case.[127] Under *Brady*, "the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to the defense can entitle the defendant to a new trial."[128] Here, Charles's photo array identification of an individual who was not defendant was *Brady*. The People were required to disclose this information to the defense as soon as the police discovered that the Sheldon Thomas identified in the photo array was not defendant. It is irrelevant that the People did not know about the misidentification at that time. Favorable information possessed by any police

[125] *See also United States v Glover*, 725 F.2d 120, 122 (1984) and *Hill v. California*, 401 U.S. 797, 802 (1971), cited by the Appellate Division.

[126] *Tejada*, 270 A.D.2d at 657, quoting *Glover*, 725 F.2d at 122.

[127] Under *Brady* and its progeny, the People are required to disclose exculpatory and impeachment evidence that would be material to the outcome of the case. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *People v. Scott*, 88 N.Y.2d 888, 890 (1996).

[128] *People v. Vilardi*, 76 N.Y.2d 67, 73 (1990).

officer who participates in a case will be imputed to the prosecution, because they are part of the prosecution team.[129]

"*Brady* does not, however, require prosecutors to supply a defendant with evidence when the defendant knew of, or should reasonably have known of, the evidence and its exculpatory nature."[130]

When the People learned that defendant's photo was not in the photo array viewed by Charles, and that she had identified another Sheldon Thomas, the People posited three arguments to preserve their case: (1) they denied that Charles's identification of the Sheldon Thomas in the photo array to a 90 percent certainty was an identification at all; (2) they blamed the detectives for failing to tell them that Charles had identified the wrong Sheldon Thomas and for failing to document that information in a DD5; and (3) they claimed they had "no legal or ethical obligation" to disclose that the person in the photo array was not defendant because "the first person" to discover it was defendant himself. (*see* above, Hearing ADA Aff. Motion for Spec. Pros.)

First, citing Martin's hearing testimony, the People argued that Charles made no identification because she "was not a 100 percent sure" about number five in the photo array. (H.308) The People concluded,

> That the person in the photo array was not the defendant but someone who looks remarkably similar to him does not turn the witness's statement into a misidentification.

(Hearing ADA Aff. at 3) The People maintained this position through trial, eliciting the same from Charles—that she did not identify anyone in the photo array, but merely told the detectives it "looked like him." (T.946-47) And they argued the same on summation, which seriously prejudiced the defense. (*see* below; T.1832-34, 1850)

This tactic was misguided. The law was well-settled that when a witness identifies someone from a photo array, even without complete certainty, the identification gives rise to probable cause to arrest.[131] Certainly, before the People became aware of the misidentification, they maintained that Charles had identified defendant. The People served the defense with a VDF stating that Charles identified defendant in a photographic procedure. This was the factual predicate for defendant's arrest upon which a *Wade/Dunaway* hearing was granted.

The People also could not avoid their *Brady* obligation by shifting the blame to the detectives' failure to document the information in a DD5. The knowledge of the police is imputed to the prosecution. (*see* above) In any event, the People certainly could have obtained this information themselves. The People stated they reviewed the "NYPD file" prior to the grand jury presentation and none of the DD5s indicated that the person in the photo array was not defendant. (*see* above, Trial ADA Affs.,

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[129] *People v. Garrett*, 23 N.Y.3d 878, 886-87 (2014) (The rationale for the imputation of knowledge is that, when police and other government agents investigate or provide information with the goal of prosecuting the defendant, they act as an arm of the prosecution"); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

[130] *People v. Doshi*, 93 N.Y.2d 499, 506 (1999) (emphasis added).

[131] *Pelzer*, 115 A.D.3d at 573 (victim's identification of defendant from a photo array need not be made with complete certainty to give rise to probable cause); *Rhodes*, 111 A.D.2d at 194 (same); *see also Keith v. City of New York*, 641 Fed. Appx. at 66 (probable cause provided where victim said defendant "looked like" the attacker).

Motions for Spec. Pros. and to Re-inspect) A review of the entire file, however, would have discovered, at the very least, that defendant did not resemble number five in the photo array. This would likely have prompted an even closer look and revealed that the I-card issued based on the photo array had the NYSID number for the Sheldon Thomas in the photo array, but with the defendant's address. The People's failure to review their file thoroughly prejudiced the defense. Had they learned about the misidentification and the illegality of the lineup identifications (and the attendant wrongdoing by case detectives), they might not have indicted defendant. The People's error was compounded by the fact that after the grand jury presentation, the prosecutor gave the defense (false) notice that Charles identified defendant in a photographic procedure, which resulted in a probable cause hearing.

Finally, the People maintained, apparently in good faith, that they had "no legal or ethical obligation" to disclose that the person in the photo array was not defendant because "the first person" to discover it was defendant himself. (*see* above, Hearing ADA Aff., Motion for Spec. Pros.) While defendant learned during his interrogation that a witness had identified someone other than defendant in a photo array, it is not reasonable to assume that defendant, without counsel present, understood the legal significance of that fact. Indeed, we know the exculpatory nature of the revelation was lost on him because defendant did not relay the information to counsel until the time of the hearing, when he was once more confronted with the photo array. This was long past the point when counsel could have made optimal use of it.[132]

Under *Brady*, the People were legally obligated to proactively acknowledge the misidentification at the time it was discovered by Martin rather than advance the legally incorrect claim that Charles made no identification at all. (*see* above) Moreover, CRU cannot conceive of any scenario in which the People are freed of their ethical obligations as public officers to see that justice is done. "Prosecutors play a distinctive role in the search for truth in criminal cases. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal."[133] The misidentification evidence was favorable to defendant and the People had an ethical obligation—in addition to their legal obligation—to treat it as such. As the court noted during the hearing, making the People aware of this fact was an ethical obligation, and an issue of "fundamental fairness," which raised a "whole host of issues," including that the defense had been "misled" by "false" notice of a photo identification. The court also maintained that the false notice affected plea negotiations. (H.193-94) This was particularly true because the exculpatory value of the disclosure lay not only in the fact that the witness identified someone other than defendant, but in the fact that the sequence of events leading to that

[132] Defendant confirmed to CRU that Martin showed him the photo array during his interrogation, and he told Martin that number five was not him. Defendant did not recall that occurrence until he saw the photo array on the defense table during the hearing. At that time, for the first time, defendant told his attorney.

[133] *People v. Santorelli*, 95 N.Y.2d 412, 420-421 (2000).

misidentification strongly suggested that the police were intent on arresting defendant.[134]

The People Likely Failed to Disclose False Police Testimony to the Hearing Court

A duty of fair dealing requires a prosecutor to correct knowingly false or mistaken material testimony of a prosecution witness.[135] Here, it is reasonable to conclude that the People failed to timely correct Det. Martin's false hearing testimony that, when he appeared at the grand jury, he told the grand jury ADA, or maybe another ADA, that the Sheldon Thomas in the photo array was not defendant. (H.400-01, 423, 473) The prosecution's likely failure was significant because on June 26, at oral arguments at the conclusion of the hearing, the prosecutor urged the court to credit Martin, instead of Reedy, to find probable cause existed and deny suppression of defendant's lineup identifications. (H.768, 831)

The following is a timeline of relevant events, based on court filings and paperwork in the trial file:

December 24, 2004	Anderson Bercy is shot and killed.
December 27, 2004	Charles identifies the other Sheldon Thomas in the photo array.
December 28, 2004	Martin shows defendant the photo array; defendant tells Martin that the Sheldon Thomas in the array is not him.
December 30, 2004	People begin presenting case to the grand jury; case withdrawn.
January 18, 2005	People begin re-presenting case to the grand jury.
March 11, 2005	People file and serve VDF that Charles identified the defendant in a photo array.
June 5, 2006	Hearing begins. Reedy testifies until June 12, falsely claiming that Charles ID'd defendant in the photo array.
June 13, 2006	Martin testifies that he told the grand jury or another ADA, prior to his grand jury testimony, that Sheldon Thomas in the photo array was not defendant.
June 26, 2006	Both sides present oral argument. The People urge the court to credit Martin's testimony.
June 27, 2006	Defense files written Motion for Special Prosecutor (filed with the Administrative Judge).
On or about June 27, 2006	Defense files written Motion to Reinspect the Grand Jury Minutes (filed with the hearing court).
June 29, 2006	People file Opposition to Motion for Special Prosecutor with the Administrative Judge, including affirmations from the hearing and trial ADAs. In

[134] *See Kyles*, 514 U.S. at 419 (information that may enable the defense to challenge the thoroughness or good faith of the police investigation is favorable information that must be disclosed under *Brady*); *Garrett*, 23 N.Y.3d at 889 ("when a police officer engages in illegal conduct in the course of his or her investigation or prosecution of the defendant, knowledge of that misconduct may be imputed to the People for *Brady* purposes, regardless of the officer's motivation or the prosecutor's actual awareness").

[135] *People v. Colon*, 13 N.Y.3d 343, 349 (2009); *see also Giglio v. United States*, 405 U.S. 150, 153-154 (1972).

	her affirmation, the trial ADA claims that the first time she learned that the Sheldon Thomas in the photo array was not defendant was on June 6, 2006. This contradicts Martin's sworn testimony on June 13, 2006, that he told her or another prosecutor at prior to his grand jury testimony that the defendant was not in the photo array.
July 13, 2006	The hearing court issues decision on hearing, crediting Martin and holding that there was probable cause for the arrest. The hearing court also issues order that it will not review the Motion to Reinspect the Grand Jury Minutes because the original inspection was handled by a different judge.
July 31, 2006	People file Opposition to Motion to Reinspect the Grand Jury Minutes with the judge who handled the original grand jury inspection, including a second affidavit from the trial making clear that Martin did not inform her or, to her knowledge, any other ADA, about the photo array issue.
August 3, 2006	The judge who originally inspected the grand jury minutes issues decision on the Motion to Reinspect the Grand Jury Minutes, holding that Charles's identification of the Sheldon Thomas in the photo array was not exculpatory because she was not sure, and knowing about it would not have impacted the grand jury's determination.

The sequence of events makes it clear that Martin did not inform the trial ADA (or any other ADA) at the grand jury about the photo array issue. In their respective affirmations a year and a half later, in opposition to the defense motion for a special prosecutor, the hearing and trial ADAs both stated that the "first time" the trial ADA learned about the photo array was "on June 6, 2006, after it was discovered in open court." Again, this was nearly a year and a half after the grand jury presentation. The trial ADA also stated in her affirmation that she was never informed that defendant was shown the photo array during his interrogation and told Martin that the Sheldon Thomas in the photo array was not him.

Notably, the defense motion for a special prosecutor, and the People's response, which included the initial hearing and trial ADAs affirmations, appear to have been filed with Administrative Judge. Although nothing in the Office of Court Administration ("OCA") database or on the hearing court's "buck sheet" (a chronological record of the case where the filing of motions is recorded) indicates that this motion was filed simultaneously with the hearing court, CRU located a copy of the motion—bearing only the Administrative Judge's time stamp of June 29, 2006—in the hearing court's file. CRU could not determine when, or if, the hearing court ever reviewed the People's motion. Regardless, it was incumbent upon the prosecution to inform the hearing court about Martin's false testimony as soon as it occurred, and certainly before urging the court during oral argument to credit Martin's testimony. It is reasonable to conclude that the People failed to inform the court; had the People done so, the hearing court's decision would almost certainly have reflected that.

After the hearing court's decision, the trial ADA submitted another affirmation, this time with a different court—the one which inspected the original grand jury minutes—as part of the People's opposition to the defense Motion to Reinspect the Grand Jury Minutes. In this affirmation, dated July 31, 2006, the trial ADA explicitly addressed Martin's false hearing testimony that he told the trial ADA or "some Assistant District Attorney" at the grand jury about the photo array issue. The trial ADA stated that at no time before, during, or after Martin's grand jury testimony, did he inform her or anyone else, to her knowledge, about an issue with the photo array. (*see* above, Trial ADA Aff., Motion to Re-inspect)

It strains credulity that Martin told some other ADA at the grand jury—yet another "fact" he neglected to memorialize. He initially maintained on cross examination that he "personally" told the trial ADA about the issue with the photo array prior to his grand jury testimony. (H.400, 425) On redirect examination he equivocated, saying maybe it was some other ADA. (H.473, 505) Significantly, it was stipulated that on the two days Martin appeared in the grand jury, the trial ADA was the assistant who presented the case. (H.508, 510)

As with the previous affirmation, there is no indication in the court paperwork or the People's file that the hearing court was ever made aware of the trial ADA's second affirmation contradicting Martin's false testimony. Although this defense motion was filed with the hearing court, only the defense papers were submitted at that time. The motion was referred to the judge, who conducted the original inspection of the grand jury minutes. Consequently, the trial ADA's opposition affirmation was before the grand jury court, and not the hearing court.

Based on the court filings, the People's affirmations, and the hearing court's decision, CRU has concluded that there is no evidence that the prosecution informed the hearing court that Martin had testified falsely.[136] This was especially serious given that the hearing court was clearly troubled by Reedy's false testimony. The court pointedly asked Reedy if he knowingly testified falsely and advised Reedy to obtain counsel. The People argued that Reedy was incredible and that the court should rely on Martin's testimony in deciding the probable cause issue. The court ultimately found both Reedy and Martin credible. Had it known that Martin had lied under oath, and that the prosecution deemed Martin incredible with respect to his claim that he informed the People about the photo array issue, the court would likely have reached a different credibility determination. There is a reasonable possibility that the court would have found that the police had no probable cause to arrest defendant. (*see* above) Alternatively, given the seriousness of the malfeasance, the court might have dismissed defendant's case.

[136] It is likely that this error was made in good faith; the trial prosecutor might reasonably (but incorrectly) have believed that filing the affirmations with any judge associated with the matter would mean that the hearing judge would be privy to the same information. However, the facts before CRU suggest that this was not the case.

The People Should Not Have Used Charles as an Identifying Witness

As a matter of due process and fairness, when the People discovered Charles's misidentification, they should have reinvestigated the entire case. (*see* above) Charles should not have been used as an identifying witness. By the time of the People's discovery, which was during the pretrial hearing, the People knew, among other things, that: (1) Charles had provided material inconsistent versions of defendant's involvement (including no involvement); (2) the detectives ignored the misidentification and illegally placed defendant in lineups, which were questionable; (3) the People served false notice that Charles identified defendant in a photo array; and (4) both Reedy and Martin gave false testimony at the pretrial hearing.

The People avoided the problem of calling Reedy and Martin to testify at trial by eliciting the facts of the lineup procedures from the witnesses who viewed the lineups. Of course, the People are free to present their case any way they choose. But here, the decision not to have Reedy or Martin testify was almost certainly based on the People's knowledge that the detectives previously lied under oath and committed misconduct during the police investigation. (*see* above)

The People should have made the same decision about Charles as an identification witness because she gave multiple, material disparate accounts of what she saw. In relevant part, when she was first interviewed, Charles stated she heard shots from a white car, which she had seen out the window. Except for the fact that the white car had tinted windows, Charles could not provide additional details about the car. Charles did not mention defendant, or that she saw any car occupants. (*see* Police Investigation, Canvass Interviews)

The next day, in a sworn statement to an ADA, Charles had a new version. Now she said she observed that the car windows were only half-way up. She added that "Kern" (Sergeant) was in the front passenger seat and "Yellow" (Walters) was in the back. She no longer just "heard" the shooting, but she observed Kern and Walters pull out guns and fire them. Charles said she did not "really see the driver's face." She was asked explicitly whether she saw "who the driver of the car was." She said, "No," and she did not know the driver "like that." (*see* Police Investigation, Charles's Sworn Audiotaped Statement)

Thereafter, in another proceeding, Charles testified that defendant was the driver, and she knew defendant. Now, Charles maintained that defendant and Walters were the shooters. And subsequent to that, Charles testified that only Kern and Walters were shooting.

The People dismissed Sergeant's case after Charles could not identify Sergeant in a lineup, and they credited his alibi. (*see* above) Considering Charles's photo array misidentification and the above inconsistent versions she provided, the People should have questioned her reliability in implicating defendant. Instead, the People presented Charles's testimony, which they needed to establish their acting in concert theory. In the process, the People—whether intentionally or not—elicited Charles's observations of Sergeant in the vehicle and misled the jury. (*see* below)

The People Needed Charles's Testimony to Establish an Acting in Concert Theory

As a threshold issue, as demonstrated by the People's summation (*see* above), Charles's testimony was critical to establishing defendant's guilt and that he acted in concert with Walters, "and the other people in that car" (T.1862), which included "Kern."

The People maintained that Walters and defendant planned the shooting together, basing this conclusion on the claim that Charles saw defendant and Walters together once in the summer. (T.1818) This argument was weak, at best, because there was no evidence that Charles was privy to the substance of whatever transpired between defendant and Walters on that occasion. Thus, the People also elicited testimony from Charles about Kern, to connect defendant and Walters. The People argued that before the shooting, Charles saw Kern driving a white car with the scratches on the back, which Charles had seen defendant driving at some prior time. Charles "definitely" knew that Kern was Walters' friend, and he was driving "defendant's car." (T.1818-19)

The People Should Not Have Elicited Charles's Observations of "Kern"

The Prosecution Knew that Kern was Ernesto Sergeant

Charles gave a sworn statement to the prosecution that "Kern" was one of the shooters in the car. Thereafter, Det. Martin composed a photo array with Ernesto Sergeant as the subject because Sergeant was known to the 67th Precinct as Kern.[137] Charles viewed the Sergeant array and identified Sergeant as Kern. Daymeon Smith viewed that array and identified Sergeant as Kern but did not place Sergeant in the car.[138] Based on Charles's photo identification, Sergeant was indicted, along with defendant and Walters, under an acting in concert theory.

Sergeant's Case was Dismissed After Charles Was Unable to Identify Him in a Lineup

Following his indictment, Sergeant was arrested and placed in a double-blind lineup (H.69-73) Charles viewed the lineup and failed to identify anyone.[139] The prosecution investigated Sergeant's alibi and determined it was credible. Sergeant also passed a polygraph test. The People dismissed Sergeant's indictment.

The Prosecutor Elicited that Charles Observed Kern in the Car Before and During the Shooting

Despite having dismissed the case against Sergeant based, in part, on his alibi, the People elicited testimony on direct examination that Charles observed Kern driving "defendant's" car before the shooting and later observed Kern in the passenger seat and saw shots fired from the passenger window. It is of no import that the People used the name "Kern" when eliciting this testimony. The People knew that Kern was Sergeant. So did the jury. When cross examining Charles, defense counsel repeatedly referred to Kern as Ernesto Sergeant, drawing only an objection as to form from the

[137] Martin DD5, "Composing of photo array."

[138] Martin DD5, "Showing of photo array to Daymeon Smith."

[139] Smith, too, viewed the lineup. Smith recognized Sergeant as Kern but did not place him at the scene.

prosecution. (T.1121) The court overruled the objection. Thereafter, the People did not oppose the mention of Kern or Ernesto Sergeant. (T.1122, 1170)

What the jury did not know was that the prosecution dismissed the case against Sergeant because Charles failed to identify him, and because the People determined that Sergeant's alibi was credible. Thus, the People should not have elicited testimony about Kern being in the car during the shooting. Indeed, the People argued that Smith was credible because he knew Kern and did not identify Kern in a lineup as being in the car. (T.1843)

The People Erred on Summation

It is fundamental that on summation the People (and the defense) "must stay within the four corners of the evidence."[140] Thus, a prosecutor may not misstate the evidence, or advance misleading representations to encourage inferences of guilt based on facts not in evidence.[141] Here, the prosecution's summation errors deprived defendant of a fair trial because they went to the heart of the People's case.

First, to support the People's argument to the jury that Kern was connected to defendant, the People argued that Charles saw Kern driving "defendant's car" on a prior occasion. (T.1819) The claim that the car belonged to defendant was simply not true. There was no testimony or document in evidence establishing that defendant owned the white Maxima.

Furthermore, in addressing the damaging evidence that Charles picked out another Sheldon Thomas in a photo array, the People repeatedly stated that Charles did not identify anyone in that array, despite having served notice to the defense asserting that Charles identified defendant in the photo array. (*see* above, People's Notice of Defendant's Photo Array Identification) The People told the jury that Charles thought defendant was number five, but that Charles was not sure. The People suggested that counsel had misstated the record: "[The] defense stood here and repeatedly, throughout this trial" said that Charles was 90 percent sure number five was in the car. (T.1832-33)

This was not a misstatement of the record. While it was true that Charles did not acknowledge it in her direct testimony, Martin testified on cross examination that Charles told him she was 90 percent sure number five was in the car. Furthermore, Charles admitted on cross examination that before she testified, the People told her that the person she had "identified" in the photo array, number five, was not defendant. (T.1139-40 [quotation marks added]) Presumably this revelation had an impact, causing Charles to deny on the stand that she had identified defendant in the photo array.

Next, the People addressed counsel's attempt to impeach Smith's testimony that defendant was shooting from the front passenger window, with Smith's prior statement that it was the rear passenger window. The People stated that there was "no evidence" that Smith ever told the police it was the back window. (T.1838) This was false. Martin's DD5 reflects that Smith said the rear window.[142]

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[140] *People v. Ashwal*, 39 N.Y.2d 105, 109 (1976); *see Berger v. United States*, 295 U.S. 78, 88 (1935).

[141] *People v. Wragg*, 26 N.Y.3d 403, 411-12 (2015).

[142] *See* above, "Interview of Damien [Daymeon] Smith."

Similarly, the People incorrectly characterized Smith's initial description of the shooter as dark-skinned, and his admission at trial that defendant was not dark-skinned. The People told the jury on summation, "[Smith] never told the police it was a dark-skinned black male. What he said was a dark-skinned male," and "defendant is a dark-skinned male." (T.1838) (emphasis added) However, Martin's DD5 reflects that Smith said, after the right rear window came down, "a dark-skinned male black was firing" from the window.[143]

Counsel's Failures

CRU agrees with the District Court that trial counsel's representation did not satisfy the "exacting" standard required to demonstrate ineffective assistance of counsel on either the state or federal level. *Thomas v. N.Y. Dep't Corr.,* 2017 U.S. Dist. LEXIS 199481 at *39-*49. The District Court, however, addressed two "objectively unfavorable" errors made by counsel: (1) counsel elicited from Charles that she had seen defendant shoot and beat people for fun; and (2) counsel elicited on the defense case that Patrice identified defendant as a shooter in a lineup.

The District Court held that "counsel considered these risks when he made the strategic decision to attack the identification evidence and the police conduct, and counsel decided that the downside of attacking the identification evidence and the police investigation was outweighed by the benefits." *Id.* at *45.

While these errors were not sufficient to make out an ineffective assistance of counsel claim, CRU has nevertheless concluded that these two errors, and others, were serious enough that they were extremely detrimental to the defendant and contributed to an unfair result in this case.[144]

First, counsel effectively undermined Charles's credibility regarding her claim that she could see inside the white car, and what she saw there, and successfully highlighted her inconsistent prior sworn audiotaped statement and her identification of the other Sheldon Thomas in the photo array. (T.986-97, 1095-96, 1124-26, 1136-40) But counsel then undermined his impeachment of Charles.

Counsel asked why Charles did not mention defendant during her sworn statement to the ADA, asking, "Are you especially fearful of [defendant]?" (T.1160) From there, counsel asked a series of questions that ultimately elicited from Charles that she was more fearful of defendant than of the shooters in the car "because he beat[s] people up for fun. And shoot[s] people for fun." Counsel elicited the date, location, and time that Charles allegedly observed defendant shoot someone, as well as the name of the person Charles alleged was with defendant at the time. (T.1162-67)[145] This not only suggested without any basis beyond her testimony that defendant had a serious criminal past, but it enabled the People to argue that Charles identified defendant because she knew him, "better than she'd like to—she's afraid of him. She saw him shoot someone else a few months before." (T.1825)

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[143] *See* above, "Interview of Damien [Daymeon] Smith." (emphasis added)

[144] Kings County District Attorney Eric Gonzalez, *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York,* 6/9/2020, p.70.

[145] As detailed above, CRU found no basis for this claim.

Counsel's line of questioning here also shows that he did not review Charles's testimony in a prior proceeding, where she claimed to have seen defendant before, when he beat up her friend.[146] Counsel should have known not to question Charles on this issue. Notably, the minutes of the prior proceeding were not before the District Court.

Next, on the People's case, Patrice testified that he did not view any lineups or make any identifications. The People did not seek to introduce his identifications by calling either Det. Reedy or Det. Martin to testify. This was another clear indicator that the People had no faith in either detective. It was also extremely advantageous to the defense.

On the defense case, counsel informed the court that he intended to show, through Det. Martin, that the police failed to investigate the real killer—the Sheldon Thomas in the photo array. (T.1558-59, 1566) The court held that if counsel questioned Martin about what Martin did to "find this guy," meaning the Sheldon Thomas in the photo array, the court would allow the prosecution to elicit that Martin "didn't do anything because next day he got a [lineup] identification [of defendant] that was 100 percent sure." The prosecution added, "by more than one witness." (T.1566-69)

Counsel elected to proceed with his strategy. In doing so, he attempted to control the narrative and elicited that Charles and Smith identified defendant in a lineup and asked whether Patrice viewed a lineup. Martin said, "Yes." (T.1574) Counsel asked if Patrice identified defendant. After reviewing the lineup sheet, Martin said that Patrice identified defendant in position number six. Martin acknowledged that defendant was the in same position in each lineup. (T.1575) Counsel admitted into evidence the lineup report pertaining to Patrice's viewing. (T.1583-85) Counsel did not question Martin about the report because the report "speaks for itself." (T.1586) Presumably he was referring to the fact that Patrice refused to sign the lineup report.[147]

On cross examination, however, the People elicited from Martin that Charles, Smith, and Patrice all identified defendant as present in the car, and that Smith and Patrice said they saw defendant shooting. (T.1593)

As the People did with counsel's error in eliciting defendant's alleged criminal propensity from Charles, they took full advantage of the evidence of Patrice's lineup identification in summation. The People argued repeatedly that Patrice identified defendant in the lineup but denied doing so because he had to protect himself to avoid being labeled an informant. (T.1847-49)

Significantly, there was no basis in the record for the People's claim as to Patrice's motive. And this was not an isolated example. Indeed, counsel failed to object to other remarks in the People's summation that misstated facts or were not based on the evidence. (*see* above) A defense counsel's failures to object to prosecutorial summation misstatements, which are not acceptable argument and

[146] The prosecutor admonished Charles not to mention specifics other than the instant crime.

[147] The lineup report reflects that Patrice refused to sign it. Counsel elicited this from Martin on redirect examination.

misrepresent evidence central to the determination of guilt, deprives a defendant of meaningful representation and the constitutional right to a fair trial.[148]

Finally, counsel should have moved to reopen the *Wade/Dunaway* hearing based on the People's affirmations regarding Martin's false testimony, because, had he done so, there was a reasonable possibility that the outcome of the hearing might have been different. (*see* above, The People Failed to Disclose False Police Testimony to the Hearing Court)[149]

CONCLUSION

CRU, the Independent Review Panel, and the KCDA agree that defendant's judgment of conviction should be vacated. The police misconduct during the investigation violated defendant's rights. The hearing court incorrectly determined that probable cause existed for defendant's arrest in that, among other reasons, it credited the testimony of a detective, who unbeknownst to the court, falsely testified, and because it based its decision, in part, on material misstatements of fact. The record includes instances of prosecutorial missteps, and counsel's failures contributed to an unjust result in this case. Each of these errors, on its own, deprived defendant of a fair trial. Together the errors undermined the integrity of the entire judicial process and defendant's resulting conviction.

Because the evidence upon which the prosecution relied was and is defective, this case cannot be re-tried. Thus, the indictment should be dismissed.

[148] *People v. Wright*, 25 N.Y.3d 769 (2015).

[149] *cf. People v. Burch*, 201 A.D.3d 811 (2d Dep't 2022) (counsel not ineffective for failing to move to reopen the suppression hearing where there is "little or no chance of success" that the outcome of the hearing would be different).