DISTRICT ATTORNEY
KINGS COUNTY

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REPORT ON THE CONVICTION
OF
ARVEL MARSHALL

By: The Conviction Review Unit

THE CRIME

According to the People's evidence at trial, on July 15, 2008, at about 9:50 p.m., defendant, acting alone, shot 22-year-old Moustapha Oumaria ("the deceased") in the head, killing him, as he sat with Tete Eteh-Benissan ("Benissan"), Mamadou Abdoul-Salam Zakari ("Zakari"), and Abdoulaye Zibo ("Zibo") on the steps outside their home at 139 Albany Avenue. The People's theory was that defendant shot the deceased because he was jealous of the deceased's relationship with defendant's girlfriend, Janiquea "Nicki" Callier ("Callier").

Defendant is incarcerated and will be eligible for parole in 2033.

OVERVIEW OF THE ERRORS

CRU has determined that defendant's conviction should be vacated and the indictment dismissed. First, despite defendant's repeated demands throughout trial, he was not provided with a working copy of the surveillance footage. At trial, the People maintained that they could not get the disc containing the footage to play. They provided photographic stills the police had obtained from the footage and maintained that the stills represented everything in the footage, which they claimed simply showed two males walking down the street around the corner from the crime scene.

Defendant's protests during trial—some in front of the jury—that one of the two males seen in the stills fit the shooter's description were ignored. Defendant was correct. CRU was able to play the surveillance footage and it is clear that that male was the shooter who, with the other individual, headed in the direction of the crime scene and, minutes later, ran back from the direction of the crime scene.

The failure to provide defendant with this information violated his due process right to present a complete defense. Indeed, had the jury seen the surveillance footage, there is a reasonable possibility that it would have found unreliable the testimony of the eyewitnesses—to whom defendant was a stranger—that defendant was the shooter and acted alone.

Furthermore, defendant was denied the right to effective representation. Had counsel been provided with the surveillance footage, he could have investigated and possibly located the other individuals depicted in the footage, who observed the shooter. Moreover, the undisclosed footage corroborated certain information provided by a source naming a person he said was the actual shooter, which counsel could have investigated.

Regardless, defense counsel failed to advocate effectively for defendant. Among other errors, counsel accepted the People's representation that the footage was immaterial and made no attempt to review the footage in its entirety, even declining the People's offer, in court, to try to play it. Moreover, counsel made clear that all requests for the surveillance footage came from his "client" and not him, effectively disparaging defendant's entreaties and undermining the legitimacy of defendant's concerns.

The court's conduct before the jury was improper and prejudiced defendant too. The court repeatedly berated defendant, demeaned his testimony, and declared the surveillance footage irrelevant in front of the jury without having ever viewed the critical parts of the footage.

Finally, the police investigation into everything depicted in the surveillance footage was insufficient. The police apparently never watched all the footage. The photographic stills they provided to the People, and a detective's note referencing certain segments of the video, do not show the shooter and his companion running back from the direction of the crime scene or the civilians on the street reacting to these events.

THE POLICE INVESTIGATION[1]

Jay Wolsky of the 77th Precinct was the lead detective, assisted by Det. Matthew Hutchison of the Brooklyn North Homicide Squad ("BNH"), and other precinct and BNH detectives.

The Initial Response

An unknown male flagged down PSA2 P.O.s Carvajal and Tam (the time and P.O.s first names not indicated), and reported that someone had been shot, pointing to 141 Albany Avenue. The officers approached and saw the deceased lying on the sidewalk, bleeding from the head and unresponsive. They radioed for patrol supervision and established a crime scene.[2]

At about 9:50 p.m., the first 911 call was made regarding a male shot in front of 139 Albany Avenue.[3] Det. Wolsky and Sgt. Anthony Bramble responded to the scene. They observed that the deceased had a gunshot wound to the head.[4] EMS transported the deceased to Kings County Hospital (KCH)[5]

At about 9:57 p.m., the police transmitted the shooter's description as a light-skinned Black male, 5'8", 17 years old, wearing a white t-shirt and blue denim jeans.[6]

At about 10:15 p.m., Det. Patrick Coward informed Det. Hutchison about the shooting, and that the deceased was likely to die. Hutchison responded to the scene with other BNH detectives.[7]

At about 11:07 p.m., at KCH, the deceased was pronounced dead. He had been shot once, in the forehead. There was no exit wound.[8] The bullet came from the deceased's right.[9] A deformed bullet was recovered from the left side of his head.[10]

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[1] Unless otherwise stated, the police investigation account is obtained from documents in the People's trial file and the original detective file. Numbers in parenthesis preceded by "VD" refer to pages of the jury selection transcript; those preceded by "H." refer to 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 the pages of the sentencing transcript.

[2] Bennett DD5, "Respond to Scene: Front of 139 Albany Avenue."

[3] Sprint; Bramble memo to Chief of Detectives, "Bullet RE: Homicide of [the deceased] M/B/22."

[4] Wolsky DD5, "Response to Scene."

[5] Bennett DD5, "Response by EMS." (interviewed the responding officers at 10:20 p.m.)

[6] Sprint; *see also* Complaint report; Bramble memo to Chief of Dets., "Bullet RE: Homicide of [the deceased] M/B/ 22," indicating the shooter was 16 to 17 years old.

[7] Hutchison DD5, "Notification of Male Shot."

[8] Bennett DD5, "Response by EMS"; Wolsky DD5, "Respond to Kings County Hospital."

[9] Autopsy report.

[10] Hutchison DD5, "Autopsy of [the deceased]"; Hutchison memo book.

The Location

139 Albany Avenue is on the north side of Albany between Dean and Bergen Streets, closer to Dean. It is three stories high with four apartments—1, 1B, 2, and 3. The doors to 1 and 1B are adjacent and accessed directly from the street. An external staircase leads up to a landing and the outside adjacent doors to 2 and 3. The deceased and Benissan lived in apartment 2.[11] Zakari and Zibo lived in apartment 3.[12]

Ballistic Evidence

CSU found a bullet hole in the façade between the doors to apartments 1 and 2 and recovered four bullet fragments—three pieces of copper jacketing and one piece of lead—near that area.[13]

At 10:30 p.m., ESU searched for ballistic evidence (*i.e.*, gun, bullets, shell casings) with negative results.[14] The next morning, at 11:45 a.m., Dets. David Ras and Collins (first name not indicated) conducted a daytime search with negative results.[15]

Canvasses for Video Cameras and Witnesses

Dean Street—Video Canvass

The first canvass was a search for security cameras on Dean Street between Albany and Troy Avenues. At about 10:25 p.m., P.O.s Joseph Brunetti and Brian Lukowsky looked for exterior cameras from 1503 to 1521 Dean Street. No exterior cameras were observed.[16]

Albany Avenue—Witness and Video Canvasses

The remaining canvasses that evening were conducted on the block of the crime—Albany Avenue between Dean and Bergen Streets. Most of the buildings had four floors.

Witness Canvass

At about 10:40 p.m., P.O. Lukowsky canvassed 135 Albany. No one saw anything. Several tenants heard up to five gunshots.[17]

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[11] Wolsky, DD5, "(Unusual Occurrence) Preparation of Unusual Occurrence Report"; Unusual Occurrence Report; Carboine DD5, "(Interview) of Tete Eteh-Benissan"; Scratch.

[12] Coward DD5, "(Interview) Interview of Abdoul-Salam Zakari Mamadou"; Scratch.

[13] CSU Report and diagram; Request for Laboratory Examination Report, Ballistic Analysis. No analysis could be made on the bullet fragments.

[14] Ras DD5, "E.S.U. Response."

[15] Ras DD5, "Day Time Canvass for Ballistic Evidence."

[16] Brunetti DD5, "(Canvass) Video Canvass Dean Street Albany Avenue-Troy Avenue."

[17] Lukowsky DD5, "(Canvass) Canvass of 135 Albany Avenue."

At about 10:55 p.m., Det. Hutchison canvassed 137 Albany. Three residents heard several gunshots but did not look out their windows.[18] When the shooting stopped, one tenant looked out her window, saw the deceased on the ground, and called 911.[19]

At about 11:00 p.m., P.O.s Brunetti and Lukowsky canvassed 139 Albany (crime scene location), apartments 1 and 1B. The tenant in 1B said he was awakened by one gunshot. There was no answer at apartment 1.[20]

At about 11:00 p.m., Brunetti and Lukowsky canvassed 145 Albany. Numerous tenants heard between three and five gunshots. No one saw anything.[21]

At about 11:10 p.m., Brunetti and Lukowsky canvassed 143 Albany. They spoke to one tenant, who said she heard five gunshots but saw nothing.[22]

Video Canvass

At about 10:50 p.m., canvasses for video cameras were conducted from 135 to 145 Albany Avenue between Dean and Bergen Streets. None were observed.[23] The superintendent of 135 Albany told P.O. Lukowsky that there were no video cameras at the location.[24]

At about 10:55 p.m., The superintendent of 137 Albany told Det. Ras that the building did not have any surveillance cameras.[25]

At about 11:10 p.m., a tenant at 145 Albany told P.O.s Brunetti and Lukowsky that the building had no surveillance cameras.[26]

Witness Interviews

Benissan

On July 15, at approximately 10:35 p.m., at the 77th Precinct, Det. Robert Carboine interviewed 20-year-old Tete Eteh-Benissan. Benissan stated the following:

Before the shooting, he was sitting outside his apartment on the landing at the top of the steps. Zakari was standing on the landing, Zibo was sitting on the top step, and the deceased was sitting one or two steps below Zibo.

They were all talking when Benissan saw a dark-skinned Black male walking fast from the direction of Dean Street. The male stopped in front of the location. Benissan heard a "pop," which sounded like

[18] Hutchison DD5, "(Canvass) Canvass for witnesses 137 Albany Avenue."

[19] Ras DD5, "(Canvass) Canvass 137 Albany Avenue Apt 3R."

[20] Brunetti DD5, "(Canvass) Witness Canvass of 139 Albany Avenue."

[21] Lukowsky DD5, "(Canvass) Canvass of 145 Albany Avenue."

[22] Brunetti DD5, "(Canvass) Witness Canvass of 143 Albany Avenue."

[23] Brunetti DD5, "(Canvass) Video Canvass Albany Avenue Bergen-Dean Street."

[24] Lukowsky DD5, "Video Canvass of 135 Albany Avenue."

[25] Ras DD5, "(Canvass) Canvass 137 Albany Avenue Apt 4R."

[26] Lukowsky DD5, "Video Canvass of 145 Albany Avenue."

a firecracker. He heard two or three more pops and saw sparks and the male pointing something at them. Benissan realized they were being shot at.

Benissan tried to get into his apartment, but the door was locked. He knocked and his girlfriend Salimata let him in. Zakari and Zibo followed. Zibo said the deceased had been shot. Benissan went outside, saw the deceased bleeding from the head, and called 911 from his cell phone.

The shooter was about 21 years old, 5'9" to 5'10," of medium build, wearing a white t-shirt, blue thick pants, and a dark-colored hat or du-rag. The shooter "fled" north on Albany toward Dean Street, the same way he came.

Benissan knew the deceased for a year and did not know of any serious problems the deceased had where anyone would want to shoot him.[27]

Zakari

On July 15, at about 10:35 p.m., at the 77th Precinct, Det. Coward interviewed 26-year-old Mamadou Abdul-Salam Zakari. Zakari stated the following:

He was outside the location with his friends Zibo, Benissan, and the deceased, who was his roommate. Zakari was standing on the landing, at the top of the stairs. Benissan was sitting by his apartment door, Zibo was sitting at the top of the stairs, and the deceased was sitting in the "middle." Benissan then laid down on the landing.

A Black male wearing a white t-shirt and dark jeans walked by and stopped between 139 and 137 Albany Avenue. The male fired three shots in their direction. Zakari looked and saw the shooter running back toward Dean Street. After the shots were fired, the deceased fell down the stairs. Zibo yelled that the deceased had been shot and told Zakari to call 911. Zakari saw the deceased lying on his side with blood next to his head, ran into his apartment, and called 911 from his cell phone.

Zakari was not sure of the identity of the shooter, because it was difficult to see his face. Zakari was unable to describe the shooter's height or weight. He did not know of any problems the deceased had.[28] Zakari was too upset to view any photos.[29]

Zibo

At approximately 11:35 p.m., at the 77th Precinct, Det. Coward interviewed 28-year-old Abdoulaye Zibo. Zibo stated the following:

He was sitting on the stoop outside of the location with Benissan, Zakari, and the deceased. The deceased was sitting two steps below him, not saying anything while Zibo, Benissan, and Zakari conversed.

[27] Carboine DD5, "Interview of Tete Eteh-Benissan;" *see also* Carboine's notes.

[28] Coward DD5, "Interview of Abdoul-Salam Zakari Mamadou."

[29] Coward's notes.

Zibo heard what sounded like a firecracker. He looked over his shoulder and observed a young Black male wearing a white t-shirt and dark jeans shooting at them from the sidewalk.

Zibo ran into his apartment with Zakari and Benissan behind him. A few seconds later, he opened the door and saw the deceased at the bottom of the stairs bleeding from his head.

He did not know the deceased to have any problems with anyone. Zibo was too upset to look at photographs in photo management system.[30]

Moutari Mahamare

At about 11:45 p.m., at KCH, Det. Wolsky interviewed the deceased's cousin, Moutari Mahamare. Mahamare stated the following:

He did not know who may have shot the deceased. The deceased did not have problems with anyone.[31]

Abraham Omar

On July 15, at 11:50 p.m., Det. Hutchison interviewed 911 caller, Abraham Omar, by phone.[32] Omar stated the following:

He and the deceased were best friends. At about 10:00 p.m., Andrea, who lived on Albany Avenue, called him saying that the deceased had been shot. He told Andrea to call the police, and then he called 911.[33]

Additional Canvasses on Dean Street between Troy and Albany Avenues

On July 16, at about 12:01 a.m., P.O.s Brunetti and Lukowsky canvassed 1549, 1553, 1494-96 Dean Street for witnesses. A resident in 1494-96 heard three guns but saw nothing. The other residents with whom they spoke did not hear or see anything.[34]

At about 12:05 a.m., the officers canvassed 1551 Dean Street for witnesses. They spoke to three residents who all stated they did not hear or see anything.[35] At about 12:10 a.m., the officers canvassed the same location for surveillance videos. One of the tenants said that the cameras at the location were never hooked up.[36]

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[30] Coward DD5, "Interview of Abdoulaye Zibo."

[31] Wolsky DD5, "(Canvass) Notification to Family Member (Moutari Mahamare)."

[32] Hutchison DD5, "(Interview) Phone Interview of 911 Callers." Omar had called 911 at 9:56 p.m. (*see* Sprint).

[33] Hutchison DD5, "Phone Interview of 911 Callers."

[34] Brunetti DD5, "(Canvass) Witness Canvass Dean Street Albany Avenue – Troy Avenue."

[35] Lukowsky DD5, "(Canvass) Canvass of 1551 Dean Street."

[36] Lukowsky DD5, "(Canvass) Video Surveillance Canvass of 1551 Dean Street."

At about 12:10 a.m., the officers canvassed 1555 Dean Street. Two residents did not hear or see anything. One resident was not home.[37] At about 12:15 a.m., the officers canvassed the same location for surveillance videos. A tenant said there were no cameras at the location.[38]

Conferral with Brooklyn North ("BN") Gang and Narcotics Squads

On July 16, at about 3:00 a.m., Det. Wolsky notified BN Gang Det. Chell (first name not indicated) and requested increased enforcement near the scene. He asked that all those arrested and confidential informants ("CI") be debriefed for information.[39]

At about 9:50 a.m., Det. Ras made the same requests of BN Narcotics Det. Herrera (first name not indicated).[40]

Recovery of the Surveillance Video

On July 16, at about 11:30 a.m., Dets. William Winning and Michael Bennett responded to Wholesale Plus at 1529 Dean Street between Albany and Troy Avenues to obtain security camera footage "pertaining to the investigation." Winning spoke to Ben Cousin and reviewed the tape with him. Cousin made two copies of the footage for Winning. Winning gave the footage to Det. Wolsky for review and placed the other copy in the case folder.[41]

<u>Still Photos Are Made from the Video</u>

Later that day, (at 7:00 p.m.), at Fort Totten T.A.R.U., Det. Hutchison gave P.O. Peter Cannizzaro the surveillance camera compact disc ("CD") recovered from 1529 Dean Street. Cannizzaro viewed the CD and gave Hutchison still photo images ("stills") from the CD. The stills were placed in the case folder.[42]

Shameek Owens

On July 16, at about 4:50 p.m., (apparently by phone) Det. Carboine spoke to 911 caller Shameek Owens. Owens stated the following:

He was at a cookout at 1414 Bergen Street (around the corner from the crime scene) and heard about six shots coming from Albany Avenue. He went down Albany and saw the deceased on the ground near some stairs, bleeding from the head. He did not know the deceased. He did not see anyone flee the scene. He called 911 from his cell phone.[43] Owens called at 9:55 p.m.[44]

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[37] Lukowsky DD5, "(Canvass) Canvass of 1555 Dean Street."

[38] Lukowsky DD5, "(Canvass) Video Surveillance Canvass of 1555 Dean Street."

[39] Wolsky DD5, "Conferral with BN Gang."

[40] Ras DD5, "Notification to B.N. Narcotics."

[41] Winning DD5, "Response to 1529 Dean St Regards to Video Canvass."

[42] Hutchison DD5, "Enhancement of Surveillance Video."; *see also* Hutchison memo book, noting the stills. There is no mention about the number of stills made.

[43] Carboine DD5, "Interview Shameek Owens—911 Caller."

[44] Sprint.

Abraham Omar States that the Deceased Had a Problem with Callier's Boyfriend

On July 16, at about 5:00 p.m., Hutchison called Omar, again. (*see* above) Omar added the following:

He and the deceased were from Niger. The deceased told him that he had a problem with a guy. The deceased was hanging out with Nicki (Callier). The deceased said that Callier's boyfriend was just released from jail, found out about him, and threatened to kill him. Omar knew of no other problems the deceased had with anyone.[45]

Crimestoppers

On July 17, at about 7:20 a.m., Det. Hutchison requested Crimestoppers posters seeking information about the shooting.[46]

Request to Debrief 77th Precinct Informants

On July 17, at about 9:00 a.m., Det. Wolsky asked Sgt. David Cheesewright, FIO (Field Intelligence Officer), of the 77th Precinct, to debrief all informants about this investigation.[47]

Benissan Identifies Defendant in a Photo Array

On July 17, at approximately 2:20 p.m., Det. Wolsky showed Benissan a photo array with defendant as the subject. Wolsky developed the array from the Photo Manager database. The computer randomly placed defendant in position number five and selected five other males, matching defendant's "general description." Benissan identified defendant as the shooter.[48]

Benissan's Sworn Audiotaped Statement

On July 17, at approximately 3:50 p.m., at the KCDA, Benissan gave a sworn audiotaped statement to an ADA. Det. Hutchison and Sgt. Moran were present. Benissan stated the following:

The shooter was a Black male, 5'9" or 5'8", with a skinny build, wearing a white shirt, thick or dark pants, and a du-rag or a hat. He walked by and, without saying anything, fired three or four shots at them. After the shots started, Benissan tried to get into his apartment, number 2, but it was locked. His girlfriend opened the door. Zibo was lying down on the floor "after the second shot, trying to avoid a bullet."

Benissan never saw the shooter before. The shooter was alone. Benissan did not see anyone else. After the shooting, the shooter went back toward Dean Street.[49]

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[45] Hutchison DD5, "(Interview) Phone Interview of Abraham Omar."

[46] Hutchison DD5, "Request for Crimestoppers Posters"; Reward Poster Data Sheet.

[47] Wolsky DD5, "Conferral with FIO."

[48] Wolsky DD5, "Photographic Line-Up."

[49] Audiotape A08-0301, and transcript (according to the transcript Benissan said the shooter was 5'9" or 5'10." The ADA spoke over Benissan when he stated the second height, but CRU hears 5'9" or 5'8".

Zibo's Sworn Audiotaped Statement

On July 17, at approximately 4:45 p.m., at KCDA, Zibo gave a sworn audiotaped statement to an ADA. Det. Hutchison and Sgt. Moran was present. Zibo stated the following:

He and the deceased were on the stairs. The deceased was on his right, about three steps down. He was at the top of the stairs. Benissan was sitting by the door and Zakari was standing on the balcony. They heard a loud sound, and he turned around and saw a "kid" shooting at them. He ducked. When he heard the third shot, he was lying down on the balcony.

The shooter was "a little darker or brown skin." He was wearing a white t-shirt and dark jeans. The shooter did not say anything. He had never seen the shooter before. After the shooting, the shooter went toward Atlantic Avenue (one block past Dean).[50]

Zakari's Reinterview and Audiotaped Statement

Zakari Re-interview

On July 21, at approximately 4:40 p.m., at the 77th Precinct, Dets. Wolsky and Hutchison re-interviewed Zakari. His statement was consistent with his prior statement except as follows:

He, Benissan, Zibo, and the deceased were all on the landing at the top of the stairs. The deceased was sitting near the top of the stairs. (he had previously said the deceased was in the middle, *see* above) He saw the shooter walking southbound on Albany Avenue (coming from the direction of Dean Street), and the shooter fired with his right hand.

He heard that the deceased got into an argument several weeks ago (he did not mention with whom). He was not there and did not know what the confrontation was about (he previously said he did not know the deceased to have any problems).[51]

Zakari's Audiotaped Statement

On July 21, at about 5:14 p.m., at the KCDA, Zakari gave a sworn audiotaped statement to an ADA. Det. Hutchison was present. His statement was consistent with his prior statement except as follows:

Zakari was on the "stoop" with the deceased, Benissan, and Zibo. A guy came up when the deceased was at the bottom of the "stoop" (he had said the deceased was in the middle, and near the top, *see* above). The guy fired three shots and Zakari realized the deceased had been shot.

His roommate "Zac" (Zacoiu Daodaz, *see* below CRU Investigation) told him that about three weeks ago when Zakari was on vacation, the deceased was involved in a fight in front of their building. A group of young people "from that project" were chasing each other. The fight was over a girl, whom

[50] Audiotape A08-0234; *see also* Hutchison DD5, "Audio-Taping of Abdoulaye Zibo." The recording says Castro was present. Both Hutchison's DD5 and the scratch indicate that Hutchison was present.

[51] Wolsky DD5, "(Interview) Reinterview of Abdoul Salam Zakari Mamadou."

the deceased was trying to help, and with whom the deceased was involved. Zac pulled the deceased inside the apartment and then heard some shots or firecrackers.[52]

Defendant's Apprehension

On July 22, at about 6:45 a.m., Dets. Sean McTighe, Hutchison and Bennett, and Sgt. Moran went to Callier's apartment to apprehend defendant. Hutchison, Bennett, and Moran knocked on the apartment door. McTighe secured the front of the building.

McTighe heard a thud and saw defendant on the ground in the front of the house. It appeared that defendant had jumped from the second-floor window. Defendant got up and ran. McTighe pursued. Defendant jumped over a fence. As McTighe yelled to stop, defendant said, "I didn't do anything, tell me what I did."

Defendant ran into the backyards of buildings and jumped over a fence into a car lot on Atlantic Avenue where he crawled under a car. Other officers arrived and defendant was ordered to come out. Defendant complied, repeatedly saying, "But I didn't do anything." Defendant agreed to climb back over the fence but stopped and stood on top saying, "I don't want to come down. I didn't kill anyone." After a minute, defendant came down and was arrested without incident.[53]

Callier's Interviews and Search of Her Apartment

Statement to Detectives

On July 22, at about 9:15 a.m., at the 77th Precinct, Dets. Hutchison and Wolsky interviewed Callier. She stated the following:

History with Defendant

She knew defendant for about six years. Defendant's brother, Harold, is married to her mother, Delores Thornton. Callier became romantically involved with defendant a little more than a year ago. She became friends with the deceased at the end of the summer of 2007 when he visited her neighbors. She became romantically involved with the deceased when defendant was in jail.

She started seeing defendant again when he was released from jail around November 21 or 24, 2007. Defendant knew she had been seeing the deceased and said he did not want any man touching her. In December 2007, she spent the night with the deceased. The next day when she came home, defendant said that he and her brother, Jeffrey Thornton looked for her at the deceased's house. Jeffrey showed defendant where the deceased lived.

"Sometime later," Callier and defendant visited the deceased at his security job on Ralph Avenue and Park Place. There were no problems that night. She occasionally brought the deceased food to his job.

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[52] Audiotape A08-0304, and Scratch. The audiotape is difficult to hear. CRU did not locate a transcript and relies mostly on the Scratch for the substance of Zakari's statement. The defense investigators and CRU interviewed Daodaz (*see* below, CRU Investigation)

[53] McTighe DD5, "Apprehension of [defendant]."

"Sometime in March" the deceased came to her house and argued with defendant about Callier. The deceased told defendant she was still "[the deceased's] girl" and they started yelling. The police arrived. The deceased was arrested because he refused to leave.[54] After the police left, defendant pulled her hair out and kicked her. He used to beat her "all the time."

Around April 20, 2008, Callier had defendant "locked up" for beating her. On May 29, 2008, he was released from jail and went to her house. He said, "You better not let me catch you doing anything"—meaning "sleeping around."

About two weeks ago (from her statement), Callier was at defendant's mother's house, and he was telling everyone there she was a "ho" and was sleeping around with the deceased and "Supreme."

On July 7, Callier received a $900 income tax refund. The next day, she gave defendant $200 to buy clothes. Defendant was drinking beer and said, "fuck that, I'm gonna get a gun" to go after "L" up the block. She told him to buy clothes or return the money. Defendant did neither.

Date of the Crime, July 15

On July 15, at about 11:00 a.m., defendant left the house to buy Callier food. He went to his mother's house. At 4:00 p.m., defendant's mother called Callier saying that defendant was showing his friends naked pictures of her. Callier called for a cab, went to her friend Trisha's house in East New York, and spent the night. Defendant called her about three times, but she hung up on him.

July 16

At 4:00 a.m. (July 16) Callier went to sleep and woke at 9:00 a.m. She had 12 missed calls and six voicemails from defendant. At about 9:00 p.m., she spoke to defendant and told him she was coming home and needed her keys, which he had.[55] She waited at her house for defendant. He arrived an hour later and complained about her "cheating" on him.

Defendant's Apprehension, July 22

This morning (July 22), defendant woke her saying he believed the police were at the door. As she was getting dressed, defendant was gone. She looked out the window and saw him jump over a little fence and run down the street as the police chased him.[56]

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[54] On 3/14/2008, the deceased called 911 reporting that his girlfriend had been punched. When the police arrived at Callier's, the deceased was in the building doorway with an open beer bottle. He became "irate and disorderly" and was arrested for public consumption of alcohol. He pleaded guilty to disorderly conduct and received an "ACD" (adjourned in contemplation of dismissal). The case was dismissed on 9/12/2008 (*see* arrest K08624149)

[55] According to police documents and defendant, defendant did not have a cell phone. Phone records for Callier and defendant's mother (Mildred Marshall), which the People had subpoenaed, show that on July 15 Callier called Mildred at 3:04 p.m., and 4:05 p.m. From 11:25 p.m. to July 16 at 11:33 a.m., there were no calls. There were approximately 43 calls between Callier and Mildred on July 16, the last call was made by Callier at 9:16 p.m.

[56] Hutchison DD5, "(Interview) Interview of Janiquea Callier."

Callier's Audiotaped Statement

Later that day (at about 4:40 p.m.), at the KCDA, Callier made a sworn audiotaped statement to an ADA. Det. McTighe was present. Callier stated the following:

She was dating the deceased when defendant was in jail. Defendant was released from jail at the end of November. Defendant found out about her relationship with the deceased from her brother, Jeffrey.

Defendant knew where the deceased lived because Jeffrey and defendant went over to the deceased's house looking for her. Callier and her sisters spent the night at the deceased place. She had told Jeffrey where the deceased lived, so Jeffrey would know where they were. Callier last saw the deceased two months ago.

The ADA asked whether defendant and the deceased fought. Callier said they "didn't f[i]ght they just had an argument." In March, the deceased came by her house to say hello. Defendant let him in and said it was okay to hang out with them. The deceased said he would leave because he did not want any problems. The defendant knew Callier was seeing deceased at the time. Both defendant and the deceased were drinking. Defendant thought that when he went to the bathroom, the deceased and Callier were talking about getting back together. The deceased and defendant began to argue about Callier. The deceased "got loud." They were both drunk and "it was crazy." The police came and arrested the deceased because he was "rowdy" with the police and saying, "No, no, no. That's my girl."

In July, when Callier gave defendant $200 to buy clothes, he started drinking and said he was going to get a gun "and show these [ni**ers]." She did not know if defendant bought a gun. She never saw a gun and never saw one in her house.

The ADA asked what happened on the day of the shooting on July 15. Callier said, "I don't know about any shooting I didn't hear anything."

The ADA asked about defendant's six messages, and 12 phone calls. (*see* above, Callier statement to the detective) Callier said defendant called from his mother's phone denying that he showed naked pictures of her. She was fed up with defendant and was going to leave him, but he had the keys and she needed to get into her house.

The ADA started to ask, "The night after," when Det. McTighe said something (inaudible). The ADA then asked, "On the day of the shooting," did Callier meet defendant after he left her all those messages. Callier replied that she went home and told defendant to meet her at 9:00 p.m., with her keys. She took a cab home and defendant showed up an hour later. He said he was chilling with his homeboys in the park and told Callier, "Don't rush me."

The ADA asked if defendant told her anything about the shooting. Callier said she never even heard about the shooting until today. The ADA asked, "He never said anything about the shooting?" Callier said defendant did not say anything about it.[57]

Search of Callier's Apartment

On July 22, at about 12:40 p.m., with Callier's written consent, Lt. McHugh, Sgt. Moran, and Dets. Wolsky, Carboine, Coward, and Hutchison searched her apartment for evidence. Callier was present. No contraband was found.[58]

Defendant's Lineup

On July 22, at the 77th Precinct, Det. Wolsky conducted a lineup with defendant as the subject. Det. Hutchison was present. Defendant chose position number one. The fillers' ages, height, and weight were as follows: 29, 5'9", 160 lbs.; 28, 5'9", 165 lbs.; 36, 5'10", 155 lbs.; 37, 5'10", 185 lbs.; and 25, 6'3", 185 lbs.[59]

Benissan, Zibo, and Zakari viewed the lineup, at 4:40 p.m., 4:50 p.m., and 4:57 p.m., respectively. They all identified number one, defendant, as the shooter. They all viewed the lineup with the participants both seated and standing.[60]

Defendant's Arrest

At about 5:00 p.m., defendant was arrested and charged with second-degree murder.[61] Defendant was 36-years-old, 5'8", 150 lbs. He had cornrows and a mustache. He provided Callier's address as his residence.[62]

Defendant's Statement

At about 6:00 p.m., at the 77th Precinct, defendant was present with Dets. Hutchison and Wolsky. Defendant was read his *Miranda* rights, and answered "yes" to each question, but refused to sign or initial the *Miranda* sheet.[63]

At about 6:05 p.m., defendant made a *Mirandized* statement. Wolsky questioned defendant about whether he was involved in a relationship, and whether he knew who Callier dated. Defendant said he

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[57] Audiotape A08-0305 and transcript (emphasis added). The audio quality is poor, and Callier is difficult to hear most times. The transcript has numerous "inaudible" statements. CRU had the audiotape enhanced, and CRU relied, in part, on the summary in the Scratch. The Scratch includes that on July 15, after 9:00 p.m., Callier met defendant and said he knew she "was still cheating on him and they all would pay." This account should be disregarded because it is not heard on the audiotape, does not appear in the transcript, and is not included in the prosecutor's account of the statement to the court (*see* below, People's Case, People's attempt to admit Callier's statement into evidence).

[58] Wolsky DD5, "Consent to Search . . ."; Written and signed consent form.

[59] Lineup Report.

[60] Wolsky DD5, "Line-up."

[61] Carboine DD5, "(Unusual Occurrence) Arrest Unusual."

[62] Arrest Pedigree Form.

[63] Wolsky DD5, "*Miranda* Warnings"; *Miranda* Sheet.

had been dating Callier for about 14 months and provided her address. Callier dated Anthony about two years ago, and "Supreme" when defendant was in jail.

Wolsky asked if defendant knew the deceased. Defendant said he saw the deceased with Callier and he thinks they "are" friends. Callier told him the deceased was "good looking" and defendant told her he "didn't want to hear any of that shit." When asked if the deceased and Callier were more than friends, defendant said, "She can fuck who she wants. I can too, we are grown."

When asked if he knew why he was at the precinct, defendant said, "No, I want to know what's up." Defendant was told it was a homicide investigation. Defendant said, "Fuck this I got nothing to say without an attorney." The questioning stopped.[64]

THE INDICTMENT[65]

On July 28, 2008, defendant was charged with one count of Murder in the Second Degree (P.L. § 125.25[1]), and two counts of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[1][b], [3]).

THE PRETRIAL HEARING

On July 16, 2009, a *Wade* hearing was conducted.[66]

The People's Case

Det. Wolsky

Wolsky testimony about the identification procedures was consistent with the police documents. He added the following:

When he arrived at the scene, the witnesses told him that they were hanging out with the deceased at the top of the staircase when a male approached the front of the building and fired a number of times. The deceased fell from the top of the stairs to the bottom. (H.8)

From the phone interview of Abraham Omar (*see* above), it was learned that defendant had a troubled relationship with a female, and previously approached the deceased. Detectives obtained defendant's photograph and created a photo array. (H.9-10)

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[64] Wolsky DD5, "(Interview) Interview of [defendant]."

[65] 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).

[66] The purpose of a *Wade* hearing (*United States v. Wade*, 388 U.S. 218 [1967]) is to determine whether the identification procedures were so improperly suggestive as to taint an in-court identification at trial.

Regarding the lineup, Wolsky did not know who asked the witnesses to come to the precinct, what was said to them, or if they arrived together. (H.28) The witnesses were separated at the precinct. (H.16)

Normally, a lineup up is viewed with the participants in a seated position. If a witness requests that they stand, the participants individually approach the viewing window. Here, the three witnesses viewed the lineup with participants both seated and standing. Wolsky did not recall whether the participants approached the window. (H.30) Wolsky identified defendant in court as the person "seated next to defense counsel." (H.24)

The Defense Case

The defense did not call any witnesses or present any evidence. (H.33)

Oral Arguments

Defense counsel argued that the photo array was suggestive because defendant's hairstyle was noticeably different from the others. The suggestiveness of the photo array tainted the lineup. Counsel agreed with the court that he was not challenging the lineup as suggestive. (H.34)

The People argued that the photo array "speaks for itself" and, in any event, any suggestiveness was attenuated by the five-day passage of time between the array and the lineup. (H.35)

Counsel replied that "once an image is in your mind" a passage of five or even 10 days cannot ameliorate the taint from a suggestive photo array. (H.36)

Counsel added that defendant wanted him to mention that defendant was the only person in the lineup with braided hair. (H.37)

Defendant's Request for a Polygraph

Defendant asked the court whether it was possible for an officer to give him a lie detector test, with defense counsel present. The court offered to reopen the hearing for defendant to testify. Defendant agreed. After the court explained that defendant would be subject to cross examination, he declined. (H.38-39)

The Court's Decision

By written decision dated September 21, 2009, the court held that the identification procedures were not unduly suggestive. Regarding the photo array, the court stated, among other things, that the men had similar hairstyles. (Dec. at 3) Regarding the lineup, the court stated, among other things, that all participants wore baseball caps to conceal the differences in hairstyles, and any height or weight differences were eliminated by having each participant seated. (Dec. at 4)

THE TRIAL

In December 2009, the trial commenced.

Counsel States that the Defense Has No Witnesses

Before jury selection commenced, the People provided their witness list to the court to read to the jurors. The court asked the defense whether it had any potential witness names. (T.2) Counsel conferred off the record with defendant, then had an off-the-record discussion with the court. (T.3) After certain issues were briefly discussed, counsel said that defendant wanted to address the court. The court asked, "What do you want, Marshall?"

Defendant stated that he repeatedly told counsel about his witnesses, and counsel is now saying the defense has no witnesses. Counsel was not listening to him or doing anything. Defendant did not understand. (T.3-4) The court said that counsel was a good lawyer and knew what he was doing. The "alleged witnesses" will contact counsel and counsel will determine whether they are valid. (T.5) The court added,

> I mean, you saw the evidence at the hearing. What do you expect [counsel] to be, a magician? He is not a magician, he is a lawyer, he cannot change things.
>
> That's enough.

(T.5)

The Surveillance Video and Stills

<u>At Defendant's Request Counsel Inquires About the Existence of Any Videos and the People Maintain They Do Not Have Any</u>

On December 7, the first day of jury selection, defense counsel told the court that <u>defendant wanted him to ask</u> the prosecutor whether any surveillance tapes existed. Counsel said, "[defendant] understands that there are video cameras in the area and he's asking if there are surveillance tapes, that they be turned over." (VD.86-87) The court told the prosecutor to turn over any tapes he had. The prosecutor said, "<u>Don't have any</u>. We have still photos which I supplied to [defense counsel] months ago." Counsel said, "And they're of no value." The court stated, "There you go." (VD.87 [emphasis added])

Defendant said, "That was too quick. . . . It is tapes. He's lying." (VD.87) The case recessed for lunch and jury selection continued when the parties returned. (VD.87-88)

<u>Defendant Shows Counsel a DD5 Reflecting That the Police Recovered a Surveillance Video From Dean Street</u>

The next day, before jury selection continued, counsel stated that when he had asked the prosecutor for any surveillance videos, the prosecutor indicated there were not any. Counsel noted,

> <u>My client</u> did show me a DD-5 that <u>he</u> wants to share with the Court, DD-5 number 37.

(VD.150 [emphasis added])[67] Counsel summarized the DD5, which indicated that security camera footage was recovered from 1529 Dean Street and that the detective reviewed the footage, made two copies, and placed it in the case folder. (VD.150-51)

The People Said Videos Were Recovered but They Were Unreadable, and He Provided Stills

The court said, "Mr. [Prosecutor]?" The prosecutor said, "That is correct" and referred counsel and defendant to a "follow-up" DD5 indicating that "stills were taken from those videos."

The prosecutor said he had copies of the videos, but "cannot open" them. The prosecutor stated that when defense counsel came to his office "they were unreadable." The prosecutor reiterated that he could not "open them," adding that it was "one of the reasons why I assume stills were taken off of that." (VD.151)

The prosecutor stated that he provided the stills to counsel. Counsel recalled seeing the stills, and the prosecutor trying to open the video. Counsel did not recall receiving or retaining a copy of the stills. Counsel stated he recalled "videos with no evidentiary value in them," and wanted to know about the existence of the video. (VD.151-52 [emphasis added])

The Prosecutor Did Not Believe That the Video Showed Anything, and Noted the Camera Was Around the Block from the Shooting

The court told the prosecutor to get a copy of the video for counsel to try to open it. The prosecutor said that he did not believe that "anything was transferred to [the video]."

Defendant asked why stills would be made if there was nothing on the video, adding, "That's the thing that's messing me up. I'm confused." Why make a copy of the tape "if there is nothing on it?" (VD.152) Defendant believed there was something on the video that would prove his innocence, and he did not want anything erased. (VD.153, 154)

The prosecutor stated, "Just to be clear," the surveillance camera did not show the shooting location—it was around the corner. The court remarked, "The police were looking to see if they could possibly see a suspect fleeing." (VD.155) Jury selection continued and concluded.

Counsel Raises Defendant's Question About Obtaining Stills Without Playing the Video

Before the preliminary jury charge to the jury, counsel stated that defendant was concerned about the video surveillance, and that defendant raised an interesting issue—how did the prosecutor obtain the stills if the tapes could not be opened or played? (T.2)

The People Explain TARU Viewed the Tape and Provided the Stills

The prosecutor replied that one security tape was recovered from 1529 Dean Street. The NYPD made two copies. The NYPD TARU Units "was able to go in and get the stills."[68] TARU gave the copies

[67] The December 7 transcript ends on page 163, but the pagination of the December 8 minutes starts on 148. The duplicate page numbers from December 7 are designated a, b, e, *etc.*

[68] TARU, the Technical Assistance Response Unit, provides technical support to the NYPD, among other agencies.

and stills to the police who gave them to the prosecutor. The prosecutor had the two copies in his office, which he was unable to view. The prosecutor did not know how TARU viewed the tape, but the stills were made from "whatever programs" TARU had. (T.3-4) The prosecutor said he would bring in the two discs and give a copy to defense counsel "for whatever computer he can get it to play on." In the "interest of justice and fairness," counsel asked the court to have a TARU technician come to court. (T.4)

The People Represented That the Provided Stills Showed Everything on the Video, and All They Showed Were Two People Walking Down the Street

The court asked whether the stills were "all of the representations" from the surveillance video. The prosecutor replied, "Yes. That is my understanding." The court asked, "There is nothing else on that disk that hasn't been made into a hard copy?" The prosecutor said, "Yes. That is my understanding, correct." The court said, "Fine." (T.4)

The prosecutor noted that the stills depict "two individuals walking down the street." The court stated that was irrelevant because the defense was entitled to any photographs including videotapes with certain exceptions that did not apply here. (T.5)

The Court Held that The People's Position Was Improper and Directed the People to Have TARU or Some Other Entity Come to Court to Play the Video

The court stated that the People's position was not "proper." It would "fundamentally emasculate the law if the People could say, the Police Department converted this to a disk. The Police Department can open it. I can't open it. I will give it to the defense. If they can open it, they can open it." (T.5)

The court directed the People to have TARU, any NYPD agency, or the KCDA, come to court with equipment to view the video. If it cannot be viewed on a PC then the court would direct the police to allow counsel to view them at a PD location so he can compare the photographs with the video. Counsel said that he viewed the stills but did not recall if he had them. The court said that they were probably in counsel's office, and counsel probably did not have them in court if they were of no value. (T.6)

The People Declined TARU's Offer To Provide a Laptop With the Program To Play the Video Because KCDA Had One

Later, (after the People's first witness, Zakari [*see* below]), the prosecutor said he spoke to a TARU detective, who explained that a specific program was required to view the surveillance video and that if KCDA did not have the program, TARU could supply a laptop with that program installed. (T.86) The prosecutor believed KCDA had the program and he would bring a laptop with the program installed tomorrow. (T.87) The following morning, on the People's case, nothing was mentioned about the video. (T.91)

The People Were Not Permitted To Bring the KCDA Laptop With the Program to Court and Were Trying To Play the Video on Other Laptops

Later, (before the People rested their case), the prosecutor stated that he could not bring the KCDA laptop which he knew played the video. It was "from Tech Services" and "they will not let it out of Tech Services['] sight." A colleague brought another laptop from Tech Services to court, but it did

not work. The prosecutor's colleague was going to get another laptop. In the meantime, the prosecutor's colleague was in court with the surveillance tapes. (T.306)

Defendant Requests Verification of the Recovery Location of the Video

After a lunch recess, defense counsel stated, that the prosecutor "indicates that he has a surveillance video," and "My client would like to know if there are any certifications which would verify the location from which this tape was taken." (T.327 [emphasis added]) The prosecutor said "No." Counsel asked how the People came in possession of it. The prosecutor said, "Everything is reflected in the DD5s." (T.327)

Defendant Later Attempts to Testify about the Footage and Admit the Stills into Evidence

During his testimony, defendant repeatedly said there were "tapes" and further stated that they showed the shooter. The court told defendant to "be quiet" and the tapes were not relevant. (T.384-85, 389-91; *see* below, The Trial, Defendant)

After defendant testified, he asked that the stills be admitted into evidence. Defendant stated that they showed "two guys" neither of whom looked like him and it appeared that one had a weapon. The court told defendant, "Be quiet." (T.422-23; *see* below, The Trial, Defendant).

Defendant's Continued Attempts to Obtain the Video

Defendant was certain that he was not depicted in the stills. Post-conviction, defendant attempted to obtain the video from his trial counsel, his appellate attorney, and the KCDA, to prove his innocence. (*see* below) CRU provided defendant with the video.

The People's Case

Opening Statements

The People

The People stated that defendant's motive for the murder was jealousy—the deceased was involved with Callier, defendant's "on again off again" girlfriend. (T.22) The deceased's friends knew Callier, and they knew that the deceased had problems with defendant, whom they never met. (T.23)

The People told the jury that three eyewitnesses described the shooter as short and kind of skinny and that he "looked young because of his body type. They thought he was young." (T.26) The People asked the jury to find defendant guilty based on the testimony of the three eyewitnesses. (T.31)

The Defense

The defense stated that witnesses told the police that the shooter was young, 15 to 16 years old. The lineup photos show that the lineup was not fair, and that defendant stood out. There were no problems between defendant and Callier. (T.32-33)

Zakari

Zakari's testimony was consistent with his prior statements. He added the following:

In July 2008, he lived with the deceased for a year and two months. (T.40-41) At some point, he met the deceased's girlfriend, Callier. (T.41) He first met Callier at his apartment, and he saw her every night that she was with the deceased. (T.42)

Zakari testified that the deceased and Callier stopped seeing each other more than three months before July 15. (T.43) He also testified that at the time of the shooting they saw each other from "time to time." (T.79) He was not aware that Callier had a relationship with anyone other than the deceased. (T.79)

Just before the shooting, "a lot" of people were walking by their house. Zakari testified that: "the guy was coming, he just stopped at the sidewalk and he start[ed] shooting." (T.50); when he heard the first shot, he had been facing his door and had his back to the street (T.52); and the shooter came from "the left" (Dean Street). (T.57)

When he heard the first gunshot, he turned around and saw a man shooting. (T.52, 68) He saw the shooter's profile, on the left side. (T.53-54) The shooter was dark-skinned, wearing a long-sleeved white T-shirt, a blue Yankees hat, and dark pants. (T.54)

Two more shots were fired. (T.54) Zakari did not pay attention to the direction of the shooting. (T.55) After the third shot, Zakari went into his apartment. (T.56) The shooter walked fast to the next building and then started running in the same direction from where he came. (T.57, 62)

Zakari twice testified that he would be able to recognize the shooter. Both times, after looking around the courtroom, he said the shooter was not there. (T.62-63)

He went to the precinct to view the lineup with Benissan and Zibo. (T.80-81) When they arrived, they were told that someone had been arrested for the shooting that morning. (T.81-83)

He told the police he was not sure of the shooter's identity and could not describe the shooter's height or weight. (T.73) He told the police he did not see the shooter's face. (T.83)

He recalled speaking to an investigator and describing the shooter as dark-skinned, young, and the same age as Zakari and his friends. (T.76-77) He did not recall telling the investigator that the police provided him with information about the shooter, including the shooter's relationship. (T.79)[69]

The Court's Admonishes Defendant in Front of the Jury

During Zakari's cross examination, the court repeatedly sustained the People's objections about what Zakari told the defense investigator, including that he did not know defendant, and that the detective

[69] Prior to trial, assigned investigators for the defense interviewed witnesses. (*see* below, CRU Investigation)

told Zakari about defendant's relationship with Callier. Defendant said, "This is crazy." The court told defendant "Be quiet." (T.77-79)[70]

Det. Hutchison

Hutchison testified as follows:

On July 16, he received information about a woman from 911 caller Abraham Omar. Computer checks on a nickname and an address provided led to Callier, which led to defendant. (T.118-19, 159-60)

After defendant was apprehended, Hutchison called Benissan and said he had someone in custody regarding the incident. Hutchison asked Benissan to come to the precinct with Zibo and Zakari to view a lineup. (T.130-31, 143; People's Ex. 4A-D [lineup photos]) Hutchison later denied that he told Benissan he arrested the shooter. (T.170)

The defense elicited that Hutchison showed Benissan a photo array prior to the lineup. (T.164-66; Def. Ex. A [photo array]) Hutchison acknowledged that defendant was the only person in the array whose hair was parted down the middle. (T.167-68)

The Court Admonishes Defendant in Front of the Jury

During a sidebar conference between the court and counsel, defendant said, "I need to speak to the Judge." In front of the jury, the court said, "Be Quiet. Mr. Marshall, I've warned you to control yourself. Don't make an outburst. . . . You are hurting yourself. If you keep doing that, you are hurting yourself. Don't do that in my courtroom." (T.145-46)

The court told the jury it was taking a break, and to "keep an open mind. Don't form or express any opinions. You are all going to be fair, right?" (T.146) After the jury left, the court admonished defendant, and when defendant said, "Your Honor" the court said, "Shut up." (T.147)

Det. McTighe

Det. McTighe testified as follows:

He assisted in defendant's apprehension. Defendant climbed on top of a barbed wire fence and stated, "I don't want to come down, I didn't kill anybody." (T.180) On cross examination, McTighe acknowledged that defendant asked, "What do you want with me?" (T.181)

Benissan

Benissan's testimony was consistent with his prior statements. He added the following:

He saw the shooter coming from Dean Street, walking a "little" fast. Benissan watched as the shooter approached. The shooter was small, skinny, and wearing dark pants, a white t-shirt, and a hoodie, hat, or du-rag. He could not see the shooter's head, forehead, or hairstyle. (T.199) Benissan denied that he

[70] No basis for the objections were stated pursuant to the court's rulings. If the attorneys wanted to make a record for appellate purposes, they had to request a side bar. That did not happen here. (T.14)

told the police that the shooter was about 21 years old, but then testified that he told the police, "probably he would not be older than 21." (T.219)

The shooter faced the "whole house" and raised his arm to his face. (T.201) He aimed the gun at the stairs. The deceased was sitting on the stairs. Three shots were fired. After the second shot, Benissan tried to get into his apartment. By the third shot, Benissan ran inside. (T.202)

Benissan focused his attention on the shooter's face and gun.[71] Nothing blocked his view. (T.202) The streetlights were "really lit up." (T.203)

Benissan admitted he did not look at the shooter after the second shot and the first two shots were fired in a matter of seconds. (T.216-17) He admitted that during those few seconds, he did not look at the shooter. Benissan then said he "[a]ctually" looked at the "guy" as he walked up the block, "way before anything started." (T.217)

Benissan acknowledged it was a summer night with activity; other people were walking on the sidewalk, and cars were going by. He noticed this "guy" because he walked fast, and "looked like a kid" playing a game trying to get away from the friend. (T.218) Maybe "hide and seek." (T.219)

When Benissan viewed the photo array, he was told to focus on the face. The detective did not say anything about whether the suspect was in the array. (T.209) When shown the photo array during his testimony, Benissan acknowledged that defendant was the only one whose hair was parted down the middle of his head. (T.222) He drove to the precinct with Zakari and Zibo to view the lineup. (T.210)

Benissan recalled speaking with an investigator (for the defense) on August 8, 2008. (T.224) First, he did not recall the investigator asking about the lineup. Then he testified he was never asked about it. (T.224-25, 228) Benissan denied that he told the investigator that the lineup participants did not resemble defendant. He denied that he told the investigator that he was not certain whether number five (defendant) in the photo array was the shooter. (T.231-32)

Zibo

Zibo's testimony was consistent with his prior statements. He added the following:

The deceased stayed with him on and off. At the time of the crime, he had known the deceased for three years. The deceased dated Callier, and for two months he brought her home four to five times a week. (T.236) Zibo last saw the deceased with Callier four to five months before the shooting. (T.237)

At the time of the shooting, Zibo heard what sounded like a firecracker. He looked and saw fire from the weapon and ducked. He turned around, got up, and ran into Benissan's apartment. He saw the shooter walking away. (T.241) The shooter went toward Dean Street. (T.244-45)[72] The lighting was "great," and you could "see everything." (T.243)

[71] Benissan identified defendant in court as the shooter. (T.205-06)

[72] Zibo identified the defendant in court as the shooter. (T.248)

He heard the first shot, saw the second shot, and heard the third shot as he ducked. (T.243) Two or three seconds elapsed from when he saw the first muzzle flash to when he ran into the apartment. (T.255-56) He saw the shooter's face when the shooter fired the gun, and when the shooter turned to leave, Zibo saw the profile. (T.242, 244) Each time was in "an instant." (T.256) Zibo had never seen the shooter before. (T.255)

The shooter had a round nose, a round face, "like big brown skin," and was wearing a "fitted" hat. (T.242-43) On cross examination, Zibo acknowledged that he told an ADA that the shooter was a "kid." (T.255) On recross examination, he testified that he described the shooter as "a kid" because they "were on top of the balcony, there is a little distance," and the shooter was "short and skinny" and wearing a t-shirt and jeans. (T.258)

Zibo went alone to the precinct to view the lineup. (T.249) When he viewed the lineup, he asked to have number one (defendant) brought closer, and they brought number one right in front of him. (T.250)

On cross examination, Zibo denied telling the police that he did not know of any problems the deceased had. He testified that he told the police that the deceased got into "a couple of fights." (T.254) On recross examination, the prosecutor asked Zibo if he knew of any problems the deceased had with Callier's boyfriend. Zibo then testified that he heard they had a fight and Callier's boyfriend went to the deceased's job. (T.258-59)

The deceased always used Zibo's cell phone. The People elicited that Zibo received a voicemail on his phone for the deceased about "getting" the deceased for being with Callier. The court sustained defense counsel's objection. (T.259-60)

Outside the jury's presence, the prosecutor told the court that around March, a male left a message on Zibo's phone stating, "I know where you Africans live, I know Nicki [Callier] is with you. I'm going to kill you motherfuckers. I'm going to kill you both," and, "Stop messing with my girl." (T.260)

The caller did not identify himself. Zibo did not recognize the caller's voice. The message no longer exists. (T.260, 264)

The prosecutor said he could establish defendant was the caller as follows: Callier's and the deceased's relationship began when defendant was in jail; Zibo testified that the deceased had problems with Callier's boyfriend; in March the deceased and defendant fought at Callier's apartment, and the deceased "got a disorderly conduct"; the fight was the reason the deceased and Callier stopped dating; Zakari told the deceased to stay away from Callier because her boyfriend was trouble. (T.261-62) (the deceased and defendant did not have a "fight," *see* above, Police Investigation, Callier's statements)

The court held it would allow the testimony, and "circumstantially" Callier can establish that defendant left the message. The court would instruct the jury that it was not admissible for its truth, but to show the statement was made. After the prosecutor said Callier could not be located, the court held the testimony would be admitted subject to connection. Defense counsel opposed because once the jury hears the testimony, "it hears it." (T.265) The prosecutor essentially agreed and withdrew the

application. The parties agreed that if Callier was found the People could recall Zibo to testify. (T.265-67)

The People's Attempt to Show That Defendant Caused Callier's Absence at Trial, and Admit Her Audiotaped Statement into Evidence

The People could not locate Callier to testify at trial and requested a *Sirois* hearing to support their claim that defendant and his associates caused Callier's absence. (T.304-05, 307)[73] The People sought to admit into evidence Callier's prior sworn audiotaped statement. (T.307; *see above*, The Police Investigation, Callier's audiotaped statement) The court asked about the substance of Callier's prior statement. The prosecutor recounted the "gist" of the statement (T.308), which included the following:

- One day in March defendant became angry, there was "a fight," the deceased was arrested, and defendant beat up Callier. (Callier said defendant and the deceased "didn't f[i]ght they just had an argument," and the deceased was arrested because he was "rowdy")
- On July 15, Callier's mother called her saying that defendant was drinking and showing nude photos of Callier. (Callier said defendant's mother called her, [which the subpoenaed records show])
- Callier gave defendant $200 and he was "talking about getting a gun to shoot someone." Callier had stated that defendant said he was going to get a gun "and show these [ni**ers]." In a DD5 memorializing the incident, Callier stated that defendant said he was going to get a gun and "shoot that little ni**er, L."
- Callier saw defendant the day after the shooting, July 16, and "he never spoke about it, never made any admissions" although he was at her apartment that day up to the date of his arrest. (Callier stated she did not know about the shooting until after defendant was apprehended.)

(T.307-08 [emphasis added]; *see* above, Callier's audiotaped statement)

The court and the parties agreed that if the People proved that Callier's unavailability was attributed to defendant's misconduct, her prior sworn statement was admissible. (T.319-21) To establish that defendant was responsible for Callier's absence, the People wanted to play certain calls they said defendant made from Rikers threatening that his friend or relative would "take care of [Callier]." (T.309) However, the prosecutor could not get the calls to play on a laptop. Also, he did not have a witness to authenticate defendant's voice on the calls. The court ruled that since the People could not go forward with the hearing, the calls were inadmissible. (T.328-30)

Defendant's Motion for New Counsel

Defendant told the Court that, on April 3, 2009, pre-trial before another judge, he had filed a motion for new counsel, and there was no response or ruling. (T.271) Defendant claimed that counsel failed to: visit him in jail; listen to his account, provide him with copies of the legal documents; discuss

[73] A *Sirois* hearing is held for the People to prove by clear and convincing evidence that the defendant caused a witness's unavailability (*see Matter of Holtzman v. Hellenbrand and Siroi*s, 92 A.D.2d 405, 415 (2d Dep't 1983); *see also People v. Geraci*, 85 N.Y.2d 359, 363, n 1 (1995).

defense strategies; return phone calls or respond to his correspondence; and investigate witnesses (T.271; *see also* motion) The court told defendant, among other things, that:

> [defense counsel's] not a magician. He can't change things, He can only try to make them not that bad, so that's just the way life is, all right.

(T.276) Defendant asked, "You're not even going to read this motion?" The court said that the motion was denied. (T.279)

The Defense Case

Tonya Marshall

Tonya testified as follows:

She was defendant's sister. She lived on Mother Gaston Blvd. and Pitkin Avenue. On the evening of July 15, she was home with her children and mother (who also lived there). Defendant was there. (T.337-38)

At 9:45 p.m., her mother walked defendant downstairs to catch the number 14 bus. The bus stop was in front of Tonya's building. Tonya looked out her window and saw defendant get on the bus. She knew the time because she looked at the clock as she waited for her mother to return. (T.338-39)[74]

On cross examination, Tonya reiterated that defendant left at 9:45 p.m. (T.342) Three weeks after defendant's arrest on July 22, Tonya learned that defendant was charged with murder. She did not know when the crime occurred and did not ask anyone. (T.344-45) Defendant told her he was being framed. (T.353)

Callier called Tonya and told her the police apprehended defendant. (T.354) Thereafter, Callier told Tonya that the police interrogated her about something defendant did not do and that she could not discuss the interrogation. (T.357-58)

In September 2008, Tonya was interviewed by two (defense) investigators. She told them that defendant could not have been the shooter because he was getting on a bus at 9:45 p.m. (T.348-49, 353, 360) She did not tell this to anyone else because no one came to speak to her (T.352, 360, 368-69) The investigators interviewed Tonya at her home. They had asked Callier to meet them there. Callier went there and waited with Tonya and her mother for the investigators. The investigators had instructed them not to talk about the case. (T.354, 357-58)

Tonya denied that she told the investigators that defendant and Callier were having an affair. She told them that defendant was seeing Callier, but Callier was not his girlfriend. Defendant was at Callier's home every day. (T.355-57) Tonya did not know defendant showed pictures of Callier to anyone. (T.359-60)

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[74] After Tonya's direct testimony, counsel told the court that Tonya had told him that defendant left at 9:30 p.m., and he intended to argue that it was not enough time for defendant to reach the crime location. But now she became an alibi witness. The People said that since no alibi notice had been served, they would have moved to preclude her testimony had they known beforehand. The People said they will address it on cross examination. (T.339-41)

Defendant

Defendant testified as follows:

Counsel asked defendant if there was anything he wanted to say about the July 15 incident. (T.370) Defendant said yes, but not about the incident, "but about my whereabouts and what I'm being accused of, wrongly being accused of, anyway." Counsel asked defendant to testify about his whereabouts. (T.377)

On the morning of July 15, defendant was at Callier's house. When they got up, she gave him money to buy rice and fish that she was going to cook later. Defendant went up the block, saw Kelly, and said he was going to the store. Kelly asked him to pick up something for her. (T.377-78)[75]

Defendant did not go to the store. He went to Brownsville to see his mother at Tonya's house (T.378, 380) He had his camera with him containing nude pictures of Callier (T.378). He took two pictures of his mother to finish the roll. He then went to the 24-hour photo shop, dropped off the roll, and while he waited for the film to be developed defendant went to the supermarket and bought rice. He then picked up the pictures and returned to Tonya's house. He showed the nude pictures of Callier to his nephew and Tonya's boyfriend. Tonya's daughter, Tonya, and defendant's mother got upset and argued with defendant. Tonya told defendant to take his clothes and get out of her house. (T.379-81)

Defendant had no problems with the deceased. They "sat together, dr[a]nk beer together." (T.382) Callier's mother was defendant's girlfriend. Callier dated defendant's brother. Defendant and Callier had an affair when Callier's mother was in rehab and defendant's brother was in jail. (T.378, 383)

The court interrupted defendant's testimony saying, "Marshall. Marshall, enough with the story. Why don't you tell us about July 15, 2008." (T.383) Defendant replied, "There [is] really nothing I could tell you about July 15 as far as when it comes to this guy's getting murdered, because I was not there." (T.383)

When defendant left Tonya's house, he went to St. John's Place and Ralph Avenue where he hung out with friends until 12:30 (a.m.) when he returned to Callier's apartment and went to sleep. On July 22, officers came and accused him of this crime. (T.384)

Defendant did not kill "this man," and he hoped they find the person who "really committed the crime." Defendant said, "There's tapes. There's tapes with—" and the prosecutor objected. Defendant said, "You mean, I can't —." The court told the prosecutor to begin cross examination. (T.384 [emphasis added]) Defendant said that he did not finish his testimony. The court told defendant, "Be quiet." (T.385)

The court and the parties then spoke outside the courtroom. The court said that defendant is "talking poetically about things that have absolutely no relevance to these proceedings. He did finally say that he wasn't there and he doesn't know who did it and he feels bad that the guy is dead." The court noted

[75] The investigators and CRU interviewed Kelly Bright (*see* below, CRU Investigation)

that defendant wanted to continue testifying. The court understood that counsel did not want to ask defendant any questions. (T.385)

During the conference, defendant remained on the stand and the jury was present. Defendant asked a court officer to "get a bag out of the pens that contained pictures." (T.386-87) When the court and the parties returned, the court instructed the jury to disregard any comments defendant made. (T.388)

Defendant continued his testimony. He had been incarcerated for 16 months for a crime he did not commit. On July 22, when the police came to Callier's house, he ran from them because he and Callier each had an order of protection against the other. (T.388) He did not mention killing anyone to the police. He never killed anyone and would take a lie detector test or do anything else to prove his innocence. (T.388-89)

The court asked defendant, "Anything else?" Defendant then testified that while incarcerated, he tried to get his paperwork. The court said, "That's enough." (T.389) The following colloquy ensued in front of the jury:

> [DEFENDANT]: The tapes--
>
> THE COURT: Be quiet, Mr. Marshall.
>
> THE DEFENDANT: Why?
>
> THE COURT: That's not relevant.
>
> THE DEFENDANT: There [are] tapes --
>
> THE COURT: That's not relevant.
>
> THE DEFENDANT: -- that show the perpetrator, your Honor.
>
> THE COURT: Mr. Marshall, stop it.
>
> I've warned you several times outside the presence of the jury.
>
> Now, I have to do it in front of the jury.
>
> Act like a gentleman.
>
> THE DEFENDANT: What am I doing wrong?
>
> THE COURT: Follow the rules.
>
> Do you have anything that you want to say that's relevant regarding this trial?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Not some wishful thinking on your part.
>
> THE DEFENDANT: Yes, I do, but at the same time --
>
> THE COURT: Go ahead.
>
> THE DEFENDANT: That's legal documents I have right there in my possession. I'm saying why that's not relevant?

THE COURT: I find that you are not saying anything that's relevant to these proceedings.

You can cross now.

THE DEFENDANT: Anyway --

THE COURT: You can cross now.

THE DEFENDANT: All right.

Go ahead.

Go ahead, Mr. [defense counsel]. They don't want me to show you the proof.

This is really crazy.

(T.389-91 [emphasis added])

Cross examination commenced. Defendant acknowledged that he had three prior felony convictions: fifth-degree criminal possession of stolen property in November 1998; third-degree robbery in April 1999; and first-degree attempted robbery in 1992. He denied the underlying accounts involving physical contact with the victims, stating he was "railroaded" in each case, but he repeatedly admitted that he used to commit robberies. He was young and misguided, but he never killed anyone. Defendant asked the jury not to consider his past crimes and asked for forgiveness. (T.391-95)

Defendant had an order of protection against Callier because she did whatever she wanted. She told the police that defendant beat her up, but he did not do so. There was no injury report, and she did not show up in court. (T.396-97)

Defendant described an incident where he was in bed with Callier's mother, and Callier assaulted him and told him to have sex with her in the hallway. (T.399)

In 2007, when defendant was seeing Callier, he went to jail and Callier started seeing the deceased. Callier told him about the deceased when she visited him in jail. Callier wanted defendant to leave her mother and date her. When he was released, he went directly to Callier's house, but she was not home. Defendant had Callier's younger brother, Shacoy, call her. Callier answered and defendant heard the deceased in the background asking, "Who is that?" Defendant got on the phone and asked Callier if she was coming home. (T.400)

Callier came home and told defendant that she was with the deceased because defendant was not serious about her, and he was with her mother. Defendant said it was nothing (his relationship with Callier's mother). After that, defendant and Callier were "messing around" and had their "ups and downs." (T.400-01) Defendant asked Callier to marry him four times. He believed that Callier set him up and was the reason he was arrested for the murder. (T.403)

He and Callier visited the deceased at his security job. Callier had told defendant where the deceased lived, but defendant never went there. (T.401-02) He did not know anything about the deceased's murder. (T.403)

Defendant acknowledged that, on July 15, Callier found out that he showed naked pictures when he was at his mother's house. Callier was angry and they argued. Callier told defendant she wanted nothing more to do with him, but she had said that before. The prosecutor asked whether Callier mentioned the decease during that argument. Defendant replied that she did not mention the deceased during that argument. (T.403-04)

Defendant and the deceased never had any problems. They sat together, drank beer, laughed, and joked. He and the deceased did not fight in March 2008. One night in March when they were drinking, they argued, and the police were called. If defendant had any intention of harming the deceased, he could have done so then. (T.407)

To date, defendant and Callier speak often. He loves her. He had questioned her about cheating on him, and she had questioned him. Defendant had Callier's letters with him in court. (T.405) Defendant always told Callier that he did not want anybody touching her. He told that to every woman he was with. Defendant told Callier that he did not want the deceased touching her, just as he told Callier that he did not want Supreme, his brother, and his nephew touching her. (T.409)

On redirect examination, defense counsel asked, "Is there anything else you want to tell us?" (T.409) Defendant said that he was "not able to show" the jury—the court immediately interrupted saying, "Sustained." Defendant asked why. (T.409-10) The following exchange ensued.

> THE COURT: I just sustained it.
>
> You are trying to tell the jury something that you know is not admissible.
>
> DEFENDANT: I'm not telling about that. You are not even giving me a chance to talk.
>
> THE COURT: You had your chance to talk.
>
> . . .
>
> THE COURT: Ladies and gentlemen, just step out.
>
> I maintain order.
>
> We'll bring you back in here.

(T.410)

After the jury left the courtroom, the court said:

> Well, Mr. Marshall, it's clear from the manner in which you testified, I want the record to be clear, you were nasty, you were arrogant.
>
> You refused to follow the instructions of this Court.
>
> You did everything you could to inflame this jury against you.
>
> . . .
>
> You purposedly went out of your way to attempt to show this jury that in your own perception, you are being railroaded, when you don't even realize what real justice is.

(T.412 [emphasis added])

When the jury returned, the court said, "the defendant, on occasion, has been acting out. I asked you the first time he acted out yesterday to disregard these things. Don't hold it against him." (T.414-15)

When the jury was discharged for the day, the court told defendant:

> No matter how contemptuous or belligerent you continue to be or arrogant or disrespectful that you continue to be, I'm going to remain impartial.
>
> I'm a professional. I'm going to do everything I can notwithstanding your antics to give you a fair trial in this case.

Defendant thanked the court and said, "Have a nice day, your Honor." (T.416)

Counsel Did Not Question or Guide Defendant During His Testimony "In the Interest of Justice"

The morning after defendant's testimony, the court sealed the courtroom and stated for the record that prior to defendant's testimony, it had an unrecorded *ex-parte* conference with defense counsel.[76] Counsel had told the court that defendant insisted on testifying against his advice, that counsel would not disclose anything pursuant to the attorney/client privilege, and that counsel would just ask defendant what he wanted to say and allow him to speak in the narrative. (T.419)

Counsel added that during the pendency of the trial, he spoke to defendant about defendant's right to testify, defendant indicated he wanted to testify, and "I told him I would reserve my opinion on that until we see how the case unfolds." (T.419) Counsel asked defendant about the substance of his testimony, and whether defendant wanted to be prepped. Defendant repeatedly said not to worry, to put him on the stand, and he would "take care of everything." (T.419-20)

Under the circumstances, "not knowing what [defendant] was going to say, not being able to prep him," counsel decided "that the best thing to do in the interest of justice" was to put defendant on the stand and let him make his statement. Counsel "chose not to interject [him]self" during defendant's testimony. Counsel chose not to ask any questions "to possibly point him in a certain direction." (T.420) Counsel said, "I felt, again, in the interest of justice and in my own responsibility to the law, just to allow him to testify without any guidance at that point." (T.420)

The court stated that it was clear that counsel "was faced with an ethical dilemma" of "not violating the attorney/client privilege" or "permit misleading or false testify." (T.421)

Defendant's Requests to Admit Certain Evidence He Says Will Prove His Innocence

Following the parties' agreement to admit a stipulation into evidence (T.421-22; *see* below, P.O. Kelly), defendant asked to admit "legal documents." Specifically, defendant sought to admit into evidence a police investigator's document indicating that the shooter was 16 years old and 5'9," and Det. Wolsky's paperwork indicating the same and that the motive was "unknown." (T.422)

[76] Defendant was not at this proceeding.

Defendant also had "a picture from the d[i]sk" (the stills) showing two guys one of whom appears to be holding a weapon. Defendant said, "This is not me." (T.422-23)

Defendant said he has been "railroaded" his entire life. He did not understand why the documents would not be admitted. The court said, "I've had enough of you. All you do is rant—" Defendant said, "Because I'm innocent." (T.424) The court warned that it would hold defendant in contempt or exclude him from the courtroom. (T.424-25)

P.O. Patrick Kelly

P.O. Kelly's testimony was stipulated as follows:

On July 15, at about 11:35 p.m., he interviewed Zibo at the scene. Zibo stated that as far as he knew the deceased had no problems with anyone. (T.431) (Zibo denied he made that statement, *see* above, Zibo's testimony)

Investigator Donald Graham

Graham testified as follows:

He was an investigator for Walker Investigations, which investigated defendant's case for defense counsel. (T.433-34) On October 8, 2008, Graham and Mr. Walker interviewed Benissan at his house. Benissan stated that the lineup participants did not resemble each other and were different heights. Counsel asked whether Benissan compared defendant to the other people in the lineup Benissan replied, that Benissan "couldn't make a positive I.D. He said the defendant looked familiar, but [Benissan] could not be sure." (T.435)[77]

On cross examination, Graham testified he his notes of his interview were at home, but he had provided defense counsel with copies. (T.440-41) Graham admitted that his printed report, which he had with him in court, did not mention Benissan's uncertainty about his identification of defendant in the lineup. (T.443)

The Investigator's Notes

Defense counsel informed the court that he only received typed reports from the investigators and no notes. Counsel asked Graham in the hallway before Graham testified whether he had any notes. Graham equivocated and said maybe he had notes on his computer. Then Graham said, "No." (T.446)

The Court Held Defendant in Summary Contempt

Following Graham's testimony, after the jury was excused, defendant complained that defense counsel was a "buddy" of the prosecutor. (T.444) The court admonished defendant for "continuing [his] outbursts." The court held defendant in summary contempt and sentenced him to 30 days in jail. (T.445-46; Criminal Contempt of Court Order and Commitment dated 12/11/2009)

[77] Graham's report indicated that he showed Benissan a photo array, and Benissan could not identify defendant with certainty in the array (*see* below, CRU Investigation, Pretrial Defense Investigation, Benissan interview)

The court ordered that defendant be removed from the courtroom. Defendant said, "I've got pictures of the shooter in my possession, and you all not submitted them as evidence in the case." Defendant was escorted out. (T.445)

The court was prepared to continue without defendant unless defense counsel "wanted to go talk to his client" and assure the court that defendant would behave. (T.446-47) Counsel spoke to defendant, and defendant was present during the remainder of the trial. He was silent until the verdict was rendered. (T.447-549; *see* below, The Verdict)

Summations

The Defense

Defense counsel argued that photographs of the photo array and the lineup were not clear, but upon examination, they showed the identification procedures were not fair. Defendant's hairstyle stands out in the photo array. And all the lineup participants wore baseball caps backward exposing their hairstyles. Although all participants were seated, their height differential was noticeable. (T.464-69)

Counsel attacked the witnesses' identifications, noting that Zakari was unable to identify defendant in court. (T.470-75) Regarding the defense case, counsel mentioned that Tonya saw defendant leave at 9:45 p.m. Counsel argued that if defendant had committed the crime, he would not have testified and had his prior criminal record exposed. Defendant ran from the police because he was not supposed to be with Callier pursuant to an order of protection. Defendant knew the deceased and he had no motive to commit the crime. (T.476-78)

The People

The prosecutor argued that defendant acted out of anger and jealousy. The deceased had an ongoing relationship with defendant's girlfriend, Callier. (T.479) Defendant had an argument with the deceased that was "so loud and so violent" that the police had to be called. (T.483 [emphasis added]) On July 15, after defendant showed naked pictures of Callier, they argued and Callier mentioned the deceased's name, which had "a very profound effect" on defendant. (T.485) The prosecutor argued, among other things, that the witnesses had good views of defendant's face. The area was well-lit, and they viewed defendant from 10 to 14 feet away. (T.485-89) Benissan thought the shooter was "a kid" playing games and running. But then Benissan focused on the shooter when the gun came out. (T.488) The People suggested that Zakari was too scared or nervous to identify defendant in court. (T.495-96)[78]

The Verdict and Sentence

Defendant was found guilty of Murder in the Second Degree (P.L. § 125.25[1]). (T.547) As the court thanked the jurors for their service, defendant yelled that he did not kill the deceased and had "pictures to prove it." (T.549)[79]

[78] Defendant's and the deceased's argument was not violent, and Callier did not mention the deceased's name (T.403-04, 407)

[79] Defendant struggled with the court officers as they escorted out of the courtroom. (T.550)

On January 5, 2010, before sentencing was imposed, defendant objected to the following: the whole trial procedure; not receiving a full discovery package; the court's bias against him; and the court's denial of his motion for a new attorney because trial counsel did not effectively represent him. (S.5) The court converted defendant's arguments into a motion to set aside the verdict. Counsel then realized he never made a motion and incorporated defendant's arguments adding that there was no proof beyond a reasonable doubt of defendant's guilt (S.6) The court denied the motions (S.7)

The court sentenced defendant to a prison term of 25 years to life. (S.9)

THE POST-CONVICTION PROCEEDINGS

The Direct Appeal

On June 28, 2011, defendant filed, through counsel, his main brief to the Appellate Division, Second Department ("Appellate Division"), claiming that the detective improperly testified that he arrested the defendant immediately after the witnesses viewed the lineup.

On January 11, 2012, defendant filed a *pro se* supplemental brief raising myriad claims, including that the People's failure to provide the surveillance video denied him a fair trial. Defendant also claimed that counsel was ineffective for failing to: obtain the video; admit the still photos into evidence; and pursue alternative suspects named in a statement provided to his investigator.

The Appellate Division affirmed defendant's conviction. It held that the detective's testimony constituted impermissible inferential bolstering, but the error was harmless, in light of the "overwhelming evidence of the defendant's guilt." *People v. Marshall*, 97 A.D.3d 840, 841 (2d Dep't 2012). Without discussing defendant's *pro se* claims regarding the video and the effectiveness of counsel, the Appellate Division held that the claims were without merit. *Id.*

Defendant's application for leave to appeal to the Court of Appeals was denied. *Marshall*, 20 N.Y.3d 1012 (2013) (Littman, J.)

The *Habeas Corpus* Petition

On or about April 2, 2014, defendant filed a *habeas corpus* petition in the U.S. District Court for the Eastern District of New York ("District Court") raising the same claims he raised in the Appellate Division, and other claims.

On July 14, 2014, the District Court granted defendant's motion for a stay of his petition so he could exhaust his state remedies (a C.P.L. § 440.10 motion to vacate judgment, and *coram nobis*). Defendant did not file any state motions, and the stay of his petition continued.

CRU INVESTIGATION

CRU's investigation included a review of the People's trial file, which contained the surveillance video, the appeals file, the FOIL file, and all relevant transcripts. The defense did not retain its trial file. CRU interviewed myriad witnesses. Eyewitness Abdoulaye Zibo and 911 caller Abraham Omar could not be located.

The Surveillance Videos

The eyewitnesses stated that the shooter was wearing a white t-shirt, dark pants, and some type of hat, and came from and fled back in the direction of Dean Street.

As set forth above, the day after the shooting, the police recovered surveillance videos from a commercial store at 1529 Dean Street, which was just around the corner from Albany Avenue. The store is on the north side of Dean Street, between Albany and Troy Avenues. The Weeksville Gardens ("Weeksville") Development is also on the north side of Dean Street on the other side of Troy Avenue.

Defendant's Post-Conviction Attempts to Obtain the Surveillance Video

Defendant sent CRU copies of numerous letters he sent his trial attorney, appellate attorney, and the KCDA FOIL Unit attempting to obtain a copy of the videos. CRU located additional letters in the FOIL file. In pertinent part, defendant's attempts were as follows:

On August 26, 2010, defendant wrote to trial counsel asking for "a copy of the entire surveillance camera compact disc ("CD"). Because you only provided me with four photographs from that disc." Defendant stated that he could have a family member pick it up. Trial counsel wrote back, "I have no CDs in my file."

On April 20, 2011, defendant wrote to trial counsel asking whether counsel "ever received a copy of the surveillance camera compact dis[c] from the District Attorney." Defendant stated:

> I am truly innocent . . . . I would appreciate if you would tell me if you received a copy of the DVD. You only provided me with still photos that were made from the DVD, on December 8, 2009, when the prosecutor's co-worker walked in the courtroom with the disc and still photos in her hand.
>
> Can you please get back to me on this as soon as possible, because I need a copy of that DVD to prove I did not commit this crime.

Counsel wrote back that he had "no such DVD in my possession" and suggested that defendant have his appellate attorney contact the DA's office "to see if such tape exists and is available."

On July 21, 2011, defendant wrote appellate counsel asking if he had the surveillance video. Appellate counsel wrote back that he was only provided with the Supreme Court file, which did not include the video. Appellate counsel suggested that defendant write to trial counsel.

By letter dated March 25, 2014, defendant wrote to the KCDA asking for the surveillance video, and other items. The Freedom of Information Law ("FOIL") Unit handled defendant's request. In pertinent part, FOIL offered defendant the video for purchase. Defendant said that his nephew would purchase the video and pick it up from FOIL because the correction facility (Elmira) did not allow inmates to possess CDs.

Thereafter, defendant twice wrote FOIL renewing his request for the video and asking for other records. FOIL wrote back that it consolidated all requests. Ultimately, FOIL denied defendant's

requests, explaining that the records were exempt, at that time, due to the pending litigation of the stayed *habeas* petition. (*see* above, Post-Conviction Proceedings, *Habeas* Petition)[80]

CRU Viewed the Surveillance Videos

CRU located a DVD of the videos in the trial file. CRU uploaded the footage and viewed it without issue. There are two videos—marked as Camera 8 and Camera 9. Although the footage is grainy, the two videos clearly depict two Black males walking down Dean Street toward Albany Avenue, passing a drink in a white cup back and forth. They both appear young. One of the young men is wearing a white t-shirt, blue jeans, or dark pants, and has something dark on his head—matching exactly the description of the shooter provided by all three eyewitnesses. The other is dressed in all black.

The videos also show the following:

1. The young man in the white t-shirt lifts his shirt on the right side and does something with his right hand near his waist, in the vicinity of his right hip. Then he lifts the hem of the shirt up and out, lowering the shirt and covering the area that had been exposed. (Camera 8, 24:00-24:55)
2. A view of the back of the young man in the white t-shirt shows him doing something with his right hand near his waistband, ultimately removing a dark object. He holds the object in his right hand with his arm straight down by his side. (Camera 9, 45:36-45:37)
3. After the two young men go off-screen while walking toward Albany Avenue, two men—clearly older—appear on the street. One of them is also walking toward Albany Avenue on the same side of the street as two young men seen earlier. The other is walking two dogs on the opposite side of Dean Street. At one point, something draws the attention of both men and they both look toward Albany Avenue and stop walking. Then they both turn and start walking quickly away from Albany Avenue. The man with the dogs crosses the street over to the other older man, while each man glances back over their shoulder toward Albany Avenue. (Camera 9, 48:00-48:20)
4. Moments later, the two young men originally seen walking toward Albany Avenue come sprinting down the opposite side of Dean Street (the side closest to where the shooting occurred) away from Albany Avenue. They do not look behind them at any point. (Camera 9, 48:20-48:30)
5. The two young men, still running, cross Dean Street to the north side of the street and keep running toward Troy Avenue (toward Weeksville). The young man in the white t-shirt and dark pants is holding his right arm straight down by his side and slightly away from his body as he runs and appears to be holding something in his hand. (Camera 8, 28:38-28:55)
6. The two older men, who had previously changed direction to walk away from Albany Avenue, now come back into frame walking quickly toward Albany Avenue and away from Weeksville while repeatedly glancing back over their shoulders in the direction the two young men just ran. (Camera 9, 48:33-48:55)

[80] Citing Public Officers Law 87(2)(e)(i); *Matter of Whitley v. New York County Dist. Attorney's Off.*, 101 A.D.3d 455 (1st Dep't 2014), *et al.*

The Detective's Note Regarding the Video

A handwritten note torn from what appears to be a detective's spiral notebook was stapled to the DVD of the videos in the People's file. The note does not have any detective's name. CRU showed the note to Det. Hutchison, who did not recognize the handwriting.[81] The note states:

> Video
> Camera #8
> 2357 until 2414
>
> Camera # 9
> 4135 until 4220
> 1529 Dean St.

When compared to the video, the time frames listed for both cameras do not capture all of the actions of the young man in the white shirt, as described above. (*see* above, accounts 1 and 2) Nor do they capture any of the reactions of the two older men on the street, or the two young men running back from Albany Avenue. (*see* above, accounts 3-5)

The Stills From the Video

CRU found three stills in the FOIL file. The stills depict two individuals walking down the street, as the prosecutor told the trial court. It is apparent that the stills were taken from Camera 8, from 2357 until 2414 as reflected in the detective note.

The prosecutor twice represented to the trial court that the stills represented the entirety of the videos. (T.4) CRU's review of the videos, described above, shows that this is incorrect.

The Defense Pretrial Investigation

Prior to trial (in November 2008), on August 18, 2008, the trial court appointed Walker Investigation Agency, Inc. to assist the defense. Defendant provided CRU copies of certain interviews, which defense investigators ("DI") David Walker, June Walker, and Donald Graham conducted prior to trial, and which are discussed below. All interview reports were typed.

CRU could not interview David Walker because he is deceased. Neither Graham nor June Walker recall the investigation. The Walker investigation files no longer exist.

Tonya Marshall (defendant's sister)

On September 20, 2008, DI Graham interviewed Tonya at her home. Tonya stated the following:

Defendant had been living at her house since he was released from jail. Her older brother Harold was engaged to Callier's mother, Delores Thornton. Harold went to jail, and defendant started dating Delores until she entered an inpatient rehabilitation program. Defendant then dated Callier. At the time of the interview defendant and Callier were still dating.

[81] The prosecutor viewed the note and did not know who wrote it.

On July 15, at about 2:00 p.m., Tonya returned home from the park with her children. Defendant was outside with their mother, Mildred Marshall. Tonya went upstairs to the apartment. When she came outside, she and defendant argued about his showing naked pictures of Callier to Tonya's boyfriend.

Between about 3:30 and 4:00 p.m., Tonya's daughter, Shatasia, came over to drop off her son. Shatasia and defendant argued (substance of argument not indicated).

Mildred called Callier telling her that defendant was showing pictures of her in the neighborhood. Callier was upset. Later, Callier called back saying that she was on her way over to speak to defendant about the pictures. Tonya told Callier not to come because defendant had left.

At about 9:30 p.m., from her window, Tonya saw defendant board the B14 bus.

Mildred Marshall (defendant's mother)

Following Tonya's interview, DI Graham interviewed Mildred at her house (she lived with Tonya). Mildred stated the following:

Defendant arrived at about 1:00 p.m. and hung outside with Mildred. Tonya arrived, they spoke, and she went upstairs.

Mildred told Tonya that defendant showed naked pictures of Callier to others, including Tonya's boyfriend. Tonya argued with defendant over his actions. Later, they all went upstairs since defendant had come to pick up some food.

Between 3:30 and 4:00 p.m., Shatasia arrived. After some time, defendant and Shatasia argued.

Mildred called Callier and told her about the pictures. Callier called defendant and they argued.

Defendant left the house around 9:30 p.m. Callier called soon thereafter, saying she was coming over. Tonya told Callier to not come because defendant had left already.

Shatasia Marshall (defendant's niece)

DI Graham next interviewed Shatasia at Tonya's home. She stated the following:

When she arrived at Tonya's defendant was there. She did not recall what she and defendant argued about; they were always arguing about something. When she left at 8:30 p.m., defendant was still there.

Defendant

On September 28, 2008, at Rikers Island, DI Graham interviewed defendant. Defendant stated the following:

The morning of July 15, he and Callier woke and took naked pictures while having sex. They talked about dinner. Defendant went to Tonya's to pick up food. He arrived at about 1:00 p.m. His mother was outside, and he took two pictures of himself with his mother. He went to get the pictures developed. He returned to Tonya's and showed his mother the pictures of her. She wanted to see the other pictures. Defendant said no and explained why. He showed the naked pictures to a man in the neighborhood, who confirmed what he told his mother. He also showed the pictures to Tonya's boyfriend.

At about 2:00 p.m., Tonya came home. Tonya argued with defendant about the pictures of Callier. Then they all went upstairs. Shatasia arrived around 3:30 p.m. Defendant and Shatasia argued. Shatasia left at 8:30 p.m. Callier called defendant and confronted him about the pictures of her.

Between 9:30 and 9:45 p.m., defendant left Tonya's and took the B14 bus to Eastern Parkway and Ralph Avenue. He walked to St. John's Place and Ralph Avenue where he hung out by a liquor store.[82] While there, he called Callier from a phone booth. She said she was not coming home. At about midnight, defendant headed back to Callier's, but she did not show. On July 16, at 9:40 p.m., he went to Callier's apartment, and she was there.

When defendant was in jail, Callier visited him and said she was dating the deceased. Defendant and Callier had visited the deceased at his job. Defendant did not have any problems with the deceased. They had drinks together and spoke several times.

Defendant's brother was engaged to Callier's mother. When defendant's brother went to jail, defendant dated Callier's mother until she went to rehab. Defendant and Callier started dating. They had an open relationship and were both seeing other people. Among others, Callier was dating "L," who looked like Callier's brother, Jeffrey.

Defendant fled from the police because Callier had an order of protection against him.

Callier

First interview

On September 28, 2008, DIs Graham and David Walker interviewed Callier. Callier stated the following:

She met the deceased through a next-door neighbor. More than four months before the murder, Callier broke up with the deceased so she could date defendant. The breakup was not hostile, and they remained friendly. She had been to the deceased's house with her friend, who dated the deceased's friend. It was the "white house on Albany." She did not know the address.

Callier was at a friend's house in East New York the night of the shooting. Defendant called her that night from his mother's house. After the shooting, Callier heard that the deceased had a "beef" with lots of people in the area—that "people robbed him; he got drunk; and he would drop money all over the area."

The Re-interview

On September 29, Walker re-interviewed Callier. Callier added the following:

Both deceased and defendant knew about the other's relationship with Callier. There was no problem between them. She and defendant argued, but he often argued with his family as well. Defendant

[82] The B14 is the only public transport from Tonya's house to St. John's Place and Ralph Avenue (*see* Google maps)

argued with most everyone. He did not like her seeing other men, and he had a different attitude whenever he drank.

On July 15, Callier argued with defendant about defendant showing pictures of her in her underwear. She was going to talk to him at his mother's house, but he had already left. The night of the shooting she stayed at her friend Leticia's house, and returned home the following night at about 9:15 p.m. Defendant returned at about 9:30 p.m.

Callier's friend, Kelly (Bright), and Bright's boyfriend, Ahmad, told Callier that the deceased had been robbed near the Brevoort Houses (about a mile from the crime scene) and had been beaten up two days before the shooting. Callier stated many people stayed at the deceased's house, including a Puerto Rican man. Kelly and Ahmad told her that they heard that defendant was in the area at the time of the shooting. "[H]e or somebody was there with some short person or a little kid, and that he had something wrapped around his face, like a scarf or something."

A Contact Reported that Jamal Jones Arranged a Hit on "Five" From Weeksville

On September 28, 2008, a "contact" provided information. The investigator's report did not contain any information about the contact. The investigator's name was not noted. The contact stated the following:

Jamal Jones, Darnel Wright, Rashawn McCoy, "Louis," and "Franklin" were involved in the shooting. Jones set up the shooting. Jones lives at 137 Albany, first floor. His mother is a "cop." Defendant is in his 30s and is not the shooter. The shooter was 16-year-old Darnel Wright, who lives in Weeksville. Louis was the "arms dealer" for the group. He is Hispanic. The gun from the shooting would probably be found in Louis's house. He lives in Weeksville. Rashawn McCoy and "Franklin" were also involved. They also live in Weeksville.

Jones arranged the hit because he thought he was being played. It was a takeover of the drug trade. Jones is the boss and sent his "little man" to do "Five" in. The hit was on "Five" but the "African" (the deceased) was shot by mistake. It was a case of mistaken identity.

Three to four days before the shooting, the deceased argued with someone and was robbed. He was outside "where Five usually hangs out and he was mistaken for Five."

The Albany and Weeksville Houses were both controlled by the Bloods but by two different sects.[83] Jamal Jones, Darnel Wright, and Rashawn are not in a gang but were shooting at a Bloods member. The deceased was killed in front of 145 Albany Avenue, the contact's home, and not 139 Albany.

The shooting happened on the same day as the "big Bar-B-Que" on "Hally Day." These guys can usually be found right next to "Griffith's building, in the square in the middle of the building."

"Nicky Johnson" (Callier) is not really known, but her status and relationship to the shooting is being checked.

[83] The Albany Houses are on Albany Avenue south of Bergen Street. The Weeksville Houses are on Dean Street, and Troy Avenue (the direction in which the two young males seen on video fled).

Zakari

On October 3 and 8, 2008, DI David Walker interviewed Zakari. On October 10, DI June Walker interviewed him. Essentially, Zakari stated the following:

Zakari was standing on the landing and the deceased was sitting on the steps. The shooter was alone and approached from Dean Street. He appeared to be young. He was 5'10", dark-skinned, and had no facial markings, beard or sideburns. He had a thin moustache and thick lips. The shooter was wearing a white t-shirt, dark pants, and a Yankees baseball hat. His face was uncovered. Zakari got "almost a good look at him when he was shooting."

After shooting three times, the shooter fled toward Dean Street and turned right on Dean Street, towards Troy Avenue. Zakari never saw the shooter before.

At the lineup, defendant did not resemble the others. Zakari selected the defendant because "he looked like" the shooter. Zakari recognized his profile.

The detectives told him that the person arrested for the shooting was 36 years old and was Callier's boyfriend. Callier told one of his friends that her boyfriend had been arrested for the shooting. Zakari knew Callier and knew she had been the deceased's girlfriend.

DI David Walker showed Zakari a photo array with defendant's photo. Zakari did not identify anyone as the shooter.[84]

Benissan

On October 10, 2008, DI David Walker interviewed Benissan. Benissan stated the following:

He was lying down on the landing and saw a person approach the building from Dean Street. After the shots were fired, the shooter ran toward Dean Street. Benissan did not know whether the shooter turned on Dean Street or continued on Albany Avenue. He had never seen the shooter before. At the lineup, defendant did not resemble the other lineup participants' heights, weights, or skin complexions.

DI Walker showed Benissan a photo array with defendant's photo. Benissan was not certain whether the defendant was the shooter.

Zibo

On October 10, 2008, Zibo agreed to be interviewed at a later date. The interview never occurred.

Zaciou "Zac" Daouda

On October 10, 2008, DI June Walker interviewed Daouda. Daouda stated the following:

At the time of the shooting, he lived at 139 Albany Avenue, but was not home. (he was Zakari's roommate, *see* above, Police Investigation, Zakari interview)

He knew Callier, Kelly Bright, and Bright's boyfriend Ahmad Nasairou. Nasairou and the deceased were close friends. The deceased told Daouda that he had problems with Callier's boyfriend. Less than

[84] The array was created by the defense investigator. (T.430)

a year before the shooting the deceased and Callier's boyfriend fought, and the police detained the deceased for the night. Daouda did not know the defendant and had never seen him before.

A month before the shooting, the deceased had been out late drinking with friends and was robbed on his way home. The robbery was in a different neighborhood.

Amadou "Ahmad" Nasairou

On October 10, 2008, DI June Walker interviewed the deceased's friend Nasairou. He stated the following:

He and his girlfriend Kelly Bright used to be Callier's neighbors. Nasairou knew the deceased for about a year. He knew defendant from Callier. The deceased considered Callier a "sexual partner."

The deceased fought with Callier's brother, Jeffrey, when defendant was incarcerated. Nasairou did not know why. They fought in Nasairou's hallway, and he broke it up. After the fight, Jeffrey left New York. Nasairou did not know about any other issues between Callier and the deceased. He told the deceased to stay away from Callier's house, and the deceased did so.

He heard that the deceased was robbed by some people who were not from his neighborhood.

Kelly Bright

On October 10, 2008, DI June Walker interviewed Bright. Bright stated the following:

Defendant and Callier fought all the time. He beat Callier, her mother, and her brother Jeffrey every Friday and Saturday. For one of the assaults, defendant went to jail for four to six months.

Bright witnessed the deceased and defendant fight one time and the deceased and Jeffrey fight one time.

Allegedly, two weeks before the shooting, defendant was shopping for a gun and approached Bright's brother, among others, but no one had access to a weapon.

The defendant would send Callier to the deceased's house for money. One time, defendant became angry when he could not locate Callier and asked everyone for the location of the deceased's house. About six to seven months before the shooting, defendant was angry at Callier for being with the deceased and said, "Just wait; I got something for him."

CRU Interviews

The Contact

CRU could not determine the contact's identity. Defense counsel had no recollection of the defense investigation. DIs Graham and June Walker could not provide any information about the identity of the individual.

CRU could not locate a Darnel Wright or Rashawn McCoy (named by the contact). CRU checked NYCHA records, the agency that managed Weeksville starting in 2020, KCDA and NYS criminal databases, and conducted an Accurint and other online searches.

CRU, however, found and interviewed Jamal Jones (*see* below)

Jamal Jones (named by the Contact as the one who planned the shooting)

CRU interviewed Jamal Jones in jail. His statement was recorded. Jones stated the following:

He spent most of his time hanging out in Weeksville where his mother lived. He grew up in 137 Albany Avenue. In 2008, his grandmother lived there with his young son. He hung out in that area as well. 139 Albany was a fairly new building. He knew some of the tenants were Africans but did not know them.

Jones was a drug dealer. He was in jail for six months and released sometime in 2007. (Department of Corrections ["DOC"] records show that Jones was convicted of felony drug possession and released from prison on April 21, 2007)

CRU told Jones about the contact's statement. Jones knew "Five" (whom the contact said was the intended victim). In 2007, when Jones returned home from prison, Five was selling drugs on Jones' turf—Albany Avenue, including the Albany projects. Five had "just appeared" and Jones was angry that his people allowed this to happen. Jones put an end to that. He denied that he wanted to have Five killed. Jones said it would have been "stupid" to do a shooting right next door to where his grandmother lived, as he and his son could be exiting the building.

Five was light-skinned and short, medium build, with low-cut hair. Jones heard Five was a Blood member. Jones viewed a photograph of defendant. He did not know defendant, but defendant looked familiar. Jones never saw defendant in the neighborhood. There were no rumors about the shooting. He would have heard who committed the murder if it involved anyone he knew.

Jones viewed the surveillance video and recognized "Ty," the person with the ponytail walking down Dean Street toward Albany and returning toward Troy Avenue approximately 20 minutes later. Ty lived on Dean Street. Jones said the quality of the video was too poor to make any other identifications.

Jones' associates were Griff, Dee, "Ty" (not the one Jones identified in the surveillance footage), and Duke. He did not know Darnell Wright, Rashawn McCoy, or Franklyn. In 2008, no one 16 to 17 years old worked for him. He was not familiar with Hally Day.

Zakari

CRU interviewed Zakari at his residence. His statement was recorded. Zakari stated the following:

The shooter was wearing a long t-shirt almost down to his knees and a baseball cap. Later in the interview, Zakari said it was not a baseball cap, but a hat with a brim. The shooter came from the direction of Dean Street. Zakari did not pay attention at that time. The shooter fired three times. Two shots hit the deceased and the third hit the wall. The shooter turned and ran away. The shooter was alone. Zakari did not see anyone at the corner.

A few days before the lineup, detectives told him, Zibo, and Benissan that they "got" the shooter. At the lineup, Zakari was not completely sure about his identification. Zakari identified the person by his profile, and who looked the "most like" the shooter.

After the lineup, the detectives told him, Zibo, and Benissan they identified "the right guy." The detective told them that they identified Callier's boyfriend, that he fled from the police, and helicopters

were required to apprehend him. Zakari had never met her boyfriend and did not know what he looked like.

A few days after the lineup, Det. Hutchison told him that Callier gave a letter to the police saying that "she believed her boyfriend was the one that killed the deceased" because he fled from the police. Hearing this, and knowing that he, Zibo, and Benissan all identified Callier's boyfriend, Zakari was confident he had selected the right person in the lineup.

Zakari initially did not recall testifying at trial. CRU reminded him that he was unable to identify the shooter at trial. He reasoned that the shooter might have changed his appearance.

Prior to the shooting. Zakari knew about an altercation and drama between defendant and the deceased. Zakari advised the deceased to avoid Callier. Zakari surmised that the shooter probably aimed at the deceased because the deceased was at the bottom of the stairs by himself.

A couple of days after the shooting, neighbors from the building closer to Dean Street said they saw the shooter "walking back and forth, back and forth" prior to the shooting.

Zakari did not know Abraham Omar or Kelly Bright. He did not recall being interviewed by a defense investigator.

Benissan

CRU interviewed Benissan at his residence. He declined to be recorded. Benissan stated the following:

The shooter came from Dean Street and fled back in that direction. He did not recall if the shooter turned on Dean. He did not see the shooter with anyone else.

The shooter was slim and shorter than Benissan, who is 6'1". The shooter appeared to be the same age as him and his friends. Days or months after the lineup, Benissan learned that he identified defendant, Callier's boyfriend, and that defendant was older than them.

The deceased did not have any problems in the area.

Benissan was certain of his identification of defendant in the photo array. He did not consider defendant's hair because the shooter wore a hat. The detectives did not urge him to identify defendant.

CRU showed Benissan the surveillance video, focusing on the two males running back from Albany Avenue. Benissan said it was weird and they "look like two kids running." He could not say with any certainty that the person in the white t-shirt was the shooter.

Kelly Bright

CRU conducted a recorded phone interview with Bright. Bright stated the following:

She met Callier through Callier's mother Delores, who was Bright's neighbor. Callier was more of a neighbor than a friend. She did not know of any fight between the deceased and defendant. Rather, they argued at Callier's house.

She heard the deceased got into arguments when he drank. Callier told her that defendant thought she was spending time at the deceased's house, and that he stalked Callier and held her hostage in the

house. Callier was afraid of him. Bright witnessed defendant hit Callier multiple times. Once, defendant assaulted Bright when she tried to defend Callier. Defendant beat Delores and paralyzed her a couple of times.

She never saw defendant with a gun. Callier had informed Bright that the night of the crime, she argued with defendant and left. Defendant thought she went to the deceased's house.

Callier

CRU conducted two recorded interviews of Callier at her residence. Callier stated the following:

First Interview

She stopped dating the deceased because it "was not working out," not because defendant was home from jail. She learned about the shooting a week later, from the police. From July 15 to when defendant was apprehended, he never said anything to her about any shooting, and he did not act any differently during that time.

CRU told Callier that when the police apprehended defendant he said, "I didn't do nothing I didn't kill anybody." Callier said, "Oh, so he already knew what they were there for . . . I sure didn't know."

CRU asked Callier about her statement to the ADA, that defendant said he was going to get a gun, to go after "L" up the block (*see* above, Police Investigation, Callier's Audiotaped Statement). Callier did not remember "L."

CRU asked Callier about her conversations with defendant when he was at Rikers Island after his arrest in this case. Callier said, "He just kept saying he didn't do it, so I didn't know what to believe." CRU asked whether defendant pressured Callier to say he was not the shooter. Callier said, "No, I just really didn't know."

Callier was "definitely surprised" when defendant was arrested "because [Callier] wouldn't think he would do that, you know? . . . I didn't think he was that type of person."

When defendant drank, he broke things in the house. She never saw defendant with a gun. Defendant did not have a cell phone.

The Second Interview

CRU played Callier the surveillance footage. She said the video was blurry and she did not recognize anyone. But no one in the video looked like defendant. Everyone looked "husky." Defendant was small and skinny.

Defendant

CRU interviewed defendant in the presence of his attorney. His statement was recorded. In substance, defendant stated the following:

Defendant's account of July 15 was consistent with his trial testimony—that he went to see his mother, showed nude pictures of Callier, and his mother called Callier and told her. Defendant did not have a cell phone and called Callier's phone from a pay phone at the corner by his mother's house. Callier

wanted her keys, told him she was leaving, and hung up. He returned to his mother's house and argued with his mother.

As he testified at trial, defendant stated that at 9:30 p.m., he took the B14 bus to Ralph Avenue and St. Johns Place. He added that he went to a liquor store at that corner and called Callier from "C's" phone. She did not answer. He called her from a pay phone at the corner. She did not answer. Later, he called her from "little Blood dude's" phone, and she did not answer. He ultimately returned to Callier's apartment.

Defendant added that on July 15, in the morning, when he left Callier's apartment, he saw the deceased on the block. They fist-bumped each other. The deceased went into the building next to Callier's, where the deceased had family. Defendant did not mention this to his attorney.

About a year before the shooting, after he was released from prison, Callier brought defendant to the deceased's security job on Park Place, posing as her cousin. Callier wanted to get money from the deceased.

When he was apprehended defendant yelled, "Y'all chasing me like I killed somebody, this is only a temporary order of protection." He never left a threatening message for deceased on the deceased's friend's cell phone. He never fought with the deceased at Callier's apartment. Callier called the police because she thought they were going to fight.

Defendant knows "L." He is a Crip gang member who lived in Kingsborough Projects. Callier liked "L", but "L" did not like Callier. Defendant saw "L" in prison and showed him Callier's statement to the police. "L" laughed.

During his trial, the prosecutor came to court with another ADA, who had two disks and photographs. The prosecutor took the pictures from his colleague and put them on the table. Defendant saw the pictures were of the two males, obtained from the video. He recalled that the attorney, the judge, and the court reporter left the courtroom and went into the judge's chambers. Defendant thought they viewed the video. His attorney never told him that, and he did not see anyone carry a laptop to chambers.

Det. Hutchison

CRU conducted a recorded phone interview with Hutchison. He is retired. He stated the following:

He did not recall watching the video, but he must have watched it at least once at TARU. It was his practice to view any video recovered. Moreover, the TARU detectives would have needed the lead detective to identify the relevant portions to enhance them or make stills. He does not recall what he told the trial prosecutor about the video.

Trial Counsel

CRU spoke to trial counsel by phone and then conducted a recorded video interview. He stated the following:

Phone conversation

CRU informed counsel that it was investigating defendant's conviction. Counsel somewhat recalled the case. Defendant was combative with the judge and unruly in front of the jury. Counsel had "absolutely nothing positive" to say to help CRU's investigation. He was assigned defendant's case, and he would not have represented defendant as a private attorney. He did not recall any discussion about a surveillance video.

Video Interview

At the outset, counsel said that if he had had a video with evidentiary value, he would have utilized it. CRU played the video for counsel and showed him the still images. From the video, he could not tell if the male wearing the white t-shirt had a hat on. It appeared to him that the male in the white t-shirt was holding a dark object "right in front of his abdomen" and placed his hand under the t-shirt holding what appeared to be a "black object."

He restated that he had never seen any of the footage before and did not recall the still images. Had he seen the video, he would have shown it to defendant, because it could have "flowed" with his alibi ("Out of the ashes comes something"). He would have discussed with defendant whether he was identifiable in the footage. He did not know if he would have used it as evidence, but maybe he could "have made something out of it [the video]." It was "something to work with."

He did not recall the defense investigators Graham or Walker. He did not recall the unidentified contact's statement. He always instructed his investigators not to take notes.

<u>The Trial Prosecutor</u>

CRU interviewed the trial prosecutor at his office. The interview was not recorded. He stated the following:

CRU played the video for him, and he said it had evidentiary relevance, but no identification relevance. He did not recall watching it before. He did not recall the still images.

The video showing two people was not inconsistent with the People's theory. Had he viewed the video, he would have played it for the jury and argued that the male in the white t-shirt was defendant, and the other was Callier's brother.

He did not know why the court did not make a record of whether the video was ultimately played. The trial prosecutor surmised that the court might have had an *ex-parte* conversation with defense counsel about it.

KCDA detectives could not locate Callier at the time of trial. Zakari was "terrified" when he testified and would not look in defendant's direction when asked whether he could identify the shooter in court. Defendant was slight of build and therefore the descriptions the eyewitnesses gave did not trouble him.

The Trial Judge

The trial judge did not recall the case. CRU also spoke to the judge's court attorney at the time, and he did not recall the case.

Zacoiu "Zac" Daodaz

CRU conducted a recorded interview with Daodaz. He stated the following:

CRU asked Daodaz about telling Zakari that three weeks before the shooting the deceased was involved in a fight outside the building with a group of young people from the projects, and the fight was over a girl. (*see* above, The Police Investigation, Zakari's Audiotaped Statement)

Zac said that incident was "way way before" the murder. He and the deceased were sitting outside the building when a group of kids was chasing a lady. The lady approached the deceased and asked for help. No fight occurred but "probably words" were said. The kids came from the projects by Bergen Street (Albany Houses). When the kids ran off, gunshots were heard.

Shameek Owens

Owens was a 911 caller who reported that he was at a cookout when he heard the shooting, and he did not know the deceased. (*see* above, Police Investigation, Owens interview) CRU interviewed Owens on the phone and in person. The interviews were recorded. His statement was consistent with his prior statement. He added the following:

Around the time of the shooting, he hung out in the Albany Houses. The cookout was a vigil for a friend, who had been killed in Virginia. It was held in the grassy area between 1400 and 1414 Bergen Street. A lot of people were there celebrating and drinking. He was drinking and "it was crazy."

He never heard of "Hally Day." He had no personal information about the shooting and had not heard anything.

CRU ANALYSIS

Defendant was convicted, under the theory that he acted alone, of shooting the deceased outside his building alongside three eyewitnesses. The eyewitnesses, the deceased's close friends, were all in their 20s, and described the shooter as young, "a kid," between 16 and 21. Defendant was 36.

Despite defendant's repeated demands throughout the trial, he was not provided with a working copy of the surveillance footage and was told in front of the jury that it was irrelevant. CRU discovered that the footage showed two young males—the shooter and another individual—on their way to and sprinting back from the shooting location, passing other people in the street. As discussed below, the suppression of this footage violated defendant's right to due process, and the right to a fair trial.

Regardless, defense counsel failed to advocate effectively for defendant. For example, counsel accepted the People's representation that the footage was immaterial and did not attempt to review the footage in its entirety. Moreover, counsel made clear that all requests for the surveillance footage came from his client and not him, effectively disparaging defendant's entreaties and undermining the legitimacy of defendant's concerns.

Furthermore, the court's conduct before the jury was improper and prejudiced defendant. The court disparaged defendant and demeaned his testimony.

Moreover, the police investigation into everything depicted in the surveillance footage was insufficient. The police apparently never watched all the footage. The photographic stills taken from the footage, which they provided to the People, and a detective's note referencing certain segments of the video, do not show the shooter and his companion running back from the direction of the crime scene or the civilians on the street reacting to these events.

The *Brady* Violation

Prosecutors have an obligation to disclose to the defense information that is favorable to the accused. In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[85] The duty to disclose encompasses impeachment as well as exculpatory evidence.[86]

Due process is violated when the prosecution suppresses favorable evidence that is material to guilt because every criminal defendant should "be afforded a meaningful opportunity to present a complete defense."[87] Even where the evidence is "potentially" exculpatory, the People have the duty to disclose it.[88]

To establish a *Brady* violation, it must be shown that: (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material.[89]

Where—as here—a defendant makes a specific request, the evidence is material if there is a "reasonable possibility" that had it been disclosed, the result of the proceedings would have been different.[90] In making this determination, the trial record is examined, and the withheld evidence is evaluated "in the context of the entire record."[91]

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[85] 373 U.S. 83, 87 (1963).

[86] *Id.*

[87] *Id.*

[88] *People v. Davis*, 81 N.Y.2d 281 (1993) (People's failure to comply accurately and completely with *Brady* demand, coupled with their misrepresentation regarding the potentially exculpatory evidence entitled defendant to a new trial).

[89] *People v. Fuentes*, 12 N.Y.3d 259, 263 (2009).

[90] *Fuentes*, 12 N.Y.3d at 263. Where a defendant does not specifically request the information (or make any request), the materiality element is satisfied if there is a "reasonable probability" that had the evidence been disclosed, the result of the proceedings would have been different. *People v. Bryce*, 88 N.Y.2d 124, 128 (1996).

[91] *People v. McGhee*, 36 N.Y.3d 1063, 1065 (2021) (internal quotation marks and citations omitted)

The Surveillance Footage Was Favorable to Defendant

The video was favorable evidence because it captured the shooter walking to and fleeing the scene.[92] The People's case relied on witness testimony (and an alleged motive, discussed below). Benissan, Zibo, and Zakari (collectively, "the eyewitnesses") consistently said that the shooter came from and ran back in the direction of Dean Street. Zakari told the defense investigators prior to the trial that the shooter fled on Albany toward Dean Street, and turned right on Dean Street, towards Troy Avenue.[93]

Indeed, right after the detectives arrived at the scene, Dean Street between Albany and Troy Avenues was the first location they canvassed for surveillance cameras. They repeated the search there the next day. The footage that was recovered was from a business on Dean Street, between Albany and Troy Avenues. (*see* above, Police Investigation)

As set forth above (*see* CRU Investigation), the videos clearly depict two Black males walking down Dean Street toward Albany Avenue, and subsequently fleeing down Dean Street in the opposite direction. They both appear young. One of the young men is wearing a long white t-shirt, blue jeans, or dark pants, and has something dark on his head—matching the exact description provided by the eyewitnesses. Zakari told CRU that the young man's white t-shirt was extremely long (*see* above, CRU's interview of Zakari)

In one frame, the young man in the long white t-shirt is adjusting something in his waistband—movements that suggest the presence of a gun: he lifts his shirt and does something with his right hand near his waist, by his hip. He then lifts the hem of the shirt up and out, then lowers the t-shirt, covering the area that had been exposed.[94]

When the two young men go out of the cameras' view, two older men ("the pedestrians") appear on opposite sides of the street. The pedestrians apparently hear the gunshots from the shooting. At one point, they both stop in their tracks and look toward Albany Avenue. Then they both turn and start walking quickly away from Albany Avenue while glancing back over their shoulders. Notably, the location of the surveillance camera was .1 mile from the shooting—just around the corner. It was close enough for the two older men to hear the gunshots. Shameek Owens, a 911 caller, heard the gunshots from a slightly further distance, .2 miles, on Bergen Street, by the Albany Houses (*see* above, CRU interview of Owens).[95]

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[92] *People v. Ulett*, 33 N.Y.3d 512 (2019) (vacating the conviction where the People failed to disclose favorable evidence consisting of a video capturing the scene at the time of the crime, and the People's case relied principally on witness testimony)

[93] CRU visited the scene and could not see the corner of Albany and Dean from the steps of the location. It is likely that Zakari later learned this. In fact, Zakari told CRU that he later learned that people observed the shooter just prior to the shooting (*see* above, CRU Zakari interview). Although not documented, the police also apparently learned the direction of flight from someone at the scene who saw the shooter flee. As stated above, the first canvass was conducted on Dean between Albany and Troy.

[94] *See*, *e.g.*, *Matter of Jaquan M.*, 97 A.D.3d 403, 404 (1st Dep't 2012) (the police thought the object could have been a firearm by the way defendant handled it "and because it was in his waistband, the most common location for carrying a gun").

[95] *See* Google Maps.

Moments after the gunshots, the two young men come sprinting down the opposite side of Dean Street—the side closest to where the shooting occurred—away from Albany Avenue. Significantly, unlike the two pedestrians who initially reacted to the gunshots, the two young men fleeing down Dean Street never look back.

As the young man in the white t-shirt flees on Dean Street, he is holding his right arm straight down by his side and appears to be holding something in his hand. Again, it is reasonable to conclude that he was holding a gun. The reaction of the pedestrians at this point supports that conclusion. While they had previously changed direction to walk away from Albany Avenue in the wake of hearing the gunshots, now they abruptly change direction, again, in order to distance themselves from the two young men. Here, the pedestrians appear, again, walking back toward Albany Avenue, away from where the two young men just fled, while repeatedly glancing back over their shoulders in the direction of the two young men.

Notably, when CRU showed the prosecutor the video, he stated that it had evidentiary value. The prosecutor recognized that the footage showed the shooter. In fact, the prosecutor suggested arguments he would have made to the jury to support the notion that the shooter in the video was defendant. (*see* above, CRU interview of the prosecutor)

Defense counsel, too, recognized the value of the footage. He observed the male in the white t-shirt holding a dark object in front of his abdomen and place what appeared to be a black object under the t-shirt. Counsel told CRU he would have discussed the video with defendant, might "have made something out of it," and said he would have had "something to work with." (*see* above, CRU interview of trial counsel)

Even without seeing the footage, the court recognized a potential value, remarking, "The police [recovered the video because they] were looking to see if they could possibly see a suspect fleeing." (VD.155) It is clear beyond any reasonable doubt that that is exactly what the footage depicted.

<u>Despite Defendant's Repeated Requests, The Surveillance Footage Was Not Disclosed</u>

At the beginning of jury selection, defendant, himself, noted that a DD5 indicated that a surveillance video was recovered. He repeatedly demanded the video. The People first asserted they did not have any videos, but then said they did have a video but that it was "unreadable" and could not be opened. The People indicated that the video was irrelevant—they did not believe that "anything was transferred to [the video]" and the surveillance camera was around the corner from the shooting location.

The court instructed the People to bring the video to court, and have it played. The People explained that a specific computer program was needed. They declined TARU's offer of a laptop with the program because the KCDA had a special laptop with the program installed. However, when they brought the video to court, the People did not bring the special KCDA laptop. They tried to play the video in court with other laptops.

It is clear the video was never played in court. Indeed, both counsel and the prosecutor assured CRU that they had not seen the video. (*see* above, CRU interviews). Accordingly, the People failed to meet their *Brady* obligation.

Notably, *Brady* does not require prosecutors to disclose evidence "when the defendant knew of, or should reasonably have known of, the evidence and its exculpatory nature."[96] Although the defense knew of the video's existence and was even offered an opportunity to try to play it in court (T.4), this did not satisfy the People's duty to disclose. The defense had no knowledge that the footage was potentially exculpatory. To the contrary, the People provided photographic still images of two young men apparently walking together on the street, and twice asserted that the stills represented everything of significance that was on the video. In other words, the People represented that the video was irrelevant (*see* above, The Trial, Defendant's Requests for the Video)

Defendant Was Prejudiced Because the Suppressed Evidence Was Material to His Innocence

There is a reasonable possibility the verdict would have been different if the video had been disclosed. The failure to disclose prejudiced defendant in numerous ways—defendant was denied the right to present a defense; denied the opportunity to undermine the People's theory; denied the opportunity to challenge the reliability of the eyewitnesses' identifications of defendant; denied the right to effective assistance of counsel; and prejudiced by his own emotional conduct in front of the jury.

Defendant Was Denied the Right to Present a Defense

The defense was denied the right to show the video to the jury. The jurors observed defendant's appearance in court, including how old he looked, and how he walked. They could have determined for themselves whether defendant was the male in the white t-shirt.

Furthermore, defendant could have testified and/or presented testimony, that he was not the male in the long white t-shirt—the shooter.[97]

There is a reasonable possibility that the jury would have concluded that 36-year-old defendant, who to CRU looked his age or older, was not depicted in the video. To be sure, the shooter looked like "a kid," and was younger than the eyewitnesses, who were in their 20s. Benissan, who was 20-years-old, testified that the shooter "looked like a kid" (T.219), 28-year-old Zibo testified that the shooter was a "kid" (T.255), and 26-year-old Zakari, who saw the shooter's profile only, testified that the shooter was young. (T.76-77)

Moreover, when CRU showed the video to Benissan, particularly the segment where the male in the white t-shirt and his companion were fleeing back from the crime scene, Benissan remarked they "look like two kids running."

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[96] *People v. Doshi*, 93 N.Y.2d 499, 506 (1999); *People v. McClain*, 53 A.D.3d 556 (2d Dep't 2008).

[97] In certain circumstances, including where a surveillance video is of low quality, or the defendant has changed his appearance (as Zakari claimed to CRU, *see* above), a lay witness familiar with defendant can offer an opinion as to whether the defendant was the person depicted in a surveillance video. *People v. Mosely,* 2024 N.Y. LEXIS 535 (2024); *People v. Russell*, 79 N.Y.2d 1024 (1992).

The Nondisclosed Evidence Undermined the People's Theory

The People's theory was that defendant acted alone. The defense could have undermined that theory with the video, which showed that the shooter acted with another individual. They walked to the crime scene together and ran away from the scene together.

The prosecutor recognized that significance, positing to CRU a counterargument—that defendant was with Callier's brother. But that was not the People's theory. Nor could the People present this theory because Jeffrey left New York, prior to the crime, after he fought with the deceased (*see* above, CRU Investigation, Defense Pretrial Investigation, Nasairou's interview)

The Nondisclosed Evidence Could Have Served to Impeach the Reliability of the Eyewitnesses' Identification of Defendant

Eyewitness identification can be one of the most unreliable forms of proof and may result in wrongful convictions.[98] Here, defendant was a stranger to the eyewitnesses.

Each was cross-examined on his ability to observe the shooter. Benissan admitted that he did not see the shooter's face during the shooting, claiming instead that he "[a]ctually looked at the guy as he walked up the block "way before anything started." (T.216-17) Notably, during the defense pretrial investigation when shown a photo array with defendant's photo, Benissan was not certain whether the defendant was the shooter (*see* above).

Zibo admitted that he ducked and saw the shooter twice: each time for "an instant." (T.256)

Zakari, who could not identify defendant in the courtroom, admitted that he did not see the shooter's face, height, or weight. (T.73, 83) He nevertheless was certain of his identification at the time of the lineup (T.62-63, 64). However, Zakari revealed to CRU that he was only sure of his lineup identification because the detectives told him, Zibo, and Benissan they identified "the right guy," Callier's boyfriend (defendant), and that defendant fled from the police, and helicopters were required to apprehend him.

The eyewitnesses were consistent from the police investigation to trial about the shooter's young appearance. They were cross-examined on their claims that the shooter was young, looked like a kid, and was a kid (T.76-77 [Zakari]; T.218 [Benissan]; T.258 [Zibo], respectively)

The video would have been powerful evidence to undermine the reliability of the eyewitnesses' identification of defendant.[99] Counsel could have confronted the witnesses with the video showing

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[98] *Stovall v. Denno*, 388 U.S. 293, 297 (1967); Garrett, *Convicting the Innocent; Where Criminal Prosecutions Go Wrong* (Harvard University Press 2011) p. 48 (researchers have found that eyewitness misidentifications have been a factor in 76% of the first 250 convictions [190 of 250] overturned due to DNA evidence since 1989); *see also People v. Marshall*, 26 N.Y.3d 495, 502 (2015) ("Wrongful convictions based on mistaken eyewitness identifications pose a serious danger to defendants and the integrity of our justice system").

[99] Of course, CRU cannot go into the minds of the jurors. Thus, it is not known whether the jury credited any or all of the eyewitnesses. The jury could have very will convicted defendant based solely on the court's conduct toward him, admonishment to be quiet during his testimony, and saying his testimony was irrelevant—which defense counsel allowed "in the interest of justice." (*see* below, Counsel's Errors and the Court's Conduct)

that the shooter was a "kid" and had a companion. Counsel could have asked whether the person they identified—36-year-old defendant—appeared to be the kid in the white t-shirt as seen in the video.[100]

Defendant was Denied the Right to Effective Assistance of Counsel

Nondisclosure of the video also denied defendant the right to effective assistance of counsel. Counsel could have investigated and attempted to locate the two older men who saw the shooter, and any other witness on Dean Street. At that time, it should not have been difficult to locate the man walking two dogs, since dog owners (or walkers) usually take their dogs out at the same time of day, and to the same location. Counsel could have also shown the video to neighborhood residents to see whether anyone else could be identified. Notably, Jamal Jones, whom the contact named, recognized his friend "Ty" in the video. (*see* above, CRU contact's and Jones's interviews)

Counsel would have also realized that the video corroborated information the contact provided to the defense investigators—that the shooter lived in Weeksville. Given that defense counsel told CRU he did not recall the contact, he most likely did not investigate the information at the time.[101] Or if he did, he may not have credited the contact's account without seeing the video. Had counsel seen the video he would have observed that when the shooter and his companion came running back from the crime scene, they crossed to the north side of Dean Street, heading straight toward Weeksville. (*see* above, CRU Investigation, CRU Viewed the Surveillance Videos) Counsel would have gone back to interview the contact again.

Interestingly, CRU corroborated other important information the contact provided. The contact stated that Jamal Jones, who lived at 137 Albany Avenue, set up the shooting, that Jones was the boss of a "drug trade," that Jones believed that "Five" took over his drug trade, and that Jones sent his "little man" to shoot "Five." (*see* above, CRU Investigation, the Defense Pretrial Investigation, Contact interview)

CRU found and interviewed Jamal Jones. Jones corroborated that he lived at 137 Albany Avenue, he was a drug dealer, and "Five" was selling drugs on his turf—Albany Avenue. Jones was angry that his people allowed this to happen. Jones denied that he wanted Five killed but acknowledged that he put an end to Five selling drugs on his turf. Jones did not explain how. Thus, had counsel had the video and interviewed the contact, it is reasonably possible that the defense could have offered an alternative-shooter theory.

Finally, the presence of unidentified witnesses, who saw the shooters pass them by, could have been used by the defense to argue that the police failed to conduct a thorough investigation.[102]

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[100] *Ulett*, 33 N.Y.3d at 520 (Nondisclosed video of the crime scene capturing events surrounding the murder, could have been used to impeach the eyewitnesses, on whom the People's case principally relied).

[101] Because counsel did not maintain his file, and has no recollection, CRU cannot determine what his investigation entailed.

[102] *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (undisclosed *Brady* material could have been used to attack "the thoroughness and even the good faith of the investigation").

Defendant's Conduct

Defendant had many emotional outbursts during the trial, mostly about the video, particularly during his testimony. Had the video been disclosed prior to trial, defendant would not have repeatedly attempted to tell the jury that a video exists which shows he was not the shooter. In turn, the court would not have had to admonish defendant in front of the jury. (*see* below, Court's Conduct)

Had the video been played after defendant testified, the jury possibly would have understood defendant's outbursts, and credited his insistence that he was not depicted on the video.

Counsel's Errors

Counsel committed serious errors that were detrimental to defendant and denied defendant a fair trial.[103] It is apparent that counsel did little to prepare for trial and had little or no regard for defendant. In fact, counsel told CRU he had "absolutely nothing positive" to say to aid CRU's investigation. He was assigned defendant's case, and he would not have represented defendant as a private attorney. Counsel abdicated his role as an advocate.

Counsel Failed to Advocate for Defendant

Defendant raised valid questions about his case, the court's rulings, and the evidence. When counsel presented those questions to the court, counsel made clear that they were defendant's concerns and not counsel's. This likely influenced the court's perception of the issues, effectively disparaged defendant, and telegraphed to the court that defendant was a problem and nuisance. Counsel's failure to advocate also compelled defendant to speak out. In turn, the court denigrated defendant in front of the jury. (*see* below, The Court's Improper Conduct)

The Lineup

For example, at the pretrial hearing, defendant was apparently concerned that counsel did not challenge the lineup as unduly suggestive. (H.34) Even defendant knew this was wrong. Counsel told the court that defendant wanted counsel to mention that defendant was the only one in the lineup with braided hair. (H.37)

Although the hair differences did not render the lineup suggestive because all the participants wore hats, there were noticeable differences in their heights and weights. The fillers' heights and weights ranged from 5'9" to 6'3" and 160 to 185 lbs. Defendant was 5'8" and 150 lbs. Defendant was the smallest and thinnest. Benissan described the shooter as, 5'9" or 5'8", with a skinny build (*see* Police Investigation, Audiotaped Statement). The People later told the jury that three eyewitnesses described the shooter as short and skinny (T.26)

Significantly, the lineup DD5 reflected that all of the witnesses viewed the lineup with the participants both seated and standing (*see* above, Police Investigation) At the pretrial hearing, counsel, himself,

[103] It is not CRU's role to make a legal determination as to whether counsel's errors constituted constitutional ineffectiveness.

elicited that the three witnesses viewed the lineup with participants both seated and standing. (H.30) With this evidence, there was no strategic reason for counsel not to challenge the lineup as suggestive.

Indeed, the court recognized the height and weight differentials, but then incorrectly held that the differences were inconsequential because the participants were all seated. (Dec. at 4; *see* above, pretrial hearing) Having failed to recognize that participants were standing, counsel did not move to reargue the court's decision. In fact, counsel's failure continued through trial. He urged the jury on summation that although all participants were seated, their height differential was noticeable. (T.464-69)

Notably, when a defense investigator later interviewed Zakari and Benissan prior to trial, they were shown a photo array with defendant's photo (created by the investigator). Zakari did not identify anyone as the shooter. Benissan could not say whether defendant was the shooter. (*see* above The Defense Pretrial Investigation)

Additionally, Investigator Graham testified at trial that Benissan stated that the lineup participants did not resemble each other and were different heights (*see* Defense Case, Graham's testimony)

The Surveillance Video

Furthermore, regarding the surveillance video, it was defendant's concern, not counsel's. Prior to jury selection, when counsel asked whether there was a surveillance video, he repeatedly presented the request as defendant's request, and not his. (VD.86-87) After the People stated they did not have any videos, defendant understandably spoke out—"It's the tapes. He's lying." (VD.87) Counsel apparently did not take defendant seriously or adequately prepare, or both. Defendant showed counsel a DD5 indicating that a surveillance video had been recorded. But even then counsel presented this as defendant's issue—"My client did show me a DD5 that he wants to share with the Court . . ." (VD.150 [emphasis added])

Counsel then accepted the prosecutor's explanation that the video was unreadable, nothing was transferred to the video, and photographic stills were provided which reflected the entirety of the video. This understandably prompted defendant to speak out again—saying he was "confused," and did not understand how stills could obtained from a video that had nothing on it. (VD.153, 154) Counsel remained silent. (*id.*)

Later, at the start of trial, counsel stated defendant was concerned about the video, and defendant raised "an interesting issue." Counsel finally asked for an explanation as to how the stills were obtained. (T.2)

Thereafter, counsel told the court that defendant wanted to verify the location from where the video was recovered. (T.327)

Finally, during defendant's testimony, counsel remained silent when defendant attempted to testify about videos showing the actual shooter, and when defendant sought to admit the stills into evidence (*see* above, The Trial, Defendant's testimony T.384, 389-91, and T.421-22 [request to admit stills])

Counsel failed to consider and evaluate the evidence and defendant's concerns. Instead, counsel simply accepted the People's assertion that they "don't have any" videos and volunteered that the stills

provided were of "no value." (VD.87) Thereafter, when the People acknowledged the existence of videos, and claimed they were unreadable, counsel agreed. He now recalled "videos with no evidentiary value in them." (VD.151-52) Counsel, again, simply accepted that the videos were irrelevant. The court, not counsel, wanted the People to bring the videos to court and have them played. When the People were still unable to play them, the prosecutor offered them to the defense, saying, "If they can open it, they can open it." (T.5) That apparently did not happen. Counsel told CRU he never watched the video. Counsel apparently never took possession of the video, as he subsequently indicated to defendant. (*see* above, Defendant's Post-Conviction Attempts to Obtain the Surveillance Video)

Defendant's Witness List

After the jury was selected, counsel said the defense had no witness list for the jury. (T.5) Counsel's assertion prompted defendant to speak out, again. Defendant told the court that he did have witnesses and that counsel was not listening or doing anything. (T.3-4) Counsel was silent and did not object or attempt to explain when the court told defendant, "You saw the hearing evidence," counsel was not a "magician." (T.5) Notably, the defense presented Tonya Marshall's testimony, and PO Kelly's stipulated testimony. (*see* above, the Trial, Defense Case)

Counsel's Failure to Prepare Defendant for His Testimony, or Question Him

Counsel allowed defendant to testify without preparation, questions, or guidance. Even when defendant provided damaging unsavory testimony about his relationship with Callier and her mother, counsel chose not to help defendant "in the interest of justice," and not to violate the attorney/client privilege. This resulted in the court stepping in and disparaging defendant in front of the jury.

Counsel did not have any cogent or ethical reason for abandoning defendant. Counsel stated that during the pendency of the trial, he spoke to defendant about defendant's right to testify. Defendant indicated he wanted to testify, and counsel told defendant he would reserve his opinion "until we see how the case unfolds." (T.419) Counsel stated that defendant ended up testifying against his advice. Counsel asked defendant about the substance of his testimony, and whether defendant wanted to be prepped. Defendant repeatedly said not to worry, to put him on the stand, and he would "take care of everything." (T.419-20)

Under these circumstances, counsel decided "that the best thing to do in the interest of justice" was to put defendant on the stand and let him make his statement. Counsel decided not to question defendant "to possibly point him in a certain direction, . . . in the interest of justice and in my own responsibility to the law, just to allow him to testify without any guidance at that point." (T.420)

This was not justice. It was counsel's deficient performance of his professional duties and responsibilities to his client. The court's suggestion that counsel wanted to avoid eliciting perjured testimony (T.421) was unfounded. Had that been the case, counsel would not have reserved his decision on defendant testifying, based on how "the case unfolds." Nor did defendant commit any perjury. He gave an account of his day, and repeatedly stated—as any innocent defendant would testify—that he did not commit the crime.

Equally baseless was counsel's claim that he did not know what defendant would say. Counsel had defendant's account to the detective, and defendant's pretrial statement to the defense investigators, both of which mirrored his trial testimony. Moreover, it strains credulity that counsel did not interview defendant.

Counsel Failed to Adequately Prepare for Trial and Prepare Defense Investigator Graham

On cross examination, Benissan denied that he told the defense investigator (Graham) that none of the lineup fillers' heights, weights, or skin tones resembled defendant. Benissan also denied that, when Graham showed him a photo array with defendant's photo, he could not identify defendant as the shooter, with any certainty. (*see* above, The Trial, Benissan's testimony [T.231-32]; *see also* CRU Investigation, Defense Pretrial Investigation, Graham's report on Benissan)

The defense called Graham to rebut Benissan's testimony. Counsel, however, asked Graham whether Benissan said that he was uncertain of his identification of defendant in the lineup. Graham agreed that was true. (*see* above, The Defense Case, Graham's testimony trial testimony [T.435])

Counsel not only asked Graham the wrong question, but he also failed to recognize his mistake when the prosecutor undermined Graham's credibility by forcing Graham to admit that his report did not indicate that Benissan was uncertain about his lineup identification. (T.443)

Counsel's failure to prepare Graham was also apparent after Graham testified on cross examination that he left the notes of his report home, but counsel had copies. Counsel told the court that he spoke to Graham in the hallway prior to Graham's testimony and Graham equivocated about having notes on his computer and then said he did not have any. (T.446) Graham's value as witness to undermine Benissan's identification of defendant was lost by counsel's inadequate preparation.

Counsel's Perfunctory Motion

Last, displaying his lack of zealous advocacy, at sentencing, defendant moved to set aside the verdict. Counsel then realized he failed to make any motions (at the end of the People's case, and prior to sentencing). Counsel adopted defendant's motion and merely stated that the People failed to prove their case beyond a reasonable doubt. (*see* above, the Sentencing)

The People's Errors

The People committed two significant errors. First, they failed to view the surveillance footage. Second, they made misstatements regarding motive.

The People's Failure to View the Surveillance Footage

Although the People never managed to view the video, the prosecutor maintained that the stills obtained from the footage represented all that was on the video. It is unknown why or how this occurred. It is likely that when the police (Det. Hutchison) gave the videos to the prosecutor, it was conveyed that the stills were representative of the entirety of the footage. The lead prosecutor subsequently confirmed to CRU that he never watched the footage. Furthermore, when the court asked whether the stills were "all of the representations" from the surveillance video, the prosecutor replied, "Yes. That is my understanding." And when the court then asked, "There is nothing else on

that disk that hasn't been made into a hard copy?" The prosecutor said, "Yes. That is my understanding, correct." (T.4 [emphasis added])

However, the KCDA had a laptop with the program necessary to view the video, which the People explained they were unable to bring to court. The People should have watched the footage at the KCDA. The stills, although grainy, depicted two males walking Dean Street, heading toward Albany Avenue. One of the males was dressed just as the eyewitnesses described—a white t-shirt, dark pants, and some type of hat. He appeared to be holding an object in front of his waist. Defendant believed that the object was a weapon. He wanted the stills admitted into evidence, saying "This is not me." (*see* above, The Defense Case, T.422-23) The People committed a *Brady* violation by failing to watch the footage, and representing that the footage was unimportant (*see* above, The *Brady* Violation)

The People's Misstatements Regarding Motive

The People heavily relied on the evidence of motive to corroborate the eyewitnesses' identifications of defendant—which were unreliable as discussed above. In their opening statement the People argued that defendant's motive for the murder was jealousy. The deceased had a relationship with defendant's girlfriend, Callier. The People argued that the witnesses knew that the deceased had problems with defendant. (T.22-23)

In their summation, the People argued that defendant had a loud and "violent" argument with the deceased, and the police were called. (T.483) On July 15, after defendant showed naked pictures of Callier, they argued and Callier mentioned the deceased's name, which had "a very profound effect" on defendant. (T.485 [emphasis added])

Despite the People's representations, there was no evidence that defendant wanted to murder the deceased. First, no witness testified that Callier mentioned the deceased's name during an argument on the day of the murder. The People questioned defendant about that, and he testified that Callier did not mention the deceased during that argument. (T.403-04)

Furthermore, there was no evidence of a "violent" argument. This was a reference to the argument the deceased and defendant had in March—four months before the crime. Defendant testified that he and the deceased did not fight in March 2008. One night in March when they were drinking, they argued, and the police were called. (T.407)

This is confirmed by Callier's sworn audiotaped statement to the ADA, in which she stated the deceased and defendant "didn't f[i]ght they just had an argument." In March, when the deceased stopped by, defendant let him in and had no problem hanging out with him. Both defendant and the deceased were drinking. They argued about Callier and the deceased "got loud." The police came and encountered the deceased being "rowdy." (*see* above, The Police Investigation, Callier's Audiotaped Statement)

Outside the jury's presence, when the People sought to have Callier's sworn audiotaped statement admitted into evidence, the People similarly misrepresented the dispute, claiming that the deceased and defendant fought in March. In addition, the People mistakenly told the court that Callier said defendant "talk[ed] about getting a gun to shoot someone." Callier actually stated that defendant said

he was going to get a gun "and show these [ni**ers]." In the DD5 memorializing Callier's statement to Det. Hutchison regarding the incident, Callier stated that defendant said he was going to get a gun and "shoot that little ni**er, L." (*see* above, The Trial, The People's Attempt to Show That Defendant Caused Callier's Absence at Trial, and Admit Her Audiotaped Statement into Evidence [emphasis added]) The People's misstatement allowed the court to surmise that defendant was talking about the deceased, and only served to validate the court's belief that defendant was guilty, which likely exacerbated its ensuing improper conduct toward defendant in front of the jury. (*see* below)

Finally, there was no evidence to support the People's opening statement that the witnesses knew that the deceased had problems with defendant. The People did not argue this on summation. That is because Zibo was the only witness who testified about this. On cross examination, he denied telling the police that he did not know of any problems between the deceased and defendant. He claimed that he told the police that the deceased got into "a couple of fights." (T.254) On recross examination, the prosecutor asked Zibo if he knew of any problems the deceased had with Callier's boyfriend. Zibo then testified that he "heard" they had a fight and Callier's boyfriend went to the deceased's job. (T.258-59 [emphasis added]) It was stipulated that at the scene immediately after the shooting, Zibo told P.O. Kelly that as far as he knew the deceased had no problems with anyone. (T.431)

During the police investigation, 911 caller Abraham Omar reported that the deceased had a problem with Callier's boyfriend (defendant). According to Omar, defendant found out about the deceased when defendant was released from jail and threatened to kill the deceased. (*see* above, Police Investigation) However, Omar's account was never corroborated. The People did not interview Omar, and CRU could not locate him. The deceased's roommate Zakari told CRU that he never heard of Omar. Notably, Callier told CRU that she did not believe that defendant would kill someone, and she never saw defendant with a gun. In fact, defendant lived at Callier's apartment at the time of the crime up to his apprehension a week later. The police searched Callier's apartment and did not recover anything.

Strikingly, there was evidence that undermined a heat of passion motive. Zakari testified at trial that Callier and the deceased ended their relationship three months before the shooting. (T.43) In her sworn audiotaped statement, Callier told the ADA that she last saw the deceased two months prior.

The Court's Improper Conduct

> A fair trial in a fair tribunal is a basic requirement of due process. The right of every person accused of a crime to have a fair and impartial trial before an unbiased court and an unprejudiced jury is a fundamental principle of criminal jurisprudence. Not only must judges actually be neutral, they must appear so as well. The pertinent inquiry in that regard is not whether the judge is actually, subjectively biased, but whether the average judge in the same position is likely to be neutral, or whether there is an unconstitutional potential for bias.[104]

[104] *People v. Towns*, 33 N.Y.3d 326 (2019) (internal citations and quotation marks omitted).

Defendant had many emotional outbursts during the proceedings. He interjected myriad times but with concerns and questions about the court's rulings and his dissatisfaction with his attorney's performance. The court was transparent about its belief in defendant's guilt. The record is replete with instances where the court expressed its disdain for defendant.

For example, when defendant asked to address the court (outside the jury's presence) after counsel said the defense had no witnesses, the court said, "What do you want, Marshall?"

When defendant said he had witnesses, and he did not understand why counsel did not listen to him, the court said counsel was a good lawyer,

> I mean, you saw the evidence at the hearing. What do you expect [counsel] to be, a magician? He is not a magician, he is a lawyer, he cannot change things.
>
> That's enough.

(T.5; *see also* T.276 [again telling defendant that counsel was not a "magician" when defendant was troubled that his motion for new counsel was never addressed])

That the court lost control is reflected in how, in front of the jury, it repeatedly addressed defendant, as "Marshall," and when defendant asked to speak to the court, it stated "Be Quiet. Mr. Marshall, I've warned you to control yourself. Don't make an outburst. . . . You are hurting yourself. If you keep doing that, you are hurting yourself. Don't do that in my courtroom." (T.145-46)

Outside the jury's presence, the court told defendant, among other things, to "Shut up." (T.147), "You don't even realize what real justice is" (T.412), and "All you do is rant," to which defendant replied, "because I'm innocent." (T.424)

The court denigrated and belittled defendant's testimony before the jury. For example, it interrupted defendant by saying, "Marshall. Marshall, enough with the story." (T.383) When defendant tried to testify about the "tapes" the court interrupted him and told the People to cross-examine defendant. Defendant said that he did not finish his testimony. The court told defendant, "Be quiet." (T.385)

Defendant attempted to explain that the tapes "show the perpetrator, your Honor." The court said, "Stop it . . . Do you have anything that you want to say that's relevant regarding this trial? . . . Not some wishful thinking on your part." (T.389-91) The court told defendant he had his "chance to talk" and announced, "I maintain order." (T.410)

In a case before a different court, where the defendant's behavior included walking out of the courtroom, refusing to participate, threatening to kill himself, taking 35 pills of a prescribed psychotic drug during proceedings, and partially disrobing before the judge, the court "showed great patience."[105] A review of the transcript shows that the court remained respectful and never admonished or denigrated the defendant. That was not the case here.

[105] *Harrison v. Senkowski*, 247 F.R.D. 402, 405 (E.D.N.Y. 2008).

The court in this case abandoned the role of a neutral arbiter and demonstrated its bias, depriving defendant of due process.

The Inadequate Police Investigation

The police investigation regarding the surveillance footage was insufficient. The police apparently never watched all the footage. If they had, they would have seen the shooter fleeing from the scene with another individual, and they would have used that information to inform their investigation, and they would have relayed those findings to the People. Instead, they gave the People still images taken from the footage, which only showed two males walking down Dean Street.

An unnamed detective's note, stapled to the DVD in the People's trial file, references certain segments of the footage. These segments do not capture the most relevant parts—the shooter and his companion running back from the direction of the crime scene or the civilians on the street reacting to these events. This further supports the conclusion that the police did not watch all of the footage.

CRU cannot determine at what point the mistake occurred. Det. Hutchison told CRU he did not recall watching the video, but his usual practice was to watch a surveillance video at least once at TARU. Moreover, the TARU detectives would have needed the lead detective to identify the relevant portions to enhance them or make stills.

In any event, if the police viewed the entire footage, somehow the People believed that the stills represented all of it, resulting in a *Brady* violation. (*see* above, the *Brady* Violation and the People's Errors) In addition, the police failed to investigate the other witnesses seen on the video.

CONCLUSION

CRU concludes that defendant's judgment of conviction should be vacated. The *Brady* violation, counsel's and the People's errors, the court's improper conduct, and the insufficient police investigation denied defendant due process and a fair trial. Because, at this late stage, there is no avenue of investigation to locate witnesses seen in the surveillance footage or determine the identity of the contact, or investigate the information the contact supplied, the indictment should be dismissed.