To be argued by
ELIZABETH FELBER
(15 Minutes)

New York Supreme Court

APPELLATE DIVISION -- SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JAMES DAVIS,

Defendant-Appellant.

Kings County
Ind. No. 1925/04
A.D. # 2020-02023

BRIEF FOR DEFENDANT-APPELLANT

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THE PEOPLE OF THE STATE OF NEW YORK, :

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PRELIMINARY STATEMENT

This is an appeal from an order of the Supreme Court, Kings County, rendered January 24, 2020, after a hearing, denying appellant's C.P.L. §440.10 motion to vacate the judgment convicting him of murder in the second degree, and second-degree criminal possession of a weapon, and sentencing him to an indeterminate term of 18 years to life imprisonment on the murder conviction, running concurrently with ten years on the weapons charge. A timely motion for permission to appeal was filed. On May 20, 2020, Justice Sylvia O. Hinds-Radix of this Court granted appellant leave to appeal. Appellant's representation continues on appeal.

The Appendix method is being used.

QUESTIONS PRESENTED

1. Whether, where the defense called eight credible witnesses to establish that Davis was not present at the time decedent was killed, that he did not fit the description witnesses provided of the shooter, and that the information that caused the police to focus on Davis was a lie, the defense proved Davis's innocence by clear and convincing evidence. U.S. Const. Amends. V, VIII, XIV; N.Y. Const., Art. 1 §§ 5, 6; C.P.L. § 440.10(1)(h); People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014).

2. Whether trial counsel's failure, without any conceivable strategic basis, to investigate and interview numerous alibi witnesses, to scrutinize the prosecution's case, or to secure the presence of the alibi witness who had testified at the first trial, constituted ineffective assistance of counsel. U.S. Const. Amends. VI, XIV; N.Y. Const., Art. 1 § 6.

3. Whether the court's summary denial of the motion to reopen the 440 hearing based on newly discovered evidence and failure to disclose Brady material was reversible error. U.S. Const. Amends. V, VIII, XIV; N.Y. Const., Art. 1 §§ 5, 6; C.P.L. § 440.10(1)(b), (c), (f), (g), (h).

INTRODUCTION

On January 25, 2004, Blake Harper was shot and killed at 4:00 a.m., at a large party at the Masonic Temple in Brownsville, Brooklyn. The shooter was described as an African-American man with braids. James Davis was arrested and tried twice for Blake Harper's murder.

At the first trial, two prosecution witnesses identified Davis as the shooter, and another one said Davis resembled him, except that Davis did not have

the braids the shooter wore in his hair. Kaneen Johnson, Davis's girlfriend, testified on his behalf. She said that a cab delivered a drunk Davis to her mother's home well before 4:00 a.m. - the time of the shooting - and that she spent the rest of the night with him. She further testified that he did not have braids; he wore his hair short in a Caesar cut with waves. The jury hung 11 to 1 for acquittal. At the second trial, Johnson did not testify, and Davis was convicted. The court sentenced him to 18-years-to-life in prison.

The post-conviction investigation subsequently revealed that Davis should never have been a suspect in the first place. The police focused exclusively on Davis after speaking to Tina Black Jr., who was not at the party but held a grudge against Davis because she was jealous of his relationship with another woman. The first page of the detective's notebook states: "Perp: James Davis, 'J.'" The prosecution never called Tina Black Jr. to testify at either of Davis's trials.

Two weeks after Tina Black's tip, detectives asked Blake Harper's brother-in-law, Jose Machicote, who had been with Harper when he was killed, to come into the station house to view a photo array. When he came to the precinct, Machicote described the shooter as a brown-skinned man with braids. Prior to this, Machicote had given no recorded description of the shooter. Detective Matthew Hutchison showed him a photo array that included a photo of a younger Davis in braids. Machicote selected James Davis's photo as that of the shooter. By the time

of the second trial, Machicote was the only witness who affirmatively claimed James Davis was the person who shot Blake Harper.

When the police arrested Davis at the end of March 2004, his hair was short, which did not match the description of the shooter. Davis provided an exculpatory account that would remain consistent and unshaken over the next two decades. He told police that he had attended the party that evening to celebrate his brother's birthday, but he had too much to drink, became ill and left in a taxi to meet his then-girlfriend before any shooting had occurred. He gave police the names of several people who were at the party and could corroborate his account, but neither the police, the prosecutor, or defense counsel ever spoke to any of them.

In the years following Davis's unsuccessful appeal, post-conviction counsel conducted an investigation, locating many of the witnesses whose names Davis had provided from the start. These witnesses confirmed the account that Davis had related to the police from the moment of his arrest. At the 440 hearing, several of these witnesses testified that, shortly after arriving at the party, Davis had become intoxicated and, much to the entertainment of his friends, repeatedly vomited in the Temple's bathroom before being sent away in a taxi, well before the shooting occurred. Several of the witnesses also confirmed that, at the time of the incident, Davis no longer wore his hair in braids and thus did not meet the shooter's

description. One witness, Jamel Black, who was himself stabbed that night, identified the true shooter when he testified.

Midway through the 440 hearing, defense counsel learned that the People's main witness, Machicote, was not the humble barber he claimed to be. At trial, Machicote had acknowledged his own criminal past, but stated that, he had reformed and was living quietly and working as a barber. On the contrary, at the time of Davis's second trial, Machicote was the subject of a joint FBI/NYPD drug investigation because he was a major drug trafficker in Brownsville. Counsel moved to reopen the hearing and call the FBI agent who was the source of this information, to determine if this constituted newly discovered evidence and/or a Brady violation.

At the close of the hearing, the court rejected Davis's claim of actual innocence. The court also rejected the other post-conviction claims that the defense had raised. Davis argued that his assigned counsel was ineffective for failing even to interview the other exculpatory witnesses whose names he had furnished. While the court speculated that these witnesses' criminal histories might have provided a reason not to call them to testify,[1] neither the court nor the prosecution could explain how any competent attorney could have arrived at this determination without even bothering to speak with the witnesses. Indeed, at Davis's trials, the prosecution relied heavily on witnesses with criminal histories. In summation, the prosecutor urged jurors to credit Machicote's testimony because he had been forthright about

his past and had turned his life around. In truth, however, Machicote was a major drug dealer at that time. He was killed about five months after Davis's conviction, when he tried to rob a rival drug dealer.

Regarding counsel's request to re-open the hearing, the 440 court declined even to allow a further defense fact-finding inquiry into the newly discovered evidence and Brady claims, after initially agreeing to signing a subpoena for an FBI agent who had provided the defense with information about the Machicote investigation and to explore the issue of newly discovered evidence. As to the Brady claim, the court found that the defense had failed to establish that the prosecution or NYPD investigators working on the case had actual or imputed knowledge of the joint federal-state investigation of Machicote. The court did not explain how the defense could plausibly be expected to make such a showing in the absence of the discovery and the reopened hearing that it had unsuccessfully sought. The court further found that even if the prosecution knew of this evidence and suppressed it, the witness's admission to past criminal activity made his enormous ongoing criminal activity – and perjury regarding it – somehow immaterial to his assertion at trial that he was just a barber.

For more than 16 years, James Davis's account of events at the Masonic Temple on January 24-25, 2004, has not wavered. The defense submits that, at the 440 hearing, he presented seven witnesses, of different ages, leading different kinds

of lives, whose varied perspectives on his case wove seamlessly together to support Davis's own account of his actual innocence. Further, he established that he was denied the effective assistance of counsel, and that newly discovered evidence and Brady violations mandated reversal of his conviction (or at least further inquiry). The hearing court rejected each of these claims. Davis seeks reversal of the 440 court's denial of his 440 motion and dismissal of the indictment, a new trial, or, at the very least, a hearing on his newly discovered evidence and Brady claims.

STATEMENT OF FACTS

The Indictment

On April 1, 2004, James Davis was indicted on two counts of second-degree murder (intentional and depraved indifference), criminal possession of a weapon in the second and third degrees, and reckless endangerment in the first degree in connection with the shooting death of Blake Harper (Vol. I, at 6).[1]

The Police Investigation

The police focused on James Davis after speaking to Tina Black, Jr., a young woman who had not attended the party (Vol. 2, Ex. 30 at 724-25; Vol. 1, Ex. 9 at

[1] All citations in this brief are to page numbers of the exhibits contained in the three volume Appendix filed with Appellant's brief. Each volume of the appendix is separately paginated and begins with page number 1. Volume I of the Appendix contains the Statement Pursuant to Rule 5531, the Order Granting Leave to Appeal, the Indictment, and Exhibits 1 through 15. Volume II contains Exhibits 16 through 32. Volume III contains Exhibits 33 through 44, and the Certification Pursuant to CPLR 2105.

452). On the first page of Detective Egger's notebook it states: "Perp: James Davis – 'J' " (Vol. 1, Ex. 9 at 450). Two weeks later, Jose Machicote went into the precinct and was shown a photo array that contained a photograph of a younger James Davis when he had braids. Machicote identified Davis as the shooter. Machicote provided police with a statement for the first time. He described the shooter as brown skinned with braids. Machicote was at the bar when the shooting occurred on the dance floor several feet away. As shots rang out, Machicote saw flames coming out of the side and front of the gun, and took off running for the exit, slamming into the wall as he rushed to leave the dance hall (Vol. I, Ex. 9, 454-55).[2]

Six weeks later, when James Davis was arrested, Detective Hutchison reached out to the mother of the deceased, who in turn persuaded two of her son's good friends to go to the precinct to view a lineup, telling them that the police "think they have somebody that fit the description" and that they wanted them "to verify if that was him" (Vol. I, Ex. 3 at 143). Neither of the friends had previously given a description of the shooter to the police. One of the friends, Harold Pou said that James Davis looked "similar" to the shooter (Vol. I, Ex. 3 at 143). The other friend,

[2] In Machicote's statement to the police, he distanced himself from the fight, claiming that the fight started when Blake Harper stepped on someone's foot. Machicote claimed he intervened to try to break it up (Vol. 1, Ex. 9). Other witnesses put Machicote squarely in the middle of the fight. Pou testified at trial that Machicote (a/k/a "Papo") had a fight with a male black shortly before Blake Harper was shot (Vol. II, Ex. 27 at 627-628). Belton told the police that Machicote was arguing with a male black, and that Blake Harper (Mel) walked over to him (Vol. 1, Ex. 9 at 459).

Shawn Belton, gave no description of the shooter when he was interviewed shortly after Harper was killed (Vol. I, Ex. 9 at 457), but now he claimed that he had, and described the shooter as being "a light skin male black, about 5'10" tall wearing a black skully cap" (Vol. I, Ex. 9 at 459). This was the second of four statements that Belton would provide.[3] He identified Davis as the shooter (Vol. I, Ex. 2 at 58 n.6)

The First Trial

Davis's first trial began on November 10, 2005. Harold Pou, Sean Belton, and Jose Machicote testified for the People. Kaneen Johnson, Davis's then-girlfriend, testified for the defense.

Kaneen Johnson's Alibi Testimony

Johnson described James Davis as her fiancé. They had known each other for three years (Vol. I, Ex. 3 at 151). She recalled the events of January 24-25, 2004, because she did not want Davis to go to the party and they had argued about it (Vol. I, Ex. 3 at 156).

Around 2:30 a.m., Johnson received a phone call from Davis, who said he was leaving the party and taking a cab to her house on Hancock Street, where she lived

[3] When Belton was interviewed the morning of the shooting, he made no mention of seeing the shooter (Vol. I, Ex. 9 at 457). When Harper's mother brought him to the precinct six weeks later, he described the shooter as being a light-skinned man who was 5'10" and wearing a black skully cap (Vol. I, Ex. 9 at 459-60). At the first trial, Belton testified that the shooter was a light-skinned man with braids (Vol. III, Ex. 42 at 329). At the second trial, Belton testified that he just glanced, saw sparks coming from a gun and was not able to identify the shooter (Vol. II, Ex. 28 at 669-70).

with her mother, to pick her up. Johnson recalled Davis was "drunk" and "staggering, slurring" when he got out of the cab; he threw up on the street. Then, they walked to her aunt's house on Herkimer Street and spent the night there. They often stayed in her aunt's second bedroom, because Kaneen Johnson's mother did not get along with James (Vol. I, Ex. 3 at 151-153, 158-173).

Johnson testified that in January of 2004, Davis had a low Caesar cut, not cornrows or braids. He used to have slightly longer hair, but he had his hair shaved "real low," sometime in 2003, when he got ringworm. He had to take pills and use an ointment on his head. After that, he kept his hair short (Vol. I, Ex. 3 at 155, 181-184).

The first trial ended in a mistrial on November 23, 2005, after the jury deadlocked at 11 to 1 to acquit (Vol. III, Ex. 33 at 5-6; Vol. II, Ex. 25 at 589).

The Second Trial

The retrial began on May 3, 2006. The People hoped to obtain in-court identifications from Machicote, Belton, and Pou, but as the trial unfolded, only Jose Machicote identified James Davis. Machicote, then 27, had a lengthy criminal history, involving loaded weapons, armed robbery, and shootings. He was on parole when the Masonic Temple shooting took place (Vol. II, Ex. 29 at 683-687).

According to Machicote, during the party, Blake Harper got into an altercation with some other men. Machicote claimed he tried to break it up and someone started

shooting (Vol. II, Ex. 29 at 691-692). He described the shooter as having brown skin, a goatee, and hair braids that were close to the scalp and ran in a line to the back of his head (Vol. II, Ex. 29 at 693-694, 718-721).[4] Machicote repeated his prior in-court identification of Davis as the shooter (Vol. II, Ex. 29 at 693, 698-699).

Belton testified under a material witness order (Vol. II, Ex. 28 at 660). He testified that he and Harper had been friends for ten years and he was the godfather of one of Harper's two children (Vol. II, Ex. 28 at 662-663).[5] He was with Harper at the party when an altercation broke out. He saw Harper move towards it (Vol. II, Ex. 28 at 668-669). Belton was talking to a girl when he heard shots being fired (Vol. II, Ex. 28 at 669). He saw "sparks" coming out of a gun (Vol. II, Ex. 28 at 669).

Belton did not make an in-court identification. He testified that he did not get a good enough look at the shooter to be able to make an identification (Vol. II, Ex. 28 at 669-670). He said he had only "glanced" at the shooter (Vol. II, Ex. 28 at 668-670). Both newspaper accounts and witness testimony established that the party was

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[4] Machicote testified he did not recall the shooter wearing a "skully" cap (Vol. II, Ex. 29 at 722).

[5] According to a DD5, which listed the results of HIDTA ("High Intensity Drug Trafficking Area") checks requested by a Detective Robert Wagner, Shawn Belton had an arrest history consisting of robbery in the first degree in 2003; criminal possession of marijuana in 2003; assault in the third degree in 2000; a criminal possession of a controlled substance in 2000; and robbery in the second degree in 1997 (Vol. I, Ex. 9 at 462).

very crowded – 200-250 people – and turned chaotic as people rushed toward the single exit once shooting began (Vol. II, Ex. 18, 208-210; Vol. I, Ex. 3, 114).

Harold Pou did not appear as a witness at the second trial. According to Pou's prior testimony from the first trial, which the prosecutor read into the record, he and Blake Harper had been friends for 15 years (Vol. II, Ex. 27 at 619-622).[6] He recalled Jose Machicote got into an argument with someone at the end of the party. Blake Harper, Pou, and some others joined in. People were arguing and pushing. As they were about to fight, Pou heard shots ring out (Vol. II, Ex. 27 at 628-630). He saw, in profile, a light-skinned man with braids. Pressed by the prosecutor, Pou would say only, "the guy over there [Davis, sitting at the defense table] resemble [sic] him, but I know the guy had braids. Like that's [t]he main thing that I really knew about it. He was light skinned with braids, but he resemble him" (Vol. II, Ex. 27 at 630-631).

Defense counsel presented no witnesses.

This time, the jury convicted (Vol. II, Ex. 32 at 74-742). On June 2, 2006, the court sentenced James Davis to 18 years to life in prison (Vol. III, Ex. 34 at 22).

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[6] At the trial, Pou testified that he had been arrested and convicted of shoplifting in New Jersey a couple of times and had successfully completed probation on one of those cases in September of 2005 (Vol. II, Ex. 27 at 620-621).

The Post-Conviction Investigation

Appellate counsel, Susan Epstein, interviewed all available witnesses, most of whom had been identified by Davis in his statement to the police when he was arrested. Six witnesses who the jury never heard told her that Davis was innocent and could not have committed the crime because he had left the party early that night. All of these witnesses voluntarily gave statements to the District Attorney's Conviction Review Unit. With exculpatory information from seven witnesses (Kaneen Johnson, Daniel Davis[7], Jamel Black, Junior Watkins, Corey Hinds, Ishmael Avent, and Tina Black Sr.), and with James Davis's own affidavit, the defense moved to set aside James Davis's conviction on grounds of ineffective assistance and actual innocence. The People responded to the defense motion by opposing vacatur, but agreeing to an evidentiary hearing.

The Evidentiary Hearing

The defense called eight witnesses at the evidentiary hearing, none of whom had been heard by the jury that convicted Davis. Daniel Davis could not be called as a witness because he was killed in 2012. The court declined to accept his affidavit, dated August 23, 2011, in which he attested to the fact that he found his intoxicated brother, James Davis, asleep in a chair, holding a bottle, and put him into a cab and

[7] In June 2012, Daniel Davis was shot to death in East New York. See Vol. I, Ex. 3 at 196.

sent him to his girlfriend's home at 1:15 a.m. (Vol. I, Ex. 3 at 192-193). Daniel remained at the party and was still there when the shooting started (Vol. I, Ex. 3 at 193). He described leaving the party after the shooting and encountering Jamel Black, who had been stabbed, and helping to bring Jamel to Daniel's apartment (Vol. I, Ex. 3 at 194).

The defense sought to call psychologist Nancy Franklin to testify about the specific factors present in this case that would have made the identification evidence unreliable: including but not limited to both the circumstances surrounding the shooting, and the contaminating comments post-incident that impacted the subsequent identifications; but the court denied that request (Vol. I, Ex. 6). The defense also sought to call an expert witness, Professor Gregory Donaldson, author of "The Ville: Cops and Kids in Urban America," who would have testified about the deep-seated distrust between young Black men and law enforcement that was prevalent in Brooklyn in the early 2000's, to explain why the defense 440 witnesses would have been reluctant to go the police on their own initiative, but the court declined to accept his testimony as well (Vol. I, Ex. 8).

Testimony Presented at the Hearing

Daniel Davis, James's younger brother, wanted to attend a party that was being held on his 17th birthday, January 24, 2005, at the Masonic Temple hall in East New York to celebrate Capricorn/Aquarius birthdays. Daniel's name was on

the flyer advertising the party. Before heading to the Masonic Temple, Daniel and several of his friends, along with his brother James, gathered in the lobby of an apartment building in the Ocean Hill projects to "pre-game" (Vol. II, Ex. 16: Davis at 14, 16-17, 79; Vol. II, Ex. 20: Hinds at 384, 402-03; Vol. II, Ex. 19: J. Black at 239-40, 286-87).

James Davis was very close to Daniel, who was four years younger than he, because they had both been orphaned and had experienced the same struggles as a result (Vol. II, Ex. 16: Davis at 13-14). James was not much of a drinker; he preferred to smoke marijuana (Vol. II, Ex. 23: Johnson at 491; Vol. II, Ex. 20: Hinds at 386). Although James did not ordinarily attend parties and clubs, he wanted to be there to celebrate with Daniel (Vol. II, Ex. 16: Davis at 20; Vol. II, Ex. 23: Johnson at 490).

Earlier that day, James had an argument with his girlfriend, Kaneen Johnson, who did not want him to go to the party because "bad things happen" at parties (Vol. II, Ex. 23: Johnson at 490).[8] Kaneen left James's apartment and went home (Vol. II, Ex. 23: Johnson at 490). Prior to going to the party, James went out and bought

[8] At the hearing, Johnson testified pursuant to a material witness order. Before she entered the courtroom, her assigned attorney informed the court that she was willing to testify but was terrified of doing so in the presence of the deceased's family. After the court cleared the courtroom of spectators, Johnson testified that after she appeared at Davis's first trial, several family members of the deceased followed her out of the courthouse, calling her names and threatening her. Davis's trial lawyer was so concerned about her safety that he put her in a cab to get away (Vol. II, Ex. 23: Johnson at 487-487, 495-96, 509).

a bottle of Hennessy and a bottle of Moet Champagne to share with Daniel and his friends at the pre-game gathering in the projects (Vol. II, Ex. 16: Davis at 17, 20). Daniel and his friends left for the Masonic Temple party before James (Vol. II, Ex. 16: Davis at 20). James poured the remainder of the Hennessy into the Moet bottle before he went to the party so he would not be bringing two bottles into the building (Vol. II, Ex. 16: Davis at 22). By the time James arrived at the party - sometime after midnight - he had already consumed three cups of alcohol and was somewhat intoxicated (Vol. II, Ex. 16: Davis at 28-29, 102).

Jamel Black recalled that before James got there, he and Daniel Davis, Junior Watkins ("Smiley"), Nathaniel Black, Tasha and Corey Hinds were already at the Masonic Temple, hanging out in the bathroom partying (Vol. II, Ex. 19: J. Black at 240-245, 301-303). Jamel had been friends with James when they were younger, but he was no longer was friends with him at the time of the party because James had slept with Jamel's girlfriend while Jamel was incarcerated. (Vol. II, Ex. 19: J. Black at 247, 305-306).[9] When Daniel got a call that James had arrived at the party, Jamel left the bathroom to avoid him (Vol. II, Ex. 19: J. Black at 242-245, 301-303).

[9] When Attorney Epstein reached out to Jamel Black to ask him to testify, he wrote back insisting on an apology from James before he would testify about what happened that night. A copy of that letter – in which he said that he would take his secret to the grave unless James apologized – was read into the record and introduced into evidence at the CPL 440 hearing (Vol. II, Ex. 19: J. Black at 275-76; Vol. I, Ex. 7: Letter at 367).

Ernest Hollman, whose nickname was "B.O.," was one of the party's promoters (Vol. II, Ex. 18: Holman at 203).[10] He testified that he remembered that James had attended the party because he saw him come into the hall (Vol. II, Ex. 18: Hollman at 204-205). Hollman knew James and his brother Daniel because they were from the same neighborhood (Vol. II, Ex. 18: Hollman at 204, 218). He was friends with James, but he was older, and they did not hang out often (Vol. II, Ex. 18: Hollman at 205, 218).

Hollman remembered joking with James about his hairstyle when he entered the party (Vol. II, Ex. 18: Hollman at 205-206). He explained that James wore his hair short in a Caesar style with waves:[11]

> [I]n the neighborhood the younger guys, like we have an, it like a friendly competition with our hairstyle, you know. Me and "J" used to do that a lot about our waves, who has the deepest waves…
>
> His hair was sort of like mine but his was a little bit more groovier that night. When we say groovy it means his waves were all around . . . .

(Vol. II, Ex. 18: Hollman at 205-06).

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[10] At the time of the hearing, Hollman was forty-four years old, lived in Brooklyn and worked for a catering company (Vol. II, Ex. 18: Hollman at 202-203). As a young man, Hollman was convicted of possession of weapon twenty one years earlier, and served thirty days and five years of probation. In 2007, he was convicted of distributing narcotics in federal court. Since completing that sentence, he has lived a law abiding life, working ever since (Vol. II, Ex. 18: Hollman at 213-215).

[11] The waves haircut is a popular way to style a buzz cut. www.menshairstylestoday.com. https://www.menshairstylestoday.com/waves-haircut/

When James came into the bathroom with his bottle, he found several of Daniel's friends in there smoking marijuana because they were not allowed to smoke on the dance floor. They got cups and hung out in the bathroom with him smoking and drinking (Vol. II, Ex. 16: Davis at 22-24; Vol. II, Ex. 20: Hinds at 385).

Meanwhile, after Jamel left the bathroom, he ran into Tay Hall, someone he had known since 2001 (Vol. II, Ex. 19: J. Black at 245, 293-294).[12] Jamel and Tay both sold drugs on the corner of Rockaway Avenue and Marion Street (Vol. II, Ex. 19: J. Black at 245, 294-95). Tay and Jamel smoked a blunt of marijuana together, until Jamel's brother Nathaniel came over and told him that James wanted to see him in the bathroom (Vol. II, Ex. 19: J. Black at 246).

When Jamel entered the bathroom he heard his friends laughing. Suspicious that they were laughing at him because James had slept with his girlfriend, Jamel asked what was so funny (Vol. II, Ex. 19: J. Black at 246-247, 305). His friends said they were laughing because James was throwing up in the bathroom stall. Corey Hinds recalled it was particularly funny because even though James was older than them, he could not hold his liquor (Vol. II, Ex. 19: J. Black at 248, 305-306; Vol. II,

[12] Jamel Black testified that he had previously been arrested for attempted sale and possession of controlled substances two or three times and he pled guilty (Vol. II, Ex. 19: J. Black at 271). He was sentenced to a "six-five split" the first time (Vol. II, Ex. 19: J. Black at 271). He was also arrested and pled guilty to weapon possession and he was sentenced to one year on Rikers Island (Vol. II, Ex. 19: J. Black at 271-272). He stated he was guilty of those offenses (Vol. II, Ex. 19: J. Black at 271-272). At the time of the hearing, he was serving 31 year sentence for robbery and weapon possession (Vol. II, Ex. 19: J. Black at 272).

Ex. 20: Hinds at 386, 396; Vol. II, Ex. 16: Davis at 29-30). When James came out of the stall, he tried to give Jamel a high five, but Jamel was still angry and gave him his fist instead (Vol. II, Ex. 19: J. Black at 248). James told Jamel that he needed to get over that. Ignoring James, Jamel left the bathroom and went back to the corner outside the bathroom where he had been smoking marijuana with Tay (Vol. II, Ex. 19: J. Black at 248).

When Daniel came back into the bathroom, he started laughing too and asked James if he wanted to go home (Vol. II, Ex. 16: Davis at 31). Several of Daniel's friends also told him that he should go home (Vol. II, Ex. 20: Hinds at 396). James did not want to leave because he wanted to spend the rest of the night with Daniel, but his brother persuaded him to take a cab to his girlfriend Kaneen's house (Ex. 16: Davis at 31, 110-111). When the cab arrived, James took it to Kaneen Johnson's mother's home (Vol. II, Ex. 16: Davis at 32-33).

Kaneen Johnson was asleep when she was awakened by James calling to tell her that he was coming to get her (Vol. II, Ex. 23: Johnson at 491-92, 505). They met up in front of her house on Hancock Street in Bedford-Stuyvesant (Vol. II, Ex. 16: Davis at 32, 34, 80). Her recollection was that it was 1:00 or 1:30 when he called (Vol. II, Ex. 23: Johnson at 492, 505). It took James less than half an hour to get there. Kaneen remembered that James was drunk when he pulled up in a cab; he staggered as he exited the cab and immediately threw up (Vol. II, Ex. 23: Johnson

at 492). James remembered the time being "somewhere around 2:45" (Vol. II, Ex. 16: Davis at 80).

From there they walked to Kaneen's Aunt Wanda Chapman's apartment, which took about ten or fifteen minutes (Vol. II, Ex. 23: Johnson at 492-93). Her aunt opened the door and let them in; Kaneen did not have a key (Vol. II, Ex. 23: Johnson at 503; Vol. II, Ex. 16: Davis at 35; Ex. 23: Chapman at 475-476).[13] Chapman testified that she would not have let them in if they had come after 2:00 a.m. (Vol. II, Ex. 23: Chapman at 476, 480). Kaneen recalled that James threw up again in her aunt's home and then went to sleep (Vol. II, Ex. 23: Johnson at 493-494). Chapman heard someone throwing up, but did not know who it was. Neither Kaneen nor James left the house after they arrived (Vol. II, Ex. 23: Chapman at 476). Chapman knew that because she was the only one with a key and she would have had to get up and lock the door behind them had either of them left the apartment (Vol. II, Ex. 23: Chapman at 476).

After waking up together the next day, Kaneen and James were watching the news together when they saw that there had been a fight at the Masonic Temple hall, and that someone had been killed (Vol. II, Ex. 23: Johnson at 494).

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[13] Chapman remembered that they were both drunk, a fact that Kaneen who had not gone to the party, denied (Vol. II, Ex. 23: Chapman at 476; Ex. 23: Johnson at 501).

The Fight at the Masonic Temple Hall

Jamel was still at the party when they made the last call for drinks (Vol. II, Ex. 19: J. Black at 252). At that time his brother Mikey[14] came to him and asked for money to buy a bottle of Moet. They agreed to split the bottle, and Jamel went back to hang out with a girl while he waited (Vol. II, Ex. 19: J. Black at 252-53). When Mikey did not come back, Jamel went to look for him, and found Mikey at the front of the dance floor arguing with a Puerto Rican man in a fur coat (Vol. II, Ex. 19: J. Black at 253-255). Mikey told him that the man had snatched the bottle of Moet from him because Mikey had stepped on his foot (Vol. II, Ex. 19: J. Black at 255, 317).[15] Jamel tried to grab the bottle from the man, but he pushed Jamel (Vol. II, Ex. 19: J. Black at 255). At that point, a Black man who was with the Puerto Rican man told Jamel to "break out" because this had nothing to do with him, and pushed Jamel into someone behind him, who in turn said, "there ain't gonna be no shit in the club, this shit is about to be over, we gonna replace the bottle" (Vol. II, Ex. 19: J. Black at 255-56). Jamel returned to where the girl was waiting for him while his brother went to get the Moet (Vol. II, Ex. 19: J. Black at 256).

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[14] Mikey was Nathaniel Black's nickname (Vol. II, Ex. 17: T. Black at 171).

[15] As noted earlier, page 8 n.2, Jose Machicote described his own version of this incident in the statement he gave to police on February 4, 2004. He claimed that a black man started a "beef" with Mel (a/k/a Blake Harper) after Mel stepped on the man's foot. Machicote described himself as the peacemaker rather than the instigator, saying he had to intervene to calm things down (Vol. II, Ex. 9 at 454-455).

When Jamel decided to leave, he went to get his coat at the coat check (Vol. II, Ex. 19: J. Black at 257). While he was waiting, he heard someone say, "you thought this was over," and Jamel then felt a pain in his back (Vol. II, Ex. 19: J. Black at 259).[16] He turned around and saw the black man who had pushed him earlier, weaving his way through the crowd headed toward the exit door (Vol. II, Ex. 19: J. Black at 259-60, 278, 324-327). Jamel tried to follow him, but he felt immense pain, and instead decided to find his brother (Vol. II, Ex. 19: J. Black at 260-61, 325, 328). As he walked toward the back of the club, he ran into Tay, who said he would take Jamel to the hospital, and wrapped his arm around Jamel as they headed for the door (Vol. II, Ex. 19: J. Black at 261-264, 330).

Suddenly, Jamel heard Tay say, "oh shit," and then he pushed Jamel to the floor by the benches (Vol. II, Ex. 19: J. Black at 262, 330-333). As Jamel was falling, he heard at least three gunshots (Vol. II, Ex. 19: J. Black at 262-263). After the shooting stopped, Jamel turned around at looked at Tay, and saw him putting a small, silver revolver in his pocket (Vol. II, Ex. 19: J. Black at 263-264, 334-35, 372-73). Tay asked if he would be alright, and told Jamel that he needed to leave before the police came, and ran towards the door (Vol. II, Ex. 19: J. Black at 264, 373). When Jamel got up he saw the black guy that he had argued with earlier,

[16] Jamel's testimony was transcribed as both "you thought this was over" and "I thought this was over" (Vol. II, Ex. 19, J. Black at 259, 323).

bloodied and lying on the floor with a knife next to him (Vol. II, Ex. 19: J. Black at 264, 333-34, 336, 372).

Corey Hinds recalled seeing a crowd forming in the front of the hall (Vol. II, Ex. 20: Hinds at 387). He testified that James was not there when the fight broke out, but he was not sure how much earlier he had left (Vol. II, Ex. 20: Hinds at 389). Around the time the fight broke out, he heard Jamel yell out "Oh shit, I got stabbed," but Corey was across the room in the middle of the party space (Vol. II, Ex. 20: Hinds at 388, 412). He remembered going to the bar, when he heard an announcement for "last call" and then he heard two or three shots ring out (Vol. II, Ex. 20: Hinds at 390, 410-411). He did not see who was doing the shooting (Vol. II, Ex. 20: Hinds at 390).

At the time of the shooting, Hollman was in the middle of the dance hall near the stage where the D.J. was located. Hollman testified that the party was very crowded, with about 200 people or more (Vol. II, Ex. 18: Hollman at 208-09). When the shooting began, a lot of people started screaming and jumping on the floor (Vol. II, Ex. 18: Hollman at 210). Hollman was also on the floor (Vol. II, Ex. 18: Hollman at 210). He knew that James was not at the party when the shooting took place. At the hearing, he explained:

> [D]uring the course of the event I have to walk around and make sure everything is good, secure. I came to the front area. And this is way before, hours before the shooting started, someone threw up upon the floor. So when I asked

> who threw up, the head security detail, he didn't know "J" personally, but he described, he said, him, the one of the brothers, the brothers, one of the birthday, the guys, the brothers that's celebrating their birthday is sick. He threw up. So he told me that he made them go outside.

(Vol. II, Ex. 18: Hollman at 210-11).

With the help of Daniel Davis and Junior Watkins, Jamel made his way to Daniel's grandmother's building (Vol. II, Ex. 19: J. Black at 265-66). She came out of her apartment[17] when she heard them making noise in the lobby and she called an ambulance for Jamel. Jamel testified that there were a lot of people in the lobby including Daniel, Junior and Corey, as well as some of James and Daniel's little cousins, but James was not there (Vol. II, Ex. 19: J. Black at 266, 340-342).[18] Once Jamel got inside the ambulance, he passed out; when he awoke he had 26 staples in his body, and his mother, sister and girlfriend were there (Vol. II, Ex. 19: J. Black at 267). He subsequently had two surgeries (Vol. II, Ex. 19: J. Black at 267).

After his first surgery, Jamel was interviewed by the police (Vol. II, Ex. 19: J. Black at 268). He told them what happened at the club, beginning with the incident

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[17] James and Daniel's grandmother lived on the first floor of their apartment building (Vol. II, Ex. 16: Davis at 8, 43-44).

[18] Corey Hinds testified that after the shooting, he tried to gather the people he knew who were still at the Masonic Temple, whose names he could not recall, and headed to James's grandmother's building, where she lived in an apartment on the first floor. Corey testified he saw Jamel Black there and the ambulance (Vol. II, Ex. 20: Hinds at 391-392). On cross-examination, the court asked Corey if he ever saw James Davis again that night, after James left the bathroom at the Masonic Temple. Corey responded that he did not see James again for the whole night. Then, when the court asked Corey if he saw James after the party at James's grandmother's building, Corey said "yes" (Vol. II, Ex. 20: Hinds at 397-398).

involving his brother Mikey, and explained how he got stabbed (Vol. II, Ex. 19: J. Black at 269-70). He told the police about Tay putting the gun into his pocket, and that the man who was shot was the one who had stabbed him, and that there was a knife on the floor next to the man's body (Vol. II, Ex. 19: J. Black at 269-70, 343). Jamel told them about Tay because they were suggesting that Jamel was involved in the shooting, but he did not give them Tay's last name or where he thought Tay lived (Vol. II, Ex. 19: J. Black at 269-70, 343-44, 351-52, 367-68).

After Jamel was released from the hospital, he saw Tay one last time (Vol. II, Ex. 19: J. Black at 284). They went to Tay's house to smoke marijuana (Vol. II, Ex. 19: J. Black at 285). While smoking, Tay told Jamel that he was lucky, but that Jamel "owed him one" (Vol. II, Ex. 19: J. Black at 285).

James's Arrest and Interview at the Precinct

James was arrested for this crime on March 25, 2004, two months after the incident. The warrant squad came to his apartment early in the morning looking for James's brother, Daniel. James knew that he had his own outstanding bench warrant for failure to do community service, so he tried to climb out his bedroom window (Vol. II, Ex. 16: Davis at 43-44). James was interrogated the entire day, initially about whether he knew what had happened to Jamel Black (Vol. II, Ex. 16: Davis at 52). James asked why he was being held, and the detectives told him that they wanted to know about what had happened to Jamel (Vol. II, Ex. 16: Davis at 52-53).

James told them everything that he remembered about that night, and gave them the names of the people he had been with at the party, including Daniel, B.O. (Hollman), Big Man (a/k/a Corey Hinds)[19] and some others. He also told them about getting sick, leaving the party early and spending the night with Kaneen Johnson (Vol. II, Ex. 16: Davis at 52-53, 91; See also Vol. I, Ex. 3 at 127).

After questioning him for hours, the police put James in a lineup (Vol. II, Ex. 16: Davis at 54). James realized that they had tricked him (Vol. II, Ex. 16: Davis at 58). The fillers in the lineup were a heavy-set dark man, a short dark-skinned man, and a tall, West Indian looking man with a good deal of weight on him. Another filler was also very heavy set. Only one resembled James. At that time, James was 5'7", 145-150 pounds (Vol. II, Ex. 16: Davis at 56).

When the detective finished the line-up procedure, he came back and told James that he had been picked out and was being arrested for murder. He then told James that he knew exactly what happened at the party: someone came at him with a knife and James shot him. Sympathizing, he told James that he would have done the same thing in that situation, and that if James confessed, he would speak to the prosecutor and try to help him (Vol. II, Ex. 16: Davis at 58-59). James said that the detective did not need to speak to anyone for him, and that he was not going to admit to something that he did not do (Vol. II, Ex. 16: Davis at 59).

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[19] Corey Hinds's nickname was "Big Man" (Vol. II, Ex. 16: Davis at 91).

None of the hearing witnesses testified to being questioned by the police about James Davis. With the exception of Kaneen Johnson, none of them testified they were contacted by James's attorney. James testified that when he met his attorney, Joel Medows, James gave him the same names of his witnesses that he had given the detective. Although James did not have their phone numbers, he told his attorney that his girlfriend could get all of their numbers for him (Vol. II, Ex. 16: Davis at 62). To the best of his knowledge, his attorney never spoke to Corey Hinds, Jamel Black, Jamel Gray, Ismael Avant, or Junior Watkins – all names that James had provided to him (Vol. II, Ex. 16: Davis at 63-64). Nor did his attorney ever speak to James about investigating any of his witnesses (Vol. II, Ex. 16: Davis at 147-148).

At the first trial, Medows told Davis that they did not have to put on a case, and that they could just have Kaneen Johnson testify (Vol. II, Ex. 16: Davis at 64-65). When Johnson did not appear at his second trial, James asked to testify, but his attorney convinced him that the prosecutor would pick him apart because he had a rap sheet (Vol. II, Ex. 16: Davis at 67). Medows repeated that they did not have to put on a case (Vol. II, Ex. 16: Davis at 67-68).

Medows subsequently told James that Kaneen had called him and was very upset because she thought that Medows had subpoenaed her, but it was actually the prosecutor who had done so. The police came to her house after midnight to serve the subpoena and her mother encountered them. When her mother learned that she

had been subpoenaed to testify in a murder trial, she was very upset and kicked her daughter out of the house (Vol. II, Ex. 16: Davis at 65-67; Vol. II, Ex. 23: Johnson at 510-511).

James Davis Did Not Have Braids at the Time of this Shooting

When James was arrested, he had short hair as evidenced in his arrest photograph (Vol. II, Ex. 16: Davis at 37-38; Vol. I, Ex. 7 at 365). At the hearing, Asia Snow testified that she used to braid his hair back in 2002, but his scalp became "crepey" and the hair on the top his head started breaking off when she tried to braid it. She told him that it would be best if he cut if off (Vol. II, Ex. 16: Davis at 40-41; Vol. II, Ex. 17: Snow at 164-65).[20] The last time Asia Snow saw James his hair was short and he never came back to her to braid his hair again (Vol. II, Ex. 17: Snow at 166).

James and Kaneen both testified that James had a skin condition, which they believed at that time, was ringworm (Vol. II, Ex. 16: Davis at 40-41; Vol. II, Ex. 23: Johnson at 495). As a consequence, he cut his hair short in 2003, which was how he wore it on the night of the shooting (Vol. II, Ex. 16: Davis at 37-38, 40; Vol. II, Ex. 23: Johnson at 495; Ex. 7 at 365). Jamel Black had told the prosecution's

[20] At the time of the hearing, Asia Snow suffered from Fibromyalgia which caused her to be in chronic pain (Vol. II, Ex. 17: Snow at 164). Although Asia Snow did not testify that she was questioned by the police, her name and date of birth were listed in Detective Eggers's notebook (Vol. I, Ex. 9 at 464-465).

Conviction Review Unit that James probably had braids on the night of the party, but he testified that James could also have had short hair that night, because he wore it both ways. Jamel explained that he had been avoiding James during that time period because of the incident with Jamel's girlfriend (Vol. II, Ex. 19: J. Black at 277, 361, 370).

Tina Black Junior's False Tip

It was not until November 5, 2005, during pre-trial hearings, that James learned that it was Tina Black, Jr. who had named him as the shooter, despite the fact that Tina Black, Jr. was not at the Masonic Temple party that night (Vol. II, Ex. 16: Davis at 70). By that time, she was very sick, on dialysis, and had difficulty walking up and down stairs (Vol. II, Ex. 16: Davis at 70; Vol. II, Ex. 17: T. Black at 174-75).

Her mother, Tina Black, Sr., testified at the hearing that her daughter, Tina Monique Black, known as "TT," died on September 23, 2013, of juvenile diabetes (Vol. II, Ex. 17: T. Black at 172). In addition to TT, she had nine other children, including Jamel and Nathaniel Black (Vol. II, Ex. 17: T. Black at 172).

Tina Black, Sr. remembered the night of that party because she received a call early that morning letting her know that Jamel had been stabbed. When she arrived at the hospital, Jamel was cut open and she thought he had died (Vol. II, Ex. 17: T.

Black at 173-74). No one was ever arrested for stabbing her son (Vol. II, Ex. 17: T. Black at 174).

Tina Black, Sr. confirmed that TT had not gone to the party; she was home with her mother that night (Vol. II, Ex. 17: T. Black at 174). TT was not going to parties in 2004 because her diabetes made her very ill (Ex. 17: T. Black at 174-175). TT did not take her illness seriously, and as a result, she had congestive heart failure, needed a kidney transplant, and her eyes, liver and legs were failing (Vol. II, Ex. 17: T. Black at 175).

Tina Black, Sr. said that her daughter and James were friends, but that TT probably thought that they were girlfriend and boyfriend because she was in love with him: "[s]he loved herself some J. That's what she talk about, J this, J that. She loved herself some J" (Vol. II, Ex. 17: T. Black at 176). TT's attitude towards James changed, however, when she learned that he was seeing Kaneen Johnson (Vol. II, Ex. 17: T. Black at 177). Tina Senior explained that her daughter was mild-mannered, but if she became mad at someone "she's taking out no stops" (Vol. II, Ex. 17: T. Black at 177).

Before TT died, she told her mother that she had lied and told police that "J" killed somebody at a party (Vol. II, Ex. 17: T. Black at 179-180). Tina Senior asked her daughter why she would do "something stupid like that," to which her daughter

explained that James had pissed her off and "kicked her to the curb like an old boot" (Vol. II, Ex. 17: T. Black at 180).

Investigation of Machicote

During the course of the C.P.L. §440.10 hearing, defense counsel reached out to the former Assistant United States Attorney who had prosecuted the people who had murdered Jose Machicote, the prosecution's star witness at Davis's trial, shortly after Davis's conviction.[21] That attorney referred counsel to the FBI agent on that case, Agent Jed Salter. Salter informed counsel that, in January 2006 – four months *before* Machicote testified against Davis – there was a joint FBI/NYPD investigation into drug trafficking in Brownsville, and that Machicote was a target of that investigation (Vol. I, Ex. 12 at 609). Salter explained that Machicote was on a "bad guys list," which he described as a list of violent criminals and major drug dealers, and he was part of that investigation (Vol. I, Ex. 12 at 610).[22]

Machicote had convictions for robbery in the second degree, fourth-degree criminal possession of a weapon, assault in the third degree, and drug sales. He

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[21] Jose Machicote was murdered when he tried to rob a rival drug dealer for the second time, in November of 2006, six months after he testified at James Davis's trial (Vol. III, Ex. 40 at 264). Machicote's murder led to federal prosecutions of the men who killed him, as well as federal prosecutions of Machicote's two co-conspirators in the robbery of that drug dealer, Richard Gilliam. See Vol. III, Exs. 35, 37, 38. All of the defendants in those cases pleaded guilty except one, who was convicted after trial.

[22] That joint task force included the FBI, Brooklyn North Narcotics' major case unit, and the 73rd Precinct. See Vol. III, Ex. 38, Agent Salter at 187.

spent several years in prison and was on parole and in violation of his curfew when he attended the party where Blake Harper was killed. In summation at James's trial, the prosecutor argued that Machicote was so brave to come forward and testify against him (Vol. II, Ex. 32 at 670). She told the jury that he was credible when he testified because he was so honest about his past, but that the days of his criminal activity were behind him, and that he was a barber now (Vol. II, Ex. 32 at 677).

Defense counsel found documents pertaining to Machicote's murder, as well as drug sellers who worked for Machicote, on PACER, the federal court database. As a result of the FBI/NYPD joint investigation, an individual named Steven Turner was arrested on drug conspiracy charges and became an informant (Vol. III, Ex. 38, Salter at 188-89*)*. During the spring of 2006, at the direction of Agent Salter, Steven Turner began purchasing crack from an individual named Deshawn Miles; Machicote was the "source" of the drugs Miles provided to Turner, and Miles acted as Machicote's middleman in those transactions (Vol. III, Ex. 38 at 197, 215; Vol. III, Ex. 39 at 247-48). After a few purchases from Miles, Turner was able to begin purchasing directly from Machicote (Vol. III, Ex. 38 at 197).

Miles was later arrested and interviewed by Agent Salter. Miles told Salter that Machicote "was known as one of the most infamous and violent criminals in Brooklyn . . . ." (Vol. III, Ex. 36 at 86, 141-42). Miles stated that he cut and

packaged drugs for Machicote, as much as $4,000 to $5,000 worth of narcotics at a time, and that he drove Machicote to make his drug transactions.

In addition to being a major drug dealer at the time of Davis's trial , according to Miles, Machicote was also known for committing robberies. (Vol. III, Ex. 41 at 271). In fact, according to Agent Salter, Machicote was charged with a robbery in state court in early 2006 – before he testified against Davis in the second trial -- but the case was dismissed because a federal agency took the case over. Machicote was ultimately not prosecuted for that incident, though his co-defendant was prosecuted (Vol. I, Ex. 12 at 605).[23]

Motion to Reopen the 440 Hearing

Based on this newly discovered evidence, defense counsel moved to reopen the hearing and subpoena Agent Salter to explore whether the New York City Police Department or the Kings County District Attorney's Office, who prosecuted Davis's case, had actual or imputed knowledge that Machicote was a major drug dealer rather than a humble barber (Vol. II, Ex. 21 at 446; Vol. II, Ex. 23 at 517). Defense counsel served the prosecution with a discovery request, in which it requested, *inter alia*, which database contained information regarding Jose Machicote (Vol. II, Ex. 21 at 441). Initially, the court agreed to sign the subpoena and reopen the hearing on the

[23] Machicote's reputation was fearsome. When Richard Gilliam was ultimately sentenced for Machicote's murder, Gilliam's attorney recounted at the hearing a story he had been told during his investigation in which rival gangs involved in a shootout put down their weapons when Machicote rode through on his bicycle (Vol. III, Ex. 35 at 41).

issue of newly discovered evidence, but refused to permit questioning pertaining to Brady material, on the grounds that the case was under investigation at the time of Davis's trial (Vol. II, Ex. 21 at 447-48, 450). While not directly ordering the prosecution to comply with the discovery request, the court noted that it was confident that the District Attorney's office would comply with its discovery obligations (Vol. II, Ex. 21 at 447). Subsequently, the court reversed its ruling and refused to sign a subpoena to allow defense counsel to call Agent Salter (Vol. II, Ex. 23 at 519). The prosecution never complied with the demand for discovery.

Counsel moved to reargue the denial of the motion to reopen, noting that bad acts, not just convictions, are Brady material. In support of re-argument, defense counsel provided an affidavit from retired NYPD narcotics detective, Thomas McCall, who described the different databases that detectives utilize as protocol when investigating cases. McCall attested to the fact that there are numerous databases that police routinely search when investigating cases, to determine whether witnesses have criminal records, or are part of ongoing criminal investigations conducted by both state and federal law enforcement agents (Vol. II, Ex. 12 at 612-14). In this case, McCall noted that Detective Wagner, one of the first officers on the scene at the Masonic Temple party, performed multiple checks in the H.I.D.T.A. (High Intensity Drug Trafficking Area) database of potential witnesses shortly after the incident (Vol. II, Ex. 12 at 609; see Vol. I, Ex. 9: DD5 at 462).

In denying the motion to reargue, the court found that defense counsel had not proved that the prosecution suppressed Brady material (Vol. 1, Ex. 1 at 42-43). It failed to address the newly discovered evidence claim.

The Hearing Court's Decision

Actual Innocence

The court found that "the defendant failed to demonstrate by clear and convincing evidence that he is actually innocent," because "the defendant failed to provide clear and convincing credible evidence of his alibi that he left the party before the shooting" (Vol. I, Ex. 1 at 32). The court found that, apart from the defendant, none of the hearing witnesses could definitively state "that the defendant was not the shooter, or even that the defendant was not present at the club at the time of the shooting" (Vol. I, Ex. 1 at 32). It noted that, besides the defendant, "the only other person that saw the defendant actually leave the club and get into a cab is the defendant's brother, Daniel Davis, but he is deceased and cannot testify" (Vol. I, Ex. 1 at 32).

The court refused to credit the defendant's testimony, stating he was "absolutely the most interested witness and given such an overwhelming amount

of self-interest," the court found that his testimony was neither "credible nor reliable" (Vol. I, Ex. 1 at 33).[24]

The court further held that even if it were to consider defendant's testimony in conjunction with the testimony of the other hearing witnesses, Davis still failed to establish his innocence by clear and convincing evidence (Vol. I, Ex. 1 at 33). First, the court disregarded Ernest Hollman's testimony that the security guard told him that one of the brothers who was celebrating his birthday, threw up on the floor and he made them leave (Vol. I, Ex. 1 at 33-34). The court dismissed that testimony claiming it did not prove that the guard was referring to James Davis and his brother Daniel, since there were other people celebrating their birthday that night at the party (Vol. I, Ex. 1 at 33-34).

The court pointed to Corey Hinds's testimony that he saw James Davis at his grandmother's apartment after Jamel was stabbed, as "clearly contradict[ing]" Davis's alibi testimony that he left the club and met Kaneen, as well as "Kaneen's testimony that she met up with the defendant at 1:30 or 2:00 a.m. and Wanda's testimony that the defendant and Kaneen arrived at her house around 1:00 a.m.," and the testimony that defendant and Kaneen stayed there the rest of the night

[24] The court also did not believe that James spent his entire time at the party in the bathroom drinking with his friends before he got sick, because he was there to celebrate his brother's birthday (Vol. I, Ex. 1 at 33). The court relied on the fact that when the warrant squad came to his house, because he had a bench warrant, James tried to jump out the window and gave them a false name, as a further reason not to credit any of his testimony (Vol. I, Ex. 1 at 33).

(Vol. I, Ex. 1 at 34). The court concluded, "viewing the testimony of all the witnesses as a whole, this court finds that the defendant did not provide any clear and convincing evidence to corroborate the defendant's alibi that he left the club hours before the shooting" (Vol. I, Ex. 1 at 34).

Next, the court found that the defendant failed to prove by clear and convincing evidence that he did not have braids on the night of the murder. Ignoring the fact that Belton recanted at trial, the court claimed that the prosecution's three witnesses, Jose Machicote, Harold Pou and Shawn Belton, all said that the shooter had braids (Vol. I, Ex. 1 at 34-451). When the defendant was arrested a couple of months later, he had a "short, crew cut hairstyle." His hair was also short during the lineup, at his trials and at this hearing (Vol. I, Ex. 1 at 34).

Ignoring the four witnesses who testified to the fact that Davis had short hair (Davis, Hollman, Johnson and Snow), the court relied on Jamel Black's equivocal statement to the Conviction Review Unit, in which he said that Davis "probably" had braids, while ignoring the fact that Jamel told the Conviction Review Unit that James also wore his hair short and that he was avoiding being around James at that time (Vol. I, Ex. 1 at 35).

Relying solely on this equivocal testimony, the court found there was no clear and convincing evidence that James Davis did not have braids the day of the

shooting, and therefore could not be the shooter (Vol. I, Ex. 1 at 35). Significantly, the court discounted Kaneen Johnson's testimony that Davis had a short Caesar cut at the time of the party based on its erroneous recollection that Johnson had not testified why she remembered that Davis's hair was short after so many years (Vol. I, Ex. 1 at 35). In fact, Johnson had specifically testified at the hearing that she remembered Davis having to get his hair cut some time prior to the night of the party because of the ringworm on his scalp (Vol. II, Ex. 23: Johnson at 495).

Next, the court found that the hearing evidence failed to show that Tay was the shooter. The court found that Jamel's testimony that Tay was the shooter was not credible, and was "contradictory and not worthy of belief." The court was "not convinced that the defendant has shown by clear and convincing evidence that Tay shot the deceased" (Vol. I, Ex. 1 at 35-36).

Finally, the hearing court stated even if it were to credit the testimony that T.T. told the police that James Davis was the shooter "without knowing whether that was true, the defendant's argument ignores the fact that there were eyewitnesses that identified the defendant" (Vol. I, Ex. 1 at 36). The court concluded there was "sufficient evidence of the defendant's guilt at trial, and consequently, there was no merit to the defendant's argument that he became a suspect only because of T.T.'s false tip" (Vol. I, Ex. 1 at 37).

The court further held that "[e]ven if one *assumed arguendo* that the defendant and Kaneen Johnson's testimonies taken together were somehow believable, this court finds that it would only amount at most to preponderance of conflicting evidence as to the defendant's guilt, still falling short of the required standard for actual innocence" (Vol. I, Ex. 1 at 38).

Ineffective Assistance of Trial Counsel

The court stated that it found the ineffectiveness argument for failure to properly investigate "without merit" (Vol. I, Ex. 1 at 39). The court relied on the fact that trial counsel had contacted Kaneen Johnson, that she testified at the defendant's first trial, and that counsel expected Kaneen to testify at the second trial until she failed to show up (Vol. I, Ex. 1 at 39). The court never addressed the fact that counsel failed to interview the other witnesses. Instead it found that counsel could have had a strategic or other legitimate explanation for his decision not to call defendant's brother and friends, who were at the party with him, as alibi witnesses, citing to the fact that several of his friends either had convictions or pending cases (Vol. I, Ex. 1 at 39-40). Consequently, the court, citing Sacco v. Cooksey, 214 F.3d 270, 275 (2d Cir. 2000), found that trial counsel could have made a reasonable tactical decision not to use them as alibi witnesses, because that could have been unsuccessful in persuading the jury of his alibi (Vol. I, Ex. 1 at 40).

The court further found that the defense argument that there was a deep-seated distrust between young black men and law enforcement authorities in Brooklyn in the early 2000's, meant that "there [was] no reasonable probability that the outcome of the case would have been different had [counsel] contacted the potential witnesses" (Vol. I, Ex. 1 at 40). Ignoring the fact that several of those witnesses had actually testified at the 440 hearing, the judge found that they would not have testified at trial (Vol. I, Ex. 1 at 40). Therefore, the court concluded that in light of the "overwhelming evidence against the defendant including in court identification of the defendant by two witnesses," the defendant "suffered no prejudice by his counsel refusing to forgo a weak alibi defense through his brother and friends" (Vol. I, Ex. 1 at 40).

The *Brady* Violation

Acknowledging that that it had denied the defendant's request to expand the scope of the hearing to address the potential Brady violation, the court found that even if it had permitted the hearing to be expanded, there was no Brady violation that would require vacating the judgment (Vol. I, Ex. 1 at 41). Without allowing the defense to call FBI Agent Salter to testify about the NYPD's knowledge regarding Machicote, the court accepted the People's contention that the defense was "speculating that the NYPD had knowledge of that information," and found "the defendant failed to prove that the information regarding the FBI's investigation

of Machicote was in the People's possession or that it was suppressed by the People" (Vol. I, Ex. 1 at 42). The court failed to address the newly discovered evidence argument.

POINT I

WHERE THE DEFENSE CALLED EIGHT CREDIBLE WITNESSES TO ESTABLISH THAT DAVIS WAS NOT PRESENT AT THE TIME DECEDENT WAS KILLED, THAT DAVIS DID NOT FIT THE DESCRIPTION OF THE SHOOTER, AND THAT THE INFORMATION THAT CAUSED THE POLICE TO FOCUS ON DAVIS WAS A LIE, THE DEFENSE PROVED DAVIS'S INNOCENCE BY CLEAR AND CONVINCING EVIDENCE. U.S. CONST. AMENDS. V, VIII, XIV; N.Y. CONST., ART. 1 §§ 5, 6; C.P.L. § 440.10(1)(H); PEOPLE v. HAMILTON, 115 A.D.3D 12 (2D DEPT. 2014).

A. Davis Presented Clear and Convincing Evidence of His Actual Innocence

At the evidentiary hearing, five witnesses confirmed what James Davis has said from the day that he was charged with this murder and what he described when he credibly testified at the 440 hearing: that he had attended the party at the Masonic Temple to celebrate his brother Daniel's birthday, but left early – well before Blake Harper was killed - after he became sick and began throwing up. The defense also presented three witnesses (in addition to James), who testified credibly that he had a short haircut that night: 1) his girlfriend who remembered he cut if off after contracting ringworm; 2) his hairdresser who advised him to cut if off because of the skin condition; and 3) the party promoter who remembered teasing James about who

had the better waves in their Caesar cuts. This testimony clearly established James's innocence, because the only distinguishing feature of the shooter described by eyewitnesses was that he wore his hair in braids.

In addition, the prosecution's case against Davis was flawed from the outset. The defense showed that the original tip that had led the police to focus on James Davis came from a jealous young woman, an ex-girlfriend who made an impulsive decision to inculpate him because she was angry at him over seeing a new girlfriend. The police failed to investigate both Davis's named alibi witnesses, as well as the information provided by Jamel Black, who was injured during the fight, which pointed to another suspect.

The evidence presented at the hearing, provided by James Davis and seven other witnesses of different ages and places in their lives, created a detailed, compelling narrative that clearly established that James Davis was completely innocent of the crimes for which he was convicted. As a result, his state and federal rights to due process of law and to be free from cruel and unusual punishment, have been, and continue to be violated by his continued incarceration for these crimes. U.S. Const. Amends. V, VII, XIV; N.Y. State Const, Art. 1 §§ 5, 6; People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014).

This case has *all* of the earmarks of a wrongful conviction. It rests solely on the identification testimony of a single eyewitness, who grossly misrepresented his

true identity. Despite the People's strenuous efforts to depict the case against James Davis as resting on multiple sources, the fact is that only Jose Machicote offered an unequivocal identification against Davis. Moreover, Machicote concealed an extraordinary level of ongoing criminality, and the prosecutors, unwittingly or not, capitalized on that lie in closing arguments, presenting the jury with a material misrepresentation of fact regarding their most important witness. The second eyewitness, Shawn Belton, did not identify Davis at trial. The third eyewitness, Harold Pou, also failed to identify Davis as the shooter. He testified that Davis resembled the shooter, but had a different hairstyle. Everything else the People offered is nothing more than speculation and innuendo.

This case includes another hallmark of wrongful conviction: a near-total lack of investigation by defense counsel, coupled with a failure to mount *any* effective defense at trial. Davis was saved from conviction at his first trial by the strong alibi testimony of Kaneen Johnson. Yet when she failed to appear at his second trial, counsel stood idly by. See Point II.

An additional classic hallmark of wrongful conviction is the phenomenon known as "tunnel vision." Police and prosecutors may become convinced, in good faith, that a suspect is guilty. Contrary evidence is ignored, and doubts about the strength of the inculpatory evidence are pushed aside. Here, the police appeared to have focused solely on Davis based upon what we now know was a false tip by a

woman who had not even attended the party. Both the detectives and the prosecutors wholly disregarded Davis's detailed alibi from that evening, never bothering to even investigate it.[25]

People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014), established a freestanding claim of actual innocence in New York: a defendant is entitled to relief when he establishes by clear and convincing evidence that he is actually innocent. The determination of whether a defendant has met this standard must be based on "all reliable evidence, including evidence not admissible at trial based upon a procedural bar." People v. Hamilton, 115 A.D.3d at 27. In addition, the court is not bound by the rules of admissibility that would govern at trial. Schlup v. Delo, 513 U.S. 298, 327 (1995); People v. Tankleff, 49 A.D.3d 160, 181 (2d Dept. 2007) (hearing court must view and evaluate the evidence in its entirety, making its final decision based on the likely cumulative effect of the new evidence had it been presented at trial). See also, People v. Bermudez, 25 Misc.3d 1226, *39(A) (N.Y. Cty Ct. 2009) (there must be a full and fair review of the evidence and the reasonable inferences that flow from that evidence).

[25] Perhaps it was tunnel vision that caused them to disregard the fact that Davis did not have braids that evening as well, or that their case rested solely on eyewitness testimony with no corroborating physical evidence. The eyewitness testimony in this case was particularly suspect, given that it was a crowded, chaotic scene in which the shooting took place, and the witnesses did not know the shooter – factors that would have been explained at the hearing had Judge Chun permitted the testimony of an eyewitness expert.

Here, as in other cases where hearing courts have found actual innocence, more than one witness came forward to explain why the defendant was actually innocent. Further, the defense in those cases presented a narrative that was extremely detailed and provided clues as to what led to the wrongful conviction. See People v. Wheeler-Whichard, 25 Misc.3d 690 (NY Cty. 2009); People v. Bermudez, supra; People v. Hamilton, supra (relying on detailed testimony by several alibi witnesses).

So too, in this case, two witnesses – Corey Hinds and Jamel Black – confirmed James Davis's account and testified to the details of drinking ahead of the party and meeting up in the bathroom at the Masonic Temple Hall, where they smoked marijuana and drank some more. They further corroborated the fact that James Davis began throwing up and that people were laughing at him. Jamel Black – who still held a grudge against Davis for having sex with his girlfriend while he was incarcerated – testified that when he walked into the bathroom and heard the laughter, he thought they were laughing at him about his girlfriend's infidelity with Davis, only to find they were laughing at Davis because he could not hold his liquor. Thus, Jamel Black had both a distinct reason to remember this moment, and no motive to testify, other than to right a wrong. Ernest Hollman corroborated that "one of the brothers who had a birthday that night" had been sick and threw up by the bar,

and that the security guard told them to leave. All of those witnesses testified that it was Daniel's birthday .

Kaneen Johnson appeared at the 440 hearing pursuant to a material witness order and testified to the same set of facts she had told Davis's first jury about fourteen years earlier.[26] Kaneen Johnson's testimony, which convinced eleven jurors at the first trial of Davis's innocence, was similarly specific and rife with memorable details of his throwing up on the sidewalk and again at her aunt's house that night. Her aunt, Wanda Chapman, corroborated that Davis was drunk, that he and Kaneen spent the night and that she remembered hearing someone throwing up. Both she and Kaneen Johnson testified that it was well before 4:00 in the morning when James and Kaneen arrived at her apartment.

Beyond the strong alibi testimony, the discrepancies in the prosecution witnesses' descriptions of the shooter point to the likelihood of a mistaken identification. Here, one witness, Shawn Belton, described the shooter as a light skinned black man wearing a black skully cap. Another, Harold Pou, described him as a light skinned black man with braids. The deceased's brother-in-law, Jose Machicote, described the shooter as brown skinned with braids. At the 440 hearing, however, three defense witnesses corroborated Davis's testimony about his hair style

[26] The last time that Kaneen had seen James Davis was in court, at his first trial in November of 2005 (Vol. II, Ex. 23 at 514).

that night, a short Caesar cut with waves, not braids. Further, each witness gave detailed reasons for remembering Davis's hair. See Statement of Facts, Infra at p. 17, 28.

As in several previous cases involving wrongful convictions,[27] there were clues here about what went wrong with the investigation and the prosecution of James Davis. The detectives focused exclusively on James Davis after his ex-girlfriend falsely accused him of murdering Blake Harper, although it was clear from the only police report of that conversation that she had not attended the party. Indeed, based upon the detective's notebook from that first day – where James Davis's name is written on the first page, along with the description "perp" – it is clear that tunnel vision set in, and no further investigation was conducted. At the pretrial hearing, Detective Hutchison reluctantly conceded that Tina Black, Jr. had named James Davis, and as a result, Davis's photo was put in a photo array that was viewed two weeks after the incident by the brother-in-law of the deceased, Jose Machicote.

That two weeks after the shooting, Jose Machicote came to the police station to look at a photo array is in itself suspicious, given that there was no police record

[27] In Bermudez, the eyewitnesses were left alone with the arrest photographs to identify the shooter, creating an unduly suggestive identification proceeding. The witness who claimed to know the shooter was then threatened with being prosecuted as an accomplice if he did not cooperate. In Hamilton, the detectives, including Detective Louis Scarcella, threatened the main witness (who had since recanted) with criminal prosecution and with removing her children from her custody if she did not testify against the defendant.

of his having witnessed the shooting in the first place. If anything, Machicote was also in the middle of the fight that occurred just before the shooting. Several witnesses – both prosecution witnesses at trial and Jamel Black at the hearing - credited him with instigating the fight. According to Shawn Belton and Harold Pou, Machicote got into a fight and Harper went over to assist him. According to Jamel Black, a short Puerto Rican man in a fur coat (Machicote) grabbed a bottle of champagne from Jamel's brother, Mikey, after his brother stepped on Machicote's foot. Machicote, on the other hand, concealed his role as the instigator of the fight, and described himself as attempting to mediate a dispute that arose when Blake Harper stepped on another man's foot. This fact, combined with the fact that Machicote was on parole, and was in violation of parole for being at that party after his curfew, made him someone who could have been pressured into cooperating. In addition, Blake Harper was his brother-in-law. It is reasonable to infer that there was pressure on him by the family to cooperate. That he picked James Davis from a photo array, which included a two-year-old photograph of Davis from when he was nineteen and had braids, is hardly reliable proof upon which to stake a prosecution.

The subsequent lineup identifications made by Pou and Belton were suspect from the beginning: they only became witnesses after Harper's mother pressured them to go to the precinct to view the lineup which they were told contained the

suspect; neither had previously given any description of the shooter or stated that they had witnessed the shooting. Had the hearing court not precluded the testimony of an identification expert who would have testified to the unreliability of identifications made after being told that there was someone in the lineup they needed to identify, the effects of stress on an identification, and weapons focus, the court might not have found the identification testimony made by Pou and Belton to be reliable evidence. Clearly, the jurors from the first trial were not persuaded by their testimony, since they had voted 11 to 1 to acquit Davis.

At Davis's second trial, Belton was forced to testify by means of a material witness order. This time, he recanted, testifying that he had only glanced at the shooter and could not identify him. The prosecutor capitalized on Belton's recantation, claiming that he was too frightened to testify against Davis, even though there was nothing in the record to support that inference. Then, she buttressed that speculation with her vouching for Machicote, claiming he was very brave for coming to court to identify James Davis, and extolling his credibility, basing it on his so-called honesty about his criminal record. She claimed that he was now a barber, implying that his criminal activity was a thing of the past. Had the hearing court permitted testimony about Jose Machicote's true identity at the time of Davis's trial – a major drug trafficker in Brooklyn who was the target of a joint FBI/NYPD investigation - it might have evaluated Machicote's trial testimony more critically.

Notably, the court excused the inconsistencies in the testimony of the People's eyewitnesses, but then relied on the inconsistencies in the defense witnesses' testimony to reject the defense evidence at the hearing in its entirety. Incredibly, based solely on speculation and hearsay, the court cited to a hearsay statement by the prosecutor at Davis's first trial that some woman came up to Harold Pou and said that the defendant knew where he lived to find that Davis had actually threatened Pou. Pou never testified to that fact. The court further excused Shawn Belton's recantation, relying on Davis's hearing testimony that he recognized Belton from a middle school basketball team they had both briefly played on together. With no evidence to support its finding the court ruled that: "[t]he fact that Pou *was threatened* after the first trial makes it plausible that Belton, whom the defendant actually knew, could have been threatened as well, and that is why Belton recanted" (Vol. I, Ex. 1 at 37).

B. The Hearing Court Failed to Conduct a Full and Fair Review of the Evidence and Failed to Draw the Reasonable Inferences from that Evidence

In reaching its conclusion that James Davis failed to prove his innocence, the court distorted legal principles, refused to consider all available evidence, precluded defense counsel from putting on all of its evidence, and conflated clear and convincing evidence with proof beyond a reasonable doubt.

Initially, the court erred when it refused to consider James Davis's evidence in its entirety, simply because he was the defendant. Calling Davis "absolutely the

most interested witness," the court held that "given such an overwhelming amount of self-interest," it could not find his testimony to be credible or reliable. (Vol. I, Ex. 1 at 33). By so ruling, the court distorted the law governing interested witness which states: *You are not required to reject the testimony of an interested witness*, or to accept the testimony of a witness who has no interest in the outcome of the case (emphasis added). You may, however, consider whether an interest in the outcome, or the lack of such interest, affected the truthfulness of the witness's testimony. CJI2d [NY] "Interested Witness." [28] Indeed, all wrongfully convicted defendants will always have an interest in having their convictions overturned. This cannot be the end of the inquiry.

Rather than fully evaluate James Davis's testimony, the court picked one fact it found incredible: his testimony that he was in the bathroom the entire night. Had the court followed the guidelines that are given to jurors when assessing credibility, it would have noted that James Davis has maintained his innocence from the day he was arrested. The court might have weighed the fact that James Davis provided the court with a level of detail about that night that resulted in a full day of testimony,

[28] If anything, to exclude Davis's testimony out of hand, without a careful assessment of its entirety, simply because he was the defendant, is akin to the county court in People v. Tankleff, 49 A.D.3d 160, 179 (2d Dept. 2007), dismissing the possibility that witnesses with criminal records, drug addictions, and psychiatric issues are capable of testifying truthfully. Instead of dismissing Davis's testimony outright, the hearing court should have evaluated the evidence in its entirety, considering what evidence, if any, was substantiated by the testimony of other witnesses.

and included details about his skin condition that caused him to cut his hair, and that he now knew that the condition was called folliculitis, and that he had been given medication for the skin condition while incarcerated. It would have also noted that James Davis told the detectives the names of several people to speak to who could corroborate his alibi. The judge would then have had to concede that three of those witnesses came to the hearing, fifteen years later, and did in fact, corroborate his alibi.

By discounting Davis's testimony in its entirety, the court held that there was no direct evidence that Davis actually left the party altogether. Of course, there was direct evidence, the testimony of Kaneen Johnson, who met James Davis when he took a cab to her house that night around 1:30 to 2:30 a.m. The other piece of evidence that established that Davis had definitively left the party was a sworn affidavit from his deceased brother, Daniel Davis, in which Daniel describes placing James in the cab and sending him to Kaneen's address. The court refused to consider that affidavit, despite the principles set forth in both the state and federal cases that all evidence must be considered, even evidence which would be inadmissible at trial. Tellingly, Daniel Davis's affidavit not only attested to the fact that the defendant had left the party in a cab, but also provided a detail that James Davis did not know: that his brother found him passed out in a chair holding a bottle of alcohol.

The court also discounted Ernest Hollman's testimony about finding vomit on the floor by the bar and the security guard telling him that one of the birthday brothers had been sick and that he had kicked them out. First, it found it incredible because Davis did not testify to throwing up by the bar, and then it reasoned that there could have been other brothers attending the party since there were several names on the flyer.

The Judge's two conclusions -- that James Davis never left the party and that there were other brothers at the party, where one had a birthday and one began throwing up - were unreasonable inferences to draw from the evidence. The reasonable inferences to draw were that James Davis, who did not like parties and was not a drinker, left when he became sick. It is reasonable to infer that he might not have remembered every time that he threw up that evening. It is not reasonable to believe that he left, but then came back to party, undetected by his friends, and hung around until he shot someone. Nor was it reasonable to reject the testimony of all of the witnesses who came to court, some – Tina Black and Asia Snow – in pain, who corroborated what James Davis told the police fifteen years earlier.

Instead of considering all the credible evidence, the hearing court did the exact opposite, and precluded several aspects of the defense's evidence: Daniel Davis's affidavit, testimony about Jose Machicote's true identity, expert testimony regarding the unreliability of the sorts of identifications that occurred in this case, testimony

regarding the named shooter, Tay Hall's reputation for violence, and expert testimony about the distrustful relationship between people in the community of Brownsville and the police. All of the precluded testimony and evidence fully supported James Davis' actual innocence.

* * *

The cumulative effect of the testimony from Jamel Black, who no longer liked James Davis; Ernest Hollman, the party promoter who is now in his forties, working as a caterer; Asia Snow, the middle-aged female neighbor who suffers from fibromyalgia; Tina Black, Sr., the mother of the deceased woman who falsely accused James Davis; and Kaneen Johnson, Davis's former girlfriend who came to court against her will, having been threatened the day she testified fifteen years earlier, and corroborated James Davis's account, all combined to create a detailed narrative that credibly described what really happened that night. James Davis went to the party at the Masonic Temple to celebrate his brother's birthday, he drank too much alcohol, began throwing up, left the party and spent the night with Kaneen Johnson at her aunt Wanda Chapman's apartment. On that night, James Davis's hair was not in braids, but styled in a low Caesar cut with waves, because he had cut if off after he developed a skin condition on his scalp. Further, the defense showed how James Davis became the sole target of this investigation based upon the false allegation of Tina Black, Jr.. Viewing this strong and highly credible evidence

against the People's weak identification testimony and the complete lack of physical evidence, the testimony of the defense's eight hearing witnesses established by clear and convincing evidence that James Davis was actually innocent of the murder of Blake Harper on January 25, 2004.

Thus, this conviction should be vacated and dismissed. If this Court determines that a remand is necessary, this case should be remanded to a different judge.

POINT II

TRIAL COUNSEL'S FAILURE, WITHOUT ANY CONCEIVABLE STRATEGIC BASIS, TO INVESTIGATE AND INTERVIEW NUMEROUS ALIBI WITNESSES, TO SCRUTINIZE THE PROSECUTION'S CASE, OR TO SECURE THE PRESENCE OF THE ALIBI WITNESS WHO HAD TESTIFIED AT THE FIRST TRIAL, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. U.S. CONST. AMENDS. VI, XIV; N.Y. CONST., ART. 1 § 6.

James Davis insisted from the moment of his arrest that he had left the party at the Masonic Hall long before the shooting, and that several of his friends, whose names he provided to counsel, could verify his account. Yet trial counsel limited himself to speaking with Davis's then girlfriend, who corroborated his version of the

evening.[29] It was this "investigation" that the 440 court implicitly,[30] and erroneously, found to satisfy counsel's constitutional obligation to "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed…." People v. Bennett, 29 N.Y.2d 462, 466 (1972); People v. Fogle, 10 A.D.3d 618, 619 (2d Dept. 2004) (post-conviction submissions revealed the existence of exculpatory witnesses such that counsel's failure to investigate prejudiced the defendant); see also Wiggins v. Smith, 539 U.S. 510, 522-23 (2003) (reasonableness of investigation leading to failure to present mitigating evidence to be assessed objectively in terms of relevant professional standards). Yet when the girlfriend did not appear at the second trial, counsel took no steps to secure her attendance. Instead, because he had not even interviewed the other witnesses, the numerous witnesses who could have supported Davis's alibi defense never testified. Because no conceivable strategic reason could possibly justify counsel's failure even to interview any of the additional potential alibi witnesses, and because he failed to secure the attendance of the one witness whose testimony he knew supported Davis's alibi defense, counsel did not provide the effective assistance of counsel to which

[29] Davis's trial attorney passed away in 2013, so it was not possible to question him regarding his failure to investigate. Instead, hearing counsel relied on the court file and testimony of the hearing witnesses.

[30] The court's opinion never so much as mentions these seminal cases, focusing instead on counsel's decision not to have additional alibi witnesses testify at trial.

Davis was entitled under both the federal and New York State Constitutions. U.S. Const., Amends. VI, XIV; N.Y. Const. Art. 1, §6; People v. Borcyk, ___ A.D.3d ___, 2020 WL 3160982, *2 (4th Dept. June 12, 2020)

The conclusion that counsel's performance in conducting the investigation in this case was grossly deficient is inescapable under uniformly accepted standards governing the criminal defense function. See ABA Criminal Justice Standards for the Defense Function, Standard 4-4.1, Duty to Investigate and Engage Investigators.[31] Even if it might have been reasonable for trial counsel ultimately to decide not to use[32] one or more of the many witnesses who spent time with Davis that evening, it is simply unimaginable that investigation into this case could be deemed "adequate" or "appropriate" without so much as trying to talk to them. Significantly, trial counsel failed even to request an investigator to assist in this case, despite explicit authorization for such an appointment.[33]

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[31] This duty is described broadly: "Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter…." Standard 4-4.1(c), and specifically requires defense counsel to "determine whether the client's interests would be served by engaging fact investigators…." Standard 4-4.1(d).

[32] Tellingly, rather than addressing counsel's virtually non-existent *investigation*, the hearing court focused on counsel's supposed strategic decision *not to call* any of the alibi witnesses the defense presented at the hearing. See Vol. I, Ex. 1 at 39.

[33] See New York County Law Article 18b, Section 722, Case Assignment Rules – Panel Attorneys (providing authorization to hire an investigator to assist with locating and interviewing witnesses who might have exculpatory information); see also New York State Office of Indigent Legal Services, Standards for Establishing and Administering Assigned Counsel Programs, §8.5, 8.5a (ensuring that assigned attorneys have access to non-attorney services, including investigatory

The hearing court made much of the fact that some of defendant's friends had criminal records. That is absurd on its face, given the spectacular criminal history of Jose Machicote, the People's star witness, and the record of Shawn Belton, their (non-identifying) second witness, who testified grudgingly under a material witness order. The shooting took place in a crowded dance hall at 4 a.m. in East New York. As the People so frequently remark, the parties must take the witnesses as they find them.

But even more fundamentally, without speaking to the witnesses, counsel was in no position to make any judgment about whether to call them or not. As the Supreme Court has made clear in setting the constitutional standard for ineffective assistance of counsel, the deference owed to any purported strategic judgments regarding performance at trial depends on the adequacy of the investigations supporting those judgments:

> [S]trategic choices made after *thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*.

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services, needed at every phase of the case.): §9.2.k (as part of the Quality Assurance Provisions, requiring that attorneys utilize "appropriate non-attorney professional services, such as investigators.")

Wiggins, 539 U.S. at 521, quoting Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (emphasis added). Indeed, the Court emphasized again in its most recent opinion how thorough investigation is critical to the effective performance by counsel guaranteed by the Sixth Amendment. See Andrus v. Texas, ___ S. Ct. ___, 2020 WL 3146872 (U.S. June 15, 2020).

As the Supreme Court precedents emphasize, the question is *not* whether counsel should have presented the alibi witnesses Davis had identified, but rather "whether the investigation supporting counsel's decision not to [present these witnesses] was itself reasonable." Id. at 523. It is simply impossible to conclude that talking to witnesses whose names Davis gave, not only to counsel but to the detectives investigating the case, was "unnecessary."[34]

Speaking to one witness, particularly when that witness is closely related to the defendant, cannot excuse counsel's failure even to find out what other witnesses might have to say, especially witnesses who were actually at the party when the shooting took place. It is in no way reasonable to fail even to try to talk to witnesses who could support the defense. See People v. Green, 37 A.D.3d 615 (2d Dept. 2007) (defendant denied effective assistance where trial counsel failed to investigate

[34] And indeed, the 440 court made no such finding, noting only that counsel did in fact contact Kaneen. Vol. I, Ex. 1 at 39.

potential witnesses who could have offered exculpatory testimony substantiating misidentification defense).

True, when a defense attorney fails to make a particular pre-trial motion, see, e.g., People v. Rivera, 71 N.Y.2d 705 (1988), or omits a particular issue from an appellate brief, see, e.g., United States v. McKee, 167 F.3d 103 (2d Cir. 1999), courts evaluating an ineffectiveness claim must consider whether those decisions might have had a strategic basis. See Rivera, 71 N.Y.2d at 709; McKee, 167 F.3d at 106. But when it comes to exploring possible defenses that might be available for presentation at trial, no strategic reason could possibly justify the failure to investigate witnesses who were indisputably present when the crime occurred.

That conclusion would follow no matter what Davis told his attorney,[35] as well as the detectives, about his whereabouts that evening. But counsel's failure to investigate is all the more egregious given that, from the start, and until the present day, Davis has insisted that he was innocent of this crime, and that he could prove his innocence through witnesses who would confirm that he left the party at the Masonic Temple where they were celebrating his brother's birthday, after throwing

[35] See ABA Criminal Justice Standards for the Defense Function, Standard 4-4.1(b): "The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt."

up in the bathroom, well before the shooting occurred. Any competent lawyer would seek out these witnesses.

Had counsel done even the most cursory investigation into these potential witnesses, he would have learned that these young men did indeed observe the embarrassing scene of Davis not being able to hold his liquor, an image that stayed with them many years later because they were still present at the party when the shooting took place. Their recollections might have provided strong support for Kaneen's testimony, in which she described Davis throwing up after getting out of the cab in front of her house. Critically, it is only after speaking to these witnesses that counsel would have been in a position to make any reasonable strategic decision about whether to put them on the stand. Further, Daniel was alive at that time and could have testified to putting James into a cab well before the shooting occurred.

Moreover, counsel's deficient performance had a devastating impact on the trial resulting in Davis's conviction of murder, far exceeding the applicable standard of a "reasonable probability of a more favorable outcome" had counsel performed effectively. See Strickland v. Washington, 466 U.S. at 694. Notably, at his first trial, when Kaneen testified to Davis's leaving the party early, despite the testimony of three witnesses pointing to Davis as the shooter, the jury came just one vote short

of finding him not guilty.[36] It is therefore at least reasonably probable that, had even just one witness corroborated Kaneen's testimony regarding Davis's alibi, that hold-out juror would have been persuaded.

Second, the probability of a more favorable outcome at the second trial, had counsel investigated these potential witnesses, is even more likely. When Kaneen failed to appear, counsel would have had two possible options. He could have secured a material witness order to secure Kaneen's appearance. Indeed, counsel's failure to pursue that remedy itself supports the conclusion that counsel was ineffective. See People v. Borcyk, ___ A.D.3d ___, 2020 WL 3160982, *2 (4th Dept. June 12, 2020) (failure to secure the presence of a witness whose boyfriend had admitted that he was the killer constituted ineffective assistance). In fact, at the 440 hearing, defense counsel brought Kaneen to court pursuant to a material witness order and her testimony was consistent with that of the first trial.

And if Kaneen had remained unavailable, counsel would have been in a position to reevaluate whether calling Davis's brother or one of his friends, despite their criminal records or open criminal cases, was preferable to putting on no case,

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[36] The fact that the jury struggled, and nearly voted to acquit, when the defense actually put on a case, belies the hearing court's characterization of the People's case as "overwhelming" (Vol. 1, Ex. 1 at 40). The hearing court's decision is also oblivious to the many warning signs of wrongful conviction present here, including reliance on stranger eyewitness identification, and "tunnel vision" as exemplified by the false tip that led the police to focus on James Davis ("Perp: James Davis, J")(Vol. I, Ex. 9 at 450).

particularly given the fact that the prosecution witnesses all had criminal records, especially the only one who never wavered in his identification.

Each of the potential defense witnesses had something to add to create a reasonable doubt in the minds of the jurors. Ernest Hollman (named in Davis's statement to the police) and Asia Snow (whose name was listed in Detective Egger's notebook) could have testified about the fact that James had short hair that night, thereby distinguishing Davis from the consistent description of the shooter as having braids. Corey Hinds, Jamel Black and Daniel Davis could have testified to the fact that James Davis was throwing up and left the party well before the shooting occurred. In addition, these witnesses could have provided critical testimony about how crowded the dance hall was, and how chaotic it became when everyone began rushing to the only exit once the shooting began.

Counsel's failure to take the basic steps of hiring an investigator and interviewing the alibi witnesses cannot not be defended as a strategic decision, where he did not know what details they could provide or how they would present to a jury. His failure to take these fundamental steps to properly investigate Davis's detailed alibi defense, coupled with his failure to bring Kaneen Johnson to court with a material witness order - as in the postconviction hearing - greatly prejudiced Davis. As a result, Davis was deprived of his constitutional right to effective assistance of counsel.

POINT III

THE COURT'S SUMMARY DENIAL OF THE MOTION TO REOPEN THE 440 HEARING BASED ON NEWLY DISCOVERED EVIDENCE AND FAILURE TO DISCLOSE BRADY MATERIAL WAS REVERSIBLE ERROR. U.S. CONST. AMENDS. V, VIII, XIV; N.Y. CONST. ART. 1 §§ 5, 6; C.P.L. § 440.10(1)(b), (c), (f), (g), (h).

During the course of the hearing, defense counsel presented evidence establishing that Jose Machicote, a key prosecution witness, was not only engaged in serious and ongoing criminal conduct in the period leading up to James Davis's trial, but that state and federal authorities were aware of this conduct and had him under active investigation. This evidence was of great significance: not only did it have the potential to thoroughly undermine the prosecution's theory at trial that Machicote's criminal activity was behind him, and that the jury could credit his testimony because he had been honest about his past, but it also demonstrated that he had testified falsely when he presented himself as a simple barber. Given that Machicote was the only prosecution witness who identified Davis in court as the shooter and, hence was the sole witness connecting Davis to the crime, evidence that called his credibility into question, or provided a motive for him to wish to curry favor with the police and prosecution, would have been extraordinarily powerful.

This information constituted newly discovered evidence within the meaning of C.P.L. § 440.10(1)(g), and was also evidence of a potential violation of the

prosecution's obligation to disclose favorable evidence pursuant to Brady v. Maryland, 373 US 83, 87 (1963). The defense sought to expand the hearing to include testimony by FBI Agent Jed Salter, who had uniquely relevant first-hand knowledge on the subject, having led the investigation, orchestrated controlled purchases of drugs from Machicote, and coordinated efforts with the NYPD. However, the court denied the defense's request, and the prosecution rebuffed the defense's efforts to obtain information in the prosecution's exclusive possession that would have permitted the defense to fully litigate these claims.

The court denied the defense's Brady claim on the ground that the defense had "failed to prove that the information regarding the . . . investigation of Machicote was in the People's possession or that it was suppressed by the People" (Vol. I, Ex. 1 at 42).[37] However, the defense had clearly made sufficiently detailed allegations to warrant a hearing on that issue. The court further held that even if the information had been suppressed, Davis was not prejudiced by this violation because Machicote had been impeached with his prior criminal record. Id. However, it is one thing to ask the jury to accept the word of a reformed violent felon and quite another to ask them to credit the testimony of a violent felon engaged in ongoing criminality. The court did not address the newly discovered evidence claim.

[37] The court neglected to consider that law enforcement might have possessed this information – particularly since Hutchison had been a narcotics detective in that area – and they too, had an obligation to disclose this evidence.

A. Newly Discovered Evidence

The newly discovered evidence demonstrating Machicote's involvement in drug trafficking and other crimes at the time of his testimony in Davis's trial established a prima facie case for entitlement to a new trial under C.P.L. § 440.10(1)(g), and therefore warranted a hearing so that the defense could further develop the facts and meet its burden. C.P.L. § 440.30(5); People v. Jones, 24 N.Y.3d 623, 638 (2014) (Abdus-Salaam, J., concurring). Yet the 440 court denied the motion without conducting a hearing, or even addressing this aspect of the defense's pleadings in its decision. On the record before the court, it was error to deny the defense a hearing on the newly discovered evidence claim.

This Court articulated the standard for analyzing whether newly discovered evidence requires vacatur of a conviction in People v. Hargrove, 162 A.D.3d 25 (2d Dept. 2018). The defendant must be granted a new trial when: "(1) new evidence has been discovered since the entry of a judgment (2) which could not have been produced by the defendant at the trial even with due diligence on his part and (3) which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." Id. at 59. In determining whether the evidence creates a probability of a more favorable verdict, courts must "consider whether and to what extent the new evidence is (1) material to the pertinent issues in the case, (2) cumulative to evidence

that was already presented to the jury, and (3) merely impeaching or contradicting the evidence." Id. But this Court clarified that impeachment evidence "may properly form the basis for a new trial where it is of such weight that it would create a probability of a more favorable verdict." Id. at 58. The reviewing court "must view and evaluate all of the evidence in its entirety," and "make its final decision based on the likely cumulative effect of the new evidence had it been presented at trial." People v. Tankleff, 49 A.D.3d 160, 181 (2d Dept. 2007). That effect is measured not "by simply considering the strength it would afford the defense case," but also "in the context of the relative strength of the People's evidence of guilt." People v. Hargrove, 162 A.D.3d at 66.

The decision below makes no reference to Hargrove, or the standard articulated therein. It does not refer to C.P.L. § 440.10(1)(g). The decision below referred only to the Brady violation, without any analysis whatsoever of whether Davis was entitled to a new trial on this additional ground, or a hearing at which he could demonstrate his entitlement.

One source of the error committed by the court below was its conflation throughout the proceedings of the defense's newly discovered evidence with its Brady claim. In ruling on the defense's request for a hearing on the newly discovered evidence, the court grafted on a requirement of suppression of the evidence not contemplated by C.P.L. § 440.10(1)(g) or Hargrove. Initially, the court

granted the defense permission to present testimony regarding newly discovered evidence, while denying the defense's request as to Brady (Vol. II, Ex. 21 at 447-48, 450). However, when presented with a subpoena for Agent Salter, the 440 court refused to sign it.[38] In explaining this decision, the 440 court focused on whether the information about Machicote had been suppressed by the prosecution or police working on the case. When defense counsel attempted to explain that Agent Salter's testimony about Machicote's activity would also constitute newly discovered evidence, the court returned to the question of whether it had been suppressed, answering that counsel could only have cross-examined Machicote about it if the prosecution had disclosed it, which would have required the prosecution to know about it (Vol. I, Ex. 12 at 599; Vol. II, Ex. 23 at 517, 519).

In its subsequent written submissions and oral argument, the defense squarely presented the Brady and newly discovered evidence issues as two separate grounds for relief. The defense asked for a hearing at which Agent Salter could testify about specific acts committed by Machicote and identify specific dates on which they occurred (Vol. I, Ex. 12 at 597; Vol. I, Ex. 14 at 640; Vol. III, Ex. 44 at 371-382). The defense called attention in its papers to its lack of access to detailed information

[38] Refusing to sign the subpoena had the effect of denying the hearing, as the FBI would not permit Agent Salter to testify without a judicial subpoena.

about Machicote's criminal conduct, which was solely in the possession of law enforcement (Vol. I, Ex. 12 at 604-05). However, the 440 court decided the motion without a hearing, without explaining why it did not permit the defense to call Agent Salter to give testimony about this issue, and indeed, without acknowledging that this additional ground for a new trial was before it.

The defense amply established its entitlement to a hearing on this issue. A 440 court must grant a hearing where, as here, the defense's sworn allegations set forth a legal basis for relief, and the case is not otherwise summarily disposed of pursuant to § 440.30(2), (3), or (4). At the pleading stage, the defense is not required to establish a likelihood that it would prevail were a hearing granted. People v. Jones, 24 N.Y.3d at 637-38 (Abdus-Salaam, J., concurring); People v. Hughes, 181 A.D.2d 912, 913 (2d Dept. 1992). Rather, "CPL 440.30(5) clearly contemplates that defendants who make the required prima facie showing have the right to present that evidence at an evidentiary hearing." People v. Jones, 24 N.Y.3d at 638 (Abdus-Salaam, J., concurring).

In its papers in response, the prosecution did not dispute that any of the conduct attributed to Machicote occurred, or that it could not have been discovered by trial counsel. The prosecution did not address the defense's allegation that Machicote lied, or controvert the defense's contention that the trial assistant was able

to capitalize on that lie during summation. Instead, in a footnote[39], the prosecution downplayed the significance of the newly discovered evidence on two grounds. First, the prosecution countered that Machicote was never convicted of any of the crimes uncovered in the investigation, ignoring the fact that charges were not brought against anyone until well after his death (Vol. I, Ex. 13 at 628, n.1.; Vol. I, Ex. 14 at 639). Second, the prosecution stated that the value of the information about Machicote's conduct was "limited" because the jury had been apprised of his prior convictions (Vol. 1, Ex. 13 at 628, n. 1). But this argument disregarded the fact that the jury had been led to believe that Machicote was a barber whose criminal days were squarely in his past—"back in the late '90's," as the trial assistant described them—whereas we now know that he was actually involved in a violent criminal enterprise at the time he testified and concealed that fact from the jury (Vol. I, Ex. 12 at 591, 603-04).

Given the foregoing, there was at minimum "a dispute between the defendant and the People concerning . . . the weight to be given" to the evidence regarding Machicote "in light of" the other evidence in the case. People v. Jones, 24 N.Y.3d

[39] The prosecution's chief argument was that the defense's request to call Agent Salter was moot, because the defense had been granted permission to call a witness regarding newly discovered evidence and then failed to do so. This argument at best misunderstood the procedural posture of the case and at worst mischaracterized it, as the defense had been prevented from calling its witness by the court's refusal to sign a subpoena for Agent Salter (Vol. I, Ex. 13 at 627-28; Vol. 1, Ex. 14 at 638).

at 636. Under these circumstances, a hearing should have been held on the defense's allegations to determine the Davis's entitlement to relief. Accordingly, this Court should reverse the court below and order a hearing.

B. The Brady Violation

The 440 court ruled, again without holding a hearing, that Davis had not established a Brady violation with respect to Machicote's false testimony regarding his true occupation and concealment of his ongoing criminal activity. First, the court held, Davis "failed to prove that the information regarding the FBI's investigation of Machicote was in the People's possession or that it was suppressed by the People" (Vol. I, Ex. 1 at 42). The court went on to hold that even if such information had been suppressed, Davis was not prejudiced by this violation because Machicote had been impeached with his prior convictions and the jury was able to factor them into its evaluation of his credibility (Vol. I, Ex. 1 at 42).

The decision below is flawed in numerous respects. First, the court erred in reaching the merits without granting a hearing; in doing so, the court not only ignored the defense's evidence suggesting strongly that the prosecution was aware of Machicote's criminal activities, but failed to give due consideration to the defense's lack of access to necessary information. Furthermore, in its consideration of the substance of the Brady argument, the court reached an erroneous conclusion regarding prejudice, which resulted from its disregard of the bulk of the evidence

put forth by the defense, most notably Machicote's dishonesty on the stand and the prosecution's use of his lie to shore up his credibility. Moreover, what facts it did consider, it did so in isolation, rather than cumulatively as is required. These errors of fact and law require reversal by this Court, and remand for a hearing on the defense's allegations.

1. A Hearing Was Required Where the Defense Had No Other Means of Accessing Relevant Information in the Exclusive Possession of Law Enforcement

In oral colloquy and written argument regarding its Brady claim, the defense requested a hearing to resolve the underlying issues of fact. The defense argued that it had made the most specific factual showing possible under the circumstances, but that it lacked access to information it required to sustain its burden because that information was in the exclusive possession of law enforcement. The 440 court instead resolved contested factual issues against Davis without a hearing. The court's denial of the defense's motion without a hearing contravened established law regarding the standard by which courts should assess the sufficiency of factual allegations and the necessity of a hearing.

In a trio of cases, the Court of Appeals has articulated a standard for determining whether a hearing is required prior to resolution of a motion. In People v. Gruden, 42 N.Y.2d 214, 215 (1977), the Court held that motions may be decided without a hearing "unless the papers submitted raise a factual dispute on a material

point which must be resolved before the court can decide the legal issue." Subsequently, in People v. Mendoza, 82 N.Y.2d 415 (1993) and People v. Jones, 95 N.Y.2d 721 (2001), the Court clarified the standard applicable when considering whether a defendant's factual allegations are robust enough to require a hearing. In sum, the Court held that "it would be unreasonable . . . to require precise factual averments when . . . defendant . . . does not have access to or awareness of the facts necessary to support" his motion. Jones, 95 N.Y.2d at 728, quoting Mendoza, 82 N.Y.2d at 429. The defendant must supply whatever facts he does possess, and their sufficiency is to be evaluated within the context of the case and the defendant's ability to access relevant information. In conducting this analysis, two relevant factors are whether the defendant has received discovery regarding the contested factual issue, and whether the defendant noted in his papers a lack of access to missing information. People v. Jones, 95 N.Y.2d at 728-29; People v. Mendoza 82 N.Y.2d at 427-28, 429, 433-34. Ultimately, as the Court held in Jones, a defendant cannot "be required to allege facts about which he had no knowledge." 95 N.Y.2d at 729.

Applying this standard to the allegations set forth in Davis's motion, the 440 court should have considered his Brady claim within the context of his lack of access to information in the exclusive possession of law enforcement, and the District

Attorney's apparent refusal to disclose information within its control. Had the 440 court done so, the need for a hearing would have been apparent.

The defense set forth a detailed factual basis for its contention that Machicote's criminal history was not simply history, but was his present occupation at the time of Davis's trial. The sources of this information were (1) a conversation with an FBI agent who had been personally involved in investigations into Machicote and had personally directed controlled purchases of drugs from him; (2) that agent's sworn testimony in an earlier federal trial; and (3) court filings, the vast majority submissions by federal prosecutors, the remainder statements made in open court by defense counsel and not contradicted by the prosecutors who were present. As for the defense's contention that the officers working on the investigation of Blake Harper's murder either knew or should have known about Machicote's activity, the defense submitted an affidavit from a former NYPD Detective Investigator who was on the force contemporaneously with the investigation of this case, detailing his first-hand knowledge that targets of federal investigations are routinely entered into databases that are regularly searched by NYPD officers in the course of their own investigations, particularly prior to a trial witness's testimony (Vol. I, Ex. 12 at 612-14).

The defense was able to make a robust factual showing based on publicly available documents and the professional experience of one of its investigators.

However, the defense lacked access to the information that would have enabled it to definitively plead that any law enforcement actor working on Davis's case knew about Machicote's activity, or the precise dates of specific acts engaged in by Machicote. Detective Hutchison refused to speak with the defense, and the prosecution failed both to respond to the defense's request for discovery and to make its promised inquiries with the trial assistant. The defense called the court's attention to this lack of access to necessary information repeatedly and requested a hearing for this reason (Vol. 1. Ex. 12, 597-98, 607; Vol. 1, Ex. 14 at 632, 636-38).

In opposing Davis's motion, the prosecution did very little to address any factual issues. The prosecution's papers did not contest the veracity of the defense's core factual allegations regarding the nature of Machicote's activity or the FBI and NYPD's investigation.[40] They merely argued that the defense's allegations were insufficient and speculative, without explaining how the information available to the defense could possibly lend itself to more detailed pleadings, or why the prosecution chose not to respond to the defense's discovery request (Vol. I, Ex. 13 at 626-27). The prosecution's papers flatly denied that any law enforcement officer working on the case knew about Machicote's recent and ongoing criminal conduct (Vol. I, Ex.

[40] During oral argument on November 20, 2019, the prosecution concluded by stating, "The defense pointed out that in my response papers I didn't dispute the allegations defense made in their papers . . . . The People are disputing those allegations" (Vol. III, Ex. 44 at 403). Apart from this generic denial, the prosecution did not specifically controvert any of the defense's facts.

13). But this assertion was called into question by prior statements the prosecution made during colloquy with the court. When asked what was known to the prosecution at the time of the trial, the prosecution replied that there was no indication in the file; the subject had not come up in prior conversations with the trial assistant; and the prosecution's 440 team would inquire with the trial assistant to learn more (Vol. II, Ex. 21 at 445). The prosecution's papers did not explain what subsequent investigation it had undertaken to arrive at the definitive conclusion it presented, and further inquiry was required to resolve this apparent contradiction. In any event, the prosecution's bald assertion on this point could not substitute for an evidentiary hearing at which the relevant witnesses provided sworn testimony.

What was before the court, then, was a factual dispute in which the defense lacked access to the ultimate facts. Under Mendoza and Jones, this issue should not have been resolved without a hearing. At a hearing, Agent Salter could have testified about the specific dates of the controlled buys he oversaw, as well as details regarding any other bad acts of Machicote's that he was aware of, particularly those that transpired around the time of Davis's trial. The defense finally would have been able to fully develop its factual predicate with respect to Machicote's conduct. Furthermore, Agent Salter could have described the nature of the collaboration between the FBI and NYPD, discussed any contacts he had with NYPD officers, including those investigating the murder of Blake Harper, and confirmed whether

Machicote was entered into the federal databases accessed by the NYPD. Agent Salter's testimony could also have led the defense to other witnesses or sources of evidence that it was unable to learn of given the lack of discovery. In addition, Davis's attorneys could have questioned the detectives who investigated Davis's case, and the prosecutors, about their knowledge of Machicote's criminal activities.

Instead, the 440 court held that "the defendant failed to prove that the information regarding the FBI's investigation of Machicote was in the People's possession or that it was suppressed by the People" (Vol. I, Ex. 1 at 42). The court did not address the defense's lack of access to information or explain how the defense could have been expected to prove this fact in the absence of some discovery or a hearing; in fact, the court did not make any findings about the defense's factual allegations at all.

Mendoza and Jones leave no room for doubt: the 440 court erred in deciding these issues against Davis without a hearing. This Court should reverse the decision below and order a hearing on the defense's claim alleging a Brady violation.

2. The Court's Ruling on the Merits of the Brady Argument Misconstrued the Facts and Misapplied the Law

As for the merits of the Brady argument, the 440 court held (1) that the defense had failed to prove that the prosecution was in possession of information regarding "the FBI's investigation," and (2) even if it was, "there is no reasonable possibility that the outcome of the trial would have been different if the jury knew of the FBI

investigation" because the jury was already aware of Machicote's prior convictions (Vol. I, Ex. 1 at 42-43).

"The prosecution is required to disclose information that is both favorable to the defense and material to either defendant's guilt or punishment." People v. Ulett, 33 N.Y.3d 512, 516 (2019), citing Brady v Maryland, 373 US 83, 87 (1963), and People v Vilardi, 76 NY2d 67, 73 (1990). "To establish a Brady violation warranting a new trial, a defendant must show 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." Id.

The 440 court committed multiple errors in applying this standard to reach its conclusions. It applied an overly restrictive interpretation of what it means for information to be in the prosecution's possession, and failed to conduct the appropriate cumulative analysis of the entirety of the defense's facts in analyzing prejudice. The 440 court's flawed analysis of the merits is another ground on which this Court should reverse the decision below.

a. The 440 Court Erred in Failing to Consider the Prosecution's Duty to Learn of Favorable Material Known to Officers Working on the Case

The 440 court held, without any explanation, that the defense had failed to prove that "information regarding the FBI's investigation of Machicote was in the

People's possession or that it was suppressed by the People" (Vol. I, Ex. 1 at 42). In focusing exclusively on what was actually known by the prosecution the 440 court applied an erroneously narrow standard, requiring reversal by this Court.

It is well established that a prosecutor has a "duty to learn" of favorable material known to others working on the case, including police officers, and will be charged with their knowledge even if the prosecutor does not have personal knowledge. Kyles v. Whitley, 514 U.S. 419, 437 (1995); People v. Santorelli, 95 N.Y.2d 412, 421 (2000). In Santorelli, the Court of Appeals underscored that the concept of "the People's possession or control . . . has not been interpreted narrowly." 95 N.Y.2d at 421. Furthermore, Brady's requirements cannot be skirted by evasive maneuvers such as intentionally avoiding learning, or taking possession of, evidence that would be subject to disclosure. In People v. Novoa, 70 N.Y.2d 490, 498 (1987), the Court of Appeals held that a prosecutor's "disinclination to ask" about a subject that might reflect adversely on the credibility of her witness did not obviate her obligation to do so. See also Youngblood v. West Virginia, 547 US 867, 868-89 (2006) (finding Brady violation where police officer read an exculpatory note written by the prosecution's witnesses but "declined to take possession of it," and its contents were not disclosed to defense). Failure to search databases that would otherwise be routinely checked, lest a witness's name might be found within, represents precisely this kind of "disinclination to ask." And even if

the prosecutor was not involved in the decision not to search, she would ultimately still be held responsible for it.

The 440 court reached its conclusion that information was not in the possession of, or suppressed by, the prosecution without hearing any evidence regarding what the officers working on the case may—or should—have known, or what the trial prosecutor did to discharge her duty to learn of exculpatory information. The prosecution offered no explanation regarding the basis for its ultimate conclusion that the information "was not in the possession of a law enforcement officer working on the prosecution of defendant's case" in light of its previous admission that it had not discussed the matter with the trial assistant, as discussed above. And while the prosecution would not inform the 440 court about the trial prosecutor's actions with respect to her Brady obligation, the defense could not, because it had no access to that information.

The 440 court apparently credited the assertion that no officers working on the case were in possession of the information, even though it was not only unsupported but was actually undermined by the prosecution's previous acknowledgement that it had had no relevant conversations with the trial assistant. This assertion by the prosecution was also called into question by the defense's affidavit of former police detective Thomas McCall, which established a likelihood

that material regarding Machicote's criminal activities would have been contained in databases that the officers investigating the case would ordinarily have searched.

Given this record, the 440 court erred in concluding that "the People" were not in possession of any information about Machicote's criminal activity. And under Kyles and Santorelli, the 440 court erred in concluding that this was the end of the inquiry, rather than requiring an accounting of the trial prosecutor's efforts to discharge her duty to learn. This Court should reverse the decision below and order a hearing to resolve this contested issue.

b. The 440 Court's Analysis of Prejudice Failed to Consider the Totality of the Defense's Facts

The 440 court's ultimate holding on the Brady issue was that Davis could not establish prejudice because the jury was able to consider Machicote's prior convictions in evaluating his credibility. Consequently, the court held, "there is no reasonable possibility that the outcome of the trial would have been different if the jury knew of the FBI investigation" (Vol. 1, Ex. 1 at 42-43) (internal quotation and citation omitted). The 440 court failed to consider the defense's core factual premise, improperly weighed what it did consider, and misapplied the legal standard. These errors constitute additional grounds to reverse the decision below.

Suppression of favorable evidence constitutes a due process violation when that evidence is material. Under the federal standard, and in New York when there has not been a specific request for the information, the test of materiality is "whether

there is a reasonable probability that had it been disclosed to the defense, the result would have been different." People v. Ulett, 33 N.Y.3d 512, 519 (2019) (internal quotation marks and citation omitted); Kyles v. Whitley, 514 U.S. at 434 (internal quotation marks and citation omitted). However, where the defense requests the information, New York courts evaluate materiality under the lower "reasonable possibility" standard, which is what the 440 court purported to have applied here. People v. Vilardi, 76 N.Y.2d 67, 77 (1990).

In conducting its analysis of the materiality of the defense's evidence, the 440 court's task was to consider the totality of that evidence cumulatively, not piece by piece in isolation. Wearry v. Cain, 136 S.Ct. 1002, 1007 (2006) (citing Kyles v. Whitley, 514 U.S. 419, 441 (1995)). Instead, the court dismissed the record of Machicote's bad acts as an "FBI investigation." Crucially, the court also failed to consider the defense's submissions in the context of the trial, where Machicote had tremendous significance to the prosecution's case as the only testifying witness who never wavered in his identification of Davis as the shooter. No forensic evidence linked Davis to the crime; Machicote was "the sole identification witness, and his credibility was a pivotal consideration." People v. Steadman, 82 N.Y.2d 1, 8 (1993). The 440 court simply "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not." Wearry v. Cain, 136 S. Ct. at 1007. Such an analysis demonstrates a misunderstanding of Brady's materiality inquiry.

Demonstrating a "reasonable probability" of a different outcome is not a demanding standard., and "reasonable possibility" is even less so. To establish materiality under the reasonable probability standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." People v. Ulett, 33 N.Y.3d at 519 (quoting Kyles v. Whitley, 514 U.S. at 434) (quotation marks omitted). To surmount this bar, the "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict . . . . Defendant need only show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." People v. Ulett, 33 N.Y.3d at 519-20 (quoting Kyles v. Whitley, 514 U.S. at 434-35) (internal quotation marks omitted). The Supreme Court has explicitly stated that a defendant may prevail under the reasonable probability standard "even if . . . the undisclosed information may not have affected the jury's verdict." Wearry v. Cain, 136 S. Ct. 1002, 1006 n.6 (2016). Appropriate consideration of the totality of the defense's factual allegations in light of this flexible standard leads inexorably to the conclusion that there is at least a "reasonable probability" of a different result had the information been disclosed to trial counsel,

which necessarily means the defense also satisfied the lower "reasonable possibility" standard the 440 court claimed to apply (Vol. I, Ex. 1 at 42).

Accordingly, this Court should reverse the 440 court's decision and order a hearing on the Brady claim at which the court below may apply the correct standard in evaluating the entirety of the defense's evidence in the proper context.

CONCLUSION

FOR THE REASONS STATED IN POINT I, APPELLANT'S CONVICTIONS MUST BE REVERSED AND THE INDICTMENT DISMISSED. FOR THE REASONS STATED IN POINT II, APPELLANT'S CONVICTIONS MUST BE REVERSED AND A NEW TRIAL ORDERED. ALTERNATIVELY, FOR THE REASONS STATED IN POINT III, THE COURT SHOULD HOLD THE APPEAL IN ABEYANCE AND REMAND FOR A HEARING ON THE DEFENSE NEWLY DISCOVERED EVIDENCE AND BRADY CLAIMS.

Respectfully submitted,

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ADDENDUM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JAMES DAVIS, :

Defendant-Appellant. :

----------x

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 1925/04.

2. The full names of the original parties were People of the State of New York against James Davis.

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

4. This action was commenced by the filing of a C.P.L. § 440.10 motion.

5. This appeal is from a denial of a C.P.L. § 440.10 motion to vacate the judgment convicting appellant, after a jury trial, of the crimes of murder in the second degree, and second-degree criminal possession of a weapon.

6. This is an appeal from a denial of appellant's C.P.L. § 440.10 motion rendered January 24, 2020 (Danny K. Chun, J.)

7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is being used.