

OFFICE COPY

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: MISCELLANEOUS MOTION PART

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :
Respondent, :
-against- :
JAMES DAVIS, :
Defendant-Movant. :
-----X

NOTICE OF MOTION
TO VACATE JUDGMENT
PURSUANT TO C.P.L.
§ 440.10
Kings County
Ind. # 1925/04

PLEASE TAKE NOTICE, that upon the annexed affirmation of SUSAN EPSTEIN, the affidavits of James Davis, Jamel Black, Junior Watkins, Corey Hinds, Ishmael Avent, Tina Black, and Daniel Davis, the Memorandum of Law, and accompanying exhibits, and upon all the prior proceedings had herein, the undersigned will move this Court, at a term for motions thereof, to be held on September 24, 2018 at the Courthouse, 320 Jay Street, Brooklyn, New York, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to C.P.L. § 440.10, vacating the judgment of conviction rendered on June 6, 2006, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
September 10, 2018

Yours, etc.

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SUSAN EPSTEIN
Of Counsel

TO: MOTION CLERK
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HON. ERIC GONZALEZ
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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: MISCELLANEOUS MOTION PART

-----x
THE PEOPLE OF THE STATE OF NEW YORK, :
Respondent, : AFFIRMATION
-against- : Kings County
JAMES DAVIS, : Ind. # 1925/04
Defendant-Movant. :
-----x

SUSAN EPSTEIN, an attorney admitted to practice in the courts of this State, hereby affirms, under the penalties of perjury, that the following statements are true, or are believed to be true:

1. I am associated with The Legal Aid Society, Criminal Appeals Bureau, assigned by the Appellate Division, Second Department, on November 15, 2006, to represent James Davis on his appeal from a Kings County judgment of conviction entered on June 6, 2006, convicting him after a jury trial, of murder in the second degree (P.L. § 125.25(1)) and criminal possession of a weapon in the second degree (P.L. § 265.03(2)), 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. The Appellate Division affirmed the conviction, People v. Davis, 63 A.D.3d 755 (2d Dep't 2009), and the Court of Appeals subsequently denied leave to appeal. 13

N.Y.3d 743 (2009).

2. Defendant is currently incarcerated pursuant to the judgement set forth above.

3. I make this affirmation in support of defendant's motion to vacate the judgment of conviction and to dismiss the indictment or order a new trial pursuant to C.P.L. §§ 440.10(1)(g), (h).

4. I have been reinvestigating Mr. Davis's case since it was assigned to me in 2006. I have obtained affidavits from six witnesses and spoken to several others, and reviewed police reports, media accounts, and other records as described below. I have shared my results with the Kings County District Attorney's Conviction Review Unit, which has independently interviewed and audio-recorded the new witnesses.

5. In the accompanying memorandum of law, I argue that the totality of the record now establishes defendant's innocence, requiring that the judgment be vacated under C.P.L. § 440.10(1)(h) and the indictment dismissed; that there is newly-discovered evidence under C.P.L. § 440.10(1)(g) that requires a new trial; and that he did not receive the effective assistance of counsel at trial, which requires a new trial under C.P.L. § 440.10(1)(h).

INTRODUCTION

6. At about 4:00 a.m., on January 25, 2004, Blake Harper, age 21, was shot to death during a fight that broke out at a large party, with 250 attendees, in a Masonic Temple, in Brooklyn. Within hours of the shooting, a young woman named Tina Black told police that James Davis, also age 21, was the shooter. Ten days later, police showed a picture of Davis to Blake Harper's brother-in-law, who was at the party, and he identified Davis as the person he had seen commit the shooting.

7. Davis was arrested two months after the shooting. He told police that he had been at the party with his younger brother and some friends to celebrate his brother's birthday, but got sick after drinking too much to drink and left the party at 2:30 a.m., taking a cab to his girlfriend's house. His girlfriend, Kaneen Johnson, confirmed his alibi. There was no physical or forensic evidence connecting Davis to the crime. However, based on identification testimony from Harper's brother-in-law and two of Harper's friends who were at the party, none of whom knew Davis, Davis was charged with Harper's murder.

8. At Davis's first trial, the jury deadlocked 11-to-1 in favor of acquittal. His girlfriend, Kaneen Johnson, testified in support of his alibi at this trial. By the time of his retrial,

however, Davis and Johnson were no longer on good terms, and she declined to testify. The jury at the second trial convicted Davis of second-degree murder and weapon possession and he was sentenced to terms totaling 18 years to life imprisonment.

9. In the course of my investigation, I have spoken to many witnesses, all of whom have consistently confirmed some or all of James Davis's story. I have obtained affidavits from six witnesses, none of whom testified at Davis's trial. Even though Davis gave the police and defense counsel the names of these witnesses, no one ever contacted them. Five of these witnesses were at the party that night and they, consistent with James and Kaneen's accounts, specifically recalled that James was at the party and that he got sick after drinking too much. His friends recalled laughing at him as he threw up in the men's room and that he left the party in a cab to meet his girlfriend, about one and one-half or two hours before the fight broke out and Blake Harper was shot.

10. Two of these new witnesses told me a man they knew from their neighborhood, named "Tay" or "Tagy," was the real shooter. Some of the other witnesses told me they heard Tay had subsequently been shot on a street in Brownsville and died. After many Google searches of newspaper reports, I was able to identify Tay a/k/a Tagy as Ovadiah Taji Hall-Ricks. Mug shots

provided by the district attorney's office show a resemblance between Tay Hall-Ricks (see Exhibit A) and James Davis (see Exhibit B). Their skin tone, haircuts, facial hair, head shapes, noses, and lips are similar. Someone looking for Tay Hall-Ricks in a lineup might easily confuse him with James Davis.

11. In December of 2016, I learned more about the young woman, Tina Black, who told police James Davis was the shooter. I learned that Ms. Black had a strong feelings for James Davis and that people who knew them said that Ms. Black had "loved James and hated him." Her brothers had been at the party that night (one of them, who was stabbed at the party, gave me an affidavit), but Ms. Black was not. I wondered if she loved/hated James enough to falsely implicate him. Her brother told me that she had passed away in 2013, so I contacted her grandmother, who directed me to Tina's aunt, Lydia Black, a retired corrections officer. Lydia Black told me she knew her niece had been in love with James and I asked if she knew why Tina gave the police his name. She was not aware of that and told me she would speak to Tina's mother, also named Tina Black, and get back to me. On December 13, 2016, I received a phone call from Lydia Black. She told me her sister, Tina Black (Senior), would speak to me. Lydia Black then passed the phone

to Tina Black (Senior), who said her daughter, Tina, was in love with James Davis, whom she called Jay. After the incident, at which her son Jamel Black was stabbed, Tina (Junior) confessed to her mother that Jay was messing around with someone else and she was upset with him, so she told the police that Jay did the shooting. I asked Tina Black (Senior) if she would be willing to talk to the District Attorney's Office about this and she agreed to do so. That meeting took place December 20, 2016. An affidavit from Tina Black (Senior) and excerpts from the audiotaped recording of that interview are attached as exhibits to my affirmation.

12. In addition to Ms. Black, the District Attorney interviewed the other new witnesses, identified below, who were at the party, as well as Kaneen Johnson and James Davis himself. All of these interviews were recorded and the prosecution has provided me with compact discs of all of them, with the exception of James Davis's interview.¹

13. After listening to the recorded interviews, I realized the witnesses' actual voices were even more compelling than their affidavits. In order to present these recorded statements

¹ Compact discs containing these witnesses' complete interviews by the District Attorney's Conviction Review Unit are available to the Court upon request.

to the Court in a manageable format, we condensed the interviews into a 35 minute video, which is attached to this Affirmation as Exhibit X.

14. This newly-discovered evidence, viewed in conjunction with the People's witnesses' weak identification testimony, clearly and convincingly demonstrates that James Davis is actually innocent in the shooting death of Blake Harper. Therefore, the judgment should be vacated and the indictment dismissed under C.P.L. § 440.10(1)(h). In addition, Tina Black's affidavit is newly-discovered evidence that requires a new trial under C.P.L. § 440.10(1)(g). Finally, it is clear that James Davis received ineffective assistance from his trial counsel, who failed to interview any witnesses besides Kaneen Johnson, and should receive a new trial on that basis under C.P.L. § 440.10(1)(h).

15. This affirmation is divided into two sections. Section I provides an account of this case based on information gathered from police records turned over to the defense, trial testimony, and other sources, such as newspaper articles. Section II lays out the new evidence Legal Aid has acquired during the post-conviction investigation, including the recorded statements taken by the district attorney's office from the new witnesses, Kaneen Johnson (James's former girlfriend) and James

Davis himself.

SECTION I

The Shooting and the Police Investigation

The Incident

16. A large party was held on Saturday night, January 24-25, 2004, in the Prince Hall Masonic Temple, at 70 Pennsylvania Avenue, in Brooklyn. There was dancing and a bar. Police estimated 250 people were in attendance. Twenty-one year-old Blake Harper went to the party with his brother-in-law, Jose Machicote, and two friends, Shawn Belton and Harold Pou. Twenty-one year-old James Davis went to the party as well, with his brother, Daniel, and several friends, to celebrate Daniel's birthday.

17. The Daily News and the New York Post reported a dispute arose at the party around 4:00 a.m., on January 25th, after an unidentified man got angry at Blake Harper for speaking to a woman. See Exhibit C. According to these reports, a friend of Blake Harper's pulled out a knife and stabbed the other man or one of his friends. Then, someone pulled out a gun and fired a number of shots. Blake Harper was shot and died at the scene.²

² See Exhibit D. The medical examiner's autopsy report indicated Blake Harper died from gunshot wounds to the head and

A man named Eddie Thomas was shot in the buttocks, and two other men, one identified as Alexander Shannon, were stabbed.

The Police Investigation

18. Hours after the shooting, the police interviewed a young woman named Tina Black on the telephone and she named James Davis as the shooter.³ See Exhibit E, at Item 21. It is unclear who initiated the call.

19. On February 4, 2004, Detective Matthew Hutchison prepared a six-person photo array that included a picture of James Davis, and showed it to Jose Machicote, Blake Harper's brother-in-law.⁴ Machicote selected Davis.⁵

James Davis Tells the Police He Left the Party Early

20. James Davis was arrested on March 26, 2004. He told police he had heard about the shooting at the club. He had been at the party with his brother, Daniel, three friends he referred

extremity, with brain, spinal cord and musculoskeletal injuries.

³ See Testimony of Detective Matthew Hutchison, Kings County Indictment Number 1925/2004, Huntley-Wade Hearing, Nov. 10, 2005 at pp. 50-51.

⁴ Id. at 8-9. See Photo Array, Exhibit F, signed and initialed by Machicote.

⁵ See Testimony of Detective Matthew Hutchison, Kings County Indictment Number 1925/2004, Huntley-Wade Hearing, Nov. 10, 2005, at 5-12.

to as "B.O.," "Big Man," and Vic, and some other guys from Ocean Hill. Davis left the party around 2:30 a.m. because he was not feeling well. He took a cab by himself to his girlfriend's house. Davis's statements to police are in the Voluntary Disclosure Form, attached hereto as Exhibit G.

21. Davis made a second statement that included a little more detail. He told police he was not out on the floor much during the party, but was in the bathroom smoking "weed." He had brought about 15 bags with him and he and his friends did not want to smoke it on the floor. He drank and smoked so much that he got sick and had to leave. He took a cab to his girlfriend's house but did not stay there, because he did not get along well with her mother. His girlfriend met him outside and they walked to her aunt's house. Davis found out about the shooting the next day, when he went back to his grandmother's house and learned three people had been shot, two of whom he knew. See Exhibit G.

Line-Up identifications

22. After the arrest, police asked Jose Machicote, Shawn Belton and Harold Pou to view Davis in a lineup. Blake Harper's mother brought Belton and Pou to the station and encouraged them to speak to the police.

23. Jose Machicote, Shawn Belton and Harold Pou separately viewed the lineup. See Lineup Photo, Exhibit I. They each selected James Davis as the man who shot Harper.⁶

24. Detective Hutchison interviewed Belton. He asked Belton why he originally told police he did not see anything. Belton replied he was "concerned for his safety out on the streets but felt that he had to do the right thing at this time for his friend Mel [Blake Harper]." Belton described the shooter as a "light skin male black, about 5-10 [inches] tall wearing a black skully cap." ⁷ (Belton later changed his description to say that the shooter had braids, and was not wearing anything on his head.)

25. Harold Pou was interviewed after the lineup by assistant district attorney Steven Murphy.⁸ Pou said this was the first time he had spoken to the police. He came forward only because "[Blake Harper]'s mother gave me a call and told me they think they have somebody that fit the description. She told me she'd like for me to come and verify if that was him."

⁶ Testimony of Detective Matthew Hutchison, Kings County Indictment Number 1925/2004, Huntley-Wade Hearing, Nov. 10, 2005, at 30-41.

⁷ See Complaint Follow-ups, Interview and Reinterview of Shawn Belton, Exhibit H.

⁸ A transcript of that interview is attached as Exhibit J.

See Exhibit J, at 7.

26. When A.D.A. Murphy asked Pou if he saw someone in the lineup, Pou replied, "Yes, I saw similar [sic]." In response to further questioning, as to whether the person he identified was the shooter, Pou replied, "Yes." See Exhibit J, at 7.

The Indictment

27. 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. See Exhibit K.

The First Trial

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

Kaneen Johnson's Alibi Testimony

29. Johnson described James Davis as her fiancé. They had known each other for three years.⁹ She recalled the events of

⁹ See Trial Testimony of Kaneen Johnson, Kings County Ind. # 1925/04, November 17, 2005, at 370. Ms. Johnson's testimony is attached as Exhibit L.

January 25, 2004, because she did not want Davis to go to the party and they had argued about it.¹⁰ He was going to sell "weed" there; he sold "weed" almost every day. He did not invite her to come to the party.¹¹

30. Around 2:30 a.m., on January 25, 2004, Kaneen 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 with her mother, to pick her up. Johnson recalled Davis was "drunk and stupid" 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 Davis.¹²

31. Ms. Johnson testified that in January of 2004, James Davis had short hair, not cornrows or braids. He had gotten ringworm in in August of 2003, as a result of which he had his head shaved, and took pills and used an ointment on his head. After that, he kept his hair short.¹³

¹⁰ Id. at 375.

¹¹ Id. at 378.

¹² Id. at 372, 390.

¹³ Id. at 374, 399-402.

Jury Deliberations

32. The trial ended in a mistrial on November 23, 2005, after the jury deadlocked at 11 to 1 to acquit.¹⁴

The Second Trial

33. The retrial began on May 3, 2006. Significantly for the defense, Kaneen Johnson, who was no longer James Davis' fiancé, did not testify. The defense did not present any witnesses.

The People's Case

34. Jose Machicote, Blake Harper's brother-in-law, identified James Davis as the shooter.¹⁵ 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 spent several years in prison and was on parole and in violation of his curfew when he attended the party.¹⁶ According to Machicote, during the party, Blake Harper

¹⁴ See Trial Transcript, Kings County Indictment Number 1925/04, November 23, 2005, at 1-3. See also Sentencing Transcript, Kings County Indictment Number 1925/04, June 6, 2006, at 12; trial court file, Kings Indictment 1925/04, court exhibit 8, jury note dated November 22, 2005, 4:05 p.m.

¹⁵ Trial testimony of Jose Machicote, Kings County Indictment Number 1925/04, May 10, 2006, at 240.

¹⁶ Id. at 229-232, 242-243, 263.

got into an altercation with some other men. Machicote claimed he tried to break it up and someone started shooting.¹⁷ He described the shooter as a man with brown skin, a goatee, and hair braids, which were close to the scalp and ran in a line to the back of his head.¹⁸ Machicote did not recall the shooter wearing a "skully" cap. Id. at 266-268.

35. Harold Pou was not called by the People at the retrial. The prosecutor claimed to have information that Pou was afraid to testify and would testify untruthfully if he was called.¹⁹ Pou's testimony from the first trial was read into the record.²⁰

36. Pou had testified he and Blake Harper had been friends for 15 years. He saw Jose Machicote get into an argument with someone. He, Blake Harper and some others joined in. People were arguing and pushing. As they were about to fight, Pou heard shots ring out.²¹ He saw, in profile, a light-

¹⁷ Id. at 237-238.

¹⁸ Id. at 239-240, 265-267.

¹⁹ Trial Transcript, Kings County Indictment Number 1925/04, May 11, 2006, at 292-301.

²⁰ Trial Testimony of Harold Pou, Kings County Indictment Number 1925/04, May 12, 2006, at 337.

²¹ Id. at 239-240, 265-267.

skinned man with braids shooting towards the door. When asked if he saw the shooter in the courtroom, Pou pointed to James Davis and said, "the guy over there resemble him, but I know the guy had braids. Like that's he [sic] main thing that I really knew about it. He was light skinned with braids, but he resemble him."²²

37. Shawn Belton testified at the second trial under a material witness order. His testimony was different in significant respects from his testimony at the first trial.²³

38. Belton testified that and Harper had been friends for ten years. Belton was the godfather of one of Harper's two children. He was with Harper at the party when an altercation broke out. He saw Harper move towards it. Belton was talking to a girl when he heard shots being fired.²⁴ He saw "sparks" coming out of a gun.

39. At the first trial, Belton had made an in-court identification of Davis, and said he observed the shooter as

²² Trial Transcript, Kings County Indictment Number 1925/04, May 11, 2006, at 292-301.

²³ Trial Testimony of Shawn Belton, Kings County Indictment Number 1925/04, May 9, 2006, at 93-96.

²⁴ Id. at 98, 101-104.

being "light skinned," with "facial hair" and "braids."²⁵ This was different from his initial description of the shooter to police, in which he said the shooter wore a black "skully cap." His trial description changed to a man with braids, just like the testimony given by Harold Pou and Jose Machicote.

40. At the second trial, Belton refused to 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.²⁶ He said he had only "glanced" at the shooter.²⁷

The Verdict and Sentencing

41. On May 15, 2006, James Davis was found guilty of intentional murder in the second degree and criminal possession of a weapon in the second degree.²⁸ On June 2, 2006, he was sentenced to 18 years to life, concurrent with ten years' imprisonment, on the murder and possession counts, respectively.²⁹

²⁵ Id. at 105-113.

²⁶ Id. at 104-105.

²⁷ Id. at 103-105.

²⁸ Id. at 473-477.

²⁹ Sentencing Transcript, Kings County Ind. # 1925/04, June 6, 2006, at 14-15.

SECTION II - THE POST-CONVICTION INVESTIGATION

42. The Legal Aid Society's Criminal Appeals Bureau was assigned to represent James Davis on his appeal in this case on November 15, 2006. James Davis informed me from the start that he was innocent. Over the course of ten years, I interviewed and obtained affidavits from six witnesses who corroborate Davis's account. The affidavits from these six witnesses are summarized below, and are attached hereto as exhibits. One of these witnesses, James Davis's brother Daniel, is now deceased. At our request, the People interviewed the other five witnesses, and interviewed Kaneen Johnson, Davis's alibi witness from the first trial. The People made audio recordings of the interviews, which we can provide to the Court upon request. The audio recordings are quite compelling, but lengthy, so in order to present them to this Court in a condensed format, we created a 35 minute video entitled, "The People v. James Davis: A Second Look." See Exhibit X.

The Six New Witnesses' Affidavits

Affidavit of Daniel Davis

43. On August 23, 2011, Daniel Davis, James Davis's brother, provided us with an affidavit, attached as Exhibit M. Daniel Davis states that on January 24-25, 2004, he celebrated

his birthday with his brother, James, and a group of friends, at a party at the Masonic Temple. They arrived at the party around 10:30 p.m.. They danced and smoked and had a good time. While Daniel was dancing, a woman came up to him and said James was very drunk and "out of it."

44. Around 1:15 a.m., Daniel found James asleep on a chair, holding a bottle, and telephoned James' girlfriend to say he was putting James in a cab and sending him to her house. Daniel then returned to the party. Daniel was still at the party when the shooting took place. His friend Jamel Black, "Lil Mel," got stabbed during the altercation.³⁰

Affidavit of Jamel Black

45. On August 24, 2012, Jamel Black provided us with an affidavit, attached as Exhibit O. Jamel is the son of Tina Black and Tina Black (Junior) was his sister. Jamel states that on the day of the shooting, his brother Nathaniel called to tell him they were celebrating the birthday of their friend, Daniel Davis, at a party at the Prince Hall Masonic Temple in East New York. Jamel arrived at the party around 11:00 p.m., and saw a

³⁰ In June 2012, about a year after he gave me his statement, Daniel Davis was shot to death in East New York. See Exhibit N. This took place before I contacted the People and asked them to re-investigate this case. Consequently, there is no audiotaped interview of Daniel Davis.

lot of people he knew from the neighborhood.

46. Jamel was with Daniel when Daniel got a call between midnight and 12:15 a.m., from his brother, James Davis, saying he was at the front door. Jamel and James had also been friends, but Jamel was not talking to James at that time because of a dispute involving a girl.

47. Later that night, Jamel went into the men's room, and he saw James Davis smoking and drinking with Daniel and two other friends, Junior and Corey. James tried to be friendly with Jamel, but Jamel refused, and left the bathroom.³¹

48. When Jamel got back to the bar, he saw Tagy "Tay" Hall. Jamel knew Tagy from the neighborhood. Tagy lived on the same block as Jamel's grandmother. They were smoking when Nathaniel came up to them and said James wanted to talk with Jamel.

49. Jamel left Tagy and went back into the bathroom, where he found Daniel, Corey, and Tasha all laughing. They said they were laughing because James was throwing up in the stall. James came out of the stall and said he was leaving because he was "mad bent." He asked Jamel and Daniel to go outside with him while he tried to get a cab.

³¹ Jamel recalled that he said to James, "friends don't fuck each other girl."

50. Jamel went outside with James, but was still angry with him. They got into an argument and Jamel went back inside the party. That was the last time Jamel saw James. The time was approximately 2:00 a.m. The party was supposed to end at 4:00 a.m.

51. Around 3:00 a.m., a fight broke out between Jamel's brother, Nathaniel, and two men who had snatched Nathaniel's bottle of Moet. Jamel described the two men as "a black guy and a Spanish guy." One of the party's promoters broke up the argument and said he would replace the bottle.

52. Shortly before the party was scheduled to end, Jamel was at the coat check. Someone behind him said, "you thought it was over," and as Jamel turned, he felt a pain in his right backside and stomach. Then, he saw the black man he argued with earlier heading towards the back of the club.³²

53. Jamel was in a great deal of pain and started walking towards the bathroom, when he ran into Tagy. Jamel told Tagy what happened, and Tagy said he would take him to the hospital. As they were heading to the exit, Jamel heard Tagy say, "oh

³² It can be surmised from Jamel Black's affidavit and his interview with the prosecutor's Conviction Review Unit, that Blake Harper is the man who stabbed Jamel Black, and that Harper and Machicote were probably the men who stole the bottle of Moet from Nathaniel. See Exhibits O and X.

shit," and then he pushed Jamel. Jamel heard six rapid shots and when he looked up, he saw Tagy putting a small gun in his pocket. Tagy helped Jamel up off the floor and said he had to go before the police came. Jamel looked to see who got shot and saw it was the black man he had been arguing with earlier, lying on the floor with a knife next to him.

54. Jamel went outside and saw Daniel and another friend named Junior Watkins. They brought him on foot to Daniel's grandmother's apartment and she called an ambulance. Jamel was taken to Kings County Hospital, where he received 27 staples in his stomach. He recalled that the police came to speak with him and he told them what happened. The Legal Aid Society has not been provided with any notes regarding this interview, assuming any were taken.

Affidavit of Junior Watkins

55. Junior Watkins gave us an affidavit, dated August 16, 2012, which is attached as Exhibit P. Watkins, who was friends with both James and Daniel Davis, stated he was at the party. He saw James Davis leave around 2:30 a.m., before the shooting took place, "because he was throwing up real bad." Watkins stated a guy named "Tay" was the person who did the shooting at the Masonic Temple that night. Exhibit P. When he was interviewed by the District Attorney's Conviction Review Unit, Watkins stated

he knew Tay from the neighborhood and that he actually saw Tay shooting the gun at Blake Harper. See Exhibit X.

Affidavit of Corey Hinds

56. Corey Hinds provided us with an affidavit on September 21, 2015. See Exhibit Q. Hinds went to the party at the Masonic Temple with Daniel Davis, Junior Watkins, and several friends. It was Daniel's birthday. James Davis arrived later. Hinds remembered that Kaneen came with James. Hinds was with James Davis, Daniel Davis, Jamel Black, Nathaniel Black, and Jerome Ford smoking in the men's room for a while. James was throwing up because he drank too much.

57. Hinds recalled someone helped James Davis and Kaneen to a cab. After James left, Hinds remained at the party. Later that night, he heard a commotion towards the front of the room, then he heard a couple of shots. He saw a dark-skinned man with braids lying on the ground, not moving, and saw blood. Hinds left the party with Junior Watkins through the front door. Hinds confirmed this account in his interview with the Conviction Review Unit. See Exhibit X. He also told the Unit he knew Tay and had heard Tay had subsequently been shot and killed in Brownsville. Exhibit X.

Affidavit of Ishmael Avent

58. Ishmael Avent provided an affidavit to me on December 8, 2015. See Exhibit R. He stated he was at the party to celebrate Daniel Davis' birthday. He was there with a number of friends, including Corey Hinds, Jamel, Junior, and James Davis.

59. Avent remembered that James Davis got "hammered" from drinking and left about an hour and a half or two hours after they got there. A couple of people helped James Davis to a cab.

60. Avent remained at the party and was on the dance floor when a commotion broke out. The altercation had started at the bar. He heard his friends saying "we are fighting, we fighting." Avent approached the bar area and heard Jamel saying, "I'm poked, I'm poked." Then, Avent heard shots being fired and he "ducked for cover." He did not see the shooter.

61. Avent helped escort Jamel Black to James and Daniel Davis's grandmother's house and an ambulance was called. Avent heard rumors afterwards that the person who died had been the one who started the fight. Exhibit R. Avent confirmed this account when he was interviewed by the Conviction Review Unit. See Exhibit X.

Affidavit of Tina Black (Senior)

62. Tina Black is the mother of Jamel Black, Nathaniel Black, and a daughter, also named Tina Black, who is now deceased. In her affidavit, attached as Exhibit S, Ms. Black stated that her daughter, Tina Black Jr. had been in love with James Davis. She signed this affidavit on December 20, 2016.

63. Ms. Black recalled her sons, Jamel and Nathaniel, attended the party at the Masonic Temple that night. Jamel got stabbed during a fight that broke out there, and another young man was shot and killed.

64. Ms. Black recalled that after this incident took place, her daughter, Tina, confessed to Ms. Black that she falsely told the police James Davis was the person who shot and killed the young man that night. Her daughter stated she lied to the police about James Davis being the shooter, because she found out he was romantically involved with someone else and she was very upset. Tina (Junior) said, "Mommy, he kicked me aside like I was an old boot." Ms. Black told her daughter she should not have done that. Ms. Black stated Tina (Junior) continued to express regret about her false accusation, but never came forward to the police or the District Attorney to say she had lied.

65. During her interview with the Conviction Review Unit, Ms. Black stated that her daughter had been in love with James and she was very upset when she learned he was involved with someone else. She said Tina (Junior) confessed to her that was the reason she told the police James did the shooting. When Ms. Black told her daughter she should not have lied, Tina (Junior) told her to "shutup." When she was asked by the Conviction Review Unit why she never come forward and reported her daughter's false accusation, Ms. Black stated her daughter was diabetic and subsequently became extremely ill, finally passing away in 2013. She was afraid if she told the police, her sick daughter would get in trouble. When she was asked why she had not come forward after her daughter died, Ms. Black asked what was she supposed to do and who was she supposed to tell at that point? See Exhibit X.

ADDITIONAL EVIDENCE

Letters from Tina Black to James Davis

66. James Davis received numerous letters from Tina Black (Junior) during his incarceration. Unfortunately, over the years, he lost most of them. He was able to locate three letters he received from Tina Black (Junior), which are attached as Exhibit T. In a letter dated September 21, 2005, a month and a half before Davis's first trial, Tina Black (Junior) says,

"I'm writing you because I was thinking about you. I really do miss you. I still love you. Always have. Like Mariah said 'And you'll always be my baby'". The letter adds, "I hope when they find you not guilty you sue those bastards."

67. In a letter dated November 6, 2005, four days before the start of the first trial, Tina Black (Junior) says, "I miss you. Do you miss me? The few times we did spend together we had fun Well I know I did."

68. In a letter dated September 11, 2007, 15 months after Davis was convicted, Tina Black Junior sent James Davis photographs of herself in various states of dress. She said she missed him a lot and hoped he would come home soon. After talking about some mutual acquaintances, she wrote, "I took these pictures for you. My weight keeps going up and down so I might not look like that when you see me. Hopefully that'll be sooner than later. By the way, that's what took so long to write you back. I had to wait for the pictures. Enjoy."

Conversation with Kaneen Johnson

69. On January 8, 2010, I spoke with Kaneen Johnson on the telephone. I asked her why she decided not to testify at the second trial and she replied, "I wanted to move on with my life." Ms. Johnson affirmed that her testimony at the first

trial was accurate and stated she told "them" to use her testimony from that trial at the second one because she was not coming back. I asked her if she would sign an affidavit to that effect, but she declined. See Exhibit U. In her interview with the Conviction Review Unit, Ms. Johnson affirmed her testimony from the first trial, that James left the party and called her from a cab, that she met him at the cab and he was drunk and got sick and they spent the night at her aunt's house. Her recollection of the time James arrived at her house in the cab that night was vague. She believed it was before one or two in the morning. See Exhibit X.

Conversations with Harold Pou and Shawn Belton

70. On November 16, 2011, I spoke with prosecution witness Harold Pou on the telephone. He told me that he was not sure of his identification, either at the lineup or the at trial. He told me that in the lineup, he only told police that James Davis "resembled" the shooter. He added Davis was the only one in the lineup who did. Pou declined to sign an affidavit. See Exhibit U.

71. On October 11, 2016, I spoke on the telephone with prosecution witness Shawn Belton. He said he knew who James Davis was at the time of the incident. Then he told me, "I did not see anything. I didn't see him do it." Belton declined to

sign an affidavit. See Exhibit U.

Jose Machicote

72. I was unable to contact Jose Machicote, the one remaining prosecution witness. Machicote, age 27 at the time of Davis's second trial, had a serious criminal history. At age 18, he had been sent to state prison for second-degree robbery. He was released to state parole in 1999. Machicote shows up on federal wiretaps in the months following his testimony against James Davis. Machicote was part of a criminal gang that was robbing drug dealers in East New York. According to U.S. Attorney filings, Machicote was murdered by a drug dealer named Richard Gilliam on November 13, 2006, when Machicote and some associates tried to rob Gilliam. See United States v. Gilliam, 2011 WL 2113449 (C.A. 2) (Appellate Brief). That was about five months after James Davis's conviction.

73. Wiretaps also captured one of Machicote's co-conspirators saying that Machicote's wife, LaVonne Harper (Blake Harper's sister) was close enough to the N.Y.P.D. that she called a detective named Shulman to report that Machicote was missing. See U.S. v. Wesley Robinson, Criminal Docket No. 10-777 (JG), Document 3.

News Reports

74. Based on the statements of Jamel Black and Junior

Watkins, described above, and other leads, I searched media reports for information on the man they identified as "Tay" or "Tagy." I found a September 9, 2004, New York Post report that a man named Ovadiah Ricks, who had been shot several times on July 28, 2004, while crossing a Brownsville street, had passed away "at Brookdale Hospital at 10:10 p.m. Tuesday." See Exhibit V.

75. I also found an obituary for Ovadiah "Taji" Hall-Ricks, that was published in The Wave, a local newspaper from the Rockaways, on September 17, 2004. See Exhibit W. According to the obituary, Hall-Ricks died on September 8, 2004.

76. These news reports establish that the "Tay" and "Tagy Hall" identified as the real shooter by Jamel Black and Junior Watkins is the same person as the Ovadiah Ricks gunned down in Brownsville six months after Blake Harper was killed at the Masonic Temple. See Exhibits V and W. After I provided this information to the Conviction Review Unit, they gave me the mug shot of Ovadiah "Taji" Hall attached hereto as Exhibit A, which closely resembles the photograph of James Davis in the lineup. See Exhibit B.

Affidavit of James Davis

77. In an affidavit dated June 11, 2018, James Davis states that he told his trial counsel, Joel Medows, that his

brother, Daniel, was at the party, along with Jamel Black, Nathaniel Black and Corey Hinds. See Exhibit Y. However, Mr. Medows told Davis that he just wanted to use Kaneen Johnson as an alibi witness. Exhibit Y.

78. In early March of 2016, James Davis was questioned, in my presence, by the Conviction Review Unit for more than an hour. In this session, he responded consistently with the account he gave the police on the night of his arrest, and has continued to maintain since that time. (The Unit has not provided me with a recording of the interview.)³³

Exhibit X - Video Documentary

79. Exhibit X to this affirmation is a 35 minute video, entitled "The People v. James Davis: A Second Look." It presents a brief overview of Legal Aid's investigation and contains audio excerpts from the prosecution's Conviction Review Unit's interviews with all of the witnesses whose affidavits are attached to this motion, with the exception of Daniel Davis, who was shot and killed in 2012. The unit's interview with Kaneen

³³ Although my investigation has revealed much of what happened at the Masonic Temple Hall on the night of November 24-25, 2004, there are still notable gaps in the record. I do not know whether police followed up with the other victims reported in the press from that night, specifically Eddie Thomas and Alexander Shannon. Jamel Black states that he was stabbed that night and that police spoke to him, but I do not know what follow-up if any was done in his case.

Johnson is also included.

80. One question that the witnesses interviewed on the Exhibit X video were asked by the Conviction Review Unit is how come you did not come forward before, how come you did not testify at James Davis's trial? Junior Watkins was asked, "when your friend was arrested for this, did anyone come to you and ask for your help as an alibi witness?" He replied, "Nah! We didn't know about this! We didn't know about the law! We was seventeen years-old!" See Exhibit X. ADA Edelstein asks, "His lawyer didn't come to you or anything like that?" Watkins says, "Nah!" He continued: "Everybody loved him. That's why I told you, if we would had knew how serious this situation would have been . . . We would have stepped up to the plate." Exhibit X. He continued:

but like I said -- we was young. We don't - we don't know nothing about the law. I didn't know nothing about nothing. I could barely read!

Exhibit X.

81. Ishmael Avent told the Conviction Review Unit that no one ever contacted him. He never spoke to the police. ADA Edelstein asks him, "Why didn't you come forward?" Avent replies:

We didn't know. We didn't know, we was ignorant about the law. We was young, we

didn't know. You learn stuff through experience. We didn't know we could all come forward. I got a criminal case, a couple of us got criminal cases.

See Exhibit X. ADA Edelstein asks him, "Did the family say anything to you?" Avent says, "They ignorant too about criminal law. They don't know shit about criminal law." Edelstein says: "They didn't contact any of you guys?" He responds:

No, none of us, cause we would have come forward. Why wouldn't we come forward if we know our man didn't do the crime. We would have all come forward.

See Exhibit X. She asks again, "so nobody contacted you over all these years?" He says, "No. No lawyer, no ADA, no nothing." Exhibit X.

82. When Tina Black (Senior) is asked by the Conviction Review Unit how come she never came forward before today, she replied: "Cause that's my daughter. And by her lying would she be getting in trouble. She was already sick and half dead, you understand me? She died three years ago. My daughter was 30 years-old when she died." Then, the ADA asks her why she did not come forward in the three years since her daughter had died, if this was bothering her so much? Ms. Black replied, "how am I supposed to know? What, I'm supposed to - find you, you, you -- what. I'm supposed to go out my way, to knock myself out to go find somebody?" See Exhibit X.

83. Jamel Black told the Conviction Review Unit he was

interviewed by the police when he was in the hospital recovering from the stab wounds he received at the party. See Exhibit X. When asked if he was ever contacted by the "DA," Jamel replies simply, "No." Exhibit X.

84. Now, we have reached the point where all of these witnesses have finally been contacted, and they have come forward and spoken to the District Attorney's Office, but nothing has changed. James Davis is still incarcerated.

CONCLUSION

85. Mr. Davis now seeks to vacate his convictions. The statements of Jamel Black, Junior Watkins, Corey Hinds, Ishmael Avent and Kaneen Black, as well as the newly discovered evidence that Tina Black (Junior) lied to police when she named Mr. Davis as the shooter, constitutes clear and convincing evidence that Mr. Davis is actually innocent of the shooting and murder of Blake Harper. C.P.L. §§ 440.10(1)(g) & (h). In addition, Mr. Davis's conviction should be vacated on the grounds that he was deprived of the effective assistance of counsel, as a result of his counsel's failure to interview his brother Daniel, as well as Jamel Black, Nathaniel Black, and Corey Hinds, after Mr. Davis told counsel about them.

WHEREFORE, it is respectfully requested that this Court

vacate James Davis's convictions and dismiss the indictment against him with prejudice. Alternatively, a hearing should be ordered.

Dated: New York, New York
September 10, 2018



SUSAN EPSTEIN

cert. denied sub nomine Goldblum v. Kerestes, 555 U.S. 850 (2008)). Finally, with respect to claims for actual innocence, unlike claims based on newly-discovered evidence, the court should consider all reliable evidence, whether or not it satisfies the factors set forth in People v. Salemi, 309 N.Y. 208, 215 (1955).

As discussed below, Mr. Davis's instant motion and exhibits meet the Hamilton standard of demonstrating actual innocence by clear and convincing evidence. At the very least, this Court should conclude that Mr. Davis's motion makes a prima facie showing of actual innocence sufficient to warrant a hearing.

Six Reliable Witnesses Agree that James Davis Left the Party Early, Before Blake Harper Was Shot, Which is Exactly What Davis Told Police When He Was Arrested

When James Davis was arrested on March 26, 2004, he told police he attended the party at the Masonic Temple on January 25, 2004, but left at 2:30 a.m., and took a cab to his girlfriend's house, because he became ill from too much smoking and drinking.

At the first trial, which ended with a hung jury, James Davis's then fiancée, Kaneen Johnson, provided credible alibi testimony which supported James's account. Johnson has reaffirmed her testimony in an interview with the Conviction Review Unit. See Exhibit X.

Daniel Davis, Jamel Black, Junior Watkins, Corey Hinds and Ishmael Avent have all provided convincing statements that corroborate James Davis's account of his movements at the Masonic Lodge on January 25, 2004. It was a memorable night for all of them. First, they were celebrating Daniel Davis's birthday. Second, James Davis got so sick from drinking and smoking that he threw up in the men's room. Third, an hour or two after James Davis left the party, a frightening melee erupted, resulting in stabbings (including Jamel Black's stabbing), shootings, and one death.

These statements present consistent recollections of James Davis's early departure from the party and the subsequent mayhem that took place.

Two of these witnesses, Jamel Black and Junior Watkins, identify the real shooter as "Tay" or "Tagy Hall," whom they knew from the neighborhood. Our investigation establishes that Tay's real name was Ovadiah "Taji" Hall-Ricks, who was shot on a Brownsville street on July 28, 2004 and died on September 8, 2004. There are clear similarities between his mug shot and that of James Davis. Those similarities may provide another explanation for why Jose Machicote, Harold Pou, and Shawn Belton initially identified James Davis in the lineup.

Finally, we know now that the only reason James Davis became the suspect in Blake Harper's murder was because Tina Black Junior, a young woman who loved him and felt he had rejected her, sought revenge.

Thus, this case has all the hallmarks of a miscarriage of justice - an investigation that got off on the wrong foot by relying on a single tip from a person who was not even present at the party. Police had no other suspects and focused exclusively on James Davis. No corroborating evidence was ever developed, leaving the case reliant on the stranger identifications of Machicote, Pou and Belton. Pou and Belton subsequently waffled on their identifications, leaving Machicote as the single strand of the People's case. Machicote was murdered in 2006, shortly after the trial, by a drug trafficker he was trying to rob. Measured against the mountain of evidence showing that Davis left the party early, and that the real killer was another person at the party who had a strong physical resemblance to Davis, the People's case can no longer stand.

Scientific Research Helps Explain How Machicote, Belton, and Pou Selected the Wrong Person in the Lineup

Unfortunately, this is not the first case where multiple eyewitnesses picked the same wrong suspect. As the Supreme Court stated more than 50 years ago,

[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

United States v. Wade, 388 U.S. 218, 228 (1967). See People v. Santiago, 17 N.Y.3d 661, 669 (2011) ("mistaken eyewitness identifications play a significant role in many wrongful convictions"); People v. Riley, 70 N.Y.2d 523, 531 (1987) ("The complex psychological interplay and dependency of erroneously induced identification ... must be vigilantly guarded against because (it) drives right into the heart of the adjudicative guilt or innocence process affecting the person accused and identified"); People v. Caserta, 19 N.Y.2d 18, 21 (1966) ("One of the most stubborn problems in the administration of the criminal law is to establish identity by the testimony of witnesses to whom an accused was previously unknown, from quick observation under stress or when ... there was no particular reason to note the person's identity").

In 1984, in Virginia, Thomas Haynesworth was identified by four separate rape or attempted rape victims in photo arrays and found guilty. He served 27 years in prison before he was cleared by DNA and other evidence.¹ The Innocence Project has reported that since the 1990's, when DNA testing was introduced, approximately 70% of the 350 convictions overturned through DNA

¹ www.innocenceproject.org/cases/thomas-haynesworth/.

testing were based on mistaken eyewitness testimony, and one third of these cases involved two or more mistaken eyewitnesses.² As examples, The Innocence Project website features the stories of ten other defendants who were erroneously convicted based on multiple misidentifications: Richard Alexander, Anthony Capozzi, Alan Crotzer, Lonnie Erby, Dennis Maher, Jerry Miller, Maurice Patterson, Walter Smith, Raymond Towler, and Patrick Waller.³

There are many factors that can contribute to mistaken identifications. In State v. Lawson, 291 P.3d 673, 685-688 (Or. 2012), the Supreme Court of Oregon reviewed a number of variables in both the administration of identification procedures and in the characteristics of the witnesses, the alleged perpetrator and the environmental conditions of the event that can affect the reliability of eyewitness identifications.

The Lawson Court wrote, “[i]deally, all identification procedures should be conducted by a ‘blind’ administrator - a person who does not know the identity of the suspect.” The reason is because “[i]n police lineup identifications, lineup administrators who know the identity of the suspect can

² www.innocenceproject.org/dna-exonerations-in-the-united-states/.

³ www.innocenceproject.org/cases/.

consciously or unconsciously suggest that information to the witness.” Id. at 686. In James Davis’s case, Detective Hutchison administered both the photo array and the lineup identification procedures.

Another factor that might have played a role in the instant case is that James Davis and Tay Hall look similar to each other in terms of their skin tone, haircuts, head shapes, noses and lips. See Exhibits A, B. If Machicote, Pou and Belton saw Tay Hall shoot Blake Harper and they were looking for Tay in the lineup, they might have made a selection even though Tay was not in the lineup. “Research has found that experimental witnesses have a tendency to select a suspect even if the actual target is not in the lineup.” Lacy J., Stark C. The Neuroscience of Memory: Implications for the Courtroom. Nat Rev Neurosci. 2013 September; 14(9): 649-658. This is known as relative judgment, where a witness chooses the lineup member who most resembles the witness’s memory of the target relative to other lineup members. Researchers have found that this was not necessarily harmful in lineups where the actual target was present, but that it led to higher rates of false identifications in lineups where the target was absent.⁴

⁴ Lindsay RCL, Wells GL. Improving eyewitness identifications from lineups: simultaneous versus sequential lineup presentation. Journal of Applied Psychology. 1985;70(3):556-564.

One way to avoid this problem is to conduct sequential lineups, which have been found to reduce a viewer's propensity to use a relative judgment strategy, thereby resulting in a lowering of the false identification rate. Lawson, 291 P.3d at 686. In James Davis's case, a simultaneous lineup was conducted. If Machicote, Pou and Belton were looking for Tay Hall in this lineup might, they might have concluded that James Davis, in position 5, most resembled Tay relative to the other lineup members. See Exhibits A, I. When Harold Pou made his lineup identification, he actually said James Davis looked "similar" to the shooter. At trial, when Pou was asked if he saw the shooter in the courtroom, Pou pointed to Davis and said, "the guy over there resemble him, but I know the guy had braids. Like that's he [sic] main thing that I really knew about it. He was light skinned with braids, but he resemble him" (Pou 347-348).

Familiarity with James Davis could also have been a factor in the identifications in this case. James Davis was at the Masonic Lodge that night and it is possible that Machicote, Pou, and Belton saw him while he was there. Researchers have observed a phenomenon known as unconscious transference, where "a witness presented a lineup containing a familiar but innocent person may incorrectly attribute that person's familiarity to

the crime context and, consequently, make a false identification.”⁵

There are other reasons to doubt the People’s identification evidence in this case. First, the three eyewitnesses provided inconsistent descriptions of Blake Harper’s shooter. Jose Machicote recalled a man with brown skin, a goatee, and hair braids, which were close to the scalp and ran in a line to the back of his head. Harold Pou described a light-skinned man with braids. Shawn Belton did not see any braids. At the precinct, before the lineup, he told police the shooter was wearing a black “skully” cap.

Second, by the end of the trial, the People had only one identification witness left, Jose Machicote. The other two witnesses backed off of their identifications. As stated above, Harold Pou repeatedly stated he thought James Davis looked “similar” to the shooter. As for Shawn Belton, at trial, he completely recanted his prior identifications of James Davis. He testified he only glanced at the shooter, and never got a good enough look at him to make a valid identification.

Third, Harold Pou and Shawn Belton were both reluctant witnesses. The decedent in this case, Blake Harper, was a close

⁵ Ross DF, Ceci S, Dunning D, Toglia M. Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person. Journal of Applied Psychology. 1994, Vol. 79. No. 6, 918-930.

friend to both of them. Yet neither one of them came forward in this case until six weeks after the shooting, when Harper's mother called them and said the police had a suspect. She asked them to come with her to the precinct. After the lineup, Pou told the prosecutor:

[Harper]'s mother gave me a call and told me they think they have somebody that fit the description. She told me she'd like for me to come and verify if that was him.

(Exhibit J).

Clearly, at Harper's mother's urging and perhaps for her sake, both Pou and Belton may have felt emotionally compelled to make an identification at the lineup. That could explain why they would pick someone who "resembled" the shooter, even if they were not completely certain. Finally, as set forth in the Affirmations of Susan Epstein (Exhibit U), both Harold Pou and Shawn Belton continue to maintain they could not make positive identifications of the person who shot Blake Harper. Unfortunately, Machicote appears to have been killed in 2006, so we are unable to determine whether he had second thoughts about his identification as well.

It is also important that Jose Machicote made his lineup identification after he had already selected James Davis in the photo array. In Lawson, the Court found that "[v]iewing a suspect multiple times throughout the course of an investigation

can adversely affect the reliability of any identification that follows those viewings." 291 P.3d 686-687.

* * *

Mr. Davis has been incarcerated for over 14 years. We urge this Court to conclude that his convictions should be vacated, and the indictment dismissed because he is actually innocent. In the alternative, an evidentiary hearing should be held.

POINT II

TINA BLACK JUNIOR'S ADMISSION THAT SHE LIED TO THE POLICE WHEN SHE ACCUSED JAMES DAVIS OF SHOOTING BLAKE HARPER CONSTITUTES NEWLY DISCOVERED EVIDENCE, WHICH IN CONJUNCTION WITH THE WEAK IDENTIFICATION EVIDENCE, SUPPORTS THE CONCLUSION THAT JAMES DAVIS WAS WRONGFULLY CONVICTED OF HARPER'S MURDER. C.P.L. § 440.10(1)(H).

Tina Black (Senior) has disclosed that her daughter, Tina Black (Junior), who passed away in 2013, had confessed to her that she lied to the police by telling them James Davis shot Blake Harper. She did it because she felt James had rejected her. Ms. Black recalls her daughter saying, "Mommy, he kicked me aside like I was an old boot." See Exhibits S, X.

Evidence of the strength of the younger Tina's feelings for James can be found in the letters (Exhibit T), which she sent to him in prison, in 2005 and 2007. Notwithstanding that her

statement set in motion the events that culminated in James Davis's lifetime sentence, Tina Black Junior's love was strong enough to lead her to seek a relationship with him, even behind bars.

When the prosecutor interviewed Tina Black Senior on audiotape, on December 20, 2016, Ms. Black became extremely emotional as she revealed her daughter's wrongdoing. See Exhibit X. In her interview with the prosecution, she said she told her daughter to tell the police she lied, but her daughter told her to shut up. It is evident from Ms. Black's voice that the pain she felt from losing her daughter was compounded by her pain in admitting to the prosecutor that her daughter falsely accused James Davis of murder.

Tina Black's Admission Constitutes Newly-Discovered Evidence

Tina Black Junior's admission meets the standard for newly-discovered evidence and it supports the conclusion that James was wrongfully convicted. C.P.L. § 440.10(1)(g). In order for evidence to be considered newly-discovered, a defendant must satisfy the following six criteria: 1. the evidence will probably change the result if a new trial is granted; 2. the evidence was discovered or became available since the trial; 3. the evidence could not have been discovered before the trial, even by the exercise of due diligence; 4. the evidence is

material to the issue; 5. the evidence is not cumulative; and 6. the evidence does not merely impeach or contradict the former evidence. People v. Salemi, 309 N.Y.2d 208, 216 (1955), cert. denied, 350 U.S. 950 (1956). See C.P.L. § 440.10(1)(g). Each of these six criteria are satisfied here.

Tina Black Junior is deceased. However, her statements to her mother before she died would be admissible at a new trial. The statements would be admissible as a declaration against penal interest, because they satisfy the four prerequisites that must be met to introduce it into evidence as a statement of a nontestifying third party. These are: (1) the declarant is unavailable to testify; (2) the declarant was aware that it was adverse to her penal interest; (3) the declarant has competent knowledge of the facts underlying the statement; and (4) circumstances attest to the statement's trustworthiness and reliability. People v. DiPippo, 27 N.Y.3d 127, 136-137 (2016); People v. Deacon, 96 A.D.3d 965, 968 (2d Dep't 2012). Moreover, "declarations which exculpate a defendant, such as those presented here, are subject to a more lenient standard, and will be found 'sufficient if [they] establish[] a reasonable possibility that the statement might be true.'" People v. Deacon, 96 A.D.3d at 968, quoting People v. Settles, 46 N.Y.2d 154, 169-170 (1979).

There can be no dispute that the first three criteria are

met in this case. First, Tina Black Junior was deceased when her mother came forward with her confession. Second, Tina Black Junior must have been aware that volunteering false information to the police about the identity of a murder suspect was against the law. See P.L. § 240.50(3)(c). Indeed, the fact that she confessed her criminal act to her mother supports the finding that Tina understood her statement's potential to incriminate her. People generally acknowledge their own criminal activity only to someone they trust. Her awareness of her culpability is also evident from the fact that she never corrected her mistake, even though she continued to love James Davis. Third, Tina Black Junior did not attend the party and therefore it is clear that she had no first-hand knowledge about Blake Harper's murder. Fourth, her letters to James Davis are proof that she loved him and given that fact, her only plausible reason for framing him for Harper's murder was to seek revenge. Indeed, she told her mother she lied to the police because she was upset that James was romantically involved with someone else. She said, "he kicked me aside like I was an old boot." See Exhibit S. These circumstances clearly demonstrate that her confession is trustworthy and reliable evidence.

Under the Penal Law, falsely reporting an incident in the third degree [P.L. § 240.50(3)(c)], is a class A misdemeanor. Consequently, Tina Black's confession most certainly qualifies

as a declaration against penal interest. See, e.g., People v. Soto, 26 N.Y.3d 455, 461 (2015) (declaration against penal interest exception satisfied where declarant admitted leaving the scene of an accident that caused property damage, which was merely a traffic violation).

The Introduction of Tina Black's Declaration Against Penal Interest is Material

It appears highly likely that, if the jurors at James Davis's first trial, which heard Kaneen Johnson's alibi testimony, had also learned that Tina Black falsely identified Davis as the shooter, they would have acquitted him, instead of voting 11-to-1 to acquit. And, even without Johnson's alibi testimony, if the jury at the second trial had the benefit of learning Tina Black's false accusation was the only reason James Davis was in the lineup, they would have had a completely different context in which to understand why Harold Pou said only that Davis "resembled" the shooter and why Shawn Belton completely retracted his lineup identification of Davis.

Instead, what the jurors heard was the People's argument on summation that Pou and Belton "back[e]d away" from their initial lineup identifications because, "there is a code on the street . . . [d]on't talk to the police." She continued:

And I submit to you that is what is going on here. And each time Mr. Pou and Mr. Belton has to come here and say who it

was that did it. They back away and they back away. . . . There are other factors working here, ladies and gentlemen. You don't need to be an expert on all of this. You use your common sense and you know what is going on here. You know what is going on.

The prosecutor's argument, that Pou and Belton backed away from their identifications because of the "code on the street, would not have been persuasive if the jury had learned the police had no legitimate reason to put Davis in that lineup. Indeed, Tina Black's confession would have provided the defense with a highly persuasive argument to explain why Pou and Belton were unable to say Davis was the shooter - they could not identify him because he was the wrong man. Further, Tina Black's confession, in conjunction with Pou and Belton's inability to identify Davis, would have undermined the credibility of the prosecution's remaining eyewitness, Jose Machicote, as well.

Because the identification testimony was the only evidence against James Davis, there is a high likelihood that if Tina Black's newly discovered confession had been presented at James Davis's trial, the outcome of this case would have been different. Therefore, the judgment should be vacated and a new trial ordered.

POINT III

JAMES DAVIS WAS DENIED THE RIGHT
TO THE EFFECTIVE ASSISTANCE OF
COUNSEL, WHERE TRIAL COUNSEL
UNREASONABLY FAILED TO CONTACT
WITNESSES TO INVESTIGATE
POTENTIALLY EXCULPATORY EVIDENCE.
U.S. CONST., AMENDS. VI, XIV; N.Y.
CONST., ART. I, §6.

James Davis was represented at trial by Joel S. Medows, a court-appointed, 18-B lawyer. As set forth in Mr. Davis's affidavit, attached hereto as Exhibit Y, Mr. Medows asked Davis who was with him at the Masonic Temple party, on January 25, 2004. Davis told Medows that his brother, Daniel Davis, was there, as well as Jamel Black, Nathaniel Black and Corey Hinds. Some of these names were also turned over to Mr. Medows in the form of James Davis's memorialized statement to Detective Matthew Hutchison, stating who he was with at the party, made on March 26, 2004, at 11:45 a.m.. See Exhibit G.

Thus, there can be no doubt that Mr. Medows had notice that there existed potentially important defense witnesses, who needed to be contacted. Time and again, however, these witnesses reported to the Conviction Review Unit, during their audio-recorded interviews, that no defense attorney ever contacted them.

Mr. Medows is deceased.⁶ It is clear, however, that was no strategic downside to him contacting these witnesses, to see if they had useful information. Mr. Medows did present Kaneen Johnson as an alibi witness at Davis's first trial. At the very least, when she refused to testify at the second trial and the defense collapsed, Mr. Medows should have made some effort to speak to these other potentially crucial witnesses.

Daniel Davis, Jamel Black, and Corey Hinds could have provided testimony that completely exonerated Mr. Davis. And Jamel Black could have even provided Mr. Medows with the name of the person who did the shooting that night, Tay Hall. Consequently, Mr. Medow's failure to investigate these witnesses demonstrates that his performance fell substantially below accepted professional standards, thereby denying Mr. Davis his fundamental right to the effective assistance of counsel. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, §6; see Wiggins v. Smith, 539 U.S. 510, 521 (2003); Strickland v. Washington, 466 U.S. 668 (1984); People v. Benevento, 91 N.Y.2d 708, 713 (1998). Therefore, the judgment should be vacated, and a new trial ordered. C.P.L. §440.10(1)(h).

"[T]he right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771

⁶ See Saint John's Law Alumni Magazine, Fall 2015, Reports of Gifts, Class of 1970, at 42.

n.4 (1970). The United States Supreme Court has formulated a two-pronged standard for evaluating ineffectiveness: counsel's performance will be found deficient if it falls below an "objective standard of reasonableness" and there is a "reasonable probability that, but for [the errors of counsel], the result of the proceedings would have been different." Strickland, 466 U.S. at 687-88; accord Wiggins, 539 U.S. at 521; Williams v. Taylor, 529 U.S. 362, 391 (2000).

In New York, prejudice "is examined more generally in the context of whether [Mr. Davis] received meaningful representation." Benevento, 91 N.Y.2d at 713. The question is whether the attorney's conduct constituted "'egregious and prejudicial'" error that deprived Mr. Davis of a fair trial. Id. (citation omitted). Under either New York State or the federal analysis, even a single error can constitute ineffectiveness. Murray v. Carrier, 477 U.S. 478, 496 (1986); People v. Hobot, 84 N.Y.2d at 1022; People v. Jenkins, 68 N.Y.2d 896 (1986).

While counsel is not necessarily ineffective for proceeding with an ultimately losing defense, he must make an informed and reasonable evaluation of potential defenses and select those supported by the evidence. See Wiggins, 539 U.S. at 521-523; Strickland, 466 U.S. at 690-91; Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, Dugger v. Harris, 493 U.S. 1011

(1989); Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); see also People v. Baba-Ali, 179 A.D.2d 725, 729 (2d Dep't 1992) (inadequate presentation of key defense).

Moreover, it is well-settled, under both the state and federal standards, that a defendant's right to representation entitles him to have counsel "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial." People v. Bennett, 29 N.Y.2d 462, 466 (1972), quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968); see Wiggins, 539 U.S. at 521-22 (citing Strickland, 466 U.S. at 690-91); see also People v. Oliveras, 21 N.Y.3d 339, 346 (2013) ("an attorney's strategy is shaped in significant part by the results of the investigation stage of the representation"); People v. LaBree, 34 N.Y.2d 257, 260 (1974) (duty to conduct appropriate pretrial investigations); People v. Smith, 237 A.D.2d 388, 388-89 (2d Dep't 1997) (failure to investigate facts of case). Thus, courts have repeatedly reversed convictions on the ground of ineffective assistance of counsel where the defense lawyer failed to investigate or interview witnesses. See, e.g., Coles v. Peyton, 389 F.2d at 226 (counsel made no attempt to interview important defense witnesses); People v. Bennett, 29 N.Y.2d at 467 (counsel

ineffective where record demonstrates "a complete lack of investigation or preparation whatever on the only possible defense available"); People v. Fogle, 10 A.D.3d 618 (2d Dep't 2004) (defendant's post-conviction submissions revealed the existence of exculpatory witnesses; accordingly, trial counsel's failure to investigate and locate these witnesses prejudiced the defendant); People v. Bussey, 6 A.D.3d 621 (2d Dep't 2004) (finding defendant denied effective assistance of counsel based on counsel's failure to investigate defendant's alibi or call any of the alibi witnesses to testify at trial). See People v. Jenkins, 84 A.D.3d 1403 (2d Dep't 2011) (hearing ordered based on trial counsel's failure to investigate two additional alibi witnesses, where defendant submitted affidavits from witnesses stating counsel failed to contact or interview them).

The defendant bears the burden of demonstrating that the attorney's performance fell below a standard of reasonable competence, and that counsel's errors were not due to strategic or other legitimate explanations consistent with the conduct of a meaningful defense. People v. Rivera, 71 N.Y.2d 705, 709 (1988). For example, a defendant may show that there was no legitimate reason for neglecting to pursue a specific defense tactic. Id.; see People v. Hewlett, 71 N.Y.2d 841 (1988).

Here, there was no strategic downside or other legitimate

reason prevent Mr. Medow's from contacting Daniel Davis, Jamel Black, and Corey Hinds. If he had spoken to them, he would have found that their testimony corroborated James Davis's account of his actions that night. He might also have learned, as we did, the names of additional witnesses. Instead, he proceeded at the second trial with no defense at all.

Ineffective assistance of counsel claims are most appropriately raised via a C.P.L. §440.10 motion rather than on direct appeal. See People v. Smith, 301 A.D.2d 471, 473 (1st Dep't 2003); see generally People v. Brown, 45 N.Y.2d 852, 853-54 (1978) ("[I]n the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on a[] post-conviction proceeding brought under CPL 440.10").

Here, Mr. Medow's failure to conduct an adequate pretrial investigation into testimonial evidence supporting Mr. Davis's claim of innocence deprived Mr. Davis of meaningful representation. See Benevento, 91 N.Y.2d at 713; see also Strickland, 466 U.S. at 687-688. Because Mr. Medow's errors of omission did not appear on the record, they could not have been raised on direct appeal. See Brown, 45 N.Y.2d at 853-854.

In conclusion, Mr. Medow's failure to investigate and obtain crucial testimonial evidence that would have established James Davis left the Masonic Temple party well before the

shooting took place, not only constituted less than "meaningful representation" of Mr. Davis, it was grossly deficient. Benevento, 91 N.Y.2d at 708; see Strickland, 466 U.S. at 687-88. Accordingly, the judgment should be vacated and a new trial ordered. Alternatively, a hearing should be ordered on this motion. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, §6; C.P.L. § 440.10(1)(h).

CONCLUSION

FOR THE REASONS GIVEN IN POINT I, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. FOR THE REASONS GIVEN IN POINTS II AND III, A NEW TRIAL SHOULD BE ORDERED. ALTERNATIVELY, A HEARING SHOULD BE ORDERED.

Respectfully submitted,

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