DISTRICT ATTORNEY
KINGS COUNTY

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REPORT ON THE CONVICTION

OF

BLADIMIL ARROYO

By: The Conviction Review Unit

February 2019

I. The Crime and Background

According to the trial evidence, on September 16, 2001, at about 2:50 a.m., on 42nd Street between 2nd and 3rd Avenues near the Sweet Cherry strip club, Bladimil Arroyo ("defendant") and Eddie Lorenzo ("Lorenzo"), each armed with a gun, attempted to take property from Cary Greene ("Greene") and Gabor Muronyi ("the deceased"). While the deceased struggled with defendant, Lorenzo repeatedly hit Greene on the side of the head with a gun. Greene managed to stab Lorenzo and escape. Defendant or Lorenzo then fatally shot the deceased in the back. The bullet exited the chest.

Greene identified Lorenzo, but not defendant. Police Officer Michael Monteverde, who was in the vicinity, heard gunshots and saw a car speeding from the direction of the shots. He later identified Lorenzo as the driver and defendant as a passenger of the car.

Initially, defendant stated that he was merely present when Lorenzo hit Greene and when Lorenzo fired several shots. After a detective learned that the murder occurred during an attempted robbery and was told—inaccurately—that the deceased had been fatally stabbed in the chest, defendant "spontaneously" confessed to the detective that he had stabbed the deceased in the chest during an attempted robbery.

Although Greene initially reported that three gunmen committed the crime and Officer Monteverde initially reported seeing three individuals flee from the car, at trial they both testified that they saw only two individuals. The prosecution's theory was that since Lorenzo had been identified as Greene's attacker, defendant's confession established that he was the second individual and therefore the confession proved his guilt of felony murder.[1]

Defendant is currently incarcerated, serving a sentence of twenty years to life in prison. He will be eligible for parole in May 2021.

II. Overview of the Errors

The CRU discovered the following errors in this case, which raise serious concerns about the integrity of the conviction: (1) the only direct evidence of defendant's guilt was his purportedly spontaneous confession, which was consistent with a false fact law enforcement believed to be true at the time defendant confessed (that the deceased had died of a stab wound to the chest) and which must have been supplied to the defendant by the interrogating detective; (2) the interrogating

[1] Without defendant's confession, the circumstantial evidence—defendant's initial statement placing himself at the crime scene, defendant's flight from the direction of the crime scene with his friend Lorenzo, and a trail of Lorenzo's blood leading to defendant's house where defendant was apprehended—was insufficient to establish guilt beyond a reasonable doubt. *See People v. Cabey*, 85 N.Y.2d 417 (1995) (mere presence at a crime scene is insufficient for a finding of criminal liability); *People v. Lopez*, 137 A.D.3d 1166, 1167 (2d Dep't 2016) (mere presence at a crime scene, even with knowledge that a crime is occurring, or mere association with the perpetrator of a crime, is not enough for accessorial liability); *see also People v. Yazum*, 13 N.Y.2d 302 (1963) (flight is weak circumstantial evidence of consciousness of guilt).

detective's reports, statements and testimony concerning how the false confession originated which can be characterized, at best, as incomplete and, at worst, false and deliberately misleading; (3) the apparent failure to disclose detective notes containing Greene's identification of another individual as possibly one of the two who attacked the deceased may have deprived defendant of the opportunity to refute the prosecution's case and advance a viable theory of defense; (4) the apparent failure to disclose detective notes containing Officer Monteverde's initial statements—that three individuals were involved in the crime—may have deprived defendant of the opportunity to refute the prosecution's case and advance a viable theory of defense; (5) the untimely disclosure of Greene's past conviction for Hindering Prosecution may have foreclosed the defense from challenging his credibility, because the defense did not have an opportunity to investigate the conviction and was unaware that Greene falsely testified at trial about the underlying facts of that conviction; and (6) the apparent failure to disclose detective notes containing Officer Monteverde's description of the car's passenger which, among other things, did not match defendant, may have prejudiced the defense.[2]

III. The Police Investigation[3]

The police investigation commenced and concluded on September 16, 2001. The lead investigator, Detective David Gilbert of the 72nd Precinct Detective Squad, was assisted by Squad Detectives Anthony Spencer, Scott Prendergast, James Gaynor, Donald Kerr, and Bernard Pontoo, and Brooklyn South Homicide Squad Detectives Robert Keating, Robert Cermenello, and Robert DeMarco.

A. *The Police are Informed that the Deceased was Fatally Stabbed in the Heart*

On September 16, 2001, at about 2:50 a.m., Police Officers Richard Colangelo and Frank Dileo of the 72nd Precinct discovered the deceased's body at 42nd Street and 2nd Avenue near Sweet Cherry. No witnesses were at the scene.[4]

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[2] As explained below (*infra* at 40 n.68), the nondisclosed documents constituted *Rosario* and *Brady* material. Under *People v. Rosario*, 9 N.Y.2d 286, *cert. denied* 368 U.S. 866 (1961), the People are required to disclose recorded statements of their witnesses relating to the subject matter of the witness's direct-examination. C.P.L. §§ 240.44(1), 240.45(1)(a). Under *Brady* and its progeny the People are required to disclose exculpatory and impeachment evidence that would be material to the outcome of the case. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *People v. Scott*, 88 N.Y.2d 888, 890 (1996).

[3] Unless otherwise cited, the police investigation facts are obtained from the police documents in the People's trial file. Numbers in parentheses preceded by "W." refer to the joint *Wade* hearing, those preceded by "DH." refer to defendant's *Huntley* hearing, those preceded by "VD." refer to the minutes of the voir dire, and those preceded by "T." refer to defendant's trial transcript.

[4] DeMarco DD5, "Interview of First Officer;" Spencer DD5, "Interview of First Officer P.O. Colangelo & P.O. Dileo;" Gilbert's notes concerning Colangelo and Dileo.

At about 3:02 a.m., EMS transported the deceased to Lutheran Medical Center ("Lutheran").[5] An emergency room doctor pronounced him dead at 3:15 a.m. The doctor informed Officer Colangelo that the cause of death was a stab wound to the heart, and that the deceased also sustained two gunshot wounds to the lower back.[6] Shortly thereafter, Detective Gilbert arrived at Lutheran and learned about the deceased's death. Colangelo handed Gilbert the deceased driver's license.[7]

B. *Greene Reports that Three Individuals Committed the Crime and Makes Uncertain Identifications Near the Scene*

Meanwhile, at about 3:00 a.m., Greene flagged down Police Officers Stewart and Mundy. Greene was frantic and shouting that three black males "tried to rob us!" Greene described that one of the men had a light complexion, was six-feet tall, weighed 210 pounds, had short hair, and wore a white shirt, blue jeans, and sneakers. Mundy recovered a bloody knife from Greene, which Greene said he had used to stab one of the males in self-defense.[8]

Soon thereafter, Patrol Officer Belise, who heard a radio call about "three male blacks wanted for an assault" and the description, stopped Nicolas Johnson at 44th Street and 5th Avenue. Officers Stewart and Mundy drove Greene to the location, where Greene identified Johnson as his assailant and Johnson was arrested. Greene then stated that he was not completely certain, adding that "if the guy did not have a stab wound then this would not be the guy." Johnson did not have any apparent stab wounds or injuries, and while Johnson physically fit the description his clothing did not. Johnson's arrest was subsequently voided.[9]

Police Officer Cavendish was en route to the crime scene when James Ortiz approached Cavendish and asked what happened. Ortiz's hand was lacerated and he was clutching a bloody napkin. Ortiz was with two other people. A sergeant instructed Cavendish to arrest Ortiz.[10] Officers Mundy

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[5] DeMarco DD5, "Interview of First Officer."

[6] Spencer DD5, "Interview of First Officer P.O. Colangelo & P.O. Dileo;" Gilbert's notes concerning Colangelo and Dileo.

[7] Gilbert DD5, "Response to LMC [Lutheran Medical Center]." Colangelo testified at trial that he recovered the deceased's driver's license from under his body and gave it to the "squad supervisor" at the scene (T.371, 378). The license was not photographed or vouchered, and no supervisor or detective testified at any proceeding about receiving the license (*infra* at 14 n.43).

[8] Spencer DD5 [page 1], "Interview P.O. Stewart & P.O. Mundy." Spencer's DD5 does not reflect that Greene described the other two black males. According to their respective on-line booking arrest sheets, Lorenzo was black-Hispanic, dark skin tone, 5'10", 270 pounds, and was 23 years old; defendant was white-Hispanic, medium skin tone, 6'0", 205 pounds, had black hair, and was 22 years old. Defendant's arrest photo shows that his hair was shaved closed to his head.

[9] Pontoo DD5, "Interview with P.O. Balise;" Spencer DD5 [page 1], "Interview P.O. Stewart & P.O. Mundy."

[10] The CRU concludes that Ortiz's arrest was voided at the precinct because the arrest does not appear in the KCDA computer case-tracking database, and the Early Case Assessment Bureau has no record of it.

and Stewart drove Greene to 42nd Street and 4th Avenue where Greene identified Ortiz as possibly one of two individuals who approached and attacked the deceased.[11]

C. *Defendant is Apprehended*

Also at about 3:00 a.m., Police Officers Michael Monteverde and Ronald Saez were on 4th Avenue and 42nd Street when they heard approximately six gunshots. The officers then heard a car screeching, and saw a four-door black Pontiac Grand Am, with tinted windows, speed up towards them and run the light at their corner.[12] The rear passenger window was down as the car went by, and Officer Monteverde observed a white male sitting in the back seat.[13]

The officers drove after the Grand Am to where it pulled over in front of 423 42nd Street, between 4th and 5th Avenues.[14] Officer Monteverde saw three males jump out of the car and run into a building.[15] Officer Saez saw two or three males run out of the black car and into a building.[16] Saez went into a building, which the officers believed the men had fled into; Monteverde remained outside and then observed a stocky Hispanic male walk past him.[17] The stocky male had on a bloody shirt.[18] Monteverde realized that he and Saez were at the wrong building. The stocky male got into the Grand Am and drove off.[19]

Police personnel arrived and followed a blood trail into 455 42nd Street and to apartment 1R. After obtaining consent from defendant's mother to search the apartment, the police followed the blood trail to a bedroom where defendant was in bed.[20] Officer Monteverde entered and saw "a male" (who he later identified as defendant) with tan pants inside the apartment with the police; he had

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[11] Spencer DD5 [page 2], "Interview P.O Stewart & P.O. Mundy;" *see* Gilbert's notes. None of the Ortiz information was disclosed to the defense (*infra* at 24-25, IX. A.1[a], [b]).

[12] DeMarco DD5, "Interview of P.O. Monteverde;" Prendergast DD5, "Interview w/ P.O. Saez."

[13] Prendergast's notes (which were not disclosed [*infra* at 25, IX. A.2]). At trial, Monteverde described the rear passenger as a "light-skinned male" (T.71).

[14] DeMarco DD5, "Interview of P.O. Monteverde;" Prendergast DD5, "Interview w/P.O. Saez."

[15] Prendergast's nondisclosed notes (*infra* at 25, IX. A.2). At trial, Monteverde testified that "approximately three, but two," ran out of the black car (T.74).

[16] Prendergast DD5, "Interview w/P.O. Saez."

[17] DeMarco DD5, "Interview of P.O. Monteverde;" Prendergast DD5, "Interview w/P.O. Saez."

[18] Monteverde later told detectives that he was unable to identify the stocky male's face (Prendergast's nondisclosed notes [*infra* at 25, IX. A.2]).

[19] DeMarco DD5, "Interview of P.O. Monteverde;" Prendergast DD5, "Interview w/P.O. Saez."

[20] Cermenello's notes regarding defendant's apprehension.

seen the male with tan pants run out of the black car.[21] Officer Saez observed a male Hispanic (defendant) taken into custody but was unable to identify him.[22]

The police at the precinct questioned defendant about who he was with that evening. Defendant stated that he was with Lorenzo at Sweet Cherry, that Lorenzo had been stabbed, and that Lorenzo lived in Staten Island.[23]

D. *Evidence Recovered at the Crime Scene*

Evidence Collection Team Officer Louis Denora recovered six .380 shell casings; three bullet fragments; a black wallet containing the deceased's identification; and a watch.[24]

E. *Lorenzo is Apprehended*

At about 4:15 a.m., Detective James Gaynor and others located Lorenzo and his brother, Ricardo Lorenzo ("Ricardo") at St. Vincent's Hospital in Staten Island. Lorenzo and Ricardo were subsequently taken to the precinct.[25]

F. *Greene is Interviewed and Repeats that Three Individuals Committed the Crime*

At 5:25 a.m., Detective Cermenello interviewed Greene at the precinct. Greene stated, in sum and substance, that earlier that evening, he and the deceased went to a couple of bars, ate pizza, and ended up at Sweet Cherry. At about 2:50 a.m., they left Sweet Cherry and walked down 42nd Street towards 3rd Avenue, and passed an idling parked car with dark windows. They realized that they went the wrong way and turned back. As they passed the idling car again, the front passenger window lowered and a male inside yelled, "Do you have a problem?" Greene and the deceased responded "no" and continued walking. The car quickly backed up and stopped near them.

Greene told Detective Cermenello that:

> [t]hree black males exited the car with guns and demanded money, wallets, and chains. The shorter male exited the front passenger [side] and the driver approached [the deceased]. A taller male approached [Greene] from the rear of the car.[26]

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[21] Prendergast's nondisclosed notes (*infra* at 25, IX. A.2).

[22] Prendergast DD5, "Interview w/P.O. Saez."

[23] LH.4-5; W.11-14. The People did not serve notice of this statement to defendant or seek to use it at his trial.

[24] Kerr DD5, "Interview with Evidence Collection Team."

[25] Detective Gaynor's DD5 "Response to St. Vincent's Hospital."

[26] Greene did not describe the driver.

Greene removed a knife from his pocket and opened it behind his back. The taller male, again, demanded Greene's wallet at gunpoint. As Greene attempted to walk away, the taller male twice hit Greene with the gun, on the side of his head. Before the taller male could hit Greene again, Greene repeatedly stabbed the taller male in his upper body.

Greene ran off and heard several gunshots behind him. A car stopped for Greene and called 911. Greene returned to the scene and saw his friend lying on the ground, bleeding. Officers Stewart and Mundy arrived and placed Greene in their police car.[27]

At the time of the crime, Greene was on probation.[28]

G. *Defendant's Initial Statement*

At approximately 7:00 a.m., Detective Keating interviewed defendant. Detective Kerr was present. After waiving his *Miranda* rights, defendant stated the following in sum and substance. The prior evening, at around 9:00 p.m., he was at his house with his girlfriend Ruthie. Lorenzo drove up with Ricardo, hung out for a while, and left. Ruthie then went to work "(she works at Sweet Cherry)." Defendant "beeped" Ricardo to pick him up. At around 1:00 or 2:00 a.m., Lorenzo arrived without Ricardo, who had stayed in Williamsburg drinking.

Defendant and Lorenzo went to Sweet Cherry. At some point, defendant wanted to leave to pick up Ricardo. As they were leaving, a "Russian dude" brushed against Lorenzo and Lorenzo fell towards a table. Lorenzo looked at defendant and "stared at the Russian." Defendant told Lorenzo to forget about it and they left. When they reached Lorenzo's car "(Black Pontiac)" on 42nd Street, the two "Russian guys" were walking up the street.

Defendant and Lorenzo got into Lorenzo's car. Lorenzo drove up 42nd Street, past the two Russians, and then backed up fast. Lorenzo said that he wanted to talk to these guys, and yelled out the window "(He yelled to them 'What's up now?')." Lorenzo grabbed a silver gun from the left side of the car and both Lorenzo and defendant got out. Lorenzo ran towards the Russians and hit one of them in the face with his right hand. That Russian pulled out a knife, repeatedly stabbed Lorenzo by the neck, and then ran away.

The other Russian turned, and Lorenzo fired at least six gunshots. At that time, defendant was "already in the car." Lorenzo jumped in the car and drove off, passing red lights. Lorenzo yelled at defendant, "why didn't [defendant] help him." They drove to defendant's house and went into defendant's room where they attempted to stop Lorenzo's bleeding. Lorenzo wanted to see

[27] Cermenello DD5, "Interview of Witness, Carey Greene."

[28] Cermenello's notes regarding Greene's probation, which notes were not disclosed to the defense (*infra* at 25-26, IX. A.3[a]).

Ricardo and left. Twenty minutes later the police arrived. Lorenzo's gun was a silver automatic, and defendant did not know what Lorenzo did with it "after he did the shooting."[29]

H. *Lorenzo's Statement*

At approximately 10:15 a.m., Detective Gilbert interviewed Lorenzo. After waiving his *Miranda* rights, Lorenzo stated, in sum and substance, that "two white guys" bumped into defendant at Sweet Cherry. Thereafter, after Lorenzo and defendant got in Lorenzo's Grand Am, the same two white guys walked past them. Defendant jumped out and began to fight with "the victim." When the other guy joined in the fight, Lorenzo fought that guy, who stabbed Lorenzo. Defendant pulled out a small silver gun from his leather jacket, and fired a few shots.[30]

I. *Ricardo's Statement*

At approximately 11:40 a.m., Detectives DeMarco and Prendergast interviewed Ricardo, who stated, in sum and substance, that Lorenzo told him the following: Lorenzo and defendant were at Sweet Cherry, and when they left they saw two males walking up the street. Defendant wanted to rob the men, and Lorenzo told defendant that "he had his back." Defendant started fighting the two men. Lorenzo went to help defendant and was stabbed. Defendant pulled out a gun and fired shots "all over the place."[31]

J. *Defendant Confesses to Stabbing the Deceased in the Chest*

At 12:45 p.m., approximately five to six hours after defendant's initial statement, during which time he was in the Detective Squad holding pen, Detective Keating reported that "[defendant] asked to speak with [me] and then stated, 'I did not tell you the whole story before, the part about going to the club but there is more.'" Defendant then stated, in sum and substance, that he brought a knife to the club because Ruthie had a problem with one of the girls. Inside the club, Lorenzo saw "the Russian guy with a chain on his neck." When defendant and Lorenzo were leaving, Lorenzo said, "I want his chain."

As defendant and Lorenzo were getting in Lorenzo's car, they saw the Russian guys walking up the street. Lorenzo said, "let's do them," "pulled up past them," and yelled out the window "what is your problem now?" The Russian guys said that they had no problem, and they forgot where

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[29] Keating DD5, "Interview of [defendant]" (parentheticals in original; material in brackets added); defendant's statement written by Keating and signed by defendant.

[30] Gilbert DD5, "Interview of Edwin Lorenzo."

[31] DeMarco DD5, "Interview of Ri[c]ardo Lorenzo." Ricardo was arrested for the instant crime. At 6:37 p.m., Ricardo gave a sworn audiotaped statement to the trial A.D.A. and a junior A.D.A., which mirrored Ricardo's statement to Detectives DeMarco and Prendergast. Thereafter, his arrest was voided. Spencer DD5, "Audio Tape of [Ricardo] Lorenzo."

they parked. The Russians guys started walking down towards 2nd Avenue and Lorenzo backed up "real fast."

Lorenzo grabbed a silver automatic gun from the left side of his driver's seat and placed it in his waist area. Defendant held his knife, and they both got out of the car. Defendant approached one guy and demanded his property. Lorenzo was by the other guy. Defendant's "guy" removed his watch, and took out his wallet and dropped it. The guy then "[came] toward [defendant]" and defendant stabbed him "in the upper chest."

That guy started to walk away. Lorenzo was hitting the other guy, who pulled out a knife and stabbed Lorenzo. Lorenzo fired several gunshots in the direction of the two who were walking toward 2nd Avenue. Defendant got in the car, followed by Lorenzo. Half way up 42nd Street, just before 3rd Avenue, before passing the Gowanus, defendant threw the knife out of the passenger side window.[32]

Defendant completed his statement at 1:00 p.m., and was provided with lunch.[33]

K. *The Lineups*

Detective Cermenello conducted a lineup with Lorenzo as the subject and a lineup with defendant as the subject. At 2:30 p.m., Greene viewed Lorenzo's lineup. Lorenzo was in position #5. Greene identified Lorenzo stating, "I fought with him and he hit me with the gun. I'm sure it's #5."

At 2:34 p.m., Officer Monteverde viewed the same lineup and identified "#5," as "the guy who ran out of 455 42nd Street and drove away."[34]

At 2:50 p.m., Greene viewed defendant's lineup. Defendant was in the #2 position. Detective Cermenello asked Greene whether he recognized anyone. Greene replied "no."

At 2:55 p.m., Officer Monteverde viewed the same lineup, and stated that he recognized #2 as "one of the guys that ran into 455 42[nd] Street."[35]

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[32] Keating DD5, "Interview of [defendant];" defendant's statement written by Keating and signed by defendant. There is no evidence that the police searched for defendant's knife.

[33] Gilbert DD5, "Food for [defendant] and Lorenzo."

[34] As stated, Prendergast's nondisclosed notes reveal that Monteverde reported prior to the lineup that he could not identify Lorenzo's face (*infra* at 25, IX. A.2).

[35] Cermenello DD5, "Lineups," and Cermenello's notes.

L. *Defendant's Videotaped Statement*

From 3:17 to 3:44 p.m., in the presence of the trial A.D.A. and Detective Gilbert, a junior A.D.A. interviewed defendant on videotape.[36] After waiving his *Miranda* rights, defendant reiterated his second statement, adding details about the knife, stabbing, and robbery.

Defendant stated that when he and Lorenzo got out of the car to approach the Russian guys, he removed a knife from his pocket. Defendant explained that he had left the knife in the side of the car seat and did not bring it into the club. When he had returned to the car, defendant had placed the knife in his pocket. Defendant described the knife as silver with a black rubber handle. Defendant further described that the knife "clicks out" with the snap of the wrist, and that it was a type sold in grocery stores.

Defendant approached the man who was wearing a silver chain and watch. Defendant asked for the chain and the man gave it to defendant. Defendant next asked for the watch. As the man started to remove the watch, defendant saw that it was "like a black plastic $10 watch" and did not want it. Defendant asked the man if he had money in his wallet, and the man said no. The man asked whether he could keep his ID and dropped the wallet to the ground.

When defendant bent down to get the wallet, the man grabbed him by the neck and defendant "went at" the man's chest with the knife, and the man "staggered off." Defendant did not know "exactly where" he stabbed the man, but it was in the "upper body area." During his statement, defendant demonstrated with his left hand how he stabbed the man, and placed his right hand on his own upper chest to show the location of the stabbing. Defendant stated that he "felt like shit" and that he did not want any of the property so he threw the chain and "everything" on the ground "around the area."

As Lorenzo and defendant fled the scene in Lorenzo's car, and as they approached 3rd Avenue, just before passing the Gowanus, defendant tossed his knife out of the car.

During his statement, the junior A.D.A. repeatedly asked defendant whether it was just him and Lorenzo at the club and the crime scene. Defendant repeatedly answered that it was just the two of them.

M. *Lorenzo's Videotaped Statement*

From 4:27 to 4:50 p.m., Lorenzo gave a videotaped *Mirandized* statement to the trial and junior A.D.A.s at the precinct. Detective Gilbert was also present. Lorenzo's videotaped statement was consistent with his earlier oral statement to Detective Gilbert. Lorenzo added the following: After he was stabbed and got into his car, defendant pointed a gun at the smaller man. Lorenzo did not witness the shooting, but saw flashes and heard two shots. After the shooting, Lorenzo told

[36] Except for a pretrial hearing (*infra* at 12, VI. B.), the trial A.D.A. handled defendant's case from the arrest through sentencing.

defendant to get in the car, and defendant got in the passenger side. Neither Lorenzo nor defendant intended to rob the guys, and neither he nor defendant took any property. Defendant just wanted to beat them up and got "a little carried away."

N. *Greene's Audiotaped Statement Claiming for the First Time that Two Individuals Committed the Crime*

At 5:52 p.m., Greene gave a sworn audiotaped statement to the junior A.D.A. at the 72nd Precinct. This statement was largely consistent with his previous statement to Detective Cermenello, except for one significant change—instead of stating that there were three assailants, Greene now stated that there were two.

Greene stated that when he and the deceased passed the car a second time, "[t]wo voices" asked whether they had a problem, and that "two guys jumped out, both with guns." Greene stated that "the "small guy" went after the deceased. Greene started walking faster, but "a larger" "bigger" guy cut him off. Greene stated that the guy weighed about 250 pounds, and the other guy, "couldn't even been 180 [pounds], if that."

Greene stated that after the two guys exited the car, they pointed guns at Greene and the deceased and demanded their wallets, chains, and leather jackets. Greene told the men that he did not have a wallet, and the bigger one hit him on the left side of his head with the gun. No property was taken from him.

O. *The Case was Closed, Charging Defendant and Lorenzo with a Fatal Stabbing and Shooting During an Attempted Robbery*

Detective Gilbert's closing DD5, entitled "Case Closing with Two Arrests" (no time noted), states that:

> On 9/16/01, [the deceased] was stabbed and shot during a Robbery. Subsequent investigation by members of the 72 Detective Squad and Brooklyn South Homicide lead to the arrest of [defendant and Lorenzo] . . . . [the trial A.D.A.] of the [KCDA] was present and consulted with in regard to this case.

That evening (September 16), a criminal court felony complaint was filed charging defendant and Lorenzo with two counts of murder in the second degree (intentional and felony murder [committed by any participant during the course of committing attempted robbery]); two counts of attempted robbery in the first degree (armed with a deadly weapon and use of a dangerous instrument) and several weapon possession charges. The complaint alleged that defendants, acting in concert, "were armed with a knife and handgun," and during an attempted robbery of Greene and the deceased, defendants shot and stabbed the deceased causing his death.

IV. <u>The Autopsy Revealed that the Deceased Had Not Been Stabbed</u>

The following day, September 17, 2001, Detective Cermenello was at the Medical Examiner's Office during the deceased's autopsy. The autopsy revealed a single gunshot wound, which was fatal. The bullet entered the left lower back, perforated numerous organs including the heart, and exited the left side of the sternum. No stab wounds were noted.

V. The Grand Jury Proceedings[37]

On October 5, 2001, the grand jury indicted defendant and Lorenzo on all counts charged: three counts of Murder in the Second Degree (P.L. § 125.25[1], [2], [3]); two counts each of Robbery in the First Degree (P.L. § 160.15[1], [2]); Attempted Robbery in the First Degree (P.L. §§ 110.00/160.15[1], [2]); Robbery in the Second Degree (P.L. § 160.10[1], [2][a]); Attempted Robbery in the Second Degree (P.L. §§ 160.10[1], [2][a]); and one count each of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[2]); Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]); and Assault in the Second Degree (P.L. § 120.05[6]).

None of the charges involved a stabbing or possession of a knife.

VI. The Pretrial Suppression Hearings

A. *The Wade Hearing*[38]

On March 22, 2002, Justice Alan Marrus conducted a joint *Wade* hearing for defendant and Lorenzo. Detective Cermenello was the sole witness and testified about the lineups he conducted.

Regarding defendant's lineup, Green did not recognize anyone. Officer Monteverde identified defendant as "one of the guys that ran into 455 42nd Street" (W.29).

Regarding Lorenzo's lineup, Greene identified Lorenzo as the person with whom he fought and who hit him with a gun. Monteverde identified Lorenzo as "the guy who ran out of 455 42nd Street and from where they had followed the two people into the building" (W.25) (emphasis added).

The court found Cermenello credible, and held that the lineups were not unduly suggestive.

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

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

B. *Defendant's Huntley Hearing*

On April 18, 2002, Judge Marrus conducted defendant's *Huntley* hearing. A different A.D.A. represented the People because the trial A.D.A. testified to authenticate defendant's videotaped statement.

Detective Keating was the sole witness and testified as follows:[39] He interviewed defendant on September 16, at 7:00 a.m. in the Detective Squad's interview room. Prior to the interview, Keating did not review any paperwork. Detectives Gilbert, Kerr, and Cermenello informed him that someone was shot on 42nd Street by Sweet Cherry, that there was a surviving witness, and that two perpetrators had been arrested. Keating did not speak to the surviving witness. He did not know whether anyone spoke to defendant about the shooting before he did. Keating told defendant that he was investigating an incident that happened at Sweet Cherry and did not mention a homicide (DH.20). Defendant waived his *Miranda* rights, and made a statement (DH.10).

After defendant's statement, Detective Keating placed defendant in the Detective Squad's holding cell, and then spoke to Detective Gilbert, who had interviewed Lorenzo. At approximately 12:40 or 12:45 p.m., Keating returned to defendant to speak about what he had learned from Gilbert (DH.14).[40] Keating testified that "[o]nce I went in [the holding cell], [defendant] said he wanted to talk to me and he wasn't forthcoming in the first statement and he left some things out" (DH.14). Before Keating had had a chance to say anything, defendant "offered" that he had left "things" out of his first statement (DH.30). Defendant's demeanor had changed and defendant appeared as though "he wanted to get something off his chest." Defendant had "[a] look in his eyes that he wanted to tell [Keating] the whole story" (DH.31-32). Keating removed defendant from the cell, sat him in a chair, and defendant explained what he had omitted. Keating did not testify whether anyone else was present during defendant's second statement.

On cross-examination Detective Keating testified that he had no "substantive" conversation with defendant between the statements (DH.28).

Defendant's third statement, his videotaped statement, was admitted into evidence through the trial A.D.A**.** and played in court. The trial A.D.A. was repeatedly cross-examined about whether he talked to Detective Keating, or any other detective, regarding what brought about the second statement. Each time, the court sustained the People's objection to this line of inquiry.

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[39] Defendant's three statements were admitted into evidence at the hearing. Detective Keating was not questioned about the substance of the statements, or the purported stabbing of the deceased.

[40] Defense counsel asked Keating about "the nature" of his conversation with Detective Gilbert. Keating testified that it involved Gilbert's interview of Lorenzo. Keating did not testify about the substance of that statement (DH. 28-29).

At the end of the hearing, the defense withdrew its motion to suppress the voluntariness of defendant's statements under *Huntley.*[41]

The court found that Detective Keating was "very credible" and held that defendant's statements were voluntarily made and admissible at trial.[42]

VII. The Trial

Defendant's trial commenced on November 15, 2002, before Justice Gustin Reichbach.

A. *The People's Opening Statement*

In his opening statement, the prosecutor (also referred to as the "trial A.D.A.") stated that two gunmen—Lorenzo and defendant—demanded Greene's and the deceased's property. Greene stabbed Lorenzo, ran for his life, and flagged down a police car. Greene was "upset" and "frantic" and "in that condition," Greene stated, "three individuals, three male blacks, I think it was three male blacks, I don't know" (VD.154-55).

The prosecutor stated that the police "stopped a few people" and "[n]o charges were ever brought against them." The prosecutor specified that Greene identified someone who might have been Lorenzo, but that individual did not have any injuries (VD.155-56).

Regarding defendant's statements, the prosecutor argued the following: At 7:00 a.m., defendant gave a statement to the detectives claiming that Lorenzo was the gunman (VD.158-59). Thereafter, the detectives discovered that "there was a gunshot wound and a stab wound," and "around 10, 11, 12 o'clock" they returned to speak to defendant (VD.160). When the detectives confronted defendant about the nature of the injuries, defendant stated that he attempted to rob the deceased, the deceased attacked him, and he stabbed the deceased in self-defense.

Specifically, the prosecutor told the jury that:

> And at that point [when the detectives learned about the stabbing] they said [to defendant], you indicated that Edwin Lorenzo had the gun, right. . . . And he's the one that fired the shots, right. . . . How do you explain the knife wound to the chest? And it was at that point, . . . where the defendant pounced on that. Well, okay, I had the knife, it was a small folding knife and we got out and I approached the smaller guy, [the deceased]. I demanded his watch, I demanded his wallet, which

[41] Defense counsel told the CRU that, by the time of the *Huntley* hearing, he knew based on the autopsy report that the deceased had not been stabbed and he was certain that Keating testified falsely that defendant's statement was spontaneous. Accordingly, counsel strategically withdrew his motion to suppress the statement on *Huntley* grounds to expose Keating's "lie" at trial and undermine his credibility.

[42] A separate *Huntley* hearing was held for Lorenzo, during which Detective Gilbert, Lorenzo, and Ricardo testified. The hearing court suppressed Lorenzo's statement crediting Lorenzo's and Ricardo's testimony that Gilbert threatened to charge Ricardo with murder unless they made statements.

> he laid down but then started to fight me, he struggled, he came to attack me and I had that knife in my hand, I moved out, I stabbed him to defend myself. Forget the fact that I was demanding his money, I only used that knife to defend myself, but I didn't have that gun, I didn't fire those shots and I sure didn't shoot anybody.

(VD.160-61) (emphasis added).

The prosecutor then told the jury that the deceased had not been stabbed, and that the jury should evaluate the evidence and determine whether the confession had been coerced. Specifically, the prosecutor stated that:

> But, . . . there was one problem with the defendant's story. A few days later . . . the body of [the deceased] was taken to the Office of the Chief Medical Examiner, the medical examiner performed . . . an autopsy. And during that autopsy, . . . the truth came out about the nature of his injuries. That [the deceased] was killed by a gunshot wound but there was no stab wound, no stab wound. The bullet entered and exited through the chest and that . . . is what the medical legal investigator believed to be a stab wound.
>
> Now, you might be asking yourself how does that fit in? What's the relevance of this? Well, . . . what I'm going to ask you to do at the conclusion of the case I want you to listen to these statements, I want you to listen to the gradual change in these statements. And [defense counsel] has asked you could it be possible it was coerced. Also keep in mind, . . . keep in mind when faced with evidence, faced with knowing, knowing that guns were used, knowing that those guns caused someone's death. A gun or a knife? The knife didn't kill anybody. Yes, I had that knife, I had that knife but the other guy had the gun.
>
> . . . at the conclusion of all the evidence, all the evidence, the testimony of the surviving victim, or the police officers who followed that blood trail right to his door, of each of these statements, of the physical evidence that was found at the scene, . . . the layout, place everything together and at the conclusion of the testimony, . . . I'm going to ask you based upon all the evidence I'm going to ask you to find defendant guilty of robbery and murder of [the deceased].

(VD.162-64).

B. *The People's Case*

Officer Colangelo

Officer Colangelo testified that he discovered the deceased's body, found the deceased driver's license under the body, and gave the license to the "squad supervisor" at the scene (T.371, 378).[43] On cross-examination, Officer Colangelo admitted that he was told that the cause of death was a

[43] As stated (*supra* at 3, n.7), Detective Gilbert's DD5 states that Colangelo gave him the driver's license. Gilbert was not questioned about the license. Nor was the license vouchered or admitted into evidence at trial.

stab wound to chest, which penetrated the heart, and that he transmitted this information to the investigating detectives (T.377, 379).

Medical Examiner Marie Macajoux

Dr. Macajoux testified from the report of a medical examiner who was unavailable. The deceased had sustained one gunshot wound, which was fatal. The bullet traveled in an upward direction and exited the left side of the chest. On cross-examination, Dr. Macajoux acknowledged that the ER doctor's original diagnosis of a stab wound to the chest was incorrect; the deceased had no stab wounds (T.396-97).

Officer Monteverde

Officer Monteverde's testimony was consistent with the account he gave to Detective DeMarco, but also provided new facts. Monteverde stated that "it was weird, it was as if [the Grand Am] was in slow motion as it passed right by us," and that the rear passenger was "light-skinned" (he had previously described him as "white") (T.68, 70-71). Monteverde added that the rear passenger looked at him, he saw the passenger's face though the open rear window (T.69, 71, 101). Counsel cross-examined Monteverde about the fact that Detective DeMarco's DD5, "Interview of Police Officer Monteverde," did not mention that he saw the rear passenger though an open window. Monteverde testified that he was certain that he had reported that information (T.103-04).[44]

Although Monteverde initially reported seeing three passengers run out the car (*supra* at 4, III. C.), he now said that there were two. Specifically, the following colloquy ensued on direct-examination:

> Q. Did you see approximately how many people got out of the car?
>
> A. I thought that there was approximately three, but there were two.
>
> Q. Well, --
>
> [Defense counsel]: Objection.
>
> THE COURT: Sustained.

(T.74).

The People then elicited that Officer Monteverde observed only two individuals exit the car by asking Monteverde only whether he saw the rear passenger and the driver exit the car (T.74-75). Monteverde testified that after the police arrived, and entered a bedroom in an apartment he saw

[44] Prendergast's nondisclosed notes of the interview show that Monteverde reported that the rear passenger window was down, and a "male white" was sitting in the rear (*infra* at 25, IX. A.2) (emphasis added). Neither defendant nor Lorenzo could be described as "white." As stated (*supra* at 3, n.8), defendant was a "white-Hispanic" with a medium skin tone; Lorenzo was a "black-Hispanic" with a dark skin tone. The significance of Prendergast's nondisclosed notes is discussed below (*infra* at 37-38, X. D.).

that, "an individual was sitting on the corner of the bed dressed in the same clothing he had on that I saw him [sic] in the car" (T.79-80).[45]

Officer Monteverde next testified about his lineup identification of defendant. Monteverde said that he identified defendant "as the one sitting in the back when the window was down" (T.113). On cross-examination, Monteverde conceded that he identified defendant in the lineup as one of the individuals who ran into the building (T.113-14). On redirect-examination, Monteverde said that he saw the side of the face of the person who ran out of the back seat and that it was defendant (T.116-17).

Detective Cermenello

Detective Cermenello interviewed Greene, who was distraught and cried at times. Greene did not smell of alcohol or appear to be intoxicated (T.15). Greene might have had a cut on his hand but did not otherwise appear to be injured (T.41).

Detective Cermenello testified about the lineups he conducted, and when Greene viewed defendant's lineup, Greene said he did not recognize anyone (T.28-29).

Detective Keating

Detective Keating testified that, regarding defendant's first statement, he told defendant that he was investigating an incident that occurred near Sweet Cherry but did not say that anyone died or mention any other facts of the crime. Defendant's first statement was read to the jury and submitted into evidence. Detective Keating said that he did not question defendant during the statement (T.242-46, 249, 253-54, 256). On cross-examination, when confronted with information in parentheses in the written statement, Keating conceded that the information pertained to defendant's responses to Keating's questions (T.346-47; *see supra* at 6, III. G.).

At about 8:30 a.m., when defendant's statement ended, he was placed in the holding cell (T.259-60, 265, 267, 328). Detective Keating then spoke to Detective Cermenello, who had interviewed Greene, and to Detective Gilbert, who had interviewed Lorenzo, and learned defendant's "role" in the crime (T.267-68). Keating also learned about the deceased's injuries (T.270).

Detective Keating returned to defendant in the holding cell. Keating testified, "actually" it was the "third time" that he went to the holding cell; he went to see defendant several times "to make sure he [was] okay" (T.268).

At 12:45 p.m., Detective Keating removed defendant from the holding cell (T.270-71). At first, Keating testified that "I explained to him [that] I wanted to speak to him again in regards to some inconsistencies" (T.269). Keating then testified that "I explained to him that if there is anything else he wanted to tell me, and he said, he explained to me—to my recollection that he wasn't totally

[45] Prendergast's nondisclosed notes reveal that Monteverde reported seeing a male with tan pants inside the apartment with the police, and had seen the male with tan pants run out of the car (*infra* at 25, IX. A.2).

forthcoming in his initial statement," "he left some things out," and he did not tell "the entire story" (T.271-72).

The following exchange then ensued between the prosecutor and Detective Keating:

> Q. And Detective, at that time did you speak to [defendant] or give him any additional details with regard to things that you had learned in between the time you took the original written statement and going in to speak to him again?
>
> A. I explained to him that someone was shot.
>
> Q. Did you explain whether there were any other injuries?
>
> A. And that someone was stabbed.
>
> Q. Did you speak to him or give him any other details with regard to what happened at that time?
>
> A. No, I did not.

(T.271-72). The prosecutor did not elicit, and Keating did not testify about what the prosecutor stated in his opening statement—that Keating had asked defendant "[h]ow do you explain the knife wound to the chest?" (VD.160). Keating read defendant's statement aloud in court, and it was admitted into evidence (T.274-75).

On cross-examination, Detective Keating testified that he did not recall testifying on direct-examination that he told defendant "that someone had been shot" (T.318). After reviewing the minutes of his direct testimony, Keating acknowledged that he told defendant that someone had been shot, and that he also told defendant that someone had been stabbed (T.318-19). Keating testified that Detective Gilbert gave him that information. When asked whether Gilbert told him that the deceased suffered a fatal stab wound to the heart, Keating replied, "It was a gunshot wound and a stab wound" (T.319). Ultimately, Keating conceded that Gilbert told him that there was a fatal stab wound to the heart. Detective Keating admitted that he also told defendant that someone was dead (T.319-20, 322).

When asked if he recalled testifying at the *Huntley* hearing that he had no "substantive" conversation with defendant between the two statements, Keating ultimately conceded that he had a substantive conversation with defendant before the second statement (T.324-25). On redirect-examination, Keating testified that the substantive conversation was <u>part</u> of the second questioning at 12:45 p.m. and, had not occurred <u>between</u> the two statements (T.353).

On recross-examination, Keating maintained that defendant's second statement was spontaneous (T.364-65).

Detective Gilbert

Case Detective Gilbert testified that he went to Lutheran and learned from the ER doctors "what happened to [the deceased]" (T.511). When Gilbert returned to the precinct, defendant was present. Gilbert did not speak to defendant. Detective Gilbert was present during defendant's videotaped statement, which was admitted into evidence, and played for the jury (T.509-12, 515, 518-19).

At approximately 10:00 a.m., Detectives Gilbert and Cermenello interviewed Lorenzo. From about 11:00 to 11:15 or 11:30 a.m., Cermenello compared notes with Detectives Keating and Kerr. Keating then left to speak with defendant (T.513-14).

On cross-examination, Gilbert testified that he did not know whether defendant was told to say that he stabbed the deceased (T.543).

Detective Gilbert was cross-examined about Greene's uncertain identification of Nicolas Johnson as his attacker (T.534). Neither the prosecution nor the defense questioned him about Greene's uncertain identification of Ortiz as one of the two men who attacked the deceased.

Cary Greene

1. *Greene's criminal history*

On a Wednesday, before Greene testified that afternoon, defense counsel informed the court that he had just learned from the prosecutor that Greene had a criminal record. The court stated that it would assign the defense an investigator, and that counsel could recall Greene, if necessary, before summations on Monday (T.288). The prosecutor explained that he learned about Greene's criminal record the prior evening while preparing Greene for his testimony. The prosecutor explained further that Greene's criminal record ("rap sheet") was previously searched under Gary Greene instead of Cary Greene. The prosecutor stated that Greene had been convicted of Hindering Prosecution, as a misdemeanor, in "late '98 or '99 upstate in the Adirondacks," for which Greene was on probation (T.291-92).

Greene testified that he had been convicted of Petit Larceny in 1990, when he and two friends stole two fishing lures (T.403). Regarding his 1999 Hindering Prosecution conviction, on direct-examination, Greene testified that he drove his friend, who was wanted by the police, out of town, and when Greene returned home to Wellsville, N.Y., he turned himself into the police. On cross-examination, Greene gave an extensive account of the facts, which included that his friend had placed "homemade bombs" in Greene's home to set off if the police came to arrest him. Greene was essentially held hostage by his friend for seventeen hours, and could not call the police.

Greene agreed to drive his friend out of town 100 miles to evade the police because his friend was armed with a knife. After leaving his friend, he drove straight home to Wellsville without stopping, turned himself in, and was arrested because he did not contact the police after dropping his friend

off. Greene subsequently pled guilty, and was sentenced to three years' probation and 250 hours of community service (T.405).

After Greene's testimony, counsel informed the court that he was having difficulty investigating Greene's conviction, and that the prosecutor agreed to contact the Wellsville authorities to determine the underlying facts (T.501-05). On Monday, prior to summations, the prosecutor stated that he spoke to a Sergeant Mattisson, who recalled interviewing Greene. The prosecutor stated that Greene's statement to the sergeant was essentially the same as his trial testimony. Defense counsel accepted the prosecutor's representation (T.602).

2. *The Instant Crime*

Greene testified that from the evening of September 15, 2001, until the early hours of the following morning, he and the deceased visited some bars at which they had several drinks each, and ended up at Sweet Cherry. As usual, the deceased wore a thick necklace, a bracelet, and a watch. They had no problems or arguments with anyone in the bar (T.407-15).

Greene's account of the crime was largely consistent with his prior accounts to the police, except he testified that there were two armed men and not three (which he had first said in his sworn audiotaped statement [*supra* at 10, III. N.]). Moreover, Greene added new details about the two men and the guns. Greene testified that when the car screeched back, he "was staring at two handguns, one coming from the back seat, and one being pointed by the driver" (T.422). The man in the back seat was holding a "very bright shiny gun," and the man in the driver's seat was holding a "darker colored gun" (T.423). Both men were swearing at Greene and the deceased and demanded their "leather" (jackets), wallet, and chains (T.424).

When the two men exited the car, the rear passenger went at the deceased with his gun drawn and the driver approached Greene with his gun drawn. The driver was heavy-set, either black or Hispanic, and weighed between 200 and 250 pounds. Greene did not see what had occurred between the deceased and the other man because his back was to them and because he was focused on the driver. Greene, however, heard the other man demand the deceased's chains, leather jacket, and wallet (T.424-25).

Greene's testimony about the showup identification(s) was confusing. Greene testified that the officers drove him to a location where they asked him to "look out the window at people" to see if he recognized "any of them" (T.437). Greene saw an individual, who resembled the "lighter skinned black person or Spanish person" (T.437). When the prosecutor asked Greene if that was "the person that actually attacked [Greene]" he replied, "No. No." (T.437). Greene testified that he was not sure about his identification because the police were shining a light on this individual (T.437). The prosecutor then asked when the officers "stopped <u>this</u> individual, what happened next?" (T.439) (emphasis added). Greene testified that he said that he was not 100% certain, and that if that individual was bleeding in the shoulder he was "probably the guy that attacked me"

(T.439-40).[46]

Regarding the number of people involved in the crime, the prosecutor asked Greene "approximately how many people" did you tell the officers were involved (T.437). Greene testified that "I said I thought I saw three people" (T.438). The following exchange then ensued between the prosecutor and Greene:

> Q: Yes. Did you ever see a third?
>
> A: I did not but I did assume that there was someone riding in the passenger's side, the front passenger's side of the vehicle.
>
> . . .
>
> Q: Did you see someone get out of the driver's side?
>
> A: Yes.
>
> Q: Did you see someone get out of the rear passenger side?
>
> A: Yes.
>
> Q: At any point did you see anyone get out of the side—
>
> A: No.
>
> Q: -- the front passenger side?
>
> A: The driver's passenger side, no.

(T.438-39).

On cross-examination, defense counsel asked, "when did the three people in the car become two people in the car?" (T.456). Greene reiterated that he "assumed" that he saw three people. Counsel next asked, "That's not what you told Detective Cermenello, is it?" (T.456). Greene admitted that he told Cermenello that he saw three people, but denied that he reported seeing three people exit the car with guns. Greene testified that he told Cermenello that two people exited the car with guns (T.456). Counsel showed Greene Cermenello's DD5 and asked whether it refreshed Greene's recollection. Greene testified that "I personally do not recall that I told him I saw three people exiting the car. I said I saw three people. I thought I saw three people, is what I said" (T.457). Greene also denied telling Cermenello that the driver of the car approached the deceased (T.457).

[46] Although it appears that Greene testified about one showup, he testified about two—the Ortiz and Johnson showups. Ortiz was stopped with other people, and Greene identified Ortiz "as possibly one of the persons that attacked [the deceased]" (*supra* at 3-4, III. B.). At a different location, Greene identified Johnson as the person who might have attacked him if the person was bleeding, but he was not 100% certain (*id*.). The information about Ortiz was never disclosed to the defense (*infra* at 24-25, IX. A.1[a], [b]).

Defense counsel then asked Greene whether he recalled describing three people to Officers Stewart and Mundy—specifically, a male black with light complexion, and two other black males (T.457). Greene, however, did not answer the question about the number of people. Instead, Greene testified that he had described "light-skinned black guys." Here, the following exchanged ensued:

> A: Yes, and we discussed that issue. They said 'Define black?' and I said, 'Well, you know, I don't know whether they were of Spanish or Black descent, they were darker skinned, but they were, if I had to say, they were light-skinned black guys.' So, they said, 'They were black guys?' and I said, yes.
>
> Q: Mr. Greene, you never said to anybody involved in this case on police level that these were Hispanic men, you said they were black men?
>
> A: They asked me if they were Hispanic or Black. I couldn't tell. I know they are light-skinned black guys.
>
> Q: You said they were light-skinned black guys?
>
> A: Yeah.

(T.457-58).

Greene did not identify defendant at trial.

On cross-examination, Greene denied that the incident was just a physical alteration, and denied that he fabricated the attempted robbery to avoid violating probation for the stabbing (T.460-63).

C. *The Defense Case*

The defense presented the testimony of Detective Cermenello, who acknowledged that Greene reported that three armed black men exited the car. Greene reported that the taller man approached him, and a shorter male, and the driver approached the deceased (T.557-59).

On cross-examination, the prosecutor elicited that when Detective Cermenello interviewed Greene, Greene was distraught, crying, and traumatized, and that about twelve hours after the interview, Greene gave a sworn audiotaped statement stating that two men exited the car (T.559-61). On redirect-examination, Cermenello acknowledged that Greene's audiotaped statement occurred after Greene viewed two lineups (T.561).

D. *The Defense Summation*

In summation, defense counsel argued, among other things, that both Greene and Officer Monteverde observed three individuals, and the police had only two suspects and manipulated the evidence to support the theory that defendant and Lorenzo committed the crime (T.611).

Counsel attacked Officer Monteverde's credibility regarding his ability to see defendant in the back seat (T.609), and his opportunity and ability to see defendant run out of the car. Counsel argued that regardless of whether Monteverde had a good look at the car occupants, Monteverde

identified defendant in a lineup because it was suggestive—defendant stood out because, among other reasons, he was the only one wearing khaki-colored pants (T.613).

Counsel argued that defendant's confession was the only proof of his involvement in the crime, and maintained that defendant's confession was coerced.

Counsel attacked Greene's credibility maintaining that Greene's account of his Hindering Prosecution conviction was incredible and made no sense (T.638). Counsel also challenged Greene's credibility based on his changed account of three black men to two Hispanic men. Additionally, counsel argued that only a fight occurred, and that Greene fabricated the robbery because he was on probation when he stabbed Lorenzo.

E. *The People's Summation*

The prosecutor argued in summation, among other things, that Greene and the deceased where approached by two men, and not three. The prosecutor maintained that since Lorenzo was undoubtedly one of the two men the other man had to be defendant.

The prosecutor argued that the deceased's watch, wallet, and driver's license recovered from the scene was proof of the attempted robbery. The prosecutor stated that Greene was credible and his past crimes were not at all remarkable.

The prosecutor urged the jury that defendant's confession to a stabbing was an attempt to minimize his culpability by "putting a knife in his hand where there was a gun." The prosecutor argued that even if defendant was not the shooter, defendant's participation in the attempted robbery proved his guilt of felony murder.

F. *The Verdict and Sentence*

On November 25, 2002, the jury convicted defendant of Murder in the Second Degree (P.L. § 125.25[3]), two counts of Attempted Robbery in the First Degree (P.L. §§ 110.00/160.15[1], [2]); and Assault in the Second Degree (P.L. § 120.05[6]).[47] The jury acquitted defendant of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[2]), and Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]).

On March 25, 2003, defendant was sentenced, as a second felony offender, to twenty years to life on the murder count, ten years on each attempted robbery count, and five years on the assault count. The robbery sentences were imposed to run consecutively to each other, and the robbery and assault sentences were imposed to run concurrently with the murder sentence. Defendant

[47] The parties consented to dismiss the intentional murder charge.

expressed sympathy for the deceased's family, and maintained his innocence.[48]

VIII. Post-Conviction Proceedings

A. *The Direct Appeal*

Defendant appealed to the Appellate Division, Second Department ("Appellate Division"). In pertinent part, defendant claimed that counsel was ineffective for waiving the challenge to the voluntariness of defendant's confession. Specifically, counsel failed to challenge the credibility of Detective Keating's testimony that defendant spontaneously admitted to a false account of a stabbing consistent with what the police mistakenly believed at the time.

On March 20, 2007, the Appellate Division affirmed the judgment of conviction. *People v. Arroyo*, 38 A.D.3d 792 (2d Dep't 2007). In pertinent part, the Appellate Division held that any error by counsel in waiving the challenge to the voluntariness of defendant's statements was not so egregious as to render counsel's performance ineffective. Moreover, no prejudice resulted "since there was overwhelming evidence of defendant's guilt." *Id*. at 792-93. On June 6, 2007, defendant's application for leave to appeal to the Court of Appeals was denied. *People v. Arroyo*, 9 N.Y.3d 839 (2007) (Read, J.).

B. *The Federal Habeas Petition*

In September 2008, defendant filed a petition for a writ of *habeas corpus* to the U.S. District Court for the Eastern District of New York ("District Court") raising the same claims he raised on appeal. On October 7, 2010, the District Court denied the petition. *Arroyo v. Conway*, 2010 U.S. Dist. LEXIS 107337 (E.D.N.Y. Oct. 7, 2010) (Irizarry, J.). In pertinent part, the District Court held that counsel was not ineffective for not challenging the voluntariness of defendant's statements, because defendant "acknowledged and signed two *Miranda* waivers, signed the written version of his oral statements, and made a voluntary videotaped confession." *Id*. at * 12.

The District Court held that even if counsel had acted unreasonably, and even if the statements had been suppressed, defendant was not prejudiced because there was "overwhelming evidence" of guilt. *Id*. at * 13-14. The District Court held that "based on the overwhelming evidence of defendant's presence and participation in the attempted robberies and murder, it is highly unlikely that the jury would have acquitted [defendant] if defendant's statements had been suppressed." *Id*. at * 15.

[48] Lorenzo waived his right to trial, and on January 27, 2003, he pled guilty to Attempted Robbery in the First Degree. On May 5, 2003, Lorenzo was sentenced to nine years' imprisonment. The CRU was unable to ascertain why Lorenzo was offered a plea deal. Lorenzo did not appeal or otherwise attack his judgment of conviction. The CRU did not attempt to contact Lorenzo.

IX. The CRU Investigation

A. *The Nondisclosed Documents*

The CRU discovered that a page of a DD5 and certain detective spiral notes should have been disclosed, but were not.[49] With respect to the notes, the record shows that before the *Wade* hearing commenced, the prosecution provided Detective Cermenello's notes pertaining to the lineup. Following opening statements, counsel stated that the prosecutor had informed him that the People only had Cermenello's notes, and were searching for others. Counsel requested that the prosecutor ascertain, before each witness testified, whether that witness had notes. Thereafter, during trial, the prosecutor provided Detective Gilbert's notes regarding his interview of responding Officer Colangelo (T.288, 292). The record is silent regarding other disclosures.[50]

1. *Documents about Greene's identification of Ortiz as one of the two who approached his friend*

(a) *Detective Spencer's DD5*

The CRU found, in the People's trial file, a two-page DD5 written by Detective Spencer regarding Greene's identifications of Johnson and Ortiz (*supra* at 3-4 nn.9, 11). The first page contains information about Greene's identification of Johnson as Greene's attacker. The second page states that Greene identified Ortiz "as possibly one of the persons that attacked [the deceased]." The CRU has determined that the second page was not disclosed to the defense.

The trial record shows that certain discovery was disclosed during the proceedings (T.155-56, 209, 213, 288, 292), but there is no mention of Detective Spencer's DD5. The record, however, strongly supports the conclusion that the defense did not have the information about Ortiz. Although Detective Gilbert was cross-examined about Greene's uncertain identification of Nicolas Johnson as his attacker, Greene was not questioned about his identification of Ortiz "as possibly one of the persons that attacked [the deceased]." Given that the defense theory was largely based on Greene's initial report that three men committed the crime, it strains credulity that counsel would not have questioned Gilbert about Greene's identification of Ortiz if counsel had that information. Indeed, counsel extensively cross-examined Greene about his initial reports to Detective Cermenello and Officers Stewart and Mundy that three men committed the crime.

Moreover, after Greene denied that he told Detective Cermenello three people exited the cars with guns and two approached the deceased, and refused to admit that he described the assailants as

[49] The CRU did not locate the nondisclosed documents in defense counsel's file, and counsel believes that never received them, or he would have used them. As discussed in this section, the record supports counsel's belief.

[50] Throughout this case, where the prosecutor received and disclosed certain police documents in stages he appropriately stated so on the record. In a recent interview, the trial A.D.A. stated that this murder occurred a few days after 9/11, arguably the most traumatic event in NYPD history, and he recalls that usual processes for obtaining and disseminating documents for discovery were disrupted.

three black men to Officers Stewart and Mundy, the defense called Cermenello as a witness to testify that Greene did, in fact, report seeing three individuals. Against this backdrop, it is apparent that the defense did not have page two of Detective Spencer's DD5.

(b) ***Detective Gilbert's notes***

The CRU found, in the People's file, Detective Gilbert's original spiral notebook, which contains information about Greene's identification of Ortiz. Specifically, Gilbert's notes reflect that: (1) Officers Stewart and Mundy reported that Greene identified Ortiz as "one of the two who approached his friend;" and (2) P.O. Cavendish stopped Ortiz, whose hand was bleeding, and that Ortiz was with two others, whom Greene was not able to identify. For the reasons stated as with page two of Detective Spencer's DD5, it is clear that Gilbert's notes were not disclosed.

2. ***Detective Prendergast's notes about Officer Monteverde's initial statements***

Detectives DeMarco and Prendergast interviewed Officer Monteverde. DeMarco's DD5, which had been provided to the defense, states that Monteverde followed the speeding Grand Am to 423 42nd Street where Monteverde and Officer Saez went into the building they believed the Grand Am occupants had entered. The CRU located, in the People's file, Prendergast's notes of the interview, which includes additional information.[51]

In pertinent part, the notes reveal that Officer Monteverde reported that:

- the rear passenger window was down as the Grand Am drove by and a white male was sitting in the rear;
- the car pulled over and three males jump out and ran into a building;
- he saw a male with tan pants run out of car and saw the same male inside the apartment with police; and
- he could not identify the face of the person (Lorenzo) who exited a building and drove off in the Grand Am.

It is apparent that the defense did not have these notes at trial. All the above information was vital to the theory of the defense, and there was no strategic value for the defense not to confront Officer Monteverde with any of it (*infra* at 34-35, X. B.2, 3; 37-38, X. D.).

3. ***Greene's Criminal History***

(a) ***Nondisclosed notes regarding probation***

Detective Cermenello's DD5 regarding his interview of Greene was provided to the defense. It did not contain any information about Greene being on probation at the time of the crime. The

[51] The notes do not include the name of the detective who wrote them, and the handwriting does not match that of DeMarco's as it appears in other documents. The CRU has concluded that they are Prendergast's notes. First, DeMarco's DD5 reflects that Prendergast was involved in Monteverde's interview. Furthermore, Monteverde testified that the detectives wrote notes during the interview (T.103).

CRU found, in the People's file, Cermenello's notes regarding the interview. The notes contain Greene's pedigree information, and it states: "on Probation—Greenville."[52]

It is clear that the notes were never disclosed to the defense (and that the prosecution was not aware of them). Just prior to Greene's trial testimony, the prosecutor stated that he learned the prior evening from Greene that Greene had a prior conviction and was on probation. In response, counsel did not state that he had been provided with information about Greene's probation. To the contrary, counsel objected at length to the late notice.

(b) ***Greene mispresented the facts of his prior conviction***

The CRU did not locate any documents in the trial file concerning Greene's past conviction for Hindering Prosecution. Apparently, the prosecutor credited Greene's account of Greene's prior conviction based on the prosecutor's conversation with Sergeant Mattisson of the Wellsville Police Department (*supra* at 18, VII. B. [Cary Greene section 1]).[53]

The CRU investigated Greene's prior conviction for Hindering Prosecution, for which he was on probation. Based on Greene's trial testimony and arrest record, the CRU knew that Greene had been on probation in Wellsville, New York, and called the Alleghany County D.A.'s Office. The CRU received the Hindering Prosecution criminal complaint against Greene, as well as a supporting deposition from Greene's girlfriend. Thereafter, the CRU obtained other witness statements from the Wellsville Police Department.

The records received by the CRU revealed that Greene's testimony about the facts of his Hindering Prosecution conviction was fabricated. Unbeknownst to the prosecutor, the information he obtained from Sergeant Mattisson did not pertain to Greene's past conviction. The information was based on the sergeant's interview of Greene as a witness in Greene's friend's case. The documents obtained in Greene's case show that his friend was a parole absconder on a conviction for Robbery in the Second Degree. More important, Greene was not an unwilling victim forced to drive his friend out of town to Owego. Numerous witnesses confirmed that Greene devised and executed an intricate plan to help his friend escape and that Greene was not under duress. Also, contrary to Greene's trial testimony that he drove straight back to Wellsville without stopping; Greene, in fact, stopped at his parents' house in Owego for forty-five minutes.

In addition, the CRU discovered that Greene misrepresented facts of his 1990 Petit Larceny conviction. Greene did not steal two fishing lures with two of his friends, as he testified. The

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[52] The CRU determined that Greene worked in Greensville, N.Y. He was on probation in Wellsville N.Y., and not Greenville.

[53] As stated (*supra* at 18, VII. B. Greene section 1), the prosecution had searched Greene's criminal history under "Gary" Greene instead of Cary Greene. Upon learning about Greene's past conviction from Greene, the prosecutor conducted a new search and provided counsel with a corrected rap sheet (T.291-92). A rap sheet, however, does not provide a factual account of an arrest or a conviction.

criminal complaint filed in Oswego City Court alleged theft of eight lures, and that Greene acted alone.

X. Analysis

A. *Defendant's Confession*

From the time defendant was taken into custody on September 16, 2001, at about 3:30 a.m., until his videotaped confession at 3:44 p.m., he made three statements. Initially, at 7:00 a.m., defendant made an exculpatory statement to Detective Keating that he was merely at the scene when Lorenzo fought with Greene, stemming from an incident at Sweet Cherry. Defendant stated that Lorenzo was armed with a gun and defendant heard gunshots.

Detective Keating then learned from other detectives, including lead investigator Detective Gilbert, that the deceased had been fatally stabbed in the heart during an attempted robbery. Keating also learned that Lorenzo had stated that defendant fought the deceased, stemming from an incident at Sweet Cherry, and that defendant possessed a gun and fired the shots.

Thereafter, at 12:45 p.m., when Detective Keating returned to defendant, defendant purportedly spontaneously confessed to stabbing the deceased in the chest during an attempted robbery and provided details about the knife. Defendant repeated his confession on videotape, describing the robbery and enacting the way in which he stabbed the deceased near the heart, and providing even more details about the knife, including his disposal of it.

Defendant's confession was accepted by the prosecution as truthful at the time it was made. After all, not only did the confession fit into a version of the facts consistent with what the police believed at the time—that the cause of death was a stab wound to the chest—but also the confession fit into the theory of an attempted robbery based on Greene's account, and the recovery of the deceased's wallet, watch, and driver's license from the crime scene.

In the early morning of September 17, however, the autopsy results showed that the deceased had not been stabbed in the chest. In fact, the deceased had not been stabbed at all, but instead had sustained a single gunshot wound to the lower back, with the bullet exiting the heart.

Despite this new fact, defendant's confession remained the only direct evidence of his guilt presented at trial. Greene did not identify defendant, and Officer Monteverde only identified defendant as someone who fled from the direction of the shooting.

In evaluating the validity of the confession, as a threshold issue, there is no dispute that defendant's confession was, at least in part, false—defendant confessed to a stabbing that never occurred.[54] That is not to say that this was legally a "false confession," but rather that it was a statement which

[54] *See* Richard A. Leo & Richard J. Ofshe, (*Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*), 88 J. CRIM. L. & CRIMINOLOGY 429 (Winter 1998) (there are four types of "proven false confessions," the first of which is confessing to a crime that has not occurred).

contained false facts, and that these facts were likely not supplied by defendant, but provided by the police. Whether the statement came about because defendant was coerced into making a "false confession," or whether he made a calculated decision that it was in his interest to admit to a statement he knew to be false, the confession to the stabbing was not true.

Before the case was brought to trial on a partly false confession, the CRU believes it was incumbent upon the People to question the voluntariness and reliability of the false admission to a stabbing, as well as the remainder of the confession (*i.e.*, the robbery). *See, e.g.,* ABA Standards for Criminal Justice, Prosecution Function, standard 3-1.2(c) (3d ed. 1993) ("[t]he duty of the prosecutor is to seek justice, not merely to convict"). The CRU appreciates that the People presented the voluntariness and reliability of the confession as issues for the jury to consider and decide, but believes this was not enough. In *People v. Santorelli*, 95 N.Y.2d 412 (2000), the Court of Appeals stated that:

> Prosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process

95 N.Y.2d at 420-421. The prosecution instead made several missteps throughout, which taken together impaired the integrity of the conviction.

1. *The autopsy results*

The CRU believes that as soon as the autopsy results revealed that the deceased had not been stabbed, the prosecution should have questioned the circumstances of defendant's confession, and questioned the integrity and credibility of the detective who portrayed in his DD5 that defendant's confession was spontaneous. For example, the prosecution should have ascertained from the detective exactly how defendant's purported spontaneous detailed admission and subsequent reenactment to stabbing the deceased near the heart—the same location that the bullet exited—came about.[55]

In addition, under the circumstances, after the autopsy defendant's confession to the attempted robbery should have been evaluated. No eyewitness identified defendant participating in the crime, and all the evidence of the attempted robbery was known to Keating when defendant confessed. Thus, there was no assurance that defendant did not "falsely" confess to an attempted

[55] There is no evidence that any other detective was present during defendant's confession (*supra* at 7-8, III. J.; 12, VI. B.). Thus, no other detective could have been questioned (or testified) about the origin of the statement.

robbery also based on information provided by Keating.[56] After all, defendant's initial statement did not mention a stabbing or a robbery.

The People did not seek any explanation from the detective, did not consider that defendant's statement was invalid, and did not analyze the entire confession in light of learning that the police fed defendant facts which proved to be false.

2. *The Huntley Hearing*

At a hearing on a defense motion to suppress a defendant's statements made to law enforcement officials, the People have the burden of demonstrating, beyond a reasonable doubt, that the statements were voluntary and not the product of coercion, either physical or psychological. *People v. Thomas*, 22 N.Y.3d 629, 643 (2014); *People v. Huntley*, 15 N.Y.2d 72 (1965). If the People meet their burden, the defendant then bears the burden of persuasion. *People v. Santos*, 112 A.D.3d 757, 758 (2013).

Here, Detective Keating's testimony on direct-examination, that defendant spontaneously confessed to stabbing the deceased in the chest, satisfied the People's burden. In addition, on cross-examination, Keating maintained that he had no "substantive" conversation with defendant between defendant's exculpatory statement and confession (DH.28). Keating's testimony, however, could not have been truthful since defendant confessed to a false account consistent with what the police believed at the time, but was not, in fact, accurate, as the deceased did not sustain a stab wound.

Perhaps the A.D.A. who conducted the *Huntley* hearing (but was not the trial A.D.A.) was not aware of Detective Keating's misrepresentation at the time. In any case, the *Huntley* hearing court was never made aware of Keating's untruthfulness. Consequently, the hearing court was effectively prevented from making an informed decision about Keating's credibility, including whether Keating was "incredible as a matter of law."[57]

Accordingly, the hearing court did not accurately consider whether defendant's confession, in part, or in whole, was involuntarily made.

Moreover, at some point prior to trial, the trial A.D.A. (who did not conduct the suppression hearing) learned from Detective Keating that prior to defendant's confession Keating had confronted defendant by asking, "[h]ow do you explain the knife wound to the chest?" The

[56] Providing a suspect with the facts of a crime and demanding that the suspect admit to them does not necessarily constitute coercion. But it is an axiom of proper interrogation technique not to provide suspects with salient facts about the crime because it can render the resulting confession meaningless. *See* Fred E. Inbau, *et al*., *Essentials of the Reid Technique: Criminal Interrogations and Confession*, 2d ed. 2015.

[57] Intentionally perjured testimony or testimony that otherwise lacks credibility rises to the level of "legal insufficiency" only where such testimony can be found to be so unworthy of belief as to be "incredible as a matter of law." *People v. Adams*, 272 A.D.2d 177, 178-179 (1st Dep't 2000). Testimony is incredible as a matter of law when it is "manifestly untrue, physically impossible, contrary to experience, or self-contradictory." *People v. Garafolo*, 44 A.D.2d 86, 88 (2d Dep't 1974).

prosecutor did not tell the suppression hearing court or otherwise correct the record. As a matter of fair dealing, the prosecutor was required to correct the record and inform the hearing court that Keating's testimony was inaccurate, because the prosecution had asked the court to rely on Keating's testimony to deny suppression of defendant's confession.[58]

3. *The Trial*

Based on the foregoing discussion about defendant's confession, the CRU believes that the defendant's confession was irreparably tainted and, thus, should not have been before the jury.[59] Irrespective of Detective Keating's credibility, which was before the jury, all the facts regarding the confession were not. Keating's trial testimony underscores the CRU's concern regarding his lack of candor and the prosecution's reliance on Keating to establish the voluntariness and truthfulness of defendant's confession.

As stated, prior to trial, Detective Keating apparently admitted to the prosecution that he had asked defendant to explain the knife wound to the chest. In fact, the prosecutor told this to the jury during opening statements.[60] Nevertheless, during trial, when the prosecutor asked Keating whether he provided defendant with any details about the crime between defendant's first two statements, Keating stated that he only told defendant that someone was shot. After the prosecutor pressed Keating on direct-examination, Keating added that he told defendant that someone was stabbed. Keating denied that he gave defendant any other details (T.271-72). The prosecutor did not attempt to elicit that Keating asked defendant to explain the knife wound to the deceased's chest.

On cross-examination, counsel attempted to elicit that fact to support the defense theory that defendant's confession was coerced. Detective Keating, however, was evasive and refused to acknowledge even his direct testimony that he had told defendant that someone had been shot and someone had been stabbed (T.318-19). Ultimately, after reviewing his direct testimony, Keating reluctantly agreed that he told defendant that someone had been shot and stabbed. Moreover, Keating would not give a direct answer to whether he had learned prior to defendant's confession

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[58] *See Giglio v. United States*, 405 U.S. 150, 153-154 (1972) (a prosecutor must correct the false testimony of a prosecution witness when it relates to a significant issue in the case); *People v. Colon*, 13 N.Y.3d 343, 349 (2009) (duty of fair dealing requires a prosecutor to correct knowingly false or mistaken material testimony of a prosecution witness). The prosecution should have also notified the defense, but given that counsel was aware of Keating's false or misleading testimony, and strategically withdrew his *Huntley* motion, it is doubtful that counsel would have moved to reopen the hearing.

[59] A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him." *Parker v. Randolph*, 442 U.S. 62, 72 (1979) (citations and internal quotation marks omitted).

[60] The jury was instructed that opening statements are not evidence. The jury is presumed to follow the court's instructions. *People v. Berg*, 59 N.Y.2d 294, 299 (1984) ("we depend, for the integrity of the jury system itself, upon the willingness of jurors to follow the court's instructions"); *People v. Martinez*, 59 A.D.3d 361, 362 (1st Dep't 2009) (jury is presumed to following instructions that opening statements are not evidence).

that the deceased suffered a fatal stab wound to the heart, but ultimately conceded that Detective Gilbert told him that information (T.319-20).

Furthermore, when cross-examined about his *Huntley* hearing testimony that he had no substantive conversation with defendant between defendant's exculpatory statement and confession, after insisting he did not, he ultimately conceded that telling defendant that someone was shot and stabbed was substantive (T.325).

On redirect-examination, however, the People did not attempt to correct the record by eliciting that Keating asked defendant to explain the stab wound to the deceased's chest.

Finally, on counsel's recross-examination Detective Keating maintained that defendant's second statement was spontaneous (T.364).

Thus, Detective Keating's trial testimony established that: he merely told defendant that someone was shot and that someone was stabbed; he did not speak to defendant between defendant's exculpatory statement and confession; and defendant's confession was spontaneous.

Detective Keating's refusal to admit what he had apparently told the prosecutor—that he confronted defendant with the "fact" that the deceased was stabbed in the chest—was significant. It may explain why defendant falsely confessed to stabbing the deceased in the chest, and why defendant demonstrated during his videotaped confession how he stabbed the deceased in the chest near the heart.[61] Accordingly, although Keating's credibility was before the jury, the CRU believes that the jury was not presented with all of the facts.

The evidence before the jury allowed the People to argue that defendant falsely confessed to the stabbing to minimize his guilt. If the jury had all the facts perhaps the evidence would have undermined the prosecution's theory and given credence to the defense theory that the confession was coerced, including defendant's confession to the robbery (which defendant did not mention in his exculpatory statement).

At the time the prosecution learned that the deceased had not been stabbed, it did not question how defendant came to spontaneously confess to a false fact, which was believed by the police to be true at that time. At some time prior to trial (apparently after the hearing), when the prosecution learned that Detective Keating confronted defendant with the false fact of a stabbing, the prosecution failed to perceive that his explanation raised serious issues as to how defendant came to "spontaneously" confess to a purported stabbing. The prosecution did not reevaluate the evidence, or question Keating's veracity, police tactics, or defendant's guilt. Rather, the prosecution reconciled defendant's "false" confession with an attempt to minimize his guilt, and overly-relied upon the jury to sort out Keating's credibility. As discussed below (*infra* at 40-41, XII. B.), this was likely due to confirmation bias.

[61] Notably, the bullet had exited the deceased's heart.

B. *The Nondisclosed Notes Regarding Three Individuals*

The integrity of defendant's conviction was equally undermined by the nondisclosure of certain material showing that three individuals were involved in the crime. To obtain a conviction based on defendant's confession (which involved only two people) it was crucial to the prosecution that two individuals committed the crime. The two-defendant theory was advanced upon the filing of the criminal court complaint, and argued at trial. As the prosecution argued on summation, since there was no doubt that Lorenzo attempted to rob Greene, defendant's confession proved that he was the other individual involved in the crime.

At trial, the prosecution relied on Greene's and Officer Monteverde's testimony to show that two individuals committed the crime. Early in the investigation, however, Greene and Monteverde separately reported that three individuals were involved. Although the defense received some documents reflecting that Greene had reported that three males attempted to rob him and the deceased, nondisclosed documents showed that Greene identified someone as "possibly one of the two" individuals who attacked the deceased. In addition, the defense was never provided with notes showing that Monteverde reported seeing three individuals run out of the car.

The nondisclosure of such information deprived defendant a fair chance to refute the People's case, and advance a viable theory of defense.

1. *Greene's initial statements regarding three black males*

At trial, the defense was in receipt of two documents reflecting that Greene reported that three black males were involved in the crime. First, the defense possessed page <u>one</u> of Detective Spencer's DD5, "Interview P.O. Stewart & P.O" stating, in pertinent part, that immediately after the crime, Greene flagged down Officers Stewart and Mundy shouting that three black males "tried to rob us!"

Second, the defense possessed Detective Cermenello's DD5, "Interview of Witness, Carey Greene," reflecting that about two and a-half hours later (at 5:25 a.m.), Greene reported that:

> [t]hree black males exited the car with guns and demanded money, wallets, and chains. The shorter male exited the front passenger [side] and the driver approached [the deceased]. A taller male approached [Greene] from the rear of the car.

In his opening statement, the prosecutor acknowledged that Greene had initially reported that three individuals were involved, but the prosecutor maintained that at the time Greene was "upset" and "frantic," and that Greene reported, "I <u>think</u> it was three male blacks, <u>I don't know</u>" (T.154-55) (emphasis added). In the People's case, the prosecution established through Detective Cermenello that Greene was upset and distraught when he was interviewed (T.15).

On direct examination, the prosecution asked Greene "<u>approximately</u> how many people" did you tell the officers were involved (T.437) (emphasis added). Greene testified that "I said I <u>thought</u> I saw three people" (T.438) (emphasis added). Greene testified that he did not see three people,

explaining that he assumed that someone was in the front passenger seat because he saw the driver and the back-seat passenger exit the car (T.438-39).

The defense attempted to impeach Greene with the documents it possessed. Counsel asked Greene "when did the three people in the car become two people in the car?" (T.456). Greene's answer was not responsive to the question; he reiterated that he just assumed that he saw three people. Counsel then confronted Greene with his statements to Detective Cermenello, but Greene simply denied his statements. Next, counsel confronted Greene about whether he recalled telling Officers Stewart and Mundy that he saw three black males, but Greene's response addressed the race and skin tone of the men, and not the number of men (T.457-58).

The defense called Detective Cermenello, who reluctantly acknowledged that Greene had told him that three armed black men exited the car, that the taller man approached Greene, and that a shorter male and the driver approached the deceased (T.557-59). On cross-examination, however, the prosecution, again, established that during the interview Greene was distraught, crying, and traumatized, and further elicited that about twelve hours later Greene swore on audiotape that two individuals exited the car (T.559-61). Although on redirect-examination, the defense elicited that Greene's audiotaped statement occurred after Greene viewed two lineups (T.561), ultimately, the defense's attempt to impeach Greene was apparently unsuccessful.

There was additional information—which the jury never heard—showing that Greene had reported that three individuals were involved in the crime. The additional information appeared in notes, which were not disclosed to the defense. The nondisclosed notes consisted of the following:

- page two of Detective Spencer's DD5 reflecting that Greene made a second showup identification and identified James Ortiz "as possibly one the persons that attack [the deceased];"[62]

- Detective Gilbert's spiral notes reflecting that Officers Stewart and Mundy reported that Greene identified Ortiz as "one of the two who approached his friend;" and

- Detective Gilbert's spiral notes reflecting that P.O. Cavendish had stopped Ortiz, who was with two others, and that Ortiz's hand was bleeding.

The potential impeachment value of the nondisclosed notes is obvious. The additional information that Greene identified someone as "one of the two" who possibly attacked the deceased confirmed what Greene had reported to Detective Cermenello. Such information would have seriously undermined Greene's credibility regarding his claimed mistake of seeing three individuals, and Greene's denial of his statements to Cermenello.

[62] The information about the first showup was included in page one of Spencer's DD5, and involved Greene's identification of Johnson as Greene's attacker.

Moreover, the nondisclosures prejudiced the defense in that counsel plainly did not comprehend Greene's confusing testimony about his showup identification. Had defense counsel possessed the nondisclosed notes, he would have likely understood that Greene's testimony pertained to two showups. Specifically, when the prosecution questioned Greene about a showup identification, Greene testified that the officers asked him whether he recognized any of the people outside the police car, and he stated that one of the individuals resembled the "lighter skinned black person or Spanish person." The prosecution then asked if that was "the person" that actually attacked [Greene]," and Greene replied, "No. No." (T.437). Here, Greene clearly referenced the Ortiz showup because Greene identified Ortiz as possibly one of the deceased's attacker.

Greene's testimony, however, became confused when the prosecution (which, apparently was also confused) next asked Greene when the officers "stopped this individual, what happened next?" (T.439) (emphasis added). Greene now testified that he told the officer that he was not 100% sure, and that if that individual was bleeding in the shoulder he was "probably the guy that attacked me" (T.439-40). This testimony mirrored what Greene had stated about Johnson's showup at the different location. Having not received the information about Ortiz, the defense missed an important opportunity to confront Greene and establish that he observed three individuals.

2. *Monteverde*'s *initial statements regarding three individuals*

At trial, the defense possessed Detective DeMarco's DD5 regarding his interview of Officer Monteverde shortly after the incident. In pertinent part, DeMarco's DD5 stated that Monteverde followed the speeding Grand Am to the front of 423 42nd Street where and he and his partner went into the building they believed the male occupants of the Grand Am had entered. The DD5 did not state the number of males Monteverde had reported seeing.

Detective Prendergast's notes of Officer Monteverde's interview, however, which were not disclosed to the defense, show that Monteverde had reported seeing three males jump out of the Grand Am.

Had the defense known this information it would have appreciated the prosecution's question about the "approximate" number of individuals Monteverde had seen, and perhaps not objected (*see supra* at 15-16, VII. B.).[63] Regardless, counsel certainly would have cross-examined Monteverde about seeing three individuals and attempted to impeach the credibility of his claim that he only saw two individuals exit the car (*id*.).

3. *Defendant was unduly prejudiced*

On their own, the nondisclosures of Greene's and Monteverde's initial statements to law enforcement each deprived the defense of a fair opportunity to cross-examine them and attack their credibility. Together the nondisclosures deprived the defense of its ability to defend and refute the People's case. As stated above, the theory of the prosecution was that Lorenzo's identity as one

[63] The prosecution also asked Greene about the "approximate" numbers of individuals he saw.

of the two individuals involved in the crime was uncontroverted, and that defendant's confession proved that he was the other individual.

The theory of the defense was that three individuals committed the crime, and the police manipulated the facts to fit the two-defendant theory that defendant and Lorenzo committed the crime. By the time of summation, defense counsel realized the value of Monteverde's testimony to which he had objected. Counsel argued that Greene and Monteverde both observed three individuals, and the police had a problem because they had only two suspects. Counsel's argument was weak. Counsel's attempt to impeach Greene with his initial report of seeing three individuals, and how and when three individuals became two, had little force; the prosecution established that Greene was distraught and not sure about the number of individuals at the time of his initial statement. Moreover, the jury could not consider counsel's reference to Monteverde's testimony about seeing "approximately three" because counsel's uninformed objection to that testimony was sustained. In any event, Monteverde concluded, at trial, that he observed two individuals, and not three.

Had the defense possessed the nondisclosed information it would have been in a position to cross-examine Greene and Monteverde fully and cast reasonable doubt that two individuals were involved in the crime. Moreover, with evidence that two individuals independently changed their original statement from three to two individuals, the defense's argument that the facts were changed to fit the theory of the police would have been more persuasive.

Notably, the CRU's investigation did not uncover any evidence addressing when or why Greene and Officer Monteverde independently changed their statements. In light of the fact that both Greene and Monteverde separately reported observing three individuals, the CRU does not discount the possibility of a third individual's involvement.

Most disturbing, when the CRU interviewed Greene by phone, he reverted to his original statement that he and the deceased were attacked by three individuals. Greene told the CRU that he saw three people in the car: the driver, the front passenger, and the rear passenger. All three men exited the car with guns: the two passengers approached the deceased and the driver approached him. He heard the two men, who approached the deceased, saying, "give me, give me." In addition, and Greene told the CRU that he was certain that after he flagged down two female officers (Mundy and Stewart), he made two "mistaken" identifications.

C. *The Belated Disclosure of Greene's Criminal History*

Detective Cermenello's notes revealing that Greene had a conviction for which he was on probation were never disclosed to the defense.[64] Due to an error in checking Greene's criminal history by the wrong name, the prosecution had misinformed the defense that Greene had no criminal history. On the morning of Greene's testimony the prosecution informed the defense that Greene was on probation upstate for a conviction of Hindering Prosecution. Because the defense

[64] The prosecution must disclose its witness's criminal record under *Brady* and C.P.L. § 240.45[1][b]).

was unable to investigate the upstate conviction at that late time, counsel cross-examined Greene without any knowledge of the underlying facts of the conviction, with the understanding that he could continue to investigate it and recall Greene if necessary (T.602). Although, after Greene's testimony, the prosecutor assisted counsel in the investigation and determined that Greene testified truthfully about the facts of his crime, the CRU discovered otherwise—Greene had falsely testified about the facts of his crime to portray himself as a victim, which he was not (*supra* at 26, IX. B.3[b]).

As a result, the defense was not afforded an opportunity to investigate and pursue the matter on cross-examination, and relied on the prosecution's (unknowing) erroneous assurance that Greene testified truthfully.[65] Moreover, contrary to the trial court's view that the impeachment value of Greene's prior conviction was not "critical" because Greene was not an identifying witness (T.501-05), the material was highly probative of Greene's credibility on several material issues.

For example, the truth about Greene's prior conviction would have called squarely into question Greene's credibility about the number of individuals he had seen involved in the crime. The truth would have cast doubt on Greene's denials regarding his initial report to Detective Cermenello—that three armed black men exited the car, the taller man approached Greene, and a shorter male and the driver approached the deceased (T.456-57, 557-59). Similarly, it would have undermined Greene's testimony that the driver approached him (T.424-25), which was inconsistent with his statement to Cermenello.

Another important defense strategy was to show that the incident was a merely physical altercation and challenge Greene's credibility about the attempted robbery. Counsel attempted to elicit a motive for Greene to fabricate his testimony—to avoid a possible probation violation for unjustifiably stabbing Lorenzo. If the jury heard the truth about Greene's prior conviction, and discredited his testimony that an attempted robbery occurred, then defendant would have been acquitted of the single murder count submitted to the jury—felony murder (as well as the two counts of attempted robbery).

D. *The Nondisclosed Notes Regarding Monteverde's Descriptions of Defendant*

[65] *Cf. People v. Osborne*, 91 N.Y.2d 827 (1997) (late disclosure of a prosecution's witness prior conviction did not prejudice defendant where defendant had a meaningful opportunity to review the late disclosure and pursue the matter on cross-examination); *People v. Washington*, 282 A.D.2d 375, 376 (1st Dep't 2001) (no violation for failing to disclose criminal record of victim, since victim's computerized criminal history indicated the absence of such record, and the People had neither actual nor constructive notice of such record).

The defense was provided with DeMarco's DD5 of his interview of Officer Monteverde, but not Prendergast's notes of the interview. In pertinent part, the notes include the following information provided by Monteverde, which was not contained in the DD5:

- the rear passenger window was down, as the Grand Am drove by, and Monteverde observed a white male sitting in the back seat;

- Monteverde observed a male with tan pants run out of car and saw the same male inside the apartment with the police; and

- Monteverde could not identify the face of the person (Lorenzo) who exited a building and drove off in the Grand Am.[66]

This evidence was material, and its nondisclosure prejudiced defendant, as it constituted impeachment material and tended to undermine Officer Monteverde's identification of defendant.

Officer Monteverde's testified at trial about two observations he made of the rear passenger in the car. First, he observed the rear passenger through an open window as the speeding car slowed down and passed by. Monteverde testified that the rear passenger was "light-skinned" and he saw the passenger's face. Second, Monteverde observed the rear passenger run out of the car and into a building. Here, Monteverde provided no description other than the driver was darker-skinned than the rear passenger.

During his testimony, Monteverde identified defendant in court as the rear passenger he saw as the car drove by. Monteverde testified that he also identified defendant in the lineup "as the one sitting in the back when the window was down" (T.113). On cross-examination, Monteverde ultimately conceded that he identified defendant in the lineup as one of the individuals who ran into the building. On redirect-examination, however, Monteverde stated, for the first time, that as the rear passenger ran out of the car, he observed the side of the passenger's face, and it was defendant. Thus, in the end, Monteverde maintained that he recognized defendant as the rear seat passenger in the car when it drove by, and as the rear passenger who ran out of the car and into the building.

Defense counsel's attempts to impeach Monteverde's credibility regarding his observations of the rear passenger were unavailing. With respect to Monteverde's testimony that he saw the rear passenger as the car drove by, counsel confronted Monteverde with the fact that Detective DeMarco's DD5 did not include that a window was down and that Monteverde saw the rear passenger. Monteverde testified that he was certain that he had reported that information. Monteverde was correct. The information appeared in the nondisclosed notes. Crucially, the notes also showed that Monteverde reported that he observed that the rear passenger was a white male,

[66] As discussed above, Prendergast's nondisclosed notes also showed that Monteverde reported that three men ran out of the car. DeMarco's DD5 only contained the information about Monteverde hearing gunshots, following the speeding Grand Am, seeing the car "occupants" run into a building, seeing Lorenzo emerge from a different building, and following Lorenzo.

and it did not mention that he saw the passenger's face. The information about the white male would have been powerful impeachment material, if not exculpatory. Moreover, that Monteverde had failed to mention before that he observed the passenger's face would have further impeached his credibility. Equally reasonable, but unsuccessful, was counsel's attempt to impeach Monteverde's credibility regarding his ability and opportunity to observe the rear passenger exit the car.

Had the defense known that Monteverde observed a male with tan pants run out of the car and, again, saw the same male inside of the apartment with the police, counsel could have discredited Monteverde's account of his identification of defendant by showing that Monteverde did not see or identify defendant by his face, but he identified defendant by his tan pants. Furthermore, Monteverde's identification of defendant based on his tan pants could have been used to attack Monteverde's in-court identification of defendant, which Monteverde maintained was based on his seeing, through an open window, the face of the Hispanic man in the rear seat.

Also, if defense counsel had been provided with the information Monteverde had reported that he was unable identify Lorenzo's face, counsel could have undermined Monteverde's lineup identification of Lorenzo and, therefore, undermine his credibility for all purposes.

Without Monteverde's identification of defendant, there would be no evidence that defendant was in a car speeding from the direction of gunshots, or any explanation as to why he was apprehended.[67]

XI. The Errors Deprived Defendant a Fair Trial and Eroded the Integrity of the Conviction.

The CRU has concluded that each of the above errors, on its own, likely deprived defendant a fair trial. Together the errors completely undermine confidence in defendant's conviction.

Defendant confessed to a false account of a stabbing, which the police mistakenly believed to be true at the time, and it was presented throughout the proceedings as the only direct evidence of his guilt. The prosecution did not adequately investigate how the false confession came about. The suppression hearing court was not informed that the confession was undeniably false in part, or that Detective Keating was not truthful when he testified that defendant's confession was spontaneous. Consequently, the hearing court was prevented from making an informed decision about Keating's credibility and ultimately the voluntariness of the confession.

[67] The District Court held that, even without defendant's confession, Monteverde's identification of defendant as a passenger in a car speeding from the direction of the shooting was "overwhelming evidence of defendant's presence and participation in the robberies and murder." *Arroyo v. Conway*, 2010 U.S. Dist. LEXIS 107337, at * 15. That decision was incorrect. At best, Monteverde's identification of defendant placed him at the scene, but there is no direct evidence connecting defendant to the crimes except his confession. In any event, the District Court was unaware of the nondisclosed information that undermined Monteverde's identification of defendant.

Given that Detective Keating supplied the details of the stabbing to defendant, the CRU cannot credit that other parts of defendant's confession, including the robbery details, were not also fed defendant. The CRU believes that the entirety of defendant's confession cannot be considered reliable. Thus, the prosecution should not have presented and supported the truthfulness and accuracy of the confession at trial. Moreover, although the jury observed Keating's equivocations and untruthfulness and assessed his credibility, a prudent prosecution would not have urged the jury that Keating was credible. At a minimum, before putting the confession before the jury, it should have given a fuller picture of the circumstances in which the confession was obtained.

Because there was no other direct evidence of defendant's participation in the crime, the confession was dependent on a two-defendant theory: according to the prosecution, because Lorenzo was identified as one defendant, defendant's confession proved that he was the other defendant. Nondisclosed detective notes, however, showed that Greene observed three individuals, two of whom approached the deceased. Other nondisclosed notes showed that Monteverde initially reported seeing three individuals run out of the car speeding away from the gunshots. No explanation appears on the record, or has been uncovered, as to why Greene and Monteverde independently changed their observations from three to two individuals.

Additionally, late disclosure of Greene's Hindering Prosecution conviction effectively prevented the defense from challenging Greene's credibility on every issue, including his changed account about the number of individuals he had seen, and the account of the attempted robbery. The CRU's discovery that Greene testified falsely about the underlying facts of his Hindering Prosecution conviction, and even his Petit Larceny conviction, creates doubt about his entire testimony, particularly his claim of an attempted robbery.

Finally, Officer Monteverde was the only witness tending to connect defendant to the crime scene, but not the crime. Monteverde identified defendant in court as a passenger in a car speeding away from the direction of the shots. Nondisclosed detective notes contained exculpatory information (the passenger was a white male) and other information which contradicted his testimony about his observations of the passenger.

The CRU does not believe that any of the errors recounted above were deliberate. The People apparently exercised what appears, in retrospect, to be poor judgment with respect to defendant's confession, and to have relied too heavily on the jury to resolve the discrepancies between the confession and the other evidence. The fact that different A.D.A.s conducted the *Huntley* hearing and trial may have led the People to overlook serious problems with Keating's credibility. With respect to the nondisclosures of detective notes, the prosecutor stated at trial that he had difficulty obtaining the detectives' notebooks (perhaps because the murder happened just shortly after September 11, 2001, an event that caused great strain on the NYPD) and, therefore provided discovery in stages. Perhaps due to the manner in which documents were turned over, the

prosecution failed to provide the detective notes at issue. Nevertheless, the nondisclosures likely affected the jury's verdict.[68]

It is not the CRU's position that defendant did not commit the crime, but rather that defendant did not receive a fair trial because the evidence upon which the prosecution relied was and is defective. Consequently, as the Independent Review Panel and the KCDA agrees, defendant's conviction should be vacated.

XII. Recommendations

A. Video Recording Interrogations and Statements

The instant case presents an uncommon situation in the investigation and prosecution of a serious crime, one now largely mooted by the statutory requirement to record by video interrogations of persons accused of, or may be accused of, certain serious crimes, including murder.[69] In this case, had all questioning of defendant while he was in custody at the precinct—including, any questioning before, after, and between defendant's three statements—been recorded in their entirety, as now required by law, the errors described here would surely not have occurred.

B. Training on Confirmation Bias

Immediately following defendant's arrest, the police and the prosecution reasonably concluded that defendant was guilty of murder and attempted robbery. To be sure, the police believed, and communicated to the prosecution, that the deceased had been fatally stabbed in the heart. Defendant not only confessed to the stabbing, but also demonstrated on videotape the location and manner of the stabbing, and provided details about the knife that he allegedly used.[70]

The very next day, however, the autopsy report revealed a new crucial fact—the deceased had not been stabbed at all. Rather, the deceased had been shot in the back, and the bullet passed through

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[68] The nondisclosures constituted both *Rosario* and *Brady* violations. The detective notes constituted *Rosario* material because they consisted of Greene's and Monteverde's recorded statements concerning the subject matter of their direct testimony. The notes constituted *Brady* material because they consisted of Greene's and Monteverde's prior inconsistent statements regarding their observations of the individuals involved in the crime. *See generally United States v. Giglio*, 405 U.S. 150 (1972). A defendant is prejudiced by the failure to disclose *Rosario* material where there is a "reasonable possibility" that the nondisclosure affected the verdict. *People v. Machado*, 90 N.Y.2d 187, 193 (1997). Under *Brady*, where a defendant makes no specific request for the information (as here), the evidence is material to the outcome of the case, if there is a "reasonable probability" that had it been disclosed, the result of the proceedings would have been different. *People v. Fuentes*, 12 N.Y.3d 259, 263 (2009).

[69] Pursuant to C.P.L. § 60.45(3)(a) (effective April 1, 2018), law enforcement is now required to video record all custodial interrogations that occur at a "detention facility," which is defined as "a police station, correctional facility, holding facility for prisoners, prosecutor's office, or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them."

[70] Even still there was no objective evidence that defendant stabbed the deceased. Greene had not seen the assailants with a knife, there was no blood on defendant indicating that he had engaged in a stabbing, and no knife was recovered. In fact, Greene was the only one who possessed a knife.

the heart and exited the front chest. This new evidence should have immediately raised the question as to how defendant not only confessed to a stabbing that never happened, but also confessed to stabbing the deceased in the very location of the bullet's exit wound.

In an interview, the trial A.D.A. recalled extensive conversations with colleagues and supervisors in the Homicide Bureau about the discrepancy between the statement (stabbing) and autopsy report (shooting). He further recalled that the Bureau drew upon its "collective" experience that defendants often minimize their guilt or otherwise make false statements to "manage their culpability," and that they all discussed that in this case, the confession might have been an effort (however misguided) to get away from the gun charges. They also discussed whether this was a jury issue, and concluded that it was. It is clear that neither the trial A.D.A., nor his supervisors, nor his colleagues questioned: (1) what prompted defendant to confess "spontaneously" to stabbing the deceased in the chest—which the police believed to be true at the time of the confession; (2) how defendant confessed to stabbing the deceased in the same location where the bullet had exited (near the heart); or (3) whether the stabbing portion of the confession, or even the entire statement, was coerced.

While it is easy in hindsight to assume that the prosecution should have and would have reevaluated their initial conclusion, the reality is otherwise. Once one forms an opinion or reaches a conclusion, it is not a simple matter of changing one's mind. This is due to confirmation bias, which explains the tendency of people to embrace information that supports their existing beliefs and reject information that contradicts those beliefs. One behaving with a confirmation bias acts with "unwitting selectivity in the acquisition and use of evidence. . . . [T]hat people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so, is fundamental to the concept." Raymond S. Nickerson, *Confirmation Bias: Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol. 175, 175-76 (1998).

Here, confirmation bias prevented the prosecution from correctly concluding that the police had supplied the stabbing information to defendant, and prevented the prosecution from objectively analyzing the veracity and voluntariness of the entire confession. In the normal course of events, once it came to light that the most damaging and truly inculpatory piece of evidence against defendant was compromised, the confidence level about the evidence against defendant should have changed. Yet, instead of reevaluating the evidence, due to confirmation bias, it was assumed that the police were truthful and defendant was not. Accordingly, this led to the incorrect trial tactic of failing to question the credibility of the police, and the new information apparently was considered essentially from the perspective of how it could be explained away—that defendant was lying to minimize his guilt.

The CRU recommends training prosecutors on this issue.

C. Improved Discovery Practices

As discussed above, discovery in this case may have been complicated by the events of September 11, 2001, and the ensuing strains on the New York Police Department. The trial A.D.A. recalls difficulty in reaching various officers, and receiving documents late and piecemeal—and that this was anomalous in his experience. The CRU was unable to ascertain when, if at all, the trial A.D.A.

received the documents at issue here, though they were discovered in the People's file during the CRU investigation. Regardless, the CRU believes that significant improvements in discovery practices at the KCDA—both since the prosecution of the instant case, and forthcoming—greatly reduce the recurrence of nondisclosures like those described here.

At the time of the instant case, the KCDA did not have a uniform practice regarding obtaining discovery material and information, disclosing it to the defense, and memorializing the disclosures. This often resulted in an incomplete and/or inaccurate record of discovery which was almost impossible to reconstruct post-trial.

Since the instant case, the KCDA has instituted an Open File Discovery Policy (OFD) for most cases in which materials, including items which by statute would not be discoverable until just prior to opening statement, are compiled by the trial assistant and disseminated to the defendant, in open court, on the first court date after arraignment (generally 30 to 60 days). The OFD is also filed with the court creating a reviewable record of what exactly was in the possession of the prosecutor and disclosed to the defendant. This obviates motion practice as detailed in the Criminal Procedure Law. While homicides and other serious felonies have been exempted from the OFD policy, in the main because of concerns for witness safety and integrity, OFD should be extended to all cases subject to written *ex parte* protective orders which detail the existence and nature of the material sought to be withheld to create and maintain a consistent record of materials in the possession of the prosecution.

Furthermore, the District Attorney has adopted the recommendation of the Justice 2020 Committee to produce discovery electronically, and has begun the process of transitioning to a paperless discovery process. These changes surely reduce the chances that paper is lost or mismanaged.