



# DISTRICT ATTORNEY KINGS COUNTY

DISTRICT ATTORNEY ERIC GONZALEZ

REPORT ON THE CONVICTION  
OF  
GERARD DOMOND

By: The Conviction Review Unit

## **I. The Crime and Background**

According to the trial testimony, on March 23, 1987, at approximately 2:00 a.m., in a parking lot behind night club Love People 1 (“the club” or “club Love”) located at 1055 Washington Avenue, the defendant shot and killed Patrick Hinkson (“the deceased”) during an argument about money the deceased owed the defendant from drug sales. Identifying witness—referred to here as FP—who testified pursuant to a cooperation agreement and was angry at the defendant, was the sole evidentiary basis for the defendant’s conviction. No crime scene was located, no forensic or ballistic evidence was recovered, and no other witnesses were located.

The defendant was paroled in 2016, after serving twenty-seven years in prison.

## **II. Overview of the Error**

CRU discovered that the prosecution did not disclose that FP was in the psychiatric ward at Kings County Hospital near the time of trial. As a result, the defendant was denied an opportunity to possibly uncover material impeachment evidence regarding FP’s reliability as a witness.<sup>1</sup>

## **III. The Police Investigation**<sup>2</sup>

On March 23, 1987, at approximately 2:06 a.m., a man, who identified himself only as Thompson, brought the deceased to St. Mary’s Hospital located in the 77th Precinct. Thompson provided the deceased’s name to a hospital clerk, Olivera Farquharson, and reported that the deceased had been shot in a parking lot at club Love.<sup>3</sup> Thompson left the hospital before Police Officers James Frank and John Kristofferson of the 77th Precinct arrived, at about 2:35 a.m., pursuant to a radio call of a shooting victim at the hospital. Brooklyn North Night Watch Detectives William Crowe and Wilson Lopez arrived shortly thereafter.<sup>4</sup> At that time, the deceased was in critical condition in the intensive care unit.<sup>5</sup>

The deceased had sustained a single gunshot wound to the left side of the head. The bullet passed entirely through the head exiting the right side and inflicting non-survivable injuries. He was pronounced dead at 3:40 a.m.<sup>6</sup>

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<sup>1</sup> FP died on June 16, 2006.

<sup>2</sup> Unless cited otherwise, numbers in parentheses preceded by “T.” refer to the trial transcript; those preceded by “S.” refer to the sentencing transcript; and those preceded by P.1, P.2, and P.3 refer to the transcript of the defendant’s three parole hearings, respectively.

<sup>3</sup> Patrol Supervisor letter to Chief of Patrol, “Homicide—Unknown Location Dropped in 71st Precinct.”

<sup>4</sup> *Id.*; Lopez DD5, “Response to St. Mary’s Hospital.”

<sup>5</sup> Lopez DD5, “Response to St. Mary’s Hospital.”

<sup>6</sup> Frank, “Complaint Report”; T.67 (*infra* at 7, VII. B. [Dr. Gutierrez]).

Because the club was located in the 71st Precinct, Patrol Supervisor Sergeant Anthony Messina of the 71st Precinct responded.<sup>7</sup> Between about 4:15 and 4:25 a.m., Night Watch Detectives Crowe and Lopez and Emergency Service Unit (“ESU”) Officers Dennis Martin and William Hinz arrived.<sup>8</sup> They all searched the area around the club, including a gas station, a lot at 43 Empire Blvd., and a dirt parking lot.<sup>9</sup> They did not find any evidence or locate a crime scene.<sup>10</sup>

Three and a half days after the murder, on March 26, at 7:00 p.m., FP walked into the 77th Precinct stationhouse and spoke to Detective Douglas Assiff.<sup>11</sup> FP stated that on March 23, shortly after midnight, he was downstairs in club Love with the deceased, “Toby” (the defendant), Guy, Yves, and several others. The defendant and the deceased argued about drug money; the defendant had given the deceased \$7,000 worth of drugs to sell, but the deceased repaid only \$2,000. During the argument the defendant punched the deceased in the mouth. Yves stopped the fight and the deceased stated, “let’s take it outside.”

Everyone went outside to the corner near the gas station. The defendant went to his car, which was parked on the sidewalk. He opened the trunk and returned to the deceased and the others with his hand inside his jacket as if holding something. The deceased said, “you don’t scare me.” From a distance of about six feet, the defendant drew a revolver, shot the deceased in the forehead, and said, “told you don’t fuck with me.” As the defendant fired another shot, Yves struck the defendant’s arm deflecting the bullet from striking the deceased. FP and the others ran back into the club. FP did not know what happened to the deceased.<sup>12</sup>

At 9:17 p.m., an assistant district attorney (A.D.A.) interviewed FP on audiotape in Detective Assiff’s presence. FP’s audiotaped statement was substantially consistent with his statement to Assiff.<sup>13</sup>

On March 29, FP identified the defendant in a photo array as Toby, the person he saw shoot the deceased.<sup>14</sup> On March 31, Detective Louis Scarcella apprehended the defendant at the corner of

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<sup>7</sup> Patrol Supervisor letter to Chief of Patrol, “Homicide—Unknown Location Dropped in 71st Precinct” (time of Messina’s arrival is not stated).

<sup>8</sup> *Id.*; Crowe DD5, “Homicide (Gunshot) . . . Search of immediate [area of club] by Emergency Services.”

<sup>9</sup> Crowe DD5, “Homicide (Gunshot) . . . Search of immediate [area of club] by Emergency Services.”

<sup>10</sup> Patrol Supervisor letter to Chief of Patrol, “Homicide—Unknown Location Dropped in 71st Precinct;” Crowe DD5, “Homicide (Gunshot) . . . Search of immediate [area of club] by Emergency Services.”

<sup>11</sup> FP testified at trial that he went to the precinct on his own to report the crime and asked the detectives to retrieve his gold chain as a condition for his statement (T.135, 162 [*infra* at 9, VII. B. 2]).

<sup>12</sup> Assiff DD5, “Interview of Witness.” Throughout his statement, FP referred to the defendant as Toby, and the deceased as Bunny.

<sup>13</sup> Audiotape A87-568, and accompanying transcript.

<sup>14</sup> Scionti DD5, “Photo Array Shown to Witness.” There is no evidence explaining how the police determined that the defendant was the target suspect called “Toby” by the witness so as to place his photograph in the array for viewing.

Winthrop Street and Remsen Avenue, near the defendant's residence.<sup>15</sup> On April 1, at 3:00 p.m., an A.D.A. and Detective Steven Fitzpatrick placed the defendant in a lineup at the 77th Precinct under the supervision of Sergeant Shields. FP viewed the lineup and identified the defendant as the shooter.<sup>16</sup> At 6:00 p.m., Fitzpatrick placed the defendant under arrest.<sup>17</sup> The defendant did not make any statements.

On April 2, the defendant was arraigned in Criminal Court. His attorney told the court that the defendant was in Georgia from March 21 to 25 1987, and there were fifteen alibi witnesses.<sup>18</sup>

#### **IV. The Grand Jury Proceedings**<sup>19</sup>

On June 25, 1987, the grand jury charged the defendant with Murder in the Second Degree (P.L. § 125.25[1]), Criminal Possession of a Weapon in the Second Degree ([former] P.L. § 265.03), and Criminal Possession of a Weapon in the Third Degree ([former] P.L. § 265.02[4]).

#### **V. The KCDA Investigation of the Defendant's Alibi Defense**

On November 4, 1988, the defense served and filed an alibi notice. The notice stated that at the time of the murder the defendant was with several others at a religious retreat in Gainesville, Georgia, and returned to New York on March 27, 1987.<sup>20</sup>

KCDA Detective Investigator ("D.I.") Catherine Latawiec interviewed several of the defendant's alibi witnesses, including Stella Scott, Blanche Moore, Willie Simon, and Willie McDonald. In pertinent part, Stella Scott said that the group left for Georgia on March 12, 13 and stayed two days (until March 14, 15). Blanche Moore, the trip's organizer, said the group returned on March

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<sup>15</sup> Voluntary Disclosure Form ("VDF"). The VDF is the only document mentioning Scarcella. Fitzpatrick testified at trial that Scarcella transported the defendant to the precinct to be placed in a lineup (T.210 [*infra* at 10, VII. B.]). There is no evidence that Scarcella was involved with the lineup procedure, or had any other role in this case (*infra* at 23, XI. D).

<sup>16</sup> Fitzpatrick DD5, "I.D. of Perp in Line-up;" *see also* Lineup Report.

<sup>17</sup> Fitzpatrick DD5, "Arrest of Perp. Closing of Case."

<sup>18</sup> KCDA "Chronology of Case."

<sup>19</sup> 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).

<sup>20</sup> Alibi Notice. At arraignments, the defense stated that the defendant returned on March 25 (*supra* at 4, III.).

28, but showed D.I. Latawiec a ledger having March 27 as the return date. Neither Willie Simon nor Willie McDonald recognized the defendant in a photo array D.I. Latawiec showed them.<sup>21</sup>

Deputy Heath Elliot of the Seminole County Sheriff's Department, assisting the KCDA, displayed a photo array containing the defendant's photo to Dallas Moore, a spiritual advisor, whom the defendant claimed that he and the others visited on their trip.<sup>22</sup> Dallas did not identify the defendant. Dallas did not recall whether he saw Blanche Moore from March 22 to 27, but in the past, she did not stay in Donalsonville more than two to three days at a time.<sup>23</sup>

#### **VI. FP's Criminal History, Incarceration in Kings County Hospital's G Building, and Cooperation Agreement**

FP had repeatedly failed to return to court on three pending Kings County felony cases: a gun possession case, a narcotics case, and a robbery case.<sup>24</sup> On December 14, 1988, he was returned on a bench warrant.

A January 12, 1989 notation in the trial file of FP's narcotics case states that FP is a witness in a homicide case. A February 15 notation states that FP "might have AIDS, but per [the homicide A.D.A.], this is questionable." A March 14 notation states that FP was not produced in court because he was incarcerated at King County Hospital ("KCH") and "may have AIDS."<sup>25</sup>

On April 11, the prosecutor requested, in writing, and was granted a judicial "takeout" order for FP to be transported from custody on April 13 into the KCDA's temporary custody.<sup>26</sup> The prosecutor's takeout application stated that FP was incarcerated in the KCH "G" Building.

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<sup>21</sup> Latawiec's notes; (T.591 [*infra* at 13, VII. D]).

<sup>22</sup> Blanche Moore and Dallas Moore are not related (T.294).

<sup>23</sup> The alibi notice states Gainesville, not Donalsonville.

<sup>24</sup> See FP's Criminal History Report ("Rap Sheet"). FP was charged, by Indictment Number 1314/87, with Criminal Possession of a Loaded Firearm in the Third Degree and Criminal Possession of a Weapon in the Fourth Degree. On September 23, 1987, he pled guilty to Attempted Criminal Possession of a Weapon in the Fourth Degree and was sentenced on April 7, 1989.

FP was charged, by Indictment Number 2661/88, with Criminal Possession of a Controlled Substance in the Third and Fourth Degrees. On April 20, 1989, he pled guilty to Criminal Possession of a Controlled Substance in the Fourth Degree and was sentenced on October 13, 1989.

FP was charged, under an alias, by Indictment Number 10774/87, with one count of Robbery in the First Degree and two counts of Burglary in the First Degree. On June 23, 1989, he pled guilty to Attempted Robbery in the Second Degree. He was sentenced on October 13, 1989, with his narcotics case. The robbery sentence was imposed to run concurrently with the narcotics sentence.

<sup>25</sup> The January and February notations appear on the inside "flap" of the file. The March notation appears on the front of the file. Defense counsel told the court that FP was incarcerated on that date (March 14, 1989 transcript at 2).

<sup>26</sup> Pursuant to a takeout order, also referred to as a *Damiani* order, an inmate, upon consent, is taken into temporary custody by KCDA detectives and returned to jail the same day. See, e.g., *People v. Johnson*, 285 A.D.2d 516 (2d Dep't 2001); see also *People v. Spruill*, 164 A.D.3d 1270, 1271 (2d Dep't 2018).

On April 18, FP, represented by counsel, entered into a written cooperation agreement with the KCDA on his narcotics case.<sup>27</sup> Pursuant to the agreement, in exchange for his truthful testimony at the defendant's trial, FP was offered a plea of guilty to Criminal Possession of a Controlled Substance in the Fourth Degree and promised a jail sentence of six months and five years of probation. In addition, FP later claimed that there was an understanding with the KCDA, not written in the cooperation agreement, that if he pled guilty on the robbery case the sentence would not be greater than the sentence on the narcotics case (T.79 [*infra* at 10, VII. B.]).<sup>28</sup> On April 20, FP pled guilty in his narcotics case to the agreed upon charge.<sup>29</sup>

## VII. The Trial

The defendant's trial commenced on April 25, 1989.

### A. *The Opening Statements*

#### *The Prosecution*

In his opening statement the prosecutor stated that FP worked for the defendant's drug business, had an armed altercation with the defendant, and then reported to the police that he observed the defendant shoot the deceased, who was known as Bunny (T.37-40). After the shooting FP was arrested for possessing hundreds of vials of crack, and was testifying pursuant to a cooperation agreement, under which, in exchange for his testimony, he pled guilty in his narcotics case and was promised a jail sentence of six months and five years of probation (T.40-41).<sup>30</sup>

The prosecutor stated that FP had spent the last four or five months in a Kings County Hospital unit suffering from the AIDS virus but did not have AIDS. The prosecutor added, "[FP] has the virus and he wanted to get out and that's the deal we made him" (T.41).

The prosecutor also stated that Paul Thompson brought the deceased to the hospital, provided the deceased's name and address (T.30), and "Paul Thompson then hasn't been seen or heard from since that night" (T.39).

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<sup>27</sup> CRU did not locate a takeout order for April 18 in the trial file, and could not locate the court file for this case.

<sup>28</sup> The cooperation agreement does not mention FP's robbery case, and the prosecutor did not attempt to correct FP's claim. Apparently, FP was correct because he ultimately pled guilty on the robbery case and received a sentence imposed to run concurrently with the sentence on his narcotics case (*see* Rap Sheet; *supra* at 5 n. 24).

<sup>29</sup> *See* WebCrims database of the Unified Court System. CRU was unable to obtain FP's plea minutes on his narcotics case. On April 27, 1989, FP testified at trial that he had been released from custody the prior week (T.143 [*infra* at 10, VII. B. 2.]).

<sup>30</sup> The prosecutor did not disclose to the jury the oral agreement regarding FP's robbery case (*supra* n. 28).

## *The Defense*

Defense counsel stated that the defendant was in Georgia at the time of the murder with several others (T.43). Counsel stated that FP was not credible, no one saw or heard a shooting, and there was no crime scene. Counsel told the jury that FP was “lying to save his own hide” (T.45).

### **B. *The People’s Case***

#### *Olivia Farquharson*

Olivia Farquharson registered patients in the emergency room (“ER”) at St. Mary’s Hospital. On March 23, 1987, at approximately 2:00 a.m., a friend of the deceased’s dropped him off in the ER. The friend identified himself, but Farquharson did not recall his name. The friend said that the deceased had been shot. The friend needed help bringing the deceased from his car into the ER. A security guard, Mr. Foy, helped bring the deceased into the trauma room. The deceased was not responsive. The friend identified the deceased as Bunny. The friend stayed at the hospital for about thirty minutes and left before the police arrived (T.48-54).

#### *Dr. Joaquin Gutierrez*

Associate Medical Examiner Gutierrez conducted the deceased’s autopsy. The deceased sustained one gunshot wound. The bullet entered the left temporal area and exited the right temporal area. The cause of death was a gunshot wound to the head and brain (T.64-68).

#### *FP*

##### 1. *The Rodriguez hearing*<sup>31</sup>

FP knew the defendant for eighteen months prior to the shooting, and they dealt drugs together. FP initially testified that he saw the defendant every night at the defendant’s drug spot on Rockaway Avenue, but later testified that the defendant was not there every night. FP initially testified that he learned the defendant’s name a couple of months after he met the defendant. He then admitted that he first learned the defendant’s name after the crime. Before that, he knew the defendant as Toby. FP testified that no one used their real names in the drug business, and FP was known as Peter (T.82-88).

At the end of the hearing the parties did not make oral arguments, and the court did not render a decision on the record. CRU did not locate a written decision. The court, however, apparently

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<sup>31</sup> The defense did not file any pretrial motions, including one to suppress FP’s identification of the defendant. The court decided to conduct a *Rodriguez* hearing before FP’s trial testimony to determine his familiarity with the defendant. The court stated that if it determined that FP did not know the defendant it would hold a *Wade* hearing (T.3-7). The purpose of a *Rodriguez* hearing (*People v. Rodriguez*, 79 N.Y.2d 445 [1992]) is to show that police-arranged identification procedures (*i.e.*, photo array and lineup) were confirmatory as a result of the defendant being known to the witness to such a degree so as to be impervious to police suggestion. The purpose of a *Wade* hearing (*United States v. Wade*, 388 U.S. 218 [1967]) is to determine whether the identification procedures were so improperly suggestive as to taint an in-court identification at trial.

held that FP knew the defendant well enough to identify him at trial since the court did not conduct a *Wade* hearing and FP testified immediately thereafter.

## 2. *FP's trial testimony*

FP knew the defendant for a year and a half (T.94).<sup>32</sup> He provided security for the defendant's crack dealing operation at Rockaway and Riverdale Avenues in East New York. The defendant paid FP \$1,000 a week. FP carried a different gun every day, which the defendant provided. The defendant supplied the drugs and collected the money (T.93-98).

FP knew the deceased for six months before the shooting.<sup>33</sup> The deceased sold drugs for the defendant at a crack spot located at Snyder and Church Avenues. At the time of the murder the deceased owed the defendant \$7,000 for drugs, which the defendant had given him to sell (T.100, 107-08, 113).

On March 23, 1987, at about midnight, FP went to club Love with his bodyguard, Carl, and his friend Gary (T.104-06, 168, 196).<sup>34</sup> The defendant, the deceased, and Yves were there (T.110). Yves worked with FP and the defendant selling drugs (T.111). While downstairs in the club, the deceased gave the defendant \$2,000, but the defendant threw it in the air because the deceased owed him \$7,000. Everyone picked up the money, including FP who took \$300 (T.109-11, 148-49, 175-78, 197). The deceased then punched the defendant, and a fight ensued (T.110).<sup>35</sup> Yves broke up the fight and the deceased said, "let's take it outside" (T.111). FP, the defendant, the deceased, Yves, and about eleven others went outside (T.110-111, 113-14, 127-28, 167-68, 176).

Yves, FP, FP's bodyguard, and the deceased walked to a parking lot and the defendant went to the opposite side of the club to his car, which was parked on the street next to FP's car (T.120-28, 170-74, 178-79, 189-93). The defendant then approached the deceased in the parking lot, with his right hand under his jacket. The deceased told the defendant, "you're going to shoot me, don't scare me, shoot me. Go ahead" (T.128, 171-72, 179, 192, 194, 201-02). The defendant pulled out a 9 millimeter gun and shot the deceased in the forehead. FP saw the flash from the gun and saw the deceased fall backwards onto the front bumper of a car. There was not a lot of blood. FP testified that he did not know where in the head the bullet struck the deceased, because he was not paying attention (T.129-30, 133, 175-82). He also testified that he saw the bullet strike the deceased between the eyes (T.180).<sup>36</sup>

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<sup>32</sup> During his testimony FP identified the defendant in court (T.94).

<sup>33</sup> FP referred to the deceased as Bunny throughout his testimony.

<sup>34</sup> FP also testified that his bodyguard was John (T.168).

<sup>35</sup> FP initially reported that the defendant had punched the deceased (*sup3a* at 4, III.).

<sup>36</sup> The deceased had not been shot between the eyes, but on the left side of his head and the bullet exited the right side. *See* Frank, "Complaint Report;" T.67 (*supra* at 7, VII. B. [Dr. Gutierrez]).

As the defendant fired a second shot Yves pushed him and the bullet went into the air (T.130-31). FP, Yves, and the defendant fled in the defendant's car.<sup>37</sup> FP did not flee in his car because he had a gun in the glove compartment and feared being stopped by the police. FP did not help the deceased or call the police (T.132-35, 161-62). The defendant drove them to his drug dealing spot on Rockaway and Riverdale (T.132-34, 173-74).

Shortly after the shooting FP received a call from Dred, who had been in the club with FP and the others before the shooting and present during the shooting. Dred told FP that he drove the deceased to the hospital and the deceased died. FP did not speak to Dred again (T.134, 182-84, 194-96). Initially, FP testified that he knew Paul Thompson (T.147), but later denied that he knew Thompson (T.159). FP testified that he did not know Dred's real name (T.148, 182, 202).

The night after the shooting, FP went to the drug spot on Rockaway and Riverdale Avenues to get money from the defendant. He told the defendant that the deceased had died. The defendant said he knew (T.134-35).

On March 26, 1987, at approximately 5:00 p.m., FP went to see his girlfriend, Shirley, at her house and found the defendant there. FP testified, "[the defendant] tried to screw my girlfriend."<sup>38</sup> FP confronted the defendant. The defendant drew a .38 caliber gun. FP drew a 25-shot "Uzi." The defendant said, "all right, all right," and FP said, "okay." The defendant then left (T.135-39, 161, 185).

Later that night, at approximately 8:00 p.m., FP went to the 77th Precinct and reported that the defendant shot the deceased. Admittedly, FP went to the police because of the "argument" he had with the defendant about FP's girlfriend. He did not mention to the detectives that he and the defendant drew guns at each other (T.135, 139-40, 160-61, 185-86).

On cross examination, FP acknowledged that he told the police that unless they helped him retrieve his gold chain, he would not give them any information. The following colloquy then ensued:

[Defense counsel]: You wanted your gold chain back right?

[FP]: Yes.

[Defense counsel]: Until you got your gold chain back you weren't going to do anything: right?

[FP]: Yes.

(T.162).<sup>39</sup>

Three days later, FP identified the defendant in a lineup as the person who shot the deceased. Detective Fitzpatrick was present during the lineup (T.140-42).

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<sup>37</sup> FP told the police and the prosecution that he and others ran back to the club (*supra* at 3, III).

<sup>38</sup> FP was married at the time. Shirley was his girlfriend, not his wife (T.136).

<sup>39</sup> A note in the trial file refers to a gold chain. There is no other documentation referring to the chain.

Regarding his cooperation agreement, FP testified that he had been arrested in Florida on a bench warrant for a Brooklyn narcotics case (T.166). Discussions with the KCDA about a cooperation agreement started four months before trial. Pursuant to the agreement, FP was required to testify in this case; in exchange, he would plead guilty in his narcotics case with a promised sentence of six months' jail and five months' probation. FP testified that he was also promised the same sentence on his open 1987 robbery case. A week before his trial testimony, FP pled guilty in his narcotics case (T.143-47, 166-67). FP testified that he served six months in jail and was no longer in custody at time of the trial (T.143).<sup>40</sup> The following colloquy then ensued:

[Defense counsel]: And where were you doing your six months?

[FP]: I was in jail in Kings County, KCH.

[Defense counsel]: Means what?

[FP]: Kings County Hospital.

(T.143).

FP testified he had not yet pled guilty to the robbery case and although he acknowledged that he did commit the robbery (T.146-47), he also insisted that he did not (T.162-65).<sup>41</sup>

FP maintained that he told Detective Fitzpatrick that Dred was at the club during the shooting. He also testified that he told the prosecutor his bodyguard's real name and that the bodyguard was in prison. Additionally, FP testified that he gave the prosecutor contact information for his girlfriend, Shirley, and Yves (T.184-85).<sup>42</sup> When the prosecutor asked FP where Yves lived, FP said on "93<sup>rd</sup>" (T.131).<sup>43</sup>

#### *Detective Steven Fitzpatrick*

On April 1, 1987, at about 3:00 p.m., Detective Fitzpatrick placed the defendant in a lineup at the 77th Precinct. His lieutenant and an A.D.A. supervised the lineup. Prior to the lineup, detectives contacted the defendant by calling the car service for which the defendant worked and asked for his cab number. Detective Scarcella of Brooklyn North Homicide brought the defendant to the precinct (T.207-12). After the lineup Fitzpatrick arrested the defendant (T.217).

FP and a hospital security guard told the detectives that Paul Thompson brought the deceased to the hospital. Fitzpatrick attempted to locate Thompson. Fitzpatrick did not know Thompson's address. He looked in the phone book and conducted computer searches, including a search for

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<sup>40</sup> FP testified on April 27, 1989.

<sup>41</sup> FP admitted that he had been arrested ten times and had prior convictions for forgery and gun possession. He did not recall the dates of his arrests, his other convictions, or what dates of birth he provided to the police. He admitted that he used an alias name (T.154-59).

<sup>42</sup> Fitzpatrick testified that FP only gave him first names and nicknames (T.220-21 [*infra* at 11, VII. B.]). There is no evidence that FP gave the prosecutor any witness information.

<sup>43</sup> Outside the presence of the jury, the prosecutor told the court that the KCDA paid \$200 or \$300 in airfare for FP's wife to leave New York City because she was afraid of the defendant (T.151-52).

an arrest of any Paul Thompson. He located ten individuals with that name in a license plate database, but none turned out to be the actual Paul Thompson (T.219-20).

FP provided other names to the detectives, including “Yves” and “Gary,” and nicknames of other individuals. Detective Fitzpatrick learned that Yves’s last name was Brazard. Fitzpatrick called Yves’s phone number and asked Yves’s mother to give him a message. Fitzpatrick spoke to Yves’s attorney, and he left his card at Yves’s house and with Yves’s neighbors asking that Yves call him (T.220-21). Just before Fitzpatrick testified, he finally spoke to Yves “in the hallway” of the courthouse (T.221). Fitzpatrick was not successful finding anyone else. Another detective spoke to Gary, but Gary did not get in touch with Fitzpatrick (T.221).<sup>44</sup>

### **C. The Defense Case**

#### *Police Officer Dennis Martin*

On March 23, 1987, at 4:10 a.m., ESU Officers Martin and Hinz received a call to respond to club Love to search for ballistics evidence and a possible crime scene (T.240-41, 243-44, 246). They arrived at about 4:25 a.m. (T.245). They did not find any evidence or see any blood (T.242, 248-49). They searched the parking lot behind the club. Martin did not recall, but they also “probably” searched around the area of a gas station (T.242). On cross examination, Martin acknowledged that CSU was not given a specific location of a shooting, and they just searched around the general area outside the club, including the sidewalk and curb (T.246-47).

#### *Detective Carlos Gonzalez*<sup>45</sup>

On March 23, 1987, Detective Gonzalez of the 77th Precinct Detective Squad, was assigned to investigate the deceased’s murder. At 3:00 p.m., he went to 68 Kenilworth Place, a SRO-type building, to speak with Bobby White, who lived with the deceased. White was not home so Gonzalez left his card (T.263, 273).

While at the building, Detective Gonzalez saw mail addressed to Joaquin Thompson at the same apartment as the deceased. Other than the mail, Gonzalez did not have information connecting Thompson to that address (T.264, 266, 273-74).

Also, on a step in front of the building Detective Gonzalez observed two to three red stains, which appeared to be drops of blood (T.261-63, 269-70). In the event that it was relevant to this case, Gonzalez summoned the Crime Scene Unit (“CSU”). CSU photographed and recovered samples of the red stains. CSU gave the samples to Gonzalez, but he “inadvertently” did not send them to the police lab for analysis and “essentially threw them out” (T.261-63, 270-71, 280). Gonzalez learned that the blood was from a girl who had cut herself. Gonzalez did not memorialize this

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<sup>44</sup> Fitzpatrick did not testify about the substance of his conversation with Yves. CRU could not find any information regarding Fitzpatrick’s encounter with Yves, or determine the identity of the detective who spoke with Gary or the substance of that conversation.

<sup>45</sup> The trial transcript spells Gonzalez as Gonzales, but his DD5s and other police documents spell it as Gonzalez.

information because he did not consider it significant (T.271-72). Gonzalez did not observe any blood inside the building (T.276).

The next day, Bobby White came to the precinct and spoke to Detective Gonzalez. White was very cooperative and stated what he did the night of the shooting.<sup>46</sup> Gonzalez, however, did not find out whether White knew Joaquin Thompson (T.263, 273-74).

During the investigation, Detective Gonzalez had been informed that Paul Thompson found the deceased in the club's parking lot, and brought the deceased to the hospital where Thompson provided the deceased's name and address (T.265). Gonzalez was also informed that Thompson waited for the police to arrive at the hospital, but left because the police took too long. Gonzalez never learned whether Paul Thompson was Joaquin Thompson, and he never located Joaquin (T.264-66, 274, 279).

#### *Fitzroy Taylor*

On March 23, 1987, Fitzroy Taylor was working security at the main front entrance door of club Love. The club was busy with approximately 300 customers. The defendant was a regular customer, but Taylor did not recall seeing him on the evening or morning of the shooting (T.414-15, 420-21, 423-25).<sup>47</sup>

At approximately 2:00 a.m., Taylor did not hear anything out of the ordinary such as gunshots or a commotion. Because of the loud music, however, Taylor would not be able to hear noise from the parking lot. The club did not have any windows facing the parking lot behind the club (T.414-15, 418, 423).

#### *The Alibi Witnesses*

The defendant presented several witnesses who testified that they were in Georgia with the defendant on the day of the murder. The group returned to New York on March 27 according to Blanche Moore, the defendant's mother-in-law (T.282, 284-89, 307, 365), Dorthey Harris (T.470), Millicent Cooper (T.473, 476, 493), and Tracy Domond, the defendant's wife (T.538-39).<sup>48</sup>

Blanche Moore testified that fifteen people travelled from New York, in her van, to Donalsonville, Georgia for a religious revival. The group left March 21, arrived March 22, and stayed at the Rufus Motel for four nights. Moore provided an "account sheet" and registration cards of the motel for only March 22 and 23, neither of which contained the defendant's name. Moore explained that only one person registered for a room, and Willie McDonald was on the registration

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<sup>46</sup> Gonzalez did not testify about what White had told him.

<sup>47</sup> At the start of trial, out of the jury's presence, the prosecutor told the court that he interviewed Taylor and Taylor said that he did not recall if the defendant was at the club that night. The prosecutor further stated that he and Fitzpatrick showed Taylor a photo array containing the defendant's photo, and a photograph of the defendant's lineup. Taylor failed to identify the defendant in either, but identified the defendant from a single photograph. Fitzpatrick memorialized the identification procedures in a DD5 (T.7-8). CRU did not locate the DD5.

<sup>48</sup> The defendant and Tracy married in May 1987 (T.518).

card for the defendant's room (T.285, 298-99, 328, 336, 365, 368-71). When they returned on March 27, Moore drove the defendant to see his parole officer (T.285, 293-94). Moore admitted that she had previously testified at a preliminary parole hearing that the group returned on March 25 (T.310-15).<sup>49</sup>

Seventy-six year old Willie McDonald testified that he shared a room at the Rufus Motel with the defendant for three or four days. McDonald acknowledged that he was unable to identify the defendant in a photo array a KCDA detective showed him, explaining that all the men in the array looked the same (T.432-34, 444). During his testimony, McDonald identified the defendant in court, but due his failing eyesight he had to approach the defendant at the defense table (T.428).

Numerous undated photographs at unspecified locations were admitted into evidence in an attempt to show that the defendant was on the trip. The defense maintained that the group celebrated the defendant's birthday on March 24, but there were no photographs of that event (T.325, 327, 330, 332, 334-37, 541-42).

#### **D. *The People's Rebuttal Case***

##### *D.I. Latawiec*

D.I. Latawiec testified that when she interviewed Willie McDonald at his home, she showed him a photo array containing the defendant's photo and McDonald stated that he did not recognize anyone with whom he travelled to Georgia. McDonald told Latawiec that the group arrived back in New York on Tuesday, March 25 (T.591).

D.I. Latawiec interviewed Tracy Domond, who stated that she and the defendant went to Georgia in the summer of 1987, not in March, and she had photographs to show that (T.592-93).

##### *Parole Officer Joseph Cretella*

Parole Officer Joseph Cretella testified that he saw the defendant on March 25, 1987, at 10:32 a.m., at his office (T.598-99).

#### **E. *Summations***

##### *The Defense*

Defense counsel argued that the prosecution failed to present any evidence corroborating FP's testimony that the defendant or the deceased were at the club, or that the defendant shot the deceased—there was no blood at the scene, no shell casings were found, and the security guard did not hear any gun shots. Counsel further argued that the prosecution did not disprove the defendant's alibi defense, and that the alibi witnesses were credible (T.609-10, 616).

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<sup>49</sup> The preliminary parole hearing was held to determine whether the defendant violated parole for travelling to Georgia on March 21. It was held at Rikers Island. The defendant was represented by counsel. The hearing officer determined that although the defendant "[t]echnically" violated parole, "it was not an important violation" because the parole office was closed the day he left New York (Preliminary parole hearing at 35).

## *The People*

The prosecution argued, among other things, that the evidence showed that FP's account that the shooting occurred at 2:00 a.m. in the club's parking lot, was correct. The prosecutor stated that either Detective Fitzpatrick or Detective Gonzalez testified that Paul Thompson, who the defendant knew as Dred, brought the deceased to the hospital and "gave all the information to the police at that time as to where it occurred and how it occurred." The prosecutor stated that ESU went to the location provided by Thompson to search for a crime scene (T.659-61).<sup>50</sup>

### **F. *The Verdict and Sentence***

The defendant was convicted of Murder in the Second Degree, Criminal Possession of a Weapon in the Second, and Criminal Possession of a Weapon in the Third Degree (T.701-02).

On May 30, 1989, the defendant was sentenced, as a persistent violent felony offender, to twenty-five years to life on the murder count and twenty-five years to life on each weapon count. All of the sentences were imposed to run concurrently.

## **VIII. Post-Conviction Proceedings**

### **A. *The Direct Appeal***

On his direct appeal, the defendant claimed, in pertinent part, that counsel was ineffective because, among other alleged failures, counsel failed to conduct an adequate pretrial investigation into the defendant's alibi defense. The defendant also claimed that the People failed to disprove his alibi defense.

On May 10, 1993, the Appellate Division unanimously affirmed the judgment of conviction. Without discussion, the Appellate Division stated that the defendant received the effective assistance of counsel. It also held that the evidence was legally sufficient to prove the defendant's guilt and disprove his alibi defense beyond a reasonable doubt. It stated, among other things, "[a]lthough the defendant presented several alibi witnesses, it cannot be said that the trier of fact improperly discredited their testimony." *People v. Domond*, 193 A.D.2d 692 (2d Dep't 1993).

On August 12, 1993, the Court of Appeals denied the defendant's application for leave to appeal. *People v. Domond*, 82 N.Y.2d 717 (1993) (Simons, J).

### **B. *The Habeas Corpus Petition***

On February 3, 1998, the defendant filed, *pro se*, a petition for a writ of *habeas corpus* in the United States District Court, Eastern District of New York ("District Court"). The defendant raised the same ineffective assistance of counsel claim he raised on direct appeal. On April 5, 1999, in an unpublished decision, the District Court denied the defendant's petition. On November

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<sup>50</sup> Thompson did not speak to the police or ever mention how the shooting occurred. Defense counsel objected to the prosecutor's remark on the basis that there was no evidence that Thompson spoke to the police, but the court overruled the objection (T.661, 691-92).

16, 1999, the United States Court of Appeals for the Second Circuit denied the defendant's application for a certificate of appealability from the denial of his *habeas petition*.

### **IX. The Defendant's Parole Release**

The defendant appeared before the state board of parole three times: First, on May 21, 2013, the defendant admitted that he had murdered the deceased. He was denied parole.<sup>51</sup> The defendant then wrote the parole board apologizing for his false admission explaining that he wanted to be released to help his sick mother. On May 13, 2015, at his second parole hearing, the defendant recanted his admission and maintained his innocence. The defendant, again, was denied parole.<sup>52</sup> Last, on August 24, 2016, the defendant maintained his innocence and stood by his recantation. The defendant was granted parole.<sup>53</sup>

### **X. CRU Investigation**

CRU reviewed all available materials, including the prosecution's trial file, transcripts of all proceedings, police documents, and parole board interviews. Significantly, CRU discovered that before trial, FP—the prosecution's sole inculpatory witness, and the only evidence of the defendant's guilt—was in custody in the Department of Corrections (DOC) Psychiatric Forensic Unit at KCH's G Building. Specifically, CRU located the following documents in the trial file:

- 1) A takeout order, dated April 11, 1989, signed by the trial prosecutor, requesting FP's production from the G Building Kings County Hospital on April 13, 1989;
- 2) An undated and unsigned handwritten note containing the following information:

[FP]  
Kings County Hospital  
G WARD (CORRECTIONS)  
G Bldging  
Prison Ward

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Psychological

- 3) An undated and unsigned handwritten note mentioning FP and the 6th floor of the KCH G Building; and
- 4) A handwritten note on a legal pad mentioning that FP was in the "prison ward" of the KCH G Building. The legal pad also contains proposed questions and answers for FP's trial testimony. One proposed question concerns FP's incarceration, and FP's proposed answer that he was at KCH for symptoms of a "virus."

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<sup>51</sup> P.1 at 2-3, 9-14, 16.

<sup>52</sup> P.2 at 3, 16.

<sup>53</sup> P.3 at 2-16.

CRU has learned that the G Building mentioned in the above notes exclusively housed psychiatric patients. It is clear that this information was not disclosed to the defense or the court. First, there is nothing in the file or record suggesting that the above documents or information were disclosed. To the contrary, the prosecutor listed on the record certain discovery material provided, including that pertaining to FP (T.13-14, 78-80), but nothing was mentioned about FP being in the psychiatric unit at KCH's G Building. Furthermore, had the defense possessed any of the above documents or information, there is no doubt that the defense would have used it since an essential part of the defense strategy was to attack FP's reliability and credibility. In fact, the defense cross-examined FP about the location of his custody. When FP replied that he was incarcerated in Kings County Hospital, the defense did not question him further about it (T.143 [*supra* at 10, VII. B.]).

CRU attempted to obtain records from the NYC Department of Corrections ("DOC"), and the NYC Health and Hospitals/Correctional Health Services ("HHC"), which operated the 6th floor of KCH G Building. CRU requested FP's medical and admission records, the policy and procedures for the admission of inmates at the time of FP's incarceration, and FP's movement log from Rikers Island. Both the HHC and DOC submitted affidavits to CRU confirming that the records no longer exist.

To ascertain the significance of an inmate's incarceration on the 6th floor of KCH's G building, CRU reviewed a 1989 report of the New York City Bar Association entitled, "AIDS and the Criminal Justice System: A Final Report and Recommendations" ("AIDS Report") (*infra* at 16, X. A.). Furthermore, CRU interviewed Dr. Alan Perry, former chief psychologist of the Forensic Inpatient Unit at the KCH's G Building, and Dr. Cheryl Paradis, former clinician of the KCH G Building (*infra* at 16, X. B.)

**A. *DOC Policy Regarding Hospitalization of Inmates***

The AIDS Report addresses the housing of NYC inmates suffering from AIDS and HIV. It states that inmates with HIV-related conditions "short of diagnosed AIDS," were housed in the general population at Rikers Island or in the infirmaries of other City DOC facilities (not hospitals), "as their medical condition dictate." Inmates with "full-blown AIDS" were held at "a special AIDS infirmary" at Rikers Island. Also, "inmates in need of acute inpatient care [hospitalization]" were treated in a HHC correctional facility located at KCH, Bellevue Hospital, or Elmhurst Hospital. Each hospital had separate medical and psychiatric forensic units.

**B. *CRU Interview of Doctors Perry and Paradis***

The HHC correctional facility at KCH was located on the 6th floor of the G Building. It was referred to as the Forensic Inpatient Unit and functioned as an annex of Rikers Island. Both Drs. Perry and Paradis stated that, in 1989, inmates with mental health issues were sent to the 6th floor of the G Building. Inmates with serious medical issues were sent to a different forensic unit in a different building at KCH. According to Dr. Paradis, patients with both mental and medical health

conditions were usually admitted to the medical forensic unit, and the treatment of medical conditions was prioritized over mental health.

Both Drs. Perry and Paradis stated that admission to the G Building required that the inmate displayed psychiatric symptoms. Dr. Perry explained that inmates were first evaluated at Rikers Island. Those who met criteria based on certain symptoms were then sent to the ER in the G Building where they were evaluated by specialists, including a psychiatrist, a psychologist, and a nurse. Dr. Perry stated that the inmate would be hospitalized if diagnosed with “an active psychosis” or “active suicide.”<sup>54</sup> He defined active suicide as a new suicide attempt or having on-going suicidal thoughts.

According to Dr. Perry, inmates with HIV or AIDS were never sent to a mental health forensic unit to separate them from other inmates for the purpose of preventing possible contagion to the prison population. When CRU mentioned that the prosecutor told the jury in his opening statement that FP was in custody at KCH for four or five months (T.41 [*supra* at 6, VII. A.]), and FP testified that he was hospitalized for six months (T.143 [*supra* at 10, VII. B.]), Dr. Perry stated that a four-month stay in the G Building indicated a “very serious mental health condition.”<sup>55</sup> He remarked that the goal was to release the inmates from the hospital as soon as possible. The longer that the inmate is hospitalized the more serious the mental health condition.

CRU asked the doctors whether it was possible that FP was in the G Building because he was suicidal and depressed due to having HIV (as the prosecutor told CRU [*infra* at 18, X. C.]). Both doctors said that it was unlikely. Dr. Paradis explained that the length of time for a suicide watch and related depression was three to six weeks, during which time hospital personnel monitored the administration of anti-depressants.<sup>56</sup> Dr. Perry explained that a suicide watch longer than that usually signified that the inmate was “very, very depressed and exhibited the psychiatric features associated with that.” He said that the inmate would undergo “a lot of treatment and would be medicated.” Dr. Paradis stated that such treatment could affect cognitive abilities and render the inmate “more fragile, vulnerable to coercion, and desperation.” Both doctors agreed that those symptoms could affect an inmate’s ability to make a rational decision regarding cooperating with the prosecution, and could be used by the defense to attack the defendant’s reliability and credibility. Of course, on the other hand, if one suffered from a psychotic disorder, then the probable effect on his or her reliability, specifically the clarity and coherence of his or her recall

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<sup>54</sup> Active psychosis encompasses a number of symptoms that would affect a person’s ability to be a reliable witness, including hallucinations and delusions (see <https://www.ncbi.nlm.nih.gov/books/NBK519704/table/ch3.t20/>).

<sup>55</sup> Although the prosecutor told the jury that FP was hospitalized for four to five months, it was more likely three months. Correspondence in FP’s narcotics case file shows that he was in KCH from December 14, 1988 to January 4, 1989, and in the Rikers Island infirmary from January 6 to 10, 1989 (*infra* at 18-19, X. D.). FP was due back at KCH sometime after January 10 and before January 25, but did not show (*id.*). Based on the prosecutor’s estimation of four to five months, it was likely that FP was in KCH shortly after January 25, where he remained until he was released on or about April 20, 1989 (T.143 [*supra* at 10, VII. B.]).

<sup>56</sup> Dr. Perry stated that some inmates feigned suicide attempts or thoughts of suicide to leave Rikers Island and gain admission to the psychiatric ward. Their stay in the G Building would customarily last for about a week.

of a remote incident, would be impacted equally, if not more than if his or her hospitalization was depression-related.

CRU explained to Dr. Perry that on April 13, 1989, FP was transferred from KCH to the KCDA pursuant to the takeout order, and on or about April 20, 1989, he was released from custody.<sup>57</sup> CRU asked about the procedure regarding the G Building's release of a prisoner once the prisoner's case was over—meaning that the prisoner is no longer in custody. He said that once a mental health patient's court case is over, the psychiatric forensic unit would not see the person again unless doctors believed that the person had to be civilly committed. Such cases were rare.

### **C. *Interview of the Prosecutor***

CRU interviewed the prosecutor by telephone on three occasions. The prosecutor did not recall that the defendant was in the KCH G Building, but he confirmed that he signed the takeout order, which stated that the defendant was in the KCH G Building. Regarding the notations in the file mentioned the G Building, he stated that he did not write the note stating, "Psychology," and believed a paralegal wrote it. The prosecutor did not recall whether he disclosed the G Building information or the file notations to the defense or the court. After reviewing the trial transcript he concluded that it did not appear that he disclosed the information.

The prosecutor told CRU that he knew at the time of trial that the KCH G Building was a psychiatric ward. He surmised that FP was there because FP had AIDS and might have attempted suicide. He did not recall any evidence suggesting that FP was a "nut." He said FP was a "character" and an "opportunist." FP's account of the murder made sense to him.

### **D. *It Was Never Established that FP Had AIDS or Any Medical Condition***

FP's hospital and jail records no longer exist. Thus, CRU could not determine the length and nature of FP's hospitalization at KCH or whether he was admitted to the medical forensic unit. Neither could the court in FP's narcotics case, despite its attempts to do so.

CRU found the following correspondence in the court file for FP's narcotics case:

- 1) By letter dated January 10, 1989, the court wrote Dr. Alan Goldberg, of Prison Health Services, that FP claimed to have AIDS. The court asked for confirmation.
- 2) By letter dated January 13, 1989, Dr. Wallace C. Rooney, Jr. replied that it could not be verified. Dr. Rooney stated:

[FP] was re-admitted into Kings County Hospital from Rikers Island Infirmary on or about January 10, 1989, where he had been previously hospitalized from December 14, 1988 through January 4, 1989 . . . [FP] was at the Rikers Island infirmary from January 6<sup>th</sup> through 10<sup>th</sup>, 1989, an

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<sup>57</sup> FP testified on April 27, 1989, that he was released from custody a week before (T.143 [*supra* at 10, VII. B.]). Thus, it is reasonable to conclude that FP was released around the time he pled guilty on April 20, 1989 (*supra* at 5, VI. n. 24).

insufficient time for verification of his claim of having AIDS. I recommend that you obtain medical information directly from Kings County Hospital.

3) By letter dated January 17, 1989, to Esta Armstrong, Director of Prison Health, the court asked for confirmation of FP's medical condition.

4) By letter dated January 25, 1989, Armstrong replied that FP had an appointment for a medical workup at KCH to confirm whether he suffered from AIDS. Armstrong added:

[FP] refused the medical and returned to Rikers Island. At this time, we cannot verify his condition nor give a prognosis of his future medical expectations.

The court file contains no other documents regarding FP's health. FP had a pending robbery case at the time (*supra* at 5, VI. n. 24), but in 2015, that court file was destroyed in a fire.<sup>58</sup>

#### **E. CRU Could Not Locate Paul Thompson or Yves**

Paul Thompson brought the deceased to the hospital and was probably an eyewitness to the shooting. At the time of the investigation, Detective Fitzpatrick was unable to locate Thompson (T.219-20 [*supra* at 10-11, VII. B.]). Also, the Homicide Scratch, which lists witnesses and their contact information lists Paul Thompson with no contact information. At the time of trial, the prosecutor told the jury in his opening statement, Paul Thompson "hasn't been seen or heard from" since he brought the deceased to the hospital (T.39 [*supra* at 6, VII. A.]). CRU searched multiple databases for any information on Paul Thompson, but had no success.

According to FP, Yves was an eyewitness to the shooting (T.130-31 [*supra* at 8-9, VII. B.]). Detective Fitzpatrick testified at trial that he spoke to Yves Brazard in the courthouse (T.221 [*supra* at 10-11, VII. B.]). Fitzpatrick was not questioned about the substance of the conversation, and apparently did not memorialize it. CRU has not located any document regarding Fitzpatrick's conversation with Yves. Moreover, CRU did not locate any document with Yves's contact information. CRU searched multiple databases for Yves Brazard with various spellings, but had no success.

#### **F. CRU Interview of Attorney who Represented FP Prior to Trial**

CRU interviewed the attorney who represented FP on his 1988 narcotics case and cooperation agreement (*supra* at 6, VI.). He did not recall FP.

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<sup>58</sup> "Supreme Court of the State of New York Criminal Term Correspondence Unit" letter dated March 2, 2020, "Re: [FP] Ind # 10774-87."

### **G. *CRU Interview of Trial Counsel***

The defendant's lead trial attorney is deceased. CRU interviewed the lead attorney's assistant, who, at the time of trial, had not yet been admitted to practice law. He did not recall FP, or much about the case.

### **XI. CRU Analysis**

CRU has concluded that—based on the documentary evidence in the KCDA files, and the opinion of two experts with personal knowledge about the psychiatric unit where FP was hospitalized — that FP could have had “a very serious mental disorder” just days before he signed the cooperation agreement and testified at trial. The prosecutor knew that FP was in a psychiatric ward in the G Building at KCH but did not disclose this information or investigate it. Instead, the prosecution told the jury in his opening statement that FP had been hospitalized for the AIDS virus.

The non-disclosure prejudiced the defendant by denying him the opportunity to possibly uncover material impeachment evidence regarding FP's reliability as a witness. The defendant was further prejudiced because the only evidence of guilt consisted solely of the testimony of FP, who testified pursuant to a cooperation agreement and admittedly went to the police because of his animosity toward the defendant.

#### **A. *FP was Hospitalized in a Psychiatric Unit***

The prosecutor's April 11, 1989 takeout order for the KCDA to obtain temporary custody of FP on April 13, unequivocally establishes that FP was in custody in KCH's G Building at that time. Additionally, a note in the trial file in this case specifies that FP was on the 6th floor of the G Building, and other notations state that he was in the prison of the G Building (*supra* at 15, X.). Drs. Perry and Paradis maintained that the 6th floor of the G Building was the psychiatric forensic inpatient prison ward used by the DOC to treat prisoners. Both doctors and the AIDS Report state that the unit did not segregate prisoners to prevent AIDS contagion. Because FP's records no longer exist, CRU cannot determine FP's length of stay in the psychiatric unit.

There is no evidence suggesting that FP was ever hospitalized in the medical unit. Moreover, the prosecutor's opening remarks placed FP in KCH for four or five months.<sup>59</sup> There is certainly no evidence suggesting that he was ill enough to warrant a four to five-month medical stay.<sup>60</sup> Consequently, it is possible that FP suffered from or was suffering from some type of “serious

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<sup>59</sup> FP testified that he was hospitalized for six months at KCH (T.143 [*supra* at 10, VII. B.]). But FP was extradited from Florida in December 1988, four months prior to the trial (*supra* at 5, VI.).

<sup>60</sup> See court correspondence to prison hospital service administrators, dated January 10 to January 27, 1989 (*supra* at 18-19, X. D.); see also references to FP's narcotics case file (*supra* at 5, VI.). The court correspondence further establishes that FP was not hospitalized at KCH continuously during the four to five-month period, as the prosecutor told the jury on April 25, 1989 (T.41 [*supra* at 6, VII. A.]).

mental health condition” at the time he signed the cooperation agreement and, at the very least, just before trial.

Further, it seems likely that on April 18, 1989, the signing of the cooperation agreement, FP was still hospitalized in the G Building as a psychiatric patient, which the prosecutor had to know.<sup>61</sup> FP was released from custody by the time of his trial testimony on April 27, 1989 (T.143 [*supra* at 10, VII. B.]).

**B. *The Prosecutor Knew that FP was in a Psychiatric Unit***

The prosecutor confirmed to CRU that, on April 11, 1989, he signed a request for a judicial takeout order specifying that FP was in KCH G Building. Three handwritten notes in the file indicate that FP was in the G Building. The prosecutor confirmed to CRU that at the time of trial the KCH G Building was a psychiatric ward.<sup>62</sup> Importantly, a note in the prosecutor’s case file contains the handwritten word “psychological” beneath FP’s name and KCH G Building (*supra* at 15, X.). Given this, it strains credulity that the prosecutor did not know, or at least, suspect that FP was in a psychiatric unit due to likely mental health issues. Whether or not the trial prosecutor, himself, wrote those notes is not dispositive since the prosecutor is presumed to have knowledge of the contents of his case file.

Yet, in his opening statement the prosecutor told the jury that FP entered into a cooperation agreement, in part, because he had the AIDS virus. The prosecutor stated:

[FP] promised to cooperate. We promised to give him that plea. He spent the last four or five months in the Kings County Hospital unit suffering from the AIDS virus. He doesn’t have AIDS. He has the virus and he wanted to get out and that’s the deal we made him.

(T.41 [*supra* at 6, VII. A.]).

The prosecutor’s statement to the jury is troubling because the February 15, 1989 notation in FP’s narcotics case file states that the homicide prosecutor thought it was “questionable” that FP had AIDS (*supra* at 5, VI.).<sup>63</sup>

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<sup>61</sup> The takeout order was signed on April 11, 1989 to transfer FP to the KCDA on April 13. The order specifies that FP should be returned to the same location where he was held, which was the G Building. In any event, even if FP was not in the G Building when the cooperation agreement was signed the timing was close enough to have warranted disclosure.

<sup>62</sup> In fact, at the time the G Building was synonymous with psychiatric patients. *See* Days of infamy at the G Building, NY Daily News, Feb. 10, 2009, <http://www.nydailynews.com/new-york/day-infamy-g-building-article-1.389,647> (“The G Building was the psychiatric ward of Kings County Hospital . . . it was a modern-day Brooklyn Bedlam, where unspeakable things occurred behind the barred windows. A place where lunatics ran the loony bin. Where the truly crazy of the violent Brooklyn streets were separated from the ordinary criminals”).

<sup>63</sup> CRU is also troubled by the prosecution’s failure to disclose to the jury that the cooperation agreement included an unwritten understanding regarding FP’s pending robbery case (*supra* at 6, VII. A.).

CRU concludes that by telling the jury the defendant had the AIDS virus the prosecution most likely choose to ignore and not investigate FP's mental health status, which could have threatened the prosecution of the case (*infra* at 22, X. C.).

### C. *The Non-Disclosure Prejudiced the Defendant*

A prosecutor has no duty to obtain a witness's psychiatric records that might bear on the witness's mental illness. *People v. Sealey*, 239 A.D.2d 864 (1st Dep't 1997); *People v. Diaz*, 134 A.D.2d 445, 446 (2d Dep't 1987). A prosecutor, however, does have a duty to disclose what he or she knows about the witness's mental condition, if it might affect the witness's reliability. *People v. Rensing*, 14 N.Y.2d 210 (1964).

Here, as stated above, the prosecutor should have known, or at least suspected, that FP might have had some type of psychiatric problem. Whether the prosecutor had a duty to disclose that information is not dispositive. When the prosecution is aware that a witness might have a psychiatric problem—out of fairness—the prosecution should at least inform the court about it. CRU acknowledges that the trial occurred in 1989, and the policy was different then, but KCDA's current policy requires disclosure, at least to the court, of any information indicating that a witness is in a psychiatric ward near or at the time of trial. See generally *People v. Velasquez*, 49 Misc. 3d 265, 271 (Crim. Ct. Bronx Cty. 2015) (where a prosecutor knows or has reason to know that a crucial prosecution witness has a psychiatric history that might affect the witness's reliability, the prosecutor has an affirmative duty to seek justice by investigating and providing the court with any relevant records for an *in camera* inspection) (citing the Code of Professional Conduct, 22 NYCRR 1200.0 rule 3.8[b], and the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11 [3d ed 1993]).

While psychiatric records are generally confidential, they may be disclosed upon a court's finding that the interests of justice significantly outweigh the need for confidentiality. See Mental Hygiene Law § 33.13[c]; *People v. Lowe*, 96 Misc. 2d 33 (Sup. Ct. Bronx Cty. 1978). For a court to order production of the records and to inspect them *in camera*, a party has to show a reasonable likelihood that the records might contain material bearing on the reliability and accuracy of the witness's testimony. See *People v. Gissendanner*, 48 N.Y.2d 543, 550 (1979); *People v. Duwe*, 164 A.D.3d 1256 (2d Dep't 2018); *People v. Sakadinsky*, 239 A.D.2d 443 (2d Dep't 1997); *Diaz*, 134 A.D.2d at 446.

Here, the defense never had an opportunity to make such a showing. CRU concludes that regardless of the actual contents of the psychiatric records, non-disclosure of the mere fact that FP was in a psychiatric unit denied the defendant the opportunity to start the procedure for the production of FP's records, as well as the opportunity to independently investigate FP's reliability. *Velasquez*, 49 Misc. 3d at 271 (where the defense made a showing that it had learned during an interview that the complainant took medication for bipolar disorder and the medications caused both physical and mental side effects, the court directed the People to investigate whether the complainant suffered from a psychiatric condition that impacted her reliability, and, if such a

condition existed, to attempt to secure the psychiatric records pertaining to that condition for the court's *in camera* inspection).

Notably, without FP's testimony the prosecution had no case. FP was the only eyewitness at trial, and his testimony was the only evidence of the defendant's guilt. There was no other direct evidence, and there was no circumstantial evidence. No 911 calls were made. The police did not find a crime scene, nor did they recover any forensic or ballistic evidence. No admissions were recorded, and aside from FP, no witnesses were interviewed.<sup>64</sup>

Thus, if the defense had learned that the sole witness implicating the defendant suffered from a psychiatric condition prior to trial (which based on CRU's investigation FP likely did), the defense would have had an opportunity to suggest to the jury that even if FP was not lying, he was nonetheless unreliable, and his testimony about the shooting should not be taken at face value. Indeed, FP's testimony on at least three significant facts was unreliable: he testified that the crime occurred behind the club in a parking lot, yet no crime scene was found there; he testified that after the shooting, he ran back into the club, but he also testified that he fled with the defendant in the defendant's car; and he testified that the defendant shot the deceased between the eyes, but the medical examiner determined that the deceased was shot in the temple. The defense also might have called a psychiatric expert to demonstrate that FP's capacity to perceive and recall events was impaired by his psychiatric condition. *See Rensing*, 14 N.Y.2d at 212-214 (defendant entitled to a new trial where newly discovered evidence showed that the sole witness implicating defendant was mentally ill); *People v. Baranek*, 287 A.D.2d 74, 78-79 (2d Dep't 2001) ("Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition"); *see also Diaz*, 134 A.D.2d at 446 (where the prosecutor did not disclose that the witness was detained in the KCH G Building because the prosecutor believed that it was to separate the witness from other prisoners, the court ordered the prosecutor to obtain the witness's medical records when the defense learned of the witness's psychiatric history during cross examination of the witness).<sup>65</sup>

#### **D. Detective Scarcella**

Detective Scarcella's role was limited to apprehending the defendant and transporting him to the precinct for a lineup (T.210 [*supra* at 10, VII. B.]). There is no other evidence, either documentary or testimonial, mentioning Scarcella. He did not search for evidence, participate in an

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<sup>64</sup> On summation, the prosecutor argued that FP's account—that the shooting occurred at 2:00 a.m. in the club's parking lot—was correct because Paul Thompson reported that information when he brought the deceased to the hospital (T.661 [*supra* at 14, VII. E.]). But, FP testified that before he spoke to the police he spoke to Dred, who brought the deceased to the hospital (T.134, 182-84, 194-96) [*supra* at 9, VII. B.]). Thus, it is possible that FP's account came from Dred, and FP did not witness the shooting.

<sup>65</sup> Without FP's health records it is not possible to determine whether the nondisclosure constituted a *Brady* violation. 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); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

identification procedure, or question the defendant, FP, or anyone else. Moreover, Scarcella did not testify in this case at any proceeding. CRU concludes that Scarcella's limited involvement in apprehending the defendant after the defendant had already been identified in a photo array as the shooter (*supra* at 3, III.) and transporting the defendant to the precinct did not at all affect the integrity of the investigation, prosecution, or verdict.

## **XII. Conclusion and Recommendation**

CRU has determined that the defendant was not afforded a fair trial. FP's uncorroborated testimony was the sole evidence against the defendant. Yet, the prosecution failed to disclose information that FP was hospitalized at the KCH psychiatric unit at the time of the signing of the cooperation agreement, or at the very least two weeks before the defendant's trial and in all probability much longer. The prosecution misled the jury through his opening remarks regarding the reason for FP's hospitalization thus depriving the jury of its function of determining the credibility and reliability of the prosecution's single witness—the only witness wholly dispositive of the jury's determination of guilt. Since FP is deceased and his records long destroyed, there is no way to correct the error, or determine the extent of the error, to ensure a fair retrial. Accordingly, CRU recommends that the defendant's judgment of conviction be vacated, and the indictment be dismissed.