DISTRICT ATTORNEY
KINGS COUNTY

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CONVICTION REVIEW UNIT
REPORT ON THE INVESTIGATION
CONCERNING THE CONVICTION OF
JAMES IRONS – CRU 18-0034

THE CRIME AND BACKGROUND

According to the trial evidence, on November 26, 1995, at about 1:40 a.m., 18-year-old defendant, acting in concert with 18-year-old Thomas Malik, 17-year-old Vincent Ellerbe, and four unapprehended others, attempted to rob the token booth at the Fulton Street/Kingston Avenue subway station. When the clerk, Harry Kaufman ("the deceased"), refused to hand over money, defendant and his accomplices set the booth on fire causing it to explode. On December 10, the deceased succumbed to severe burns and other related injuries.[1]

Defendant lived across Kingston from the subway station, three buildings west of the corner, on the same side of Fulton (a little over 120 feet from the Fulton subway entrance). Upon hearing the explosion, defendant's mother, Miriam Graham, told him to call 911, which he did. Weeks after the crime, defendant confessed to Dets. Chmil and Scarcella that he was a lookout.

REASONS FOR VACATUR

CRU discovered the following errors in this case, which undermined the integrity of the conviction: (1) defendant's confession, the sole evidence against him, was obtained by Chmil and Scarcella, and new evidence of their alleged misconduct would probably have resulted in a different outcome; (2) defendant's confession was, in any event, unreliable; and (3) defendant's constitutional right to present a complete defense was violated where defendant was precluded from admitting his 911 call into evidence, thereby preventing the jury from determining whether defendant was home at the time the crime was committed.

THE POLICE INVESTIGATION[2]

Commanding Officer Lt. Willie Shaw of the 79th Precinct supervised the investigation. Mario DeLucia was the lead precinct detective. Brooklyn North Homicide Squad (BNH) Stephen Chmil was the lead homicide detective, assisted by his partner Louis Scarcella.

The 911 calls and Evidence Recovered from Scene

An alarm was activated from the token booth at 1:40 a.m. (the number of seconds is unknown).[3] At 1:40:33 a.m. the first 911 call was received. Over the next six and a half minutes, 18 people called 911 reporting an explosion in or near the subway station, a man on fire, and a second explosion minutes later.[4] Six callers, including the defendant's mother, specified that the token booth blew up, was on fire, or was destroyed (*see* alibi section in CRU Analysis).

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[1]There are separate CRU memoranda for Malik and Ellerbe.

[2] Only those portions of the police investigation relevant to defendant are discussed. Unless otherwise stated, the police investigation facts are obtained from the police documents. Numbers in parentheses preceded by "V." refer to the pages of the transcript of defendant's videotaped statement; those preceded by "H." refer to the pages of the *Huntley*/*Dunaway* hearing transcript; those preceded by "T." refer to the pages of the trial transcript; and those preceded by "S." refer to the pages of the sentencing minutes.

[3] Superintendent, Station Command John Laido 9/26/95 report indicating that the alarm at the booth appeared on the workstation screen for several seconds then dropped off. The time of entry of the alarm was "0140."

[4] There was a 19th call, which for unknown reasons was placed on a separate disc and not admitted into evidence at trial. This call is not relevant to CRU's investigation or analysis.

Shortly thereafter, law enforcement and the FDNY arrived. The subway station had two entrances/exits on Kingston, across the street from each other, between Fulton and Herkimer. One faced Fulton as you exit; one faced Herkimer as you exit. Both were L-shaped with two flights of stairs separated by a short walkway.

The evidence recovered from the crime scene included: a loaded and operable .30 caliber rifle with a folding stock and a banana clip;[5] a plastic bottle containing gasoline residue;[6] a book of matches, which were all apparently lit simultaneously;[7] and a burnt glove. The Crime Scene Unit ("CSU") was unable to obtain viable fingerprints from the rifle, the matches, or the plastic bottle. Fire Marshal Robert Fash, of the Bureau of Fire Investigation, determined that the fire's point of origin was the coin slot, and the used accelerant was gasoline.[8]

The Deceased's Descriptions of Two Individuals Who Set the Booth on Fire

Transit Bureau (TB) Sgt. Theresa Cohen and TB Officer Timothy Richardson arrived at the scene pursuant to 911 call of a "man on fire at the token booth." Before getting out of his car, Richardson heard witnesses on the street saying that there were two explosions "in the token booth."[9] "Heavy smoke" billowed from the subway station. The deceased was severely burned. Because the ambulance took too long to arrive, Cohen, Richardson, and TB Officer Michael Santo placed the deceased into Cohen's patrol car and transported him to the closest hospital, St. John's.[10]

Upon arrival at St. John's, the deceased was immediately transported to Cornell Medical Center Burn Unit, accompanied by Santo.[11] En route, the deceased said two men approached his booth to, he believed, buy tokens, squirted some liquid into the booth through the change slot and set it on fire. The deceased described the two men as follows:

- 6', 200 lbs., light-skin black, 20-25 years old, green sweater/brown jacket
- 5'6", 150 lbs., dark-skinned black, 20-25 years old[12]

The next thing the deceased recalled was being blown out of the booth, running to the street, and people extinguishing the fire on his clothing.[13]

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[5] Ramirez DD5 71. It was later determined from the gun's serial number that it had been reported stolen in the Bronx on June 12, 1975; no arrest was made.

[6] Dieumegard DD5 13; Coursey DD5 14

[7] Dieumegard DD5 13; Fire Marshall Fast trial testimony.

[8] Fire Marshal Fash report.

[9] DeLucia DD5 5.

[10] Moore DD5 9.

[11] DeLucia DD5 5.

[12] Defendant is medium-skin black, 5'7" and 145 lbs.; Malik is light-skin black, 5'6" and 165 lbs.; and Ellerbe is medium-skin black, 5'6" and 125 lbs. (online booking sheets for their respective arrests for this crime).

[13] Santo memo book (also indicating the taller one was "heavy set"); Ramirez DD5-10; Ferrari DD5 16 (indicating the taller one had a "heavy build" and "light complexion").

Canvasses, Press Coverage, and the Reward Offer

Within hours, an extensive canvass was conducted which obtained little information or leads.[14] Two witnesses saw numerous individuals trying to extinguish the fire on the deceased and place him in a red Jeep.[15] The police distributed flyers around the subway station with a hotline number (TIPS [now Crime Stoppers]) to call with information.

The next morning (Monday), newspapers reported that two individuals committed the crime, the type of rifle recovered, and that a plastic bottle was used with an accelerant, which one paper indicated, "smelled like gasoline." The New York Times described the crime as a "botched robbery that replayed scenes from the movie Money Train" (which was released on November 22, four days before the crime).

The newspapers mentioned a $21,000 reward for information, and one paper included the hotline number. NYPD plastered flyers in the neighborhood asking for any information. One flyer mentioned a $41,000 reward for information leading to the arrest and convictions of the person or persons responsible for the fire. Police vans with loudspeakers also advertised a $41,000 reward.[16]

The 911 Call from Defendant and His Mother, Miriam Graham

On November 26, at 1:41:54 a.m., defendant called 911 reporting that someone was on fire at a corner store on Kingston and Throop Avenues. When the operator replied that those streets run the same way, defendant said it was Fulton and Kingston. The operator asked, "Someone has been burned, right?" Defendant replied, "Yeah" and "Hold on, my mother wants—."

At 1:43:32, Miriam Graham took the phone from defendant. She said, "Hello? . . . the token booth on Kingston and Albany just blew up. Man came running out, he's on fire . . . there's a whole lot of people standing right out there." Graham provided her name and number. The call concluded at 1:44:22.[17]

Interview of Graham

Thereafter, on November 26 (time not stated), DeLucia and Det. Ramirez interviewed Graham at her residence at 1486 Fulton Street. Graham stated that she heard an explosion and ran to her window. She saw a man on fire coming out of the subway. She called 911. Graham did not mention that defendant made the call or that he spoke to the 911 operator.[18]

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[14] DD5s 24, 38, 44-74, 50-70, 77, 100.

[15] Rooney DD5s 19, 20.

[16] DD5s 75, 76, 139-41; Flyers.

[17] Audio M96-0018 and accompanying transcript (the end time of the call is incorrect in the transcript)

[18] DD5 37. DeLucia told CRU that before interviewing Graham, he did not listen to the 911 call or know what she had reported (*see* CRU Investigation section).

Darlene Williams

On November 26, at 1:41:18 a.m., Darlene Williams anonymously called 911 reporting that a man on fire just emerged from the subway station. She first said, "it was two white boys that ran." When the 911 operator repeated the description, Williams then said, "two light skins . . . he could look like [a] white boy." She described one boy as fat and wearing all black and a ski hat, and the other had "kind of like medium" build. They were running down Herkimer Street toward Albany Avenue.[19]

On November 27, at 10:25 a.m., Chmil and Scarcella interviewed Williams at her third-floor apartment at 12 Kingston Avenue.[20] Williams stated that she was looking out her window at the subway station when she heard a "big boom." Seconds later she saw two light-skinned boys run up from the station. Seconds after that, a darker-skinned boy ran up from the station. The taller of the two light-skinned boys ran on Kingston to Herkimer. The shorter, fatter, light-skinned boy started running on Kingston, but he could not run because he appeared to be hurt.

Williams ran to a neighbor's apartment on her floor which had a clear view down Herkimer. Williams saw the two light-skinned boys get into a dark-colored, four-door car parked on Herkimer between a fire hydrant and a light pole. The car drove off toward Albany.

The darker-skinned male ran on Fulton toward Albany.

Williams knew the boys from the neighborhood. She knew who the "bad boys" were. She saw them earlier that night arguing with a group of boys at Regina's record store on Fulton. Williams stated that all three boys were 18-21, and described them as follows:

- light-skinned, 5'7-5'8 tall, wearing all black, army pants, sweatshirt, boots, and a wool hat;
- light-skinned, shorter, stockier, belly protruding, may have been injured, wearing all black the same as the other light-skinned boy, except wearing black sneakers; and
- darker-skinned, wearing a blue or black "bear" jacket. [21]

On December 14, (after defendant's confession [discussed below]), Williams gave a similar sworn audiotaped statement to an ADA in Chmil's presence. Williams said that after the blast, the taller light-skinned boy was across the street. The heavy-set one was on her side of the street, limping, and crossed the street over to the taller one. The two entered a car parked on Herkimer. Williams could not see the car from her window.

The third individual was standing at the site right after the boom. Williams saw him right after hearing the boom and did not know how he got there. This individual went towards Albany Avenue.[22]

[19] 911 recording and accompanying transcript.

[20] Williams' building is located on the west side of Kingston and runs from almost mid-block to Herkimer.

[21] Scarcella DD5 86 and notes.

[22] Audiotape A95-1755 and accompanying transcript.

The Unidentified 30-Year-Old Female

On November 26, at about 7:00 p.m., at the 79th Precinct, Scarcella and Det. Kevin Warren interviewed a 30-year-old female, who would not give her name. She said she could be reached through Tony Rogers of the 79th Precinct. She reported that between about 1:30 and 2:00 a.m., her son went out and a short time later she heard a "big boom." She thought her son had a car accident and within two minutes she was outside. While standing on the southwest corner of Herkimer Street and Kingston Avenue, she observed two black males walking fast on the eastside of Kingston towards Herkimer. They went over to a black "Mustang or Toyota type" car parked on Herkimer between a fire hydrant and light pole on the northeast corner of Kingston and Herkimer (as Williams observed). One fumbled with keys and the other said, "Come on man we didn't get anything." They drove off.

Both males were dressed in black army clothes with black hoodies and black boots. One was 20 to 22 years old, 6', 170 to 180 lbs., husky, with brown to light brown skin.

The Initial Suspects[23]

McCargo and Butler

In early December, a Confidential Informant ("CI") reported that S. McCargo and R. Butler were involved in the crime. On December 7, Scarcella conducted a photographic identification procedure with an eyewitness, Jacqueline Robinson, who immediately identified McCargo, with absolute certainty, as one of two males she saw heading to the subway station prior to the explosion.[24]

On December 8, Scarcella, in Chmil's and DeLucia's presence, conducted a photographic identification procedure with Robinson, who identified Butler as the other male she saw heading to the subway station.

On December 12, NYPD determined that Butler was incarcerated at the time of the crime. On December 13, NYPD concluded that McCargo was in or near Baltimore at the time of the crime and eliminated McCargo as a suspect.[25]

Sport, Crime, and Biz

On November 26, at about 6:30 p.m., a female CI reported a conversation she had at around 2:00 a.m. that morning that "Crime" and some other guys blew up the token booth, and that Crime wanted to hide at "Ringy's" drug spot.

On November 27, M. Ortiz reported to DeLucia and Paul, that he saw Sport, Crime, and Biz with a rifle at a party shortly before the murder. Ortiz described the rifle in detail, which matched the rifle recovered at the scene.[26] The three left the party with the gun shortly after 1:00 a.m.

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[23] A detailed account of the initial suspects is discussed in Malik's memorandum.

[24] Robinson did not identify defendant or testify at his trial and is discussed only to the extent necessary.

[25] The reason for concluding McCargo was not involved is unknown. Robinson later identified Malik as that person.

[26] Lt. Shaw's 11/26 report indicates that Ortiz identified a photograph of the recovered gun as the gun he saw at the party.

Sport, a 21-year-old black male, 6', 180 lbs., medium skin tone, with prior arrests for thefts and a robbery in the subway, and Crime, a 22-year-old black male, 5'8," 150 lbs., medium/dark skin tone appeared to match the deceased's description of the two individuals who approached his booth.

DeLucia issued wanted cards for each, and all three had open arrest warrants at the time of the crime. On December 5, 1995, Biz was located and interviewed by Chmil and Scarcella. Biz confirmed that he and Sport were at the party (attended by Ortiz) shortly before the murder. He stated that he left the party at 5:00 a.m.

There are no documents showing that Sport or Crime were interviewed. On December 21, 1995 (six days after Malik's arrest), Sport was arrested in Manhattan on an open warrant, and on December 22, his wanted card in this case was cancelled. On January 11, 1996, Crime's wanted card in this case was cancelled.

In March 1996, one of the trial prosecutors wrote out questions including, "How did we ultimately eliminate crime, sport et. [a]l"? CRU did not find any documentation providing an answer. The prosecutors told CRU they were certain that the issue had been resolved but did not recall specifics.

<u>Ringy</u>

On December 12, 1995, an anonymous female reported to TIPS that Ringy and Kato were responsible for the arson, and that Antwan, a light-skinned black male, drove the getaway car.[27] She stated that they lived in the Albany Houses and provided their addresses. On the same day, an anonymous male caller told detectives that Ringy was at his sister's apartment. A search warrant was obtained. When the warrant was executed, Ringy was not there.

A wanted card was issued for Ringy. On January 18, 1996, Chmil and Scarcella interviewed him (discussed below).

<u>Ricardo James</u>

On December 13, at approximately 7:30 p.m., at the 79th Precinct, Chmil spoke with a CI brought in by Officer Lita Steed of the 88th Precinct.[28] The CI reported that Ricardo admitted to the CI that he (Ricardo), Tyrone, Pop, and Pepe, robbed the token booth.[29]

At approximately 11:30 p.m., detectives brought Ricardo James to the precinct. Defendant accompanied them (discussed in the hearing section below). Scarcella and Chmil interviewed Ricardo until Paul interrupted the interview to tell Scarcella and Chmil that defendant had information.[30]

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[27] Millwater DD5 145; Squad logbook entry dated 12/12 at 1:50 p.m.

[28] The documents are not clear as to whether Scarcella and DeLucia were present.

[29] Chmil's 12/13 notes (describing Ricardo was a 20-year-old male black with dreadlocks, residing on New York Avenue; Tyrone, was a male black in his twenties; and Pop and Pepe lived in the Albany Projects); *see also* DeLucia's undated notes indicating the CI knew Ricardo from high school. CRU was unable to determine the CI's identity. And there is no evidence regarding the basis for the CI's information, or how the detectives determined that Ricardo was the Ricardo who lived on Fulton and not New York Avenue.

[30] H.12-13, 38-39.

On December 14, at 12:40 p.m., Dets. Kevin Coursey and Richard Bergin continued Ricardo's interview. Ricardo stated that he and Lite (Rastafari Brathwaite) left a party to buy beer at the bodega on the corner of Fulton and Kingston, just feet from the subway entrance. There was an explosion and he and Lite ran down Fulton toward Throop. About half-way down the block, Ricardo stopped and started back towards the subway. He saw smoke and the deceased, on fire, emerge from the station. Ricardo and others told the deceased to roll around on the ground. A man driving a red Rodeo jeep used a towel in an attempt put out the flames on the deceased. The police arrived, and Ricardo returned to the party.[31]

At 3:40 p.m., DeLucia interviewed Brathwaite, who largely corroborated Ricardo's account. Brathwaite added that he saw a male dressed in black run out of the subway and up Kingston toward Eastern Parkway (towards Herkimer).[32]

At 10:00 p.m., at the precinct, Steed's CI identified Ricardo to Paul and DeLucia as the person who had confessed to the CI.[33]

DEFENDANT'S CONFESSION

While Ricardo was being interviewed, Paul saw defendant in a waiting area in the precinct and thought defendant was a witness waiting to be interviewed. According to Paul, after speaking to defendant for a few minutes, defendant's story changed from looking out his apartment window to being down in the subway station at the time of incident. Paul ended the conversation and sought out Chmil.[34]

Defendant's Confession to Chmil

On December 14, at 1:30 a.m., Chmil with Scarcella present, interviewed defendant.[35]

At 2:15 a.m., defendant identified Ringy.[36]

At 2:30 a.m., Scarcella *Mirandized* defendant. Defendant signed the *Miranda* card, apparently misspelling his name, as "Irens" before superimposing an "o" over the "e." Defendant said that Ellerbe and Malik (whom he referred to as "Vincent" and "Tommy," respectively) came to his home a couple of days before the crime. Ellerbe gave defendant a .32 and asked if defendant "would be down" on a robbery of the token booth. Defendant replied he would only be a lookout. Ellerbe and

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31 Coursey DD5 155; *see also* Chmil's notes, "0030 HRS 12/14/15," containing a similar account, and includes that before the party, Ricardo and Lite saw "Dr Jeckel (sic) & Clueless."

32 DeLucia handwritten note dated 12/14/95 at 3:40 p.m.

33 DeLucia note on 12/14/95 at 10:00 p.m. The type of identification procedure was not documented.

34 H.34-37 (Paul's hearing testimony). The circumstances of how defendant ended up at the precinct, and why he was interviewed are set forth at the pretrial suppression hearing.

35 Chmil written statement and DD5 161, (which are essentially the same except where noted), state that the interview was conducted at 2:30 a.m., after *Miranda* had been given, and that Paul was present. Chmil's notes indicate that the interview was conducted at 1:30 a.m., and that Paul was present. Chmil later testified at the pretrial suppression hearing that the interview was at 1:30 a.m., and both Chmil and Paul testified that Paul was not present during the interview.

36 Scarcella, DD5 154 and notes. Though not reflected in the notes, the DD5 indicates that a photo array identification procedure was conducted.

Malik said that they needed money for Christmas. Ellerbe said they would rob the token booth "downstairs from [defendant's] house." Defendant said it was not a good idea because he lived in the neighborhood. Malik showed defendant "a large gun" (identified in a parenthetical in the written statement as "a rifle type" and in the DD5 as a "rifle"). Malik had a banana clip for the gun in his pocket.[37]

When Ellerbe and Malik first talked about the robbery, they did not mention using gasoline. Ellerbe and Malik told defendant that Chris and Andre, who were brothers, as well as "Eric" were going to be involved. The plan was for them and the others to meet in front of defendant's building the next day at 1:00 a.m.

Ellerbe and Malik showed up at about 1:00 a.m. Ellerbe said that Chris and Eric were parked around the corner, on "(Kingston and Herkimer)," and Chris would wait in the car. Ellerbe had a plastic container with gasoline in it. Defendant later learned Ellerbe bought the gas at a gas station on Alabama Avenue. They planned to go into the subway station where Ellerbe and Malik would rob the clerk. Defendant repeated he was "only the lookout."

When defendant, Ellerbe, Malik, Eric, and Andre were in the subway station Ellerbe squirted the gasoline into the change slot. Malik squirted the gas near the booth's door. Defendant heard the deceased inside the booth repeatedly say, "Don't light it." Malik was trying to light the gasoline, while holding the "big gun" under his arm. Malik approached the change slot and lit a match, causing "a big explosion." After the explosion, Malik dropped his gun and they all fled. Defendant ran up the subway stairs and Ellerbe, Malik, and Eric ran up Kingston. Eric was burned during the incident and ran up the opposite staircase from the one defendant, Ellerbe, and Malik used.

Defendant next stated to Chmil and Scarcella that he left something out—that Ringy was also there. Ringy came "with the others" and had a gun. Ringy had shot defendant in the leg a year ago. Defendant saw Ellerbe and Malik "the next day" on Tompkins and Fulton, and they said it was not supposed to happen that way, and that Eric was burned.[38]

Chmil's DD5, but not the written statement, included that defendant added that when Ellerbe and Malik came to his home the day before the crime, they showed him a dark-colored Ford Taurus, parked on Herkimer and Kingston. They said that it was the car they were going to use, and it was stolen. Defendant also added that he had been thinking about what happened and was upset about the deceased. He wanted to mention this sooner but was afraid to do so.[39]

At 3:10 a.m., Chmil, Scarcella, and defendant signed the bottom of the handwritten statement. Defendant also signed the bottom of the DD5 (the time was not noted). Defendant printed his name on both documents.

At 4:15 a.m., defendant identified a photograph of Ellerbe as Vincent.

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[37] Chmil's notes indicate that Ellerbe had a "9mm."

[38] Written statement and Chmil DD5 161.

[39] Chmil testified at trial that defendant added the information as Chmil typed the DD5 (T.616).

Defendant's Videotaped Statement

From 6:12 to 6:49 a.m., defendant gave a videotaped *Mirandized* statement to an ADA. Chmil was present. The format of the interview was questions and mostly yes and no answers. Many of defendant's answers were conflicting. And at times, when defendant could not recall certain names or details, the ADA helped him.

Defendant agreed that he signed the statement he made to Chmil and agreed that it was his signature (which was printed). Defendant also agreed that he signed the *Miranda* card (V.5).

<u>The ADA Established the Time Frame of The Incident</u>

Defendant stated that he lived at 1486 Fulton between Kingston and Tompkins and was familiar with the subway station there (V.7). Regarding the day of the crime, defendant agreed that he went to the subway on Sunday. The ADA asked Saturday into Sunday? Without waiting for a response, the ADA asked about the reason defendant went there. Defendant said because "Vincent [Ellerbe] and them" asked him to be "the watchout" so they could "stick the token booth up" (V.8).

<u>Defendant Did Not Recall the Other Guy's Name</u>

The ADA asked if defendant was approached by "others" to take part in the robbery. Defendant replied, "The only ones that ask me about that was Ellerbe and [um]." Defendant could not recall the name of the other person, and the ADA told defendant to take his time. Defendant still could not recall the name of the other person and said, "[Ellerbe] and [um]. Damn" (V.8).

<u>Ellerbe Asked Defendant to Be Involved the "Day Before" Which Defendant Agreed Was Saturday After Thanksgiving</u>

Defendant said that Ellerbe asked if defendant wanted to be "involve[d] with, the stick-up they goin' do in the train station." The ADA asked when the conversation occurred and defendant said, "the day before." Defendant agreed with the ADA's suggestions, "that would be Saturday," and "after Thanksgiving" (V.9).

<u>Ellerbe Asked Defendant to Be Involved "A Couple of Days" Before Saturday, Which Defendant Agreed Was Before Thanksgiving, the Same Week</u>

Defendant said the conversation occurred in front of his building, and he agreed that Ellerbe came over (V.9). When asked if it was "set it up before," or if Ellerbe "just walked by," defendant replied that the meeting had been set up. Ellerbe came by "a couple days before that," rang defendant's bell, and defendant went downstairs. Defendant agreed with the ADA suggestions that this first meeting occurred before Thanksgiving, and the same week as Thanksgiving (V.10).

<u>Defendant Still Could Not Recall the Other Guy's Name</u>

The ADA asked if Ellerbe came alone. Defendant said that Ellerbe came with a friend (V.10). When asked, again, for the friend's name, defendant did not respond. The ADA told defendant to take his time, but he still did not respond. Defendant then agreed with the ADA's suggestion that he could not recall the name "now that we're talking" (V.11).

Defendant Initially Rejected Ellerbe's Idea to Rob the Train Station.

The ADA asked if defendant was expecting Ellerbe or if it was a surprise. Defendant said that it was a surprise. Defendant said he knew Ellerbe for four years from Herkimer. Defendant agreed that Ellerbe lived in or around defendant's neighborhood (V.11-12).

The conversation about sticking up the token booth occurred right in front of defendant's building. Ellerbe said, "James, you want to get down with this stickup?" (V.12). Defendant asked where, and Ellerbe said, "Train station, right here." Defendant said to Ellerbe, "don't do it right here, it's too close to home" (V.12-13). The ADA asked defendant about his concern, and defendant replied, that it did not "seem right doin' it around the way" (V.13). Defendant agreed with the ADA that it would make his block "hot" for him, that is what he meant when he told Ellerbe not to do it around here, and those were some of the things that were going through his mind (V.13-14).

Defendant's Only Role Was to Be a Watchout

Regarding his role, Ellerbe asked defendant if he wanted to be a "watchout." That was defendant's only role. He just had to look out for cops (V.14). Ellerbe did not tell defendant where he would need to stand (V.15).

Defendant Still Could Not Recall the Other Guy's Name

The ADA then asked defendant, again, whether he could remember the other guy's name "now that we're talking a little bit." Defendant still could not recall.[40] The ADA asked if defendant knew that person's nickname. Defendant said, "No" (V.15).

Defendant Did Not Expect Any Proceeds for His Role

The conversation about the stick-up was about 15, 20 minutes long. The other guy (whose name defendant could not recall) was standing there. After Ellerbe spoke, the other guy said, "we going' get paid off a this." The ADA asked defendant what that meant to him and he said, "Nothin' really" (V.16). The ADA asked if that meant defendant would get money, and defendant replied, "to them, yeah" (V.16-17).

They First Discussed Robbing a Bodega

The ADA questioned whether they discussed robbing any other places, including stores. Defendant replied they discussed "stickin' up a store on Albany and Pacific," a bodega. Defendant agreed that he knew the store as soon as it was mentioned because he lived in that area (V.17). Defendant agreed with the ADA that it was his decision not to rob the bodega. The ADA asked how he decided that, and he said, "Cause I ain't feel right to stick up nobody cause I don't wanna go to jail." The ADA asked, "so you said, let's not do the bodega," and defendant replied, "Um-hum." The ADA asked, "Is that something you said?" Defendant, again, replied "Um-hum" (V.18).

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[40] Defendant mumbled something, which the transcript indicates as inaudible. CRU believes he said something to the effect of "I can barely tell who I am talking to."

Defendant Changed His Mind About Robbing Token Booth

Defendant agreed with the ADA that he told Ellerbe he would be the watchout guy for the token booth. Neither Ellerbe nor the other guy said anything to change his mind about robbing the booth. Defendant agreed that it was something he decided on his own (V.18-19).

The Other Guy Whose Name Defendant Did Not Recall Sold Drugs With Ellerbe

The ADA asked whether defendant knew the other guy with Ellerbe (V.19). Defendant stated that he had seen that guy before, and he agreed that the guy hung out with Ellerbe. Defendant said that Ellerbe and that guy were partners selling drugs. Defendant agreed that he knew Ellerbe sold drugs at some location. Defendant did not sell drugs with Ellerbe (V.20). Defendant was surprised that Ellerbe showed up with the other guy, even though Ellerbe and the other guy were partners (V.21).[41]

Defendant Changes the Day of the First Meeting from Saturday to Friday after Thanksgiving

At that time (the first meeting), they did not discuss that any others would be involved in the robbery (V.21). The next time defendant saw Ellerbe to discuss the token booth was "the day they was goin' do it . . . that Saturday." The ADA asked, "Can you remember what day of the week it was that you met with [Ellerbe] and his partner? Defendant said, "it was that Saturday." The ADA clarified the question by saying, "Okay. That's the next time you saw them, but the very first time that they rang your bell" (V.22).[42]

Defendant said, "Very first time was that Friday" (V.22). Defendant agreed with the ADA that Thanksgiving was a Thursday (V.23). The ADA asked if it was before or after Thanksgiving (V.22-23). Defendant said, "After Thanksgiving." The ADA said, "Good, so you think is was Friday," and defendant replied "Uh-hum." The ADA asked, "but you're not sure about the day." Defendant did not respond. The ADA then asked, "You're pretty sure?" Defendant did not respond. The ADA then asked, "You're pretty sure?" and defendant said, "Uh hum." The ADA said, "okay you're nodding" and asked, "so that means you're pretty sure?" The ADA did not wait for a response and changed the subject (V.23).

(Apparently referring to the first meeting on Friday), the ADA asked, "where do you see them or meet them or talk to them about doing this this other thing on Saturday. They come by your house?" Defendant said, "Yes" (V.23). The ADA asked whether they came alone, and defendant said "Yes" (V.23-24).

Defendant Recalls the Other Guy's Name Starts With "T" And the ADA Suggests Tommy

Defendant agreed that just Ellerbe and the other guy came by. The ADA asked defendant if he remembered the other guy's name. Defendant now recalled that it started with a "T." The ADA asked, "Could that be Tommy [Malik]?"[43] Defendant said, "Yes" and then agreed that he knew Malik was

[41] CRU did not find any records indicating that either Ellerbe or Malik was arrested for selling or possessing drugs.

[42] Defendant already said that Ellerbe first came by and rang his bell, "a couple days before that [Saturday]," and agreed with the ADA that it was before Thanksgiving, and the same week as Thanksgiving (V.10).

[43] Thereafter, Malik was referred to as Tommy.

Ellerbe's partner in selling drugs (V.24). Defendant agreed with the ADA's suggestion, "You just forgot his name this time?" (V.24-25).

<u>Ellerbe And Malik Come Alone Saturday at 12:30 at Night (Sunday 12:30 a.m.)</u>

The ADA asked at what time Ellerbe and Malik arrived at defendant's building on Saturday. Defendant said, 12:30 at night. They came alone and said "yo get ready"—meaning get ready to go "downstairs" (V.25). Defendant did not put on any special kind of clothes, although they told him to (V.26). He wore blue jeans, a blue shirt, a beige jacket, and a beige baseball hat (V.26-27).

<u>The Three Went Down to the Station, Where They Met Another Guy</u>

The ADA asked whether only the three of them went to the station. Defendant said, "another guy" came down "after we went down." The ADA asked, "so you went with [Malik and Ellerbe] downstairs; is that right?" Defendant did not respond (V.27).

<u>Defendant, Ellerbe, And Malik Had Guns</u>

The ADA asked, "When they came to your house to discuss what to wear" did they have any weapons. Defendant said Ellerbe had a "9" and "the other one" had a rifle to which the ADA said, "Okay was that Tommy [Malik]" (V.27). Defendant described that the rifle was "long, with a banana clip" (holding his hands about 3-feet apart) (V.28). It was banana shape. The ADA asked if the clip came out of the bottom of the gun, and defendant said "Yes." Defendant never saw one before (V.29). Ellerbe had a "9"—an automatic. Defendant agreed it was a handgun. Defendant had seen a 9 before (V.29-30).

Ellerbe gave defendant a .32 (V.30). When the ADA asked why he took the gun, he said "I don't know, for protection." When asked if he needed it for the robbery, defendant said, "Not really." When asked, again, why he took the gun, defendant said "cause he gave it to me" (V.31). Ellerbe did not tell defendant that others were going to be involved (V.31-32).

The ADA asked whether Ellerbe gave defendant the gun "inside your house or down the street?" Defendant said down the street. The ADA asked, "out on the street, like right out in the open?" Although defendant agreed, the ADA then gave defendant more options—"Or is it like in the, by the door, on the stoop." Defendant now said, "Right there, the first door . . . he leaned up on front of me, pass it to me" (V.32).

Defendant said Malik pulled his gun out of his jacket halfway to show the clip (demonstrating on video). The ADA asked if it was it in Malik's pants, "like down his, the leg of his pants?" (V.32-33). Defendant said, "Yeah." Ellerbe took his gun from his coat pocket (V.33).

Defendant answered "no" when asked if weapons were discussed the day before when they were planning the robbery (V.33). After agreeing that he knew he would have a weapon, the ADA asked, "So you had discussed having a gun the day before. Defendant now said, "The day before and the day on." The ADA then said, "let's go back to the day before" and asked if everyone talked about guns the day before. Defendant said, "it was only going to be us three, but there wind up bein' three other guys with us" (V.34).

The ADA repeated the question asking whether weapons were discussed on Friday. Defendant said "yes." When asked about that conversation, defendant replied Ellerbe said, "yo, we all goin' have guns on us that day when we do go do that" and he (Ellerbe) would bring them (V.35).

The ADA suggested, "And did you say, okay, I'll take the gun? (V.35-36). When defendant agreed he said that the ADA said, "Okay, you didn't say that." The ADA then immediately asked, "You were going to take the gun?" Defendant agreed, again (V.36).

Defendant agreed that the next day Ellerbe brought the gun as planned and that defendant took the gun. The ADA asked, "So it's just the three of you '<u>sort of</u>' out there?," and defendant agreed (V.36 ([emphasis added]). They did not have anything with them other than the guns (V.36-37).

<u>The Other Three Guys and the Getaway Car</u>

From Fulton and Kingston Defendant Was Able To See The Getaway Car On Herkimer And Kingston

Defendant was asked where the other three guys he mentioned came from. Defendant said there were two in a car on Herkimer and Kingston. Defendant saw the car when he went to the corner of Kingston and Fulton. Defendant then agreed with the ADA's account that he was "around Fulton," when he took the gun from Ellerbe (V.37). The ADA asked, "Is that right?" and defendant, again, agreed (V.38).

In describing where the car was parked defendant said, while gesturing, "I'm on this side of the street, the car is parked on that corner, way sitting there." The ADA asked it if was "cater-corner" explaining that meant diagonally across the street. Defendant agreed that it made sense (V.38). Defendant said that the car was a Ford Taurus, dark blue. When asked what brought his attention to the car, he said Ellerbe did. The ADA asked what Ellerbe said, and defendant replied that Ellerbe said, "That car right there, that's the getaway car." The getaway car was not discussed on Friday and defendant had not seen it before (V.39).

Chris Was the Driver

Defendant said Chris was in the driver's seat of the car (V.40, 43). He met Chris about two months ago when Chris was smoking weed with Ellerbe on Herkimer (V.40-41).

Defendant Maintained That the Passenger Was Not Eric, But Agreed When the ADA Suggested It Was Eric

The ADA asked if anyone was in the car with Chris. Defendant replied, "Eric – <u>not</u> Eric – damn. What's the damn name?" (V.43 [emphasis added]).

The ADA told defendant to "start slow" and asked numerous questions to help defendant recall. The ADA elicited that the person was sitting in the passenger seat (V.43). The ADA suggested, "Front passenger seat?" and defendant agreed. The ADA nevertheless asked, "Or back passenger seat"? Defendant said front seat. Asked whether defendant recognized the passenger, defendant said not until he came "downstairs" (V.44).

The ADA asked whether the car was black. Defendant agreed that it was. The ADA said, "Black Ford Taurus" and defendant said, "Blue" (V.44). The ADA asked what Ellerbe said about the guys in the

car. Defendant replied that Ellerbe said, "Yo, they going be down there with us," and defendant told Ellerbe they did not "need all of them" (V.45).

Defendant agreed when the ADA asked if they all went down to the station. The ADA asked how they got out of the car. Defendant now said that only one person got out. Chris stayed in the car. Defendant agreed with the ADA that Chris stayed in the car because Chris was the getaway driver (V.45-46).

The ADA then asked, "And can you remember the name of the other guy in car." Defendant did not respond (V.46). And although defendant had stated that the person was not Eric (V.43), the ADA asked, "would that be Eric?" Defendant agreed, "yes" (V.46).

Thereafter, the ADA and defendant referred to the passenger as Eric. Defendant said he knew Eric, through Ellerbe. The ADA suggested that defendant knew Eric for about two months. Defendant replied, "Um-um." Defendant was then asked was it "less time or more time?" Defendant said it was less time. Defendant said he met Eric at a party. He agreed with the ADA that it was the same party where he met Chris (V.46)—although defendant said he saw Chris smoking weed on Herkimer and never said he met Chris at a party (V.40-41).

Defendant Agrees That Eric Went Down to the Station with Him, Malik, And Ellerbe

Defendant agreed that Eric came out of the car and went down into the subway with him (V.47)—although defendant had previously said that: he went down to the station with Ellerbe and Malik only; another guy came after (V.27); and he did not recognize the passenger (now Eric) until Eric came downstairs (V.44). Defendant agreed with the ADA's conclusion that he, Ellerbe, Malik, and Eric went into the station together. The ADA asked how Eric knew when to get out of the car. Defendant said, "I guess" Ellerbe told Eric how long to stay in the car (V.47). Defendant agreed with the ADA's statement that Eric "just seem[ed] to get out the car and come over" (V.48).

Eric pulled out a .380 in the train station. Defendant agreed that this happened when they were "waiting downstairs" (V.48). The ADA asked whether Eric pulled it out for the robbery or to show it off. Defendant said it was the latter. Eric said if anyone came, "I'm going let the gun off" (V.48-49).

Defendant's Role as The Watchout

Defendant agreed with the ADA that he was supposed to be positioned by the stairs going out. Ellerbe told him to whistle if anyone came (V.49-50). The ADA asked whether defendant suggested another signal, "or [Ellerbe] just said why don't you whistle and you said that's a good idea or something like that? Defendant said, "Yes" (V.50).

Ringo

Defendant said that Ringo also went into the station. The ADA asked if defendant knew Ringo by the nickname Ricky or only as Ringo. Defendant said only by Ringo. Defendant knew Ringo from that same party, and this was the first time since the party that defendant saw Ringo. Defendant first saw Ringo when he came downstairs. Ringo was not in the car with Chris and Eric, or with Ellerbe or Malik when they came to defendant's house (V.51-52, 54).

Ringo had “four fifth”—a .45. First, defendant said that Ringo “pulled it out” and had it on his side. When the ADA asked if Ringo “already had it out” defendant agreed. When asked if Ringo said anything, defendant stated that Ringo let them know who he was when he came downstairs—Ringo knew Eric, and said, “yo, Eric. Yo, I’m down here now” (V.53).

<u>The Crime</u>

Defendant’s Location

The ADA asked, “what’s the next thing that happened? Are you on the steps or on the platform by the booth? Defendant said he was on the steps (V.54).

The Gasoline

Defendant stated that Ellerbe sprayed gasoline. It was the first time defendant saw the gasoline (V.54). The ADA asked, “Where did it come from? Did he have it in his pocket? Did he have it in his hand?” Defendant said it was in his hand. He said, “once I saw it, seen the gasoline goin’ around, that’s when I saw it” (V.55).

The ADA asked, “What kind of container was it in?” Defendant said “plastic.” Asked what kind of plastic, defendant said “clear.” Defendant was then offered options of the bottle type. He was asked, “Like a soda bottle?” and he said no. He then agreed that it was “Like a shampoo bottle.” And he also agreed that it was “Like a squeeze kind” for “dishwashing stuff” (V.55). And although defendant had stated that he only saw the container in Ellerbe’s hand, the ADA asked, “Did you see what part of pants or jacket he got it from? (V.55-56). Defendant replied, “Um-um” (V.56).

Ellerbe first squirted the gasoline “by the change slot.” Defendant saw the deceased, who was saying, “don’t do it, don’t light it.” Ellerbe also squirted gasoline “[b]y the door.” Although defendant just said that Ellerbe first squirted by the change slot, the ADA asked whether Ellerbe squirted the door before or after he squirted the slot and defendant said “before” (V.56).

Ellerbe never discussed using gasoline. Defendant did not know it was gasoline until Ellerbe told him the next day. The ADA asked, “So all you know is it’s liquid, right? Does it look clear?” Defendant said “Yes” (V.57). The ADA asked, “You got a good look at the bottle?” and defendant said “Yes” (V.57-58).

Ellerbe squirted and then moved back. Ellerbe did not say anything to the deceased before he squirted (V.58). Defendant agreed with the ADA’s statement: “First thing you know he takes out this squeeze bottle and starts squirting the booth up” (V.58)—although defendant had said he only saw the bottle in Ellerbe’s hand (V.55).

As Ellerbe squirted, Malik was on the other side by the booth’s door lighting matches (V.58-59). Eric and Ringo were standing by defendant (V.57).

Defendant started to run up the stairs when he saw the fire flame up. The ADA asked, “So after it got lit, you ran away, right?” Defendant said, “Yes” (V.59).

The ADA asked, “So does Malik ultimately get this liquid torched up, lit?” Defendant said “Yes” (V.59-60). Defendant said Malik lit “about two” matches. The ADA asked, “You watched him light two?” and defendant nodded. Defendant then agreed that it could have been more (V.60).

Demand for Money

Although defendant told the ADA that Ellerbe did not say anything to the deceased before Ellerbe squirted (V.58), the ADA asked if Ellerbe or Malik demanded from the deceased “money or anything like that before they squirted the booth.” Defendant now replied that Ellerbe said, “Gimme the money” (V.60-61). When asked how much time elapsed from when Ellerbe demanded money and the bottle “came out” defendant said Ellerbe asked for money three times. Defendant agreed with the ADA “and then the gasoline bottle came out” (V.61). Malik did not say anything. Defendant agreed that Malik “was just lighting the matches” (V.62).

They All Fled

Defendant saw the change slot go up in flames and he ran up the stairs (V.62). The ADA asked defendant what he heard on the way out, and he said an explosion. He agreed that it was loud. Defendant ran straight home (V.63).

When asked where Eric went, defendant said “They went up Kingston.” Ringo also went up Kingston. Defendant said he did not see where they went (V.63). Nevertheless, the ADA asked, “Did they go towards Chris in the car,” and defendant said “Yes” (V.63-64). The ADA asked, “Are you guessing, or you saw that?” (V.64). Defendant replied that he saw Ellerbe and Malik run to the car. The ADA asked whether Eric and Ringo ran up Kingston toward Fulton or toward Herkimer, and defendant said Herkimer. The ADA asked, “Okay, so they ran to the car too? Did you see them get to the car? Defendant said “Um-um” and shook his head no (V.64).

Defendant ran the other way towards Fulton, towards his building. He placed the gun under his mattress because he was scared (V.65-66).

The Next Day

Defendant bumped into Ellerbe and Malik the next day on Tompkins and Fulton when defendant was coming from a store (V.65-66). Defendant returned the gun to Ellerbe. Defendant had the gun with him because he intended to return it to Ellerbe after going to the store. Defendant knew where Ellerbe lived and knew that Ellerbe was always outside his building selling drugs (V.66-67).

When asked why he wanted to get rid of the gun, defendant said because his mother did not allow guns in the house (V.67). Defendant then agreed that he had no further need for the gun (V.67-68).

Ellerbe said, “that shit went bad,” and was not supposed to happen that way (V.70). Defendant told Ellerbe that Ellerbe never said anything about gasoline or anyone getting hurt. Ellerbe did not respond and walked away. Ellerbe told defendant where he bought the gasoline, but defendant could not recall the gas station. It was not near the subway station (V.71).

Defendant did not see Eric again. Ellerbe told defendant that Eric was burned on the top of his body (V.74). The ADA asked defendant who was by the booth, defendant now said that Eric was close to the booth (V.75), although defendant had stated previously that Eric was standing by him (V.57).

Proceeds

Ellerbe told defendant he was going to split it up proceeds but did not say how much defendant would get for being a lookout. The ADA asked if he thought he was going to get the same as everybody else? Defendant said, "Yes." The ADA asked, "Is that what you understood?" and defendant replied, "Un-hum." The deceased did not give them anything (V.68).

Defendant's Observation from His Window and Call to 911

The ADA asked whether the deceased attempted to get out of the booth. Defendant said that the deceased tried but "by the time he got out, he was on fire, cause it . . . The ADA interrupted asking, "You saw him burning? Defendant replied, "When the deceased came upstairs, cause I was looking out the window." The ADA asked, "what window?" and defendant said "My house? The ADA asked, "So you were already upstairs when you saw him come out, burning" and defendant said yes (V.69).

The ADA asked, "Did you call 911 or anything like that?" Defendant said "yes." The ADA asked, "You did call 911? Did you leave your name," Defendant said, "Yes." The ADA asked, again, "You left your name?" and defendant said "Yes." The ADA asked why he called, and defendant said, "Cause I was sorry I was down with them, cause I was scared" (V.70).

Andre

After the ADA had no further questions, Chmil reminded defendant that defendant had mentioned Andre and asked about Andre's part. Defendant said Andre was the "other one by the token booth (V.75). Chmil asked, "So he came with Eric," and defendant said "Un-hum." Chmil asked, "And Chris." Defendant said, "Yes" (V.76).

The ADA said, "No now I'm confused." The ADA asked, "Chris and, it turned out to be Eric, were in the blue, the dark blue Taurus." Defendant said "Yes." The ADA said, "that was parked at Herkimer and Throop, right? Right? And Throop?" Defendant said "Yes" (although it was Kingston and not Throop, which does not intersect with Kingston or Herkimer). Defendant was then asked, "And Eric comes out of the car and comes over by your way and you all go downstairs, right?" Defendant replied, "Um-hum." Defendant was then asked, "And you said Ringo comes out of nowhere, right?" He replied, "Um-hum" (V.76). The ADA said, "And he speaks to Eric," and then asked, "Where does Andre come into the picture?" Defendant said that Andre came down when Ellerbe was "pouring the gas" (V.77). The ADA asked, "That's the first you saw of him?" Defendant replied "Um-hum" (V.77). The ADA asked whether Andre was at the planning, or whether defendant knew him before, or whether Andre was at a party like the others. Defendant said "no" to each question. Defendant said it was first time he "heard of [Andre]" (V.77-78). Asked where Andre went afterward, defendant said by Ellerbe, and agreed that it was by the car over on Herkimer. Defendant was the only one who ran to Fulton (V.78).

THE PROSECUTION'S INTERVIEW OF GRAHAM[44]

At about 9:45 p.m. (December 14), defendant's mother, Miriam Graham, gave a sworn audiotaped statement to two ADAs. BHN Det. Anthony Baker was present.

Graham stated that she brought defendant to work with her in Manhattan every Saturday from 8:00 a.m. to 4:00 p.m., including the day of the crime. At approximately 6:00 p.m., they returned home, after she found a parking spot. Defendant picked up food for them from a local Chinese take-out restaurant. Graham ate but defendant did not.

In the early evening, defendant went to a party across the street. Graham stayed home crocheting. Defendant arrived home from the party at about 12:30 a.m. At the time of the explosion, defendant was in the kitchen heating up food. Upon hearing the explosion, Graham ran into the kitchen and said, "Sounds like a bomb. What do you think? You know, a bomb at the store, . . . the corner store."

Defendant ran into the bedroom and looked out the window with Graham. They saw a lot of people on the corner of Fulton and Kingston. Graham did not see any smoke coming from the subway or the subway grates.

Graham told defendant to call 911 and report "a bomb." Graham also stated that she told defendant to report that "the store blew up." While defendant was talking to 911, Graham, still at the window, saw a man on fire on the corner. She ran to defendant and told him to report that someone was on fire, and no one was helping the man. Defendant "got nervous or whatever" so she took the phone and reported that.

Later, the ADA asked Graham whether she took the phone from defendant because he "got a little tongue-tied" when he was talking to 911. Graham said she took the phone because defendant could not explain things as well as she could. Later, Graham was asked, again, about defendant being nervous. Graham responded that defendant was not nervous, but he was "slow." She reiterated that he cannot explain things like she can.

Graham repeatedly said she spoke to 911 for about twenty minutes. Graham was on the phone with 911 for 50 seconds.

Graham was asked if anyone called for defendant the previous day (the Friday before the crime), after 5:00 p.m. Graham did not know. However, she said that defendant and others often hung around the front door of the building talking to friends. Graham said that the front door to the building locked, but it was often held open when people talked to each other out front.[45]

[44] There is no evidence as to whether Graham knew that defendant was about to be arrested. She did not sound emotional or concerned during her interview.

[45] That same night, after defendant's arrest, Graham was interviewed on camera by the press at what appears to be the front of the precinct. Graham stated that when she heard the explosion, defendant was in the kitchen heating up food, and she told defendant to call 911. Graham also said that defendant might have known those involved, and that he might have been a lookout. Clips of this interview appeared during various local news shows.

ELLERBE'S CONFESSION[46]

On December 15, at 3:00 a.m., Ellerbe gave a *Mirandized* statement to Det. Anthony DeRita. No other detective (or ADA) was present. In pertinent part, Ellerbe stated that about a week before Thanksgiving he was in Binghamton and heard that Malik was planning a robbery. The Friday after Thanksgiving (11/24), after Ellerbe had returned to Brooklyn, Malik told Ellerbe that he was going to rob the token booth. Ellerbe agreed to participate. The next day, around 5:00 p.m., Ellerbe went to Malik's house. Malik gave Ellerbe a .32 revolver to give to defendant, who was also going to participate. Ellerbe and Malik hung out at Malik's until they left for defendant's residence.

Around 1:00 a.m. on Sunday (11/26), Malik and Ellerbe met defendant in front of defendant's building on Fulton Street. Ellerbe gave defendant the .32 revolver. The three of them waited about 20 minutes and then walked across the street to the subway station where they met up with Chris and two others (unnamed).

As they headed down the subway steps, defendant gave Ellerbe a white bottle with a spray top and said, "If anything goes wrong, just spray it." The bottle smelled like gasoline, though he could not see inside it.

Ellerbe, defendant, and Malik approached the booth with Chris behind them. The two others were near the stairs acting as lookouts. Defendant slid the .32 into the slot and demanded money. The deceased refused. Ellerbe sprayed the booth's glass with his graffiti tag "Teff." As Ellerbe sprayed, Malik pulled out matches. Ellerbe backed away and dropped the bottle. Malik lit a match. Ellerbe headed for the staircase opposite the one he came down. He ran up the stairs and down Kingston to the park. He stayed there about a half hour and never saw the other five.

At approximately 10:15 a.m. Ellerbe gave a videotaped *Mirandized* statement to an ADA adding, among other things, that the bottle of gasoline resembled a "white" Windex bottle.[47]

MALIK'S CONFESSION[48]

On December 15, at 1:45 p.m., Malik gave a *Mirandized* statement to Scarcella in Chmil's presence. Malik twice denied any involvement and then confessed, saying that defendant and Ellerbe and two others were there. Defendant squirted gas and lit it. Ellerbe had a .32 or .38. Once Malik realized they were not bluffing, he fled, and then heard the explosion.

At approximately 6:35 p.m., Malik gave a videotaped *Mirandized* statement to an ADA. Scarcella and Chmil were present. Malik's statement was evasive and inherently inconsistent. Essentially, Malik admitted that he acted as a lookout, but he also denied acting as a lookout explaining that he did not believe defendant and Ellerbe were going to commit a crime. He said that he met defendant and

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[46] Neither Malik's nor Ellerbe's confession was admitted into evidence at defendant's trial. They are briefly discussed to complete the narrative of the police investigation and to the extent they are relevant to the analysis. A full account of Malik's and Ellerbe's confessions are set forth in CRU's memorandum in those cases.

[47] Ellerbe referred to Malik as Tommy, and defendant as James throughout his statements.

[48] After Stoecker located Malik's full name and address, Ellerbe identified a photograph of Malik, and Malik was apprehended at his home.

Ellerbe at about midnight before the crime, in front of 400 Herkimer. He also claimed that the crime was supposed to happen the night before, but that defendant and Ellerbe did not show up.

THE GRAND JURY[49]

The grand jury presentation commenced on December 18, 1995.

On December 21, 1995, defendant was charged, under an acting in concert theory, with two counts of Murder in the Second Degree (P.L. § 125.25[2], [3] [depraved indifference and felony murder, respectively]); one count of Attempted Robbery in the First Degree (P.L. §§ 110.00/160.15[1]); and one count of Attempted Robbery in the Second Degree (P.L. §§ 110.00/160.10[1]).

CONTINUED INVESTIGATION AND ADDITIONAL INTERVIEWS

"Chris"

On December 14, 1995, at 1:30 p.m., Chmil, Scarcella, and DeLucia interviewed "Chris."[50] Chris stated that he spent the night of the crime drinking with Shaka, Geneva, and Shawn at Herkimer and Nostrand Avenue and did not return home until the morning.

On December 15, between 5:50 and 6:30 p.m., Sgt. McGarrity, Det. Salley, Det. Burzotta and Steed picked up Chris and conducted a show-up with an unnamed witness, with negative results.

Ringy

On December 19, 1995, as discussed above, Steed's CI provided information to detectives regarding Ringy's location.[51] On December 22, the wanted card for Ringy was cancelled.

On January 18, 1996, Scarcella and Chmil interviewed Ringy, who denied knowing anything about the crime. Ringy said he was at with his girlfriend at the time, and first heard about the crime days later. The police were "locking up" everyone in the projects after it happened. Ringy was shown photographs of defendant, Ellerbe, and Malik, and did not recognize them.[52]

Follow-up with Ricardo James

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[49] 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 only 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).

[50] Defendant's confession included Chris as an accomplice. It is not known how or why this particular Chris was interviewed. He lived on Decatur Street, is dark-skinned, 6', 185 lbs., and was 20 years old at the time of the crime.

[51] Chmil's notes, dated 12/19/95, at 4:15 p.m.

[52] Chmil's notes, dated 1/18/96, at 2:00 p.m. There is no documentation as to whether his girlfriend was interviewed.

On March 23, 1996, at approximately 6:00 p.m., Chmil re-interviewed Ricardo.[53] Ricardo added that he might have seen defendant in defendant's apartment window prior to the explosion but was not sure.

THE PRETRIAL SUPPRESSION HEARING[54]

On October 7, 1996, a *Dunaway*/*Huntley* hearing was conducted.[55]

The People's Case

Det. Baker

Baker testified as follows:

On November 13, 1995, at about 9:00 p.m., he and Det. Ike Johnson were assigned to pick up Ricardo James and bring him to the 79th Precinct (H.12, 14, 17).[56] They went to Ricardo's building at 1486 Fulton Street and spoke to Ricardo's mother, who said Ricardo was somewhere on Fulton making a phone call (H.18, 20).[57] After they drove around looking for Ricardo, the detectives parked in front of Ricardo's building (H.29). At some point, Baker saw defendant "hanging outside" of the building. Thinking defendant might be Ricardo, Baker spoke to defendant for a few minutes and asked his name. Baker testified that he had never heard of defendant. Baker told defendant they were looking for Ricardo (H.17-18, 22-23).

Baker returned to his car. At some point he saw defendant head down Fulton. The detectives followed defendant into the subway station at the Kingston/Throop entrance, where Ricardo was on the telephone. They asked Ricardo if they could speak to him about this case, saying that there was potential reward money. Ricardo agreed to go to the precinct with them (H.12-13). Defendant asked if he could go along, and the detectives agreed (H.13, 28). It had been about an hour or two since Baker first saw defendant (H.28). Neither Ricardo nor defendant was handcuffed. They were considered individuals with information (H.14, 31).

At the precinct, Baker sat Ricardo and defendant in the public waiting area of the detective squad and did not speak to them again (H.15, 32).

[53] Chmil's notes. It is not clear what prompted this inquiry. The prosecutor's list of questions in the trial file, includes Ricardo James as question 11, followed by "3/23/96 Spoke To Him Nothing To Report."

[54] Before the hearing commenced, counsel stated that the prosecution sought to speak to defendant and his mother to work out a disposition "or whatever else," but they were not interested. Defendant confirmed that to the court (H.9-10).

[55] The purpose of a *Dunaway* hearing (*People v. Dunaway*, 442 U.S. 200 [1979]) is to determine whether probable cause existed for an arrest. The purpose of a *Huntley* hearing (*People v. Huntley*, 15 N.Y.2d 72 [1965]) is to determine the voluntariness of a defendant's statement to law enforcement.

[56] Ricardo's identity was confidential at the time of the hearing, and he was not named.

[57] Defendant lived in the same building.

Det. Paul

Det. Paul testified as follows:

On December 13, 1995, he was at the 79th Precinct in connection with the investigation (H.34). He "happened to notice" defendant sitting alone in the waiting area (H.35). Paul thought defendant was a witness, introduced himself, and asked if defendant heard Paul's name before. Defendant said yes (he had heard of Paul) (H.37, 42). They "just started talking about the incident in the subway" (H.37). Defendant told Paul where he lived, which was at the corner of Kingston and Fulton (H.36, 45). Paul was not familiar with defendant's building and was not involved in the investigation canvass on Fulton (H.45).

Paul asked defendant if he hung out in the "Albany projects" (H.43).[58] Paul asked defendant if he had any information about the token booth incident or knew anyone involved. During a "5, 10-minute conversation," defendant first stated that he was looking out his window, heard something, and saw people running. Defendant thereafter said he was in the subway station (H.38). Paul ended the conversation and told Chmil that "this young kid" had given him a conflicting story about being a witness (H.38-39, 44). Paul did not know the time of his conversation with defendant, stating that he needed to see a document; however, there was no document, because he did not memorialize his conversation or interaction with defendant (H.40). Defendant was still in the public area when Paul left him (H.39).

Paul had no further involvement with defendant. He "might have knocked on the door to go in [the interview room], if [Chmil] had a phone call or something like that" (H.43-44).

Det. Chmil

Chmil testified as follows:

On December 14, at about 1:00, 1:30 a.m., Paul interrupted Chmil's and Scarcella's interview of a male (Ricardo) regarding the investigation (H.47, 49, 65-66). Chmil and Scarcella stopped Ricardo's interview and met defendant between about 1:30 and 2:00 a.m. (H.47, 49-50). Chmil and Scarcella interviewed defendant in an office where Paul had placed him (H.49). Chmil suspected that defendant was involved in the crime. First, defendant, said that from his window, he saw the subway station at the corner of Fulton and Kingston and observed "two males," whom he knew, on Kingston "near" the subway. Chmil was familiar with defendant's building and thought it was "very hard," although not impossible, for defendant to see the two males on Kingston Avenue (H.51, 67-68). Chmil admitted on cross examination that he was never in defendant's apartment prior to defendant's interview (H.68).

Second, Chmil found it suspicious that defendant asked about a reward. Chmil told defendant that Chmil knew that a "sound truck" had been in front of defendant's building, every day for weeks handing out reward posters and playing recordings about a reward (H.52).

[58] Paul incorrectly referred to the Albany Houses as the Albany projects. They were about .07 miles from defendant's home. The initial suspects—Crime, Sport, Ringy, and McCargo, among others—lived in the Albany Houses or the immediate area. Paul did not testify about defendant's response if there was one (H.43).

Either Chmil or Scarcella said to defendant "you were there, not in your house, but present at the scene when this thing happened?" (H.52). Defendant then admitted that he was a lookout (H.53). Chmil advised defendant that he could no longer treat defendant as a witness and would read defendant his *Miranda* rights (H.53, 71).

Chmil and Scarcella spoke to defendant for about 10 to 15 minutes or "a little longer" before reading the *Miranda* warnings (H.57, 66-67). At 2:30 a.m., Scarcella read the *Miranda* warnings from a card, which Scarcella and defendant signed (H.54-57).

After Chmil wrote out defendant's statement, Chmil read it aloud as defendant read along (H.60). Chmil testified about the substance of defendant's statement, and defendant's additional statement after the written statement—that Ringy was there, and that Ringy had shot him in the leg the previous year (H.60, 72). Defendant never requested an attorney or asked to speak to any family members (H.62).

Defendant agreed to make a videotaped statement to an ADA. Chmil was present during the videotaped statement, which was admitted into evidence and played for the court (H.62-64).

On cross examination, Chmil testified that when defendant asked about a reward prior to the *Miranda* warnings, he told defendant, "Yes, there was a lot of reward money" and Scarcella also said there was a reward. Defendant did not respond (H.66-67).

Chmil further testified that the issue of a reward "might have come up" after the *Miranda* warnings. Chmil did not have any additional notes with respect to this conversation about the possible reward (H.71).

Before the interview, Chmil had never heard of defendant (H.65). Nor had he heard of Vincent or Tommy or any of the other names defendant mentioned in his statements, including Ringy (H.71).[59]

Chmil further testified on cross examination that he showed defendant a photograph of the rifle recovered from the crime scene when defendant mentioned "a long gun" (H.75-76). Chmil also told defendant, "[t]here was a gasoline – there was a container recovered at the scene," and "described" the container to defendant without showing him a picture of it (H.76).

Chmil further stated that no one threatened, restrained, or touched defendant, or pounded on the table (H.74). On direct he testified that Paul never came into the interview room for any reason (H.64). On cross examination, Chmil testified that Paul entered the interview room. Paul "stuck his head in once or twice" asking Chmil, defendant, and Scarcella "how are things going" (H.72-73). No other detective entered the room (H.72). Defendant's emotional state initially appeared normal but changed to remorseful. He appeared to cry during the interview (H.77-78).

[59] As set forth above, Ringy was one of the initial suspects. His name came up on the day of the crime, and, again, within 48 hours before defendant's statement. The police knew Ringy had an open warrant. At the time of defendant's interview, the police already had created a photo array for Ringy. They later interviewed Ringy, who denied any involvement.

The Defense Case

The defense did not present any evidence or testimony at the hearing. It also waived any oral argument, resting on the record.

The Court's Decision

In a written decision the court held, in pertinent part, that defendant's pre-*Miranda* statements were admissible because he was not in custody at the time they were made (Decision at 4). Among other things, the court noted that defendant voluntarily went to the precinct and was placed in a waiting area. Believing that defendant was a witness, Paul asked investigatory questions. Chmil's and Scarcella's questions were also investigatory. Defendant first asked about the reward money, as a potential witness would, and his statements pertained to his observations as a witness. The questioning became custodial when he stated he was the lookout, at which point he was immediately advised of his rights (*id.* at 5).

The court held that the *Mirandized* videotaped statement was voluntary, and that defendant appeared fit, alert, and responsive (*id.* at 6).

THE TRIAL

On October 8, 1996, defendant's trial commenced.

The People's Case

TB Officer Calandra

Calandra testified as follows:

Initially, when asked where he was at approximately 1:40 a.m., he stated that he received a radio call and within three minutes he responded to Kingston and Throop. Thick white smoke was rising from both entrances to the subway station (T.322-24).[60] Other police cars arrived simultaneously (T.324). Calandra observed the deceased by the Kingston Avenue exit. The deceased was "burned" and his body was "still smoking" (T.325). The deceased said, "They blew up the booth. They blew me out of the booth" (T.326).

Calandra described the location, and a not-to-scale hand drawn diagram of the Kingston and Fulton intersection was admitted into evidence illustrating the intersection, the locations of the subway entrances on either side of Kingston, and several street addresses on Fulton on either side of Kingston (T.327 [People's Exhibit 1]).

Officer Santo

Santo's testimony was generally consistent with his prior statements. He testified as follows:

The deceased's entire body was burned, and his skin peeled off as EMS removed his clothes to treat him (T.546-47). The deceased's responses to Santo's questions were delivered in a "broken manner." The deceased stated, "two black men" "blew up" his booth (T.547). Both males were 20 to 25 years old. The first male was light-skinned and the second one was dark-skinned. They approached the

[60] The time of the explosion was not established.

booth, and one squirted a substance into the aperture and lit it. The deceased was unclear as to whether one or both males did that (T.547-49). The deceased did not mention whether they had weapons (T.549).

Not having been asked, Santo's testimony did not include his prior account regarding the deceased's description of the heights or weights of the men, or that he believed they were going to buy tokens.

Fire Marshal Fash

Fash testified as follows:

Fash, an expert in the cause and origins of fire, arrived at the scene at approximately 1:54 a.m. He observed that the token booth had been "blown apart," three sides of the booth (both sides and the back wall) were lying on the ground with debris spread all around. Only the front of the booth containing the coin aperture and part of a side were still standing (T.367-69).

The front of the booth had "a burned, scorched mark," and scorching in the coin aperture plate (T.369-70). There was a "pour pattern" in the coin aperture. The glass on the front wall of the booth was cracked and scorched, and the glass above the coin aperture was cracked. Fash determined that the coin aperture was the fire's point of origin (T.369-71). The burn pattern was reflected by a "discoloration of the glass above the coin aperture "and a burn coming down off the tray onto the metal where the liquid . . . spilled over" (T.374).

A two-liter bottle found at the scene had no label and was crushed as if squeezed by hand. It contained some liquid that smelled like gasoline. A book of matches found at the scene had been burned almost evenly "straight across." The matchbook cover was not burned (T.376-78). Fash concluded that the matches were lit simultaneously and did not ignite due to the subsequent fire. Although the matches had been recovered outside the booth, the fire was "confined to the inside of the booth" (T.385-86). Fash explained that the vapors of the gasoline itself ignite and burn—not the gasoline. Any puddle of gasoline would ultimately be burned off (T.386). The ignition of the gasoline could cause the booth to explode. Pouring the gasoline into a closed area in the forceful way it was done by squeezing the bottle, caused the vapors to disperse (T.387-89, 391).

Fash observed certain other evidence at the scene, including a rifle, a transit badge, and a Windex-like cleaning bottle containing a substance that Fash determined to be a soapy window cleaner (T.394-97).

Forensic Chemist Jagjeet Bains

Bains, of the Police Lab Arson ID Unit and an expert in the field of fire science, testified as follows:

He tested certain evidence recovered from the scene, including the two-liter bottle and liquid inside the bottle, charred clothing, a charred glove, the burnt matchbook, and a storage bag for tokens found inside the booth. Each item contained traces of gasoline (T.484-86).

Det. Baker

Baker's trial testimony was largely consistent with his hearing testimony. Additionally, he testified as follows:

At 9:05 p.m. on December 13, Baker was at 1486 Fulton Street, a four-story apartment building, looking for Ricardo (T.553). He spoke to defendant between three and seven minutes outside the building. When defendant gave his name, Baker asked for his date of birth and address before being satisfied that defendant was not Ricardo (T.556).

Defendant told Baker that Ricardo went up the block. Baker returned to his car in front of the building and waited for Ricardo to return. Baker observed defendant go up and down the block calling people at windows and ringing doorbells for about 5 to 20 minutes before returning to the front of the building. Defendant stayed in front of the building for about 15 to 20 minutes and then headed towards Kingston (T.557-58, 565).

Baker did not recall any conversation while driving Ricardo and defendant to the precinct (T.574-75). They arrived at the precinct between 11:30 p.m. and midnight. They had been at the building about an hour or two before they spoke to defendant (T.563-64). To Baker's knowledge Ricardo was not considered a suspect at the time (T.568-69).

Ricardo James

Ricardo testified as follows:

Ricardo and defendant lived in the same building and were friends (T.506).[61] His testimony about his activities shortly prior to and at the time of the crime was consistent with his prior account (T.507-17). He added that at the time he heard the explosion, he was buying beer at Charlie's, a 24-hour store, on the corner of Kingston and Fulton (T.509-10).

The day after the crime he spoke to an officer in the hallway of his building, but he did not tell the officer he was on the street at the time of the explosion or that he saw the deceased on fire. (T.522).[62]

When he was on the phone in the train station, defendant showed up and said the police were looking for Ricardo (T.518-19). The detectives arrived and asked him to go the precinct. They said, "Your friend could come with you if you'd like him to" (T.520). Ricardo did not want to walk home by himself, and asked defendant if he wanted to come along. Defendant said, "sure" (T.520-21).

Ricardo believed that reward money was mentioned in the car en route to the precinct. Ricardo saw posters around the area offering a large reward for information (T.521, 529).

On cross examination, Ricardo acknowledged that despite having told someone that he saw defendant looking out the window at the time of the crime, he was not sure who he had seen in the window

[61] Ricardo identified defendant in court (T.506).

[62] There are no documents reflecting that the police spoke to Ricardo the day after the crime.

(T.532-53). On re-direct examination, the only question asked elicited that when he spoke to the police, he told him he was not sure whom he had seen in the window (T.536-37).

Ricardo had previously been shot in the leg. He did not to know who shot him (T.530).

Det. Paul

Paul's testimony was consistent with his hearing testimony. He added the following:

Upon seeing defendant, he made no inquiry as to who defendant was or why he was in the precinct (T.494). Paul told defendant that someone would be with him shortly and struck up a conversation. Defendant said he lived "off Fulton Street, down the block from where the incident had happened." Hearing the explosion, defendant looked out his window and saw young black males coming out of the subway and described their clothing (T.490-92). Paul thought it would have been "pretty hard" for defendant to "have seen what he had seen." Paul confronted defendant, and defendant stated, "he was downstairs in the subway" (T.492).

On cross examination, Paul acknowledged that he had not investigated the Kingston/Fulton area when he spoke to defendant, and he was not familiar with defendant's building (T.495).

When asked what alerted him that defendant was not being truthful, Paul replied, "I guess it was a distance from where his house was compared to where the subway is" (T.499).

Although Paul testified at the hearing that he might have walked in on Chmil's interview of defendant (H.43-44), he now testified that he did not do so, and he did not know where the interview was conducted (T.501-02).

Det. Chmil

Chmil's testimony was more detailed than his hearing testimony. Chmil added the following:

Paul placed defendant in the RIP Unit where Chmil introduced himself and Scarcella to defendant (T.603-05). Chmil asked defendant where he lived and about his familiarity with the subway station (T.605). Chmil also asked defendant whether he knew Ricardo and saw Ricardo at the scene that night. Defendant said he knew Ricardo but was not sure if Ricardo was there that night (T.636).[63]

Chmil told defendant that he understood from speaking with Paul that defendant had information about the crime. Defendant said he had information but was concerned for his and his family's safety (T.606). Chmil told defendant that they suspected that those involved were from the area and that the incident was intended to be a robbery and did not happen the way it was planned (T.606, 635-36).

Defendant then stated that, from his window, he saw two people he knew—Vincent and Tommy—on Kingston near the subway (T.607).[64] Chmil told defendant that he found it very hard to believe that defendant could see anyone "at that location," given where his residence was in relation to the subway (T.607, 641). Chmil testified that to look out defendant's window and see Kingston was

[63] Chmil testified that when he interviewed Ricardo, Ricardo did not mention defendant (T.634)

[64] At the hearing, Chmil testified that defendant said he saw "two males that he knew" (H.51).

"virtually impossible" (T.607). Chmil was very familiar with the area around Fulton and Kingston having worked in the 79th Precinct for seven years and investigated numerous homicides (T.605). On cross examination, Chmil admitted that he had never been to defendant's building (T.638).

After Chmil told defendant that he did not believe defendant, defendant then said, "it wasn't supposed to happen the way it happened. <u>You have it right</u>" (T.607 [emphasis added]).[65] Chmil told defendant that he was not at his window but was at the crime scene. Defendant admitted that was true. Scarcella then read defendant his *Miranda* rights from a card, which defendant and both detectives signed (T.608-10; People's Exhibit 16A [*Miranda* card]). The detectives signed their names. Defendant printed his name (T.643).[66]

Chmil testified about the substance of defendant's statement (T.612-14). Chmil said that during the interview, Paul checked in a couple of times, one time asking defendant if he knew Ringy.

Defendant then said that he left something out—Ringy was also there.[67] Defendant stated that Ringy had shot him in the leg. Chmil later learned that this was not true. Chmil did not learn that Ricardo had been shot in the leg (T.646-48).

After Chmil wrote out defendant's statement, he read it back to defendant, with defendant sitting next to him. Defendant said he could read (T.643-44). Defendant and the detectives signed the written statement (T.614).[68] Chmil denied that he told defendant that a lookout was less involved than other participants, or that defendant should say he was a lookout (T.644).

Defendant's statement (both the written and DD5) were admitted into evidence (T.615-16; People Exhibits 16B and 16C). Chmil marked a street grid diagram showing where defendant, Ellerbe, and Malik lived, in relation to each other and to the crime scene (T.618-19; People's Exhibit 17 [street grid diagram]).

Chmil testified on cross examination that prior to meeting defendant, defendant's name had not come up during the investigation. Neither had the names Ellerbe or Malik. Ringy's name was known prior to his interview of defendant. Defendant mentioned Ringy's name when Paul interrupted (T.623-24).[69]

As part of his investigation, Chmil directed a canvass of the crime scene area, including 1486 Fulton Street, and requested the 911 calls. He did not know that a 911 call originated from 1486 Fulton or

[65] "You have it right" does not appear in the written statement. As discussed in the Chmil and Scarcella section in the analysis, this phrase (and other similar phrases) appears in several confessions taken them.

[66] On the *Miranda* card defendant apparently misspelled his name, as "Irens" before superimposing an "o" over the "e."

[67] There is no documentation that Paul appeared during Chmil's interview of defendant, or that he asked defendant about Ringy. Nor is there any other evidence that this occurred. Chmil's own hearing testimony was that Paul "stuck his head in once or twice" asking, "how are things going" (H.72-73). Paul testified at trial he did <u>not</u> even go into the interview room (T.501-02), and while he testified at the hearing that he might have done so, it would have been if Chmil had a phone call or "something like that" (H.43-44).

[68] Chmil testified at the hearing that defendant read the statement along with him.

[69] Chmil testified at the hearing that he was not familiar with any name defendant had mentioned (H.71).

that Miriam Graham spoke to a 911 operator (T.624-26). After defendant's arrest, Chmil learned that defendant spoke to 911. Chmil at no point listened to any of the 911 calls (T.653-54).

Before he interviewed defendant, Chmil knew that, after the crime, two men entered a dark-colored car parked on the corner of Kingston and Herkimer. Chmil stated that he showed defendant a photograph of the recovered rifle with the banana clip (T.631-32).

Chmil knew that the fire was started with an accelerant. At first, he denied knowing the type of accelerant, but then acknowledged that it was "probably gasoline" (T.632-33). Chmil showed defendant a photograph of the gasoline container during the interview (T.631-33).[70] Chmil never spoke to the fire marshal and never read his reports (T.651).

Defendant asked about a reward prior to the *Miranda* warnings.[71] Chmil "felt" that this question was "a little odd" given that there had been a police sound truck announcing the reward and handing out fliers in front of defendant's home for almost three weeks. Chmil *Mirandized* defendant because of what defendant claimed he could see from his window (T.638-39).

Defendant's videotaped statement was admitted into evidence and played for the jury (T.592-93 [People's Exhibit 15]).

The Defense Case

Darlene Williams[72]

Williams' testimony was largely consistent with her prior accounts. She testified as follows:

She reiterated that upon hearing the explosion, from her window she saw two males exit the subway, go down Kingston to Herkimer and get into a dark car, which drove off (T.669-72, 677-78).

Williams did not know defendant by name. Pointing to defendant in the courtroom, counsel asked if she recognized him "from anywhere." Williams said no (T.673-74). Williams knew Ellerbe and he was not one of the males she had seen. Williams did not know Malik by name (and therefore was not asked if she recognized Malik as one of the males she had seen) (T.675-76).[73]

Regarding the third individual with darker skin, Williams had repeatedly stated in her prior statements that this individual ran on Fulton towards Albany Avenue. She was not asked about this third individual on direct examination. On cross examination, Williams testified that this individual ran on

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[70] At the hearing, Chmil was asked if he showed defendant a picture of the container or described it to him. Chmil testified that he described it to him (H.76).

[71] Chmil also testified at the hearing that the reward "might have come up" after *Miranda* but he had no notes about it (H.71).

[72] Mid-trial, the People stated that they would not be calling Williams to testify, although she was on their witness list. Court documents indicate that, by early-to-mid October, Williams was apparently avoiding the prosecutors and police. In Ellerbe's ensuing trial, it was established that Williams had not met with prosecutors since December 1995, next met with them on September 25, 1996.

[73] Williams viewed Malik's lineup and did not recognize anyone (see CRU memorandum in Malik's case).

Fulton, towards Brooklyn Avenue (T.684-85). Williams traced the route this individual ran along People's 1, the diagram of the Fulton/Kingston intersection.[74]

Miriam Graham

The testimony of Miriam Graham, defendant's mother, was essentially consistent with her prior sworn statement to the prosecutors. She testified as follows:

Defendant could only print, and he had a tenth-grade education (T.740).[75]

Graham heard defendant return home from a party across the street around 12:30 to 1:00 a.m. (T.706, 708-09). Graham went into the kitchen where defendant was taking off his jacket, and she then went back to her room (T.709-10, 714).

Graham heard an explosion, what "seemed like seconds" later, and yelled to defendant, "they bombed the corner store" (T.714). Counsel asked whether, when she "heard the boom" and spoke to defendant it appeared that defendant had been running. The People's one word objection was sustained (T.717). She ran to the window in her room, opened it, and stuck her head out (T.715-16, 741).[76] Graham saw a man running. He was on fire. She told defendant a man was on fire and to call 911 (T.716).

When defendant was on the phone, Graham took the phone from him since she witnessed it and could "explain it better" (T.716-17). She gave her name and phone number, and said a man was on fire (T.717).

Her apartment was on the top floor of a four-story walkup (T.719-20). The staircase is only wide enough for one person (T.731). The building had two doors: an interior door leading to a small vestibule; and an outer door leading to the street. Both doors were usually locked (T.719-20).

During Graham's testimony, counsel played Graham's portion of her 911 call. Graham recognized that it was her *"[c]alling 911 myself."* Counsel asked if that "was the call that you made that night?" Graham answered, "Correct" (T.742) (emphasis added).[77] The portion of Graham's call was then admitted into evidence (on consent) (T.743 [Defense Exhibit L]).

On cross examination, Graham described several stores in the immediate area of her building, including a 24-hour grocery store, "Charlie's," on the far corner.[78] When Graham heard the explosion, she thought the grocery store exploded (T.747-49). But when she looked out the window, she saw that the store had not exploded. It took some time before she saw smoke (T.754). Graham was able to see Kingston Avenue from her window (T.756).

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[74] Defendant's building is between Fulton and Brooklyn Avenue. Fulton and Albany are the opposite direction.

[75] Counsel asked Graham if defendant could read. She said no. The court sustained the prosecution's single-word objection and struck the answer (T.740).

[76] The prosecution admitted into evidence a Polaroid photo taken from the window inside Graham's apartment (T.752-53 [People's Exhibit 18B]). The window was in the front room and looked out on to Fulton Street.

77 As Graham had just previously testified, she did not call 911. Defendant did.

[78] Charlie's is the store where Ricardo was buying beer when he heard the explosion ((T.509-10).

Graham believed that she first told the 911 operator that there was a man on fire. Graham denied that she first told the operator that the token booth exploded (T.759).[79]

Defendant often spoke with friends in front of the building. After he brought back the Chinese food that night, defendant could have been in front of the building talking to people (T.763-66).

Defendant

Defendant testified on his own behalf as follows:

He was not employed around November 25, 1995. He completed tenth grade at Boys and Girls High School, where he was in a Special Education program. He could not read and could only write "a little bit." Defendant had never been convicted of a crime (T.780-81).

Defendant knew Ellerbe, but they were not friends and did not hang out together. Defendant did not know Malik. He also did not know Chris, Andre, or Eric, whose names appeared in his statement to Chmil (T.786). Defendant had never been shot in the leg by someone named Ringy or anyone (T.799-800).[80]

Defendant did not know anything about the crime. He was not at the scene or involved in any way (T.786-87, 793). When defendant returned home with his mother that Saturday afternoon/early evening, she sent him to pick up Chinese food. When he returned with the food, he sat down for a little while. He then hung out in front of his building for about 15 minutes, then went down the block to see his friend "Curly." Curly was not home, so defendant went to visit his brother, who lived on Rockaway Avenue. Defendant returned home at about 7:30 p.m. and got ready to go to a party (T.787-91). The party was across the street from his building. Defendant returned home from the party around 12:30 to 1:00 a.m. (T.792).

Defendant was in the kitchen for about 15 to 20 minutes listening to the radio. He was about to heat up the Chinese food his mother had left for him when he heard the explosion (T.794). Defendant "just stood there and that's when [his] mother called [him]" (T.795). His mother told him to call 911, which he did from the phone in her room. Defendant spoke to the 911 operator, but he could not recall what he said (T.796).[81] Defendant's mother told him the corner store blew up. He did not recall what else she said, but he told the 911 operator what his mother had told him to say (T.797).[82] Defendant's mother took the phone from him, and he went to the window and saw people who were at the party with him. He saw fire engines arrive, and firemen preparing to go into the subway.

[79] Graham's 911 call had already been played in court. Counsel repeatedly objected to the prosecution's questions about what Graham first stated to 911 on the basis that the tape speaks for itself. The court ruled that the tape is in evidence and the jury can listen to it (T.759).

[80] Counsel did not ask defendant whether he knew anyone named Ringy.

[81] Counsel asked permission to play defendant's portion of the call, but the prosecution objected, and the defense was precluded from doing so (T.795-96).

[82] Defendant told 911 that there was a man on fire at Kingston and Throop. Defendant was on the phone with 911 for a little over a minute and a half before his mother got on the phone (*see* the Police Investigation section).

Defendant did not see the subway station, or a fire (T.797-98). He did not see anything happening on Kingston Avenue and did not tell Paul that he did (T.799).

Defendant knew Ricardo, who lived downstairs. Defendant was in the subway station when Baker and another detective approached Ricardo and told Ricardo they wanted to speak to him at the precinct (T.800-02). Defendant was about to walk away when the detectives told him that they wanted to speak with him too. Defendant complied and went them (T.801, 835). En route, Baker mentioned the reward money. Defendant already knew about the reward from the flyers handed out, but he did not know the amount (T.802-03).

At the precinct, Baker sat defendant and Ricardo in a waiting room on the second floor. Defendant did not see Baker again (T.803-04). After 15 to 20 minutes, Paul approached defendant and introduced himself. Paul asked if defendant knew him. Defendant had heard Paul's name around the neighborhood and said yes (T.805).[83] Paul asked defendant what he knew about the incident. Defendant said he did not know anything about it. Paul did not speak to Ricardo, who was sitting next to defendant. Defendant did not tell Paul that he saw anything from his apartment, or that he witnessed what happened that night (T.806).

About five minutes later defendant met with Chmil. Chmil repeatedly accused defendant of lying when defendant insisted that he was home with his mother at the time of the incident (T.838). Defendant did not tell Chmil any of the information in the statements (T.810-12). The detectives mentioned Vincent (Ellerbe), Chris, and a couple of other names and asked if defendant knew them. Defendant testified that, except for Ellerbe, he did not know any of the others. Chmil wrote the statement and read it to defendant. Defendant did not provide the information in the statement, but he could not explain why he signed it. Chmil told him to repeat what was in the written statement when he made his videotaped statement (T.807-10, 830-31).

Nothing defendant said on video was true. Defendant made the statement because he was scared when a detective (whose name he did not remember) "showed [defendant] the gun" (T.813-15). Defendant did not mention this to the prosecutor because he was afraid the detectives would "Pop [him] in the back of [his] head" again (T.816).

The detectives told the defendant to say "most of the stuff" in his statement. Defendant was able to describe the "big gun" with the banana clip because they showed him a picture of the gun. He said a plastic bottle was used because the detectives had told him that. Defendant was just guessing when he described it (T.817-19). The detectives told him about the getaway car and where it was parked (T.820).

On cross examination defendant agreed that he could not see the subway station, Kingston Avenue, or Herkimer Street from his apartment window (T.821). Defendant agreed that, although he did not see the explosion and did not know where the fire started, he knew the firemen he saw were going down into the train station (T.821-22). Defendant acknowledged that his mother reported to 911 that

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[83] When Paul was questioned at the hearing about his conversation with defendant, Paul testified that he introduced himself and asked if defendant knew him (H.37). At trial, when questioned about his conversation with defendant, Paul did not testify that he asked defendant if defendant knew him (T.490-91).

the token booth blew up. He denied that he told her that and denied that he had been in the subway (T.823-24).

After defendant agreed that Ellerbe was dark-skinned and Malik was light-skinned, their photographs were admitted into evidence (without objection) (T.824-25 [People's Exhibits 19A and 19B]). Defendant knew Ellerbe about four years from around the neighborhood, and knew Ellerbe sold drugs. He and Ellerbe were not friends (T.825-26). Defendant first testified that the detectives provided the information in his statement that Ellerbe sold drugs. He then admitted that he knew that "for a fact" (T.826).

Although defendant could not read what Chmil had written, he memorized what they wanted him to say because the detectives spent several hours telling him what to say (T.827). Defendant acknowledged that there was writing on the papers (the written and DD5 statements) when he signed them (T.828). Defendant maintained that everything he said on video was in the written statement (T.829). Defendant was cross-examined about certain details in the videotaped statement that did not appear in the written statement. Defendant did not recall whether he told Chmil that Ellerbe and Malik sold drugs (T.829, 839-40).[84] Defendant did not recall and denied that he told Chmil that Eric had a .380 or Ringy had a .45. Defendant said those facts were fed to him, but he also agreed that the detectives could not have made him say all those things (T.829-30, 839-40).

Defendant agreed that he said on video that he considered robbing the bodega but rejected it because it was too close to his house, and further agreed that the detectives did not make him say that (T.840-41) (In fact, defendant said he did not want to rob the bodega because he did not want to "go to jail" [V.18]).

Defendant acknowledged that he corrected the prosecutor during the videotaped statement when she referred to the getaway car as black, by telling her that it was blue (T.832). However, the detectives told him that the car was blue (T.840).

Defendant was nervous and could not think clearly or concentrate when he made the videotaped statement. When asked how he was able to memorize his statement, defendant said he did not know (T.843-44).

Defendant did not know what was in the written statement when he signed it, and he would have signed anything put in front of him (T.831).

The Defense Attempts to Admit into Evidence Defendant's Portion of the 911 Call

During the prosecution's case, counsel informed the court and the prosecution that he intended to offer the entire 911 tape—all 18 calls, including defendant's and Graham's call—into evidence as an excited utterance (T.579-80). The prosecution objected, arguing that a showing of an excited utterance was required, and defendant should not be entitled to admit his own statements to 911 <u>without testifying</u> (T.580).

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[84] It is not known whether Malik or Ellerbe sold drugs. There are no records that either were arrested on drug charges.

Counsel argued that all the calls, including defendant's and Graham's, were excited utterances because they were made within minutes of the event. Counsel maintained that defendant's call was relevant regardless of whether defendant testified. The court stated that a 911 call was not a substitute for testimony (T.582). Counsel argued that he should be permitted to offer defendant's portion of the call through Graham's testimony. The prosecution opposed saying that it should have the opportunity to cross-examine defendant (T.583). The court stated that if defendant testified then his portion "will probably be able to come in" during his testimony. But considering defendant's confession the court did not "see" how defendant could "tell his story on a tape which he very well could have made by running across the street and running up the steps" (T.583-84).

Counsel then argued that the call was admissible as a business record and should be identified as a call from both defendant and Graham (T.584-85). The prosecution objected saying it would agree to stipulate to the phone number only, but not that the number was registered to defendant's residence (T.584-86).

The court reviewed the transcript of the 911 call and agreed it was an excited utterance or present sense impression—depending on defendant's state of mind.[85] The court asked how the call was relevant (T.587-88). Counsel said the phone call was part of defendant's "alibi" and it was relevant not only what he said, but also "how he says it" (T.588 [emphasis added]).[86]

Prior to the start of the defense case, counsel stated that he intended to ask Graham to listen to the 911 call and ask if she recognized both her and defendant's voices. The prosecution objected to playing defendant's portion of the call unless defendant testified (T.659-60). The prosecution argued that if Graham authenticated the call, "what is to stop the defense from not calling the defendant," adding that it had no objection to its admission if defendant testified (T.661-62).

The court held that Graham could testify that defendant called 911 in her presence, she heard him say something, she then took the phone and said something, "and then the tape is the best evidence. And if all he said was, there is a man standing on the corner that is burning—" (T.662). The prosecution interjected "he actually said less than that" (T.662). The court stated, "Well, whatever, it fits" with defendant's confession that the booth exploded, he ran up the steps, and went home (T.662-63). The court stated it was inclined to let the tape in, "but we'll argue it at the right time" (T.663).

Defendant's 911 call was not admitted into evidence through Graham's testimony. During Graham's testimony, when explaining his request for a jury visit to the scene (see next section), counsel stated, "sooner or later the [911] tape will be played to the jury in which the defendant's voice is on it." Neither the court nor prosecution refuted counsel's assertion (T.736).

During defendant's testimony, counsel elicited that defendant called and spoke to 911. Counsel then said, "with the Court's permission, if I could ask the defendant to listen to the tape and identify his voice" (T.795). The prosecution asked, "could we step up?" and an off-the-record discussion ensued.

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[85] There is no evidence that the court listened to the call.

[86] CRU listened to defendant's call. Defendant sounds calm and not out of breath.

Thereafter, counsel questioned defendant about the call, but his portion of the call was never admitted into evidence (T.796).

Following defendant's testimony, a tape recording containing all (18) 911 calls, except for defendant's portion, was admitted into evidence (T.844-46 [Court Exhibit 1]). The court informed the jury that the calls were not in chronological order because they were received by different 911 operators. The court stated the start and end time for each call (T.845-46). The court stated that call 17 originated from Graham's apartment, and that the call started at 1:41 and 54 seconds and ended at 1:44 and 22 seconds (T.846). The jury was not informed that Graham did not take the phone from defendant until 1:43:32.

After the jury was dismissed, counsel made a record of the off-the-record discussion, which occurred when he asked to play defendant's portion of the call. Counsel stated that he had attempted to have defendant listen to the tape and pursuant to the bench conference, it was ruled that it was not permitted. The court responded, "At that time." Counsel said, "Correct" (T.848-89).

The Defense Motion for the Jury to Visit the Scene[87]

On the morning of October 16, during the defense case (Graham's testimony) defense counsel stated that the prior day, the court and parties had discussed (off-the-record) "the feasibility or the usefulness of the jury going to the scene of this event" (T.735).[88] After thinking it over, counsel now requested that the jury visit the scene for two reasons. First, the jury needed to consider defendant's ability to view the vicinity of the scene from his apartment window.

Second, "sooner or later <u>the [911] tape will be played</u> to the jury in which the defendant's voice is on it," thus, the jury needed to consider whether defendant was able to get from the crime scene to his apartment in time to make the 911 call (T.736 [emphasis added]).

The court stated that it had inquired the prior evening and again that morning, and it was "logistically impossible" for a jury visit without the trial extending into the next week, because it would probably take several days to set it up. The court stated that because it was starting codefendants' trials "tomorrow or the day after, sorrowfully, I say no" (T.735-37).

Summations

<u>The Defense</u>

Counsel told the jury that it did not hear defendant's portion of the 911 call, and only Graham's portion of the call was in evidence. Counsel maintained that it was "agreed" that defendant called 911, and the jury should determine whether he could have made that call if he was at the scene (T.861).

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[87] Pursuant to C.P.L. § 270.50(1) a court may, in its discretion, at any time before the commencement of summations, order the jury view or observe the premises or place where the crime occurred, or any other premises or places involved, if it will be helpful to the jury in determining any material factual issues.

[88] Counsel did not state what the discussion entailed, or the prosecution's position. That the court inquired about the logistics after counsel's motion suggests that the court considered that a visit would benefit the jury in determining the issues.

Counsel stated that the first 911 call began at 1:40:33 and that it was reasonable to conclude that the call was made "perhaps a few seconds" after the explosion. Counsel stated that since defendant's call about the explosion started at 1:41:54, "what are we talking about, two minutes before that the phone call is made?" (T.862). Counsel urged the jury to listen to the 911 calls, look at the charts and pictures in evidence, and look at the distance from the subway to defendant's building, to determine what defendant had to do to get from the subway station to his apartment to make that call. Counsel said that defendant had to cross the street, run four or five houses, and run up four flights of stairs (T.862-63). He argued it was "probably possible" but was "simply unlikely" that he could have made it back to the apartment in time to make that call (T.863).

Counsel said he assumed the prosecution would argue that Graham could not have seen the deceased, on fire, from her window, and that defendant provided that information to her. Counsel maintained that witnesses observed the deceased at or close to the corner of Kingston and Fulton, which was "one or two steps" within Graham's view. Thus, although Graham could not see down Kingston, the jury could not discount, beyond a reasonable doubt, that the deceased was close to the corner of Kingston and Fulton and in Graham's view. Further, Graham had only a matter of seconds to come up with this "scheme" to protect her son, which would have been "mighty quick thinking" (T.863-64).

Counsel reminded the jury that defendant could not read and could not read the statement (T.866-87). Moreover, it was "useless" for the detective to read the statement to defendant because, as defendant's signature showed, he was "a special ed student who barely completed the tenth grade" (T.867).

Counsel argued that the prosecutor questioned defendant like a "second grade teacher." She "inch[ed] her way through the event," "talking quietly," and asked yes/no and multiple-choice questions. The prosecutor returned to areas where she believed defendant was confused (T.868).

Counsel posited that it was meaningless that certain statements on videotape were not contained in the written statement because defendant did not know the content of the written statement. Moreover, with few exceptions, the information was available to the police at the time of the statement. The detectives knew how the fire started. Counsel pointed out that defendant described the banana clip because Chmil showed him a picture of it. Defendant described the bottle, but he described it wrong on the videotape (T.865-70). Counsel further argued Chmil's presence in the room "enforced" defendant repeating what he had been told (T.870).

Counsel noted that defendant mentioned Ringy for the first time after Paul poked his head into the room. Defendant allegedly said that Ringy shot him in the leg. However, it was established that "the other James" (Ricardo) was shot in the leg. Counsel commented that this "confusion" was no longer part of his statement by the time of the videotape (T.872), and this inaccurate fact put the "entire videotape" in question (T.872-73).

<u>The People</u>

The prosecution argued that defendant could not have memorized and repeated the details of the written statement if he had learning disabilities (T.877).

The prosecution argued that defendant provided the detectives "detail by detail by detail" of how he and the others planned that robbery. The prosecution argued that "every aspect of the confession was corroborated by independent evidence" (T.883 [emphasis added]).

The prosecution argued that defendant acted with the others planning meetings, he rejected robbing the bodega, and he vetoed how many people went down into the subway station and how many remained on Herkimer Street and Kingston Avenue (T.889).[89] The prosecution posited that defendant "certainly knew that they had gasoline when they went down into that subway station" (T.889).

The prosecution noted that defendant had stated that two people—Malik and Ellerbe—torched the token booth, and the deceased described the two who approached his booth—one was light-skinned, and one was dark-skinned. Apparently, referring to the photographs of Ellerbe (dark-skinned) and Malik (light-skinned), the prosecution said that it was no coincidence that defendant placed them in front of the token booth (T.884-85).

The prosecution argued that regardless of whether the deceased could be seen from defendant's window, the token booth area could not be seen from the window. The prosecutor noted Graham's first words to the 911 operator were that "the token booth just blew up." The prosecutor argued that the only way she could have known that was from defendant, who was there:

> How would she possibly have known? How could anybody possibly have known that the source of that explosion and the reason a man on the street was on fire was because the token booth had just blown up unless you were there? And she had no clear view and no clear vision of the subway station or the token booth underneath it. Understand that and know that there's only one reasonable answer.

(T.877-78).

The prosecution said it was not going to say Graham had defendant call 911 to give him an alibi. "There's a much simpler reason for that." Defendant had just blown up the token booth under his house. "He has a vested interest in having the fire put out because he lives there. Defendant ran home and told his mother to call 911 because he had just started a fire underneath his house and it was about to burn down (T.878-79).

The prosecution argued that maybe defendant knew that Ricardo was on the street at the time of the explosion, and maybe defendant thought Ricardo saw him. The prosecution suggested defendant went to the subway (when detectives were looking for Ricardo) to prevent Ricardo from talking to the detectives about him. When the detectives showed up, defendant went to the precinct to make sure Ricardo did not give him up (T.880-81).

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[89] Referring to the individuals in the car, defendant stated that Ellerbe told him, "Yo, they going be down there with us," and defendant told Ellerbe they did not "need all of them" (V.45).

The prosecution argued that defendant told Chmil that he saw Ellerbe and Malik from his apartment "running on Kingston to Herkimer Street" (T.881-82 [emphasis added]).[90]

The prosecution argued that defendant and Graham both testified that Kingston cannot be seen from their window (T.882-83). The prosecution argued that defendant's videotaped statement that he saw Ellerbe and Malik run to Herkimer Street, was corroborated by Darlene Williams (T.885).[91]

The Charge, Verdict, and Sentence

The court charged the jury on an alibi defense stating, in pertinent part, that defendant presented evidence that he was someplace else when the crime occurred, and the jury should consider the alibi witness's relationship to defendant and motive for testifying (T.913-14).

The jury began deliberating late in the morning on October 17, 1996. During deliberations, the jury requested, among other things, the list of 911 calls, and the 911 tape (with all 18 calls, except for defendant's portion). The court played the 911 calls. Some jurors were taking notes and were instructed not to do so. No transcripts of the 911 calls were in evidence or provided (T.922-23).

That afternoon, the jury found defendant guilty of Murder in the Second Degree (P.L. § 125.25[3] [felony murder]), and Attempted Robbery in the First Degree (P.L. §§ 110.00/160.15[1]) (T.931).

On November 18, 1996, prior to imposing sentence, the court stated that when the jury heard Graham tell the 911 operator that "they blew up the token booth . . . the jury realized that the only way that she could know that they blew up the token booth is [defendant] came in and told her" (S.6).

Defendant declined to make a statement. The court then noted that the probation report did not contain any mitigating factors and showed that defendant denied his involvement (S.6).

The court sentenced defendant to concurrent prison terms of 25 years to life on the murder count, and seven and one-half to fifteen years on the attempted robbery count (S.6).

POST-CONVICTION PROCEEDINGS

On his direct appeal to the Appellate Division, Second Department ("Appellate Division"), defendant claimed, in pertinent part, that the trial court abused its discretion in denying his motion to have the jury visit the scene. Furthermore, defendant claimed that his pre-*Miranda* statements should have been suppressed because it was questionable whether he voluntarily went to the precinct, and because his remarks to Paul about being in the train station transformed the situation into a custodial one.

Without further discussion, the Appellate Division held that defendant's statements were properly suppressed, because "Under the circumstances of this case, a reasonable person, innocent of any

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[90] Defense counsel objected without stating the basis. Presumably it was because Chmil had testified that defendant had said he saw Ellerbe and Malik on Kingston near the subway and had never said anything about Herkimer. The court instructed "if that's not the evidence the jury will disregard it. It is their recollection" (T.882). The prosecution then insisted that it was the evidence (*id.*).

[91] Williams testified that she knew Ellerbe and he was not one of the males she saw running from the subway after the explosion (T.675-76). Williams repeated this later at Ellerbe's (and Malik's) trial, and further testified that Malik was not one of those males.

crime, would have believed that he was free to leave the presence of the police." *People v. Irons*, 265 A.D.2d 574 (2d Dep't 1999) (internal quotation marks and citations omitted).

The Appellate Division also held that the Supreme Court's denial of defendant's application "to have the jury view certain locations at issue in the trial was not an improvident exercise of its discretion." *Id.* at 575.

Defendant's application for leave to appeal to the Court of Appeals was denied. *People v. Irons*, N.Y.2d 904 (2000) (Ciparick, J.).[92]

CRU INVESTIGATION

CRU investigated defendant's conviction as part of its investigation into cases involving Scarcella and Chmil.

The Attorneys

CRU interviewed defendant's trial attorney.

Counsel stated that defendant had limited intelligence and was extremely impressionable. Counsel claimed that he was never informed that Ricardo was a possible suspect, and he did not know about Steed's informant. He insisted that had he known, he would have questioned Ricardo about it. It was counsel's personal belief that defendant was at the scene and ran when he saw what was happening. Counsel thought the prosecution had a very solid case based on defendant's "very detailed" confession.

CRU interviewed the prosecutors and learned nothing new.

Law Enforcement Officers

Lt. Shaw

CRU interviewed Shaw by phone. Shaw corroborated his prior account that Steed's CI provided information to Scarcella and Chmil leading to defendant's arrest (and Malik and Ellerbe).[93] Shaw added that the CI had said that defendant, Ellerbe, or Malik was related to the CI

Officer Steed

Steed told CRU that she brought the CI to Shaw to register her as an informant so the CI could be paid for her cooperation. Steed did not recall any other identifying information and did not know what information the CI provided to the detectives.

Fire Marshal Fash

CRU interviewed Fash at his home. Fash explained that it was possible that the fire was unintentional. The flame from a lit match held too closely to the gas vapors in the aperture could have ignited the

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[92] Defendant did not file any collateral motions or applications challenging his conviction.

[93] Chief of Detectives Charles Reuther reported to the New York Times that defendant was brought to the attention of the police by an informant (https://www.nytimes.com/1995/12/15/nyregions/police-arrest-18-year-old-in-subway-fire). CRU did not find any corroborating evidence.

fire. It was likely that the individual immediately in front of the aperture would have been burned and was wearing the burnt glove.[94] Anyone standing behind, or at the door side of the booth, including by the staircase, would have been knocked down due to the explosion's force. Fash also said that other than the aperture and the inside of the booth, no gas was sprayed or poured on any other part of the booth.

Det. Baker

Baker recalled that his assignment was to locate Ricardo and that he unexpectedly spoke with defendant in the process. Baker reiterated that while he sat in his vehicle outside Ricardo's (and defendant's) building, defendant rang doorbells and talked to people in the windows, adding that it was across the street from defendant's building. Baker thought it was "weird," but not suspicious. After defendant's arrest Baker did not consider returning to the location to investigate defendant's activities, nor did he inform anyone about it.

When defendant walked away heading down Fulton, Baker and his partner followed defendant on foot, about 30 seconds behind defendant. Defendant did not look around to see if he was being followed and he did not appear to be nervous or suspicious.

When they entered the subway station Ricardo was on the telephone, and defendant was standing against the wall about ten feet away. Defendant did not appear to be surprised to see the detectives. It did not appear that defendant had spoken to Ricardo before the detectives arrived. Baker stated that defendant asked to go the precinct with Ricardo. CRU asked why defendant was permitted to go, Baker responded, "the more the merrier." Baker was surprised to learn from CRU that defendant called 911.

Baker stated that Sgt. Johnson assigned him to pick up Ricardo. Baker only knew that Ricardo might have information about the crime. Baker did not know that Steed's CI reported that Ricardo was involved in the crime. Baker told CRU that, had he known, he would never have gone out to pick up Ricardo without more detectives present. Also, he would not have entered Ricardo's apartment, and he would have patted down Ricardo before Ricardo got into Baker's vehicle. Further, he would not have allowed defendant in. Baker did not know why he was not told that Ricardo was a possible suspect.

Det. DeLucia

CRU interviewed DeLucia at CRU. He was very cooperative. All case materials, including reports, notes, tapes, and photographs, were available to DeLucia during his interview.

DeLucia said although he was the lead precinct detective, he was a relatively new detective and largely played a secondary role in the high-profile investigation. He was, however, involved in much of the

[94] The glove could not be located for DNA testing by either the OCME or the NYPD Property Clerk. The trial file contains a receipt that the glove was given to an officer to return to the Property Clerk. The Property Clerk informed CRU that its records indicate the glove was signed out by a prosecutor in October 1996, and never returned.

investigation and interviews of witnesses. He was also the arresting officer for defendant (and Malik and Ellerbe). Despite this, he never spoke to the trial prosecutors (a fact the prosecutors confirmed).

DeLucia had a general recollection of the events. He did not recall Steed's informant, even when shown his own handwritten notes of his interview of the informant. He could not explain why a DD5 was not prepared.

DeLucia speculated that Paul brought in M. Ortiz because Paul had many street contacts and informants.[95] Ortiz's account pointed to Sport, Crime, and Biz. DeLucia did not know why the investigation into them ended. Regarding the wanted cards, DeLucia explained that the standard procedure was that if the subject of a wanted card was picked up, the issuer of the wanted card (DeLucia) would be notified. He said that the issuer or a boss could cancel the wanted card. DeLucia was certain that he was never informed that Sport was arrested on an open warrant on December 21 (or any other date) or that Crime was arrested shortly thereafter. He never cancelled the wanted cards. He did not know whether Sport or Crime was interviewed after their arrests. DeLucia heard of S. McCargo but had no relevant information.

DeLucia stated that he interviewed Graham because she had called 911. She did not provide any useful information or mention that her son (defendant) had called 911. He did not listen to the 911 call before the interview. He believed the recordings might not have been available at that time. CRU played the 911 call for DeLucia, including defendant's portion. DeLucia was troubled hearing that defendant was not out of breath and sounded calm—not like someone who had just run from an explosion less than two minutes before.

Civilian Witnesses

Darlene Williams

CRU interviewed Darlene Williams, who only recalled calling 911. She did not recall speaking to law enforcement, viewing a lineup, or testifying at trial. Williams' fiancé told CRU that Williams' memory is poor. He did not attribute it to a condition, medical or otherwise.

Ricardo James

CRU interviewed Ricardo James at the KCDA. He added to his prior statements and testimony that the detectives who interviewed him (Scarcella and Chmil) said they had evidence that he committed the crime with two others, he was facing the death penalty, and the first one to cooperate would get "a deal."

Ricardo later learned that defendant confessed. Defendant's family blamed Ricardo for defendant's arrest.[96] Ricardo felt guilty that he asked defendant to accompany him to the precinct. Neither defendant nor Ellerbe was a "street guy." Defendant may have met Ellerbe through Ricardo, but

[95] Neither DCJS nor KCDA's case tracking reflects an arrest for M. Ortiz around that time, which might have led to the conclusion that he was in custody when he spoke to detectives.

[96] Defendant's prison intake papers reflect that he stated Ricardo committed the crime and blamed it on defendant.

Ricardo doubted that defendant knew Malik. Ricardo did not believe that Malik, defendant, and Ellerbe got together to commit this crime. Ricardo knew Ringy, who died years ago.

Chris

Defendant mentioned that "Chris" was involved in the crime, and detectives interviewed Chris. CRU spoke to Chris. Chris stated that he and defendant were "best friends" and hung out together all the time. They also hung around a guy named Larry, and a man named Pete, who at the time of the incident owned a neighborhood hardware store across from a Chinese restaurant. Chris never heard of Ellerbe or Malik.

Detectives brought Chris to the 79th Precinct. They did not mention defendant, and Chris did not know defendant had been arrested. Before the detectives even inquired into his pedigree, one of them hit Chris in the face. This detective was short, white ("or Italian") with grey-brown curly hair and a mustache. The detectives told Chris that he was going to jail; they were intimidating. Chris told the detectives that the night of the crime, he was at a party at a vacant apartment. After speaking with the detectives, Chris was released. Chris' father, a pastor, then had him leave the city.

Chris told CRU that he did not believe defendant was involved in the crime.

CRU interviewed Pete from the hardware store that Chris mentioned. Pete said that he was surprised that defendant was arrested. The rumor on the street was that defendant was wrongfully convicted. The entire neighborhood believed that.

Miscellaneous

Telephone Records

Defendant testified that he did not know Malik, and he knew Ellerbe from the neighborhood and did not hang out with him. CRU reviewed phone records from the residences of defendant, Ellerbe, and Malik, which the prosecution had subpoenaed. There are no records of any calls between defendant's residence and the others' residences, or any calls between defendant's residence and any number in Binghamton.

Defendant's Siblings

Miriam Graham passed away in 2004. CRU interviewed two of defendant's older siblings—Yolanda and Randall. Neither Yolanda nor Randall had information about the crime. They stated, however, that word on the street was that Malik, Ellerbe, and Ricardo committed the crime.

Randall, who was several years older than defendant, lived in Brooklyn about eight blocks from defendant. Randall knew Ellerbe and Malik for about five years. He thought defendant knew Ellerbe, and it was possible that defendant knew Malik. But defendant did not hang out with them.

Randall said that two families resided in defendant's apartment. They shared the kitchen and bathroom. The two families usually kept the apartment door locked. The building's outer street door was always locked.

Dr. I. Bruce Frumkin, Ph.D.

Defendant's current attorney hired Dr. Frumkin, a clinical psychologist, to examine defendant. Dr. Frumkin had been provided with copies of defendant's written and videotaped statements, trial testimony, and all relevant police reports and notes. Counsel gave CRU Dr. Frumkin's report (except the raw data) and arranged for an interview with CRU.

Dr. Frumkin stated that without a videotape of the detectives' interrogation, it was difficult to conclude what occurred during that time. Defendant told Dr. Frumkin that he was interrogated for three days. Defendant also said that during his videotaped interview, whenever he said something wrong or made a mistake, someone would tap him on his shoulder. Dr. Frumkin said that defendant was a "poor historian," and his recollection was unreliable. Dr. Frumkin administered several tests independent of defendant's confession and recollections.

For example, defendant was administered a Weschler Adult Intelligence Scale-Fourth test (WAIS-IV), which is an IQ test designed to measure intelligence and cognitive ability in adults. Dr. Frumkin noted that "[defendant] obtained a Verbal Comprehension Index of 66 (lower 1%), a Perceptual Reasoning Index of 69 (lower 2%), a Working Memory Index of 63 (lower 1%), a Processing Speed Index of 68 (lower 2%), and a Full-Scale IQ of 61 (lower ½ of 1%).[97] There was a 95% chance that his true Full-Scale IQ falls between 58 and 66. Dr. Frumkin also concluded that defendant's ability to read words out loud was "quite impaired," noting that on the Wide Range Achievement Test (WRAT-4), defendant obtained a Standard Score of 55 (lower 0.1%), which corresponds to reading at the "1.9 grade level." Notably, this result is like defendant's Department of Corrections ("DOC") Intake records showing that in December 1996, his reading level was "0.8", which the DOC indicated was the equivalent to the reading level of a kindergarten student. Such results also are consistent with defendant's inability to write his name in cursive script and may explain why defendant apparently misspelled his last name on the *Miranda* card.

Dr. Frumkin also administered defendant a GSS test (Gudjonsson Suggestibility Scale).[98] The GSS is a two-part test which measures a person's vulnerability to suggestion. The first part measures how susceptible a person is to "yielding" or giving in to misleading information. The second part measures how often a person "shifts" to a different response, right or wrong, when pressured and told that the response was wrong (even when the response was correct). Dr. Frumkin stated that the test placed defendant in the 99.9% range both in Total Suggestibility and Shift scores. Dr. Frumkin concluded that defendant was "much more susceptible to police influence than others if he is presented with false or misleading information and/or his denials are not accepted." Notably, Dr. Frumkin's conclusions most likely account for defendant's trial attorney's view that defendant had limited intelligence and was very impressionable.

[97] On the WAIS-IV a score of 69 and below is categorized as "Extremely Low."

[98] While informative, the GSS is controversial.

Dr. Saul Kassin

Dr. Saul Kassin is a Distinguished Professor of Psychology John Jay College of Criminal Justice of the City University of New York. He is a leading expert in police interrogation tactics and eliciting confessions, as well as the accuracy of eyewitness identifications. CRU asked Dr. Kassin to review defendant's confession, as well as Malik's and Ellerbe's confessions. Dr. Kassin issued a report of his conclusions. He acknowledged that in 1995, it was not the practice for detectives to record their interviews, which made it difficult, if not impossible for him to piece together what occurred at that time. Dr. Kassin's overall conclusions regarding defendant included the following:

1) Personal risk factors that the confession was not voluntary: defendant was arrested, his family spoke to reporters and described defendant as "mentally slow" and "easily confused." Defendant's brother (Randall) said, "I bet you that half of the questions they were throwing at him, he didn't even understand."[99]

2) Situational risk factors regarding the voluntariness of the confession included that defendant was interrogated late at night and into the morning and was likely sleep deprived.

3) Defendant's confession offered no proof of "firsthand guilty knowledge." The "accurate details" defendant provided were all known to the detectives at the time. Defendant's confession had two factual errors (gasoline was sprayed on the door, and money was demanded from the deceased). Also, there was a "false fed fact" that Ringy shot defendant.

4) There was substantial evidence of contamination, and the three statements collectively did not tell a singular coherent story.

5) External corroboration was weak to nonexistent if not outright suspicious. No physical evidence implicated defendant (or Malik or Ellerbe).

Dr. Kassin concluded that defendant's, Malik's, and Ellerbe's cases were very troubling, and "comparable to some of the worst wrongful convictions I have seen."

The View From Defendant's Window (1486 Fulton Street)

It is not disputed that the entrance to the Fulton Street subway station cannot be seen from defendant's window. Also, the interior of the subway station (or even the lower staircase) cannot be seen from the street from the top step of either the Kingston or Fulton entrance. However, a portion of Kingston Avenue can clearly be seen from defendant's window. This is shown by a Polaroid taken from defendant's window, which the prosecution admitted into evidence (T.752 [People's Exhibit 18B]). The photograph plainly shows the crosswalk that traverses Kingston. The front of the bodega facing Fulton Street, where Ricardo said he was buying beer, is also visible, as well as a portion of the bodega's building's running along Kingston.

CSU measured the distance from the near curb line of Fulton Street to the bodega building line along Fulton as 17'9". The same curb line to the top of the Fulton Street entrance, which is alongside the

[99] *see* https://www.nytimes.com/1995/12/15/nyregion/police-arrest-18-year-old-in-subway-fire.html?

bodega on Kingston, measured 27'3". Regarding the 9'6" difference, CRU determined that by leaning out the window more than three feet of the side of the bodega along Kingston is visible, with about a six-foot blind spot. Thus, someone taking two strides out of the subway entrance would more than likely have come within defendant's field of vision if he was looking out the window.

ANALYSIS

On the particular facts of this case where the only evidence of guilt was defendant's confession taken by Chmil, with Scarcella's assistance, the "new evidence" of the detectives' alleged misconduct in other cases would have probably resulted in a more favorable verdict here. Furthermore, even without the new evidence defendant's confession, by itself, was unreliable for myriad reasons. Moreover, the preclusion of defendant's 911 call curtailed his constitutional right to present a complete defense.

Chmil and Scarcella

Since defendant's trial, numerous convictions have been vacated based on "new evidence" of Chmil's and Scarcella's alleged misconduct in other cases. Last year, in *People v. Deleon*, 190 A.D.3d 764 (2d Dep't 2021), the Appellate Division affirmed the decision of the Supreme Court (Douglas, J.) granting the defendant's motion to vacate on that ground where Chmil and Scarcella played a "significant role in the defendant's arrest and the attendant police investigation." The Appellate Division held that the new evidence would have provided the jury with a "different context" in which to view the evidence—including the defendant's purported inculpatory statement which he denied making—and, thus, there was a probability it would have affected the verdict. *Id.* at 765.

Of course, "each case must be reviewed on its own facts." *People v. Hargrove*, 162 A.D.3d 25, 74 (2d Dep't 2018) (affirming a vacatur of judgment based on new evidence of Chmil's and Scarcella's misconduct in other cases). CRU believes that under the facts of this case, had the new evidence been presented at trial, it probably would have affected the outcome at trial.

Chmil and Scarcella were the lead homicide detectives and they secured defendant's confession—the only evidence of guilt. The defense theory was that both detectives coerced defendant into signing a false statement, written by Chmil, which defendant was unable to read. The jury probably would have credited the defense considering the new evidence.

For example, regarding defendant's ability to read, defendant's mother, Miriam Graham, testified that defendant had a 10th grade education and could only print. The prosecution objected to Graham establishing that her son could not read, and the court struck the testimony (T.740). The evidence that defendant was essentially illiterate then had to be established through defendant. He testified on his own behalf that he could not read, could write only "a little bit," and was a special ed student (T.780-81). Defendant maintained that he did not know what he signed and would have signed anything that was put in front of him (T.831).[100]

[100] As discussed above, although not before the jury, the fact that defendant could not read was independently determined by both the 1996 DOC intake records, and Dr. Frumkin.

Chmil, however, testified that defendant said he could read, and that defendant sat next to Chmil as Chmil read the statement back to defendant—suggesting that defendant read along (T.643-44).

Furthermore, regarding the issue of the falsity of the written statement, defendant testified that material facts were fed to him, and he did not know Chris, Andre, or Eric. He maintained that he never heard of Ringy and had never been shot in the leg by Ringy or anyone—although the written statement reflects that defendant had stated that Ringy shot defendant in the leg the year before. Chmil conceded this fact was not true, claiming that he learned that later. No explanation was offered as to how this false fact appeared in defendant's statement (T.643).

That defendant was never shot in the leg and did not know the name Ringy not only supported that defendant could not read the statement he signed, but also that he did not provide that information. Indeed, counsel urged the jury on summation that the injection of this false fact into defendant's confession, was evidence that defendant's entire statement was false (T.872-73).[101]

Notably, Chmil testified at trial that when he told defendant he did not believe defendant could see the location from his window, defendant confessed by initially saying, "You have it right" (T.607). This does not appear in the written statement or any document. While not dispositive, several murder confessions taken by Scarcella (and Chmil) contain the same or similar language at the start of the confessions.[102]

Against this backdrop, the alleged misconduct in other cases, particularly those cases involving a confession, could have served as impeachment evidence here. Consequently, CRU concludes that the new evidence would have provided the jury with a "different context" in which to view the evidence, and it is probable that it would have undermined the reliability of defendant's confession, which was the only evidence of his guilt.

Defendant's Confession

<u>Defendant's Conduct After Speaking to Baker Is Inconsistent with Guilt</u>

As a threshold matter, the police observations of and interactions with defendant before he was even questioned at the precinct, should have raised questions about his guilt. The theory of the prosecution was that defendant went to find Ricardo to somehow prevent Ricardo from incriminating him and then went the precinct with Ricardo to somehow prevent Ricardo from incriminating him (T.880-81). However, defendant's conduct before he went to the precinct was innocuous and inconsistent with guilt.

[101] Counsel could have moved to reopen the suppression hearing based on Chmil's admission. *See, e.g., People v. Maxis*, 50 A.D.3d 922, 923 (2d Dep't 2008) (request to reopen suppression hearing is required to challenge a suppression issue based on trial testimony). The hearing court might have suppressed the confession, especially if the new evidence of alleged misconduct was presented. In fact, the new evidence could have been used to impeach Chmil's account of how he obtained defendant's confession, and shown that defendant's statement was a product of "contamination" given Chmil's admissions that provided information about rifle and gasoline container to defendant (*see* discussions below).

[102] https://www.nytimes.com/2014/12/05/nyregion/scarcella-again-defends-his-methods-on-the-witness-stand.html?

According to Baker, after he and his partner approached defendant outside defendant's building and asked about Ricardo, defendant indicated where Ricardo could be found. Thereafter, defendant did not change his behavior. For the next 20 minutes to two hours, when defendant headed to the subway station, Baker sat outside the building waiting for Ricardo to appear. During that time, Baker observed that defendant continued to hang around outside his building. Defendant then went across the street where he rang door buzzers and spoke to people through their windows. While Baker thought this conduct was weird, he did not consider it suspicious. Furthermore, defendant apparently had no sense of urgency to find Ricardo to prevent him from speaking to the police. Moreover, the People's suggestion that defendant went to find Ricardo to prevent Ricardo from incriminating him is belied by the testimony of Ricardo, the prosecution's own witness, that when defendant showed up in the station, he only told Ricardo the police were looking for him (T.518-19).

Nor does it appear that defendant went to the precinct to monitor Ricardo or learn what the police knew. Although Baker testified that defendant asked to accompany Ricardo, Ricardo testified that after the police told him that defendant could come along, Ricardo asked defendant to accompany him because he did not want to walk home alone late at night from the precinct (T.520-21).[103] Given the inconsistent accounts of the prosecution's own witnesses it cannot be concluded that defendant volunteered to go to the precinct to find out about the investigation. Moreover, defendant maintained that the detectives told him to go with them (T.801, 835).

Nevertheless, CRU credits Ricardo's account. First, Ricardo's account makes sense that he would want company to walk home, particularly where defendant and Ricardo lived in the same building. Furthermore, Ricardo told CRU that he is riddled with guilt for bringing defendant along.

<u>The Detectives' Precinct Pre-Confession Interactions with Defendant Are Concerning</u>

Paul claimed he saw defendant sitting in the waiting area and engaged him in conversation. It is not clear why Paul, being minimally involved in the investigation, took it upon himself to question someone the detective himself claimed to believe was a witness in the case waiting to be interviewed by the case detectives. Under the circumstances, it seems likely that Paul considered defendant a suspect and knew something about him before he began questioning him.

It also is not clear why Paul would doubt defendant when defendant said that after the explosion, he two black males running, while looking out his window. Defendant told Paul where he lived, though Paul could not recall where that was, recalling only (and incorrectly) that it was on the corner (H.36). Paul also admitted that he was not familiar with defendant's building, though he had some familiarity with the area. Assuming that was true, Paul would have known that there are numerous residences in the area from which the Kingston-Fulton intersection and the Fulton subway entrance are visible.

Further, Paul testified that after he confronted the defendant with his doubts, the defendant immediately admitted to being at the scene. Paul's successful debrief, in which defendant's story evolved from an innocuous explanation of his whereabouts at the time the crime was committed to

[103] According to Google Maps, the shortest walking distance from the precinct to Ricardo's (and defendant's) building is 0.7 miles.

an admission that he had been inside the subway station, is questionable. It was also never addressed by any party at the hearing or trial. Yet it was this change of story that led to defendant being interviewed by Scarcella and Chmil. A common factor in cases involving false confessions is a premature police interrogation before the police have established a solid reason to treat the person as a suspect. In theory, police should interrogate only those suspects whose guilt they believe they have already established.[104] Police interrogation of someone about whom they have not reached this threshold is known as a "misclassification error," and once the error is made, the erroneous conclusion is likely to be compounded by subsequent errors.[105] How defendant went from potential witness to suspect in a few minutes is relevant to his ultimately confessing to the crime.

<u>Chmil's Explanation About the Timing of the Confession Is Contradicted by His Own Notes</u>

Chmil's testimony about the timing of the confession is also problematic. While Chmil's testimony supports the conclusion that defendant began to implicate himself quickly, the contemporaneous records indicate that it took upwards of an hour. This difference is significant given defendant's mental limitations and his being highly suggestible and easily influenced. Chmil testified at the hearing that Paul interrupted the interview of Ricardo to tell them about defendant at between 1:30 to 2:00 a.m. Chmil and Scarcella then interviewed defendant for ten to fifteen minutes before deciding to *Mirandize* him. The *Miranda* card reflects that defendant was read his rights at 2:30 a.m. Chmil's own contemporaneous notes, however, indicate that the interview of defendant <u>started</u> at 1:30 a.m. If the interview started at 1:30 a.m., then Chmil and Scarcella spoke with defendant for upwards of an hour before reading him his rights, despite the claim that they only spoke with him for ten or fifteen minutes. It also was during this unaccounted for forty-five minutes that Scarcella's paperwork indicates that defendant identified Ringy in a photo array. Again, the jury was not aware of any of this.

<u>Defendant's Confession Contains Material Facts Apparently Provided by Chmil and Scarcella</u>

It is axiomatic that to ensure a confession reflects the suspect's personal knowledge about the crime, the interrogator should not supply the facts.[106] Joseph Buckley, the president of a leading police-interrogation training firm and co-author of the leading interrogation-training manual, described the rationale for why interrogators must not reveal details to their suspect:

> [I]t is imperative that interrogators do not reveal details of the crime so that they can use disclosure of such information by the suspect as verification of the confession's authenticity . . .. The goal is to match the suspect's confession against these details to establish the veracity of the statement.[107]

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[104] *See* James L. Trainum, *How the Police Generate False Confessions: An Inside Look at the Interrogation Room* (2016).

[105] *See* Richard A. Leo and Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction, in Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations* at 9, 13 (2012) (describing misclassification error as "both the first and the most consequential error police will make" in inducing a false confession and noting that it is "also one of the least studied and thus least well understood").

[106] *See* Fred E. Inbau, John E. Reid, Joseph P. Buckley, Brian C. Jayne *Essentials of the Reid Technique: Criminal Interrogations and Confession*, at 178 (2d ed. 2015).

[107] Joseph P. Buckley, *The Reid Technique of Interviewing and Interrogation* (Tom Williamson, Ed., *Investigative Interviewing: Rights, Research, Regulation* 190, 204-05 [2005]).

CRU believes that Chmil and Scarcella revealed material facts about the crime to the defendant.

The Rifle and Plastic Bottle

The jury did not appreciate that defendant's knowledge of the details about the rifle and bottle was not firsthand knowledge. Rather, it was based on information Chmil and Scarcella provided. Defendant's written statements describe Malik showing defendant a "big gun," [immediately followed in the written statement with a parenthetical "(rifle type)" and in the DD5 as "(rifle)"] with a banana clip.[108] According to the written statement, Malik showed defendant the gun and took the clip out of his pocket. Anyone reading the statement or hearing the statement read to them would assume that defendant provided key details about the crime, details borne out by the evidence—that defendant was aware that Malik had a rifle with a banana clip. These details were corroborated by the matching rifle and clip recovered at the scene.

What the jury did not hear, however, was that this statement was likely the product of "contamination" by Chmil.[109] On cross examination at the pretrial hearing, Chmil testified that he showed defendant a photograph of the gun.[110] Asked what prompted him to do this, Chmil replied that defendant mentioned "a long gun" (H.75-76).[111] There is, however, no indication that defendant was able to independently describe any significant detail about the gun, including the existence of the clip, the folding stock, or even the color of the gun prior to being shown the photograph. Significantly, there is also no evidence to suggest that defendant was being shown the photograph to have him confirm that the rifle photographed and recovered was the rifle defendant saw in Malik's possession. Thus, defendant's inability to describe anything other than a "long gun," which was public knowledge, until Chmil showed him a photograph illustrates defendant's ignorance about a major piece of evidence in the case.[112] Chmil was not asked at trial what prompted him to show the photograph of the rifle to defendant, so the jury never learned that defendant's ability to describe the gun apparently came from the police showing him the photograph and not from his own recollections.

Chmil's testimony concerning the plastic bottle recovered at the scene supports this conclusion. In his written statement, defendant describes Ellerbe having a "plastic container" with gasoline. As with the rifle, the confession reads as if defendant is knowledgeable about the bottle. At the hearing, however, after testifying about showing the photo of the rifle to defendant, counsel asked the detective what he said to defendant about the gasoline container. Chmil answered that he said, "There was a gasoline—there was a container recovered at the scene." Asked if he showed defendant photos of the container

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[108] The reason for the parenthetical was never explained in either the hearing or the trial.

[109] For discussion on contamination of confessions *see* generally Nirider, Tepfer, & Drizin, *Combating Contamination in Confession Cases*, 79 U Chi L Rev (2012), and sources cited therein.

[110] After making the weapon "safe" and prior to photographs being taken of the gun, the banana clip was laid on top of the gun, clearly visible.

[111] Counsel failed to utilize this information at the hearing.

[112] The recovery of the M1 carbine rifle at the scene of the crime was widely reported immediately after the crime in both television news reports and in numerous newspaper articles. Several articles also mentioned the banana clip and included photos of officers holding the rifle.

recovered from the crime scene, Chmil said he did not, claiming instead that he described the container to defendant (H.76). At trial, Chmil testified that he showed defendant a picture of the bottle (T.633).[113] Whether Chmil showed a picture of the bottle to defendant, or described it to him, defendant was unable to describe either item without assistance from the detectives.

The jury was not aware of this chronology. There is an inherent reliability to Chmil's admission at the hearing about describing the bottle to defendant. Having just testified that he showed defendant the photo of the gun, the detective would have had no reason to deny also showing a photo of the bottle if he had done so. His denying showing the photo, something often done by police during an interrogation, but claiming instead to describe the evidence to defendant, something that should never happen during an interrogation, tends to lend credence to the detective's hearing testimony. The important point is that, like the rifle, Chmil's need to describe (or even show) the bottle to defendant essentially proves that defendant did not possess that information on his own.

Had the jury known that defendant could not meaningfully describe either the rifle or the bottle without Chmil's assistance, it may well have questioned these statements.[114] The videotaped statement further memorialized this same tainted information. The prosecution told the jury in summation that, "<u>Each and every aspect of the confession is corroborated by independent evidence</u>" (T.883 [emphasis added]). But the reality was that very little was corroborated by evidence, independent or otherwise, and much of defendant's knowledge of the so-called independent evidence, such as the rifle and the gas container, originated with the detectives.

<u>Ringy</u>

Defendant's inclusion of Ringy in his confession also suggests that Chmil and Scarcella fed him facts. Chmil claimed at trial (inconsistent with his pretrial hearing testimony) that defendant added Ringy to his statement after Paul interrupted the interview.[115] The detective's transcription of defendant's statement and his subsequent DD5, both in evidence before the jury, failed to acknowledge this. Defendant's reference to Ringy did not seem to be based on his own knowledge. Defendant's written statement claimed that Ringy shot him in the leg the year before. This was not true, as Chmil acknowledged at trial. But Ricardo, who was interviewed immediately before defendant, testified that he had been shot in the leg (though he did not say who shot him). Defendant's false claim that Ringy shot him is inexplicable unless the detectives confused a claim made by Ricardo and attributed it to defendant, inserting Ringy into the addendum to defendant's statement and thereby making it appear that defendant was claiming not only that Ringy was involved in the crime, but also providing this additional context about Ringy. This explanation is further supported by the fact that in defendant's videotaped statement a few hours later, defendant refers to Ringy as Ringo, claims he knows him by

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113 As with the rifle, there was never any suggestion that Chmil showed defendant this photograph of the bottle to have him confirm it to be the bottle used in the crime.

114 Counsel never brought these incongruities to the court's attention by arguing the significance of Chmil's actions, choosing instead to forego any argument and merely relied on the record (H.84).

115 The jury did not learn that Chmil and Paul both testified at the hearing that Paul was not at all involved in the interview. This inconsistency further undermines Chmil's credibility regarding the process for obtaining defendant's confession.

no other name, says he met Ringo at a party around Thanksgiving, and never says anything about Ringo shooting him in the leg. This all suggests that the claim about Ringy shooting defendant was a false fact fed to defendant by the detectives. Defendant's strange incorporation of the Ringy story was never fully explained to the jury, but given his compliant nature, defendant likely acquiesced to the detective's claim. It is also possible that given defendant's lack of reading ability, he had no idea that this claim was part of his written confession. Whatever the explanation, his apparent lack of knowledge about the rifle and bottle, and his false story concerning Ringy, cast doubt on his confession.

The Written Statement Is Different from the Videotaped Statement

To counter the defense claim that defendant was merely saying on tape what the detectives told him to say, the People questioned in summation how the detectives could have possibly gotten the defendant—a special education student—to remember all the details he gave in the videotaped statement. This argument implies that defendant's videotaped statement conformed to his written statement. But the videotaped statement is not a detailed retelling of the written statement. Where the written statement generally provided a clear explanation of the events leading up to, during, and after the crime, defendant's video statement, taken within a few hours of his written statement, was confused, contradictory, and constantly changing. Contrary to the prosecution's argument, defendant was largely unable to repeat what the detectives wrote in the statement he signed, strongly suggesting that the detectives played a significant role in creating and shaping that initial statement.

Throughout the videotaped statement, defendant was unable to relate even the most basic facts. In the written statement defendant allegedly stated that he met with Ellerbe and Malik the Friday before the crime, and he named the various participants, except for Ringy whom he added later. In the videotape, defendant repeatedly had difficulty explaining when the crime was planned and with details about almost all his accomplices. Time and again, defendant could not remember Malik's name ("Tommy"), which defendant allegedly gave the detectives prior to *Miranda* and mentioned frequently while speaking with detectives, according to his written statement. On video, defendant came up with Malik's name only after a half dozen failed attempts, and only after the prosecutor suggested the name to him once he hesitatingly came up with the first letter (V.8, 11, 15, 24).

Defendant also had problems remembering "Eric," one of the alleged occupants of the getaway car. After saying that the second occupant of the getaway car was "Eric—not Eric—damn," the prosecutor took him step-by-step though his observation regarding the car and asked again who this second person was. Upon getting only silence in return, the prosecutor asked helpfully, "Would that be Eric?" and defendant readily agreed. On video, defendant completely forgot about "Andre." When the prosecutor finished her questioning without addressing this, Chmil reminded defendant that he had mentioned Andre in their interview and asked defendant what Andre's role was. In speaking with the detectives, defendant had said that Chris and Andre were brothers; by the time of the videotape, defendant said that not only had he never seen Andre before, but he also never heard of him before (T.76-77).

Finally, there are defendant's continuing issues with Ringy. After describing on camera how he, Ellerbe, Malik, and Eric entered the station, defendant moved on to other aspects of the crime. The

prosecutor returned a few minutes later to the subject of the station and asked defendant if anyone else joined them. Defendant replied, "Ringo." The prosecutor, seemingly realizing that Ringo was not the correct name, but apparently not correctly remembering it herself, asked defendant if he knew Ringo by the nickname "Ricky." Defendant replied that he only knew him as Ringo (V.51).[116] Defendant told the ADA he knew Ringo from a party that he went to around Thanksgiving. Asked if he knew Ringo from anywhere else, defendant said he did not, despite having allegedly told detectives just hours earlier that Ringy had shot him in the leg.

Even with respect to Chris, whose name, like Ellerbe, defendant consistently recalled, defendant was inconsistent in recalling how he knew him. Defendant originally said that he had known Chris, a friend of Ellerbe's, for about two months, having met Chris "on Herkimer," where the three of them had smoked marijuana together. A few minutes later, in explaining how he knew Eric, defendant said he met Eric through Ellerbe at a party around Thanksgiving. Asked if this was the same party where he met Chris, defendant said yes, despite the party taking place over a month after he allegedly met Chris smoking marihuana on the street with Ellerbe and despite his having said moments earlier that he had not known Eric as long as he had known Chris (V.40-43, 46). Out of the six people defendant mentioned in the written statement as committing the crime with him, on the videotape defendant had trouble accurately or consistently recalling his interactions with five of them.

Similarly, defendant had problems trying to explain when it was that he met with Ellerbe and Malik to discuss the crime. The written statement established that the meeting took place on the Friday after Thanksgiving.[117] On the video, defendant initially said that Ellerbe and Malik came to his house on the Saturday after Thanksgiving to ask him if he wanted to participate in the crime (a crime that was then committed hours later). Recognizing that this did not match the written statement, the prosecutor asked defendant if this was something that had been set up before that day. Defendant agreed with the suggestion, saying that Ellerbe and Malik had unexpectedly come by his home a few days before Thanksgiving and asked if defendant was interested in robbing the train station. The prosecutor attempted to establish that, as reflected in the written statement, the three spoke about the crime on the Friday after Thanksgiving, but even with the prosecutor's leading questions and encouragement, defendant struggled to confirm the day. "[F]eeding of facts can happen inadvertently, just by asking leading questions and/or giving positive feedback when the suspect provides the 'right' answer."[118] When defendant ultimately stated that this first meeting was on Friday, the day the prosecutors were aiming for, the prosecutor responded, "Good" and ceased the questions on this topic.

Furthermore, defendant's written and videotaped statements regarding the getaway car were materially inconsistent in several ways. First, in the written statement Ellerbe told defendant at 1:00 a.m., just

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[116] According to the clock seen in the video, this comes around 6:36:25.

[117] Defendant initially told the detectives that he met with Ellerbe and Malik "a couple of days" before the incident. He then said the plan was to meet up in front of his house at 1:00 a.m. "the next day." Though never clarified, he most likely meant that the planning was on Friday and the "next day" referred to Sunday morning at 1:00 a.m. (rather than 1:00 a.m. Saturday morning). Technically speaking, as the crime occurred on Sunday, a Friday meeting would in fact have been "a couple of days" prior.

[118] KCDA Report, *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn,* at 21 (2020).

before the crime, that the car was parked around the corner on Kingston and Herkimer. However, on video, defendant said that just before crime, while on Fulton and Kingston, Ellerbe showed him the car (V.37). On the video, defendant pointed to indicate the position of the car relative to defendant. The prosecutor asked if it was diagonally down the street on Kingston and Herkimer, and defendant agreed with the A.DA. He also agreed that it was "cater-corner" from him (V.38).

Additionally, the DD5 of the written statement, but not the written statement, included that the day before the crime, Ellerbe and Malik showed him the car, parked on Herkimer and Kingston, and said it was stolen. However, on video, defendant said the getaway car was not discussed before the crime, and he had not seen it before (V.39). Moreover, defendant did not mention on video that the car was stolen.

And while the written statement, the DD5 of the written statement, and the videotaped statement placed the car on Herkimer and Kingston, at a later point in the video statement when the ADA repeatedly misstated that the car was parked on Herkimer and Throop (which do not intersect), defendant agreed (V.73).

Defendant could not even get the details about the crime to match in each statement. In the written statement, defendant said that at the planning meeting, Malik showed him a "long gun" and removed the banana clip for the rifle from his pocket. On video, defendant said that Ellerbe talked about all three of them having guns and that he would bring them the next day when they met right before the crime. Defendant further described Malik showing him the rifle by pulling it out of his pants far enough to expose the attached banana clip. This allegedly took place in front of defendant's home shortly before the crime. Similarly, defendant was inconsistent as to when Ellerbe gave him the .32, saying that it was before the day of the crime in the written statement and immediately before the crime on the videotape.

According to the written statement, defendant only mentioned hearing the deceased yell, "Don't light it!" and never said anything about anyone demanding money from the deceased. But on the video, defendant said that Ellerbe repeatedly demanded money from the deceased before Ellerbe squirted the gas. This was moments after defendant initially said that Ellerbe said nothing before the gas was "laid down."

Defendant was also inconsistent about the distribution of gasoline and the lighting of the fire. In the written statement, defendant said that he saw Ellerbe pour gasoline into the change slot and Malik put gasoline by the door. He also said that he saw Malik go up to the change slot and light the fire. But on tape, defendant claimed it was Ellerbe who poured the gasoline by the door and that Malik stood by the token booth door when he lit the fire, despite this being impossible; the door was on the side of the booth and considerably more than an arm's length away from the coin slot. In the written statement, defendant claimed that Malik had the rifle under his arm when he lit the gas, and when the booth exploded, he saw Malik drop the rifle and run out. On video, however, defendant claimed that he started to run up the stairs once he saw the fire start and only thereafter heard the explosion. If this was true, defendant could not possibly have seen Malik drop the gun after the explosion. Of course,

this ignores the fact that the gun was found by the foot of the stairs and not in front of the token booth. This aspect of defendant's story, like so much else, does not conform to the physical evidence.

Last, defendant's recollections concerning the plastic container of gasoline—the container that Chmil either described to him (pretrial hearing) or showed him a photograph of (trial)—are inconsistent. Asked about the container on the videotape, despite telling the prosecutor that he had gotten a good look at this container, defendant denied that the container was a plastic soda bottle-like container (which it undeniably was), instead ultimately settling on describing it as a dish washing liquid-type container (which it clearly was not).

The written statements and the video statement are only consistent in the broadest, most general respects; there is little agreement in the details. Contrary to the prosecutor's claim in summation, the videotape appears to prove, if anything, that defendant was unable to retain the details from the written statements and repeat them later, on tape.

Defendant's Videotaped Statement Lacks Internal Coherence

Defendant's video statement was the only opportunity that defendant had to describe the crime in his own words. But throughout the statement, rather than letting defendant describe events in his own words, it was the ADA who often provided the account leaving defendant to merely agree or disagree. The result was that time after time, defendant's claims were conflicting. In addition to inconsistencies concerning participants in the crime and how he knew them, during his video statement, defendant's story changed as to when the crime was planned, when he learned that others would be involved, when he learned weapons would be involved, and how many weapons were involved in the crime. Defendant's claims in the videotape statement also conflicted with respect to whether anyone said anything before the gas was lit, and who spoke in each instance.

Not only did defendant's videotaped statement evolve, but it also often lacked any internal logic. For example, defendant was asked whether the group discussed robbing any other locations. Defendant said they talked about robbing a bodega a short distance away. Asked why they did not rob the bodega, defendant replied that it did not feel right to "stick anybody up," and he did not want to go to jail. Given these reasons, the obvious question arises: Why would defendant agree to rob the token booth, a target he told prosecutors he was against because it was right by his home? Defendant was asked whether someone said something to him to make him change his mind. Defendant denied it and merely agreed with the prosecutor that it was something he decided on his own. This implausible story is consistent with defendant's suggestibility, deference to authority, and inability to think through his answers. He was asked by prosecutors if any other crimes were planned, so he provided them with one. Asked why this new crime was rejected, defendant gave a sensible answer, ignoring the fact that his answer should have applied with even more force to the robbery of the token booth. Perhaps most telling, at no time did the prosecutors or detectives ever try to verify this story with Ellerbe or Malik. If defendant's story was true, it contradicted the narrative prosecutors used in Malik's trial, that the token booth case was inspired, planned, and executed after one or more of the defendants saw the movie "Money Train." But, if "Money Train" was the impetus for this crime, why would the defendants first talk about robbing a bodega?

Defendant's Statements Conflict with Other Evidence

Demanding Money from the Clerk

In defendant's videotaped statement (though not his written statement), he claimed that Ellerbe demanded that the deceased hand over the money. Yet, the deceased never mentioned hearing anyone demand money. In fact, he told Santo that he thought the two males were going to buy tokens. Indeed, if the movie "Money Train" was the impetus for the crime—as the People argued at Malik's trial—then it would make sense that their only goal was to get the clerk to flee the booth so they could loot it (obviating the need to have the clerk pass money through the coin slot), as in the movie.

The Gasoline

Defendant claimed that Ellerbe (in the video statement) or Ellerbe and Malik (in the written statement) sprayed or poured gasoline on the token booth door. Fire Marshal Fash testified at the Ellerbe/Malik trial that he examined the pieces of the booth and that, "there was no other pour of gasoline on the booth" (*see* CRU memoranda for those cases). Fash was never asked if he examined the pieces of the booth during defendant's trial. The prosecution certainly knew that the claim that gasoline was sprayed on the door was not true. But defendant's jury did not know this. Additionally, information provided by defendant in his statement conflicted with the police investigation. Although it was not brought out at trial, immediately after the crime police used canine units to try to track the scent of gasoline. The dogs tracked the scent to three locations (two on Fulton and one on Herkimer) as well as the Nostrand Avenue subway station, all locations west of Kingston. According to defendant, however, after the gasoline was poured and the explosion occurred, Ellerbe, who possessed and poured the gas, and Malik who lit the gas, both fled south down Kingston and drove off east in the car.

The Getaway Car

The defendant spoke extensively about the getaway car—where it was parked, the color, the occupants, and who fled to the car after the crime. Yet, defendant's ability to know any of these "facts" would have been nearly impossible.

Defendant stated that the car was a Ford Taurus, and that it was dark blue.[119] Considering that defendant would have been making these observations from approximately 250 feet away, at about 1:40 a.m., on a street witnesses described as being dimly lit, even if he was somehow able to see the car, the defendant would not have been able to tell that the car was dark blue, let alone distinguish dark blue from black, dark grey, or any other dark color.

Nor would defendant have been able to see the car occupants, for the same reason. Defendant claimed that the driver, Chris, remained in the car throughout. But it would have been impossible for defendant, looking down a dimly lit street in the middle of the night, to recognize a person over 80 yards away whom he had met only recently. Though defendant claimed in his written statement that Ellerbe told him Chris and Eric were in the car, he never said Ellerbe told him Chris was the driver.

[119] According to Car and Driver magazine the best-selling car from 1992 through 1995 was the Ford Taurus.

Though these facts were before the jury, the jury was never made to focus on them. There was no testimony as to the distance between Fulton Street and Herkimer. There were no photographs in evidence displaying the view from Fulton to Herkimer, the cars parked on the street that night, or even the streetlights. The only arguably relevant pieces of evidence before the jury pertaining to these issues were two crude diagrams. One diagram was a general outline depicting the blocks surrounding the station, with the Kingston block between Fulton and Herkimer measuring a half-inch in length on the two-foot-long diagram. The other was a crude diagram showing the intersection of Fulton and Kingston, which did not indicate the location of streetlights or even extend far enough to show where Kingston and Herkimer intersect.[120] Neither diagram was to scale. There was no testimony from any witness as to how far any of these locations were from one another. Thus, the jury could not reasonably assess the credibility of the statements defendant made about the getaway car.

Finally, the jury was never asked an obvious threshold question: Why would defendant, Malik, and Ellerbe, all of whom lived within blocks of the subway station, need a getaway car? What was the purpose of the car? None of the defendants drove to the location. And after the crime, defendant, Ellerbe, and Malik all claimed that they ran away. The presence of the car—if defendant, Malik, and Ellerbe were the perpetrators—made no sense. But Scarcella and Chmil needed a getaway car because three eyewitnesses claimed to see possible suspects get into one.

Defendant's Claim That Eric Was Burned

Defendant claimed in his statement that Eric was burned during the incident. Eric, whose existence was never corroborated, was allegedly the only person to sustain any injuries. The police did find a burnt glove on the Kingston Street staircase, the staircase defendant claimed in his written statement that Eric ran up after the crime. Forensic Chemist Bains tested the glove and found it had traces of an accelerant (T.484-86). The detectives surmised that the glove belonged to one of the perpetrators, and they believed that this perpetrator had been burned. Defendant, Ellerbe, and Malik had no injuries. Defendant stated that the next day Ellerbe told him Eric had been burned.

But this created a significant problem. Fash explained to CRU that although he suspected that flames shot out of the aperture and could maybe have hit anyone directly in front of the coin slot, the flames were otherwise contained within the walls of the booth.[121] But according to defendant, Eric was standing with him by the steps during the crime and defendant never stated that Eric was in front of the booth.[122] Given Eric's alleged positioning inside the station, it is improbable he would have been burned.

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[120] A third diagram in evidence was a not-to-scale drawing of the interior of the subway station's token booth area.

[121] At trial, Fash testified that the fire was confined to the inside of the booth.

[122] Defendant placed only Ellerbe and Malik in front of the booth. Ellerbe placed himself, defendant, Malik, and Chris in front of the booth (defendant claimed Chris never left the car) and never mentioned. Malik placed only defendant and Ellerbe in front of the booth. Nobody ever placed Eric or an unnamed person in front of the booth.

Defendant Could Not Have Seen What He Claimed He Saw in the Station

The physical space where the crime took place makes it unlikely defendant could have seen what he said he saw from his location in the station. Defendant described seeing Ellerbe and Malik in front of the token booth committing the crime. Defendant claimed that, as the lookout, he was "by the stairs going out." What "going out" meant was never clarified, though at one point, defendant distinguished it from being on the "platform by the booth" (T.49, 54). Asked if he was "on the stairs" or "on the platform by the booth," he responded that he was "by the stairs." As the lower staircase is slightly recessed from the main platform area, defendant could very well have been on the same level as the token booth, but closer to the stairs than the booth. If by the staircase "going out" defendant meant that he was anywhere on the walkway that connects the upper and lower staircases, then defendant would not have been able to see the front of the booth. At Malik's trial, the People explicitly argued that the front of the token booth was not visible from that location.

Even if defendant was at the base of the stairs on the floor of the station, it would still be all but impossible for him to see what he claimed to see. In that position, defendant would have been standing to the side and rear of the booth. His view of people standing in front of the coin aperture on the far side of the booth would have been partially or fully blocked by the back and side walls, and by the booth door, that took up half of the booth's left side. Further, the aperture was below the glass portion of the booth, so even if he could see people in front of the aperture, defendant would have been unable to see what they were doing.

Defendant Could Not Have Seen What He Claims He Saw as He Fled

Asked what he did after running up the stairs, defendant responded that he ran home. Defendant further stated that while running home, he saw Ellerbe and Malik, as well as Eric and Ringy (and possibly Andre), exit the station and run in the direction of the getaway car on Herkimer. Defendant said Ellerbe and Malik ran to the car. If true, this would require defendant to pause long enough to watch Ellerbe and Malik run the length of the block to get to a car parked on Herkimer, a car that the initial police investigation suggested would have been impossible for defendant to see. This would all have to be accomplished fast enough to allow defendant to then run home and make the 911 call.

It strains credulity that defendant would stop on the street to watch any of this. Furthermore, Robinson (an alleged eyewitness who testified at Ellerbe's and Malik's trial but was not at defendant's) and Williams—as well as the 30-year-old female—all agreed that there were two people moving down Kingston after the explosion, and that they were walking fast, as opposed to running. But defendant's jury knew nothing about Robinson's or the 30-year-old female's observations, or that they corroborated Williams' testimony. Had even some of these problems been raised before the jury, it probably would have questioned defendant's confession.

Defendant Could Have Seen What He Claimed He Saw from His Window

The jury never heard evidence that supported defendant's initial statement that he saw people running <u>near</u> the subway. Paul challenged this statement, but later admitting at the hearing that he had no idea where defendant lived. Chmil also challenged defendant's statement but conceded at the hearing that

it was possible. Of course, defendant went from being a non-suspect to being a suspect because these detectives assumed he was lying.

According to Chmil's hearing testimony, defendant initially said he saw two males running near the subway, which Chmil repeated on direct examination at trial.[123] The claim that defendant would be unable to see from his window someone running near the entrance is false. Chmil conceded as much when, unprompted at the hearing, he said that he felt that it was "very hard" but not impossible for defendant to have seen what he claimed to have seen. At trial, however, Chmil made no such concession, telling the jury that it was "virtually impossible" (T.607), to see Kingston from defendant's window, and claiming defendant said he saw Ellerbe and Malik at the station (T.640-41). The prosecution, the detectives, the defendant's mother, and even the defendant (in his statement) all stated, incorrectly, that what defendant told the police could not possibly be true.[124] What the jury never knew and could not know based on the evidence before it was that the subway was merely a few feet out of the view from defendant's window. Thus, individuals "near" the Fulton Street entrance could easily be visible from defendant's window. Had the jury been allowed to visit the scene and defendant's apartment, as the defense requested, the jury would have realized that defendant's claims were plausible.

The Details Defendant Provided in the Video Statement Were Not Corroborated Through Investigation

The People argued in summation that the details defendant provided in his video statement—details that did not appear in his written statement—were a basis for believing defendant's confession. But of the "details" provided in the videotaped statement that were not already known to the detectives, not one was ever independently corroborated.

For example, defendant described the various types of handguns his accomplices had even though there was no other evidence that his accomplices were armed. Both Ellerbe and Malik claimed there was a single handgun, with Ellerbe claiming that defendant had it, and Malik claiming that Ellerbe had it. In fact, but for the rifle being recovered on the scene, there would have been no evidence that any firearms were involved in the crime. Additionally, although unremarked upon at trial, defendant said that all the handguns were of a different caliber (.32, .380, .45, and a 9mm). The only gun defendant seemed incapable of describing meaningfully was the one gun known to exist—the rifle. And despite virtually every participant allegedly having a gun, the deceased never said anything at all about any weapons (*see also* CRU memorandum in Malik's case regarding the "Clear Conflict Between the Confessions").

Defendant told the detectives that the Ford Taurus in question had been stolen—a fact defendant mentioned in his written statement but not in his videotaped statement. Given that in the days after the incident detectives checked the license plates of cars that were parked near the subway station, as well as cars owned by the various suspects along the way, it is unclear why, post-confession, the

[123] H.51, 67-68; T.607, 641.

[124] That defendant might change his answer and agree to what authorities say to him when challenged by detectives or prosecutors, even when his statement was true, is, once again, consistent with Dr. Frumkin's examination of defendant.

detectives never checked for reports of a stolen Ford Taurus in the days prior to or on the day of the crime.

Similarly, defendant allegedly told the detectives that Ellerbe obtained the gasoline on Alabama Avenue, another "fact" that defendant forgot by the time he gave his videotaped statement. Again, in the immediate aftermath of the crime, the police canvassed gas stations near the subway station. This canvass did not extend as far as Alabama Avenue, which would be easily accessible, especially to anyone with a car.[125] Though there were numerous gas stations in that area that the detectives could have canvassed after defendant provided this information, no attempt was made to investigate his claim (*see also* CRU memorandum in Malik's case regarding the Inadequate Police Investigation).

The detectives were not alone in failing to corroborate facts that would later be presented to the jury as proof of the veracity of defendant's confession. As previously discussed, defendant told prosecutors, but not the detectives, that he, Ellerbe, and Malik discussed robbing a bodega, but that defendant rejected it. There is no other evidence to support this claim. The prosecutors interviewed Ellerbe and Malik after defendant's arrest and statement. They were aware, based on Ellerbe's and Malik's written statements, that the detectives had not asked about the aborted bodega robbery plan. Had Ellerbe and Malik told a similar story in circumstances where prosecutors could be confident that the detectives had not fed them the information, it would be powerful evidence that defendant, Ellerbe, and Malik did plan the robbery and would be corroboration of defendant's statement. Had both Ellerbe and Malik denied other targets or told stories different from defendant's, this would have been a red flag for the prosecutors.

Contrary to the People's assertions in summation, defendant was an unreliable witness. He could not give a clear, consistent account of his accomplices, and he could not accurately describe events consistent with the scientific evidence. Defendant was even unable to give statements that were consistent with one another, and many of the details defendant provided that were not already known to detectives were never corroborated. The jury never had access to information that would have put it in a position to make a meaningful and informed judgement about the veracity of these statements.

<u>The Jury Lacked Information as to Why Defendant's Confession Was Unreliable</u>

Confessions are generally considered to be, "probably the most probative and damaging evidence that can be admitted against [a defendant]."[126] Indeed, as far back as the late 1800s the Supreme Court observed that a "confession, if freely and voluntarily made, is evidence of the most satisfactory character."[127] Even where DNA evidence does not match a defendant, juries have convicted based on confessions.[128] Thus, here, it was incumbent upon the defense to challenge defendant's confessions, not only by raising the problems detailed above, but also by challenging the detectives' claims that the

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[125] Alabama Avenue is close to the conjunction of Fulton Street, Broadway, and East New York Avenue and is about two miles from the scene.

[126] *Parker v. Randolph*, 442 U.S. 62, 72 (1979) (internal quotation marks and citation omitted).

[127] *Hopt v. Utah*, 110 U.S 574, 584 (1884).

[128] *See*, *e.g.*, convictions of Jeffrey Deskovic and the Central Park Five.

confession was not coerced. The defense argued in summation, among other things, that the detectives took advantage of a compliant and frightened defendant. But counsel's arguments were unconvincing because the evidence the defense presented at trial to support defendant's deficiencies was lacking.

To show that defendant was not very bright and was susceptible to coercion, counsel argued on summation that defendant was a special education student who barely made it to the tenth grade, defendant testified that he could not read, and his signature on the confession was equivocal.[129] Counsel offered no supporting evidence from any neutral or authoritative source. But there was additional evidence that supported counsel's argument. Counsel failed to point out that defendant misspelled his last name as "Irens" on the *Miranda* card, before overwriting the "e" with an "o."

There is also other supporting evidence. Although not available at the time of trial, DOC admission records (post-conviction) indicate that defendant read at a first-grade level. This is supported by Dr. Frumkin's later tests indicating that even years later defendant had a similar reading level. Moreover, the GSS test Frumkin administered to defendant showed that defendant would be very susceptible to police influence and interrogation tactics commonly used. This would explain defendant's changed story to Paul and Chmil—from looking out his window to being in the subway. Both times, defendant changed his story after the being challenged by detectives and told he was lying and could not have seen what he claimed.

Moreover, tests revealed that defendant has an extremely low IQ. Thus, while defendant's age and mental status do not prove he falsely confessed, the tests reveal that defendant could be easily convinced to change his position (such as being in the window), even if true, and squarely place him within the category of persons who might be susceptible to doing so under certain circumstances.

Finally, the jury never heard that Chmil most likely lied about defendant's mental ability pretrial. At the *Huntley* hearing, Chmil testified that after writing out defendant's statement, defendant read the statement with him, which, in hindsight, defendant was likely incapable of doing. At trial, Chmil did not testify that defendant read the statement. Chmil just testified that he read the written statement and the DD5 to defendant, with defendant sitting next to him.

Preclusion of Defendant's 911 Call Violated His Constitutional Right to Present a Complete Defense

One of the "minimum essentials of a fair trial" is the right to present a defense.[130] Criminal defendants must be afforded "a meaningful opportunity to present a complete defense."[131] This fundamental right is guaranteed by the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment. Where "constitutional rights directly affecting

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[129] Counsel argued, "Now, allowing for exaggeration on [defendant's] part that more than likely as he walks down the street, he can read the McDonalds sign, he can read a stop sign, he can read everyday events" (T.867).

[130] *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

[131] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986 [internal quotation marks omitted]).

the ascertainment of guilt are implicated, a trial court must not apply the rules of evidence "mechanistically to defeat the ends of justice."[132]

The purpose of alibi evidence "is to persuade the jury that the defendant could not have committed the crime charged because he or she was elsewhere at the time of its commission."[133] The alibi need not be airtight. It simply must raise a reasonable doubt concerning the defendant's presence at the crime scene.[134] The People have the burden of disproving a defendant's alibi beyond a reasonable doubt.[135]

Here, the court's preclusion of defendant's portion of the 911 call denied him a fair trial and the fundamental right to present a complete alibi defense. As set forth above (*see* section on attempts to admit defendant's 911 call), counsel sought to admit defendant's 911 call into evidence during Graham's testimony. As a threshold issue, counsel argued defendant's portion of the call was an excited utterance. However, defendant's call was not hearsay because counsel was not offering it for the truth of the matter asserted. Counsel also argued that defendant's 911 call was part of his "alibi" and was relevant not just to what he said, but "how he says it" (T.588 [emphasis added]). The prosecution objected to the admission of defendant's 911 call unless defendant testified (T.580, 583-84, 659-60, 661-62). The court stated it was "inclined" to admit the call, "but we'll argue it at the right time" (T.663). However, defendant's call was not admitted into evidence during Graham's testimony. Presumably, the court ruled against the call's admission during an off-the-record discussion. Notably, during Graham's testimony, while arguing a reason for the jury to visit the scene, counsel stated that "sooner or later" defendant's 911 call will be played for the jury. Neither the court nor prosecution disputed counsel's assertion (T.736). Inexplicably, when counsel sought to play defendant's 911 call during his testimony the prosecution objected, an off-the-record discussion ensued, and defendant's call was never played for the jury, or admitted into evidence (T.795-96).

By precluding defendant's 911 call, defendant's alibi defense was curtailed. It was limited to defendant's mother's testimony and his own testimony that he was home at the time of the crime. And although there was no dispute that he called 911 and counsel argued on summation that the jury should consider that, for all the reasons discussed below, defendant was severely prejudiced. Briefly stated, defendant's 911 call would have corroborated Graham's and defendant's testimony and raised a reasonable doubt about his presence at the scene. And the People's burden to disprove defendant's alibi would have been much harder. Instead of (inaccurately) challenging what Graham said on the 911 call, the People would have had to address the timing of defendant's call and his composure on the call.

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[132] *Chambers*, 410 U.S. at 302.

[133] *O'Donnell v. State*, 26 A.D.3d 59, 63 (2d Dep't 2005).

[134] *People v. Jack*, 74 N.Y. 2d 708 (1989).

[135] *People v. Melendez*, 16 N.Y.3d 869 (2011).

The 911 Call Would Have Raised a Reasonable Doubt That Defendant Was At The Scene

The jury had no opportunity to consider whether it was feasible for defendant to call 911 within the limited timeframe into which his actions had to fit if he had participated in the commission of the crime. Moreover, counsel compounded the error by surmising that defendant had more time than he did from the time of the explosion to his 911 call. It is highly unlikely that, under the circumstances, defendant could have made it from the subway station to his apartment, had a discussion with his mother, and called 911, all within the allotted 77 to 110 seconds.

The time the explosion occurred was not known to the jury. The specific number of seconds defendant had to get from the booth area to his apartment was not made explicit for the jury. In fact, defense counsel in summation mistakenly told the jury that defendant had two minutes, when, in fact, defendant only had between 77 and 110 seconds to get home from the station and make the call. The explosion occurred sometime between 1:40:00 and 1:40:33 a.m., but the jury only knew that the explosion occurred *around* 1:40 a.m. According to the 911 tapes, defendant's call was at 1:41:54 a.m. Allowing for defendant to take a few seconds to pick up the phone, dial 911, and however many seconds the line rang before the operator picked up, it is reasonable to conclude that defendant had begun the process of calling 911 no later than 1:41:50 a.m., leaving him between 77 (1:40:33-1:41:50) and 110 seconds (1:40:00-1:41:50) to get home from the station to place the call. This time span does not account for the time it would take defendant to react to the unexpected explosion, get his bearings, and begin to run, and excludes however many seconds it would have taken defendant to connect with his mother and coherently tell her that the token booth blew up, as the People argued he did.

In addition to erroneously lengthening the time defendant had to accomplish all this, defense counsel failed to articulate the reasons it would have been next to impossible for defendant to make the call within the allotted time. CRU learned from Fire Marshal Fash that based on the damage he observed at the scene, he would expect anyone standing anywhere near the side or rear of the booth, such as by the stairs, to be "knocked on their ass."[136] The jury was never directed to consider the physical impact caused by the explosion. Assuming that defendant was inside the station by the bottom of the staircase, he would have experienced a blast loud enough to be heard blocks away and a concussive explosion strong enough to blow out the side and back walls of the token booth, a force strong enough to shake buildings a block away.[137] Even if the explosion did not knock him off his feet, the sound from the explosion in the relatively enclosed area very likely would have disoriented him and slowed him down.[138]

The jury also learned little about the particulars of defendant's path home. In addition to considering the prospect of defendant merely running from one point (the subway station) to a second point

[136] *See* CRU interview of Fash.

[137] The New York Times reported that the power of the explosion "was felt in apartments a block away." https://www.nytimes.com/1995/11/27/nyregion/attackers-set-fire-to-token-clerk-in-brooklyn-subway-station.html

[138] As a comparable example, the booth exploding within the confined station area would likely have had an effect not too dissimilar to that of a flash-bang (stun grenade), an explosive device used by law enforcement and the military to temporarily disorient individuals in enclosed spaces.

defendant's apartment), CRU considered the following details pertaining to that journey: (1) there were 31 subway stairs and a short corridor between staircases in the station; (2) there are two doors to enter defendant's apartment building, both of which, according to the evidence, were most likely locked; (3) there is the door to defendant's apartment that defendant's family shared with another tenant. Based on information contained in the trial file and CRU's investigation, the door to defendant's apartment was usually locked by 1:00 a.m.

The jury had only vague, inexact, or erroneous information concerning the number of stairs from the booth area to the street, the distance from the top of the subway stairs to the front door of defendant's building, and the distance from the front door of the building to defendant's residence. With respect to the subway stairs, the only evidence the jury had was a photograph showing a portion of one of the staircases in the background and a hand drawn diagram, both of which were misleading in that the staircases appear substantially shorter than they are.[139] For these reasons, the jury would have benefited from a visit to the scene. Unfortunately, defense counsel waited until the final day of testimony to request, pursuant to C.P.L. § 270.50, that the jury be brought to the crime scene and apartment. Counsel's failure to raise the request earlier and to make the most persuasive arguments about why a visit was so crucial likely contributed to the court's denial.[140]

Significantly, because defendant's portion of the 911 call was not admitted into evidence, or played for the jury, the jury was unaware that defendant sounded calm and was breathing normally while speaking with the 911 operator. This fact was remarked upon by DeLucia—the lead precinct detective—when CRU played that portion of the tape for him during CRU's investigation. DeLucia had not previously heard the call.

<u>Despite Preclusion of Defendant's 911 Call, the Prosecution Did Not Disprove Defendant's Alibi</u>

Without the 911 call in evidence, the People focused on disproving defendant's alibi by attacking Graham's portion of the call. After defense counsel surmised in summation that the People would argue that defendant or his mother concocted the alibi, the People said they were not going to argue that the 911 call was intended to create an alibi, arguing instead that defendant immediately called 911 because he had just started a fire under his house (T.878-79). This argument was not based on any evidence and was not a reasonable inference.[141] The argument also failed to address the timing factor. Even assuming defendant would call 911 more quickly if he was concerned about his building than if he had first devised a plan with his mother to make the 911 call as an alibi, the jury still did not have adequate information to assess whether defendant realistically could have made it home in time to call

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[139] The photograph, which focused on burnt clothing, shows some of the stairs before the staircase disappears into the background darkness. The diagram depicted the station interior. Each staircase in that diagram was represented to have only six stairs.

[140] The court denied counsel's motion due to scheduling concerns. Calendar call minutes (not part of defendant's trial) indicate that the court had to begin the Ellerbe/Malik trial before the end of October, or the case would be transferred to another part.

[141] The explosion and any fire were confined to the station area immediately in and around the token booth. Even if the fire could somehow spread to the subway tracks, the subway runs underneath Fulton Street and not under any of the buildings on either side of the street. Where the subway tracks run was not before the jury.

911 by 1:41:54 a.m. Moreover, because the court precluded defendant's portion of the 911 call, the jury could not assess the prosecution's argument that defendant called 911 to report that a fire threatened his home. Moreover, defendant's calm demeanor, the fact that he gave the operator the wrong address (Kingston and Throop, corner store), that he told the operator nothing more than that a man was on fire (rather than saying anything about a fire that might threaten his building), undermined the People's entire argument. Had defendant's 911 call been before the jury, it is doubtful that the People would have been able to offer their alternative "home on fire" argument and they would have been forced to confront the timing problem they understood defendant's 911 call created. Without the benefit of hearing defendant's 911 call, the jury never had reason to consider any of this.

The People told the jury that Graham reported to 911 that the token booth exploded. The People argued that Graham could only have known this from defendant because he was there (T.878). In fact, at sentencing, the court agreed with this argument (S.6). But the other 911 calls admitted into evidence (but never mentioned by the defense) refuted the People's argument. In fact, five other callers, including two who called before Graham did, and a third who spoke to another operator at nearly the same time as Graham, reported that the token booth blew up, was on fire, or was destroyed.

The token booth cannot be seen from any point on the street, and it is unlikely that any of these callers ran into the smoke-filled station to see what had happened. Therefore, they were in no better position than Graham to know that the token booth exploded. Rather than Graham having exclusive knowledge, the source of which could only be someone who committed the crime, Graham was apparently just one of many people who, for obvious reasons, mentioned the token booth during their conversation with 911. The defense never mentioned this the jury. Given that the defense, the prosecution, and even the court apparently failed to recognize that other callers reported that the booth had exploded, was on fire, or had been destroyed, it is unlikely that the jury recognized that Graham was not the only caller who reported this.

It is reasonably likely that Graham heard people in the street saying the token booth exploded. The 911 calls and other evidence support this conclusion. For example, in Graham's December 14 audiotaped statement to prosecution, she said that upon hearing the explosion and believing the corner store had exploded, she went to her window, opened it, and looked out. Graham stayed at the window until she took the phone from defendant approximately three and a half minutes after the initial explosion. One of the first officers at the scene, Officer Richardson, who arrived shortly after Graham got on the phone, told detectives that before he got out of his car, he heard people on the street saying there had been two explosions in the token booth.[142] Sgt. Cohen, who was with Richardson, testified in a prior proceeding that as she approached the subway entrance, she heard people yelling to her on the street that there had been two explosions down in the station. The jury was not privy to this information. Similarly, the first 911 caller to mention the token booth, reported that "somebody said"

[142] DeLucia DD5 5. Based on the 911 tapes, the second, quieter, "explosion" occurred somewhere around 01:43:15-01:43:20 hours. Graham did not get on the phone until 10 to 15 seconds after the second "explosion" had occurred.

that the token booth was on fire.[143] It is likely that when Graham looked out of her window, she was exposed to the same excited chatter on the street that Richardson, Sgt. Cohen, and the other 911 caller heard. Had the jury been made aware of these similar accounts, it likely would have understood that what Graham reported was available and known to others, none of whom had any connection to defendant and were in no better position to see the token booth than Graham was. Moreover, even if the jury realized that others reported that the token booth blew up, it could not have known that others provided that information before Graham did, as the jury had no way to determine what time Graham took the phone from defendant.

Even if Graham could not hear the chatter on the street, numerous officers and witnesses described dense smoke pouring from the subway entrances. Although the jury did not know it, Graham could see within a few feet of the subway entrance from her window, and thus was able to see the smoke billowing up from the street.[144] Given what she could see from her window and her undoubted familiarity with the location of the subway entrance, having lived there for four years, it is not unreasonable to conclude that Graham understood implicitly that the explosions came from where the heavy smoke was emerging—the staircases leading down into the station where the token booth was located.[145] Unfortunately, no one asked Graham, either at the time she spoke to 911, later that day when she was interviewed by the police, or on December 14 when she was interviewed by prosecutors, what led her to believe the token booth had blown up.

A recording of these eighteen 911 calls—except for defendant's portion—was admitted into evidence (on consent). No transcripts for these calls were provided for the jury. In the calls where the token booth is mentioned, reference to the booth is fleeting and not the focus of the call. Though the 911 calls were "before the jury," neither the prosecution nor the defense gave the jury any reason to carefully listen to these calls. The jury had no reason to study the calls, intently listening for information they had no reason to believe existed. Moreover, the court also apparently missed the five other callers mentioning the token booth when the calls were played for the jury during deliberations. As stated, the sentencing court, essentially repeating the People's summation argument, remarked that when the jury heard Graham report "they blew up the token booth" the jury realized the only way Graham could have known that was from defendant coming home and telling her (S.6). To the extent the jury concluded that Graham could not have known about the token booth blowing up without having been informed of this fact by defendant, that conclusion was in error.

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143 To CRU, it sounds as though this call was made from some unknown pay phone. There was, however, a pay phone below defendant's window.

144 Graham told the prosecutor that she saw the smoke after the police and ambulance arrived. But witnesses and the police all indicated that smoke was pouring out of the entrances much earlier. Further, no ambulance arrived on the scene until well after the police arrived.

145 It is reasonable that Graham had in the past seen streams of people walking along the Kingston building line, walking into or out of her view. Common sense dictates that Graham would not have to see the subway station, which was just beyond her sightline, to know these people were going into or coming from the station.

CONCLUSION AND RECOMMENDATION

The "new evidence" concerning Chmil and Scarcella would likely have undermined the reliability of defendant's confession. Furthermore, even without the new evidence defendant's confession was unreliable. Moreover, defendant was denied the right to present a complete defense. CRU has no confidence in the integrity of the conviction and there is no reliable credible evidence of guilt. Consequently, as the Independent Review Panel and the District Attorney agree, the judgment of conviction should be vacated, and the indictment should be dismissed.