DISTRICT ATTORNEY
KINGS COUNTY

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CONVICTION REVIEW UNIT
REPORT ON THE INVESTIGATION
CONCERNING THE CONVICTION OF
THOMAS MALIK

THE CRIME

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 James Irons, 17-year-old Vincent Ellerbe, and two 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]

REASONS FOR VACATUR

CRU found the following errors in this case::(1) new evidence of Det. Scarcella's alleged misconduct in other cases would have probably undermined two key pieces of evidence—defendant's confession and the identification testimony of the sole eyewitness, given Scarcella's significant role in the investigation leading to defendant's arrest and confession; and (2) the trial evidence consisted of: (a) defendant's confession, which was obtained by Scarcella, who fed facts about the crime to defendant, and did not memorialize the entirety of the statement despite testifying that he did; (b) the testimony of a single eyewitness, who had identified another individual to Scarcella with absolute certainty prior to identifying defendant, and whose trial testimony was materially inconsistent with her pretrial accounts, which the jury did not hear; and (c) new evidence that a jailhouse informant--whose testimony in this case that defendant confessed to him in prison was patently incredible--has since been court-ordered never to provide information to law enforcement again based on his history of false reporting.

THE POLICE INVESTIGATION[2]

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

The 911 Calls and the Evidence Recovered from the Scene

At 1:40:33 a.m. the first 911 call was received. Over the next six and a half minutes, (19) 911 calls were made regarding an explosion in or near the subway station, a man on fire, and a second explosion minutes later.

Shortly thereafter, law enforcement and the FDNY arrived. The evidence recovered from the crime scene included: a loaded and operable .30 caliber rifle with a folding stock and a banana clip;[3] a plastic

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

[2] Only those portions of the police investigation relevant to defendant are discussed. Unless otherwise stated, the investigation facts are obtained from the police documents. Numbers in parentheses preceded by "H." refer to the pages of the pretrial *Huntley/Wade/Dunaway* hearing transcript; those preceded by "M." refer to the pages of the *Massiah* 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] 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.

bottle containing gasoline residue;[4] a book of matches, which were all apparently lit simultaneously;[5] and a burnt glove.[6]

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 token booth coin slot, and the used accelerant was gasoline.[7]

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 a 911 call of a "man on fire at token booth." Witnesses on the street reported hearing two explosions in the token booth.[8] "Heavy smoke" billowed from the subway station.[9] 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 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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[4] Dieumegard DD5 13; Coursey DD5 14.

[5] Dieumegard DD5 13; Fire Marshall Fash trial testimony.

[6] The subway station has two entrances/exits on Kingston, across the street from each other, between Fulton and Herkimer. One faces Fulton upon exiting; one faces Herkimer upon exiting. Both are L-shaped with two flights of stairs separated by a landing.

[7] Fash report.

[8] DeLucia DD5 5.

[9] DeLucia DD5s 5, 8.

[10] Moore DD5 9.

[11]DeLucia DD5 5.

[12] Defendant is light-skin black, 5'6", and 165 lbs.; Irons is medium-skin black, 5'7", and 145 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"); *see also* T.1477 [Santo trial testimony]).

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 conviction of individual(s) responsible for the crime. Police vans with loudspeakers also advertised a $41,000 reward.[16]

Darlene Williams

On November 26, at 1:41:18 a.m., Darlene Williams anonymously called 911 reporting that a man on fire had 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.[17]

On November 27, at 10:25 a.m., Chmil and Scarcella interviewed Williams at her third-floor apartment at 12 Kingston Avenue.[18] 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.

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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] 911 recording and accompanying transcript.

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

Williams knew the three 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, 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. [19]

On December 14 (after Irons' confession), Williams gave a similar sworn audiotaped statement to an ADA, in Chmil's presence. Williams said that from her apartment she could not see the car parked on Herkimer. She added that when she saw the car from her neighbor's apartment, the car's rear lights were not on. 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. Williams saw the third individual standing by the subway entrance. She saw him right after hearing the boom and did not know how he got there. This individual went right (east) on Fulton towards Albany Avenue.[20]

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 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 near 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 20-22 years old, 6', 170-180 lbs., husky, with brown to light brown skin.[21]

Jacqueline Robinson

On November 27, at about 12:30 p.m., Det. Peter Sloan received a call from C.W. reporting that her co-worker had witnessed the crime. At 12:40 p.m., Sloan, and Dets. Kevin Coursey and Richard Bergin interviewed C.W.'s co-worker—Jacqueline Robinson—at her workplace.[22]

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[19] Scarcella DD5 86 and notes.

[20] Audiotape A95-1755 and accompanying transcript.

[21] Scarcella DD5 18 (which includes a hand sketch of where the car was parked) and notes. The female said she could be reached through 79th Precinct Officer Tony Rogers. KCDA records indicate that Officer Anthony Rogers was assigned to the 79th Precinct at the time (which Det. Baker confirmed to CRU). Prior to defendant's (and Ellerbe's) pretrial hearings, the People informed the court and counsel that they were unable to identify or locate this witness.

[22] Sloan DD5 90. At trial, the prosecution said that notes might have been taken during this interview but could not be found. At the prosecution's suggestion the court gave the jury an adverse inference charge regarding the missing notes.

Robinson stated that on Sunday, at about 1:40 a.m., she and her boyfriend were talking in her car for more than an hour. They were parked on Kingston Avenue right near the corner of Herkimer Street "(between Kingston and Atlantic Ave)."[23] At that time, two young boys, apparently "up to no good," were on the northeast corner of Kingston and Herkimer. One boy was holding, in his right hand, a clear plastic bottle with a rag or napkin stuck in the top. The other boy seemed to be holding something in his right hand. A black Trans Am with tinted windows was parked on the same corner as the boys—the northeast corner of Kingston and Herkimer—facing Albany Avenue (east). The car lights were on, and the motor was running.

The two boys walked toward Fulton Street. When they reached the subway station, they ran down the stairs. There was a loud boom, and the same two boys ran from the station back to Herkimer. There was another loud boom. The boys were laughing, and one said, "we got him." They got into the passenger side of the black Trans Am, which drove off.

Robinson drove to Fulton Street to see what happened. There, the deceased emerged from the subway station. He was "on fire." Robinson's boyfriend and a man in a burgundy Pathfinder threw the deceased to the ground and used their coats to extinguish the fire. Robinson refused to identify her boyfriend until she had the chance to speak to him.[24]

Scarcella Obtains Robinson's Identification of S. McCargo

In early December, a confidential informant ("CI") reported to Det. Artie Hall that S. McCargo and R. Butler were involved in the crime and were hired by "Stymie" and "Bo-Peep," who lived in the Albany Houses.[25] The CI knew both McCargo and Butler and said they were out of town. The CI viewed six photographs and identified McCargo.[26]

On December 7, at 12:26 a.m., in an unmarked car, in front of Robinson's residence on Dean Street, Scarcella and Chmil handed Robinson a white envelope containing six photographs, one of which was McCargo.[27] When Robinson saw McCargo's photograph she began to shake and repeatedly screamed, "That's him." She started crying and repeatedly screamed, "Why did he burn him." She identified McCargo as the one with the clear plastic bottle going to the subway and laughing and saying "we got him" when returning from the subway.[28]

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[23] *Id.* It is not clear who supplied the quoted parenthetical information, but it is incorrect since those streets run perpendicular to one another. Atlantic Avenue is one block south of Herkimer.

[24] Sloan DD5 90.

[25] 12/4/95 detective activity logbook entry; Chmil notes dated 12/6/95 at 4:15 p.m.

[26] Chmil's notes, "1900 HRS w/Scarcella & Hall." There is no documentation regarding who conducted the identification procedure and no DD5 was ever created concerning this identification. There is no information regarding the identity of this CI or what his basis was to believe McCargo and the others were involved in the crime.

[27] Robinson lived less than a half a mile from Fulton and Kingston.

[28] Scarcella DD5 130.

Robinson's Sworn Audiotaped Statement

On December 8, at 6:20 p.m., at the KCDA, Robinson gave a sworn audiotaped statement to two ADAs. Chmil was present.

Robinson stated that on November 26, 1995, between 1:30 and 1:45 a.m., she and a friend were parked on Kingston Avenue, "near the park."[29] Robinson added to her prior statement that the two individuals she saw were male blacks. They came from Herkimer Street, turned right on Kingston, and were "walking fast." One had his arm straight down. The other carried in his arm a clear unlabeled bottle, like a Pepsi or Coke bottle, with something hanging out of it. They twice turned to look behind them. Robinson did not see anyone behind them. Robinson kept an eye on them because they "looked shady" and it appeared that they were up to something. She did not think they saw her because she was not parked under a light.

After the males went down to the subway, she heard a very loud explosion. Robinson stated, "and that's when I cranked my car up." The ADA asked, "You started the car at that point?" Robinson replied, "Yeah." At first, Robinson thought the explosion was a car accident. She then heard someone scream and saw black smoke rise from the subway station. She knew it was from the station because the smoke was coming right at her.

The two males came out of the subway station about "one to three minutes" later and walked fast toward her direction. As she was pulling out, one of the males said, as they passed her car, "got that motherfucker, we got him." They were both smiling "like it was funny." They were no longer holding anything. Their coats and pants were all black.

They walked down Kingston and turned left onto Herkimer where one jumped into the front passenger seat, and the other jumped into the back passenger side of a car, which "zoomed off." Robinson "zoomed off" and stopped her car when she saw the deceased. She and her friend, and a man in a Pathfinder, jumped out of their cars to help extinguish the flames on the deceased.

Robinson was not sure about the make of the car that the two males jumped into; it had a bird on the center and could have been a Firebird or Camry. It was a "fast car," black with dark tinted windows and "nice rim tires." It was parked about 25 feet from Robinson's car. Robinson first noticed the car before the two males went into the subway and she was certain that the lights were on, and the motor was running. It was cold out and the exhaust was coming from the car. She had not seen the two males, or anyone, get out of the car because it was "up that block a little bit."[30]

Robinson Confirms Her Identification of McCargo, and Identifies Butler As the Person She Saw With McCargo

During her audiotaped statement to the ADAs, Robinson confirmed that the prior day she identified a photograph of one of the two individuals she saw ([Robinson's identification of McCargo]). She told the ADAs, "I'll never forget his [McCargo's] face as long as I live."

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[29] Kingston Park runs the length of the west side of Kingston between Herkimer and Atlantic.

[30] Audiotape A95-1787 and accompanying transcript.

After the interview concluded at 6:40 p.m., Scarcella, with Chmil and DeLucia present, showed photographs to Robinson, and she identified the person she saw with McCargo, and who was holding something by his side (Robinson's identification of Butler). Robinson said that McCargo had a lighter skin tone than Butler and was holding the bottle when they went to the subway. When they returned from the subway McCargo was closer to her car as they passed by.[31]

McCargo and Butler Are Eliminated As Suspects

On December 12, NYPD officers went to Baltimore where McCargo was being questioned regarding a Maryland crime. By the time NYPD arrived McCargo had been released. The officers learned that Butler was in jail in Baltimore at the time of this crime.

On December 13, NYPD, for reasons not documented, concluded that McCargo was in or near Baltimore at the time of the crime.[32]

Other Suspects

Sport, Crime, and Biz

On November 26, at about 6:30 p.m., a female CI reported to Det. Michael Paul of the 77th Precinct that she heard the following from someone named Nicole at 2:00 a.m., Nicole and her sister were in the lobby of a building on Bergen Street (in the Albany Houses when "Crime" ran in saying that he did something on Kingston and wanted to hide at Ringy's drug spot.[33] Nicole told the CI that Crime and some other guys blew up the token booth. The CI reported that Crime lives on Herkimer, near Kingston.[34]

On November 27, at approximately 1:00 a.m., at the 79th Precinct, Paul and DeLucia interviewed M. Ortiz.[35] Ortiz stated that at 12:30 a.m., Sunday (11/26), he was at Shawnee's party on Albany Avenue in the Albany Houses. Sport, Crime, and Biz arrived. Sport had a duffle bag, from which he removed a dark gun, which had a wooden folding stock and a banana clip. Sport showed the gun to Shawnee. Shawnee's mother knocked at the door, and Shawnee returned the gun to Sport, who put it back in the bag. At 1:05 a.m., Crime asked for and was told the time. Crime left with the bag and Sport and Biz followed. Ortiz stayed at the party until 3:30 a.m., and did not see Sport, Crime, or Biz again that night.[36]

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[31] Audiotape A95-1787 and accompanying transcript. Other than the audiotape, Robinson's identification of Butler was not documented.

[32] NYPD Captain Charles Wells' report to Chief of Detectives. The report indicates that Baltimore police did not question McCargo about this case or see any burn marks on him. Though the report specifies Butler was in police custody on the day of the crime, it says nothing about McCargo. On 12/22/95 (after defendant, Irons, and Ellerbe were indicted), NYPD cancelled the wanted cards for McCargo and Butler.

[33] Irons and a CI later mentioned that Ringy was involved in the crime. Ringy was interviewed and denied any involvement.

[34] DD5 73; Chmil's undated notes state, "Van Buren sisters at 79 Squad" with no further information.

[35] There is no information as to how Ortiz came to the attention of the detectives.

[36] DD5 87.

On November 27, in the evening, Darleen Williams (after her statement [discussed above]), viewed a photo array containing a photo of Sport. She either identified him or said he "looks a little like" one of the guys she saw running from the station (discrepancy between police paperwork and Chmil's notes).[37]

Lt. Shaw Names Sport, Crime, and Biz As Suspects

On November 27, Lt. Shaw wrote a report (to the C.O. of the 79th Precinct Detective Squad) identifying Sport, Crime, and Biz as suspects. The report included that a witness (unnamed) identified Crime and Sport running from the scene. And another witness (unnamed) identified Crime and Sport at a party before the incident and identified a photo of the recovered gun as the gun he saw at the party.

Assistant Chief Raymond Abruzzi's report indicated that, "[S]ources [unnamed] viewed photo arrays of 'Crime & Sport' and tentatively ID'd them persons [sic] in possession of rifle at party and ID'd photo of rifle."

Sport's, Crime's, and Biz's Identities[38]

Sport's identity was determined. He was a 21-year-old black male, 6'0", 180 lbs., medium skin tone. KCDA case tracking shows he had prior arrests relating to thefts in the subway, including a robbery.

Biz's identity was determined. He was a 19-year-old black male, 5'8", 150 lbs., dark skin. KCDA case tracking shows that, on November 25, Biz was released at day arraignments.

Crime's identity was not conclusive. An undated note in Chmil's spiral indicates that Crime was determined to G.W., a 22-year-old black male, 5'8", 150 lbs., with medium/dark skin tone.[39]

Various DD5s indicate that detectives made extensive efforts to locate him. On November 28, 1995, Det. D. Thomas compiled a photo array containing a photograph of "[F.R.] AKA Crime."[40] There is no evidence that anyone viewed the array.

Sport, Crime, and Biz lived in the Albany Houses, a little over a half mile from the scene, east of Kingston.

Anonymous Tip About Sport

On November 29, at approximately 9:00 p.m., the 79th Precinct Detective Squad received an anonymous tip that Sport frequented a roller rink at 200 Empire Blvd. on Thursday nights. Dets. Slagg and Saunders showed photographs to the rink manager, who identified Sport and Biz as customers who come together. The manager said that the prior week there was a fight and the bouncers beat up

[37] Chart made by unknown officer says former, Chmil's notes say the latter.

[38] There is no evidence as to how their identities were determined.

[39] This information is from a January 1996 arrest. DCJS records show that arrest date as November 1996 and is the only arrest listed. DCJS, however, indicates G.W. was 5'4", 180 lbs. This information is likely from a September 1993 arrest, which was subsequently dismissed in 1995, and removed from G.W.'s record.

[40] DD5 95.

someone in Sport's group. On Tuesday (11/28) someone in Sport's group threatened that the guys who committed the token booth fire would throw something into the rink. The manager said he did not know if Sport was there when the threat was made.

Attempts to Locate Sport, Crime, and Biz

From late November to mid-to-late December, the police made numerous attempts to locate Sport, Crime, and Biz. The roller rink was among the locations that detectives surveilled without success in their attempts to locate them.[41] Wanted cards were issued for each, and all three had open arrests warrants at the time of the crime.[42]

Biz is Located and Interviewed

On December 5, 1995, Biz was located. Chmil and Scarcella interviewed him at the 79th Precinct.[43] Biz confirmed that he was at the Albany Avenue party the Saturday night before the crime (on Sunday morning). He confirmed that Sport was there. Sport had a lot to drink and was "sprawled out" on the couch (no specific time mentioned). Biz was with his roommate, who left the party to go to a store, and returned after midnight saying he heard at the store that a train blew up. Biz left the party at 5:00 a.m.

Sport, Crime, and Biz Are Ultimately Eliminated As Suspects

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

A note in the trial file from March 1996, posed the question: "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.

Ringy

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.[44] She provided their addresses on Bergen Street in the Albany Houses. On the same day, an anonymous male caller told detectives that Ringy was at his sister's apartment. A search warrant was obtained. When executed, Ringy was not there.

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

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[41] DD5 115; Detective Squad logbook.

[42] 11/28 report to Chief of Detectives. DeLucia issued the wanted cards.

[43] There is no DD5 regarding this interview.

[44] Millwater DD5 145; Squad logbook entry dated 12/12, 1350 hrs.

Ricardo James

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. The CI reported that the Ricardo told the CI that Ricardo committed the crime with Tyrone, Pop, and Pepe.[45]

At approximately 11:30 p.m., detectives brought Ricardo to the precinct. James Irons ("Irons") accompanied them. Scarcella and Chmil interviewed Ricardo until Paul interrupted the interview to tell Scarcella and Chmil that Irons had information.[46]

On December 14, at 12:40 p.m., Coursey and Bergin continued Ricardo's interview. Ricardo stated that he and Lite 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.[47]

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

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 about the crime.[48]

IRONS' AND ELLERBE'S CONFESSIONS[49]

Irons' Confession

On December 14, at about 2:30 a.m., Irons gave a *Mirandized* statement to Chmil in Scarcella's presence. Irons stated that a couple of days before the crime "Vincent" (whom Irons later identified as Ellerbe) and "Tommy" (whom Ellerbe later identified as defendant) asked if he wanted to rob a token booth. Irons agreed to be a lookout. Defendant and Ellerbe said they needed money for Christmas, and that Chris, Andre, and Eric would be involved. Ellerbe gave Irons a .32.

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

[46] *See* Irons Memorandum: H.12-13; T.559-61.

[47] 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 Brathwaite went to the movies and saw "Dr Jeckel (sic) & Clueless."

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

[49] Neither Irons' 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 that they are relevant to the account of jailhouse informant Shabazz, and the analysis regarding defendant's confession.

At about 1:00 a.m., defendant and Ellerbe met Irons in front Irons' building on Fulton Street. Ellerbe said that Chris would wait in the car parked around the corner. Defendant, Irons, Ellerbe, Eric, and Andre went into the subway station. Irons later stated that he had left something out—that Ringy, who had gun, was also there.

Ellerbe squirted gasoline from a container into the change slot. Defendant squirted gasoline near the booth door and lit a match in the slot causing an explosion. Defendant had a "big gun" under his arm and dropped it when they all fled. Irons' accomplices fled to a dark blue, Ford Taurus.

At 4:15 a.m., Irons identified Vincent Ellerbe, either in a photo array or Robbery Identification Program (commonly referred to as "RIP") photos (Scarcella's DD5 and notes say photo array, but he later testified during Ellerbe's pretrial hearing [H.423-25] that Irons viewed RIP photo books).

At 6:15 a.m., Irons gave a videotaped *Mirandized* statement to an ADA, in Chmil's presence.

Ellerbe's Confession

On December 14, 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 spoke to J. Rivers by phone. Rivers told Ellerbe that defendant was planning a robbery.[50] The Saturday after Thanksgiving (11/25), after Ellerbe had returned to Brooklyn, defendant told Ellerbe that he was going to rob the token booth. Ellerbe agreed to participate. Later, defendant gave Ellerbe a .32 revolver to give to Irons, who was also going to participate.

Around 1:00 a.m., on Sunday (11/26), defendant, Ellerbe, and Irons met in front of Irons' building on Fulton Street. Ellerbe gave Irons the .32 revolver. About 20 minutes later, they 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, Irons gave Ellerbe a white bottle with a spray top and said, "If anything goes wrong, just spray it." The bottle smelled from gasoline.

Ellerbe, Irons, and defendant approached the booth with Chris behind them. The two others were near the stairs acting as lookouts. Irons slid the .32 into the slot and demanded money. The deceased refused. Ellerbe sprayed the booth's glass with his graffiti tag "Teff." Defendant lit a match.

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.[51]

[50] Rivers later told DeRita that defendant had asked him a week before Thanksgiving to rob a "numbers" store, and he (Rivers) told this to Ellerbe by phone when Ellerbe was in Binghamton.

[51] Ellerbe referred to defendant as Tommy, and Irons as James throughout his statements.

DEFENDANT'S CONFESSION[52]

Defendant's Statements and Confession to Scarcella

On December 14, at 1:45 p.m., at the 79th Precinct Squad, Scarcella read defendant *Miranda* warnings from a card, in Chmil's presence. Defendant waived his rights and signed the card. Defendant insisted that he was not involved in the crime and was with his 18-year-old girlfriend Tonya. They were either at defendant's or Tonya's house. Tonya lived on Marcy and Verona. Defendant did not know the address and she had no phone.

At this point, Ellerbe was brought in and out of the room. Defendant acknowledged that he knew Ellerbe (whom he called Vincent). He did not recall when he last saw Ellerbe. Defendant used to date Ellerbe's sister until she became pregnant by another man. The prior day (December 13), Ellerbe's mother had called defendant telling him that the police were at her house at 4:00 a.m. Ellerbe was upstate at the time.

Defendant heard on the street that the crime was committed for Christmas money. Chmil mentioned that a .30 caliber rifle was found at the scene. Defendant jumped up and showed his hands stating, "You don't have my prints on that gun."

Defendant was shown a photograph of Irons, whom defendant said he did not know. Defendant stated the only time he was on Fulton and Kingston was when a law enforcement van was there seeking information. Defendant said there was no word on the street about who committed the crime, but that he would make some calls to find out. Defendant stated that he did not know how his life could change just like that. Defendant and Scarcella and Chmil signed the statement at 4:01 p.m.

At 4:10 p.m., defendant stated, "[t]he only reason I am here is because that man died. If he was still alive, I would not be here. Oh! And I never owned any kind of black jacket. I was not there I am an innocent man." This statement was not signed by defendant or the detectives.

At 5:00 p.m., defendant confessed stating,

> O.K. man I was there I was down on the whole thing. It was a robbery but it was not supposed to go like that. It was me [Irons] and [Ellerbe], there were two other guys there also. [Irons] had the gas in a plastic bottle, he squirted it and lit it. One of the other guys got burned on his gloves I think his hands are burned. Man what am I gonna do—can I see my girl, please can I see her. [Ellerbe] had a gun it was a .32 or .38 Special. I saw him pull the gun out. I was just the lookout I thought they were just bluffing. Now I just ran Man all I was, was the lookout. The explosion was loud. I was so fucken [sic] scared I just ran. I ran up Kingston Ave.[53]

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

[53] Defendant referred to Irons and Ellerbe as James and Vincent, respectively, in all his statements.

The last statement was signed at 5:30 p.m. by defendant only. Scarcella memorialized the statements on a yellow pad.[54]

Defendant's Videotaped Confession

At approximately 6:35 p.m., defendant gave a videotaped *Mirandized* statement to an ADA in Scarcella's and Chmil's presence. Defendant confirmed his signatures on the written statements. Defendant's statement was evasive and inherently inconsistent. Essentially, defendant admitted that he acted as a lookout, but he also denied acting as a lookout, explaining that he did not believe Irons and Ellerbe were going to commit a crime.

Regarding his presence at the subway station, defendant stated he was there "to watch, to be a lookout for 'em to get the train booth," but he did not know what was supposed to happen. He believed Ellerbe and Irons had the idea from the movie "Money Train." Because defendant was on parole they told him, "don't get involved" and "just come look." They were going to give defendant "a little bit of money" because it was Christmas. Defendant was not working at the time. He agreed to be a look out because he thought they were bluffing and did not know they were "going to do it" until it happened. Irons had a "gas bottle" which he squirted (defendant demonstrated as if squeezing a trigger). Ellerbe pulled out a gun. Once realizing they were not bluffing, he fled. He ran up Kingston down Atlantic to Pacific. He had a couple of beers and learned what happened when he got home.

Regarding the planning of the crime, defendant could not recall when he met Irons and Ellerbe. After the prosecutor said the crime occurred "very early on Sunday morning" and suggested they all met on Saturday (11/25), the evening before the crime, defendant agreed. He later changed this initial meeting to Friday (11/24). Irons and Ellerbe had approached him after they saw the movie. Defendant was shooting baskets, by himself, in Kingston Park on Kingston and Herkimer. It might have been around 4:30 or 5:00 p.m. It was somewhat dark out and the park lights were on. Defendant lived nearby on Herkimer.

Defendant knew Ellerbe, having dated Ellerbe's sister for a couple of years. Defendant went to prison in July 1993. About three months later, Ellerbe's sister became pregnant by another man. Ellerbe blamed defendant for "letting" her get pregnant, and Ellerbe and defendant did not speak to each other for a while.

Defendant did "not really" know Irons. Defendant met Irons for the first time when Ellerbe introduced Irons to him that night and said that Irons had a way to get some money. Defendant was interested. After they talked about girls and other things for about ten minutes, Irons did all the talking. Irons said they were going to "do it" that night. They "could get the train booth," and defendant could be the lookout because he was on parole. Two friends of Irons were also going to be involved. Weapons were not discussed.

They were going to meet in Kingston Park that evening. Defendant did not know the time they would meet, but Irons said that he was always there "hustl[ing]." Defendant went to meet them because he

[54] *See* written statement; *see also* Scarcella DD5, dated 12/15/95, "Interview of Subject Above"; Scarcella notes.

"just want[ed] to see." He still thought they were bluffing and would "freeze." Irons and Ellerbe did not show, and defendant went home.

Sometime the next day, defendant was walking down Herkimer to visit a friend in the Albany Houses when he ran into Irons and Ellerbe, who were smoking marijuana. He tried to sound like a "big, big bad, boy," and asked why they did not show. They said the time was not right, and it would happen that night. Defendant agreed to meet them because "they already bluff[ed] one night," and he still thought they were bluffing.

Irons did all the talking "like the head honcho." He said to meet around midnight in front of 400 Herkimer Street.[55] Defendant did not know why Irons chose that location. Defendant showed up there at about midnight. Irons and Ellerbe arrived about 30 minutes later. The three walked to the subway station. Defendant was instructed to remain at the stairs and "just look," while Ellerbe and Irons "take care of everything."

Regarding his role, defendant stated that he agreed to stand at the steps and act as a lookout. He understood that he was to lookout for the police or "somethin[g]." If he saw a problem he would go down to the station and say, "Hey yo" or something. Defendant was "there watchin[g]." Defendant also stated he "wasn't even really lookin[g]." Defendant went downstairs because he became curious about what they were doing, and it was taking longer than he expected. Defendant thought they were playing games with him, got on a train, and left him standing out there. Defendant went with them because he did not think Ellerbe and Irons "had the balls" or the "heart" to commit the crime. Defendant ultimately acknowledged that he agreed to take part in the plan, "do a certain job," take payment for the job, and take the position he needed to be in to help Ellerbe and Irons.

Regarding the crime, defendant said that he went down the stairs because he was curious, and he saw Irons with a "little bottle"—a fatter, taller soda bottle (defendant demonstrated the size with his hands). Ellerbe was next to Irons, and they were in front of the coin slot. Defendant peeked around the corner and had to look past Ellerbe to see Irons.[56] Irons shook the bottle, which contained a liquid (defendant demonstrated). Ellerbe had "a .38, or like a little one though, like a .32 or something." Ellerbe held it around face-level. Ellerbe did not say anything. Irons' lips were moving but defendant could not hear him.

Upon seeing this, defendant fled because he did not want to be involved. He ran down Kingston, turned on Atlantic Avenue, and heard an explosion. Defendant went to Pacific, via Nostrand or New York Avenue, bought a beer, and went home.

Regarding his share of the robbery proceeds, defendant said it was not discussed before the crime. Asked where Ellerbe and Irons were going to bring him his money, defendant responded, "Um-hum. No, they like brung it to me" (emphasis added). In response, the prosecutor asked, "And where were

[55] 400 Herkimer is located between Kingston and Albany, closer to Kingston. Both Irons and Ellerbe stated that they all went to subway station from Irons' building on Fulton Street (across from the subway).

[56] Using his hands to describe Ellerbe's and Irons' location, defendant said he could only partially see Irons who was on the far side of Ellerbe and said, "[Ellerbe] was like this [be]cause he shorter."

you going to be when they were going to bring it to you?" (emphasis added). Defendant responded, "probably at my house, somewhere."[57] Defendant was not concerned about the money because he did not believe they were going to commit the robbery.

After the crime, defendant did not see Ellerbe or Irons again. Defendant learned what happened from talk on the street. Defendant stated that he intended to tell his parole officer about the crime during his appointment on Wednesday (after his statement).

At this point, one of the detectives (apparently Scarcella) interjected, asking defendant about "someone else who got hurt in a car you spoke about it."[58] Defendant acknowledged he had mentioned that.[59] He replied, "[t]hose were the other two people who were totally involved." They were Irons' friends. Defendant did not know them or their names. They did not go to the subway station with defendant, Irons, and Ellerbe. Defendant thought they were present during the crime, but he did not see them. He assumed they went down the other subway entrance.

Defendant then stated that all those involved were to run to a Ford Taurus, or a similar type of car, which was supposed to be parked in front of the entrance of Kingston Park. Defendant ran off instead.

Scarcella asked about the occupants in the car—adding that it was parked at Herkimer and Kingston. Defendant said he did not know. Defendant stated that the keys were in the ignition when he was inside the car.

The prosecutor then asked whether the car was discussed before the crime. Defendant said it was not. When asked how he knew the keys would be in the ignition, defendant replied that before "we [sic] did it" there was a blue Taurus and "they just said, you gonna see it because it was on" when "everybody ran to it."

When asked how he knew someone was hurt, defendant said that Irons "and them" were talking about it. Defendant did not know when this conversation occurred. Defendant also stated that he learned from a girl that someone, who she did not name, was burned.

DEFENDANT'S IDENTIFICATION

On December 15, at approximately 11:40 p.m., Chmil conducted a lineup with defendant as the subject. Darlene Williams viewed the lineup and did not identify anyone.

On December 16, at approximately 11:00 a.m., DeRita conducted a lineup with defendant as the subject. An ADA was present. Jacqueline Robinson viewed the lineup and identified defendant as the

[57] Videotaped transcript at 60.

58 The videotape transcript identifies the questioner as "Detective." It appears that defendant was looking at Scarcella when he answered the question (the camera showed everyone's location prior to the interview).

[59] Defendant's statement to Scarcella reflects that defendant had stated that someone was burned but did not include the mention of a car, and up to that point neither had his videotaped statement.

one she saw carrying the plastic container before entering the subway, and fleeing after the explosion, laughing and saying, "We got him."[60]

THE GRAND JURY[61]

The grand jury presentation commenced on December 18, 1995.[62]

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.[63] Chris stated that he spent the night of the crime drinking with Shaka, Geneva, and Shawn at Herkimer Street 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.

Rivers

On December 16, 1995, at approximately 3:00 p.m., DeRita interviewed Rivers and memorialized the statement, which they both signed. Rivers then gave a sworn audiotaped statement to an ADA.[64]

Rivers' Signed Statement

Rivers stated that about a week before Thanksgiving he ran into defendant. He knew defendant for several years from the neighborhood. Defendant said he was going to Kingston Avenue to "look for something," which Rivers understood to mean to rob somebody. Defendant said they could "get" a "numbers" store on Lincoln and Troy and flee on bikes. Rivers said he was not interested, and they parted ways.

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[60] At the lineup Williams viewed, defendant was one of three people wearing a red shirt. At the lineup Robinson viewed, defendant was the only one wearing a red shirt.

[61] 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).

[62] The case was presented jointly against defendant, Irons, and Ellerbe.

[63] It is not known how or why this Chris was interviewed. Chris lived on Decatur Street, is dark-skinned, 6', 185 lbs., and was born in 1975.

[64] In March 2004, Rivers was fatally shot.

Soon thereafter, Rivers told Ellerbe, by phone, about his conversation with defendant. Ellerbe warned Rivers not to get involved with defendant because he did not want Rivers to end up in jail. Ellerbe was in Binghamton at the time and said he would be home in a week. A couple of days later, Rivers learned that the token booth was blown up.

At some point thereafter, Rivers went to Ellerbe's home to speak to Ellerbe's mother and learned that Ellerbe was being questioned at the precinct about the crime. While Rivers was at Ellerbe's, defendant called, and Rivers spoke to him. Rivers agreed to go see defendant but did not go after Ellerbe's mother warned him not to do so because she did not want Rivers to get into trouble.

Shortly thereafter, Rivers learned from Ellerbe's mother that Ellerbe was arrested for committing the crime, and that DeRita wanted to speak to Rivers. Rivers then went to the precinct.

At 3:40 p.m., DeRita showed Rivers a photograph of a lineup (defendant's lineup viewed by Robinson). Rivers identified number two, defendant, as the one referred to in his statement. Rivers said he never heard of Chris, Andre, Eric, or Ringy.[65]

Rivers' Audiotaped Statement

At 4:50 p.m., Rivers gave a sworn audiotaped statement to an ADA. DeRita was present. Rivers repeated his prior statement about his conversations with defendant wanting to commit a robbery, and Ellerbe's mother's advice not to go see defendant. Rivers confirmed that he identified defendant in a lineup photograph. Rivers added that defendant hung out with Jamel, Antwon, and Schyler, and some individuals Rivers did not know.

Ringy

On December 19, 1995, Steed's CI provided information to detectives regarding Ringy's location.[66] 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 1191 Park Place 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 Irons, Ellerbe, and defendant, and did not recognize them.[67]

Follow-up with Ricardo James

On March 23, 1996, at approximately 6:00 p.m., Chmil re-interviewed Ricardo.[68] Ricardo added that he might have seen Irons in Irons' apartment window prior to the explosion but was not sure.

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[65] DeRita DD5 170; DeRita notes "12/16/95 1445."

[66] Chmil's handwritten notes, entry dated 12/19/95, at 1715 hrs.

[67] Chmil's handwritten notes, entry dated 1/18/96, at 1400 hrs. There is no evidence that Ringy's girlfriend was interviewed.

[68] Chmil's 3/23/96 handwritten notes. It is not clear what prompted this inquiry. On the prosecution's March 1996 list of questions, question 11 lists Ricardo James, followed by "3/23/96 Spoke To Him Nothing To Report."

JAILHOUSE INFORMANT COMES FORWARD

Rayquan Shabazz's January 11, 1996 Sworn Audiotaped Statement

On January 11, 1996, at 1:40 a.m., at the KCDA, Marlon Avila a/k/a Rayquan Shabazz gave a sworn audiotaped statement to an ADA. KCDA Det. Investigator ("DI") Diego Rivera, and KCDA Supervising Investigator J.F. Kennedy were present.[69] Shabazz acknowledged that on January 2, he contacted Homicide Bureau Chief Kenneth Taub about this case because Taub worked on a homicide case in which Shabazz testified for the prosecution. Shabazz stated that no promises were made to him in return for his statement, and that the KCDA did not ask him to make any inquiries.

Shabazz first met defendant, who was known as "Tommy," a couple of years ago in Clinton Correctional Facility. They were acquaintances and not friends, and he never saw defendant outside of being incarcerated. Sometime between Thanksgiving and January 1, 1996, they were in Rikers, in nearby cells in "C-74." They recognized each other when they started talking the day after defendant arrived.

Defendant told Shabazz he did not commit the crime, and "some kid named James" (Irons), who defendant did not know, "put his name in something." Shabazz thereafter regularly socialized with defendant.[70] They smoked marijuana defendant supplied.

Sometime in December 1995, defendant admitted to Shabazz that he robbed the token booth. Defendant and "his man" Ellerbe planned the robbery after seeing "Money Train" the Friday before the crime. Irons, Ringy, and Julies were also involved. Defendant called Julies, who was in Binghamton. At around 2:30 a.m., Ellerbe and Irons arrived at defendant's house, discussed the robbery, and decided they had enough guns. Defendant did not tell Shabazz whether Julies was at the meeting, and defendant did not explain the plan to Shabazz.

Defendant said that after the deceased refused their demands for money, he gave Irons instructions. Initially, Irons complied and sprayed the booth's door using a squeeze bottle. Defendant did not tell Shabazz what was in the bottle. When Irons refused to ignite the door, defendant took the matches and lit it himself. Next, Irons complied with defendant's instruction to spray inside the booth. When Irons refused defendant's instruction to light it, defendant did it.

The ADA asked if defendant sprayed anything. Shabazz then changed his statement; he now stated that Irons refused to spray the inside, so defendant did it. Defendant then told Irons to light it and when Irons refused defendant did it. He added that Ellerbe wrote something on the glass.

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[69] Shabazz used numerous names. He was referred to as Marlon Avila at the *Massiah* hearing, and Rayquan Shabazz at trial. He said that defendant knew him as Shabazz and is referred to herein as Shabazz.

[70] Shabazz referred to Irons as James throughout the statement.

Ellerbe, Ringy, Julies, and others, who defendant did not name, were present.[71] Defendant had an M1 rifle, and someone had either a .32 or .380. Shabazz thought defendant said that Ellerbe had the gun. After the crime, defendant, Ellerbe, Irons, and Julies went to Binghamton to sell drugs.

Defendant told Shabazz that he had dated Ellerbe's sister. Defendant said that Ellerbe was a snitch and he intended to harm Ellerbe. The ADA said, "Now I wan[t] [to] ask you a question about visitors that [defendant] may have had. Did [defendant] indicate to you that any relatives of either [Ellerbe] or [Irons] came to visit him?" Shabazz replied that Ellerbe's mother visited defendant in jail, but defendant did not know why. Defendant said he should have done "something" to her.

One day, when defendant returned from court, he told Shabazz that he had Ellerbe's and Irons' statements and pulled out paper and an envelope. Defendant did not mention the substance of the statements.

Sometime in December, Shabazz and defendant were in the pens waiting to go to court when defendant saw someone in a protective custody cell. Defendant repeatedly shouted "James," and "what the fuck you snitching for man." Defendant said that no one would have known about the crime if they did not talk.[72]

Shabazz Reports Defendant's Intent to Harm Irons

Around February 19, 1996, Shabazz called a prosecutor reporting that defendant wanted to harm Irons.

Shabazz's June 4, 1996 Sworn Audiotaped Statement Regarding Defendant's Threat to Harm Ellerbe's Family

On May 30, 1996, Homicide Bureau Chief Taub called an Assistant Deputy Warden for the Department of Corrections. Taub relayed that a CI provided information to the KCDA that defendant was arranging to have Ellerbe killed "by unknown persons sometime after defendant is transferred to a different facility due to his turning nineteen years of age."[73]

On June 4, 1996, Shabazz made a sworn audiotaped statement to the KCDA regarding Ellerbe. Ellerbe admitted to Shabazz that he and defendant were involved in the crime. Defendant told Ellerbe to testify against him and breakdown while testifying and cry that the D.A. and the police pressured him to implicate defendant. Defendant threatened to kill Ellerbe's family if he did not agree to the plan. Defendant gave Ellerbe a statement to memorize, which Shabazz did not see. Ellerbe agreed to the plan. Shabazz said that defendant was the father of Ellerbe's sister's child.[74]

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[71] Irons had mentioned Ringy, and Ellerbe had mentioned Julies in their respective statements. Defendant had not mentioned either of them.

[72] Audiotape A96-0005 and accompanying transcript.

[73] Taub wrote a letter to Gibson, dated 5/30/96, following up on their call that morning. Defendant had already turned 19 on 5/22/96.

[74] Audiotape A96-0884 (no transcript).

Shabazz Acts as an Agent for the Prosecution

Around mid-July 1996, Shabazz aided the prosecution's attempt to record defendant speaking about his intent to harm Iron.

THE PRE-TRIAL SUPPRESSION HEARING

On October 31, 1996, defendant's *Dunaway/Huntley/Wade* hearing commenced.[75]

The People's Case

Lt. Shaw

Shaw testified as follows:

On December 13, he and his detectives developed confidential information from "street people" implicating defendant, Irons, and Ellerbe (H.62). Shaw learned the names of the street people (H.63). Specifically, that day, Shaw had received a call from Officer Steed of the 88th Precinct informing him that she developed information about the crime (H.63, 66). Shaw had Scarcella and Chmil interview Steed (H.63-64, 67). They interviewed her for between an hour, and an hour and a half (H.67-68). Scarcella and Chmil then spoke with Steed's informant. They determined that the informant was credible. They briefed Shaw on the interview and Shaw determined that the informant was credible (H.69). Shaw did not document the interview or information (H.65).

On December 14, defendant was identified by other participants in the crime "as being the mastermind" (H.26-27, 62). Lt. Shaw consulted with the KCDA and decided to arrest defendant (H.71). Shaw and other officers conducted surveillance at and around defendant's home. On December 15, they arrested defendant in his home without a warrant. They entered with defendant's mother's consent (H.27-43, 78-81).

Det. DeRita

DeRita testified as follows:

On December 15, he interviewed Ellerbe, who implicated defendant in the crime and provided defendant's approximate address (H.102-05). During Ellerbe's interview a detective entered the room and showed Ellerbe a photograph, which Ellerbe identified as defendant (H.105-06). DeRita did not know which detective showed Ellerbe the photograph, but it was not Scarcella or Shaw. DeRita did not see the photograph (H.116-20). Later, Ellerbe was brought to defendant's interview room and, thereafter, identified defendant (H.102-06, 122-24). DeRita did not document the identification (H.124).

On December 16, DeRita conducted defendant's lineup, which Jacqueline Robinson viewed (Robinson was not named during the hearing because of a protective order) (H.106-07). Prior to

[75] The purpose of a *Dunaway* hearing (*People v. Dunaway*, 442 U.S. 200 [1979]) is to determine whether probable cause existed for a defendant's 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. The purpose of a *Wade* hearing (*United States v. Wade*, 388 U.S. 218 [1967]) is to determine whether the identification procedures were so improperly suggestive as to taint an in-court identification at trial.

Robinson's viewing, DeRita and an ADA were not satisfied that the five fillers sufficiently resembled defendant and replaced them (H.110-11). Defendant chose to sit in position number two and changed the seating position of two fillers (H.112). DeRita, an ADA, and McGarrity were present during Robinson's viewing. Robinson looked through the two-way mirror and "immediately picked out number two" (H.114). She identified defendant as the person she saw walking down to the subway station carrying a clear plastic bottle, and after the explosion running from the subway laughing and saying, "we got him" (H.114-15, 139).

Sgt. Stoecker

Stoecker testified as follows:

On December 15, at 2:00 a.m., he learned defendant's full name and address through a computer search of individuals named "Tommy" and "Thomas" residing on Herkimer Street between New York and Nostrand Avenues. After learning from detectives that defendant had a prior arrest, Stoecker did a computer search for the case number, retrieved the case folder, and obtained defendant's prior arrest photo. He later learned that Ellerbe identified defendant from that photo. Stoecker directed surveillance in the vicinity of defendant's residence (H.172-96).

Det. Scarcella

Scarcella testified as follows:

On December 14, he interviewed Irons, who confessed to committing the crime with Ellerbe and defendant. Before he spoke to Irons, Scarcella had not heard of Irons, Ellerbe, or defendant (H.207-09). On December 15, Scarcella interviewed defendant. Chmil was present (H.210).

Scarcella testified about the substance of defendant's three statements to him, what he said to defendant during the interviews, and the techniques he employed to obtain the confession. First, Scarcella told defendant that he knew defendant was involved in the crime, eyewitnesses had identified defendant, and defendant's accomplices were at the precinct. After defendant stated he was not involved, Scarcella told defendant that he understood "it went wrong and it wasn't supposed to go the way it did" (H.211). Scarcella then read defendant the *Miranda* rights from a card, which defendant, Scarcella, and Chmil signed. He again told defendant he knew defendant was involved and there were witnesses (H.211-14).

Scarcella took notes as defendant spoke, asked questions intermittently, and had defendant repeat the statements (H.215-16). Scarcella testified that the two pages containing defendant's three statements were "the exact statement I took" (H.215 [emphasis added]).

At 4:01 p.m., when the first statement ended, Scarcella accused defendant of lying. Scarcella told defendant that he knew defendant was at the scene and it was not supposed to happen the way it did. Scarcella then left the room for a short break (H.219-20).

When Scarcella returned he told defendant that he knew defendant was lying because defendant could not look him in the eye. Scarcella told defendant that his children, who were defendant's age, did the same (H.220). At 4:10 p.m., defendant made a second statement denying any involvement, and said he was only at the precinct because "the man died" (H.220-21). The second interview was about fifteen

minutes long. Scarcella testified that the second statement was not signed because it was short (H.228). Scarcella told defendant he did not believe defendant. Scarcella then left the room (H.221-22).

Fifteen minutes later Scarcella returned. He again accused defendant of lying and said he knew that things went bad. He put his arm around defendant, touched defendant's hand, and talked about the deceased's suffering and his own wife's month-long stay in the same burn center and room where the deceased died (H.222-23).

At that point, defendant asked about how much jail time he faced. Scarcella replied that he did not have the authority to discuss that. He asked defendant "[w]hat do you want to tell me?" Defendant then said, "okay, okay, man I was there" and confessed (H.223-24).

Defendant was offered food and had a Coke and cigarettes, which Scarcella noted on the side of the written statement (H.224, 226). Defendant had bathroom breaks, accompanied by either Scarcella or Chmil (H.245-46).

At first, Scarcella used a standard interview technique of discussing non-related topics, such as military service, marathons, and children (H.225, 279-80). He then used techniques to obtain a confession, such as calling defendant a liar, saying there were witnesses, and bringing Ellerbe into the room (H.262-63). Scarcella and Chmil accused defendant of lying and, at times, yelled at defendant. Scarcella called defendant a coward and told him to accept responsibility for his actions. Scarcella did not recall other names he called defendant (H.286-89). Scarcella punched a locker during the interview for dramatic effect. It was not intended to be a threat of physical violence (H.294-97). Defendant was not afraid of Scarcella (H.298).

Before defendant confessed, he asked to see his girlfriend and mother. Scarcella said he would see what he could do, but it was not conditioned on defendant making a statement (H.226-27, 276). He said he would try to arrange it, in the meantime defendant should tell him what happened (H.270-271). Scarcella did not know that defendant's mother was in the precinct at the time (H.272).

After Scarcella reviewed the statements with defendant, defendant agreed to make a videotaped statement to an ADA (H.227-29). The videotaped statement, which was about 50 minutes long, was admitted into evidence and played for the hearing court (H.241, 243). Defendant's right eye did not appear to be swollen on the videotape or at the time of the interview, and Scarcella did not observe any injury to defendant (H.243, 245, 259).

On cross examination, Scarcella acknowledged that before defendant was in custody, there were many suspects, or possible suspects, including Sport, Crime, Biz, Ringy, and an individual named S.McCargo. Scarcella said that S.McCargo was his real name (H.284). As part of the investigation, photographs of these individuals were circulated and shown to witnesses. Scarcella was certain those photographs were shown during canvasses conducted during the investigation (H.281-86).

The Defense Case

Sgt. Stoecker

Stoecker testified that he learned defendant's name and address at 4:41 a.m. on December 15, not at 2:00 a.m. as he had previously testified (H.305-12).

Det. Chmil

Chmil testified as follows:

"[I]t was an oversight" that Chmil did not sign defendant's second statement (H.440). Chmil also yelled at defendant, called defendant a liar, and told defendant they spoke to witnesses (H.445-48).

Although Chmil noted in his memo book, "interview Scarcella/DeRita," DeRita was not present during the interview. At some point DeRita briefly appeared to ask how things were going, and another time he brought Ellerbe into the room (H.452-54, 456-57).

The Hearing Court's Decision

In a written decision, the court held that probable cause existed for defendant's arrest based on Irons' and Ellerbe's information that "Tommy," who resided on Herkimer Street, was involved in the crime and Ellerbe's photo identification of defendant as Tommy. Consequently, the court denied suppression of defendant's statements and lineup identification as tainted fruit of an illegal arrest (Decision at 14-15).

THE MASSIAH HEARING

Defendant moved to suppress his incriminating statements to Shabazz. On November 7, 1996, a hearing was held pursuant to *Massiah v. United States*, 377 U.S. 201 (1964).[76]

The People's Case

Homicide Bureau Chief Taub

Homicide Bureau Chief Taub testified as follows:

On January 2, 1996, Rayquan Shabazz phoned him. Shabazz said that they had met, but Taub did not recognize the name. Shabazz said he was incarcerated with defendant, who told Shabazz that he was involved in the "Money Train case." Defendant admitted that he lit the token booth because one of his accomplices would not do it, and that he wanted to harm Irons and Ellerbe because they had implicated him in the crime. Taub told Shabazz not to take any action on the KCDA's behalf. Taub relayed the information to the Department of Corrections, and one of the trial prosecutors (M.479-84, 496).

Later, Taub learned that Shabazz had been an informant for the prosecution in a case tried by (former) ADA Buckvar. Taub was Deputy Chief of Buckvar's trial bureau at the time, but he was not involved in the case. Subsequently, when Shabazz was incarcerated and sought work release, Taub wrote a letter about Shabazz's cooperation in Buckvar's case. Taub made no recommendation and did not know whether Shabazz was granted work release (M.485-80, 490-93).

[76] The purpose of the *Massiah* hearing was to determine whether Shabazz was an agent of the prosecution when defendant made his incriminating statements, in violation of defendant's Sixth Amendment right to counsel.

Shabazz

Shabazz's testimony about defendant's admission to the crime was essentially the same as his audiotaped statement, including that: prior to going to court together, the extent of his and the defendant's conversation was to say hello and goodbye; defendant and Ellerbe devised the plan to rob the token booth after seeing "Money Train"; defendant committed the crime with Ellerbe, Irons, Ringy, and Julies; defendant was armed with a M1; Shabazz did not recall whether defendant said Ellerbe was armed with a .38 or .32; Irons sprayed the booth and when he refused to ignite it, defendant did; and Ellerbe wrote something on the glass of the token booth (M.525-26, 528, 536).

Shabazz added the following:

Sometime after defendant arrived at Rikers, someone reading a newspaper article about defendant's case asked defendant about it, and defendant took the newspaper and said he was not involved (M.523); in December, he and defendant were smoking marijuana in Shabazz's cell when defendant said he should not have done "this dumb shit" (M.524-25); and sometime in December, he was alone with defendant in the day room when defendant said that he was going to "get the chair for this" and he should have never gone with "these coward motherfuckers" (M.536).

Regarding defendant's intent to harm Irons, Shabazz stated that he and defendant first spoke the day after defendant arrived, but he testified that it was "Just regular . . . Hi and bye, that was it" (M.521). There came a time that they were both going to court and spoke in the holding cells. Shabazz asked where defendant's codefendant was, but defendant did not know. Looking at another holding pen, Shabazz said, "that's probably him right there." Defendant looked over and called out "James" repeatedly. A kid looked out and defendant called him a "snitch" and said he was going to get him. (M.521-23). Shabazz added that sometime in December, defendant asked his friend Mellow to sneak razor blades into Rikers, but Mellow got caught when he attempted to bring them in (M.529-31).

Shabazz testified about his call with the Homicide Bureau Chief Taub on January 2, explaining that he initially asked to speak to ADA Buckvar because he testified in one of Buckvar's cases. When Shabazz was informed that Buckvar no longer worked at the KCDA, Shabazz asked for Taub, who had worked with Buckvar. Shabazz testified that he told Taub the details of defendant's admissions, including that the defendant committed the crime with others, instructed someone to light the matches, and lit the matches himself when that person refused. Shabazz also told Taub about defendant's intent to harm Irons. Taub told Shabazz not to question defendant and said he would call Shabazz back. Taub made no offers or promises (M.531-33). Shabazz testified that his attorney asked Taub for a letter regarding Shabazz's prior cooperation (in Buckvar's case), but it did not help (M.562-63).

At some point after Shabazz spoke to Taub the defendant showed him a yellow envelope and said, "I got the statements" (M.534-35).

Thereafter, on January 11, 1996, Shabazz gave an audiotaped statement to two ADAs. They made no promises and instructed him not to question defendant (M.536-37).

In February 1996, Shabazz called the KCDA and informed a prosecutor that defendant intended to kill Ellerbe and Irons (M.537-38).

In May 1996, Shabazz and defendant were in the punitive segregation unit (the "bing"). Defendant pointed out Ellerbe to Shabazz.[77] Shabazz did not know Ellerbe at the time. Shabazz first spoke to Ellerbe after they had left the unit. Ellerbe volunteered to Shabazz that he was involved in the crime. Ellerbe said that defendant wanted Ellerbe to testify against him, break down during the testimony, and say the police and prosecution made him lie. Defendant told Ellerbe to memorize his testimony and threatened to kill Ellerbe, Ellerbe's sister, and her child if he did not cooperate (M.539-41). Shabazz saw Ellerbe three times and had spoken to him twice. Shabazz said Ellerbe only spoke to him about his involvement because Ellerbe knew Shabazz was friendly with defendant. He never asked Ellerbe any questions (M.633-40).

On or about June 21, defendant sent a letter (undated) from the segregation unit to Shabazz in his cell saying that Shabazz should have someone shoot into Ellerbe's apartment door (M.542, 546 [Shabazz's trial testimony regarding the letter]). Shabazz already knew defendant was going to get Ellerbe because, while they were in the bing, defendant would come to Shabazz's cell and talk to him through the slot (M.627-28). When defendant left the segregation unit, he asked Shabazz why Ellerbe was still alive. Shabazz said that it was too risky to have someone else do it and he would take care of Ellerbe (M.546-47).

Shabazz informed the KCDA about the letter. At the end of June 1996, at the KCDA, one of the trial prosecutors asked for Shabazz's help in obtaining evidence regarding defendant's plans to harm Ellerbe and Ellerbe's family (M.543-45, 547).

Approximately three weeks later Shabazz agreed to cooperate, and he helped obtain "between 2 and 3" audiotaped conversations between defendant and a KCDA DI (M.548-49).[78] Shabazz told defendant that the DI was his uncle. Defendant wanted Shabazz's uncle to ring Irons' bell and shoot whoever opened the door, to scare Irons.[79] Defendant said his friend Mellow could supply a gun to Shabazz's uncle. When Shabazz saw Mellow visiting defendant, Shabazz and Mellow discussed harming a member of Irons' family. Mellow said he did not have money for a gun (M.552-54, 549-50).

Shabazz testified that he had been convicted six times for various crimes between 1984 and 1991 but he did not commit most of them (M.587-607). He had been a prosecution witness twice before: once for ADA Buckvar, and once for Queens County ADA Schaefer (M.517-18). In exchange, the prosecution recommended early release and parole on Shabazz's pending cases (M.586, 614-15).

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[77] The segregation unit was on the first floor of the Southern Wing of Building 1. It is designated as "1 Lower South" or "1LS."

[78] During the recorded conversations, defendant repeatedly told Shabazz's "uncle" that he did not know Irons and that Irons just put defendant's name into the crime.

[79] Shabazz testified that he "just recently" learned from a DI the identity of the person defendant wanted to harm, because Shabazz did not hear the phone conversation (M.550). Shabazz then testified he knew what defendant wanted Shabazz's "uncle" to do because defendant had told him (M.552).

On October 30, 1995, 10 days into his work release, Shabazz was arrested in Queens County for burglary (M.517-18). He asked his mother to send him his bible, which contained phone numbers, including KCDA numbers (M.578). At the time of his hearing testimony, Shabazz was incarcerated on a Queens case and a Rockland County burglary. Initially, Shabazz testified that he was not promised anything in exchange for his testimony against defendant. He then admitted that the prosecution promised to recommend concurrent six-year jail sentences for those two cases, in which he pleaded guilty and had not yet been sentenced (M.517, 555-57, 566-69, 573-75).

Before talking to defendant, Shabazz realized that his next conviction would be his third felony, which could expose him to a life sentence (M.586). When defendant spoke to him, Shabazz considered making a deal with the prosecution (M.578). Shabazz testified that inmates just offer him information about their crimes, and he never asks them questions (M.581).

The Defense Case

Defendant did not present any evidence or testimony at the *Massiah* hearing.

The Court's *Massiah* Decision

In its written decision, the court held that Shabazz did not become an agent of the prosecution until June 1996, and that defendant's statements to Shabazz prior to that time as well as defendant's letter to Shabazz, which fell within the same period, were admissible. Moreover, defendant's statements to Shabazz about retaliating against Irons and Ellerbe and his efforts to do so were admissible as evidence of consciousness of guilt. The court suppressed defendant's statements to Shabazz after June 1996, and the recorded conversations between defendant and the KCDA DI (Decision at 19-20; *also* oral decision at T.1308-09, 1313).

THE TRIAL

Defendant's trial commenced on November 18, 1996.[80]

Opening Statements

The People

The prosecution argued, among other things, that prior to defendant's videotaped statement, he gave a statement to Scarcella (T.1331-32). Defendant first denied committing the crime. Scarcella did not believe him and employed some "dramatics" (T.1332). Scarcella "faithfully" wrote out defendant's statement, and in a matter of hours defendant "realized the gig was up" (T.1333).

The Defense

Defense counsel attacked Shabazz's credibility, but mainly focused on Scarcella. He argued, among other things, that defendant insisted he was innocent "when he was trapped in a tiny interrogation room and held prisoner for three hours by two white detectives: Detective Chmil and Detective Scarcella" (T.1340). Scarcella cursed at defendant, called him a liar, and smashed defendant's head into a wall locker, causing a cut to open above his right eye. Then Scarcella wrote out a confession for

[80] Ellerbe and defendant were tried jointly before different juries. Irons was tried separately.

defendant to sign, which defendant did because he "would have signed a confession to every open case in the City of New York to get out of that room" (T.1342). The detectives cleaned defendant up and had defendant repeat the statement on videotape, during which the prosecutor did most of the talking. Counsel argued that defendant's wound was visible on the video (T.1342-43).[81]

Regarding Robinson, counsel argued, among other things, that she was shown photographs, "Detective Scarcella again," and picked out [S.]McCargo "who it just so happened was their top suspect in the case at that time" (T.1345).

The People's Case

Fire Marshall Fash

Fash testified as follows:

He arrived at the scene at 1:54 a.m. and observed three walls of the token booth had been "blown apart" and lay on the ground with debris spread all around (T.1432-33). The front wall containing the coin aperture (token slot), and a partial side wall remained standing (T.1433).

A two-liter plastic soda bottle, with no label, was about one foot in front of the booth. Apparently, it had been crushed or squeezed by hand. It contained a liquid, which smelled like and had the consistency of gasoline (T.1437-39, 1449).

A full book of matches was about three feet in front of the booth. The matches were evenly burned and apparently ignited simultaneously. The matchbook cover had no fire damage, indicating that it was folded back when the matches were lit (T.1437-39).

Fash concluded that the fire's point of origin was the coin aperture tray. Fash opined that based on its size, the booth exploded quickly after the gasoline was ignited (T.1451, 1454). The matches acted as a "little torch" and did not require a lot of gasoline. Less than a pint could have been used (T.1456). Fash examined the remains of the booth to determine if gas had been poured in any other part of the booth and concluded that there was "no other pour of gasoline on the booth" (T.1450).

Near the booth, Fash also observed a rifle, a transit badge, and a "cleaning bottle" containing Windex, which is not flammable (T.1450, 1452).[82]

Officer Michael Santo

Officer Santo testified as follows:

During the 10 to 15-minute ambulance ride to Cornell Medical Center, the deceased intermittently provided descriptions between his cries for help and for his family (T.1476, 1478). The deceased described two "male blacks," 20 to 25 years old. One was a light-skinned, about 6', and 200 lbs.,

[81] Throughout the trial, defense counsel attempted to attack Scarcella's credibility by raising evidence of Scarcella's alleged misconduct in other investigations. Counsel's attempts are discussed in CRU's analysis.

[82] It was stipulated that MTA employee Cheryl Stone would have testified that she regularly worked at the Fulton/Kingston token booth and that the Windex bottle recovered from the scene was used to clean the booth's windows (T.2090-91). Det. Gannalo testified that the recovered rifle was a .30 caliber semi-automatic with an 18-inch barrel and overall length of 26 inches with a folding stock, complete folded. It was loaded and operable (T.1494, 1496, 1499).

wearing a brown jacket and green sweater. The other one was dark-skinned, about 5'6" and 150 pounds (T.1477). One squirted a substance into the token aperture. The deceased did not specify which one. Nor was he clear on which one lit the match (T.1478).

Jacqueline Robinson

Jacqueline Robinson testified as follows:

On November 26, 1995, at about 1:40 a.m., she was sitting in the passenger seat of her car.[83] She was parked on Kingston Avenue between Fulton and Herkimer Streets (T.1511-13). The car was "on the corner of Herkimer." The court asked, "At the corner?" Robinson replied, "[a]t the curb, three car lengths away from the train station" (T.1516).[84] Robinson was with a coworker friend, who was "going through trial and tribulations" (T.1512).

They had been parked in that location for about an hour when Robinson saw defendant and another guy "coming from Herkimer" (T.1513, 1525).[85] Robinson added that she always looked in her rearview mirror "because that area is kind of shady at times." Defendant and his friend looked shady, liked they were up to something (T.1513).

Defendant had his arm tilted with a clear plastic soda bottle laying across his forearm (T.1514). The bottle had a white paper or cloth hanging "over a little bit" (T.1515). Defendant's friend had his hand straight as if he was holding a baseball bat (T.1514, 1518-19).

Defendant was big and husky and looked "Hispanic/black" (T.1515-16, 1525). Defendant's friend was tall, slim, and dark-skinned black (T.1515).[86] They were on the same side of the street as Robinson (T.1517). They walked side-by-side (T.1515). Defendant was closer to Robinson (T.1517). They walked at a normal pace to the train station (T.1517, 1519). Once they were out of sight Robinson felt comfortable and continued her conversation with her friend. Seconds after defendant and his friend went down in the subway station, Robinson heard "a small little boom," which she thought was a car accident (T.1517, 1548).

Defendant and his friend then came out of the subway (T.1517, 1519). They walked fast and passed her car, again, on the same side of the street (T.1520).[87] Defendant was closer to her car. As they passed by, defendant said, "I got that motherfucker, I got that motherfucker" (T.1517, 1520-21).[88]

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[83] In all her pretrial accounts, Robinson consistently stated that she was the driver.

[84] In all her pretrial accounts, Robinson placed her car on Kingston. Sloan's DD5 containing Robinson's initial account indicates that she was on Kingston near Herkimer, "between Kingston and Atlantic." In her sworn audiotaped statement to ADAs, she was parked on Kingston, "near the park," 25 feet from the getaway car on Herkimer off Kingston. In a prior proceeding, Robinson testified that she was parked on Kingston near Herkimer on the opposite side of the street. The getaway car on Herkimer was across the street from her car.

[85] In her account to the detectives, Robinson said that she had noticed the two boys standing on the northeast corner of Herkimer. During her testimony, Robinson identified defendant in court (T.1525).

[86] In a prior proceeding, Robinson testified, "they were Hispanic and black – white."

[87] Robinson testified in a prior proceeding that the two males walked by her car on the opposite side of the street from her. She did not specify whether they walking to or from the subway at that time.

[88] Robinson used the abbreviation "MF" rather than profanities (T.1520-21).

Defendant and his friend were no longer holding anything (T.1517, 1521). They jumped in a black car, which drove off. The car had been on the corner of Herkimer, behind Robinson to her right (T.1521).

Robinson next saw the deceased emerge from the subway with "fire on his back." Robinson's friend drove her car over to the deceased, who was badly burnt with "skin hanging from his clothes" (T.1523). Robinson, her friend, and the driver of a red Pathfinder jumped out of his car and tried to help the deceased. Robinson told the deceased to roll on the ground and her friend kept "fanning him, fanning him" with his coat and the fire went out (T.1522-23). Robinson then heard a big explosion, which shook her car "like a hurricane" and caused her car alarm and other alarms to go off (T.1523, 1549).

Robinson did not call the police, "[b]ecause they put your name in the newspaper" and falsely accuse people of crimes. She denied there was any other reason. Counsel asked Robinson that when they had talked in the hallway earlier Robinson mentioned another reason, that she was afraid that the police might blame her for the crime. Robinson said, "Yeah, well they do that" (T.1549-50).

The following day (Monday) when Robinson was at work, she looked in the newspaper for her horoscope and saw an article about the fire (T.1524). She told her supervisor what had happened. Robinson's supervisor wanted to call the police, but Robinson refused to speak to "blue coats." Her supervisor called TIPS. Robinson was nervous and scared when detectives arrived. She agreed to talk to them provided they did not mention her or her friend to the press (T.1524-25).

Robinson engaged in three photographic identification procedures.[89] First, she viewed a book of photographs and did not recognize anyone (T.1526-27).[90]

Next, on December 7, Scarcella gave Robinson an envelope containing six photographs to view and told her that it was okay if she did not recognize anyone (T.1527-28, 1536). Robinson identified S. McCargo's photograph telling the detectives that he (McCargo) was "light-skinned, thick eyebrows." Robinson testified that she told the detectives that the photograph looked like the heavy-set guy she had seen (T.1528).

On cross examination, Robinson admitted that during her sworn audiotaped statement, when the prosecutor asked about her December 7 identification, she told the prosecutor, "I'll never forget his face as long as I live" (T.1538). Robinson then testified, "I said that picture looks like the guy, looks like the guy" (T.1538).[91] But she then twice again admitted that she had stated during her sworn statement, "I'll never forget his face as long as I live" (T.1539, 1540).[92] Robinson did not know McCargo's name. When asked whether McCargo and defendant looked alike she testified, "No, the

[89] Based on NYPD records and materials in the KCDA trial files, it appears that during the investigation Robinson may have viewed as many as eight sets of photos, six in the form of photo arrays.

[90] There are no documents regarding this identification procedure.

[91] Apparently, Robinson was referring to what she had just testified—that she told Scarcella it looked like the guy— and not what she said during her sworn interview.

[92] McCargo's photograph was admitted into evidence and published to the jury (T.1539).

pictures are similar." She explained that she identified McCargo by his "complexion and the eyebrows," but "if I see you in person, I know you" (T.1540).[93]

Robinson also acknowledged that on December 8, during her sworn audiotaped statement, she viewed a set of "tiny" photographs and identified an individual (R. Butler) as the tall, slim and dark-skinned black guy with a bat (T.1529, 1546).[94] She did not know Butler's name (T.1547).

On December 15, at 11:00 p.m., the police called Robinson to view a lineup at the precinct.[95] The weather was freezing cold, and she did not feel well. She asked to view the lineup the following morning (T.1529-30). The following morning, December 16, Robinson drove to the precinct to view the lineup. A detective told her not to worry if she did not identify anyone. He assured her that the lineup participants could not see her (T.1530-31).

Robinson testified that she looked at all the faces and recognized defendant. They were sitting straight with "[b]ig numbers in front of them" (T.1531). She also testified that she was asked if she wanted them to approach the window, and as they started to approach, Robinson recognized defendant, number two, "right away," as the one who said, "motherfucker" (T.1532-33).[96]

Ricardo James

Ricardo James' testimony was more detailed than his prior statement. He testified as follows:

On November 25, 1995, at about midnight, Ricardo returned to Brooklyn after seeing a movie with a friend in Manhattan. They went to a party on Marcus Garvey and Fulton, about two blocks from the Kingston/Fulton train station. There were no drinks at the party. Ricardo and his friend left to buy liquor at a 24-hour store, "Charlies," on the corner of Kingston and Fulton, where purchases were made through a window. When Ricardo neared the window, he heard a loud explosion. His friend fled and he followed. Ricardo stopped in the middle of the street, between Fulton and Throop. He turned around, saw dark smoke coming from the sidewalk subway grate and headed back towards the store (T.1692-97).

As Ricardo reached the corner of Kingston and Fulton, he heard yelling for help, turned, and saw the deceased emerge from the train station, with his entire body on fire. Ricardo stepped back as the deceased headed toward him because he did not want the deceased to touch him (T.1697-98). Someone in a red jeep came out with a towel and Ricardo helped that person extinguish the flames on the deceased (T.1699).

Ricardo then heard a "small boom" (T.1701). When the police arrived, he left the scene without speaking to them. He went home, told his mother what had happened, and then returned to the party (T.1701-02).

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[93] McCargo was 6'2" and 225 lbs. (Stipulation: T.2133). Defendant was 5'6" and 165 lbs.

[94] Butler's photograph was admitted into evidence and published to the jury (T.1547).

[95] Outside the presence of the jury, the parties agreed that Scarcella called Robinson the night of December 15 (T.1794).

[96] As stated, Robinson did not use profanities and testified "MF." Three photographs of the lineup were admitted into evidence and published to the jury (T.1533-34).

On December 13, Ricardo was on the phone in the train station when two plain-clothed black male officers approached, asked if he was Ricardo James, and said that they wanted to question him at the precinct. Ricardo agreed to go. Ricardo was with his friend James (Irons). Ricardo looked "down [at Irons] and said, you want to come? And [Irons] said, 'sure"' (T.1705). Ricardo knew Irons for two years. They lived in the same building. Ricardo did not know Irons' last name. Ricardo and Irons were transported to the precinct in an unmarked car and not handcuffed (T.1703-05).

At the precinct, Ricardo was placed in a room and Irons sat in the hallway/waiting area. Ricardo was in the interview room for about an hour and a half or more. Two detectives came in and accused Ricardo of being involved in the crime (T.1706-07).

At this time, defense counsel asked for a sidebar and argued that Ricardo's testimony was elicited to show that Scarcella, who interviewed Ricardo, "is one young black man" Scarcella did not beat or arrest (T.1708). Counsel reserved the right to present evidence of Scarcella's misconduct—attacking black males during interrogations and conducting photo identification procedures where the eyewitnesses identify someone who later turns out to be the wrong person (T.1709). The prosecution replied that counsel raised the Scarcella issue when he argued in his opening that two white detectives harassed and intimidated a black person. The prosecution agreed to only elicit that Ricardo told the detectives what he knew and went home (T.1710). Thereafter, Ricardo testified to that (T.1712).

At a bench conference following Ricardo's testimony, the court asked how Ricardo first came to the detectives' attention. Counsel said that he did not know the answer and the court erroneously speculated as to the cause (T.1717). In fact, Ricardo was brought to the precinct based on a CI's information that Ricardo confessed to the CI that he had been involved in the crime. The People did not correct the record or answer the question directly.

Det. Scarcella

Scarcella's testimony was essentially consistent with his hearing testimony. He testified as follows:

He interviewed Ricardo James, Darlene Williams, Jacqueline Robinson, Irons, and defendant (T.1797-98).[97] It was stipulated that on December 14, 1995, Irons "gave a statement to the police in which he provided details of the token booth robbery" (T.2133).

Scarcella first met defendant when he was apprehended (T.1799). Scarcella testified about *Mirandizing* defendant, the techniques he used to obtain defendant's statements, and the substance of defendant's three statements to him, which were admitted into evidence (T.1800-19; People's Exhibit 19 [written statements]). Defendant asked to see his girlfriend "to get his rocks off" and asked to see his mother "to take a shower." Scarcella told defendant that he would see what he could do (T.1820). Scarcella acknowledged that while he memorialized that defendant asked to see his girlfriend, he did not note

[97] The prosecution informed the court that notes might have been taken during Robinson's initial interview could not be located and suggested an adverse inference charge (T.1795-96). The court charged the jury that: on 11/27/95, when Robinson was first interviewed, the detectives took notes, but failed to preserve them; however, a police report based on that interview was written and disclosed to the defense, thus the jury may infer that the notes would contain information harmful to the prosecution's case (T.2326).

the reason. Scarcella did not allow defendant to see his mother (T.1828). Scarcella was present during defendant's videotaped statement (T.1822).

Regarding Jacqueline Robinson, on December 7, at about 12:26 a.m., in an unmarked car with Chmil, Scarcella handed Robinson an envelope containing a photo array. Scarvey McCargo was the subject of the array. Robinson identified McCargo (T.1822-23).

On December 8, at 6:45 a.m., at the KCDA, Scarcella, with DeLucia present, handed Robinson an envelope with photos, and she identified R. Butler (T.1823-24, 1832, 1836).[98] Neither McCargo nor Butler were arrested in this case (T.1824). Scarcella did not recall whether he phoned Robinson to view the lineup (which he did) (T.1825).

On cross examination counsel showed Scarcella a photograph of McCargo. Scarcella said he did not remember the name but remembered the face (T.1829).[99] Scarcella then acknowledged that it was a photo of McCargo. Scarcella first testified that did not know whether it was the same photograph in the array he showed Robinson on December 7, but then acknowledged that it was (T.1829-30).

Scarcella acknowledged that Robinson had identified McCargo in the photograph, but he did not recall whether she hesitated (T.1833-34).[100] He did not recall that the deceased described one of the men as 6', light-skinned black. Scarcella then agreed that McCargo was the suspect who was identified as a tall, light-skinned black male. Scarcella did not know McCargo's height or weight, and he never interviewed McCargo (T.1830-32). Scarcella did not know that McCargo's nickname was Andre (T.1832).[101]

The next day, on Dec. 8, Scarcella brought Robinson to the KCDA where she identified Rocky Butler in a photo array (T.1834, 1836-37).

Scarcella testified about defendant's statements to him, and they were admitted into evidence (T.1804-18). Defendant signed the last statement (his confession), but Scarcella and Chmil forgot to sign it (T.1818). Chmil was present during the entire interview. DeRita was present for about 20 minutes during defendant's first statement (T.1847, 1862).

During the three hours between defendant's first statement and ultimate confession to Scarcella, Scarcella accused defendant of lying about a dozen times, yelled and cursed at him, and banged on a locker (T.1849-55). He knew defendant was lying because defendant could not look at him (T.1815).

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[98] The prosecutor asked Scarcella what happened with respect to McCargo and Butler. Counsel objected, but Scarcella blurted out, "We investigated and found that they were in Maryland." The court sustained the objection (T.1824). The prosecution then argued in summation that Scarcella "investigated" McCargo and Butler and "determined they weren't the culprits." Counsel objected, again, and the court sustained the objection (T.2296). No curative instruction was requested or given.

[99] During the pre-trial hearing days earlier, Scarcella testified that S. McCargo was one of the individuals whose photograph the police had during the investigation, and that S. McCargo was his true name. S. McCargo was actually S. McCargo, Jr.

[100] It was not elicited that Scarcella's DD5 indicated that when she saw the photograph Robinson started to shake and repeatedly scream "that's him" and cried.

[101] McCargo used the name A. McCarlo in an out-of-state case. DCJS does not reflect McCargo using that name for any New York arrest.

Scarcella first testified that he wanted to "bring about a sense of drama," but then acknowledged that he intended to scare defendant, "to a degree" (T.1851, 1855). Scarcella testified that defendant was not afraid of him, and he did not physically threaten defendant (T.1857).

Video Technician Ronald Nelson

Defendant's videotaped statement to the ADA was admitted into evidence through KCDA Video Technician Ronald Nelson and played for the jury (T.1574-75, 1587; People's Exhibit 13).

Det. DeRita

DeRita's testimony was consistent with his hearing testimony. In pertinent part, DeRita testified as follow:

On December 15, 1995, at about 2:00 p.m., he brought Ellerbe into defendant's interview room (T.1769-70).[102]

On December 16, DeRita arranged defendant's lineup. Defendant chose position number 2 (T.1776). DeRita phoned Robinson and told her to come to the precinct to view a lineup.[103] Robinson drove herself there and viewed the lineup at 11:00 a.m. (T.1771-72, 1781). She was "a little nervous" (T.1781).

Rayquan Shabazz

Shabazz testified as follows:

His criminal history included two burglary convictions for which he was incarcerated at the time of his testimony. While incarcerated he testified as a prosecution eyewitness in a Queens homicide case [for ADA Schaefer] and in exchange received a letter of recommendation. He also testified as a witness for KCDA ADA Buckvar about what the defendant in that case had told him. In exchange, Homicide Bureau Chief Taub wrote a letter of recommendation for work release (T.1968-72).

On October 17, 1995, Shabazz was granted work release. On October 30, he was arrested on a Queens burglary. Shabazz lied about his age to be placed in the juvenile facility because he wanted to look out for his co-defendant (T.1973-74).

On or about December 16, defendant was placed in the cell across from Shabazz and they became friendly (T.1974-75).[104] The first conversation he had with defendant about defendant's role in the crime occurred in the day room when someone was reading a newspaper account of the crime for which defendant was in custody. Defendant took the newspaper, said "I didn't do this," and went to his cell with the newspaper (T.1976).

Regarding defendant's confession, Shabazz's testimony was mostly consistent with his prior account, including that Irons complied with defendant's instructions to spray the token booth door, and when Irons refused to light the door, the defendant took the matches and lit it himself. Shabazz further

[102] It was stipulated that if Stoecker testified, he would testify that defendant's name first came up on December 15, and at around 5:00 a.m., and he ordered surveillance of defendant's home (T.1690).

[103] DeRita did not say when he phoned Robinson, and there is no documentation reflecting the time.

[104] During his testimony Shabazz identified defendant in court (T.1974).

testified that Irons refused defendant's instruction to spray the inside of the booth, so defendant sprayed inside and lit it on fire. Shabazz initially said that Irons sprayed the door and inside the booth. Asked if defendant sprayed anything, Shabazz then said that defendant sprayed inside the booth. Shabazz also testified that Ellerbe, Ringy, and Julies were at the scene and Ellerbe wrote something on the booth (T.1980-81).

Shabazz testified about his conversations with Taub, adding that he told Taub that defendant "would try and cut [Irons] or something" (T.1983). Sometime after he spoke to Taub, defendant returned from court one day and said he has the statements of everyone who was "snitching." Defendant knew that Irons snitched. He did not know about Ellerbe and would find out from the statements. Defendant had the papers on his bed and told Shabazz to "read this." Shabazz refused because he did not "like reading people's paperwork, people's law work and everything like that" (T.1983-85).

Shabazz knew Mellow, who was defendant's "man." One day, during a "blizzard," defendant was expecting Mellow to bring razor blades to the jail (T.1987).[105] Later that evening, around 9:30 p.m., defendant told Shabazz that Mellow was arrested for bringing in the razor blades (T.1988).

In February 1996, Shabazz reported to a prosecutor that defendant planned on getting into the protective custody unit to harm Irons because Irons "put his name in this bullshit" and defendant believed that Irons was going to testify against him (T.1990). Shabazz testified that, one day, when he was in the segregation unit, coming out of the "galley" with his bags and going to his cell, he was walking with defendant and saw a "little skinny kid" staring at him. Shabazz asked, "Who is that?" and defendant replied, "That is my co-defendant [Ellerbe]" (T.1991). Defendant said that Ellerbe also snitched on him, that he believed Ellerbe would testify against him, and that he wanted to harm Ellerbe as soon as he had the chance (T.1994). Defendant asked Shabazz to get defendant's crew in jail to take care of Ellerbe for him and Shabazz agreed to do so (T.1993). Shabazz reported this information to the KCDA, which subsequently had Ellerbe moved (T.1994).

Later, Shabazz and defendant were in the segregation unit. After Shabazz left the unit, defendant, who was still there, sent a letter to Shabazz asking him to take care of Ellerbe. Upon receiving the letter, Shabazz contacted DI Buthorne, who worked with the trial prosecutors (T.2002). Defendant's letter, which was undated, was admitted into evidence (T.1997; People's Exhibit 27). Shabazz read the letter aloud in court and explained the phrases and jargon. For example, the letter was addressed to B12, which Shabazz explained was him (T.1997).

Furthermore, Shabazz testified that "[j]ust go to the door and do your thing" referred to defendant previously telling Shabazz to get someone to shoot through Ellerbe's door or whoever opened it (T.1997-98). Defense counsel confronted Shabazz with his prior testimony that defendant wanted someone to shoot through Irons' door (*see Massiah* hearing testimony]). Shabazz did not recall testifying to that (T.2007). After he was provided with and read that portion of his prior testimony, Shabazz explained defendant wanted to get "both of them" (T.2008).

[105] Shabazz volunteered that Mellow was bringing razor blades "so [defendant] could get Ellerbe." The court sustained counsel's objection, and the testimony was stricken (T.1987).

The letter also stated that a gun would be waiting "in town" for Shabazz when Shabazz gets out (T.1999). Shabazz explained that he falsely told defendant, and everyone else, that he (Shabazz) would be released in a couple of months, because he did not want anyone to know that he was facing a sentence of sixteen years to life (T.2002).

When Shabazz gave prior statements to the KCDA no promises were made, and he was told not to question defendant. At that time, Shabazz had pending cases in Queens and Rockland counties (T.1985-86). Shabazz's lawyer told Shabazz he "heard something" about the KCDA recommending a prison term of six years to life on each of those cases (T.1985, 2002). At the time of his testimony, Shabazz had pleaded guilty on the Rockland County case and was sentenced to a prison term of six years. Shabazz expected to be sentenced to a prison term of six years to life on the Queens case. If he lied at trial, he would be sentenced to a prison term of 25 years to life on each case (T.2003-04). On cross examination, Shabazz admitted that he would lie to avoid going to jail, and that he had lied in the past to avoid jail (T.2009).

John Paul Osborn

Handwriting identification expert John Osborn testified as follows:

He compared the letter to Shabazz, which had no name or signature (People's Exhibit 27) with writing samples defendant provided (T.2073-74). Osborn concluded that defendant "definitely" wrote the letter (T.2076-77). Osborn acknowledge that stress or coercion can affect handwriting, but the writing in the letter to Shabazz was consistent and showed no signs of stress or coercion (T.2080-81).

Corrections Officer Windell Bullock

Rikers Island Corrections Officer Bullock testified that on January 7, 1996, there was a snowstorm. Mellow was at Rikers that day to visit defendant and was arrested for possessing a razor (T.2087-88).

The Defense Case

Darlene Williams[106]

Darlene Williams' testimony was essentially to the same as her prior statements. Williams testified as follows:

While looking out the window she saw a man whom she described as a "white man." He was "tall, skinny" wearing dark clothing, and "walking very fast" (T.2100-01). He was coming from the subway station and was across the street from her (T.2101). A short, heavy-set "white male" came out of the station on her side of the street, crossed Kingston, and joined the tall male (T.2101, 2112). The short man appeared injured because he was "limping fast" (T.2101). The men walked to Herkimer (T.2101).

At that time, Williams went to her neighbor's apartment and saw the two men turn the corner and get into a car parked on Herkimer (T.2116). There was "a firebox, a light," and a dark car parked "right

[106] Williams was Ellerbe's witness, but she testified before defendant's jury as well. She testified that she knew Ellerbe and did not see him that night (T.2103).

there" on the corner (T.2101).[107] Regarding the car Williams said, "You could see that very good" (T.2101). The car headed towards the Albany houses (T.2117).

Williams also saw a young dark-skinned male on the corner near the subway entrance but did not see him come out of the station (T.2101-02, 2113).[108] At the time, he was walking towards Fulton and turned left towards Brooklyn Avenue (T.2113, 2127).

On cross examination, Williams acknowledged that she was mistaken in describing the two boys as white, and said she was upset when she spoke to the 911 operator and described the men as "white" (T.2114-15, 2127). Chmil and Scarcella told her that she was wrong, and that the two boys were light-skinned. She then testified they were light enough to pass for white-skinned (T.2127-28, 2131).

Williams viewed a lineup (defendant's lineup) and did not recognize anyone. She did not know defendant and was unable to identify him in the courtroom (T.2130-31).

The Defense Summation

Counsel argued that defendant did not fit either description provided by the deceased (T.2232-33). Counsel also noted that when Scarcella showed Robinson photographs on December 7, which included his then primary suspect, Robinson identified S.McCargo, saying that she would never forget that face as long as she lives. Counsel argued that despite Robinson's testimony that defendant and McCargo looked alike, the jury can see that is not the case (T.2234-36). Counsel pointed out Robinson misidentified Butler as well and maintained that she was unreliable.

Counsel argued that defendant's confession was obtained after defendant spent three hours alone in a room with Scarcella and Chmil, and that it was involuntary and false. Scarcella knew that his techniques were "wrong" and that after hours of grilling and repeatedly berating defendant, defendant finally "broke." Counsel argued that Scarcella beat defendant and slammed defendant's head against a locker, and that defendant sustained a swollen and bruised eye as a result, which, counsel maintained, was visible on the videotape and in a photograph taken the next day (T.2247-48).[109]

Counsel urged the jury to observe that the prosecutor did most of the talking on the videotape, not defendant. Counsel cited contradictions between defendant's videotaped statement and the testimony of prosecution witnesses. For example, defendant said that the keys to the getaway car were supposed to be in the ignition, but Robinson said someone was waiting in the car. Furthermore, defendant said he walked to station from Herkimer with Irons and Ellerbe, but Robertson testified two people passed by (T.2253).

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[107] Williams previously stated that the car was parked on Herkimer between a fire hydrant and a light pole.

[108] According to Scarcella's DD5, Williams said that she had seen the third individual come out of the station. In her sworn audiotaped statement to the KCDA in early December, she said that she did not know from where the third individual came.

[109] CRU does not see any injury on defendant either on the videotape or arrest photo. Counsel also argued that defendant's signature on the confession was different than his signature on the statement in which defendant maintained his innocence. Counsel noted that Osborn indicated that handwriting could change under stress and suggested that the signature on the confession was a conscious or unconscious signal by defendant that he was abused (T.2248; *see also* CRU interview of Osborn).

The Verdict and Sentence

Defendant was convicted of two counts of Murder in the Second Degree (P.L. § 125.25[2], [3] [depraved indifference and felony murder]) (T.2370-71).

On December 17, 1996, defendant was sentenced to concurrent terms of imprisonment of twenty-five years to life on each count (S.17).

POST-CONVICTION PROCEEDINGS

On his direct appeal to the Appellate Division, Second Department ("Appellate Division"), defendant claimed, among other things, that: (1) his statements to law enforcement should have been suppressed because they were the fruit of an unlawful arrest and were involuntary; (2) Shabazz's testimony was improperly admitted into evidence and improperly consisted of evidence of uncharged crimes; and (3) the evidence was legally insufficient to establish his guilt.

On October 25, 1999, the Appellate Division unanimously affirmed the judgment. It held that the police had probable cause to arrest defendant because one of his accomplices implicated him and based on "the totality of the circumstances" defendant's statements were voluntarily made. *People v. Malik*, 265 A.D.2d 577, 578 (2d Dep't 1999).

The Appellate Division held that Shabazz's testimony was properly admitted into evidence because he was not an agent for the police regarding that testimony, and his testimony pertaining to uncharged crimes was relevant to defendant's consciousness of guilt. *Id.* at 578.

Without elaborating, the Appellate Division held that the evidence was legally sufficient to establish defendant's guilt beyond a reasonable doubt, and the verdict of guilty was not against the weight of the evidence. *Id.*

Leave to appeal to the Court of Appeals was denied. *People v. Malik*, 94 N.Y.2d 904 (2000) (Ciparick, J.).[110]

CRU INVESTIGATION

CRU investigated defendant's conviction (and Irons' and Ellerbe's) as part of its investigation into Scarcella's cases. CRU reviewed voluminous documentary evidence and conducted myriad interviews. The most relevant interviews are discussed below. CRU discovered new evidence—and material evidence that existed at the time—about which the jury never heard.

The Attorneys

CRU interviewed defendant's trial attorney and the trial prosecutors. Nothing new was learned except that one of the prosecutors explained that to ensure Robinson's continued cooperation she was not compelled to disclose the identity her male companion in the car.

Law Enforcement Officers

[110] Defendant did not file any collateral motions or otherwise challenge his conviction.

Lt. Shaw

CRU interviewed Shaw by phone. As he did at trial, Shaw maintained that Steed's CI provided information to Scarcella and Chmil leading to the arrest of defendant (and Irons and Ellerbe).[111] Shaw added that the CI had said that either defendant or Irons or Ellerbe was related to the CI.

Officer Steed

CRU interviewed Steed, who said brought the CI to Shaw to register her as an informant so the CI could be paid for her cooperation. Steed did not know what information the CI provided to the detectives.[112]

Det. DeLucia

CRU interviewed DeLucia by phone and in person at the KCDA. DeLucia said he was lead precinct detective but played a secondary role because he was a relatively new detective. He never spoke to the prosecutors.

DeLucia did not recall any details and had no relevant information concerning the defendant.

Fire Marshal Robert Fash

CRU interviewed Fash at the KCDA. Fash explained that it was possible that the flame from a lit match held too closely to the vapors of the gasoline in the aperture could have unintentionally ignited the fire. It was likely that the individual immediately in front of the aperture would have been burned and was wearing the burnt glove recovered outside the booth.[113]

Maryland State Attorney's Office

During the original investigation, it was determined that McCargo was in or near Baltimore at the time of the crime. CRU asked the Maryland State Attorney's Office whether McCargo had been arrested or was in custody in Maryland around the time of the crime. The State's attorney conducted a fingerprint-based record check and determined McCargo had not been arrested in Maryland before 1996.

Civilian Witnesses

Darlene Williams

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

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[111] A New York Times article reported that Chief of Detectives Charles Reuther had stated Irons was brought to the attention of the police by an informant (*see* https://www.nytimes.com/1995/12/15/nyregion/police-arrest-18-year-old-in-subway-fire.html?smid=url-share). CRU did not find any corroborating evidence.

[112] Since no one was able to provide any useful or meaningful information about this CI, CRU was unable to identify her.

[113] The glove could not be located for DNA testing by either the OCME or the NYPD Property Clerk. A receipt in the KCDA files suggests that the glove was given to an officer to return to the property clerk. The property clerk records indicate that the glove was last signed out to a prosecutor shortly before trial.

Ricardo James

CRU interviewed Ricardo James at the KCDA. He added to his prior statements and testimony, telling CRU 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."

Thereafter, Ricardo learned that Irons confessed. Irons' family blamed Ricardo for Irons' arrest.[114] Ricardo felt guilty that he asked Irons to accompany him to the precinct. Neither Irons nor Ellerbe was a "street guy." Irons may have met Ellerbe through Ricardo, but Ricardo doubted that Irons knew the defendant. Ricardo did not believe that defendant, Irons, and Ellerbe got together to commit this crime. Ricardo knew Ringy, who died years ago.

Jacqueline Robinson

CRU recorded an interview with Robinson at her home. Robinson said that at the time of the incident it was dark, and she was "parked across the street." Her car had tinted windows. She was with a co-worker, whose name she did not recall. They were "messing around" in the car at the time of the incident.

Regarding the incident, Robinson saw someone running up the subway stairs, but did not pay attention because she was "in a relationship" with her co-worker in the car. Robinson heard a "boom" and five to ten minutes later saw the deceased emerge from the stairs on fire. She saw two males come up out of the station entrance on one side of the street. For the first time, she said that a "big, fat, big guy, very young" came up out of the entrance on the other side of the street.[115] She said one male ran to a white car, "a Z-28 or something like that, I'll never forget."

The following day, at work, she saw the story in the newspaper and fainted. Her supervisor called the police for her.[116] The detectives, whose names she did not recall, were nice to her. She was shown several photos and identified someone. She looked at more photos the next day and identified a second person. Robinson was called to view a lineup. She asked to view the lineup the following morning but did not recall why. Robinson was not pressured to identify anyone at any point. She could not explain how she identified one individual (McCargo) and then another (defendant). Robinson said she just picked the person who looked like the person "coming up the steps."

Robinson did not mention seeing anyone before hearing the explosion. CRU asked whether she received reward money and she said no. She seemed surprised to hear about a reward.[117]

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[114] Irons' prison intake papers reflect that he stated Ricardo committed the crime and Ricardo blamed it on Irons.

[115] This aligns with Williams' audiotaped statement to the prosecution.

[116] CRU made extensive efforts to locate Robinson's supervisor but was unsuccessful because she had been evicted from her last known residence, and there was no other contact information.

[117] CRU learned that no records had been preserved regarding reward money in cases from the mid-90s.

New Evidence Concerning Shabazz; Additional Witnesses

The Injunction

CRU discovered that Shabazz had an extensive history of falsely reporting crimes and confessions to law enforcement in exchange for benefits. In fact, several years after defendant's conviction, a court found the evidence of Shabazz's false reporting so compelling, if not overwhelming, that it barred Shabazz from ever providing information to law enforcement again.

Former ADA Buckvar

CRU spoke with former KCDA ADA Buckvar, who had previously called on Shabazz as a jailhouse informant at a trial. Buckvar believed that Shabazz knew facts about the case that no one else could have known, though he could not say why he believed that. The trial resulted in an acquittal. Buckvar could not remember the reason(s) for the acquittal but surmised that he had not adequately prepared Shabazz.

Former ADA Schaefer

Shabazz testified as a jailhouse informant in a Queens homicide case for ADA Schaefer.. Schaefer told CRU that he believed it was the first time Shabazz testified as a prosecution witness. After his testimony against that defendant, Shabazz reported to the Queens County D.A.'s office that, in jail, the defendant threatened to kill him by simulating holding a gun to Shabazz's head. Schaefer said he had no reason to question Shabazz's veracity. In exchange for his testimony, Shabazz received a parole letter.

Thereafter, (prior to the injunction order), an inmate reported that another inmate intended to kill the police officer in one of ADA Schaefer's cases. Shabazz agreed to wear a wire to procure information from the inmate. He was instructed not to lead the inmate or ask questions. The recording from the wire revealed that Shabazz did the majority of the talking and instigated the matter. The Queens County D.A.'s office never used Shabazz as an informant again.

Mellow

CRU contacted Mellow through one of his relatives. Mellow then called CRU from an unlisted number, said he did not want to talk, and terminated the call.

Inmate Movement History Logs (Rikers Island)

CRU reviewed the Inmate Movement History Logs (Prisoner Movement Logs or PMLs) for Shabazz, defendant, Irons, and Ellerbe, and toured certain parts of Rikers, to evaluate the credibility of some of Shabazz's statements.

The Scene and Miscellaneous Inquiries

Dr. Saul Kassin

Dr. Kassin is a Distinguished Professor of Psychology at the 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 Irons' and Ellerbe's confessions. Dr. Kassin issued a report of his conclusions. He said that the failure of the police to record the interrogations, while standard practice at the time, made it difficult if not impossible to piece together what occurred at that time. His overall conclusions were as follows:

1) Defendant was subjected to interrogation tactics that are known to induce confessions from innocent people.

2) Defendant's confession offered no proof of "firsthand guilty knowledge." It contained no accurate facts previously unknown to the police, nor did it lead authorities to new evidence they did not already have. There was substantial evidence of contamination and the statements of defendant, and his two co-defendants collectively did not tell a singular coherent story.

3) External corroboration "is weak to nonexistent, if not outright suspicious." No physical evidence implicated defendant or either co-defendant. Two witnesses who testified against defendant were highly compromised: a) the eyewitness who identified defendant at trial (Robinson) had previously identified with certainty two earlier police suspects, who were presumably cleared subsequently by the police; and b) a jailhouse snitch (Shabazz) with a history of cooperation so fully discredited that he was later convicted of false reporting and barred from doing so again in the future.

4) Defendant's videotaped interview is a "classic example of a guilt-presumptive interview aimed not at an objective search for the truth but at a confirmation of prior beliefs."

5) While common at the time, defendant's lineup was not a double-blind procedure and was not recorded. In the lineup Robinson viewed, defendant was the only one wearing a red shirt— "the kind of biasing distinctiveness cue that was well known at the time and should have been avoided" (citing Buckhout, *Eyewitness Testimony*, 231 Scientific American [Dec. 1974]). By contrast, in defendant's lineup, which Williams viewed the evening before Robinson's viewing, several fillers, also had on red shirts, and Williams did not identify anyone.

Dr. Kassin concluded that defendant's, Irons', and Ellerbe's cases were very troubling, and "comparable to some of the worst wrongful convictions I have seen."[118]

Psychologist Dr. Matthew Johnson

In 1996, Dr. Johnson, a clinical psychologist who is currently an associate professor at John Jay College of Criminal Justice, interviewed defendant on behalf of the defense. Dr. Johnson was reluctant to speak to CRU because the defense had not paid him.

Dr. Kassin volunteered to talk to Dr. Johnson on CRU's behalf. Dr. Johnson relayed that defendant was intellectually limited. When Dr. Johnson tested defendant in November 1996, defendant had a full-scale IQ score of 82 (average/borderline) and a 4.1 grade equivalent reading score.[119] Defendant later told Dr. Johnson that when he was interrogated in this case he was assaulted, that he was shown

[118] *See* Kassin report to CRU.

[119] Dr. Kassin cited a 1991 report of Dr. C. Piccione that defendant, who was 13 years old at the time, had a third grade reading level, equivalent to an 8-year-old.

Ellerbe's written statement identifying defendant as the one who lit the fire, and that he was threatened with a jail sentence of 45 years-to-life if he did not cooperate.

Handwriting Analysis Expert Osborn

CRU asked Osborn whether there were signs of stress or coercion in defendant's signature on his confession, which contained a straight top "T" in his first name. Records contained in the prosecution's files include over thirty signatures of defendant, none of which contained a similar straight top T. The straight top T appeared to be an outlier. Osborn reexamined his original materials which he kept, along with a copy of defendant's signature on the DOC intake document and letters defendant had written from prison supplied by CRU. One of these letters had a similar straight top T in the return address. Osborn opined that the straight top T was within the range of examples of defendant's handwriting, however had he been questioned about it at trial, he would have testified that it was inconclusive as to whether there were signs of stress in defendant's signature on his confession.

Examination of the Intersection at Kingston and Herkimer

After the explosion, Darlene Williams and the anonymous 30-year-old female both observed two men approach the getaway car on the northside of Herkimer, between a fire hydrant and a light pole (streetlight). Robinson testified at trial that the getaway car was parked on Herkimer just off the corner of Kingston. Robinson's testimony about the location of her car was not clear. She testified that she was parked: on Kingston between Fulton and Herkimer (T.1512); "on the corner of Herkimer;" and "[a]t the curb, three car lengths away from the train station" (T.1516).

CRU went to the scene and observed the fire hydrant and the streetlight to which Williams and the female referred. The hydrant was on the northside of Herkimer, about 30 feet from the corner of Kingston. The streetlight was about another 100 feet down Herkimer.

There is also a hydrant on Kingston, north of Herkimer, 30 feet off the corner, as well as a streetlight on the northwest corner of Kingston and Herkimer, overhanging Kingston. A Certified Sanborn® Map of the vicinity of the Herkimer-Kingston intersection, circa 1995, shows the hydrant on Herkimer and the hydrant on Kingston. Neighborhood residents who have lived in the area since the time of the incident confirmed that the location of the hydrants and streetlights had not changed since then.

At the scene, CRU determined that Williams' and the anonymous female's accounts were plausible, and Robinson's account was not. Had the getaway car been parked on Herkimer, just off the corner of Kingston as Robinson testified, it would have been plainly visible to Williams from her own window, but Williams repeatedly stated that it was not.[120] The getaway car also would have been lit by the streetlight overhanging Kingston (on the northwest corner of Herkimer and Kingston). But in her December statement to prosecutors, Robinson said her car was parked in the dark and that the getaway car was parked "up the block a bit" in the dark.

[120] In her December 14 audiotaped statement, Williams stated that she could not see the car from her window and went to her neighbor's apartment, and at trial she confirmed she saw the car from her neighbor's window.

To further assess Robinson's testimony, CRU examined how far up the east side of Kingston, north of Herkimer, one could be parked and still see, at least, the hydrant on Herkimer (which is closer to Kingston than the streetlight) before being blocked by the building line along Kingston.[121] This building, on the northeast corner of Kingston and Herkimer, predated the crime. There is a crosswalk which crosses Kingston immediately north of Herkimer. Less than a car's length north of the crosswalk on Kingston is the Kingston hydrant.[122]

CRU determined that if a car was parked on Kingston at the northeast corner of Herkimer, directly in the crosswalk, a car occupant would have a clear view of both the hydrant and streetlight on Herkimer. If the car goes beyond the crosswalk, the sightline down Herkimer for any car occupant significantly diminishes. Once the front passenger side door reaches the Kingston hydrant, the building line obstructs the view of the Herkimer hydrant. In such a position, the car on Kingston would still be lit by the overhanging streetlight and the rear of the car would likely still be within the crosswalk.

Telephone Records

Ellerbe and defendant admitted knowing each other, but their relationship with Irons was not clear. CRU reviewed phone records from the residences of Irons, Ellerbe, defendant, and Julies Rivers, which the prosecution had subpoenaed.[123] From August to November 11, 1995, six calls were made from defendant's residence to Ellerbe's residence.[124] There were no further calls through December. The records reveal no other calls between any of the residences. Nor do the records reveal any calls to or from the defendant's residence to Binghamton.

Rivers told the detectives that while he was at the Ellerbe home just prior to going to the precinct to speak with them, defendant had called the Ellerbe residence. The records do not reflect that call.

ANALYSIS

Defendant's conviction is vacated for the following reasons: defendant's confession and Jaqueline Robinson's identification of defendant would have been undermined based on subsequent findings of Scarcella's alleged misconduct in other cases.

Furthermore, even without the new evidence of Scarcella's misconduct, the evidence against defendant essentially consisted of his confession, the testimony of Jacqueline Robinson, and the

[121] According to CSU Det. Henry Mulzac's Supplementary Report, the distance from the curb line to the building line on the east side of Kingston was 18 feet, 4 inches. The curb line to the same building line on the south side of Fulton was 17 feet, 9 inches. Using a presumably less sophisticated measuring device, CRU found the distance to the building line on the northeast corner of Kingston and Herkimer was approximately 18 feet.

[122] The hydrant on Kingston is approximately 30 feet from the corner and 12 feet north of the Herkimer building line.

[123] There is no evidence that defendant or any of the others owned cell phones. In 1995, cell phones were not common and relatively expensive.

[124] As defendant had a prior relationship with Ellerbe's sister, it is possible that some, or even all, of these calls had nothing to do with Ellerbe at all.

testimony of Rayquan Shabazz. Regardless of which the jury credited, each piece of evidence was unreliable.

Det. Scarcella

A significant theory of the defense was that Scarcella manufactured defendant's confession, and that Robinson's identification of defendant was incredible because, pursuant to a prior identification procedure conducted by Scarcella, Robinson unequivocally identified someone else—Scarcella's prime suspect at that time, S. McCargo. Counsel argued in his opening statement that defendant was innocent and only signed a confession because of Scarcella's illegal tactics, which included a physical assault (T.1340, 1342), and that Scarcella had Robinson identify McCargo "who it just so happened was their top suspect in the case at that time" (T.1345).[125]

During the trial, counsel attempted to elicit or introduce evidence that Scarcella allegedly engaged in misconduct in other cases by obtaining identifications from witnesses, and in manufacturing confessions. For example, counsel objected to Ricardo's testimony on the basis that it was only presented to show that Ricardo, whom Scarcella interviewed, "is one young black man" Scarcella did not beat or arrest (T.1708).[126] Counsel then reserved the right to admit evidence of alleged instances in other cases where Scarcella beat black males to force them to confess, and conducted photo identification procedures where eyewitnesses identified someone who later turned out to be the wrong person (T.1709). Counsel maintained that "[t]his has become a pattern of Detective Scarcella's investigation[s] for several years" (*id.*).

Later, after Robinson testified, counsel again argued to admit evidence of Scarcella's alleged pattern in some cases where "eyewitnesses are shown photo arrays by Detective Scarcella and sort of wondrously pick out the person who happens to be the top suspect at the time." Counsel argued that this did not occur so much with other detectives (T.1786).

Furthermore, during his cross examination of Scarcella counsel attempted to get Scarcella to admit that, in *People v. Ranta*, (Ind. No. 8990/90), after obtaining a take-out order to transport witness Alan Bloom from prison to the KCDA, Scarcella instead brought Bloom to Bloom's home to smoke crack. Scarcella replied, "of course not. Definitely not" (T.1859, 1960). Counsel next asked, "[a]nd isn't it true when you were asked about that [at the *Ranta* trial] you said, I do what I want with my prisoners?" At this point, the prosecution's objection was sustained (T.1859).[127]

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[125] CRU has not found any evidence corroborating defendant's claims of physical abuse.

[126] The prosecution did not dispute counsel's argument. It argued that the defendant opened on the theory that two white detectives harassed and intimidated a black person (T.1710).

[127] In 2019, during a C.P.L. § 440.10 hearing in *People v. Deleon* (discussed below). Scarcella admitted that he regularly brought witnesses to see their girlfriends, and that during many take-out orders he brought Alan Bloom and another *Ranta* witness to places other than the KDCA (*Deleon* hearing at 35-37). Similarly, Chmil testified at that hearing that he and Scarcella violated police protocol by using take-out orders to bring Bloom to visit his mother and girlfriend. Chmil admitted it was possible that Bloom smoked crack and had sex with a prostitute while he (Chmil) was waiting in the car. Chmil testified that he did not know that Bloom and another *Ranta* witness had reported that Chmil and Scarcella allowed them to smoke crack and have sex with prostitutes while out on a take-out order (*id.* at 209-14).

Since defendant's trial, numerous convictions have been vacated based on evidence of Scarcella's (and Chmil's) alleged misconduct in those cases—including *Ranta's*. In 2013, the then Conviction Integrity Unit vacated *Ranta's* 1991 conviction after it was determined that, among other things, Scarcella coached a witness's lineup identification, and witnesses, including Bloom, were given improper incentives in exchange for their testimony.

Notably, the People appealed from two decisions of the Supreme Court, Kings County ("Supreme Court"), which vacated the judgments, pursuant to C.P.L. § 440.10, based on "new evidence" of Scarcella's alleged misconduct in prior cases. The Appellate Division affirmed both decisions. In *People v. Hargrove*, 162 A.D.3d 25, 74 (2d Dep't 2018), the Appellate Division affirmed the decision of the Supreme Court (Guzman, J.), to vacate the conviction based on Scarcella's involvement in the single eyewitness' identification of that defendant, finding that the identification was possibly unreliable and compromised. Moreover, other troubling factors existed, including that the defendant did not fit the initial description given by the sole eyewitness. Accordingly, the Appellate Division concluded that, under the circumstances, new evidence that Scarcella had engaged in a pattern of "facilitating false identification testimony" would have affected not only the outcome of the suppression hearing, but also the trial. *Id.* at 64-67.

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 based on Scarcella's and Chmil's "significant role in the defendant's arrest and the attendant police investigation" and the newly discovered evidence of their misconduct in other cases. The Appellate Division held that the new evidence would have provided the jury with a "different context" in which to view all the evidence—including the defendant's purported inculpatory statement which he denied making and would have affected the verdict. *Id.* at 765.

The Appellate Division's decision does not elaborate on the facts, but they were set forth in the Supreme Court's decision in *Deleon*. In relevant part, a detective questioned the defendant for an hour, in Scarcella's and Chmil's presence, yet the inculpatory statement consisted of three brief sentences and lacked detail. Moreover, the statement was inconsistent with the trial testimony of two eyewitnesses (*Deleon* Sup. Ct. Decision at 3-4, 7-8).

In this case, had counsel known the new evidence of Scarcella's and Chmil's alleged wrongdoing—which involved facilitating false identification testimony (*Hargrove*), and influencing a questionable confession (*Deleon*)—counsel undoubtedly would have used the new evidence, given counsel's strenuous attempts to present at trial this type of evidence based on hearsay on the very same issues.

Moreover, there were other instances where counsel could have used the new evidence to impeach Scarcella. For example, Scarcella claimed—for the first time—that defendant asked to see his girlfriend because he "wanted to get his rocks off" and that defendant asked to see his mother because he wanted to take a shower. These statements—particularly the one about his girlfriend—are patently absurd and clearly intended to prejudice defendant and give credence to his confession. Without the new evidence, the only way this damaging testimony could be challenged was by defendant testifying, which defendant elected not to do. Thus, the jury was left with Scarcella's account.

Consequently, the new evidence might very well 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 and Robinson's identification of defendant.

The Confession

Confessions generally are perceived to be trustworthy, although it is not necessarily the case.[128] Interrogations are not designed to distinguish true confessions from false ones; they are typically undertaken on the assumption that the person being interrogated committed the crime. Yet this assumption often rests on shaky ground, which is why it is so critical to avoid feeding information to the suspect, to corroborate the information the suspect provides, and to avoid "tunnel vision" which often causes investigators to ignore leads and alternative suspects after obtaining a confession. While a determination is not made as to whether defendant's confession was true or false, significant factors in this case warrant the conclusion that the confession was unreliable.

Providing Details About the Crime

The phenomenon of police providing details of a crime to suspects has been documented in myriad false confession cases.[129] Innocent suspects can glean information from leading questions, photographs, and other secondhand sources, reinforcing the investigators' belief in the suspect's guilt and corroborating in a circular manner the police investigation.[130]

In this case, Scarcella and Chmil interviewed defendant for more than four hours and did not videotape or audiotape any of it. It is clear from the statements written by Scarcella that the detectives provided important details and information to defendant. First, Ellerbe was briefly brought in the room, although defendant had never mentioned him. The detectives showed defendant a photograph of Irons although defendant had never mentioned Irons. They also told defendant about the gun recovered from the scene. Against this backdrop, it is not unreasonable to conclude that while trying to elicit a confession, other details of the crime that the detectives believed to be true were provided to defendant, including the fact that someone had been burned during the explosion, and that a burnt glove had been recovered from the scene.

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[128] *See* Kassin, et al, *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, Law and Hum. Behav., 29(2), 211-227 (2005).

[129] In one reported case, Det. James L. Trainum discovered that he had inadvertently fed information to a suspect who was later exonerated. In reviewing the videotape of the interview Trainum realized, "We had fallen into a classic trap. We believed so much in our suspect's guilt that we ignored all evidence to the contrary [an airtight alibi]. To demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time." *Police Chief Magazine*, 2014, No. 6, 47-54.

[130] For example, DNA exoneree Eddie Joe Lloyd correctly stated that the victim wore Gloria Vanderbilt jeans and half-moon earrings and that a dirty green bottle was inserted into her rectum (*see* https://convictingtheinnocentcom/exoneree/eddie-joe-lloyd//). In Nassau County the now exonerated John Kogut correctly described his victim's maroon or black pocketbook with a strap, white high-top sneakers, and gold colored chain with what looked like a double-heart 10, and a broken piece (*see* ttps://convictingtheinnocent.com/exoneree/john-kogut//).

Moreover, it appears that the detectives provided the information about the getaway car to defendant, since is it not included in any of the defendant's statements Scarcella memorialized. Scarcella testified at the pre-trial hearing that his written two-page account of defendant's statements contained everything defendant said to him. The prosecution told the jury as much in their opening statement. This is not accurate. The written statements made no reference to a getaway car. Yet, on videotape, after the prosecutor initially finished questioning defendant, Scarcella mentioned to defendant "someone else who got hurt in a car you spoke about." Clearly, Scarcella had had a discussion with defendant that is not reflected in the written statement and that Scarcella did not testify about at the hearing or at trial. This is important because defendant then explained at the end of his videotaped statement that the getaway car was a blue Ford Taurus, which was consistent with Irons' statement about the getaway car.

Certainly, had defendant mentioned the getaway car in his confession, Scarcella would have included that fact in the written account. Notably, both Scarcella and Chmil were present during Irons' statement less than 48 hours earlier, and they knew that Robinson, Williams, and the 30-year-old female all mentioned this getaway car. That this part of defendant's statement was not memorialized suggests that the detectives may have fed this fact to defendant during the period between his written and taped statement. The jury had no knowledge about any of this.

Likewise in his videotaped statement, the prosecutors provided material details such as the time and date of the crime (*see* videotape and accompanying transcript). For example, when defendant could not say when he first met up with Irons and Ellerbe the prosecutor repeatedly stated when the crime occurred "very early on a Sunday morning" and suggested the days when they all met (*id.*).

Assumptions that Defendant's Denials Were Lies

Lack of Eye Contact

Another factor sometimes used to assess a witness's veracity is eye contact. That one can tell someone is lying based on their failure to maintain eye contact is a common belief. It is taught as a truism in the Reid Technique's training manual.[131] It is wrong. A prominent study debunking this belief demonstrated that black people who are not considered suspects make eye contact with the police less than black who are suspects. The study also found that, as a group, Caucasians make eye contact with the police far more than blacks do, and that Caucasian suspects made eye contact with the police the most.[132]

In this case, Scarcella testified at trial that after defendant's first statement, a denial, Scarcella told the defendant he knew the defendant was lying because defendant, like Scarcella's children do when they

[131] John E. Reid et al., *Essentials of the Reid Technique: Criminal Investigation and Confessions,* at 93 (Sudbury, Mass.: Jones and Bartlett Publishers, 2005).

[132] *See* Malcolm Gladwell, Talking to Strangers, at 281 (2019), citing the research of Criminologist Richard R. Johnson, *Race and Police Reliance on Suspicious Non-Verbal Clues, Policing: An International Journal of Police Strategies and Management* Vol. 30, no. 2 (June 2007): Pages:277-90.

are lying, look down and could not look at him (T.1815).[133] Based on the study mentioned above, defendant's lack of eye contact with Scarcella was inconsequential and should not have been characterized for the jury as clear indicators that defendant's denials were lies.

Defendant's Denials

Defendant admitted knowing Ellerbe and denied knowing Irons. While it might make sense to deny knowing both alleged accomplices, it makes little sense that he would admit to knowing one and not the other if it was not true.

Defendant knew early during his first statement that Ellerbe was in police custody. When Ellerbe was brought into defendant's interview room, defendant readily admitted that he knew Ellerbe and explained how he knew Ellerbe, (which was consistent with what Ellerbe had said). But defendant continued to deny involvement in the crime. And when the detectives showed him Irons' photograph, defendant told the detectives that he had no idea who Irons was. The detectives did not consider this a possibility; rather they had "tunnel vision" that defendant committed the crime and did so with Irons and Ellerbe.

CRU credits defendant's denial about Irons, and Scarcella should have considered it as the truth. Indeed, Irons had told Scarcella and Chmil that he did not know defendant, and he could not recall defendant's name during his videotaped statement. (Notably, months later, defendant continued to deny knowing Irons when he spoke to an undercover KCDA DI).

<u>Clear Conflict Between the Confessions</u>

It is important to consider defendant's confession against Irons' and Ellerbe's confessions, something the jury could not do. Descriptions from different people describing the same events should be largely similar. But as Dr. Kassin observed, the three statements in this case do not cohere at a core level.

At the outset, perhaps the most troubling inconsistency between the confessions pertains to the location where defendant, Ellerbe, and Irons met up just before walking to the subway station to commit the crime. Irons and Ellerbe both stated that they met in front or Iron's building in Fulton Street where they hung out before crossing the street to the subway. Defendant, however, stated that they met in front of 400 Herkimer Street and walked up Kingston to the subway.

The Herkimer Street location was essential to the prosecution's case against defendant because this location, unlike the Fulton Street location, neatly dovetailed with Robinson's claim of seeing defendant and another individual on the corner of Kingston and Herkimer, and then seeing defendant and the other individual pass her car on their way from Herkimer to subway.

Other significant inconsistencies between the confessions were as follows:

- Irons stated in his written statement that Ellerbe gave him a .32 handgun when they met to plan the crime, but on video Irons said that it happened just before the crime in front of his residence. Ellerbe stated that he gave Irons a .32 handgun in front of Irons' residence just

[133] Scarcella used this tactic in at least one other case CRU has examined.

before the crime. Defendant said nothing about giving Ellerbe a gun, or Ellerbe giving Irons a gun. Defendant stated only Ellerbe had a gun.

- Irons described a squeeze bottle. Ellerbe described a white spray bottle. Defendant described a soda bottle.
- Irons stated that he, Ellerbe, Eric, and Ringo had handguns and defendant had a rifle. Ellerbe said that only Irons had a gun, which both Irons and Ellerbe stated Ellerbe provided. Ellerbe never mentioned a rifle. Defendant said that only Ellerbe had a gun, which he never saw until he looked down into the station. Defendant never mentioned a rifle.
- Irons and Ellerbe stated that the crime was planned for and executed on early Sunday morning. Ellerbe stated he was not in the city until early Saturday morning. Defendant stated that the crime was supposed to take place Friday night but that neither Ellerbe nor Irons showed up. Defendant stated that the crime was rescheduled for Sunday morning after defendant happened to run into Ellerbe and Irons on Herkimer Street the next morning.
- Irons said that seven people took part in the crime. Ellerbe said that six people took part in the crime. Defendant said that five people took part in the crime.
- Irons said that Ellerbe and defendant approached the booth. Ellerbe said he, Irons, defendant, and Chris approached the booth. Defendant said that Irons and Ellerbe approached the booth. Notably, the deceased's description of the two individuals who approached his booth included a significant height discrepancy. Moreover, the two descriptions did not match defendant, Irons, or Ellerbe.
- Irons said that Ellerbe told him about the car, that Eric and Chris were inside the car, and that Chris would stay in the car. Ellerbe said nothing about the car or Eric. Defendant said that no one was in the car, only that the keys were left inside.
- Irons stated that during the crime Chris stayed in the car and Ellerbe and defendant were in front of the booth. Ellerbe stated that Chris was standing next to him in front of the token booth along with Irons and defendant. Defendant never mentioned Chris and said that only Irons and Ellerbe were in front of the booth.
- Irons said in his written statement that Ellerbe squirted gasoline into the change slot and defendant squirted gasoline near the door, while in his video statement he said that Ellerbe squirted gasoline into the slot and on the door but made no claim about defendant squirting gasoline at all. Ellerbe stated in his written and video statements that he sprayed gasoline only on the booth window and said nothing about anyone else having gasoline or gasoline being put anywhere else on or near the booth. Defendant stated in his written statement that Irons squirted gasoline, though he did not say where, while in his video statement he stated that Irons shook gasoline out of the bottle into the slot.
- Irons' statements suggest Ellerbe was the leader of the group. Ellerbe's statements suggest defendant was the leader of the group. Defendant's statements suggest Irons was the leader of the group.

These inconsistencies are significant because they cannot all be explained as the result of the defendants trying to minimize their involvement.

Clearly all three statements cannot be true. Irons' and Ellerbe's confessions, despite inconsistencies concerning the crime, are sufficiently consistent with one another that they could both be true. But if their confessions are true, defendant's confession cannot also be true.

The confessions also conflict with the physical evidence, which, in conjunction with the deceased's account, paint a simpler, more plausible picture of what happened: Two subjects approached the booth, squirted gasoline through the coin slot, and threatened to ignite the gasoline by holding up a lit book of matches. The gasoline fumes ignited unexpectedly, catching the clerk on fire and causing the booth to explode. A third person would have been positioned, with the rifle, by the door of the booth from where it was recovered, preventing the deceased from running out of the station. This version comports with the deceased's statements to Santo, with the physical evidence at the scene, and with various witness accounts as well, but not with the defendant's and his co-defendants' statements.

Inadequate Police Investigation

Finally, as previously stated, "tunnel vision" often causes investigators to ignore leads and alternative suspects after obtaining a confession. It seems clear that that is what occurred here. There is no documentation as to how, or why, Crime, Sport, and Biz were eliminated as suspects.[134] They were strong suspects, as mentioned by Lt. Shaw. They were seen at a party shortly before the murder, with a rifle that was identical to the one recovered from the crime scene. Sport (a 21-year-old black male, 6', 180 lbs., medium skin tone), 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. Darlene Williams either identified Sport in a photo array or said he looks like one of the men she saw running.[135] Nevertheless, once the investigation turned to Irons, and his confession was obtained, immediately followed by Ellerbe's and defendant's confessions, the investigation into Sport, Crime, and Biz apparently ceased.

Jacqueline Robinson

Robinson was the sole eyewitness against the defendant. She identified him as the one holding the bottle of gasoline. She claimed that she saw him entering the subway station, exiting and laughing about the crime, and getting into the getaway car and driving away. Robinson's testimony also partially corroborated defendant's confession. According to Robinson, defendant and his companion were on Herkimer Street and walked up Kingston to the subway station. This was consistent, though not in the number of people, with defendant's statement that he met his accomplices on Herkimer, where they would have had to walk up Kingston to the subway. But Robinson's testimony about what she saw, as illustrated in detail below, is entirely unreliable.

Moreover, Robinson's misidentification of S. McCargo as the man holding the bottle, and Butler as his companion, which were obtained by Scarcella, severely undermines her identification of the

[134] A note in the trial file reflects that as late as April 1996, the prosecution also questioned how Crime, Sport, and Biz were eliminated, but there is no documentation concerning an answer.

[135] Defense counsel asked Scarcella whether he questioned defendant about Crime, and Scarcella said no (H.273).

defendant. Although these misidentifications were before the jury, the full extent of her reaction when she identified McCargo, (and the "new evidence" pertaining to Scarcella)—which would almost certainly have undermined her credibility—was not.

If the jury credited Robinson, had it known about any of the following inconsistencies and issues, the jury would likely have found her identification of defendant incredible. First, for the most part, the details Robinson gave to the police and prosecutors in the days and weeks after the crime were at odds with her trial testimony. Second, the jury was unaware that Robinson was having sexual relations in the car that night, which may have impacted her ability to observe what she claimed to have observed. Third, it is possible Robinson was motivated by the reward money to provide testimony that corroborated the detectives' theory of the case. Fourth, Robinson's current recollection contradicts her testimony and mirrors defense witness Williams' statements made at the time of the crime, which cast doubt on the defendant's guilt.

The Misidentification of S. McCargo and R. Butler

On December 7 and 8, Scarcella showed Robinson loose photographs from which she identified McCargo and Butler, respectively. She identified McCargo as the person she would later identify as defendant. A week after McCargo and Butler were ruled out as suspects, Robinson identified defendant in a lineup. Three separate times Robinson was given an opportunity to identify individuals she saw that night. Three times Robinson selected the person detectives were currently focused on as their suspect. The chances of that happening at random is less than one-half of one percent. Somehow, after the NYPD rejected McCargo and Butler as suspects (Butler was incarcerated at the time of the crime; the reason for rejecting McCargo is not clear), Robinson then managed to identify defendant, Scarcella's newest suspect.[136]

Unlike many of the issues previously discussed, Robinson's misidentification of McCargo, including the photograph of McCargo that Robinson selected, was before the jury. But the jury received an incomplete and misleading account of Robinson's misidentification. Robinson admitted on cross examination that when she looked at McCargo's photo she said that she would "never forget his face as long as I live." But upon conceding this at trial, Robinson immediately qualified her answer, telling the jury that the photo of McCargo, "looks like the guy, looks like the guy . . . That's what I said" (T.1538). When asked by the court what she meant by that, Robinson stated the "complexion and eyebrows and that's what I went by at that time" (T.1540). She also claimed that she was much better at making identifications when seeing someone in person. That she might be better at identifying someone live rather than from a photograph is not an unreasonable claim. But her claim that she was basing her identification on the similarity of the two subjects' skin tone and eyebrows appears fabricated—a rationale created after the fact to explain her mistaken identification.

Furthermore, the defense failed to elicit that Robinson's explanation was not reflected in Scarcella's DD5 and there were no other indicia that she ever said anything like that to detectives or prosecutors.

[136] How Robinson mistook the 6'2", 225 lb. McCargo for the 5'6", 165 lb. defendant was a key part of defendant's defense. But the photo of McCargo displayed him only from the shoulders up.

Robinson's claim that she based her identification of McCargo on such minimal similarities is also belied by her words and actions on December 7 and 8. The jury never heard that, as reflected in Scarcella's DD5, upon seeing McCargo's photograph Robinson began to "shake and screamed, 'That's him, that's him,'" before breaking down and crying. Such a visceral reaction is contrary to someone who recognizes a person by nothing more than abstract features like eyebrows and skin tone. The jury also never heard Robinson's voice on the December 8 audiotaped interview, just hours after the misidentification, in which she can be heard confidently telling the prosecutors that she recognized the photograph from the night before as being the person she saw the night of the crime—a person, she told the prosecutors, whose face she would "never forget . . . as long as I live."[137] Add to this that Scarcella likely misled the jury when he claimed not to recall that Robinson did not hesitate in identifying McCargo; a claim that is not supported by his DD5, the detail of which makes clear that Robinson identified the photo immediately upon seeing it, and in no uncertain terms.[138]

Based on these facts, Robinson should never have been asked to view a lineup with defendant. By that point, having incorrectly identified two individuals as being participants in the crime, Robinson's utility as anything more than a fact witness was exhausted. Furthermore, neither the police nor prosecution made any attempt to have Robinson or anyone else identify Ellerbe, even though: a) he placed himself running down Kingston after the explosion, b) Robinson (and Williams) would have been able to see him, and c) he generally fit the description of one of the males Robinson claimed to have seen, as well as that of the third male Williams saw on Fulton. This was an odd decision, unless it was believed that defendant's confession, unlike Ellerbe's, was too weak to support a prosecution without an identification.

Defendant's Red Shirt

The fact that defendant was the only participant in the lineup wearing a red shirt is also problematic. In the Williams lineup held the night before, defendant was one of three people wearing a bright red top. In the Robinson lineup the next morning, with a new set of fillers, defendant was now the only person wearing red.[139] In addition to being a distinctive characteristic that should have been avoided, this raises the possibility that the detectives deliberately used the color of the shirt to signal to Robinson the person she should pick. Such conduct was at the heart of the *Ranta* exoneration, another Scarcella case, where a witness claimed that an unnamed detective told him to identify the person with the big nose.

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[137] In connection to a previous investigation, CRU consulted Dr. Jennifer Dysart an Associate Professor of Psychology at John Jay College of Criminal Justice, and an internationally recognized expert in the field of human memory and the reliability of eyewitness identifications. According to Dr. Dysart, research shows that police procedures and practices used to interview witnesses (involving the retrieval stage of the memory process) can influence the reliability of eyewitness' subsequent testimony. Dr. Dysart also said there is a well-accepted principle in psychology that memory does not improve over time and that research shows that the most reliable identification is the initial procedure.

[138] The report states that Robinson was given the six photographs and that "when she saw the photo of Scarvey McCargo she started to shake and scream" (emphasis added).

[139] Dr. Kassin noted that defendant wearing the bright red shirt was the kind of biasing distinctiveness cue that was well known at the time and should have been avoided (*see* Robert Buckhout, *Eyewitness Testimony*, 231 Scientific American, No. 6, p. 27 (Dec. 1974).

Robinson's Material Inconsistencies

Robinson's inconsistencies about her location and whether she was a passenger or driver in the car further undermine her credibility and the reliability of her identification of the defendant. Her inconsistency regarding the description and location of the getaway car undermines an important aspect of the confession. The jury was not privy to evidence of these inconsistencies.

Robinson's Statements About Who Drove Her Car Are Inconsistent

Robinson was initially interviewed by Sloan on November 27, the day after the crime. At that time, she said that she was in her car with her boyfriend, and she was the driver. In the days and weeks after the crime she consistently stated that she was driving her car. She said this in her sworn audiotaped statement to the prosecutor, and in her testimony in a prior proceeding. She maintained that after hearing the explosion and seeing the two individuals get into a car and drive off, she was the one who drove her car, and then stopped the car to see what happened. At one point during her interview with prosecutors she mentioned starting the car. She was asked, "You started the car?" She replied, "yes."

Yet at trial, Robinson stated that she was in the passenger seat. Robinson was never confronted with her prior inconsistent statements. This inconsistency reflects her inability at trial to accurately recall even the most basic details about the events in question. It also demonstrates how easily Robinson changed from one definitive position to the opposite. The jury had no knowledge about her prior inconsistent accounts.

Robinson's Statements Regarding Her Location Are Inconsistent and Contradictory[140]

Exactly where Robinson's car was parked prior to the crime is essential to assessing whether she could see what she claimed, and whether her identification of defendant was reliable. The issue is whether Robinson was parked 1) on Kingston between Herkimer and Atlantic (green arrow on the below map) or 2) on Kingston between Herkimer and Fulton (red arrow on the below map). Robinson's testimony that she was parked on the east side of Kingston, between Fulton and Herkimer was not challenged.[141]

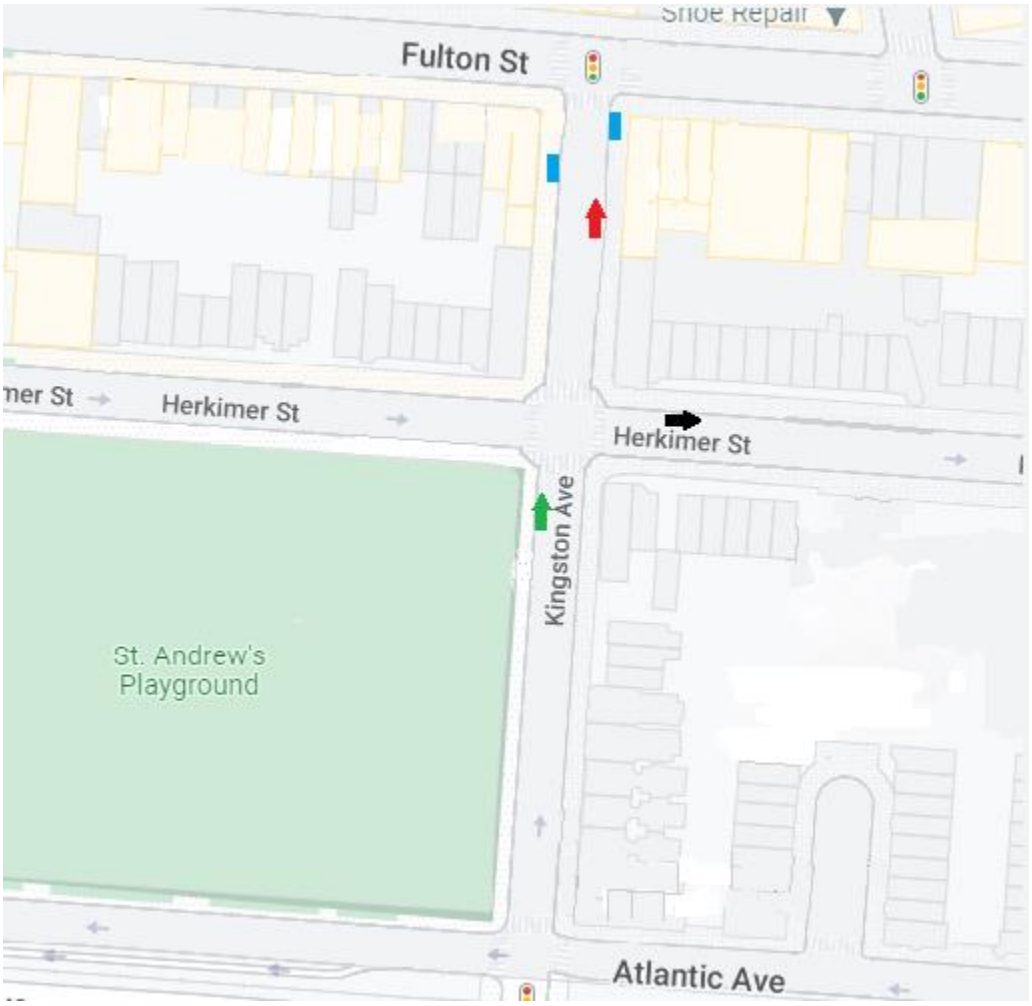
Where Robinson was located is also essential to the prosecution's case as much of her testimony is dependent on her being where she claimed to be. Many of her earlier statements and testimony in a prior proceeding contradicted her trial testimony and strongly suggested that she was parked between Herkimer and Atlantic. This is critical because from this location she would have been further from

[140] Regardless of Robinson's inconsistencies and contradictory accounts, CRU does not question that she was in the vicinity of the crime. The day after the crime, Robinson told Sloan that several individuals attempted to place the deceased into a Red/Burgundy Pathfinder before the police arrived. Other witnesses who saw the deceased on the street reported similar accounts.

[141] Also, Robinson was not questioned about which side of the street she was parked on. Nor was she asked to point to her location on any diagram. Based on her testimony, however, it is clear that if she was where she claimed, she had to be on the east side of Kingston. Specifically, Robinson claimed she was in the passenger seat, the two males heading towards the subway passed her on the same side of the street as where she was parked. Defendant was cradling a bottle in his left arm against his body. The other individual had a long object along his right side, the side away from her car so she could not really see it. For these observations to be true, she must have been parked on the east side, otherwise, the other male would have been on the side nearest to her, and defendant would have been between the other man's left arm and her, thereby obstructing her view.

defendant than she testified at trial, thereby undermining her identification and making her misidentification of McCargo more understandable. This location is also the one location from which Robinson would be able to see the getaway car and is consistent with the other descriptive details she gave concerning her location. Assuming the jury credited Robinson's identification of defendant, had the jury known about these inconsistencies, it would have been more likely to find that Robinson had misidentified defendant.

(Photo – Kingston Between Fulton and Atlantic)



1. Robinson Was Parked on Kingston, between Herkimer and Atlantic

Based on the evidence, for several reasons, it seems likely that Robinson was parked on Kingston, between Herkimer and Atlantic (green arrow on above map).

First, this location best matches the statements she made closest in time to the crime. Sloan's DD5 reflects that Robinson was parked on Kingston near the corner of Herkimer, adding erroneously, "between Kingston and Atlantic." Given that Atlantic Avenue is a block south of Herkimer and

otherwise has no connection with the case (as opposed to Fulton Street, which figures prominently), the only reasonable explanation for Sloan's writing "Atlantic" is that Robinson told him she was parked on Kingston, between Herkimer and Atlantic, and not between Herkimer and Fulton.[142]

Robinson's audiotaped statement to the KCDA on December 8 supports this conclusion. Robinson stated that she was parked on Kingston, "near the park." Kingston Park (also known as St. Andrews playground) runs along the west side of Kingston Avenue from Herkimer to Atlantic. Thus, if Robinson parked between Herkimer and Atlantic, she would be near the park. Robinson's testimony in a prior proceeding also supports the likelihood that she was parked between Herkimer and Atlantic. She testified that she was parked on Kingston, near Herkimer, on the opposite side of the street from the getaway car the two males entered (black arrow on above map).

Further, Robinson told the prosecutors in December that the getaway car was up the block a bit. This is consistent with statements from Williams and the 30-year-old female, made immediately after the crime, who both placed the getaway car between the hydrant and the streetlight east of Kingston on the north side of Herkimer Street. Had Robinson been parked on the east side of Kingston between Herkimer and Fulton (red arrow on above map), the getaway car would have been around the corner from her, not across the street, as she claimed in a prior proceeding. Similarly, Robinson testified in a prior proceeding that by the time the men got to Herkimer, "they were across the street from [her]" (emphasis added). The location that best fits these descriptions is Robinson being parked alongside the park.

Second, unlike virtually every other person the police spoke to, except for the 30-year-old female, Robinson described the first explosion as "a small little boom," and said she believed there had been a car accident. According to media accounts, however, the explosion was felt for a block and could be heard for blocks. Robinson's description of the explosion is like the description provided by the 30-year-old female, who was inside her apartment on Herkimer, west of the Kingston intersection, roughly the same distance as Robinson would have been had she been parked south of Herkimer on Kingston, by the park. Both witnesses heard a boom that they mistook for a car accident. This description is plausible from that distance.

Third, in this location Robinson would be able to see the men on the northeast corner of Kingston and Herkimer and would have been able to see them walking towards the subway and thereafter coming back and getting into the car (but the men would not have walked right past her car). The southwest corner of Kingston and Herkimer adjacent to the park (the location where Robinson seemingly told Sloan she was parked the day after the crime), provides an unobstructed view down Herkimer. Someone parked near this corner not only would be able to see the hydrant and light pole on Herkimer, along with any car parked between, but also would have an unobstructed view of the northeast corner of the intersection, as well as a good sightline down a substantial portion of both sides of Kingston towards Fulton. But because the men would not have walked past her car as Robinson claimed, this location helps explain her misidentification of R. Butler, as well as how she

[142] As the prosecution stated at trial, any notes of Robinson's interview were lost prior to trial. The court gave an adverse inference instruction to the jury regarding the lost notes.

could have identified both S. McCargo and the defendant as the man she claimed she saw holding the bottle.

Fourth, this location may explain the discrepancy between what Robinson claimed to have heard the man with the bottle say—"We got him"—with what the 30-year-old unidentified female witness claimed she heard standing on the corner of Herkimer and Kingston—"We didn't get anything." Because Robinson was in her car and the men would not have passed directly by it, she would not have been able to hear as clearly as the female who stood outside.[143]

2. The Jury Was Led to Believe That Robinson Was on Kingston at the Corner of Herkimer

Robinson testified at trial that she was on Kingston, "[p]arked on the corner of Herkimer." At that point the court interjected, "At the corner?" Robinson replied, "[a]t the curb, three car lengths away from the train station" (T.1516).[144] For several reasons, this testimony is not credible.

First, it is impossible for Robinson to have been on the corner of Herkimer while also being three car lengths from the subway station because three car lengths from the station is still well over half a block away from the corner (*see* red arrow on above map). The block between Fulton Street and Herkimer Avenue is a little over 250 feet long.[145] CSU measured the Fulton Street entrance to be a fraction over 27 feet off the near curb of Fulton Street. Thus, even giving Robinson a very generous estimate of a car length (30 feet), that would still leave her more than half the block away from Herkimer.

Second, in her sworn statement to prosecutors on December 8, Robinson explained that it was dark where she was parked. If she truly had been on the corner of Kingston and Herkimer between Fulton and Herkimer, or even a few car lengths off the corner, her car would not have been in the dark. There was a streetlight on the northwest corner of the intersection which extended over Kingston above where she claimed she was parked.[146] The corner was the best lit area on the block. Thus, if Robinson really was between Herkimer and Fulton, she had to have been parked substantially further up the block, closer to Fulton Street. But the further up the block she was, her description of being parked "near the park" becomes less credible, and if she was even a car length past the crosswalk the building line would have prevented her from seeing the getaway car on Herkimer.

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[143] The 30-year-old witness's description of what the man said also makes more sense for a failed robbery.

[144] During her audiotaped interview, Robinson also agreed when asked, "Did they walk towards you and then right past you towards their car?" This would necessarily place her car on Kingston, somewhere between Herkimer and Fulton, diagonally across from the north edge of the park because it is the only location where the individuals might have passed her car from the subway to the getaway car. If Robinson was on Kingston between Herkimer and Atlantic, then they would not pass in front of her car before entering the getaway car. This statement was inconsistent with other statements she made before and during that interview that suggested that she was parked between Herkimer and Atlantic.

[145] This measurement was obtained from Google Maps, of which courts commonly take judicial notice. *See, e.g., People v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 249 n. 14 (2020); *see also Guzman v. Mel S. Harris & Assocs., LLC*, 16 Civ. 3499, 2018 U.S. Dist. LEXIS 49622, at *16 n. 9 (S.D.N.Y. Mar. 22, 2018). This measurement is confirmed by the Certified Sanborn® Map for the area.

[146] This streetlight can be seen in the background of a CSU photograph taken the night of the crime. The streetlight is operational. This photograph was not admitted into evidence at defendant's or Ellerbe's joint trial.

Third, Robinson testified that she was in her car at 1:40 a.m. with a male friend. CRU learned that this male was not the person she was living with, and that they were engaged in sexual activity in the car at the time. Thus, it strains credulity that Robinson would park her car right in the Kingston crosswalk on the north side of Herkimer, next to and across from residential apartment buildings, in an area with a streetlight on the corner overhanging the street. Her being parked on Kingston along the desolate park, south of Herkimer, makes more sense.

Fourth, as described more fully in the second paragraph of the section above, what Robinson heard of the explosion strongly suggests that she was not on the same block as the explosion, let alone three car lengths from the station.

The jury did not learn about Robinson's previous statements suggesting that she was parked between Herkimer and Atlantic near the park. No witness ever testified about the length of the block between Fulton and Herkimer, or how far the Kingston Avenue subway entrance where the token booth was located was from Fulton or Herkimer. None of the diagrams in evidence were to scale or gave distances, and the one not-to-scale street diagram that illustrated the location of the Fulton Street entrance and the Fulton/Kingston intersection did not extend far enough to display where Kingston intersected Herkimer. No photographs were placed into evidence displaying the area at or around the northeast corner (or any corner) of the Kingston and Herkimer intersection. These facts undermine the reliability of Robinson's identification of the defendant, her claim at trial that she was parked between Fulton and Herkimer, and, if she was on Kingston between Fulton and Herkimer, where on Kingston she was parked.

Robinson's Statements Concerning the Location of the Getaway Car Are Inconsistent

Robinson testified at trial that she saw the two men run to a car that was on Herkimer at the corner of Kingston. Williams similarly testified that the car was on Herkimer near the corner, where she could see it "very good." What the jury never heard was that in her sworn statement to prosecutors shortly after the crime, Robinson said that the car was "up that block a little bit."[147] It also never heard that Williams, who lived in a building on Kingston, immediately off the northwest corner of the Herkimer intersection, also told Scarcella and the prosecutors that the getaway car was not on the corner and that she could not see it from her window. Rather she described the car as being parked between a hydrant and a streetlight. This description of the car's location was precisely corroborated by a previous witness. The jury did not know that the corner was illuminated by a streetlight on the northwest corner of the intersection, nor did it know that the hydrant and streetlight, still in existence today, were both well off the corner. As a result, not only was the jury left without reason to question Robinson's veracity, but also it provided suspect testimony that tended to bolster her claims.

Finally, the jury was never in position to understand that "three car lengths from the train station" and "the corner" are not synonymous terms, and that had Robinson been parked "three car lengths" from

[147] Robinson told the prosecution, "I didn't see anybody get out of the car because it was in – it was that – that – up that block a little bit, it's pure dark." It was not clarified whether Robinson meant that the car was parked in the dark or that it was a dark-colored car, which she had described as black with jet black windows. However, a black car parked under or near a streetlight would still be clearly visible.

the station she would have been physically unable to see the getaway car consistent with her trial testimony. It is only from alongside the park that Robinson would have been positioned to see the car consistent with the statements she made ten months earlier, consistent with the contemporaneous statements of Williams and the 30-year-old female, and consistent with Robinson's true reason for being in the car.

Robinson's Statements About the Getaway Car Are Inconsistent

In all her pretrial accounts, Robinson described the getaway car as a black, sporty, two-door car with fancy tire rims (mag wheels).[148] Even twenty years after the crime, Robinson described the car to CRU as being a sports car, although now saying it was white. Yet at trial, Robinson only described the car as being black, and nothing more. Her description of the getaway car prior to the trial contradicted defendant's statement (and Irons' statement) that the car was a blue Ford Taurus, a typical four-door sedan. Like almost every other contradiction, the defense did not mention this contradiction.

<u>The Jury Did Not Learn Why Robinson Was In Her Car</u>

Robinson did not give an honest account as to why she was parked in the area. Robinson testified that she was married, and she was in her car talking to a "friend" who was going through "trial and tribulations." Asked if this friend was a "co-worker, acquaintance, what?" Robinson answered "co-worker" (T.1513).[149] However, Robinson told detectives that she was with her "boyfriend," she told CRU that she and her companion were "messing around," and a case detective told CRU that Robinson was having sexual relations at the time.

Robinson's activity inside her car is relevant for four reasons. First, since Robinson was engaging in sexual relations, she would likely have been paying less attention to her surroundings than her testimony suggests. Second, Robinson gave various reasons, at different times, to explain why she left the scene before the police arrived. In her audiotaped interview, Robinson told prosecutors that she left when she heard the sirens because she felt that with the police coming the deceased was going to be fine. At trial, on direct examination, Robinson testified that she heard sirens all around and she thought they were going to block her off so she "jetted." On cross examination, she claimed she was afraid the police would put her name in the paper, but then had to concede that prior to her testimony she had given counsel a different explanation—that she was afraid the police would blame her for the crime. The most likely explanation is that Robinson wanted to leave the scene because she did not want the police or anyone else (*i.e.*, the man with whom she lived) to find out that she was with this other man. The jury was unable to fully assess the credibility of Robinson's testimony as to why she was in the car because it was not presented with this essential information. Third, although it would be inappropriate for the defense to try to discredit Robinson based solely on her sexual activity, it was

[148] In December 1995, Robinson described the car as a Trans Am type, which a bird symbol on it. This describes a Pontiac Firebird. Robinson testified in a prior proceeding that the car was a Pontiac. The 30-year-old female also described a sportscar to Scarcella (a black Mustang type) (*see* DD5 18 and handwritten notes).

[149] Not only did she never mention the name of her co-worker friend, but also throughout her testimony, Robinson repeatedly referred to this individual only generically as her "friend," but for one single passing pronoun late on direct examination where she mentioned that her friend took off "his" coat.

improper to present a false image of Robinson clearly designed to bolster her credibility. Finally, while not an issue for the jury, Robinson's steadfast refusal to provide the name of the man in her car prevented police and prosecutors from speaking to a witness who was likely in a position to corroborate or debunk Robinson's account. The importance of speaking with this witness increased sharply once Robinson wrongly identified McCargo.

The Reward Money

The prosecution argued on summation that Robinson had no motive to lie. But Robinson may have had a very strong motive—the $41,000 reward that was offered for information leading to the arrest and prosecution of the perpetrators. No evidence about a reward offer was presented at defendant's (or Ellerbe's) trial. (However, Irons' jury, which did not hear from Robinson, was told of the reward). Consequently, defendant's jury had no reason to question whether Robinson had an ulterior motive.[150]

Robinson testified that the morning after the crime she looked in the newspaper for her horoscope and saw an article about the fire. She told her supervisor what happened, and her supervisor called the TIPS hotline. All three major city newspapers that morning mentioned that a sizable reward was being offered for information. One of the two papers that carried horoscopes, the New York Post, also mentioned the reward and provided the TIPS phone number.[151] As per procedure, TIPS would not have taken Robinson's name but given her an identifying number and would have tried to convince her to speak with detectives, which Robinson did.

By giving her information to the hotline, by providing the police with information pertinent to defendant's arrest, and by testifying at trial, Robinson positioned herself to collect the reward; she was the only person in position to do so. Whether the reward was collected is unknown and can no longer be determined. Based on interviews with multiple TIPS lieutenants about TIPS procedures and, based on the information contained in Sloan's DD5, Robinson appears to have followed the procedures necessary to be eligible to collect the reward. Robinson denies having done so, but it is hard to believe that despite reading an article in a newspaper that mentioned the sizable reward and then calling the TIPS hotline, that Robinson was unaware of the potential reward, and would not have ultimately collected it, if she was eligible. While the potential for reward alone does not discredit Robinson, there is no question that it would have been a useful detail for the jury to consider in evaluating her credibility.

Robinson's Current Recollection About What She Saw

Robinson told CRU that she saw two males come up the subway stairs on one side of the street and saw a "big, fat, big guy, very young" come up the other side of the street. She never previously claimed

[150] Prior to trial, the prosecutors could not have known whether Robinson was aware of the reward money because, had they asked her about it, their mentioning the reward would have thereafter informed her of its existence. That would therefore give her a possible incentive to testify at trial.

[151] The papers also mentioned that an unlabeled soda bottle was used in the crime (*see*, *e.g.*, N.Y Post, Nov. 27, 1995, p. 5, stating, "clear plastic soda bottle recovered"). Thus, these same articles could conceivably be the source of some of the specific details Robinson gave to Sloan. CRU believes Robinson must have read the N.Y. Post because it was the only paper with a horoscope page, and provided the number for the TIPS line.

at any time to have seen suspects on opposite sides of the street from one another. (In fact, she had always said that she saw only two people and that they came up the stairs together.) What is noteworthy about this recollection is that it closely corresponds to the statement Williams made to detectives the day after the crime and to prosecutors shortly thereafter. That Robinson's present recollection, which contradicts her pre-trial statements and trial testimony, somehow coincides with the consistent statements of a defense witness Robinson never knew, is curious. It lends credibility to Williams' claims made contemporaneously to the crime, many of which cast doubt on the defendants' guilt, and gives added weight to the conclusion that Robinson's ever-changing story, from her initial contact with the police through trial, was not reliable.

Rayquan Shabazz

The third piece of evidence presented against the defendant was the testimony of jailhouse informant Rayquan Shabazz. As a category of witnesses, jailhouse informants are unique in the criminal justice system. They possess no firsthand knowledge of the crime, and they are highly motivated to provide the prosecution with useful evidence. In other words, they have a strong incentive to lie. In a 2005 study of 111 death row exonerations dating back to the reinstitution of the death penalty in the 1970's, use of jailhouse informants was found to be the leading cause of the wrongful conviction 46% of the time.[152] A 2011 examination of the first 250 DNA exonerations reached similar results.[153]

As set forth below, new evidence shows that Shabazz was an utterly unreliable informant. Thus, to the extent that the jury credited Shabazz, if the jury had known about the new evidence, it is probable that it would have discounted Shabazz's testimony in its entirety.

In any event, the jury was not presented with existing evidence undermining Shabazz's credibility. Instead of attacking Shabazz about the specifics of his claims, the defense mostly focused on Shabazz's criminal history. While the People were not required to aid the defense case, they should have been more skeptical of the highly questionable evidence Shabazz provided.[154]

Shabazz Has Provided False Information Multiple Times Since Defendant's Conviction

New evidence about Shabazz has emerged since defendant's trial, which seriously undermines his credibility in this case. After testifying in the defendant's case, Shabazz continued to inform on his

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[152] This was followed by erroneous eyewitness identifications (25.2%), false confessions (14.4%), and false or misleading scientific evidence (9.9%). Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System, How Snitch Testimony Sent Randy Steidl And Other Innocent Americans To Death Row,* A Center on Wrongful Conviction Survey Winter 2004-2005.

[153] *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011). Based on the first 250 DNA exonerations, there was informant testimony in 52 cases, 28 of which were jailhouse informants (p. 124).

[154] *See* Ted Rohrlich, *Review of Murder Cases is Ordered: Jail-House Informant Casts Doubt on Convictions Based on Confessions,* L.A. Times, Oct. 29, 1988, discussing experienced informant Leslie Vernon White, who, given access only to a prison pay phone and the last name of an inmate he did not know, proved that within a week or two he could obtain details of that inmate's case from official reports and sources, and even arranged to be moved to the inmate's proximity to make a claim that the inmate confessed to him appear plausible. White was subsequently interviewed on *60 Minutes* where, on camera, by making a few phone calls, he demonstrated his ability to obtain key details about another defendant's case sufficient to allow White to manufacture a plausible, but completely fake, confession.

fellow inmates. On November 14, 2003, regarding a New York County case against Shabazz, New York State Supreme Court Justice Carol Berkman issued an "Order and Permanent Injunction" ("the Order") prohibiting Shabazz from contacting any law enforcement agency, parole or probation officer, or any prosecutor's office, either directly or indirectly, for any reason other than in connection with his own cases.[155]

The Order cited instances, between the Summer of 1998 through the Spring of 2001, in which Shabazz had attempted to pedal false information to law enforcement and prosecutors' offices. The Order cited, among others, the following three matters: First, in August 1999, while in DOC custody, Shabazz claimed to have information concerning a plan to assassinate a New York County ADA He also identified a second inmate as having information about this plot. When interviewed about this, Shabazz also claimed there were weapons hidden in his housing area on Riker's Island. A thorough search was immediately ordered but no weapons were found. Investigations by various law enforcement agencies also determined that there was no basis for Shabazz's original claims.

Second, in 1999, Shabazz claimed to have information about a plot to kill an employee of his correctional facility. An investigation into his claim revealed that Shabazz had extorted and threatened other inmates into helping him disseminate these rumors, which Shabazz, in turn, reported.

Third, in March 2001 while incarcerated on Riker's Island, Shabazz coerced another inmate into writing a note purporting to order hits on two New York County ADAs. Shabazz then reported these "threats" to the New York County D.A.'s Office.

Queens ADA Schaefer's experience with Shabazz, where he initiated contact and drove the conversation with the D.A.'s target, despite explicit instructions not to, was also cited in the Order.

Had the jury known about this new evidence, it would almost certainly not have credited Shabazz. The prosecution in this case could not have predicted Shabazz's subsequent conduct. But it was incumbent upon the prosecution to scrutinize Shabazz's claims and determine whether his claims were worthy of belief. There was substantial evidence demonstrating they were not.

Shabazz's Initial Claims Appear To Be Based On Sources Other Than Admissions From Defendant

Shabazz's statements in his initial interview with prosecutors on January 11, 1996, appear to be cobbled together from newspaper articles and from Irons' and Ellerbe's statements, which were in defendant's possession at the time, rather than from actual admissions made by defendant. Shabazz claimed that the defendant said that Irons "sprayed" gasoline on the door to the booth, which the defendant ultimately lit. Shabazz also claimed that the defendant had told him that Ellerbe wrote something on the glass. By the time of trial, however, the prosecution knew, through Fire Marshall Fash and its own investigation, that gasoline was not sprayed on, or otherwise dispensed near the door, and that the door was not lit on fire.[156] They also knew that the defendant never claimed that gasoline was sprayed on the door. Indeed, in his video statement, which Shabazz would not have been

[155] The injunction ran "for the remainder of time that he is either in custody or under parole supervision on the cases for which he is currently serving a sentence of six years to life as a persistent violent felony offender."

[156] The trial prosecutors told CRU that they prior to the trials they had personally examined the remnants of the booth.

privy to, the defendant stated that Irons shook the gas out of a soda bottle into the coin slot. Similarly, neither the defendant nor Irons stated that Ellerbe wrote something on the glass. This claim was made by Ellerbe, alone, and neither the forensic nor physical evidence supported such a claim.

Shabazz's claims regarding Rivers were equally incredible. According to Shabazz, the defendant said that he had called Rivers in Binghamton after seeing the movie "Money Train" the Friday before the crime. Shabazz also claimed that Rivers was involved in the crime, and that after the crime, defendant, Ellerbe, Irons, and Rivers all went to sell drugs in Binghamton. But defendant never mentioned Rivers in his statements, despite having no motive to withhold his name while naming Irons and Ellerbe. Only Ellerbe mentioned Rivers in his statement and did so in passing. Nevertheless, when Shabazz spoke to the prosecutors, Shabazz incorporated Rivers' name into defendant's alleged confession to Shabazz. Whether 15-year-old Rivers was ever in Binghamton, before or after the crime, as Shabazz said the defendant had told him, was a fact that could have easily been determined. Given the discrepancies between the defendant's and Shabazz's accounts, it should have been.

Shabazz's Claims Concerning Defendant's Friend Mellow Are Not Credible

On January 11, 1996, Shabazz told prosecutors that the defendant had been making threats against Ellerbe and Irons. Shabazz did not mention to prosecutors that just days earlier the defendant told him that a friend named Mellow had tried to smuggle razor blades to the defendant on Rikers Island (for the purpose of assaulting Ellerbe and Irons) and that Mellow had been arrested for doing so.

When he testified at trial about this incident, Shabazz could not remember the date but recalled there was a snowstorm (Corrections Officer Bullock subsequently testified that the date of the snowstorm in question was January 7, 1996, just four days before Shabazz's meeting with prosecutors on January 11). Shabazz testified that Mellow tried to smuggle razor blades into the prison and said that at around 9:30 p.m. that same evening defendant told him that Mellow got caught (T.1988). There is strong reason to believe this testimony was not true. Shabazz's motive for reporting what the defendant purportedly told him, was to obtain a deal from the prosecution to avoid the life sentence he was facing in Queens. He had every incentive to tell the prosecutors that the defendant, whom Shabazz claimed (on January 11) had threatened to hurt Ellerbe and Irons, attempted to have razors smuggled into the prison just days earlier. Shabazz's failure to tell the prosecutors about this incident at the January 11 interview strongly suggests that Shabazz did not become aware of it at the time or in the manner he claimed at trial.[157] As an experienced informant, Shabazz knew that his credibility would be greatly enhanced if he could provide prosecutors with information that they could immediately corroborate.[158] His failure to provide it to prosecutors on January 11 strongly suggests that he was unaware of it at that time, contrary to his testimony at trial. Of course, Shabazz's perjurious testimony at trial was subsequently bolstered by Bullock's testimony.

[157] On summation, the prosecutor referred to Shabazz's account as a reason the jury should believe Shabazz (T.2280).

[158] The prosecutors told CRU that what Shabazz told them was fully reflected in the recorded interview and that they did not ask or instruct him to omit or withhold anything on tape.

Shabazz's Claims About Defendant's Intent Towards Ellerbe Are Contradictory and Undermined By Evidence

Prisoner Movement Logs (PMLs) Undermine Shabazz's Claims

The Rikers Island Prisoner Movement Logs (PMLs), and the physical layout of areas relevant to Shabazz's claims, contradict Shabazz's testimony about conversations he had concerning Ellerbe.[159]

1. Defendant's Alleged Plot to Kill Ellerbe

On May 30, 1996, Homicide Bureau Chief Taub called a Deputy Warden to tell her that, according to Shabazz, defendant was planning to kill Ellerbe. Taub's call was presumably prompted by Shabazz's claim that at some point in May he was in the "bing" with the defendant and Ellerbe, and that the defendant told him that he was going to kill or harm Ellerbe.[160] But the PMLs belie Shabazz's claim that he was with the defendant and Ellerbe in the bing. While the PMLs for both the defendant and Ellerbe place them in the bing during May 1996, Shabazz was never in the bing at any time in May 1996.[161] The PMLs reflect that Shabazz had been in general population in April and May except from May 17 through May 21, when he was in Administrative Segregation (a separate, secured, non-punitive unit in a different wing of Building 1).[162]

2. The Plot to Have Ellerbe Assist Defendant by Testifying at Trial

Shabazz also claimed that, after he and Ellerbe were released from the bing, Shabazz spoke with Ellerbe in the "day room," during which conversation Ellerbe disclosed defendant's scheme to have Ellerbe testify.[163] The PMLs also refute this claim. From May 21 to mid-June, Shabazz was housed in 1 Upper North (1UN). Shabazz met with prosecutors on June 4 and claimed his conversation with Ellerbe occurred in the 1UN day room prior to the Memorial Day weekend (Memorial Day was Monday, May 27). But Ellerbe was in the bing until he was moved to 1UN on May 30. The next day, Ellerbe was moved to "Receiving" and then to another building. Not only did Shabazz testify about

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[159] One of Shabazz's claims (about Irons only) is supported by the PMLs. Shabazz said that in December, he was in the pens with defendant waiting to go to court, and that Irons was in another holding pen for the same reason. The PMLs show that all three were in the pens at that time, waiting to go to court on their respective pending cases Shabazz on his Queens case, and defendant and Irons on their Kings County cases. On December 19, as reflected in their PMLs they would have been held in the pens. Ellerbe did not have court that day. KCDA case tracking system and the Supreme Court file confirm this information for defendant and Irons.

[160] The bing is an isolated area behind sets of locked gateways. According to Corrections Officers, the bing is a lockdown area. Prisoners are fed in their cells. There are no prisoner trustees. Hallways are cleared whenever a prisoner is moved to shower or to another location and is always escorted by officers. No one housed on any other floor, wing, or building would be able to see, let alone walk past, anyone being housed in or escorted down the hallways of the bing.

[161] According to the PMLs, defendant was in the bing from the end of April until late June, and Ellerbe was there from May 1 to May 30. Shabazz was never in the bing. Shabazz was in Administrative Segregation from May 17 to May 21. Shabazz was not in the bing from when defendant entered Rikers in December 1995, through defendant's trial.

[162] Like the bing, Administrative Segregation is isolated from the rest of the facility. It is on the first floor in the north wing of Building 1 (1LN). The bing is on the first floor in the south wing (1LS).

[163] Shabazz contacted prosecutors at least by June 3, the date the prosecution's "Take-out Order" for Shabazz was signed by the court. Though it cannot be definitively stated that the reason Shabazz reached out to prosecutors on that date was due to his alleged conversation with Ellerbe, that was the only topic discussed on the audiotape of the debriefing.

fictional events, to the extent that the jury credited him, the "details" of his fabricated story likely had a positive impact on his credibility.

Shabazz's Testimony Regarding Defendant's Letter Is Not Credible

Shabazz's testimony about the letter defendant sent from the bing was inconsistent and was contradicted by other claims Shabazz made about defendant and Ellerbe.

First, Shabazz was inconsistent about whether the threat expressed in letter was to shoot through Ellerbe's door or to shoot through both Ellerbe's and Irons' doors. At trial, Shabazz testified on direct examination that he knew the letter referred to Ellerbe based on a conversation he had with defendant "a couple of weeks back," before defendant was placed in the bing (T.1998).[164] On cross examination, when defense counsel confronted Shabazz with his *Massiah* hearing testimony, counsel mistakenly stated that Shabazz had previously testified that the letter reflected defendant's desire to have someone shoot through Irons' door (instead of Ellerbe's). Shabazz, apparently oblivious to the mix up, did not correct counsel. Instead, Shabazz changed his account and claimed—for the first time—that the letter related to both Ellerbe's and Irons' doors.[165] The fact that Shabazz accepted his characterization and then crafted his answer to fit the facts as counsel believed them to be undermines his credibility.

Second, the letter indicated that there was a gun waiting for Shabazz to use when Shabazz got out of prison. But a month later, the defendant told the DI posing as Shabazz's uncle that the defendant was planning to ask Mellow to procure a gun for the DI The defendant never suggested to the DI that Mellow or anyone else had a gun at the ready. Indeed, in a subsequent call between Mellow and the DI, a month after the letter, Mellow told the DI that defendant was "putting the arm" on him to procure the gun. (Mellow was unable to procure a gun over the next three months). This further undermines Shabazz's interpretation of the letter and its authenticity.

Third, according to Shabazz, at the time defendant made his request in the letter, defendant also expected that Shabazz's people were going to have Ellerbe killed on Rikers Island. This would make shooting through Ellerbe's apartment door unnecessary, and unnecessarily risky for defendant, who would be a prime suspect. Moreover, while Shabazz claimed the defendant was angry when he learned that Ellerbe was still alive at the end of June, in July the defendant told the DI during a recorded conversation that he did not want him to harm Ellerbe's family. That sentiment directly contradicts Shabazz's claims.

The Recorded Conversations with the DI Undermine Shabazz's Claim that Defendant Confessed to Him

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[164] At the *Massiah* hearing, however, Shabazz testified on direct examination that the alleged conversation occurred when he and defendant were both in the bing. On cross examination at the hearing, Shabazz claimed that the conversation occurred before defendant went to the bing. Later, on cross examination, Shabazz changed his testimony, again, saying the conversation occurred while they were both in the bing. Shabazz then provided details about how and where in the bing this conversation occurred.

[165] To be sure, that Shabazz never claimed until cross examination the letter referred to anyone other than Ellerbe is confirmed by the fact that after the KCDA received the letter on June 28, 1996, and debriefed Shabazz, consistent with KCDA policy KCDA DIs went to Ellerbe's mother's home to warn her of the threat and did not warn Irons' family.

While defendant's July conversations with the undercover DI are disturbing for obvious reasons (*e.g.*, defendant's expressed desire to harm Irons), they also support the defendant's claims that he did not commit the crime. Defendant believed that he was speaking with Shabazz's uncle and that the uncle was willing to harm Irons' family in order to prevent Irons from cooperating. Yet defendant never admitted to the undercover DI that he was involved in the crime; rather he consistently claimed that he did not know Irons. The recordings of the calls between the defendant and the DI were not before the jury pursuant to the *Massiah* ruling.

Defendant Never Admitted His Guilt to the DI

Although defendant allegedly admitted his guilt to Shabazz, defendant never admitted his participation in the crime to the undercover DI posing as Shabazz's uncle. This omission is particularly strange because, despite possibly being aware that prison phone calls were recorded, defendant asked the DI during the call to kill members of Irons' family. The fact defendant refrained from admitting his involvement in the underlying crime, even tangentially, questions the credibility of Shabazz's claim that defendant did so.

Defendant Repeatedly Insisted That Irons Falsely Claimed That Defendant Was a Participant in the Crime

Although defendant asked the undercover DI to harm Irons' family, he repeatedly told the DI that he (defendant) did not know Irons, and that Irons "put [defendant's] name" into "the mix." Defendant repeated on two separate calls with the DI that he had no idea who Irons was. He told the DI that he "was not down" with Irons and that he had never seen Irons in his life.[166] This mirrored Shabazz's initial statement to prosecutors that defendant claimed not to know Irons and that Irons had just "put his name" into something.

Defendant Did Not Know Where Irons Lived

The DI needed to know where Irons lived in order to carry out defendant's request, but the only information the defendant could tell the DI in their July 22 call was that Irons lived on Fulton Street, somewhere between Kingston and Brooklyn "or some shit like that."[167] During a call the following day, defendant provided an address after looking at his "legal papers," but he did not know the apartment number.

Defendant Maintained his Innocence to Mellow

When the DI contacted Mellow on October 18, Mellow, whom defendant knew far better than he knew Shabazz, told the DI that defendant was innocent. Mellow advised the DI that it was too late to enact the plan to harm Irons because Irons' trial had begun. Mellow then told the DI that defendant

[166] *See* July 22 and 23 calls.

[167] According to CSU measurements, 1486 Fulton was 75 feet from the Kingston curb line. According to Google Maps, the distance from Kingston to Brooklyn Avenue is 750 feet. Additionally, Ellerbe lived on Herkimer a block west of Irons and defendant lived on Herkimer one block further west. As defendant used to date Ellerbe's sister there is reason to believe he knew where Ellerbe lived. Yet in one of the recordings, defendant told the undercover DI that Irons lived "like 6 blocks" from Ellerbe.

had a legitimate alibi.[168] It is unlikely that defendant would admit his guilt to a stranger, Shabazz, while simultaneously feigning innocence to a friend loyal enough to try to smuggle razor blades to defendant on Rikers Island.

Defendant's Communications With the DI Do Not Prove Defendant's Guilt

While defendant's entreaties to the DI to harm Irons and Ellerbe could be interpreted, in isolation, as consciousness of guilt, the recorded calls provide critical context and suggest that defendant wanted to harm Irons and Ellerbe because they "put his name" into a crime that he did not commit. Assuming the jury credited this evidence, had it been privy to the recorded calls between defendant and the DI, it is likely the jury would have questioned whether defendant's alleged desire to harm his codefendants truly evidenced a consciousness of guilt.

Shabazz's Claim That Defendant Introduced Mellow to Shabazz Is Suspect

Shabazz claimed that defendant introduced Shabazz to Mellow when Mellow visited defendant on Rikers Island. Based on the testimony, Shabazz's cooperation with the KCDA could have started no earlier than mid-July 1996. But Mellow would not have been permitted to visit the jail after his arrest for trying to smuggle razor blades to defendant in January 1996. According to Rikers regulations, anyone who had been arrested trying to smuggle contraband onto Rikers Island would have been banned from visiting any Rikers inmate for at least a year. Based on his arrest, Mellow would have been banned until at least January 1997.

CONCLUSION AND RECOMMENDATION

In sum, the "new evidence" of Scarcella's alleged misconduct would have undermined defendant's confession and Robinson's identification of defendant. Furthermore, even without the new evidence regarding Scarcella, defendant's confession, Robinson's testimony, and Shabazz's testimony are unreliable.

CRU has no confidence in the integrity of the conviction of the conviction and there is no reliable credible evidence of guilt. Consequently, as the Independent Review Panel and the KCDA agree, the judgment of conviction should be vacated, that the indictment should be dismissed

[168] Defendant served alibi notice, but his girlfriend did not testify.