



DISTRICT ATTORNEY
KINGS COUNTY

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CONVICTION REVIEW UNIT
REPORT ON THE INVESTIGATION
CONCERNING THE CONVICTION OF
VINCENT ELLERBE – CRU 18-0052

THE CRIME AND BACKGROUND

According to the trial evidence, on November 26, 1995, at about 1:40 a.m., 17-year-old defendant, acting in concert with 18-year-old Thomas Malik, 18-year-old James Irons, and three 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 discovered the following errors, among others, which undermined the integrity of the conviction: (1) new evidence of the alleged misconduct of the lead case detectives Scarcella and Chmil would probably have resulted in a different outcome; (2) defendant’s confession was not corroborated, was contradicted by the physical evidence, and was unreliable; and (3) the People argued on summation that defendant’s confession was corroborated by witnesses’ accounts, but those arguments were all misstatements and/or misrepresentations, to which defense counsel failed to object.

THE POLICE INVESTIGATION²

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 Evidence Recovered from 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 clear plastic soda bottle containing gasoline residue;⁴ a book of matches, which were all apparently lit simultaneously;⁵ and a burnt glove.⁶

¹ There are separate CRU memoranda for Malik and Irons.

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

³ Ramirez DD5 71. It was later determined from the gun’s serial number that it was reported stolen in the Bronx on June 12, 1975; no arrest was made.

⁴ Dieumegard DD5 13; Coursey DD5 14

⁵ Dieumegard DD5 13; Fire Marshall Fash’s trial testimony.

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

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 into the booth through the change slot, and set it on fire. The deceased described the two men as follows:

- 6’, 200 lbs., light-skin black, 20-25 years old, green sweater/brown jacket;
- 5’6”, 150 lbs., dark-skinned black, 20-25 years old.¹²

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

Canvasses, Press Coverage, and the Reward Offer

Within hours, an extensive canvass was conducted which returned scant 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

⁷ Fire Marshal Fash report.

⁸ DeLucia DD5 5.

⁹ DeLucia DD5s 5, 8.

¹⁰ Moore DD5 9.

¹¹ DeLucia DD5 5.

¹² Defendant is medium-skin black, 5’6”, and 125 lbs.; Malik is light-skin black, 5’6”, and 165 lbs.; Irons is medium-skin black, 5’7”, and 145 lbs. (*see* 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).

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

¹⁵ Rooney DD5s 19, 20.

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 any 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.¹⁷ After being asked to calm down, 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.¹⁸

On November 27, at 10:25 a.m., Chmil and Scarcella interviewed Williams at her third-floor apartment at 12 Kingston Avenue.¹⁹ 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 that had a clear view down Herkimer to the east. Williams saw the two light-skinned boys get into a dark-colored, four-door car parked on Herkimer, east of Kingston, between a fire hydrant and a light pole. The car drove off toward Albany. The darker-skinned male ran on Fulton toward Albany.

Williams stated that she knew the boys she saw exit the subway station. She knew them 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.²⁰

¹⁶ DD5s 75, 76, 139-41; Flyers.

¹⁷ 911 transferred Williams to the Fire Department. The call is referred to herein as a 911 call.

¹⁸ 911 recording and accompanying transcript.

¹⁹ Williams’ building is located on the west side of Kingston between Fulton and Herkimer and runs from around the middle of the block to Herkimer.

²⁰ Scarcella DD5 86 and notes.

On December 14 (after Irons' confession and before defendant's confession [discussed below]), 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.²¹

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, above). One fumbled with keys and the other said, "Come on man we didn't get anything." They drove off.

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

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, along with Dets. Kevin Coursey and Richard Bergin interviewed Christine's co-worker—Jacqueline Robinson—at her workplace.²³

According to Sloan's DD5, 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)."²⁴ At that time, two young boys "up to no good" were on the northeast corner of Kingston and Herkimer Street. 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

²¹ Audiotape A95-1755 and accompanying transcript.

²² Scarcella DD5 18 (which includes a hand sketch of where the car was parked) and handwritten 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 Malik's) pretrial hearings, the prosecution informed the court and counsel that it was unable to identify or locate this witness.

²³ Sloan DD5 90. At trial, the prosecution said that notes might have 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.

²⁴ *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.

same corner as the boys—the northeast corner of Kingston and Herkimer—facing Albany Avenue (east). The 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.²⁵

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.²⁶ The CI knew both McCargo and Butler and said they were out of town. The CI viewed six photographs and identified McCargo.²⁷

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.²⁸ When Robinson saw McCargo’s photograph she began to shake and repeatedly screamed, “That’s him.” She started crying and screamed multiple times, “Why did he burn him?” She identified McCargo as the one with the clear plastic bottle going to the subway and laughing “we got him” when returning from the subway.²⁹

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, “near the park.”³⁰ Robinson added to her prior statement that the two individuals she saw were male blacks. They came from Herkimer Street, turned right on Kingston Avenue, 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.

²⁵ Sloan DD5 90.

²⁶ 12/4/95 detective activity logbook entry; Chmil notes dated 12/6/95 at 4:15 p.m.

²⁷ Chmil’s notes, “1900 HRS w/Scarcella & Hall.” There is no documentation regarding who conducted the identification procedure and there is no DD5 concerning this identification. Nor is there any report or paperwork indicating the basis for the CI’s knowledge or how McCargo or Butler were connected to the crime.

²⁸ Robinson lived less than a half a mile from Fulton and Kingston.

²⁹ Scarcella DD5 130.

³⁰ Kingston Park runs the length of Kingston between Herkimer and Atlantic.

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 then heard a very loud explosion. Robinson stated, “and that’s when I cranked my car up.” An 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 train station. She knew it was from the station because the smoke was coming right at her.

The two males came out of the train 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 had “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 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.”³¹

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 (see above [Robinson’s identification of McCargo]). She told the ADAs, “I’ll never forget his (McCargo’s) face as long as I live.”

After the interview concluded at 6:40 p.m., Scarcella, with DeLucia and Chmil present, showed photographs to Robinson, and she identified the person she saw with McCargo, whom she had claimed was holding something by his side (Robinson’s identification of R. Butler). Robinson said that McCargo had a lighter skin tone than Butler. Robinson said that when the two males were walking towards the subway that Butler was “closest” to her. When they came back out of the subway Butler was “furthest away, he’s always on the other side.”³²

³¹ Audiotape A95-1787 and accompanying transcript.

³² Audiotape A95-1787 and accompanying transcript. Other than the audiotape, Robinson’s identification of Butler was not documented.

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, for reasons not documented, NYPD concluded that McCargo was in or near Baltimore at the time of the crime.³³

Other Suspects³⁴

Sport, Crime, and Biz

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

On November 27, M. Ortiz reported to DeLucia and Det. Michael Paul, that he saw Sport, Crime, and Biz at a party shortly before the murder with a rifle. Ortiz apparently identified a photograph of the gun recovered from the crime scene as the same gun he saw at the party.³⁵

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

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

On December 21, 1995, (six days after Malik’s arrest), Sport was arrested in Manhattan on an open warrant, and on December 22, his wanted card in this case was cancelled. On January 11, 1996, Crime’s wanted card in this case was cancelled.

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.³⁶ She provided Ringy’s and Kato’s addresses on Bergen Street in the Albany Houses. On the same day, an anonymous

³³ 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. The report states that Butler was in police custody on the day of the crime and is silent regarding McCargo’s whereabouts. On 12/22/95, (after defendant, Malik, and Irons were indicted), NYPD cancelled the wanted cards for McCargo and Butler.

³⁴ Malik’s memorandum contains a detailed account of other suspects.

³⁵ Shaw’s report included that a 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.

³⁶ Millwater DD5 145; Squad logbook entry dated 12/12, 1350 hrs.

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).

Ricardo James

On December 13, at approximately 7:30 p.m., at the 79th Precinct, Chmil spoke to a CI brought in by Officer Lita Steed of the 88th Precinct.³⁷ The CI reported that Ricardo James ("Ricardo") told the C.I. that Ricardo committed the crime with Tyrone, Pop, and Pepe.³⁸

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.³⁹

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 halfway 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.⁴⁰

At 3:40 p.m., DeLucia interviewed Lite, who largely corroborated Ricardo's account. Brathwaite added that he saw a male dressed in black run out of the subway and down Kingston toward Eastern Parkway (toward 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.⁴¹

³⁷ Chmil's notes suggest that Scarcella and possibly DeLucia were present.

³⁸ Chmil's 12/13 notes (describing Ricardo as a 20-year-old male black with dreadlocks, who resided on New York Avenue; Tyrone, a male black in his twenties; and the Pop and Pepe who lived in the Albany Projects); *see also* DeLucia's undated notes indicating the CI knew Ricardo from high school. CRU was unable to determine the CI's identity. And there is no evidence as to how the detectives determined that Ricardo was Ricardo James, who lived on Fulton and not New York Avenue.

³⁹ *See* Irons' memorandum: H.12-13; T.559-61.

⁴⁰ 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."

⁴¹ DeLucia note on 12/14/95 at 10:00 p.m. The type of identification procedure was not documented.

IRONS' CONFESSION⁴²

On December 14, at about 2:30 a.m., Irons gave a *Mirandized* statement to Chmil in Scarcella's presence. Irons stated, in sum and substance, the following:

A couple of days before the crime "Vincent" (whom Irons later identified as defendant) and "Tommy" (whom defendant later identified as Malik) asked if he wanted to rob a token booth. Irons agreed to be a lookout. Malik and defendant said they needed money for Christmas, and that Chris, Andre, and Eric would be involved. Defendant gave Irons a .32.

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

Defendant squirted gasoline from a container into the change slot. Malik squirted gasoline near the booth door and lit a match in the slot causing an explosion. Malik had a "big gun" under his arm and dropped it when they all fled. Irons saw the others all run to the getaway car on Herkimer, and Irons ran home. The next day, Irons ran into defendant and Malik on Fulton, and he returned the gun to defendant.

At 4:15 a.m., Irons identified defendant as "Vincent" either in a photo array or RIP photos.⁴³

At 6:15 a.m., Irons gave a videotaped *Mirandized* statement to an ADA, in Chmil's presence. Regarding the .32, Irons stated that defendant gave it to him in front of his building just before the crime. Regarding the gasoline, Irons stated that defendant squirted gas near the token booth door, before attributing it to Malik.

DEFENDANT'S CONFESSION

Defendant's Apprehension

On December 14, BNH Sgt. Arthur Stoecker and Dets. James Sullivan and Frank DeLouisa went to defendant's residence at 280 Herkimer Street. Defendant was in Binghamton, and Stoecker spoke with defendant by telephone. Defendant agreed to return to Brooklyn. When defendant arrived home, the detectives were contacted, and they transported defendant, his mother, and his sister to the 79th Precinct.⁴⁴

DeRita Writes Out Defendant's Statement

At 3:00 a.m., DeRita read defendant his *Miranda* rights from a card, which defendant signed after waiving his rights. DeRita wrote out defendant's statement. Defendant signed each page and the end

⁴² Neither Irons' nor Malik's confession was admitted into evidence at defendant's trial. They are briefly discussed to complete the narrative of the police investigation, and insofar as they are relevant to CRU's analysis. A complete account of their confessions, and a copy of their videotaped statements, are contained in their respective CRU memorandum.

⁴³ Compare Scarcella DD5 54 and notes with his hearing testimony.

⁴⁴ Sullivan DD5 164

of the statement. Above defendant's signature at the end of the statement, DeRita wrote that defendant had the opportunity to write his own statement but preferred that DeRita write it.

Planning the Crime

Defendant stated that about a week before Thanksgiving, he was in Binghamton visiting a girl. He called his friend "Julius" (later determined to be Julius Rivers), who lived in his building. Rivers told defendant that he heard "[defendant's] man Tommy" (Thomas Malik) was planning a robbery.⁴⁵ Rivers said he did not know whom Malik planned to rob.⁴⁶ Defendant said he would find out.

A couple of days before Thanksgiving, defendant got Malik's phone number from defendant's sister. Defendant called Malik about the robbery. Malik asked, "You down?" Defendant said they would talk when he returned home to Brooklyn.

Defendant returned to Brooklyn "the Friday after Thanksgiving at about 3:00 a.m."⁴⁷ No one answered the door at his home. He assumed everyone was asleep. Defendant then went down the block to Malik's home where they sat on a stoop and talked. Defendant asked about the robbery, and Malik said he was going to rob the token booth. Asked how, Malik replied that he was going to "back him down and get the money." Malik said he wanted defendant to "hold him down," meaning to make sure nothing happens to him. Defendant said, "No problem" and that Malik should hurry when he does it.

Defendant returned to his building and stayed at his friend Sam's apartment on the first floor. At 5:00 p.m., when defendant woke up, he went to Malik's house where Malik showed defendant a .32 revolver. Malik asked defendant to hold the gun until they got to "his man's (Irons) crib," and then give it to Irons, who was "[d]own with us for the robbery."⁴⁸

Irons and the Other Participants

Around 1:00 a.m. (Sunday), defendant and Malik left Malik's residence and walked to Irons' residence on Fulton Street. Irons was in front of his building. Defendant gave Irons the gun. About 20 minutes later, Malik said, "You ready, Let's go." They walked across the street to the subway station. This guy "Chris" from defendant's neighborhood was there with two guys defendant did not know. They were on the steps to the subway station. When Irons saw them, he asked them if they were ready, and they said yes.

The Gasoline Bottle

As they headed down the subway stairs, Irons handed defendant a white plastic bottle with a spray top and told defendant to hold it. Defendant asked what the bottle was for, and Irons replied, "If

⁴⁵ Throughout his statement, defendant referred to Malik as Tommy.

⁴⁶ The movie Money Train opened the day before Thanksgiving. Rivers later told DeRita that Malik had asked him a week before Thanksgiving to rob a numbers store and he (Rivers) told this to defendant by phone when defendant was in Binghamton.

⁴⁷ Defendant apparently meant early Saturday morning, as he stated in his videotaped statement (discussed below).

⁴⁸ Throughout his statements, defendant referred to Irons as James.

anything goes wrong, just spray it.” Defendant could not see inside the bottle, but it smelled like gasoline.

The Crime

Defendant, Irons, and Malik approached the booth with Chris behind them. The two others were closer to the stairs, watching to see if anyone came down. Irons pulled out the .32, stuck it into the slot, and said, “Give up the money.” The deceased said, “No, No, No.” Malik and Chris then repeatedly said, “Give up the money.” The deceased repeatedly said, “No, No, No Money.”

Using the bottle, defendant then sprayed the token booth glass with his graffiti tag “Teff,” short for “Teflon Don.” As he sprayed the glass, Malik took out matches. Defendant backed away and dropped the bottle. Malik started to light a match and the deceased yelled, “Don’t light it, don’t light it.” Defendant headed for the staircase opposite from the one he came down. At the stairs, defendant turned to look for the others and saw a “bright flash” and heard “a loud blast.” He then heard a man scream and yell for help. Defendant knew the man had to be the deceased “by the way he was screaming.” Defendant ran out of the station and down Kingston two blocks until he reached the park. He stayed there about a half an hour and did not see the others. Defendant then went to his “girl’s” house at 360 Thompkins Avenue, but she was not home. Defendant went home and went to sleep.

Subsequent Discussion with Malik

Defendant woke up at about 12:00 p.m. and hung around outside. At about 2:00 p.m., Malik “came around” defendant’s block. Malik said he wanted to talk.⁴⁹ Defendant asked Malik “what’s the verdict” meaning why did Malik do what he did. Malik said it was because the deceased would not give up the money. Defendant told Malik that he would not have been involved if he had known that Malik was going to do that. Malik told defendant not to worry. Defendant said, “I ain’t worried about it because you[re] the one that lit the match.” Malik said, “I know,” and left.

Defendant went home. Later that night he went to the Port Authority and took a bus back to Binghamton. Defendant had not been back to Brooklyn since then and had not spoken to anyone about what he did. He did not know that the deceased died until he returned home (the day of his statement).

Defendant’s Videotaped Statement

From 10:15 to 10:41 a.m., defendant made a videotaped *Mirandized* statement to an ADA.⁵⁰

⁴⁹ Irons stated he ran into defendant and Malik the next day, but at a different location. Malik stated he did not see defendant or Irons again after the crime.

⁵⁰ Videotape R95-0800, and accompanying transcript.

Defendant stated the following:

Planning the crime

Defendant's statement about planning the crime was consistent with his prior statement, except that defendant added the following:

Defendant returned to New York, "about oh, November 25th I got here, like 4 in the morning," and went to Malik's house. Defendant got off the bus from Binghamton at about 3:00 a.m. (V.8). Malik told defendant that he was going to "stick' em up and get the money," and that the robbery would occur "the next day, November 26 at 1 o'clock in the morning" (V.10).

Defendant reiterated his prior account that when he woke around 5:00 p.m. the next day, he went to Malik's house, where Malik gave him the .32 to give to Irons (V.14).

Meeting with Irons

Defendant and Malik stayed at Malik's house until around 12:30 a.m. They then went to Irons' house on Fulton Street where defendant gave Irons the gun (V.16). Defendant, Irons, and Malik stayed in front of Irons' building until 1:00 to 1:30 a.m. They then walked across the street to the train station where they met the others (V.16-18). Defendant said he was with "[Malik], [Irons], Chris . . . I don't—I can't, I can't remember the last two. I don't know the last two words, the other two words go down the stairs" (V.5 [emphasis added]). As defendant stated the names, he counted on his fingers (Videotape).

Defendant knew Malik for a couple years. He knew Irons and Chris for a couple of months (V.5-6). He knew Irons from "just seein' him in the street" (V.17). Defendant did not "really know the other two guys" (V.5-6). Except for the .32 that defendant gave to Irons, there were no other weapons (V.25).

The Gasoline Bottle

Defendant statement regarding the bottle was consistent with his prior statement, that it was like a Windex bottle, but "all white" (V.20-21).

The Crime

Defendant's statement about the crime was consistent with his prior statement except as follows:

Defendant told Irons not to shoot when Irons stuck the gun into the coin slot (V.26). Defendant twice demonstrated how Irons stuck the gun into the coin slot (Videotape).

Defendant sprayed the gasoline while Irons demanded money (V.23). Defendant demonstrated a squirting motion with his index finger, as if squeezing a trigger (Videotape).

Defendant, Irons, Malik, and Chris approached the booth, Malik and Irons stood "right there in front" of it where the deceased was (V.25). Defendant demonstrated that he stood to the left of Irons, Malik, and Chris, who were in front of the booth, and further demonstrated that he sprayed the booth glass around eye-level, to the left of the aperture (Videotape).

After defendant sprayed the outside of the booth with gasoline, Irons, Malik, and Chris demanded the deceased give up the money. Defendant sprayed gasoline on the glass only, and he stopped spraying when the others were demanding the money (V.25-26). When the deceased refused, Malik took out the matches, and defendant threw the bottle on the floor and “walked away” (V.27).

When defendant was on the stairs, he saw a flame, “like, you know, you put alcohol down and you light [it] and you see flames come up” (V.27). Irons, Malik, and Chris went up the opposite staircase (V.27-28).

Defendant Runs Out of the Station

When he reached the stairs, defendant saw a flash, heard a loud noise, and ran out of the station (V.23-24, 26-27). Defendant saw Irons, Malik, and Chris run up the opposite staircase (V.27-28). At the top of the stairs, defendant heard the deceased screaming for help, but from that vantage point defendant could not see the deceased (V.28-29). Defendant ran to the park where he stayed for “half an hour or two,” and then went home (V.30).

Subsequent Discussion with Malik

Defendant’s statement about seeing Malik on his block the next day, their conversation, and leaving for Binghamton was consistent with his prior statement (V.31).

MALIK’S CONFESSION⁵¹

On December 14, at 1:45 p.m., Malik gave a *Mirandized* statement to Scarcella in Chmil’s presence. Malik stated, in sum and substance, the following:

Malik twice denied any involvement and then confessed, saying that Irons and defendant and two others were there. Irons squirted gas and lit the booth on fire. When Malik realized defendant and Irons were not bluffing, defendant fled and then heard the explosion.

At approximately 6:35 p.m., Malik gave a videotaped *Mirandized* statement to an ADA. Scarcella and Chmil and another ADA were present. Malik’s statement was evasive and inherently inconsistent. Essentially, Malik admitted that he acted as a lookout, but he also denied acting as a lookout, explaining that he did not believe Irons and defendant were going to commit a crime. The crime was supposed to happen the previous night, but defendant and Irons never showed up. Just before the crime, at about midnight, he met Irons and defendant in front of 400 Herkimer, and they all walked to the subway station from there. In his videotaped statement, Malik demonstrated that the gasoline was not squirted but rather shaken out of the bottle into the coin slot. Defendant had a .32 or .38.

Malik’s Lineup; Identified by Robinson, But Not by Williams

On December 15, at approximately 11:40 p.m., Chmil conducted a lineup with Malik 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 Malik as the subject. An ADA was present. Jacqueline Robinson viewed the lineup and identified Malik as the one she saw

⁵¹ Defendant identified a photograph of Malik.

carrying the plastic container before entering the subway, and fleeing after the explosion, laughing and saying, “We got him.”⁵²

There Were No Identification Procedures Conducted Regarding Defendant

No attempt was made to have Robinson, Williams, or anyone else identify defendant. No photo array or lineup procedure was conducted with defendant as the subject.

THE GRAND JURY⁵³

The grand jury presentation commenced on December 18, 1995.⁵⁴

Defendant was charged, under an acting in concert theory, with four counts of Murder in the Second Degree (P.L. § 125.25 [1], [2], [3] [intentional, depraved indifference, and felony murder, respectively]); and one count each of Attempted Robbery in the First Degree (P.L. §§ 110.00/160.15[1]); Attempted Robbery in the Second Degree (P.L. §§ 110.00/160.10[1]); Arson in the First Degree (P.L. § 150.20); and Arson in the Second Degree (P.L. § 150.15).⁵⁵

CONTINUED INVESTIGATION AND ADDITIONAL INTERVIEWS

Chris

On December 14, at 1:30 p.m., Chmil, Scarcella, and DeLucia interviewed “Chris.”⁵⁶ Chris stated that he spent the night of the crime drinking with Shaka, Geneva, and Shawn at Herkimer and Nostrand Avenue and did not return home until the morning.

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

⁵² At the lineup Williams viewed, Malik was one of three people wearing a red shirt. At the lineup Robinson viewed, Malik was the only one wearing a red shirt.

⁵³ 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).

⁵⁴ The case was jointly presented against defendant, Irons, and Malik.

⁵⁵ Only defendant was charged with two additional counts of murder and arson.

⁵⁶ It is not known how or why this Chris was interviewed. He lived on Decatur Street, is dark-skinned, 6’, 185 lbs., and DOB 10/3/1975.

J. Rivers

On December 16, 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.⁵⁷

Rivers' Signed Statement

Rivers stated that about a week before Thanksgiving he ran into Malik. He knew Malik for several years from the neighborhood. Malik said he was going to Kingston Avenue to “look for something,” which Rivers understood to mean to rob somebody. Malik 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.

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

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

Shortly thereafter, Rivers learned from defendant's mother that defendant 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 (Malik's lineup viewed by Robinson). Rivers identified number two, Malik as the one referred to in his statement. Rivers said he never heard of Chris, Andre, Eric, or Ringy.⁵⁸

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 Malik wanting to commit a robbery, and defendant's mother's advice not to go to see Malik. Rivers confirmed that he identified Malik in a lineup photograph. Rivers added that Malik 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.⁵⁹ 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

⁵⁷ Rivers was fatally shot in March 2004.

⁵⁸ DeRita DD5 170; DeRita notes 12/16/95 at 1445.

⁵⁹ Chmil's handwritten notes, entry dated 12/19/95, at 1715 hrs.

crime days later. The police were “locking up” everyone in the projects after it happened. Ringy was shown photographs of defendant, Irons, and Malik, and did not recognize them.⁶⁰

Follow-up with Ricardo James

On March 23, 1996, at approximately 6:00 p.m., Chmil re-interviewed Ricardo.⁶¹ Ricardo added that he might have seen Irons in Irons’ apartment window prior to the explosion but was not sure.

THE PRETRIAL SUPPRESSION HEARING

On October 31, 1996, defendant’s *Dunaway/Huntley* hearing commenced.⁶²

The People’s Case

Sgt. Stoecker

Stoecker testified as follows:

On December 14, 1995, after Scarcella informed him that Irons had identified defendant as being involved in the crime, Stoecker looked for defendant to bring him to the precinct. Stoecker first conducted surveillance around defendant’s residence at 280 Herkimer Street. At 6:30 p.m., Stoecker knocked on the door and told defendant’s mother that he wanted to speak to defendant about the subway incident, and that people had placed defendant at the scene (H.314-16, 323-24, 328, 331). Defendant’s mother said defendant was upstate. Defendant’s sister appeared with a cordless phone, said that she was talking to defendant, and handed Stoecker the phone. Stoecker told defendant that he wanted to speak with him about the subway incident. Defendant said he was in Binghamton. He agreed to return to Brooklyn and said he would arrive in about three to six hours. Three hours later (at about 9:30 p.m.), Stoecker returned to defendant’s residence, was invited in, and waited for about two hours for defendant. Since it was near the end of his tour (it was now about 11:00 to 11:30 p.m.), Stoecker gave defendant’s mother his contact numbers and left (H.317-19, 332-33).

As soon as he returned to the precinct, Stoecker heard from defendant’s mother (H.319). At that time, Stoecker returned to defendant’s residence with Sullivan and DeLouisa. Stoecker asked defendant to go to the precinct and defendant agreed. Defendant was not handcuffed. Defendant, his mother, and his sister were transported to the precinct in one car at about 12:20 a.m. (H.319-21).

Stoecker placed defendant in an interview room and assigned Det. Anthony Viggiani, and no one else, to speak to defendant (H.319-22, 335, 339-40). Stoecker remained at the precinct until his overtime tour ended at 8:00 a.m. During that time, Stoecker saw defendant when the door to the interview room opened, and a detective come out and another detective went in (H.342-43).

⁶⁰ Chmil’s handwritten notes, entry dated 1/18/96, at 1400 hrs. There is no documentation as to whether Ringy’s girlfriend was interviewed.

⁶¹ Chmil’s 3/23/96 handwritten notes. It is not clear what prompted this inquiry. A list of questions in the trial file dated March 1996, includes a question with the name Ricardo James, followed by “3/23/96 Spoke To Him Nothing To Report.”

⁶² 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.

Det. Viggiani

Viggiani testified as follows:

He was not one of the case detectives; he only handled occasional assignments during the investigation (H.346). On December 14, at about 1:00 or 1:30 a.m., Viggiani was at the 79th Precinct. Stoecker assigned him to “babysit [defendant] until the morning hours.” Stoecker did not tell him to conduct an interview (H.347-48, 359). Viggiani went into the interview room and told defendant he was there to sit with defendant until the case detectives arrived at the precinct (H.349). Viggiani had almost no contact with Scarcella and Chmil, and they did not discuss Irons’ apprehension with him. Viggiani did not review any paperwork relating to the case (H.348-49, 354, 359).

Defendant questioned Viggiani about how long defendant was going to be there, whether defendant was the only one at the precinct, and how defendant’s name came up (H.350). Viggiani tried to answer defendant, but as defendant asked more questions, Viggiani stopped defendant. Viggiani told defendant he was going to read defendant his rights and, after that, if defendant wanted to speak, Viggiani would answer any questions he could. Viggiani read defendant his rights from a *Miranda* card he carried (H.350-52).

Viggiani then got up to get a cup of coffee and asked defendant if he wanted anything to drink. Defendant asked for water. On Viggiani’s way back to defendant with coffee and water, DeLouisa asked if he could sit in on the interview. Viggiani said “no problem” (H.353). Viggiani entered the room with DeLouisa and introduced him to defendant (I.353).

Viggiani told defendant that if defendant was going to talk, “just don’t waste my time, don’t lie to me.” After about a minute, defendant asked, “Well, what if I was a witness?” Viggiani said, “it could help you. How were you a witness? What do you know?” Defendant said that he was on the lower steps of the entrance “to the token booth area,” and heard the deceased yell, “Don’t light it, please don’t light it” (H.353). At Viggiani’s suggestion, he and DeLouisa left the interview room to talk. Viggiani asked DeLouisa if he agreed that it would have been difficult for someone so far away from the booth to hear the deceased. Viggiani thought it was “definitely a problem” that he did not have information about the case, and he needed to learn more before speaking to defendant again. After attempting to get more information, Viggiani returned to defendant and saw DeRita talking to defendant in the interview room. Viggiani did not interrupt and did not reenter the room or speak to defendant again (H.355-56). Viggiani did not inform Stoecker or anyone in the precinct about his interaction with defendant and he did not document it (H.355, 361). Viggiani did not speak to DeRita before DeRita entered the interview room (H.367).

“A short time later,” Stoecker showed Viggiani a photograph and sent him and Det. Horz to surveil 139 Herkimer Street for “a third person”—Malik (H.356, 370-71). Viggiani left the precinct “roughly” between 4:00 to 5:00, 5:30 or 6:00 a.m., and then left the surveillance location between about 10:00 a.m. and 12:00 p.m. (H.357, 369).

On cross examination Viggiani testified that defendant was not under arrest or in custody, and he was free to leave (H.359). Viggiani spent about a half hour with defendant (H.358, 360, 366). It was around midnight to 12:30 a.m., or 12:30 to 1:00 a.m. (H.360, 366-67). He did not believe that it was as late as

1:00 to 1:30 a.m. (H.361). The half-hour with defendant included the time he met with defendant, the “couple of minutes” he conferred with DeLouisa, and his return to find DeRita in the room with defendant (H.364-66).

Det. DeRita

DeRita testified as follows:

On December 15, he was first “involved to assist in the investigation” (H.395). Initially, DeRita testified that he arrived at the 79th Precinct that morning about “two hours” before he met defendant at about 2:50 or 2:55 a.m. (H.379-80). He then testified that he was in the precinct for about “six and a half hours” before he met defendant at 2:50 or 2:55 a.m. (H.395-96). He saw the door to the interview room was closed, which usually meant that someone was in there (H.395-96). He asked detectives in the squad room if someone was in there, and they said yes. He knocked on the door, opened it, and saw defendant “sitting there by himself” (H.379-80, 396-97).

At that time, DeRita did not know who defendant was, or why defendant was in the interview room, and did not ask any detective at the precinct (H.397-99, 402-03). When DeRita arrived at the precinct he saw Stoecker. When counsel asked whether Stoecker mentioned anything about the case, DeRita said, “[W]ell, we were all working on the same case” (H.398).

DeRita did not ask defendant who he was, why he was there, or who brought him there (H.400-01). DeRita asked defendant if he needed to use the bathroom or if he needed a drink, or anything. Defendant said he was okay and did not need anything (H.380). DeRita introduced himself as Tony, and said he was working on this case. DeRita told defendant if he needed anything knock on the door and DeRita would be happy to help. DeRita asked whether defendant wanted DeRita to sit with him for a while. Defendant said yes. DeRita sat and they started talking (H.381).

Defendant asked if he was in trouble, saying he thought he was and that he “fucked up.” DeRita said he did not know, and he did not know if defendant “did anything” (H.381, 401). DeRita said that he was there, there were other detectives in the squad room, and if defendant wanted to talk to anyone, now was the time. Defendant said he would talk to DeRita because DeRita seemed “cool” (H.381-82, 401-02).

DeRita sat down and asked defendant what he wanted to talk about. Defendant said, “I want to talk about what happened and what I did” (H.382). DeRita told defendant that he had to advise defendant of his rights. DeRita left the room to get a *Miranda* card, then returned and read defendant his rights (H.382, 402). At 3:00 a.m., DeRita finished reading defendant his rights, and noted that time on the *Miranda* card (H.385-86).

DeRita testified about the substance of defendant’s statement (H.386-87). After defendant completed his statement, DeRita asked defendant to repeat it, two or three times. At around 4:30 a.m., DeRita told defendant that he was going to write out the statement and asked defendant if he wanted to write it. Defendant preferred that DeRita write it. DeRita wrote the statement on five sheets of white legal paper as defendant repeated it (H.388-89, 407). Prior to that written statement, DeRita took no notes (H.405-07). To the best of his knowledge and ability, DeRita “got most of [defendant’s] statement”

(H.388). DeRita then had defendant read the statement for accuracy. Defendant made no corrections or changes (H.390-91). Defendant agreed to make a videotaped statement to an ADA (H.392). The videotape was played for the hearing court (H.419-20).

During defendant's statement to DeRita no one entered the room except a detective (unnamed), who showed defendant a photograph of someone, whom defendant identified as Malik (H.391-93). At about 2:00 p.m., after conferring with Chmil, DeRita took defendant into another room for several seconds to show defendant a "subject" (H.393). When brought back to his interview room, defendant identified the person he just viewed as Malik, who participated in the crime with him (H.394).

DeRita knew that Chmil and DeLucia were the case detectives. DeRita believed that Chmil was in the precinct when DeRita interviewed defendant, but DeRita did not have Chmil or any detective sit in on the interview. DeRita also did not seek out Stoecker or any other supervisor involved in the investigation to sit in on the interview (H.408-11). He did not recall if Viggiani was in the precinct and did not recall having any conversation with him (H.397, 411). He did not learn that Viggiani *Mirandized* defendant (H.412).

At the end of defendant's statement, before DeRita memorialized it, DeRita stepped out to give Stoecker the name "Tommy" (Malik) (H.414). This was at the end of defendant's statement, right as the detective was writing it up.⁶³ To DeRita's knowledge, no one else spoke with defendant during the time DeRita spoke with defendant (H.416, 418).

Det. Scarcella

Scarcella testified as follows:

On December 14 at 2:15 a.m., during Scarcella's interview of Irons, Irons stated that defendant and Malik participated in the crime with him (H.423-24). At 4:15 a.m., Irons viewed "a number of photos" in a RIP book and identified a photograph of defendant (H.434-35). Scarcella did not recall how many RIP books Irons had viewed before he identified defendant. Irons viewed at least one book, which had four to five color photographs per page. There were about 40-60, or possibly more, photographs in the book (H.424-25).

Scarcella did not recall when he left the precinct after interviewing Irons. Scarcella was there on December 15, at 11:00 a.m., but did not recall whether he was there before 11:00 a.m., because he could have gone home after Irons' interview (H.428-29). Scarcella saw DeRita at the precinct on December 15, "walking around." He did not recall whether he saw DeRita enter the interview room (H.430). Scarcella spoke to DeRita regarding this case, but Scarcella did not recall when that conversation occurred or what was said (H.430).

That same morning, December 15, Scarcella learned that defendant was arrested. After 11:00 a.m., DeRita showed him defendant's written statement. Scarcella did not ask how the statement came about. Scarcella did not recall whether DeRita asked him about any facts of the case, or whether

⁶³ At Malik's hearing, the court asked the prosecutors to ascertain the time Stoecker began his computer search for Malik. According to NYPD Information Services Division, it was at 3:07 a.m. (Malik's memorandum: H.254-55, 310).

DeRita mentioned how defendant ended up at the precinct (H.431-32). Scarcella did not know whether he was in the precinct when defendant's videotaped statement was made (H.432).

The Defense Case

Defendant did not present any evidence or call any witnesses at the hearing.

The Hearing Court's Decision

In a written decision, the court held that based on the information provided by Irons, there was probable cause to arrest defendant. In his statement, Irons named "Vincent" as an accomplice and indicated where he lived. Thereafter, Irons identified defendant as Vincent from a photograph after viewing 40 to 60 photos in a RIP book (Decision at 13).

The court denied defendant's motion to suppress his statement as fruit of an illegal arrest. The court held that defendant voluntarily returned from Binghamton and went to the precinct. He was not handcuffed or advised he was a suspect. Defendant was not in custody until after Viggiani *Mirandized* defendant (Decision at 14).

THE TRIAL

Defendant's trial began on November 18, 1996.⁶⁴

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" 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).

⁶⁴ Defendant was tried jointly with Malik before separate juries. Irons had been convicted a few weeks earlier.

Near the booth, Fash also observed a rifle, a transit badge, and a “cleaning bottle” containing Windex, which is not flammable (T.1450, 1452).⁶⁵

Officer Santo

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 light-skinned, about 6’, and 200 lbs., wearing a brown jacket and green sweater. The other one was dark-skinned, about 5’6” and 150 lbs. (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).⁶⁶

Jacqueline Robinson

Robinson testified as follows:

On November 26, 1995, at about a 1:40 a.m., she was sitting in the passenger seat of her car.⁶⁷ 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).⁶⁸ 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 Malik and another guy “coming from Herkimer” (T.1513, 1525).⁶⁹ Robinson added that she always looked in her rearview mirror “because that area is kind of shady at times.” Malik and his friend looked shady, liked they were up to something (T.1513).

Malik 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). Malik’s friend had his hand straight down by his side, “[a]longside the leg” as if he was holding a baseball bat (T.1514, 1518-19).

⁶⁵ It was stipulated that MTA employee Cheryl Stone would have testified that she regularly worked at the Fulton/Kingston token booth, and 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 (T.1494). It was loaded and operable (T.1496, 1499).

⁶⁶ Previously, at Irons’ trial Santo testified that the deceased did not mention whether the two men had weapons (Irons memorandum: T.549).

⁶⁷ In all her pretrial accounts, Robinson consistently stated that she was the driver.

⁶⁸ In all her pretrial accounts, Robinson placed her car on Kingston. In her initial account to detectives she was on Kingston near Herkimer, “between Kingston and Atlantic.” In her subsequent account to the prosecutors, she was on Kingston, “near the park,” 25 feet from the getaway car on Herkimer off Kingston. She then testified in a proceeding that she was on Kingston between Herkimer and Fulton.

⁶⁹ In her account to the detectives, Robinson said that she noticed the two boys standing on the northeast corner of Herkimer. During her testimony, Robinson was asked to look around the courtroom to see if she recognized “either of the two people” she saw that night. Robinson identified Malik (T.1525).

Malik was big and husky and looked “High yellow” and “Hispanic/black” (T.1515-16, 1525). Malik’s friend was tall, slim, and dark-skinned black (T.1515).⁷⁰ They were on the same side of the street as Robinson (T.1517). They walked side-by-side (T.1515). Malik 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 Malik 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).

Malik 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).⁷¹ Malik was closer to her car. As they passed by, Malik said, “I got that motherfucker, I got that motherfucker” (T.1517, 1520-21).⁷² Malik 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 for Malik 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. She would not talk 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 viewed three photographic identification procedures.⁷³ First, she viewed a book of photographs and did not recognize anyone (T.1526-27).⁷⁴

⁷⁰ In a prior proceeding, Robinson testified, “they were Hispanic and black – white.”

⁷¹ Robinson testified in a prior proceedings 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.

⁷² Robinson did not use profanities and used the abbreviation “MF” (T.1520-21).

⁷³ Based on NYPD records and materials, it appears that during the investigation Robinson may have viewed as many as eight sets of photos, six in the form of photo arrays.

⁷⁴ There are no documents regarding this identification procedure.

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 telling Scarcella that he (McCargo) was “light-skinned, thick eyebrows.” Robinson testified that she told Scarcella that the photograph “looked like” the heavy-set guy she had seen (T.1528).

On cross examination (by Malik’s attorney), 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.” Robinson then testified, “I said that picture looks like the guy, looks like the guy” (T.1538).⁷⁵ 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).⁷⁶ Robinson did not know McCargo’s name. When asked whether McCargo and Malik looked alike she testified, “No, the 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).⁷⁷

Robinson also acknowledged that on December 8, she gave a sworn audiotaped statement to ADAs. Scarcella was present (T.1542). At that time, Robinson viewed a set of “tiny” photographs, and selected a photo (R. Butler). She said, “That’s the guy, he’s tall, slim and dark skinned and he is the one who had a baseball bat in his hand” (T.1529). Counsel for Malik admitted Butler’s photograph into evidence and published it to Malik’s jury. Defendant’s attorney did not have Butler’s photograph published to defendant’s jury saying, “It’s not a photograph of [defendant]” (T.1547).⁷⁸

On December 15, at 11:00 p.m., the police called Robinson to view a lineup at the precinct.⁷⁹ The weather was freezing cold, and she did not feel well. She asked to view the lineup the following morning. 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.1529-31).

Robinson looked at all the faces and recognized Malik. They were sitting straight with “[b]ig numbers in front of them” (T.1531). She was asked if she wanted them to approach the window, and as they started to approach, Robinson recognized Malik, number two, “right away,” as the one who said, “motherfucker” (T.1532-33).⁸⁰

⁷⁵ 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.

⁷⁶ Malik’s attorney admitted McCargo’s photograph into evidence and published it to Malik’s jury. The court told defendant’s jury that it did not have to view the photograph because it was not relevant to defendant (T.1538-39).

⁷⁷ McCargo was 6’2” and 225 lbs. (Stipulation: T.2133). Malik was 5’6” and 165 lbs.

⁷⁸ The court admonished counsel not to “make speeches” (T.1547).

⁷⁹ Outside the presence of the jury, the prosecution and counsel agreed that Scarcella called Robinson the night of December 15 and asked her to view lineup (T.1794).

⁸⁰ As stated, Robinson testified, “M.F., M.F.” Three photographs of the lineup were admitted into evidence and published to the jury (T.1533-34). As discussed in the CRU investigation section, DeRita, who conducted the lineup, said he would have not the lineup participants approached unless the witness requested it, or had trouble seeing.

Ricardo James

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

On November 25, 1995, at about midnight, he went to a party 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, "Charlie's," on the corner of Kingston and Fulton, where purchases were made through a window. When Ricardo neared the window, he heard a loud explosion. He and his friend fled. Halfway down the block, Ricardo 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 and saw the deceased emerge from the train station with his entire body on fire. Someone in a red jeep came out with a towel and Ricardo helped that person extinguish the flames on the deceased (T.1697-99).

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).

On December 13, Ricardo was on the phone in the subway 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 asked Irons if he wanted to go, and Irons agreed (T.1703-05).

At the precinct, 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 point, counsel for both Malik and defendant's attorney objected and asked for a sidebar. Malik's attorney, joined by defendant's attorney, 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). The prosecution replied that counsel (for Malik) raised the Scarcella issue when he argued in his opening that two white detectives harassed and intimidated a black person (Scarcella and Chmil had obtained Malik's confession). 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. Neither defendant's nor Malik's counsel knew 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.

Sgt. Stoecker

Stoecker's testimony was generally consistent with his testimony at the pretrial suppression hearing concerning his involvement in having defendant brought to the precinct. He also testified as follows:

The investigation was not his exclusive responsibility. The 79th squad detectives handled the investigation and Scarcella (Brooklyn Homicide North) was assigned to enhance the investigation

(T.1607). On December 13 or 14, Irons was arrested. He was the first person arrested in this case (T.1609, 1627-28). At that time, they developed information leading to defendant. Defendant's name came up for the first time then (T.1609-10). Prior to that, S. McCargo and R. Butler were potential suspects, but "[t]hey were proved that they were out of the city at the time of the crime" (T.1608).⁸¹ On cross examination, Stoecker did not recall how he learned about Butler and did not recall whether he saw Butler's photograph (T.1629-30). When asked if many other suspects came up during the investigation, Stoecker said that happens in every investigation, and then agreed that there were other suspects in this investigation (T.1628-29).

After Stoecker assigned Viggiani to interview defendant, DeRita spoke to defendant (T.1621). During his interview with DeRita, defendant identified Malik (T.1621-23).

A photograph of Malik was admitted into evidence (T.1625-26 [People's Exhibit 14]).

On cross examination, Stoecker testified that Viggiani went into the interview room to speak to defendant around 1:00 a.m. or 1:30 a.m. and left the room at about 1:30 a.m. (T.1640-41, 1644). First, Stoecker testified that he did not know what transpired in the room. Stoecker then acknowledged Viggiani said that he spoke to defendant (T.1641). Stoecker did not recall how long Viggiani spoke to defendant but agreed it could have been a half hour. He did not recall whether Viggiani went back into the room, but it was possible (T.1642-43). He did not see Viggiani go into the room but saw Viggiani come out (T.1642-43, 1645).

Stoecker did not know the time that DeRita entered the room to speak to defendant (T.1644, 1646). Stoecker "assume[d]" that DeRita was in the room alone with defendant, but then acknowledged that it was a fact (T.1646, 1651). DeRita was with defendant "a good part of the rest of the morning," possibly three or four hours (T.1646). DeRita stepped out of the room around 3:30 a.m. and told Stoecker that defendant was providing information about the token booth bombing and about Malik (T.1647-48). Stoecker did not ask DeRita about his questioning of defendant, or if DeRita obtained a statement from defendant (T.1648-49).

Det. Viggiani

Viggiani's testimony was consistent with his testimony at the pretrial suppression hearing. Briefly stated, Viggiani testified as follows:

He was assigned to keep defendant company until the case detectives, Chmil and Scarcella, came back on duty the following morning. He was with defendant from midnight to 1:00 a.m. (T.1676-78, 1683-84). Viggiani *Mirandized* defendant when defendant started to ask questions. Viggiani doubted defendant when he stated that he was at the bottom of the stairs and heard the deceased say, "don't light it, don't light it." Viggiani was familiar with the station and doubted that defendant would be able to hear that from the stairs. Viggiani was not familiar with the case, so he left the room to retrieve the case folder (T.1669-72). When he returned, DeRita was there talking to defendant and Viggiani did

⁸¹ Though the Baltimore P.D. stated Butler was in custody, it did not say the same for McCargo. There is no documentary evidence explaining how McCargo was eliminated as a suspect.

not go back in (T.1661-72, 1676-78, 1683-84). In total, Viggiani was with defendant about thirty minutes (T.1678-79).

Det. DeRita

DeRita's testimony was essentially the same as his pretrial hearing testimony, including that he just found defendant in the interview room, defendant volunteered that he "fucked up" and might be in trouble, defendant confessed to DeRita (which statement was admitted into evidence (T.1738); [People's Exhibit 17]), with no one else present, and defendant identified a photograph of Irons and identified Malik in another room at the precinct.

DeRita further reiterated the following:

He did not know defendant or why defendant was sitting in the interview room, and he did not know if anyone was in the process of interviewing defendant when he started talking to him. DeRita did not make any inquiry about defendant to any of the detectives in the squad room just outside the interview room, or of Stoecker prior to talking to defendant. Even after leaving the room to get the *Miranda* card, DeRita did not know defendant's identity. was and never spoke to any of the detectives sitting in the room. DeRita agreed that he took it upon himself to get the *Miranda* card and question defendant, and that he took no notes from 3:00 to 4:30 a.m., before he wrote out defendant's statement (T.1745, 1748-49, 1751, 1753-55). Defendant made no corrections to the five-page statement DeRita wrote out (T.1760-61).

DeRita did not see defendant being brought into the station. However, he was aware that prior to talking to defendant, defendant's name came up in the precinct, but he did not know what case it involved (T.1723, 1766). Other than going out of the room at some point between 3:00 and 5:00 a.m. to give Stoecker the information concerning Malik, DeRita did not leave the room until after he took the statement, and no one entered the room during that time (T.1761-62).

DeRita added the following:

He was a first-grade detective, which is the highest grade (T.1722). On December 14, he was assigned to respond to the 79th Precinct squad room to assist in the investigation (T.1722). When DeRita introduced himself to defendant, defendant said he was "Vincent" (T.1724).

On cross examination, DeRita added that he had not been involved in the investigation prior to arriving at the precinct (T.1743). He arrived at the precinct at about 9:30 p.m., about five to six hours before he spoke to defendant (T.1744). DeRita did not know if defendant was a witness, or if defendant was just arrested (T.1745, 1748). DeRita did not know how long defendant was there and agreed it could have possibly been five minutes or three hours (H.1750). When asked about the reason he "took it upon himself" to question defendant, DeRita said "That is my job" (T.1752). He did not have any files or information from any records in the case (T.1752).⁸²

⁸² Defendant's videotaped statement was admitted into evidence and played for the jury (T.1408; People's Exhibit 2).

The Defense Case

Michelle Brigham

Brigham testified as follows:

She first met defendant in Binghamton in early November 1995 (T.1911-12). Defendant moved in with Brigham, who lived with her friend Lorry at Lorry's apartment (T.1912). Defendant was not Brigham's "boyfriend" although they shared a bed (T.1923-24). Defendant was staying in Binghamton from early November until he was arrested in December (T.1912). He stayed with Brigham when they first met in the beginning of November, and then he stayed at the Windermere (T.1911).

Defendant stayed with Brigham from Thanksgiving through the weekend (T.1912-13). On Thanksgiving Day, Brigham went home, and defendant stayed at her place. Brigham returned that evening and defendant stayed that night and that weekend. On Monday (after Thanksgiving), Brigham and defendant spent the day together (T.1913-14). During the Thanksgiving week, or weekend, she read about the crime in the Post. She did not recall where defendant was when she read the story, but he was with her that night (T.1916-17).

Brigham did not recall what she and defendant did, including in the days before Thanksgiving. The Friday night after Thanksgiving, defendant, Brigham, Lorry, and Lorry's boyfriend had a "social evening" drinking beer from about 9:00 or 10:00 p.m. to 3:00 or 4:00 a.m. Brigham and defendant woke around 2:00 p.m. Saturday afternoon and spent the day watching TV and cooking. On Sunday Brigham and defendant woke up about the same time as they had on Saturday ("We go to bed late and wake up late in the afternoon"). She did not recall Sunday night, because "it happened almost a year ago" (T.1938-41).

Brigham had been arrested for cocaine possession, but believed the case was ultimately dismissed. She bounced a check once, but she was not arrested because it was a misunderstanding (T.1909-10). On cross examination when confronted with her arrest photo in that case, she still denied the arrest. She then admitted she was arrested, and charged with a crime, but she did not spend any time in jail. She admitted that she never returned to court on that case and a bench warrant was issued for her arrest. Brigham did not clear up the warrant for a year and a half—shortly before her trial testimony (T.1919-21).

Brigham first spoke to defendant's attorney sometime in December after she had not seen defendant for a couple of days. She repeatedly "beeped" defendant, but he never called her back. Finally, defendant's mother called and told her what happened. Brigham then spoke to counsel by phone, and then in person sometime around Christmas. In January, Brigham gave a sworn recorded statement to counsel and his investigator in counsel's office (T.1915-16, 1924). When Brigham first spoke to counsel, she did not recall whether defendant was with her Thanksgiving weekend. Brigham told counsel she and Lorry would, "talk and think it out if he was really there." Thereafter, Brigham and Lorry determined that defendant was with them on November 25 and 26 (T.1950-51). Defendant was with her every weekend from the time they met until the time he went back to New York and was arrested (T.1953).

Darlene Williams⁸³

Williams' testimony was essentially the same as her prior statements, but more detailed. Williams testified as follows:

At the time of the explosion, she and her son were looking out the window (T.2097-99). She saw a "white man," who was "tall, skinny" wearing dark clothing, "walking very fast" (T.2100-01).⁸⁴ He was across the street from Williams' building, coming from the train station. A short, heavy-set "white male" came out of the station on her side of the street, crossed Kingston over to the tall male (T.2101). The short man was "limping fast." The men walked to Herkimer. They went on Kingston and turned the corner on Herkimer. There was a firebox, a light, and a dark car parked "right there" on the corner, which she saw very well (T.2101). A young dark-skinned male was on the corner near the subway entrance, but Williams did not see him come out of the station (T.2101-02).⁸⁵ He walked towards Fulton and turned left toward Brooklyn Avenue (T.2113).⁸⁶

Williams knew defendant for four years and knew him "very well." Defendant hung out with Williams around an outreach program where she worked. Williams did not see defendant on the street after the explosion. She would have recognized defendant had she seen him (T.2103).

Williams spoke to detectives the day after the crime and told them the same as she testified (T.2104). She gave an audiotaped statement to the prosecution in December 1995 and testified in prior proceedings in this case. She was only asked to view one lineup (Malik as the subject) and did not recognize anyone (T.2104).

On cross examination by Malik's counsel, Williams testified that she did not know Malik, and did not recognize anyone in the courtroom who was there that night (T.2105).

On cross examination by the prosecution, Williams acknowledged that she knew defendant's family, including his mother and one of his sisters. At one time, defendant's family and her family were friendly (T.2109-10). Williams repeatedly insisted that defendant's family did not approach her about her testimony in this case (T.2129).

Williams acknowledged that she was hysterical when she spoke to the 911 operator. Williams described the men as "white" to the 911 operator because she thought they were "fair-skinned, they w[ere] lighter than light" (T.2114). Also, she was upset at the time (T.2114-15, 2127). Chmil and Scarcella told her that she was wrong, and that they were light skinned. Ultimately, she testified at trial they were light enough to pass for white-skinned (T.2127-28).

⁸³ Williams was defendant's witness, but she testified before Malik's jury as well.

⁸⁴ At Irons' trial the People elicited that the tall man was about 6', but Williams testified she was not good with heights.

⁸⁵ Williams told Scarcella that the third man came up from the station. She told prosecutors she saw this male by the station entrance but did not know how he got there.

⁸⁶ Williams told Scarcella the day after the crime and told the prosecutors two weeks later that this male turned right and went towards Throop Street/Albany Avenue.

After the explosion, Williams turned away from the window for “a second” to push her son away. When the two males ran toward Herkimer, she went to her next-door neighbor’s apartment and looked out her neighbor’s window to see where the two males went. That is when she saw them get into a car parked on Herkimer. The car drove towards the Albany houses (T.2116).

Williams did not see defendant earlier that evening (T.2117). She did not see defendant at a record store on Fulton the evening before the crime at 7:30 p.m. and did not recall telling that to the prosecutor and a detective (T.2118-19, 2125).⁸⁷ Asked if she saw defendant the week before Thanksgiving, which would place him in town, Williams replied, “I can’t say for sure because I don’t want to be wrong or not. I just can’t say. I know I had seen him. I don’t know if it was the week before. It wasn’t that week or the week before. I don’t know for sure, but I know I did see him.” Williams told someone she saw defendant but did not give any dates (T.2120-21 [emphasis added]).

When detectives interviewed her a day or two after the crime, she told them what she saw, but she was scared and not cooperative because she did not want to be a witness (T.2121-22). Between the time she spoke to the prosecution in December and Labor Day, she was asked to go to the DA’s office, but did not go (T.2123-24). When she met with the prosecutor on September 25, she had detectives picked her up on the street because she did not want them to go to her home (T.2124-25).

Summations

The Defense

Defense counsel argued that the detectives were not credible, particularly DeRita, whose testimony should be rejected. Counsel questioned DeRita’s claim that he spoke to defendant for an hour and a half without taking a single note and then wrote out a five-page statement, without a single error or omission. Counsel noted that DeRita had not been involved in the investigation until that day and argued that it was implausible that if he was the only detective in the room with defendant, he would not tell the sergeant or some other detective that defendant was giving him a statement (T.2147-49).

Counsel suggested, among other things, that defendant’s statement that he sprayed his name on the token booth window was not credible because there was no spray top on the bottle recovered at the crime scene (T.2149). Referring to McCargo’s and Butler’s photographs in evidence, counsel pointed out that neither individual Robinson identified was defendant. Counsel also noted that Robinson identified Malik in a lineup. He questioned why defendant had not been the subject of a lineup for Robinson to view (T.2150-52). Counsel recounted the testimony of defendant’s alibi witness, Michelle Brigham, and maintained that she credibly testified that defendant was in Binghamton with her around and during Thanksgiving and that weekend. Counsel posited that there was no evidence rebutting Brigham’s testimony (T.2153-54).

⁸⁷ There are no documents memorializing any conversation between Williams and the prosecutor and a detective. Right after the crime, Williams told Scarcella she knew the three males she saw exit the subway station and saw them earlier that night arguing with a group of boys at Regina’s record store on Fulton. Williams provided descriptions—none of which matched defendant—and did not provide any names. *See* Scarcella DD5 86 and notes.

Last, counsel urged the jury to credit Darlene Williams' testimony that she knew defendant and she did not see him on the street after the explosion (T.2154). Additionally, Williams repeatedly denied that she told the prosecutor and a detective that she saw defendant a week before the crime (T. 2155).

The People

At the outset, the prosecutor told the jury that the deceased "left a testament that speaks from beyond the grave" in that the deceased "gave a brief description of what happened and who his assailants were" (T.2161). The deceased said he was approached "by two young men, one light-skinned, one dark-skinned, one taller and slimmer, one huskier, heavier" (T.2161). The prosecutor concluded that defendant was the dark-skinned and slim man and Malik was the light-skinned heavy-set man (T.2161). The prosecutor maintained that the deceased reported that two men came to his booth, and "displayed guns." They also "poured a liquid" in the dish where tokens are purchased, they "demanded money" and "lit matches" blowing the deceased out of his booth (T.2161-62).

The prosecutor stated that around December 13, the first arrest was made, which was Irons (T.2163). Ricardo James was in the precinct then with Irons. The prosecutor said Ricardo testified, "I told the police I was an eyewitness, and I went home." The prosecutor stated that Irons was then arrested (T.2166). Then "the investigation turned towards [defendant]" who was "a young dark-skinned man" (T.2163).

Referencing Robinson's identification of Butler's "tiny photo," the prosecutor said that "we now know" that Butler was not involved in this case—but this is the photo of the person "whose conduct [Robinson] ascribed [to] the person who we have proven is [defendant]" (T.2163). The prosecutor told the jurors they had to work together, and they will see that Butler and defendant were "about the same age" and had the "same complexion," and although the hair was different, "look at [Butler's] face and his features" (T.2163). The prosecutor maintained that Robinson said that the man she saw "looked like this person's picture" (T.2164). The prosecutor asked, "[b]ut was she so wrong that she called this person someone who looks like the person we now know to be [defendant]?" The prosecutor suggested that it was not an "outrageous comparison" (T.2163-64). The prosecutor reiterated that Butler and defendant were generally the same age, with the same complexion, build and features (T.2164).⁸⁸

Turning to defendant's confession, the prosecutor argued that defendant was "the best witness" and knew everything about the crime, specifically that defendant "poured the gas" and Malik lit the matches (T.2164-65). The prosecutor maintained that DeRita did not coerce defendant's confession. DeRita testified that he worked on the case "one or two other days," he knew "little about the case," but Robinson corroborated the "the heart" of defendant's defense and "all the details in [defendant's] story"—the two individuals she described were defendant and Malik; the bottle she saw; and the bat she thought she saw, which was an "assault rifle" (T.2169-70). The prosecutor argued that the deceased corroborated "everything" defendant said and repeated that the deceased reported two men

⁸⁸ Butler's pedigree information was not before the jury. According to KCDA records, Butler was about eight years older than defendant. Only a very small headshot photograph of Butler was admitted into evidence, from which his build cannot be determined.

“demanded money,” “poured a liquid” into the dish, and ignited it (T.2170-71). The prosecutor repeatedly stated that the deceased and Robinson corroborated defendant’s confession (T.2172).

The prosecutor posited that there was evidence that gas was poured “in the front area where defendant said he sprayed his nickname” (T.2172).

Addressing defendant’s account that Irons stuck the gun in the coin slot dish (*see* written statement; V.26), the prosecutor maintained that it was “gap of reality” because “everyone who buy tokens knows you cannot stick a gun into that dish” (T.2180). The prosecutor suggested that it was not the gun, but the mouth of the spray bottle Irons used that would fit in the slot (T.2180).

Regarding defendant’s alibi witness, Michelle Brigham, the prosecutor assailed Brigham’s “character and integrity” because Brigham lived with defendant, and her girlfriend, and another man (T.2183). The prosecutor argued that Brigham was incredible because “[t]his girl is a criminal. She’s a petty criminal, but she’s a criminal, nonetheless” (T.2185). Moreover, the prosecutor said that Brigham’s testimony that defendant stayed with her from around Halloween through Thanksgiving up to his arrest could not be believed because Darlene Williams saw defendant “a week before” the crime (T.2183, 2186, 2189).

Finally, the prosecutor told the jury to reject Williams’ testimony that defendant was not one of the individuals she observed on the street after the explosion because Williams (1) was involved with defendant’s family and could not say what she truly saw, and (2) she did not see much of what happened because she took her son away from the window and then walked to her neighbor’s apartment and during this time, “had no idea who was running to and from the station” (T.2191).

The Verdict and Sentence

Defendant was convicted of one count of Murder in the Second Degree (P.L. § 125.25[3] [felony murder]) (T.2348).⁸⁹

On December 17, 1996, defendant was sentenced to a prison term of 25 years to life.

POST-CONVICTION PROCEEDINGS

On his direct appeal to the Appellate Division, Second Department (“Appellate Division”), defendant claimed that this confession should have been suppressed as the fruit of an unlawful arrest.

The Appellate Division affirmed defendant’s judgment of conviction. The Appellate Division held that defendant agreed to accompany the police to the precinct, was not told that he must stay, and was not handcuffed. Under the circumstances, defendant was not in custody at the time he made his initial statements to the police. *People v. Ellerbe*, 265 A.D.2d 569, 570 (2d Dep’t 1999).

Defendant’s application for leave to appeal to the Court of Appeals was denied. *People v. Ellerbe*, 94 N.Y.2d 903 (2000) (Ciparick, J.).

⁸⁹ After the jury was discharged at the end of the proceeding, defendant turned to DeRita who was sitting in the front row and said, “I’ll be back, motherfucker” to which DeRita replied, “No, you won’t” (T.2351).

Defendant filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of New York (“District Court”), raising the same claim that he raised in the Appellate Division. In an unpublished decision, the District Court denied defendant’s petition. *Ellerbe v. Duncan*, 01-CV-01313 (E.D.N.Y. Sept.2, 2003) (Weinstein, J.).

CRU INVESTIGATION

CRU investigated defendant’s conviction (and Irons’ and Malik’s) as part of its investigation into Scarcella’s and Chmil’s cases. CRU’s investigation included myriad interviews, the most relevant of which are discussed below. CRU investigated the area around the crime scene and the evidence recovered from the crime scene, including the burnt glove that could no longer be located, and had OCME conduct DNA testing of blood, which was determined belonged to the deceased.

The Attorneys

CRU interviewed defendant’s trial counsel and the trial prosecutors. Defense counsel no longer had his case file and had little recollection of the case. He offered no specifics or insights. Nothing new was learned from the prosecutors except that it was explained that to ensure Robinson’s continued cooperation she was not compelled to disclose the identity her male companion in the car. Also, one of the prosecutors mentioned that Robinson was in the area fooling around with her boyfriend.

Law Enforcement Officers

Lt. Shaw

CRU interviewed Shaw by phone. Shaw still maintained that Steed’s CI provided information to Scarcella and Chmil leading to defendant’s arrest (and Malik’s and Irons’).⁹⁰ Shaw added that the CI had said that defendant, Malik, or Irons was related to the CI.

Officer Steed

CRU interviewed Steed, who said that the CI was female in her late teens and lived near Lafayette Gardens. Steed 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.

Det. DeRita

DeRita is now retired. CRU could not locate a phone number for him and sent him several letters. In response to a letter DeRita called CRU. He was very cooperative. DeRita confirmed that he was first involved in the investigation when he was assigned to assist in the case the night he spoke to defendant. He knew that Chmil and Scarcella (from his command) were the case detectives. The case was weeks old and canvassing for witnesses and other investigative steps had been done.

DeRita did not recall why he was sent to the precinct that night or if he had a specific assignment. However, had that been the case, he would have written a report or notes about it, which would be in

⁹⁰ Chief of Detectives Charles Reuther reported stated Irons was brought to the attention of the police by an informant (<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.

the case file. (There are no such notes or reports, just his testimony that he was first assigned to the case on December 14.) As an experienced first-grade detective it would not have been unusual to be asked to interview a suspect on such a case, especially if the case detective was not around.

DeRita gave CRU a different account of his initial meeting with defendant. DeRita said, for the first time, that after introducing himself, he told defendant why defendant was at the precinct and that the police knew defendant was involved in the crime. DeRita also might have told defendant not to lie, as that was his normal practice.

DeRita did not recall the substance of defendant's statement other than defendant mentioned a white bottle with a spray top, he thought the gas would burn like lighter fluid, and he did not know it would explode (the latter two statements were not part of defendant's written or videotaped statement). CRU mentioned that the bottle was a clear plastic soda bottle with no spray top and defendant did not mention the recovered rifle. DeRita explained that he would not correct a suspect or feed information. DeRita would not want to influence any suspect's statement. He was almost certain that he did not have any of the crime scene photographs during his interview of defendant.

DeRita said he would never interview a suspect without knowing the suspect's identity, or without knowing the facts of the case. He would first review the case file and paperwork and speak to the case detectives, if they were available. Otherwise, he would not know if the suspect was lying.

It was DeRita's practice and preference to interview a suspect alone in order to avoid intimidating a suspect with multiple detectives present. Also, it would prevent a defense attorney from arguing that the statement was the product of intimidation. DeRita would have another detective present if he did not know the case well enough, but he would limit that detective's participation in the interview.

DeRita was confident that his account to CRU was accurate.

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.

Fire Marshal Fash

CRU interviewed Fash at his home. He kept a copy of his case file. As he testified, the fire was ignited at the coin aperture and gasoline was poured only in the aperture and the insides of the booth. The prosecution did not inform him that there was a claim that "Teff" was sprayed on the window to the left of the aperture.

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 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.⁹¹ Anyone standing behind or to the door side of the booth, including the bottom of the staircase, would have been knocked down due to the concussive force of the explosion.

Civilian Witnesses

Darlene Williams

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

Ricardo James

CRU interviewed Ricardo at the KCDA. He informed CRU that the detectives who interviewed him (Scarcella and Chmil) told him they had evidence that he committed the crime with two others, that he was facing the death penalty, and that the first to cooperate would get "a deal."

Ricardo later learned that Irons confessed. Irons' family blamed Ricardo for Irons' arrest.⁹² Ricardo felt guilty about asking Irons to accompany him to the precinct. Neither Irons nor defendant was a "street guy." Irons may have met defendant through him, but Ricardo doubted that Irons knew Malik. Ricardo did not believe that Malik, Irons, and defendant got together to commit the crime. To Ricardo it seemed like an odd group. Ricardo knew Ringy, who died years ago.

Jacqueline Robinson

CRU recorded its interview of Robinson at her home. Robinson told CRU that at the time of the incident she was "parked across the street" and it was dark. Her car had tinted windows. She was with a co-worker, whose name she did not recall. Robinson had a boyfriend at the time and her co-worker had a girlfriend.

Regarding the incident, Robinson stated that she 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. They were "messing around." Robinson did not mention seeing anyone before hearing the explosion. She said she heard a "boom" and five to 10 minutes later the deceased emerged from the stairs on fire. Two males come up one side of the station. And a "big, fat, big guy, very young" came up the other side.⁹³ 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.⁹⁴ Robinson did not recall the names of the detectives to whom she spoke. They 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. When called to view a lineup, she asked to view it the

⁹¹ The glove could not be located for DNA testing by either the OCME or the NYPD Property Clerk (where it was returned after trial).

⁹² Irons' prison intake papers reflect that he stated Ricardo committed the crime and blamed it on Irons.

⁹³ Williams similarly told the prosecutors in December 1995 that a heavy-set male came up on the opposite side of the street.

⁹⁴ CRU made extensive efforts to locate Robinson's supervisor but was unsuccessful.

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 (Malik). She just picked the person who looked like the person “coming up the steps.”

Robinson denied receiving reward money. She was surprised to hear about a reward, especially when told how much it was.⁹⁵

Telephone Records

Defendant and Malik admitted knowing each other, but their relationship with Irons was not clear. CRU reviewed phone records from their residences and Julies Rivers’ residence, which the prosecution had subpoenaed.⁹⁶ From August to November 11, 1995, six calls were made from Malik’s residence to defendant’s residence.⁹⁷ There were no further calls through December. There were no other calls between any of the residences.

There were three calls from Binghamton to defendant’s home on November 16 between 9:00 and 10:15 a.m. There were no calls to or from Binghamton prior to December 15, when defendant went to the precinct.⁹⁸ On December 15, at 11:30 p.m., a call was made from defendant’s residence to the 79th Squad, which was consistent with Stoecker’s claim that he was contacted when defendant returned home.

There were no calls between Binghamton and Irons’, Malik’s, or River’s residences. There are no calls supporting defendant’s statement that he called Rivers from Binghamton about a week before Thanksgiving and that he called home a few days before Thanksgiving.

Dr. Saul Kassin

Dr. Saul Kassin is a Distinguished Professor Emeritus of Psychology John Jay College of Criminal Justice of the City University of New York. He is a leading expert in police interrogation tactics and eliciting confessions, as well as the accuracy of eyewitness identifications. CRU asked Dr. Kassin to review defendant’s confession, as well as Malik’s and Irons’ 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 included the following:

- 1) Personal and situational factors increased the risk of a false confession in this case. Defendant was interrogated late at night and into the morning and, thus, he was likely sleep deprived.
- 2) DeRita claimed that he happened to see defendant in an interview room, struck up a conversation, and defendant immediately made a voluntary inculpatory statement. This was also almost identical

⁹⁵ CRU learned that reward money records were not preserved in cases from the mid-90s.

⁹⁶ There is no evidence that any of the defendants owned cell phones. In 1995, cell phones were not common and relatively expensive.

⁹⁷ Since Malik had a prior relationship with defendant’s sister, it is possible that some or even all of these calls did not involve defendant.

⁹⁸ The three Binghamton calls on December 16 lasted 2, 9, and 5 minutes, respectively.

to Paul's testimony that he struck up a conversation with Irons who quickly made a voluntary inculpatory statement.

- 3) The confessions in this case offered no proof of "firsthand guilty knowledge." They contained no accurate facts previously unknown to police; nor did they lead authorities to new evidence they did not already have. There was substantial evidence of contamination and, collectively, defendant's statement and those of Irons and Malik did not tell a singular coherent story.
- 4) External corroboration is "weak to nonexistent if not outright suspicious." No physical evidence implicated defendant or either co-defendant. Defendant insisted that he was upstate.

Dr. Kassin concluded that defendant's, Iron's, and Malik's cases were "very troubling" and "comparable to some of the worst wrongful convictions I have seen."⁹⁹

ANALYSIS

Under the particular circumstances here, the verdict would probably have been different based on subsequent findings of Scarcella's and Chmil's alleged misconduct in other cases.

Notwithstanding, the evidence against defendant consisted solely of his confession, which was not corroborated, was contradicted by evidence, and was unreliable. Rather than questioning the validity of defendant's confession, the People argued falsely in summation that it was corroborated by the deceased, Jacqueline Robinson, and Darlene Williams. All the People's arguments were premised on clear misstatements of fact, to which the defense failed to object.

Scarcella/Chmil

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

However, "each case [involving Chmil and Scarcella] must be reviewed on its own facts." *People v. Hargrove*, 162 A.D.3d 25, 74 (2d Dep't 2018) (affirming a vacatur of judgment based on new evidence of Chmil's and Scarcella's misconduct in other cases). As CRU already determined in the cases of defendant's accomplices, James Irons and Vincent Malik, there was a probability that the new evidence would have affected the verdicts. Defendant's case is no different.

Chmil and Scarcella ran the entire token booth investigation. A week after the crime, a CI reported that S. McCargo and R. Butler were responsible. That same week, by December 7, Scarcella and Chmil secured solid and certain identifications of their only suspects, McCargo and Butler, from the single eyewitness Jacqueline Robinson. As it turned out, those identifications were wrong. Butler had been

⁹⁹ See Kassin report to CRU.

in prison at the time of this crime, and McCargo was apparently nowhere near Brooklyn. Just a week later, on December 14, Scarcella and Chmil encountered Irons, who happened to be in the precinct and quickly confessed. The following day, DeRita happened upon defendant in the precinct and defendant quickly confessed. Immediately thereafter, Scarcella and Chmil obtained Malik's confession.¹⁰⁰

That Scarcella and Chmil were not directly involved in obtaining defendant's confession is inapposite. In fact, in *Deleon*, neither Scarcella nor Chmil obtained the confession. They were present during the confession, which was obtained by another detective (Deleon Sup. Ct. Decision at 3, 7). Moreover, in *Hargrove*, the Appellate Division affirmed vacatur of the conviction based on Scarcella's involvement in the single eyewitness' identification of that defendant, finding that the identification was possibly unreliable and compromised, among other troubling factors. 162 A.D.3d at 64-67.

Here, Scarcella's and Chmil's role as lead homicide detectives was so inextricably intertwined with Irons' and Malik's cases as to render unavoidable the conclusion that new evidence of their alleged misconduct probably would have affected the verdict in defendant's case. Indeed, Scarcella's testimony was necessary at defendant's pretrial suppression hearing. He explained that his interview of Irons led to defendant, and he secured Irons' identification of defendant (H.423-24, 434-35). Scarcella established that he was at the precinct on December 15, and he saw and spoke to DeRita, and DeRita showed him defendant's statement (H.430-32).

At trial, the jury learned from Stoecker, Viggiani, and DeRita that Scarcella and Chmil were the lead investigators, and that DeRita was only called in to assist the night he obtained defendant's confession. The jury also learned that Ricardo and Irons went to the precinct on December 14, when Irons was first person arrested, and then defendant's name came up (T.1609-10 [Stoecker]; 1703-05 [Ricardo]). The People made it clear to the jury that Irons named defendant when Irons was arrested, and that "the investigation turned towards [defendant]" (T.2163).

Additionally, the People extensively relied on Robinson's identification of Butler, which the jury learned was obtained by Scarcella and Chmil. Here, the People posited on summation that Butler looked just like defendant and, therefore, it was more than reasonable to conclude that Robinson effectively identified defendant.

Against this backdrop, CRU believes that had the jury known the new evidence of Scarcella's and Chmil's alleged wrongdoing, which included facilitating false identification testimony (*Hargrove*), and possibly influencing a questionable confession (*Deleon*)—it might very well have provided the jury with a "different context" in which to view Scarcella's and Chmil's role in this case, and Irons' apparent confession which led to defendant's apprehension and confession. Moreover, this new evidence would have undermined the People's reliance on Robinson's identification of Butler—which was secured by

¹⁰⁰ As set forth in Malik's memorandum, the police investigation was inadequate. There were other leads and strong suspects, including Crime, Sport, and Biz, before the investigation turned to Irons, defendant, and Malik. They were seen shortly before the crime, apparently with the rifle recovered from the crime scene. Darlene Williams either identified Sport or said he looked like one of the people she saw on the street after the explosion. Nevertheless, once confessions were obtained from Irons, defendant, and Malik the investigation into Sport, Crime, and Biz apparently ended.

Scarcella and Chmil. Additionally, the new evidence might have given credence to defense witness Darlene Williams, who testified that Scarcella and Chmil told her that her initial description to the 911 operator of the two people she saw outside her window was wrong (T.2127-28) (presumably because they did not match the descriptions provided by the deceased).

Accordingly, CRU concludes that the new evidence would have probably affected the verdict.

Defendant's Confession

Jury Received Incomplete Information About How DeRita Obtained Defendant's Confession

DeRita's Questionable Entrance into the Case

The jury heard about DeRita's encounter with defendant. DeRita testified that he had just been assigned to the precinct that night to work on the token booth case for the first time when he saw that the door to the detective squad's interview room was closed. DeRita then asked other detectives present whether anyone was inside the room and was told that there was. According to DeRita, he asked no further questions of his colleagues. Instead, he walked into the room and began talking to the defendant about a case that DeRita maintained he knew very little about. Even after a potentially inculpatory comment from the defendant prompted DeRita to retrieve a *Miranda* card and begin taking defendant's statement, DeRita did not seek to confer with his colleagues.

Defense counsel argued to the jury that DeRita's actions were implausible, and his testimony should be rejected (T.2147-49). CRU has now learned by DeRita's own admission to CRU that such behavior was highly unusual in general and was not DeRita's usual practice. In fact, DeRita told CRU that he would never interview a suspect without knowing the suspect's identity, or without knowing the facts of the case. DeRita also gave CRU a different account of his initial meeting with defendant. He said that after introducing himself to defendant, he told defendant why defendant was at the precinct and that the police knew defendant was involved in the crime. This account is more plausible than what the jury heard.

DeRita further told CRU that he would first review the case file and paperwork and speak to the case detectives, if they were available, before questioning a suspect. DeRita certainly had the opportunity to do so, given that he was called into the precinct to work on the investigation (T.1743), and arrived at the precinct on December 14 at 9:30 p.m., about 5 to 6 hours before he interviewed defendant, while Chmil and Scarcella were still present (T.1744).

CRU believes that had the jury known these new facts it might well have discredited DeRita's account of his introduction and interview of defendant.

The Interrogation

The jury was led to believe that defendant spontaneously confessed. It was not presented with facts that would likely have undermined that conclusion: (1) that DeRita interrogated defendant for far longer than he claimed, and (2) that going into the interrogation DeRita was, in fact, more familiar with the case than he implied in his testimony.

Although DeRita testified that he was with defendant for only a few minutes before reading defendant his rights and taking his statement, the facts suggest that DeRita was with defendant for up to two hours prior to that point. Viggiani's and Stoecker's testimony established that Viggiani was with defendant from approximately 12:30 to 1:00 a.m., for no more than 30 minutes. This is corroborated by: (1) phone records showing that a call was placed from defendant's residence to the 79th Detective Squad at 11:30 p.m.; (2) Stoecker's testimony that after waiting for defendant at his home for about 2 hours, at about 11:00 or 11:30 p.m., he returned to the precinct and was immediately notified that defendant had arrived home (H.317-19, 332-33); (3) Stoecker's testimony that he worked an overtime shift on December 15 that finished at 8:00 a.m. (H.342-43), suggesting that his previous shift was likely a 4:00 p.m. to midnight shift, which would coincide with the 11:30 p.m. call from defendant's residence shortly before Stoecker's shift ended; and (4) a DD5 from an unknown detective memorializing the fact that detectives transported defendant from his home to the precinct around 12:35 a.m.

Viggiani consistently testified that he left the precinct after seeing defendant with DeRita at no later than 1:00 a.m. This was corroborated to varying degrees by Stoecker, Sullivan's DD5 (who, with Stoecker, picked up defendant), and defendant's household phone records. Yet, DeRita also told the jury that he met with defendant for no more than 15 minutes before defendant signed the *Miranda* card at 3:00 a.m. Since both claims cannot be true, and since it is unlikely that defendant would have been left alone for two hours before being interviewed, it is more probable that DeRita's account was wrong, and he was with defendant for far longer than the jury was told.

DeRita also testified that he had limited knowledge, if any, about Irons' confession. This was almost certainly false. Within minutes of defendant signing the *Miranda* card, DeRita asked Stoecker to conduct a computer search for "Tommy" on Herkimer Street. Stoecker began this search at 3:07 a.m. However, DeRita did not at any time request a search for "James" who lived on Fulton near Kingston. This strongly suggests that DeRita knew Irons had been arrested already and that in the hours prior to the interview, DeRita had read Irons' confession.¹⁰¹

Moreover, two witnesses apparently misled the jury concerning the exact timing of this computer search. This supports the conclusion that DeRita was already familiar with Irons' confession. Stoecker testified that the search was around 3:30 a.m. DeRita testified that it was sometime between 3:00 and 5:00 a.m. But the prosecution knew that the search began at 3:07 a.m., a fact they stated on the record at the pre-trial suppression hearings, just a week earlier. The logical conclusion is that the prosecution witnesses stretched the time frame to give DeRita "time" to elicit the information about "Tommy" from the defendant. It seems more likely that he learned about "Tommy" from reviewing Irons' statement (and that Scarcella provided that statement). This conclusion is further supported by the fact that when DeRita passed along the information to Stoecker about "Tommy," DeRita did not request the case file, speak to any more knowledgeable detectives, or request that someone familiar with the case join him in the questioning.

¹⁰¹ DeRita claimed he was sent to the precinct to help in the investigation. Yet his notes do not reflect him doing anything in connection to the investigation other than interviewing defendant.

As previously mentioned, DeRita certainly had the opportunity to learn about the case by reviewing Irons' statement and speaking to Scarcella and Chmil. His statements to CRU support the inference that DeRita did just that and familiarized himself with the case prior to speaking with defendant. As stated above, when CRU interviewed DeRita, he told CRU that he would never interview any suspect without first learning about the case. DeRita recalled that he knew who defendant was and confronted defendant with what the police knew about his involvement in the crime. Although his memory was not perfect, DeRita recalled many details about his interview with defendant and was highly confident about his recollections. Had he handled this case in a manner that diverged dramatically from his usual practice, it is likely he would recall this departure, especially in such a high-profile case.

Without this new information, defense counsel could not undermine DeRita's testimony that he knew nothing about defendant going into the interview. Counsel had no proof when he argued to the jury that no reasonable detective would behave in this manner. As a result, the jury had no reason to question the testimony about the defendant's confession, or its veracity and reliability. It is well-established that confessions have an outsized impact on juries. The confession in this case was the only evidence of guilt against defendant. As a result of DeRita's misleading testimony and counsel's inability to expose it as such, the jury never heard critical information, information that almost certainly would have caused it to question the integrity of the confession.

Defendant's Confession Was Not Corroborated, Conflicted with the Evidence, and Was Unreliable

Confessions generally are perceived to be trustworthy, although it is not necessarily the case.¹⁰² 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, among other things, 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 CRU does not decide whether defendant's confession was true or false, significant factors in this case warrant the conclusion that the confession was not at all corroborated and was unreliable.

Defendant's Written Statement Conflicted with Known Facts

Defendant's written statement had several factual inconsistencies, errors, or anomalies that cannot be explained as defendant minimizing his guilt or distancing himself from the crime. For example, defendant admitted to spraying gasoline on the token booth window from a white, spray-top bottle that he said Irons gave him. He did not mention that any of his accomplices possessed or used gasoline during the crime, and he failed to provide an accurate description of the bottle.¹⁰³

According to defendant, using the bottle of gasoline he "sprayed" his street name on the booth's glass and then dropped the bottle at the scene. But, the evidence, including Fash's testimony and a

¹⁰² See Kassin, et al, "I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators, 29 Law and Hum. Behav. 211-27 (2005).

¹⁰³ There is no evidence that DeRita showed defendant CSU photographs (which are in color). Notably, one CSU photo shows a spray top bottle of glass cleaner. At first glance this bottle appears to be white and loosely fits defendant's description. This bottle was discovered in an area distinct from the area where defendant claimed to have dropped it.

photograph of the bottle, showed that it was a soda bottle. with no spray top, which had been crushed or twisted by hand. Notably, even Jacqueline Robinson described that she observed one of the males going to the subway station holding a clear soda bottle with a cloth hanging out of the top. (T.1514-15). More importantly, extrapolating from Fash’s conclusions about what caused the booth to explode, if the only dispensing of gasoline was done by defendant spraying his name on the front of the booth, and Malik subsequently lighting it, the booth would never have exploded.

Defendant also detailed the group’s demand for money from the deceased. He stated that four of them—defendant, Irons, Malik, and Chris—all approached the booth, and that Irons stuck the .32 caliber pistol into the slot. Defendant described Irons, Malik, and Chris demanding money from the deceased, and the deceased repeatedly saying, “No, No, No Money.”¹⁰⁴ There was no corroboration for any of this.

First, judging by the deceased’s statements to Officer Santo en route to the hospital, he seemed to be unaware that he had been the target of a robbery attempt. Though badly injured and in severe pain, the deceased was able to provide substantial information about the crime. The deceased was able to give Santo a thorough, detailed description of one of the perpetrators and a meaningful description of the other. He reported that two men approached his booth and that he believed they wanted to buy tokens. The deceased never mentioned anything about money being demanded, or about being threatened with a gun. Moreover, the deceased said two, and not four individuals approached his booth. While it could be argued that the integrity of the deceased’s statement was undermined by his condition, as discussed below, the prosecution asked the jury to believe parts of the deceased’s statements, misstated other parts, and argued that they corroborated defendant’s confession.

Furthermore, defendant’s uncorroborated statement that, other than the .32 Irons possessed, he did not see anyone else with a weapon further undermines the reliability of his confession. A long rifle, with a banana clip, was recovered at the scene. Robinson saw one of the males heading to the subway, holding a long object at his side, which she believed might have been a baseball bat. It strains credulity that any participant in the crime would not notice the rifle.

Moreover, defendant’s statement that Irons inserted the .32 gun into the coin slot, was simply wrong. As the People conceded on summation (discussed below), this was physically impossible.

Anomalies in Defendant’s Videotaped Statement

In his videotaped statement, defendant reiterated much of his written statement, including that four individuals approached the booth, three demanded money, defendant sprayed gasoline from a spray bottle, and a .32 caliber pistol was stuck into the coin slot. Defendant even demonstrated how he sprayed the gasoline and how the gun was inserted in the coin slot. Other statements defendant made in his videotaped statement are at odds with known facts or with factual statements made by Irons and Malik, or simply make no sense in context.

¹⁰⁴ Chris’ prominent role in defendant’s version of events contradicts Irons’ version that Chris was the getaway car driver and never left the car, a fact that the jury never knew.

Like Irons, defendant appeared to have had issues remembering who his accomplices were.¹⁰⁵ Defendant tried to recall the names of his accomplices while giving his statement. As he counted on his fingers, defendant listed, “Tommy, James, Chris, ... I don’t—I can’t, I can’t remember the last two. I don’t know the last two words, the other two words I forget go down the stairs” (V.5 [emphasis added]). Not names, words. This suggests that defendant was trying to remember a script, as opposed to recalling an actual memory.

Clear Conflicts Between the All Confessions

Dr. Kassin observed that defendant’s confession and those of Irons and Malik offered no proof of “firsthand guilty knowledge.” They contained no accurate facts previously unknown to police; nor did they lead authorities to new evidence they did not already have. Moreover, collectively, defendant’s statement and those of Irons and Malik did not tell a singular coherent story. CRU refers to the section in Malik’s memorandum listing the significant inconsistencies between the confessions, which further undermine their reliability.

The Prosecution’s Misstatements on Summation and Counsel’s Failure to Object Denied Defendant a Fair Trial

A prosecutor must not lose sight that he or she is to seek justice, and not merely a conviction.¹⁰⁶ Summation must remain within

the four corners of the evidence and avoid irrelevant comments which have no bearing on any legitimate issue in the case. Thus, the District Attorney may not refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence.¹⁰⁷

Moreover, a defense counsel’s failures to object to prosecutorial summation misstatements, which are not acceptable argument and misrepresent evidence central to the determination of guilt, deprives a defendant of meaningful representation and the constitutional right to a fair trial.¹⁰⁸

Here, the problems with defendant’s confession should have led the People to corroborate and evaluate its veracity and reliability. But the People apparently had “tunnel vision” causing them to conclude that defendant committed the crime, despite evidence to the contrary. The error was compounded on summation when the prosecutor exceeded the bounds of proper conduct by making misleading representations about witness testimony, physical evidence, and encouraging inferences of guilt based on facts not in evidence—to all of which defense counsel failed to object. The cumulative effect of these errors and failures denied defendant his right to a fair trial.

¹⁰⁵ During his videotaped statement, Irons repeatedly could not recall name Tommy (defendant) or the other person in the getaway car, which he mentioned to Scarcella, until the prosecution helped Irons (*see* Irons’ memorandum).

¹⁰⁶ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁰⁷ *People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976) (citations and internal quotation marks omitted); *see People v. Vielman*, 31 A.D.3d 674, 675 (2d Dep’t 2006) (“[a]dvocating a position the prosecutor knows to be false is an abrogation of the prosecutor’s responsibility of fair dealing to the defendant and candor to the courts”).

¹⁰⁸ *People v. Wright*, 25 N.Y.3d 769 (2015).

The Prosecutor Misstated the Evidence by Arguing that Defendant’s Confession was Corroborated by the Deceased

The People argued on summation that defendant’s confession was corroborated in its entirety by the deceased. In doing so, the People misstated the evidence. First, the prosecutor told the jury that the deceased said he was approached by:

two young men; one light-skinned, one dark-skinned, one taller and slimmer, one who is huskier, heavier. The dark-skinned man is [defendant], he’s the slim man. The light-skinned man is [Malik], he’s the heavy-set guy. And what does he say they did? Well, they came to his booth. They displayed guns. They poured a liquid into the dish where you buy the tokens. They demanded money and they lit matches and then they blew me out of my booth.

(T.2616).

But the deceased did not say that. He did describe one male as light-skinned and one as dark-skinned. And he did describe one male being taller than the other, and one weighing more than the other, just not in the combinations that the People claimed. The deceased described the light-skinned male as 6’ 200 lbs., and the dark-skinned male as 5’6” 150 lbs.¹⁰⁹

The People also misstated that the deceased reported that the two men who approached his booth had guns. Not only is this wrong, but also previously, in Irons’ trial, Santo was specifically asked whether the deceased mentioned weapons, and Santo said no (Irons: T.549).

Next, the People misstated that the deceased reported that the men who approached his booth demanded money. Santo, who had testified about what the deceased had told him, did not testify that deceased ever said this. To the contrary, as reflected in the police documents, the deceased had reported to Santo that he believed the men were approaching his booth to buy tokens (DD5 10).

The prosecution misstated the deceased’s account repeatedly throughout the summation (T.2161, 2164-65, 2170, 2171, 2172, 2174). Defense counsel never once objected.

The Prosecutor Misstated the Evidence by Arguing that Defendant’s Confession was Corroborated by Robinson

The People also misstated Robinson’s testimony, by repeatedly telling the jury that Robinson’s testimony corroborated the “heart of” defendant’s statement (T.2169, 2170, 2172, 2174). Here, before even addressing defendant’s statement, the People spent a great portion of their summation misstating that they proved that Butler, who Robinson had misidentified as one of the men she saw, was, in fact, defendant.

First, referencing Butler’s photograph, the prosecutor told the jury that Robinson testified that the man she saw “looked like this person’s picture”—that the person she saw on the street merely looked

¹⁰⁹ The trial was almost a year after the crime. At the time of arrest, defendant was 17, and he was 5’6” when he entered state prison in January 1997. Less than two months after the trial, he was 5’8”. Malik was 5’6” when he entered the system. In his videotaped statement, Malik said defendant was short. Thus, what defendant’s jury observed during trial concerning the height differential between defendant and Malik may well have been different than it was at the time of the crime.

like Butler (T.2164). The prosecutor was wrong. Robinson explicitly testified upon viewing the “tiny” photographs, that she selected a photo (R. Butler) and said, “That’s the guy, he’s tall, slim and dark skinned and he is the one who had a baseball bat in his hand” (T.1529 [emphasis added]). Thus, the People improperly told the jury that it was not an “outrageous comparison” (T.2163-64), to compare defendant to Butler’s photo and conclude that Robinson effectively identified defendant. It was also wrong for defense counsel not to object.

Furthermore, Butler and defendant do not look alike, a fact that was not apparent from the small headshot of Butler admitted at trial. Butler was also significantly older than the defendant. There was no pedigree information for Butler before the jury. From what little can be determined from records contained in KCDA’s case tracking system—his only two Brooklyn arrests having been dismissed and sealed—R. Butler was a little over eight years older than defendant.

The only consistent fact between Robinson’s statements and defendant’s confession is that they both mentioned a bottle. But Robinson described a clear plastic soda bottle with a white cloth or paper hanging from the bottle’s top, whereas defendant described a white spray top bottle.¹¹⁰

Robinson said one of the males was holding what she believed to be a bat (and what the People argued was the rifle) bladed alongside his body. Defendant never mentioned a rifle, a bat, or any object that might be mistaken for either, and he only mentioned a single handgun.

Robinson described seeing two men walk past her on Kingston and go into the subway station, whereas defendant said that he and two others walked to the station along Fulton. Robinson said one of these two men was tall and slim, while the other (whom she identified as Malik) was big and husky. At 5’6” defendant was far from tall, and at 165 lbs. 5’6” Malik was not particularly big or husky. Even by the time of the trial, defendant was only two inches taller than Malik.

Accordingly, Robinson’s testimony did not corroborate defendant’s confession, and it tended to exonerate him. Notably, Robinson never identified defendant. In fact, no identification procedure was conducted with defendant as a subject. During her testimony, Robinson was asked to look around the courtroom to see if she recognized “either of the two people” she saw that night. Robinson identified Malik (T.1525).

Finally, CRU refers to its memorandum in Malik’s case for an extensive analysis regarding all the issues concerning Robinson’s credibility and reliability.

The Prosecutor Incorrectly Claimed Williams Refuted Defendant’s Alibi

The People also misstated Williams’ testimony in summation. Defense counsel did not voice one objection.

The People argued in summation that Williams realized she destroyed defendant’s alibi by stating that she saw defendant “a week before” the crime (T.2183, 2186, 2189). But that was not a correct account of Williams’ testimony. Williams testified, “It wasn’t that week or the week before. I don’t know for

¹¹⁰ The prosecutor repeatedly argued the white cloth or napkin Robinson saw was really the spray top. Counsel’s repeated objections were sustained, and the jurors was instructed that their recollection controlled (T.2179-80).

sure, but I know I did see him.” Williams told someone she saw defendant but did not give any dates (T.2120-21 [emphasis added]).

The People also argued that Williams saw little of what happened on the street and had “no idea who is running to and from the station” for two reasons: a) she had to take her son away from the window when he got scared, and b) she left the apartment to “walk” to her neighbor’s (T.2191). But Williams rejected the prosecutor’s characterization that it took any real time to move her child away. Instead, she testified that she moved away from the window only for “a second” (T.2116).

There was also no testimony about Williams “walking” to her neighbor’s apartment. Williams simply testified that she went to the apartment (T.2116). Moreover, just after the crime, Williams reported to Chmil and Scarcella that she ran to her neighbor’s apartment (Scarcella DD5 86) (which the People should have known). In addition, the jury was not aware that in her prior statements, made around the time of the crime, it was clear that the men Williams was tracking were out of her sight only momentarily. Furthermore, what Williams said about the scene after the explosion, the number of men walking down Kingston, and their actions as they got to Herkimer was confirmed by Robinson (as well as by the 30-year-old woman the jury did not know about). In fact, Williams apparently had a better opportunity than other witnesses to view what was happening, as she was the only person to see the third male.

The People were free to argue to the jury that they should reject Williams’ testimony, but they were not free to claim that Williams implicated defendant when she did not, imply that she had a closer relationship to defendant or his family than the evidence supported, and misrepresent what she said about being away from the window and her ability to observe the scene on the street.

CONCLUSION

The “new evidence” of Scarcella’s and Chmil’s alleged misconduct would have probably affected the verdict. Furthermore, even without the new evidence, defendant’s confession was unreliable. CRU has no confidence in the integrity of the conviction and there is no reliable credible evidence of guilt. Consequently, as the Independent Review Panel and the District Attorney agree, the judgment of conviction should be vacated, and the indictment should be dismissed.