
DISTRICT ATTORNEY
KINGS COUNTY

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# REPORT ON THE CONVICTION OF STEVEN CARRINGTON

By: The Conviction Review Unit

## THE CRIME

According to the People's trial evidence, on January 2, 1995, around 10:50 a.m., Shannon France, armed with a gun, entered the Lumber Headquarters store located at 4212 Church Avenue. France told a customer, Hugh Keizs, to leave. France then went behind the counter and confronted employee, Lloyd St. George Campbell ("the deceased"). As Keizs attempted to leave, defendant entered the store and stopped him at gun point. France shot the deceased twice, killing him, and took about $400 from the cashbox. Defendant took Keizs's Seiko watch and "pinky" ring.

Defendant was released from prison in June 2018 and discharged from parole in June 2021.[1]

## OVERVIEW OF THE ERRORS

CRU has determined that defendant was wrongfully convicted. Evidence developed after trial established that another individual ("The Accomplice")—and not defendant—entered the store with France and robbed Keizs. Furthermore, there is no evidence that defendant was otherwise involved in the crime or had knowledge of it. For this reason alone, defendant's conviction should be vacated and the indictment dismissed.

Defendant's conviction also cannot stand because the only evidence of guilt—an in-court identification of defendant by the single eyewitness, Keizs, to whom defendant was a stranger—was improperly admitted because it was never tested for its reliability. The hearing court determined that defendant's photo array was unduly suggestive but mistakenly failed to determine whether the subsequent lineup identification sufficiently attenuated the taint, or even conduct an independent source hearing, depriving defendant of due process.

Furthermore, counsel and the People failed to alert the trial court about the mistake or move to reopen the *Wade* hearing. Notably, Keizs had no basis for the in-court identification. He did not know what his robber looked like, other than that he was a stocky Black male.

Additional errors tainted the already inadmissible and unreliable in-court identification. For example, before Keizs viewed defendant's lineup, he was effectively told that the person he had picked in the photo array was the subject of the lineup. And after his identification of defendant in the lineup, he was told he did a "good job." Moreover, counsel bolstered Keizs's identification of defendant at trial by improperly eliciting the case detective's opinion that defendant was on the surveillance video, which captured portions of the crime. Finally, any chance of an acquittal was lost by counsel's failure to properly prepare defendant's alibi witnesses and investigate their accounts, which the People easily discredited as a result.

[1] Defendant and France were jointly indicted and prosecuted through trial. France is discussed to the extent necessary.

## THE POLICE INVESTIGATION[2]

Joseph Calabrese of the 67th Precinct was the lead detective. He was assisted by precinct squad detectives, including Derek Wright, and Brooklyn South Homicide Dets. Frank Pergola and Arthur Semioli.

At about 10:55 a.m., an unknown male called 911 and said someone had been shot. The caller gave the address of the lumberyard.[3] At about 10:56 a.m., Keizs called 911 reporting that, five minutes ago, two Black males with guns were at the lumberyard and two gunshots were fired. He had no further description.[4] At 10:58 a.m., Patrick Dieudonne called 911 reporting shots were fired, and requested EMS.[5]

At 10:57 a.m., Police Officers ("PO") Keith Tierney and James Gentile responded to the scene pursuant to a radio run of shots fired. They encountered Keizs and Dieudonne outside the store. Dieudonne said that Keizs witnessed a robbery in the store. As the officers were placing Keizs in their vehicle to canvass the area, they received a radio call asking about the shooting. Keizs then said that a male was shot inside the store.[6]

At 10:59 a.m., the officers entered the store and found the deceased behind the counter with a gunshot wound to his head.[7] At 11:09 a.m., EMS arrived.[8] At about 11:29 a.m., Det. Calabrese responded to the scene and observed the deceased had been shot in the head and stomach. Calabrese found two .25 caliber shell casings near the deceased, and a deformed .25 caliber bullet in his clothing.[9]

At 11:45 a.m., Calabrese notified the Crime Scene Unit ("CSU").[10] CSU arrived at 12:35 p.m. and photographed the scene.[11] CSU recovered the ballistic evidence and a metal cash box from the floor in the office behind the counter.[12]

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[2] Unless otherwise stated, the police investigation account is obtained from the documents in the People's trial file. Numbers in parentheses preceded by "H." refer to the pages of the pretrial hearing; those preceded by "T." refer to the pages of the trial transcript; and those preceded by "S." refer to pages of the sentencing minutes.

[3] Sprint, and 911 recording.

[4] Sprint.

[5] *Id.*

[6] Calabro DD5, "Interview of First Officer."

[7] *Id.*; Sprint (confirming at 10:59 a.m., that a person was shot). Initially, separate complaints were made for the murder and robbery of the store (complaint 079) and the robbery of Keizs (complaint 080). Keizs's complaint was closed and combined with the murder/robbery (complaint 079). *See* Pergola DD5, "Combine Complaint Number 079 & 080."

[8] Calabrese DD5, "Response to Scene."

[9] *Id.*; CSU Report.

[10] Calabrese DD5, "Notification to Crime Scene."

[11] CSU Report; CSU photos (located in France's appeal file). The Sprint indicates the CSU responded at 11:29 a.m.

[12] *Id.*; Ballistics Unit Report. A bullet removed from the deceased's skull matched the deformed bullet. (T.52, 186)

**Canvasses**

At 12:00 p.m., Det. Semioli canvassed the businesses across the street from the lumberyard. Many were closed. The Copper Pot Restaurant, located at 4213 Church Avenue, was open, but Stanford Jackson (the owner) knew nothing about the incident. Zahid Khawaja, at "Robinson" Pharmacy located at 4223 Church Avenue, "opened store after 11:15 A.M., police were present."[13]

Canvasses were also conducted at the businesses adjacent to the lumberyard, and on the corner of Church and East 42nd Street. No one had any relevant information.[14]

**Keizs's Interview**

At 12:00 p.m., at the scene, Det. Wright interviewed Keizs, who stated the following:

He was at the counter buying supplies when a Black male with a slim build and wearing a brown cap (whom Dieudonne later identified as France), entered the store and went behind the counter. He told Keizs to leave and pulled out a small gun. Keizs ran to the back door, but it was locked.

When Keizs then attempted to leave through the front door, a Black male with a stocky build, wearing a black jacket and hat—whom Keizs later identified as defendant—entered. Defendant "confronted [Keizs] with a long case in his hand with the outline of a gun underneath it" and told Keizs "to stay put." Defendant walked Keizs to the other side of the store. As they passed the counter, Keizs saw the deceased and France struggling, and he heard two gunshots. Defendant then demanded Keizs's watch and ring. After defendant took Keizs's jewelry, defendant and France fled the store.[15]

<u>The Watch and Ring</u>

Keizs reported that the watch was "Gold Colored," and the ring was gold with the initials "HKM."[16] He further reported the value of the watch was $100, and the value of the ring was $400.[17]

**Keizs's Sworn Audiotaped Statement**

At 5:40 p.m., at the KCDA, Keizs gave a brief sworn audiotaped statement to an ADA. Dets. Calabrese and Pergola were present. Keizs reiterated that two Black males entered the store. He added the following to his prior statement:

When France went behind the counter he said to the deceased, "Gimme me the money." The back door Keizs attempted to exit was on Church Avenue. The front door exited to the lumberyard—where Keizs had entered. Keizs assumed there was a gun in defendant's case.

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[13] Semioli DD5, "Canvas of Church Avenue between 41st and 42nd Street." It is not clear whether Khawaja said the police were present, Semioli saw the police present, or something else. CSU photos show that the pharmacy was "Rubinson." It is referred to herein as Robinson.

[14] Wright DD5, "Canvass of Area Adjacent of the Scene of Homicide." Calabro DD5, "Canvass of 4206 Church Ave Ackee Tree Grocery & Deli."

[15] Wright DD5, "Interview with Hugh Keizs."

[16] Tierney, Robbery complaint report.

[17] Unusual Occurrence Report.

Keizs heard the gunshots as defendant walked him to the back. After the gunshots, defendant stepped back to look at what had happened. Defendant returned to Keizs and demanded his ring and watch. Keizs had trouble removing his ring. Defendant "seemed anxious to get out of there." When Keizs managed to remove his ring, he gave the ring and watch to defendant. Defendant walked off. Keizs could not see defendant or France leave. Keizs waited before he left. He went across the street and called 911.[18]

**Dieudonne's Interview**

At the scene, (time not indicated), Det. Pergola interviewed Dieudonne, who stated the following:

He opened the store at about 7:30 a.m. The deceased arrived at about 8:00 a.m. "The girl from the restaurant" (determined to be Michelle from the Copper Pot Restaurant), came into the store at about 8:30 a.m. She left, returned at about 11:00 a.m., and left again.

At about 11:00 a.m., Dieudonne was sitting on the forklift outside the store. A customer was in the store and the deceased was inside, behind the counter. About this time, two Black males went into the store. One male was 19-21, "skinny," 150 lbs., 5'11", with a blue hoody; and the other male was 24-25, 160 lbs., 5'8", with a black hoody.[19]

Two minutes later, Dieudonne heard two gunshots and the same two men came out of the store. The "older" one looked at Dieudonne. He had his hands by his stomach as if he was holding something.

They walked to Church Avenue and turned right. Dieudonne went into the store and found the deceased behind the counter bleeding from the head. He called 911 and the store manager.[20]

**Dieudonne's Sworn Audiotaped Statement**

At 5:53 p.m., at the KCDA, Dieudonne gave a brief sworn audiotaped statement to an ADA. Det. Pergola was present. Dieudonne reiterated that the two men were Black. He added the following:

He was the assistant manager. He did not see anyone enter or exit the store after the two men went inside. He heard the gunshots about a minute and a-half to two minutes after the two men entered. They came out and left the lumberyard about a minute and a-half to two minutes later.[21]

**The Surveillance Videotape**

Det. Calabrese recovered the store's security surveillance videotape.[22] It showed approximately 10-second alternating views of outside and inside the store. There was no date or time stamp on the footage. The view outside the store was of the lumberyard driveway to Church Avenue. The driveway was wide enough to accommodate two large trucks entering side-by-side. The view in the store looked

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[18] Audiotape A94-2159.

[19] Defendant was 27, 180 lbs., and 5'9". (4/26/95 arrest report) France was 24, 170 lbs. and 5'10". (6/2/95 arrest report)

[20] Pergola DD5, "Interview of Patrick Dieudonne."

[21] Audiotape A95-0002.

[22] Voucher F 773417.

down at the counter, revealing tall rows of shelving in front of the counter, and a door where people could be seen entering and exiting.

About five minutes before the crime, a Black male wearing a camouflage jacket entered and passed a woman on her way out. He walked around the aisles between the shelves, stopped in an aisle for a few seconds, walked back to the door, and left.

Next, while Keizs was at the counter, a Black male entered the store, drew a gun, and approached the deceased behind the counter. As Keizs walked to the door, another Black male entered, drew a gun, and walked Keizs back inside. The second gunman and Keizs were in front of the counter when the first gunman shot the deceased. Keizs's robbery could not be seen on the video.

Just over a minute elapsed from the time the first gunman entered and left. The second gunman was not seen leaving. The second gunman appeared on the video for about 10 seconds. In each frame, shelving blocked the second gunman's body. As he walked, he was alternately visible from above the waist or above the shoulders. Due to the poor video quality, his face cannot be made out.[23]

**Anonymous Tips**

Unique, Shannon, and Eddie West Were Together Near the Scene

On January 3, an "anonymous female" (Michelle) gave detectives a "8 ½ x 11" promotional glossy photo depicting two Black males, "Unique" and "Shannon." Michelle reported that, around the time of the crime, these two men were with Eddie West, in the vicinity of Church Avenue between East 42nd and 43rd Streets.[24]

Eddie West

On January 4, between 8:00 and 11:00 a.m., Det. J. Diver (full first name not indicated) received two phone calls. The first caller was an unknown detective in the 76th Precinct. The unknown detective related that an anonymous male called the 76th Precinct stating that the individuals who committed the murder live on 42nd Street and drive a red van.

The second caller, who identified himself as Paul, said that Eddie West confessed to Paul's 18-year-old daughter that he was involved in the shooting.[25] West was known to the police. He was born on October 5, 1971, resided at 153 East 42nd Street (between Church Avenue and Linden Blvd.), and used the alias "Malik."[26]

**Unique Is Determined to Be Mark Carrington**

On January 5, (time not indicated), Det. Pergola conducted a computer search for the nickname Unique. Pergola found that Unique was Mark Carrington ("Mark"), who had prior arrests and resided

[23] The account is based CRU's viewing of the video.

[24] Pergola DD5, "Anonymous Telephone Calls and Contact Re: Homicide." West is commonly referred to as Eddie in the documents, but also Ed and Edward. For the sake of consistency, CRU refers to him as Eddie.

[25] *Id.*

[26] Pergola DD5, "Investigation into the Identity of Subjects in Promo Photo: Unique and Shannon."

at 106 East 42nd Street with his brother—defendant—who was on parole.[27] A comparison of Mark's NYSID photo with the video surveillance photos showed that Mark was the Black male dressed in the "camouflage field jacket," who entered the store just before the murder, looked around, and left.[28]

A computer search for "Shannon" at 106 East 42nd Street returned negative results.[29]

**Keizs and Dieudonne View Mark's Photo Array, and Do Not Identify Him**

On January 5, (time not indicated), Dets. Pergola and Calabrese created a photo array using the promotional photo of Mark (Unique) and photos of five other Black males.

At 6:30 p.m., (location not indicated), Keizs and Dieudonne separately viewed Mark's photo array. Neither made any identification.[30]

**Keizs and Dieudonne Identify Defendant in a Photo Array**

On January 7, Det. Pergola created a photo array with defendant as the subject, and five other photos.[31]

At 5:20 p.m., (location not indicated), Keizs viewed defendant's photo array and identified defendant as the male who robbed him inside the store.[32]

At 6:00 p.m., (location not indicated), Dieudonne viewed defendant's photo array and identified defendant as one of men who exited the store wearing a hood.[33]

**Dieudonne Identifies Shannon in a Photo Array**

At 6:00 p.m., Dets. Pergola and Calabrese showed Dieudonne a photo array with Shannon as the subject, which they had created using Shannon's promotional glossy photo. Dieudonne identified Shannon as one of the men who left the store after the gunshots.[34]

**Defendant's Arrest**

On April 26, at 10:00 a.m., an anonymous male reported to Crime Stoppers that Shannon was in the basement apartment of 106 East 42nd Street (the Carrington's residence). At 10:40 a.m., Det.

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[27] Defendant's prison records indicated that he was 5'9", 165 lbs., and had a scar on the right side of his face. (*see* Pergola DD5, "Review of Past Prison records: [defendant]")

[28] Pergola DD5, "Investigation into the Identity of Subjects in Promo Photo: Unique and Shannon."

[29] *Id.*

[30] Pergola DD5, "Prep[a]ration of Photo Spreads and Showing Same/Witnesses."

[31] Pergola DD5, "Prep[a]ration of Photo Spread."

[32] Pergola DD5, "Photo Identification by witness Hugh Keizs." The identification procedure was conducted at Keizs's home. (*see* below, The Pretrial Hearing [H.22])

[33] *Id.* The identification procedure was conducted at Keizs's home. (*see* below, The Pretrial Hearing [H.15])

[34] Pergola DD5, "Prep[a]ration of Photo Spreads and Showing Same/Witnesses;" Calabrese DD5, "Photo Array Patrick Dieudonne." Keizs did not view Shannon France's array.

Calabrese and other detectives set up surveillance in the vicinity. At about 11:15 a.m., defendant came out of the basement apartment, crossed the street, and was arrested.[35]

The detectives continued their surveillance for Shannon. At about 11:45 a.m., they learned from Crime Stoppers that before they arrived, Shannon went to Eddie West's residence at 153 East 42nd Street. After surveilling West's residence for several hours, the detectives obtained Mrs. West's consent to search the premises. They did not find Shannon.[36]

**Keizs, but Not Dieudonne, Identifies Defendant in a Lineup**

On April 26, Det. Calabrese conducted a lineup with defendant as the subject. Defendant chose the number five position. At 7:45 p.m., Keizs viewed the lineup and identified number five as the male who robbed him in the store.

Dieudonne then viewed a lineup with defendant as the subject. Defendant was in the number four position. Everyone was asked to stand and turn to the right. Dieudonne did not identify anyone.[37]

**Defendant's Statement**

On April 26, at 9:00 p.m., at the 67th Precinct, Det. Calabrese *Mirandized* defendant. Calabrese told defendant that he was identified in the lineup. Defendant stated that he was not in the lumberyard on the day of the incident, and that he spent the night before the robbery with Salisha Kahn. Defendant provided her phone number.

Calabrese told defendant that there was a video of the incident showing his brother Mark in the store five minutes before the crime. Defendant stated he was not his "brother's keeper," he was not there, and his face will not be seen on the video.[38]

**Salisha Kahn's Sworn Statement**

On April 27, at 12:17 a.m., at the 67th Precinct, Salisha Kahn gave a sworn audiotaped statement to an ADA. Det. Calabrese was present. Kahn stated the following:

Defendant was her ex-boyfriend. At the end of January 1995, defendant told her that detectives were looking for him. They had a videotape from the store and needed someone to testify if he was seen on it.

On New Years' Eve, December 31, (1994) she and defendant went to a Boyz II Men concert at Madison Square Garden. When the concert ended at 1:30 a.m. (January 1), they rode the train back to Brooklyn and went their separate ways.

Either on January 1 or 2, she did not recall, Kahn went to see defendant at his parents' house. Defendant lived in the basement with his uncle. She arrived at about 10:00 or 11:00 p.m. and spent

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[35] Calabrese DD5, "Crimestoppers Call."

[36] *Id.*

[37] Calabrese DD5, "Line Up [Defendant]"; Lineup Report.

[38] Calabrese DD5, "Interview of [Defendant]."

the night. She did not recall whether defendant's uncle was there. Other than the uncle, Kahn never met any of defendant's family.

Probably around 7:00 a.m., defendant received a phone call. He got up, bathed, and said he had to go to Kings County Hospital to take care of his sick "son." Around 8:00 or 9:00 a.m., defendant walked Kahn home. She lived on Church Avenue, about four to five blocks from defendant's home. On the way, she saw "yellow tapes" around the lumberyard. There had been an incident there, but at that time, she did not see anyone around. She did not see the police, or any cars.[39]

**Defendant's Videotaped Statement**

On April 27, at 12:54 a.m., at the 67th Precinct, an ADA *Mirandized* defendant. Dets. Calabrese and Dixon (first name not indicated) were present. The ADA asked defendant whether he wanted to make a statement. He said, "No," leaned into the camera, and said, "I have to say I wasn't there. That's it. Mistaken identity."[40]

**Shannon France's Arrest, Lineup, and Fingerprint**

On June 2, PO Logan (first name unknown) received information from a complainant in one of his cases that Shannon was at 760 Remsen Avenue (Brooklyn). Surveillance was set up, and Shannon was apprehended jumping out the back window.[41] Later, Dieudonne identified France in a lineup as one of the males who walked out of the store.[42]

It was later determined that France's fingerprint match a latent print lifted from the recovered metal cash box.[43]

## THE INDICTMENT

On June 22, 1995, defendant was charged, under an acting-in-concert theory, with one count of Murder in the Second Degree (P.L. § 125.25[3][a] [felony murder]); six counts of Robbery in the First Degree (P.L. § 160.15[1], [2], [4]); two counts of Robbery in the Second Degree (P.L. § 160.10[1]); one count of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); and one count of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]).[44]

## THE PRETRIAL HEARING

On February 6, 1996, defendant's *Wade* hearing commenced.[45]

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[39] Audiotape A95-0556 and accompanying transcript.

[40] Videotape V95-0085. Defendant was visibly upset.

[41] Calabrese DD5, "Interview of P.O. Logan."

[42] Calabrese DD5, "Line Up of Shannon France." Keizs did not view any identification procedure with France.

[43] Calabrese DD5, "Contact with Latent Print"; "Latent Work Sheet," Latent Print Unit, Identification Confirmation

[44] France was indicted on the same charges, and another count of Murder in the Second Degree (P.L. § 125.25[1][a] [intentional murder]).

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

**Det. Calabrese**

Det. Calabrese testified as follows:

Dieudonne and Keizs Identify Defendant in a Photo Array, Containing Five Other Photos

Calabrese interviewed "CW" (confidential witness) number one (Dieudonne), and CW number two (Keizs). (H.14-15)[46] Calabrese's account of what Dieudonne reported included descriptions of the two men. (H.14) Calabrese's account of what Keizs reported did not include a description of his robber. (H.15)

On January 7, 1995, Calabrese created a photo array with defendant as the subject. (H.12, 20) Calabrese used a six-year-old photo of defendant--from a 1989 arrest. (H.48-49) The array contained arrest photos of five other individuals. (H.16) It was comprised of loose photos, unlike the usual array in which the photos are compiled together. (H.20)

At 5:20 p.m., Calabrese showed the six photos to Keizs at his residence. (H.22) Keizs identified defendant as the male who robbed him. (H.23-24, 26)

At 6:00 p.m., Calabrese showed the six photos to Dieudonne at his residence. Dieudonne identified defendant as one of the males he saw leaving the store. (H.15, 17-20)

Only Keizs Identified Defendant in a Lineup

On April 26, at 7:45 p.m., Keizs viewed a lineup and identified defendant, in the number five position, as the male who robbed him in the store. (H.33-36; People's Exh. 3 [photographs of the lineup])

Defendant's Photo Array Contained Three Photos From Mark's Array

On cross examination, Calabrese acknowledged that before he created defendant's photo array, he created one with Mark as the subject. Defendant's photo array contained three of the same photos as Mark's photo array, including Mark's photo. (H.48, 51-52, 55-56) There was no particular reason Calabrese used the same photos, other than "just the availability of the photos at that time." (H.51)

Calabrese Attempts to Explain that Two Days Prior to Mark's Array, Both Dieudonne and Keizs Viewed Mark's Array, As Stated in the DD5s[47]

Counsel asked whether Calabrese showed Mark's photo array to anyone. Calabrese said he showed it to "Both witnesses, number one and number two." (H.52 [emphasis added]) Counsel asked where and when did Calabrese show Mark's photo array to number one (Dieudonne). (H.52) Calabrese replied that he showed Mark's array on January 5, to number two (Keizs) at number two's residence. (H.53)

Counsel asked again, "witness number one, when and where did you show him?" The court interjected telling Calabrese they were asking about number one's viewing of Mark's photo array. Calabrese said he "got confused between witness number one and witness number two," and that number one

[46] At the hearing, Dieudonne and Keizs were designated CW1 and CW2, respectively. The Voluntary Disclosure Form had the CW designations reversed. (H.22) The hearing court and counsel inconsistently referenced the different designations, causing much confusion requiring clarification. (*see, e.g.*, H.21-22, 24-26, 39, 53, 64)

[47] *See* above, The Police Investigation, Keizs and Dieudonne View Mark's Photo Array, and Do Not Identify Him.

viewed Mark's photo array on January 5, at his place of employment, Lumber Headquarters. (H.53 [emphasis added]) Counsel did not question Calabrese about witness number two (Keizs). Summarizing Calabrese's account of the photo arrays, the following colloquy ensued between co-counsel and Calabrese:

> [Co-counsel]: The only photo arrays that you did with respect to this case, the one that you talked about with Mark Carrington and the other photo arrays with defendant and France.
>
> Were these the only photo arrays you did in this case?
>
> [Calabrese]: Yes.

(H.61-62) (emphasis added)

**The Hearing Court's Decision**

The hearing court determined that defendant's photo array was suggestive because it contained three of the same photos as Mark's array, which was conducted two days prior. However, the court believed that just Dieudonne viewed Mark's array. Thus, the court ordered an independent source hearing for Dieudonne, and allowed Keizs to make an in-court identification.

Defendant's Photo Array was Suggestive Because it Contained Three Photos from Mark's Array

*It was Clear that Dieudonne Viewed Mark's Array*

The hearing court determined that witness number one's (Dieudonne's) viewing of defendant's photo array was suggestive because it contained three of the same photos from Mark's photo array, which Dieudonne had viewed two days before. (H.103) Although the witness might not have indicated he recognized the duplicative photos, defendant's photo array was effectively reduced to three suspects. (H.104) The court held that an independent source hearing was required for Dieudonne. (H.104)[48] The court noted there was no rule about the number of fillers in a photo array, but this was an "improper procedure" warranting "further investigation." (H.106)[49]

*The Court Sought and Obtained Assurance that Keizs Did Not View Mark's Array (although Keizs did)*

Regarding Keizs, the court found that his viewing defendant's photo array was not suggestive. The court asked for confirmation,

> That individual [Keizs] if I'm not mistaken, did not see Mark Carrington's array[ ]; is that correct?

(H.104) Both counsel and the prosecutor said, "correct." (H.104-05)

[48] Where an identification procedure is found to be suggestive, an independent source hearing is held to determine whether the victim's observations of the criminal during the crime provide an independent basis for the victim to identity the defendant in court at trial. *People v. Rahming*, 26 N.Y.2d 411, 417 (1970) (*see* below, CRU Analysis for further discussion)

[49] Ultimately, an independent source hearing was not required for Dieudonne because he did not identify defendant in the lineup. Thus, the People did not intend to offer his in-court identification of defendant. (H.107-08)

Despite the Ambiguous Lineup Photos, the Lineup Was Not Suggestive

The court noted that the lineup photographs were "not very good," "dark," and not "ideal." It concluded that the photographs sufficiently showed there was no inherent suggestion, because there were no overall dissimilarities among the participants. (H.105)

## COUNSEL CLAIMS THAT DEFENDANT WAS INNOCENT

### Polygraph Request

Prior to trial, by motion dated October 20, 1996, defendant, through his attorney, requested a polygraph examination. Counsel's supporting affirmation stated he believed in defendant's innocence after interviewing his parents, his "sibling," and "co-defendant," and conducting a "field investigation." (Affirmation ¶ 4)[50]

### Counsel's Claim That Eddie West Committed the Crime

In the beginning of the trial, counsel stated that before the case was assigned to the prosecutor, he told the People that Eddie West committed the crime. The prosecutor said he never received that information. In any event, the police investigated West and ruled him out as a suspect. Counsel said a witness had informed him that West was the "sole perpetrator of this particular crime" and counsel intended to have that witness testify. (T.87-89, 99-101)[51]

## THE TRIAL

Defendant's trial commenced on November 21, 1996, before a different judge.

### The People's Opening Statement

In relevant part, the People stated that the crime was captured on the surveillance video, but due to the video's poor definition defendant's face could not be seen. The People then stated that defendant could be seen pulling out a gun, grabbing Keizs, and walking Keizs in front of the counter. (T.27)

### The People's Case

PO Tierney

Tierney testified as follows:

On January 2, between 10:30 and 11:00 a.m., he was instructed to respond to the scene. His memo book and the radio run communication (Sprint) indicated the time as 10:55 and 10:59 a.m., respectively. Tierney simultaneously received two calls regarding the location: one involving a robbery, and one involving gunshots. He and his partner were nearby. He recalled arriving about a minute after the calls. The Sprint indicated that they arrived at 10:57 a.m. (T.105-06, 115-16, 135)

The officers parked their vehicle across the street from the lumberyard and "a little further down" west (towards East 42nd Street). (T.115-16) Keizs ran out of the lumberyard's driveway saying he was

[50] CRU did not locate a response, decision, or polygraph examination.

[51] No such witness was produced.

robbed. The officers placed him in their vehicle intending to canvass the area, but Keizs then said that someone had been shot. After finding the deceased in the store, Tierney secured the scene by standing outside the store until his supervisor arrived, a minute or two later. (T.107-11, 117, 142-45)

Patrick Dieudonne

Dieudonne's testimony was consistent with his prior statements. He added the following:

On January 2, at about 7:30 a.m., he opened the store. He placed $60 in the register. More than $300 was kept in a metal box inside a locked cabinet behind the counter. (T.276-79, 283, 358, 409)

Dieudonne inserted the surveillance videotape into the monitor. When played, the video showed alternating views from a camera outside the store capturing the yard, and a camera inside the store capturing the counter and anyone who entered. The only way into the lumberyard was through the driveway. The store had two doors—one exiting to the lumberyard, and one exiting on Church Avenue. The Church Avenue door was always locked. (T.280-82)

The deceased worked in the store behind the counter. He arrived at 8:00 a.m. Shortly thereafter, the deceased received his usual visit from his friend Michelle asking for his help to lift the gate of her family's West Indian restaurant (the Copper Pot), which was directly across the street. At about 10:30 a.m., Michelle returned to the store. (T.275, 283-86, 416)

Around 10:20 or 10:25 a.m., Dieudonne assisted Keizs in the lumberyard. Keizs then went into the store. There were no other customers inside. Dieudonne saw France and another man entered the store.[52] After the shooting, France and the other man walked out, one behind the other. He did not know who came out first. (T.287-89, 293-94, 380) He testified that the younger one, looked at him, and was holding something. He did not recall that he had told Det. Pergola that the older one looked at him and was holding something. (T.382, 429-30)

The two men went to Church Avenue and turned toward Utica (turning right toward East 43rd Steet). (T.293-94)[53] Dieudonne got a good look at France's face. (T.339) The lighting conditions were good. It was "clear, nice and clear" out that day, but cold. (T.340)

Keizs then came out of the store and said, "those two guys just robbed the guy inside." (T.294, 400)

During Dieudonne's testimony, the surveillance video was played. He identified himself outside the store, the deceased behind the counter, Michelle at the counter, Keizs at the counter, and France entering and going behind the counter. He did not recognize a person who walked by Michelle in the store. (T.325-34)[54]

Dieudonne was certain that no one entered the lumberyard after Keizs. (T.375, 423) He acknowledged that the surveillance video showed a woman standing by door after Keizs went in. (T.424-25)

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[52] Dieudonne identified France in court. (T.319)

[53] Utica Avenue is seven blocks east of the lumberyard.

[54] About five minutes before the crime, Mark Carrington, wearing a camouflage jacket, entered, and passed Michelle as she was leaving. (*see* above, The Police Investigation, Unique Is Determined To Be Mark Carrington)

Hugh Keizs

Keizs's testimony was consistent with his prior statements. He added the following:

*The Crime*

He arrived at the lumberyard at about 10:00 a.m. After Dieudonne helped him find an item, he went in the store to pay for it. (T.456-58) As the deceased wrote up the purchase, a man came in brandishing a small handgun. He told Keizs to leave and demanded "the money" from the deceased. Keizs did not get a good look at the man. (T.459)

When Keizs attempted to leave, defendant—who Keizs identified in court—entered and blocked Keizs's path. (T.461, 471-72) Defendant told Keizs, "You are not getting out of here." (T.461) Defendant pulled what appeared to be a sawed-off shotgun or a long-barreled weapon from under his coat and pointed it at the ground. (T.461, 466)

Keizs never saw defendant before. (T.499) Keizs was face-to-face with him. Nothing blocked Keizs's view of defendant, and the lighting was good. (T.463-64) Defendant had on a dark hooded coat, with the hood over his head. The hood entirely covered defendant's hair, leaving only his face exposed. (T.462, 464-65) Defendant pushed Keizs alongside the counter toward the back of the store. Keizs saw the deceased and the first gunman wrestling and heard two rapid gunshots. (T.468-70) Keizs turned and faced defendant again. (T.566-68)

Defendant demanded Keizs's ring and watch. (T.471) Defendant tried to remove the ring, but it was tight and would not come off. Defendant seemed nervous, and told Keizs to hurry, which concerned Keizs. When Keizs finally removed the ring, he looked at defendant as he handed it over. He then gave defendant his watch. (T.474-75) He never saw his jewelry again. (T.597)

Keizs's ring was a gold signet "pinky" ring, which Keizs wore on his left pinky. (T.474) The watch "was a Seiko, a gold band, gold watch." (T.476) Keizs dropped a curtain hook he was holding. Defendant bent down, picked it up, and ran off. (T.475-76)

Keizs waited and then slowly walked out of the store. He went across the street and called 911 from a pay phone, reporting that someone had been shot. (T.477, 479) Keizs called at 10:54 a.m., within five minutes of the crime. (T.572, 585)[55]

*Keizs's Description of His Robber*

Keizs agreed that he told the 911 operator he had trouble providing a description of the two men. (T.585) He testified that his robber was heavier and stockier than the other gunman, and he could not determine their heights. (T.462) He did not notice any distinguishing facial features about his robber, including a scar, and could not determine his robber's age. (T.509-10) He only knew that his robber was Black, "heavy built," or "a little tall"—probably Keizs's height or a little taller, which was not a "helpful description." (T.510)[56] Keizs thought he was going to die and did not think about focusing

[55] The Sprint indicates that Keizs called 911 at 10:56 a.m. and reported the crime occurred about five minutes ago.

[56] The record does not reflect Keizs's height. (T.510)

on a description. (T.585-86) He did not study facial features, including the eyes, nose, lips, and eyebrows. (T.585-87) But he was sure that his robber did not have a beard or a moustache. (T.592)

*Defendant's Photo Array*

Within the week after the crime, Calabrese came to Keizs's home, probably more than once, to show him photographs. Keizs did not recall whether he identified defendant's photograph. He did not think he was "positive" in any photo identification. (T.589-91)

*The Lineup*

On April 26, Keizs went to the precinct to view a lineup. Calabrese told him, "We think we have one of the guys." (T.485) Keizs identified defendant, number five in the lineup, in less than 10 seconds. (T.485, 487) Calabrese then told Keizs he "did a good job." (T.487)

*The Surveillance Video*

The week before his trial testimony, the prosecutor showed Keizs the surveillance video. (T.491, 546) The People played a portion of the video during Keizs's testimony and asked Keizs to describe what was happening. The following colloquy ensued:

> [The People]: "Is that you right there?"
>
> [Keizs] "That's me right there and that's the guy with the weapon on me in the corner."
>
> [The People]: Is that [defendant]?
>
> [Keizs]: Yes.

(T.494-95)

The People asked Keizs to look at another portion of the video when he was "approached by [defendant]." Here the People asked,

> Okay. I ask you to take a look at [defendant] as he appears in the video tape. Do you see the hood he's wearing which you previously described?

(T.498 [emphasis added]) Keizs replied, "Yes." (T.498)

On cross examination, Keizs admitted that he did not recall a hood. His memory was "refreshed" when he watched the surveillance video prior to trial. (T.512) Keizs did not recall the description he provided to the police. (T.548-50; *see* above, T.462-64)[57] Keizs would not have seen whether defendant had dreadlocks under the hood because his hair was covered. It did not appear that defendant had dreadlocks. (T.510-11)

[57] Keizs's previous description did not include a hood. (*see* above, The Police Investigation, Keizs's Interview and Keizs's Sworn Audiotaped Statement; *see also* below, The Trial, The Defense Case, Det. Wright)

Det. Calabrese

Det. Calabrese's testimony on direct examination was brief and consistent with his pretrial hearing testimony regarding Keizs's viewing of defendant's photo array on January 7, 1995, and lineup on April 26. He added the following:

He was a 14-year veteran of the NYPD, and a detective for six years. (T.604) When he arrived at the scene, he went across the street and spoke to Michelle for 10 to 15 minutes. (T.606, 619)

On January 7, at Keizs's residence, Calabrese showed Keizs defendant's photo array. (T.619-21) Keizs identified defendant, saying he "looked like the male who robbed him." (T.622 [emphasis added])[58]

Thereafter, Calabrese looked for defendant in various locations almost every day until defendant's arrest on April 26 when defendant walked out of his house. (T.623-24, 626) Calabrese spoke to defendant's father twice, asking if he would "bring [defendant] in." That did not occur. (T.632)

On cross examination, counsel elicited the following:

*Michelle*

When Calabrese arrived at the scene, Det. Semioli suggested that he try to talk to a girl at the Copper Pot restaurant across the street.[59] Calabrese spoke to the girl—Michelle—by himself. She stated she went to the lumberyard store twice that morning. She saw someone, whom she did not name, inside, and later, outside the lumberyard at the time of the crime. She did not want to continue talking because she was afraid of being seen. Calabrese did not prepare a DD5 of the interview, to protect Michelle's identity. He did not know Michelle's last name. (T.682-87, 776-77, 821-23, 879-80, 882)

The following day, at about 5:00 p.m., Calabrese and Det. Pergola met Michelle outside the Copper Pot. The meeting was not prearranged, and the interview was not memorialized. She stated she saw Mark Carrington in the store.[60] About half an hour later, she saw Mark, Shannon (France), and Eddie West walking on the block of the lumberyard. About five to 10 minutes later, she saw an ambulance and police cars, and put it together. (T.707, 778) Michelle gave the detectives a promotional photo of "Unique" (determined to be Mark) and "Shannin." (T.688-91, 705-07, 716-17, 915)[61]

*Mark's Photo Array*

Using the promotional photo Michelle provided, Calabrese created a photo array with Mark as the subject. (T.779) Calabrese knew Mark because one of his partners had previously arrested Mark. (T.789-80)

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[58] At the pretrial hearing, Calabrese testified that Keizs positively identified defendant. (H.23-24, 26)

[59] Semioli canvassed the stores directly across the street from the lumberyard, including the Copper Pot. (*see* above, The Police Investigation, Canvasses)

[60] About five minutes before the crime, Mark, wearing a camouflage jacket, entered the store passing Michelle as she leaves. (T.923; *see also* above, The Police Investigation, Unique Is Determined To Be Mark Carrington and The Surveillance Videotape)

[61] During the police investigation Michelle had been referred to as an anonymous tip and confidential informant (*see* above, Anonymous Tips; Pretrial Hearing (H.28) The police did not learn France's full name until he was arrested. (T.625, 633)

Calabrese showed Mark's photo array to "both witnesses" (Dieudonne and Keizs). Calabrese repeated twice, "Both witnesses couldn't I.D. him." (T.781) Later, counsel asked, "did you show any witness a photo array on the 5th of January." (T.790) Calabrese said he showed it to Keizs. (T.790) During his testimony, Calabrese produced Mark's January 5 photo array. (T.790, 795) Counsel asked if defendant's photo was in the array. Calabrese said it was not. (T.791)

Counsel asked, "you showed that photo array to Hugh Keizs on the 5th?" Calabrese said he did. (T.794) Counsel asked, "isn't it a fact that in that photo array you have Mark Carrington." Calabrese said that Mark was the subject of the array. (T.795) Counsel asked why defendant's photo was not in the array. Calabrese said the array was prepared for Mark because Mark was on the surveillance video about five minutes before the crime and was a suspect at that time. (T.796-97, 924)

Calabrese believed Mark was involved in the crime, but the People determined there was insufficient evidence for an arrest because he was not identified in the photo array. (T.796-98) Calabrese did not interview Mark because the video showed that Mark "cased the place out," which was not a crime. (T.783-84)

*Defendant's Photo Array*

A check on Mark's address showed that he had a brother—defendant. Calabrese learned that defendant was on parole for a robbery. Michelle did not name defendant, and Calabrese had no information that defendant was involved. (T.690, 707, 779-81) Calabrese obtained defendant's photo because defendant fit the description of one of the perp's"—5'8" and stocky build. (T.779)[62] He had a "strong hunch" about defendant and "gave it a shot." (T.793-94)

Keizs viewed defendant's photo array on January 7, two days after he viewed Mark's array. Calabrese acknowledged that defendant's array contained three of the same photos from Mark's array, including Mark's photo. (T.800, 829-30) Counsel asked Calabrese if Keizs recognized Mark's photo. Calabrese said Keizs did not say he recognized the duplicate photos, Keizs "went right for [defendant's] picture." (T.800, 830)[63]

*Defendant's Facial Hair*

The 1989 photo of defendant used in his photo array depicted him with a moustache and goatee. (T.621, 801) Calabrese did not ask Keizs if the person who robbed him had facial hair. (T.801)

On April 26, when Keizs viewed defendant's lineup, defendant had moustache and goatee. Calabrese did not ask Keizs if his robber had facial hair. (T.803)

[62] Dieudonne provided the height description. (*see* above, The Police Investigation, Dieudonne's Interview)

[63] The hearing court determined Dieudonne's viewing of defendant's photo array was suggestive because it contained three of the same photos from Mark's array, which Dieudonne viewed before defendant's. The court mistakenly believed that Keizs did not view Mark's array. (*see* above, The Hearing Court's Decision) The trial was conducted by a different judge, who was not alerted about the mistake.

*Surveillance Video*

On January 27, before defendant's arrest, Calabrese showed the surveillance video to defendant's father. He identified Mark on the video but could not tell the identity of the others. (T.676-77, 783, 927, 929)

Counsel asked, "other than Mark Carrington, who else was on that video that you know?" (T.707) Calabrese determined that defendant was on the video, based on "the height, the weight, the walk." (T.709-10) Calabrese never saw defendant before his arrest, but after "spending so many hours with him, that's his walk." Calabrese had watched the video numerous times, including in slow motion, and frame by frame. Calabrese spent the whole day with defendant when Calabrese arrested him and was "convinced" defendant was on the video. (T.710)

Later, counsel asked Calabrese if he was "sure" that defendant was on the video, and whether Calabrese could "make out [defendant's] profile." Calabrese said,

> Sir, I explained to you the other day, I said, just watching the tape over and over again, by the way he walks, that's him that comes in the store, grabs this customer, and the customer I.D.s him.

(T.799)

On redirect examination, Calabrese again testified that defendant was on the video, specifying defendant's location in front of Keizs. (T.926)

On recross examination, co-counsel repeatedly asked, "you can tell by looking at the video, independent of everything else" that defendant is on the video. Calabrese insisted that defendant was on the video based on his height, weight, and walk. (T.932)

*Eddie West*

Calabrese acknowledged someone had reported that Eddie West set up the robbery.[64] Calabrese did not consider West a suspect because he knew West and West was not seen on the video. (T.709, 784-85) He had arrested West for drugs numerous times. (T.787-88) West was about 6'6", a little over 200 lbs., and light-skinned, and of mixed race. (T.915, 916-17; People's Exh. 18 [West's photograph])

<u>CSU Det. Frank Katen</u>

CSU Det. Katen testified as follows:

On January 2, at 11:45 a.m., Katen received a call to respond to the crime scene. CSU headquarters was in the Bronx. Katen and CSU Det. Hank Fieldster arrived at the scene at 12:35 p.m. (T.935-37) Katen took photographs and processed the evidence. (T.938-39, 943 [People's Exh. 9, CSU photos]) They left at 2:45 p.m. (T.948)

[64] *See* above, Police Investigation, Anonymous Tips.

**The Defense Case**

Det. Wright

Det Wright testified as follows:

He interviewed Keizs at the scene. Keizs described the person who robbed him as a Black male, with a stocky build, and wearing a black jacket and hat. Keizs did not mention a hood. (T.971-73)

Mark Carrington, Sr.

Mr. Carrington, defendant's father, testified as follows:

Det. Calabrese visited Mr. Carrington at his church saying that a woman reported that his sons, Mark, defendant, and "Shannon" molested or raped her in the basement of his house. Mr. Carrington said Shannon was Mark's friend. Calabrese asked Mr. Carrington to bring his sons to the precinct so Calabrese could talk to them. Mr. Carrington spoke to defendant and Mark. They said no rape or anything like that had occurred. (T.981-83, 994-95, 1001)

At Calabrese's request, Mr. Carrington viewed the surveillance video of the crime. (T.984, 995) As the video played, Calabrese identified Mark entering the store. Mr. Carrington denied that the person was Mark. (T.984, 1003) Calabrese said that defendant and Shannon were also on the video. Mr. Carrington disagreed. He asked Calabrese to enlarge the video, but Calabrese said it would distort the image. (T.985) Mr. Carrington testified that he could not tell whether defendant was on the video. (T.1006, 1024-25)

Mr. Carrington told defendant and Mark that Calabrese wanted to talk to them about the crime. They said they were not involved and did not need to go to the precinct. (T.998, 1013)

Defendant was arrested at home wearing slippers and shorts. (T.985) He did not recall whether defendant had a moustache and beard in January 1995. (T.1015, 1019-20)

On January 2, at about 7:00 or 7:10 a.m., the mother of defendant's child called. Defendant came upstairs to the phone and spoke to her. Mr. Carrington went out and called home at 10:00 a.m. He spoke to his wife, who said defendant was home. (T.1033-35, 1037)

Salisha Kahn[65]

Kahn testified as follows:

On January 1, at 11:30 p.m., she went to defendant's house and spent the evening. (T.1039-40, 1118) Defendant had a mustache and goatee at that time. (T.1050-51)

The next morning, after receiving a call, defendant said he had to go the hospital. (T.1117) At about 10:00 a.m., defendant showered, he and Kahn got dressed, and they left. (T.1040, 1042, 1094) They walked down East 42nd Street to Church Avenue. (T.1040, 1042) From the corner, on the opposite side of the street, Kahn saw "yellow tapes" in front of the lumberyard. (T.1043, 1109, 1111) They were "outstanding." (T.1111) She did not recall whether police cars, an ambulance, or other people

[65] Her name was spelled Khan for her audiotaped statement, and in certain documents.

were there. (T.1111-12) All she saw were yellow tapes around the lumberyard. (T.1111-12)[66] They arrived at Kahn's home "[m]inutes to 11:00 a.m." She knew the time because she looked at the clock. (T.1043)

On cross examination, Kahn acknowledged that on, April 26, she told an ADA that she was not sure whether she saw defendant on January 1 or January 2. (T.1068; *see* above, Salisha Kahn's Sworn Statement) When asked to explain why she was now sure of the date, Kahn said, "I have no answer for that." (T.1068)

When asked about her statement to the ADA that she and defendant left his house at 8:00 or 9:00 a.m. (T.1089, 1095), she testified that she "probably" remembered saying that. (T.1113)

When asked if she recalled telling the ADA that when she saw the yellow tapes around the lumberyard, and saying there must have been an incident there, but no police or cars were around, she replied, "probably so." (T.1113)

Richardin Carrington[67]

Mrs. Carrington, defendant's mother, testified as follows:

On January 2, she did not recall the year, at 9:45 a.m., defendant's wife, Tamara, called the house. Mrs. Carrington knocked on defendant's door because he had company. Defendant came upstairs and took the call. (T.1125-26, 1140-41)

At about 10:30 a.m., defendant and Kahn left. (T.1127, 1141) Mrs. Carrington then went out. She drove towards East 42nd Street, passing defendant and Kahn. She turned onto Church Avenue and saw an ambulance and three or four police cars arriving at the lumberyard. (T.1127-29, 1142-43)

Defendant had a goatee and moustache since he was a teenager. (T.1130) Mark and France were friends. Defendant did not hang out with them. (T.1144)

Tamara Williams Carrington

Tamara, defendant's wife, testified as follows:

On January 2, at 6:50 a.m., she called defendant. Defendant's father answered, then defendant got on the phone. Tamara told him to meet her and their baby at the hospital. Tamara arrived at the hospital at about 7:00 or 7:30 a.m. It was very crowded, and no doctor was there. (T.1168-69, 1181, 1183)

Before 10:00 a.m., while Tamara was still waiting for a doctor, she called defendant again. Defendant's mother answered and then defendant got on the phone. (T.1170)

At around 10:45 a.m., defendant arrived at the hospital. She knew the time because she looked at the clock on the wall. She was angry and worried that he took so long to get there. (T.1170) The baby's medical records were timed stamped 10:55 a.m., when Tamara registered, and the baby saw the doctor for x-rays. (T.1170-72, 1183-84, 1189; [Defendant's Exh. U, medical records])

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[66] The lumberyard was on Church between East 42nd and 43rd Streets, close to East 43rd Street.

[67] The spelling of Mrs. Carrington's first name is different on various documents from the way it was spelled at trial.

Defendant

Defendant testified as follows:

He spent New Years' Eve with Kahn. On January 1, he was at his parents' house most of the day. Kahn came over between 10:30 and 11:30 p.m. and stayed the night. (T.1216-17)

On January 2, at about 7:00 or 7:30 a.m., defendant's father woke him because his wife, Tamara, called saying their baby daughter was sick. Tamara said she would call back if the baby's fever did not go down. At about 9:00 or 9:30 a.m., defendant's mother told him Tamara was calling again. Tamara told defendant to meet her at the hospital. Defendant showered and dressed. (T.1217-18)

At about 10:30 to 10:45 a.m., defendant left with Kahn. He walked her home and then headed to Kings County Hospital. (T.1218, 1267) It was a 10 or 15-minute walk from his house. (T.1273) They walked down East 42nd Street to Church Avenue, where Kahn pointed out that the lumberyard was "crossed off." (T.1218)

At 10:45 or 10:50 a.m., defendant arrived at the pediatric ER. Tamara was upset defendant was late. Defendant brought the baby into a room for x-rays. (T.1218-19, 1267-68, 1272)

Later that day, defendant went by the Copper Pot, and saw the owner, Stanford Jackson, his wife, and two daughters—one of whom was defendant's friend, Michelle. He knew Michelle for three years. They said someone was killed during a robbery at the lumberyard. (T.1228-29)

At the time, defendant had a moustache and goatee for about 10 years. (T.1229) Defendant did not commit the crime or have any prior knowledge of it. It was a case of mistaken identity. (T.1230, 1304, 1310)

When he was arrested, defendant had just left his house to check on his car. He was wearing slippers, shorts, and a t-shirt. (T.1225-26) At the precinct, Calabrese told defendant that Mark and France appeared on video, and defendant was identified as a suspect. Defendant said it was "impossible" that he was on the video. (T.1226)

Defendant did not hang out with France. (T.1226) France was Mark's friend for several years. France rented time in the music studio in the Carrington's basement. Defendant worked on music there as well. Defendant also taught fitness at Bally's and Jack LaLanne and had a security job on Fulton Street. (T.1288-89) Defendant knew that the police were looking for him. He did not talk to them because he was on inactive parole for a 1989 felony robbery and believed any contact with the police would be a parole violation. (T.1294-95, 1297)

**The People's Rebuttal Case**

Gregory Ellis

Ellis testified as follows:

He was the Associate Director of Pediatrics Emergency at Kings County Hospital. Pursuant to procedure, after being screened in the ER, a patient waits to see a doctor, and then registers. The medical records of Keanna Williams (defendant's and Tamara's child) showed that she was screened

at 10:10 a.m. and saw a doctor at 10:55 a.m. It was not probable that someone arriving at 7:00 or 7:30 a.m. would have waited until 10:10 a.m. to be screened. A doctor was present at 7:30 a.m., and the patient log showed that only nine patients registered between 5:45 and 8:00 a.m. Tamara probably waited 30 minutes between screening and registration. (T.1362-66, 1385-87, 1389)

**Summations**

The Defense

Regarding the alibi, counsel argued that the fact that defendant's child was in the hospital at the same time of the crime, "alone should have proven his innocence or required an additional investigation" (T.1439) Counsel posited that Keizs did not identify defendant in a photo array. He noted Keizs was unable to describe any facial features of his robber, and admitted he was too scared to observe his robber. Counsel suggested something happened which tainted the lineup identification. Counsel argued that defendant was innocent and only arrested because he had a record. (T.1441, 1449)

The People

The People mentioned, at least half a dozen times, that Keizs looked at defendant's face. The People did not say that Keizs described defendant's face or provided a physical description. (T.1502-04)

The People attacked defendant's alibi arguing, among other things, that the crime occurred at 10:54 a.m., and the witnesses could not have seen crime scene tape because CSU photos, taken shortly after 12:35 p.m., showed there was none. (T.1518, 1530)

**The Verdict**

On December 12, 1996, defendant was found guilty of Murder in the Second Degree (P.L. § 125.25[3] [felony murder, predicated on the robbery of the store]), and Robbery in the First Degree (P.L. § 160.15[1] [for the robbery of Keizs]). (T.1621)

**Counsel's Letter to the Court**

By letter to the court, dated December 23, 1996, counsel stated that Keizs's testimony that he was not positive about any photo identification demonstrated that Calabrese committed perjury at the pretrial hearing when he testified that Keizs identified defendant in a photo array. Calabrese also committed perjury when he testified at trial that defendant was on the surveillance video. Counsel noted that neither Mark Carrington nor Eddie West was arrested although named by Michelle.

**The Motion To Set Aside the Verdict**

On or about January 12, 1997, defendant moved—through counsel—to set aside the verdict pursuant to C.P.L. § 330.30. Defendant reiterated the perjury allegations regarding Det. Calabrese, alleged several evidentiary trial errors, and claimed that new evidence proved his innocence.

In support of his innocence claim, defendant submitted an affidavit from Lydga Broughton dated January 5, 1997. Broughton stated the following:

She was informed that on or about June 2, 1995, France was arrested while exiting her apartment rear window. At the time, she was in Georgia. After France's arrest, he called her several times from Rikers, and said that defendant was not involved in the crime.

The Court's Decision

On January 14, the court denied the motion. Regarding the new evidence claim, the court held that defendant failed to exercise the requisite due diligence in bringing the motion prior to trial, because he could have discovered the information from codefendant or co-counsel. In any event, Broughton's information was inadmissible hearsay. (S.18)

**The Sentence**

On January 14, 1997, before sentence was imposed, counsel informed the court that defendant was innocent, and that he had told the People the name of the individual had acted with France in the lumberyard store. (S.32-33 [emphasis added]). Although counsel provided what turned out to be the correct first name of the Accomplice, the last name was incorrect or there was a typographical error in the transcript (*see* below)

Defendant maintained his innocence. He said that prior to trial Det. Calabrese and the People were told who committed the crime. (S.33) The court stated there was no reason to believe defendant was not validly or correctly identified. (S.36)

The court sentenced defendant to consecutive terms of imprisonment of 15 years to life on the murder conviction and eight to 16 years on the robbery conviction. (S.36)[68]

**POST-CONVICTION PROCEEDINGS**[69]

**The Direct Appeal**

On appeal to the Appellate Division, Second Department ("Appellate Division"), defendant, through counsel, raised numerous evidentiary issues. The Appellate Division affirmed the judgment of conviction. Without discussion, the Appellate Division held that defendant's claims were either unpreserved for appellate review or without merit. *People v. Carrington*, 265 A.D.2d 420 (2d Dep't 1999). Leave to appeal to the Court of Appeals was denied. *Carrington*, 94 N.Y.2d 860 (1999) (Smith, J.).

**Motion To Vacate Judgment**

Defendant's Motion

On or about March 1, 2010, defendant moved, through counsel, to vacate the judgment, pursuant to C.P.L. § 440.10, on the ground of newly discovered evidence. Defendant claimed he was innocent, and named the Accomplice with whom France committed the crime. In support, defendant submitted an affidavit from Mark, and a letter and proposed affidavit from France.

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[68] France was convicted of Murder in the Second Degree (P.L. § 125.25[3]) and sentenced to a prison term of 25 years to life. His conviction was affirmed. *People v. France*, 265 A.D.2d 424 (2d Dep't 1999). France did not otherwise challenge his conviction. He was paroled to US Immigration in 2021 and deported.

[69] Defendant filed other motions and applications challenging his conviction, which are not discussed.

*Mark's Affidavit*

In his affidavit, dated April 28, 2006, Mark stated that he knew defendant did not commit the crime because he saw the participants—France and the Accomplice—before and after the crime at Eddie West's house. After the crime, they were discussing the robbery and shooting at Lumber Headquarters. Mark further stated that he saw defendant shortly after the crime in his bedroom with a woman.

*France's Letter and Proposed Affidavit*

By letter, dated March 1, 2005, to an attorney, France expressed concerns about providing an affidavit admitting to the crime, because it could be used against him if he sought collateral review of his conviction. France also stated that it had been 11 years since the crime and, "I mean it is true that [defendant] is innocent, but doesn't it look strange that after all this time I just decided to come forward."

France included with the letter an unnotarized "Affidavit" stating that defendant was not involved in the crime, and on the advice of his appellate counsel, France could not say how he knew. France asked Lazzaro to return it with "the necessary changes" so that France could "properly prepare" an affidavit.

The People's Opposition

In relevant part, the People argued that defendant did not bring his motion with due diligence, because defendant knew, or should have known, about this evidence at the time of trial.

The People noted that, although no information was provided about the Accomplice, other than a name, they determined that an individual with the same name was incarcerated at the time of the crime.

Defendant's Reply

Defendant argued that he exercised due diligence, but Mark and France resisted providing affidavits because they did not want to implicate themselves. That they did not provide the entire truth does not change the fact that defendant was innocent.

The Court's Decision

The court denied the motion without a hearing. The court determined that defendant failed to exercise due diligence in bringing the motion. Moreover, France's statement was not sworn, and provided no details. Mark's observations of the robbery discussions were vague and unsubstantiated, and his observation of defendant at home after the crime was irrelevant.

The court noted that while defendant provided no information about the Accomplice,, the People determined that an individual with that name was incarcerated at the time of the crime.

**CRU INVESTIGATION**

CRU's investigation included reviewing defendant's submissions, transcripts of the pretrial hearing, trial, and defendant's and Shannon France's parole hearings, and defendant's and France's trial file,

their appeals files, and the court file. CRU interviewed numerous witnesses.[70] The relevant evidence is discussed below.

**The Accomplice's Identity**

The People's Prior Attempts To Determine the Accomplice's Identity

*The Motion To Vacate*

In 2010, when defendant moved to vacate judgment, naming the Accomplice, defendant did not provide any information about the Accomplice other than the name (*see* above, Post-Conviction Proceedings, Motion To Vacate Judgment)

The People's appeals file shows that they investigated. They obtained copies of the trial transcript and the Supreme Court file, they interviewed the trial ADA, and they conducted a search in the Criminal Justice database revealing myriad individuals with the same name as the Accomplice. .

Based on certain factors, the People focused on one individual.. However, as stated in the response to defendant's motion, that individual's rap sheet showed he was incarcerated at the time of crime. Because defendant's reply papers did not address the People's finding, they apparently had no avenue to investigate further.

*The Post-Trial Analysis Document*

At some unknown time after defendant's conviction, the People were apparently told about another individual with a similar name as the Accomplice.. CRU located in the trial file a two-page document entitled "Post Trial Analysis" ("Analysis") with a synopsis of the facts, the trial, and the verdict. The Analysis was typed and dated January 9, 1997. Undated handwritten notes at the bottom of the first page state:

> guy, . . . looks likes his son, on work release at time of killing, claims [the trial judge] excluded hearsay, do the brothers look alike, claims he was on phone with son at time of crime.

(Analysis [emphasis in original])

CRU learned that a former Homicide Chief made the notation. He would have immediately accessed the Analysis in the Homicide Bureau, rather than order the trial file. He recalled revisiting the case later, after the trial prosecutor left the office but did not recall the reason.

Since the notes twice mentioned "his son," CRU asked the defense whether Mr. Carrington could have been the source of the information. The defense said that Mr. Carrington spoke to then-DA Hynes when he visited Mr. Carrington's church during his election campaign in 2013. The defense had no other suggestions regarding the source of the information.

[70] Keizs, who is now in his 80s, refused an interview. Defendant's trial attorney, Eddie West, Det. Calabrese, and Michelle Jackson from the Copper Pot are deceased and were not interviewed. (Defense counsel died from cardiac arrest in 2001, West was shot "execution-style" in the street in front of his home in 2009 (https://nypost.com/2003/05/09/nypd-daily-blotter-209/), Calabrese committed suicide in 2019, and Michelle died from an illness in 2022).

Regardless of when the notes were written, or the circumstances, it appears that the People investigated the claim about this individual. The trial file contains arrest photos of a this individual (who seems to bear a resemblance to defendant). Although not documented in the trial file, CRU subsequently determined that this individual was deceased at the time of the crime.[71]

CRU Determined the Identity of the Accomplice

After the defense provided CRU with information for the Accomplice, CRU investigated and concluded that the incarcerated individual the People found in 2010 is the person the defense claims committed the crime.

**CRU Discovered That The Accomplice Was on Work Release**

The defense told CRU that the Accomplice was on work release at the time of the crime, but it could not obtain the Accomplice's records. CRU contacted a local Correctional Facility, which has a work furlough program. The Correctional Facility provided CRU with records of the Accomplice's chronological history of incarceration.

The Accomplice was at the Correctional Facility from September 30, 1994, to January 17, 1995. He was released on work furlough every Saturday to Thursday, for 13 weeks—the last week being December 30, 1994, to January 4, 1995 (the crime occurred on January 2). There was no information regarding where the Accomplice traveled or worked and referred CRU to the Correctional Facility from where the Accomplice was ultimately released.

The Accomplice's travel and work records were destroyed after 15 years. But his DOC records otherwise show that during his furlough the Accomplice committed two violations. First, on November 30, the Accomplice stayed out longer than allowed, violating prison disciplinary rule No. 108.12 (7 NYCRR § 270.2[B][9][iii] ["exceeding time"]). Second, on January 3 (the day after the crime), the Accomplice traveled outside the "preapproved area," violating prison disciplinary rule No. 108.11 (7 NYCRR § 270.2[B][9][ii] ["exceeding limits"]). The records of the hearing regarding his prison violations were destroyed after five years, unless the Accomplice appealed, which he did not.

**The Accomplice's Audiotaped Confession**

Appellate Counsel's Letter to Defendant Regarding the Recording

Defendant provided a letter to CRU, dated June 9, 1999, which his appellate counsel sent him in prison. It indicated that "two people" brought her a cassette recording the prior day. Appellate counsel stated that the recording supported the conclusion that a person admitted his guilt for his role in the crime for which defendant was convicted. However, the recording, alone, was insufficient to exculpate defendant because, among other things, that person and the date of the crime were not identified. Appellate counsel suggested to the "two people" that they attempt to get another taped conversation with the missing information.

[71] The trial ADA told CRU he never saw the analysis form or the arrest photos, and he does not recall the name of the Accomplice or any similar names. He had left the office in October 1997. The ADA, who signed the analysis form, told CRU he never saw the notation, or the arrest photos. The Homicide Chief did not recognize the arrest photos.

CRU spoke to appellate counsel. Other than the letter, she did not memorialize the June 9 meeting, and does not recall the identity of the two people. Counsel said she always believed defendant was innocent because after the appeal, he was one of the few defendants who persisted in asserting his innocence.

The Recording

CRU asked the defense for the 1999 recording. The defense provided two mini cassettes dated June 5 and 6, 1999, respectively, and a larger undated cassette. Defendant's mother gave defendant these recordings when he was released from prison in 2018. She informed current counsel that defendant's trial attorney handed out cassettes to numerous people (unnamed) to try to record the Accomplice confessing. France called her often from jail and together they called the Accomplice and used the cassettes to record him.

The quality of all the recordings is poor, and much of it is difficult, if not impossible, to understand. The June 5 cassette contains the conversation appellate counsel heard. The recording is about 31 minutes long. CRU had a relevant audible portion enhanced. Mrs. Carrington listened to the enhanced recording and did not recognize it.

CRU authenticated the Accomplice's voice on the June 5 recording. CRU played the enhanced recording for CW (*see* below). CW immediately recognized the Accomplice's voice as the person confessing. CRU credits CW. He has known the Accomplice for his entire life. CW was certain. (*see* below, CW, The Third Interview). CRU has not determined the identity of the person talking to the Accomplice.

From what can be heard, the conversation is as follows:

The unknown person twice mentions the "lumberyard." The Accomplice says, "Who me?" The other person asks, "You don't remember taking a gold watch . . . from a guy . . .?" The Accomplice responds,

> No, I did take a watch but it wasn't no gold watch. I took a watch and a ring. It was mini [sic] like a baby ring.

The Accomplice says, "I don't know how you knew that . . ." The other person says, "because it was in the thing, and it was in the fucking paper."

The Accomplice responds,

> Let me tell you something, I still have the watch at home as a matter of fact. You want to see the watch? It's a fucking Seiko. I took the band off and put a black leather band on [sic] . . . the glass had broke. I still got the thing at home, it's a fucking Seiko. . . . It wasn't no gold watch.

The other person says, "I thought it was a gold watch."

Later, the Accomplice says, "I know we messed up" . . . , the watch was not "solid gold . . . ," and repeats that he still has the watch at home and changed the band.

As set forth above, Keizs testified that defendant took his "Seiko" watch, and "pinky ring" which he had difficulty removing. (T.474, 476)

The trial file contains three news articles about the crime. A January 3, 1995 Daily News article mentioned that the shooter's accomplice "took a watch and ring from a customer," however, neither item was described. The other news articles about the crime did not mention jewelry. A Google search did not reveal any other articles about the crime.

**The Accomplice's Videotaped Implicit Admission**

The defense provided CRU with a videotape that a friend of defendant's made of the Accomplice on November 22, 1999, in a room at the Marriott, in Brooklyn. He wrote to defendant in prison and provided two affidavits stating the date and place he made the videotape and that he gave the tape to defendant's parents. He stated in his affidavit that it was not easy for him to come forward with evidence against the Accomplice having known him his entire life. Defendant's mother gave defendant the videotape when he was released from prison in 2018. He has not seen it.

CRU interviewed defendant's friend by phone numerous times. He was not around at the time of the crime. Everything he heard was from Mark. He made the recording to help his friend, defendant.

At the time of the recording, defendant's friend was staying at the Marriott for business relating to the music industry. Mark Carrington arranged the meeting and brought the Accomplice to defendant's friend's room under the pretense of a job interview. Defendant's friend surreptitiously videotaped the Accomplice during an hour-long conversation. Mark remained in the room and stayed off camera.

CRU is certain of the Accomplice identity on the video. He identified himself by name and age, and he is easily recognizable from an arrest photo and rap sheet photos.

For about 40 minutes, the conversation was light. Defendant's friend did most of the talking about the music business he had, and making money, among other topics. The accomplice was laughing, relaxed, and discussed music.

During the conversation, the Accomplice handed defendant's friend a sheet of paper, defendant's friend read aloud. It contained the Accomplice's "long-term goals." Defendant's friend mentioned that it was typed, signed by the Accomplice, and dated (CRU does not have a copy). Defendant's friend told the Accomplice he left out a goal—to take care of defendant's children. Defendant's friend said that defendant was part owner of the company he was in, and he was working it for defendant's children.

Defendant's friend said he wanted to invest in the Accomplice and if he put money in the Accomplice's pocket, the Accomplice needed to take care of defendant's children. Defendant's friend told the Accomplice, as a man, he should do the right thing. The Accomplice said, "I can do the best I can. I can say I can do that."

Defendant's said he heard things, and repeatedly asked the Accomplice, "What happened?" in the lumberyard, and why did they chose the lumberyard? The Accomplice was silent throughout the questioning.

Defendant's friend said he was away at the time and did not know what happened. He repeatedly asked the Accomplice to tell him what happened. The Accomplice said, "I don't want to talk about it."

Defendant's friend said he wanted to know what happened because he heard that the Accomplice "did it," And wanted to hear the Accomplice's side. In a low voice, the Accomplice said, "Honestly… now I don't like talking about that shit. Not right now . . ." Defendant's friend asked, "What the fuck we gonna talk about now? I'm serious." The Accomplice replied, "I hate it. I hate it."

Defendant's friend said defendant's "little brother right here" (indicating Mark) told him what happened, but he wanted to hear from the Accomplice. Defendant's fried said, "I know you've probably had this conversation before." Mark interjected, saying, "Malik."[72] Defendant's friend yelled, "Malik? You talking about it to Malik? Are you crazy?" The accomplice replied, "It was like we started talking about it."

Defendant's friend needed to know that the Accomplice will take care of defendant's children. The Accomplice said he would do his best. Defendant's friend asked, "How do you feel though?" The Accomplice replied, "How do I feel? I don't feel good. I always think about it. I don't really talk about it. Every time I think about it, I don't talk about it."

Defendant's friend said, "You went into the store, you did you what had to do, [someone] died. What did you get out of it?" The Accomplice shook his head and said, "Shit."

Defendant's friend asked, "Who shot the guy?" The Accomplice said, "Not me." The Accomplice said that if he wanted to talk about it, it would be with him (indicating Mark), because "he [Mark] was the closest thing to that back then."

Defendant's friend said, "Another man is in jail for you." The Accomplice did not respond. Defendant's friend told the Accomplice that his goal should be "righting a wrong." The Accomplice did not respond.

Defendant's friend asked if the Accomplice committed the crime during the day or night. The Accomplice looked down without responding. Defendant's friend yelled, "Daytime?" The Accomplice chuckled. Defendant's friend said he wished he had been there to stop "both of you." The Accomplice did not respond.

Defendant's friend said he promised defendant's mother he would take care of defendant's children. The Accomplice said he would give them money. He then lowered his head and rubbed his eyes, apparently crying. The video ended.

**Confidential Witness**

The defense provided an affidavit from a confidential witness ("CW").[73] CRU then interviewed him several times. He knew the Accomplice, defendant, and Mark Carrington practically his entire life. He is married with children, and has no significant criminal history.

Affidavit

In his affidavit, dated November 29, 2018, CW stated the following:

[72] Eddie West's alias was Malik. (*see* above, Police Investigation, Eddie West Was Involved)

[73] CRU knows the identity of the confidential witness. For safety reasons, he is referred herein as CW.

On January 2, 1995, around 10:00 a.m., he was in the pharmacy across the street from the lumberyard. Mark was in the pharmacy looking across the street. As he was talking to Mark, CW saw the Accomplice and France walk out of the lumberyard. Mark then said he had to go, walked out, and headed in the same direction as the Accomplice and France (he did not specify the direction). CW did not see defendant.

The First Interview

CRU initially interviewed CW by phone (during the pandemic). He stated the following:

Between 9:45 and 10:30 a.m., he was in the pharmacy across the street from the lumberyard. Mark was standing by the window. Mark was wearing a hoody and a brown "army fatigue." Mark said he was busy, "blew [CW] off," and left. CW left the pharmacy and walked down Church toward East 42nd Street. He noticed the Accomplice walking out of the lumberyard toward East 42nd Street (on the opposite side). The Accomplice turned left on 42nd Street, toward Snyder Avenue.

CW saw France come out of the lumberyard, cross Church Avenue, and approach Mark in front of the pharmacy. They spoke to each other and parted ways. CW knew France only as "Mr. Mohammed." The attorney supplied France's name in his affidavit. France walked to East 43rd Street and turned left toward Linden Blvd. Mark walked down East 42nd Street.

CW saw the Accomplice at a party about two weeks before the crime and saw him regularly in the neighborhood for months prior to the party. Sometime after defendant was released from jail and CW provided his affidavit to the defense, the Accomplice confessed to him. The Accomplice said he was inside the store by the door, acting as a lookout.

The Second Interview

CW gave an in-person sworn audiotaped statement to CRU. He stated the following:

He explained in detail how well he knew defendant, Mark, and the Accomplice.

CW showed CRU a recent Facebook photo of the Accomplice, which he had on his phone. CW had attempted to record the Accomplice confessing. At a later point, CW said, "let me see something—let me try to call [the Accomplice]." CRU told him not to do so.

CW knew France as "Mr. Mohammed," and did not know much about him. France was part of Mark's crew. They were the same age. CW did not know how the Accomplice got involved with them. France and Mark were in a gang known as "CAB"—the Church Avenue Boys, which hung out on Church Avenue around East 42nd Street. They robbed people and drug dealers. You knew to stay away from them. They distrusted CW because he did not hang out with and commit crimes with the gangs, and he did not get high. He knew right from wrong.

In January 1995, after New Year's Day, CW went to Robinson Pharmacy to pick up his father's medication, as he usually did. CW did not recall the day of the week or the date, but he understood that the crime occurred on January 2.

It was a clear day and very cold. CRU (mistakenly) suggested that it had been raining. CW said he did not recall any rain. It was a "pretty clear" day.

The pharmacy was on the corner of Church Avenue and East 43rd Street, directly across from the lumberyard on Church. The only way in and out of the lumberyard was through the "huge" driveway. CW's father often sent him there to buy items. He was familiar with the store inside the lumberyard and knew the Church Avenue door was never used. The store was only accessed by a door in the yard.

Upon entering the pharmacy, CW saw the owner, whose name CW believed was Mr. Khan. CW referred to him as both Mr. Khan and Mr. Robinson. Mark was in the pharmacy standing by the wide front glass window, looking out. Mark was wearing a black jacket with a hoody under it. Mr. Khan knew them since they were little and would not bother them for hanging out there.

CW said, "What's up." As he spoke to Mark, Mark "shoo[ed]" him, using "choice words." CW picked up his father's medication. Mark made a "hot beeline" out of the pharmacy and turned right toward East 42nd Street.

CW then saw France and the Accomplice walk out of the lumberyard's driveway. Using a printed Google Map depicting an ariel view of the area, CW marked the location of the pharmacy and the directions everyone went. France turned right out of the lumberyard toward East 43rd Street. The Accomplice turned left toward East 42nd. CW left the pharmacy and walked toward East 42nd Street. He no longer saw Mark and assumed Mark turned on East 42nd Street toward his house (toward Linden Blvd.).

The Accomplice crossed Church Avenue to CW's side, and both simultaneously reached the corner of East 42nd and Church. Because they knew each other so well, they said hello. The Accomplice said he had to go and would talk to CW later.

About 15 to 20 minutes later, he heard something happened at the lumberyard and the police were there. CW walked back to Church Avenue and saw Mr. Khan outside, and the police. People on the street were saying that someone who worked at the lumberyard was killed during a robbery. CW started to put it together. He immediately went home and stayed there.

That night, Mark came to his front door. That was odd because Mark never came over. While France paced back and forth on the steps, Mark mentioned that the crime happened when he and CW were in the pharmacy. Mark asked CW what he saw. CW feared Mark, and said he did not see anything, and he did not remember seeing Mark. Mark and France then left.

Defendant was not "exactly a good person." But at the time defendant was arrested for the lumberyard crime, he had been on parole and staying out of trouble. Defendant avoided the Church Avenue Boys, East 42nd Street, and Mark. He went to the park and hung out with CW and others.

After defendant's arrest, CW heard that defendant was not involved in the crime. CW did not care. He did not discuss it with anyone, including the Accomplice. He minded his own business, because he believed he would have been killed if he got involved.

Defendant visited CW when he returned home from prison in this case. CW called the Accomplice telling him that defendant had "no beef" with the Accomplice but wanted to talk. the Accomplice refused, saying he was not going to jail for anybody.

The Accomplice confessed to CW. He said Mark devised the robbery plan, scoped out the store, and was the lookout. The Accomplice, France, and another person were in the store. France got nervous and shot the guy. CW did not know the name of the fourth person. CRU asked if the fourth person could have been defendant. CW said no—but then said it could have been defendant, and he did not know. CW saw only the Accomplice and France come out of the lumberyard driveway, and Mark in the pharmacy.

CRU asked if CW knew Eddie West. He knew West well. He described him and said where West lived. CW said that West was fatally shot, "Thank the Lord." CW explained that West sold drugs from his house and the block was a dangerous drug spot. (West lived around the corner from CW) CW did not believe that West was the fourth person involved in the crime, because West was only interested in selling drugs.[74]

The Accomplice came to see CW because the Accomplice was paranoid that defendant would hurt him. He asked CW to mediate. CW said that the truth is going to come out, and "I'm your boy, . . . You told me the truth. How many other people did you tell? The streets are talking," you need to "make it right," "you sent an innocent man to jail." CW suggested that the Accomplice work out a deal with the DA's Office. the Accomplice said he was not going to jail for anybody.

CRU questioned CW's account in his first statement that he saw the Accomplice at a party about two weeks before the crime and regularly in the neighborhood for months prior to that. CRU told CW that the Accomplice was in jail during those months.[75] CW said it was not possible. He knows the Accomplice was not in jail because in November or December the Accomplice made flyers for CW's parties. He had no knowledge about the Accomplice being on work furlough. He knew he saw the Accomplice during that time because he spoke to him.

CRU asked CW if CRU could mention his interview to Mark. CW readily agreed, saying he had "nothing to hide."

The Third Interview

CW gave another in-person sworn audiotaped statement to CRU.

CRU played the audiotaped recording for CW. (*see* above, CRU Investigation, The Accomplice Audiotaped Confession) CRU did not give CW any information about it. He was just asked if he could identify any of the voices. As soon as the Accomplice spoke CW said, "That's [the Accomplice]." CW was 100 percent sure. CW again identified the Accomplice voice when he said he took a watch and ring. CW "swore on [his] kids" that it was the Accomplice voice. He was not certain about the identity of the other voice.

[74] CW stated this in a follow-up phone call, after the third in-person interview. (*see* below)

[75] At the time, CRU had confirmed that the Accomplice was on work release on the crime date but had not yet learned that the Accomplice had been furloughed for months before the crime. (*see* above, CRU Investigation, CRU Determined That the Accomplice Was on Work Release)

Using street view Google Maps, CRU asked CW to show the location of the pharmacy.[76] CW identified 4223 Church Avenue, Robinson's Pharmacy. He said it had a direct view of the lumberyard driveway. CW provided a detailed account of the inside of the pharmacy, where Mr. Khan sat, and his and Mark's locations.

CRU asked about CW's affidavit, which stated that he saw the Accomplice and France leave the lumberyard while CW was talking to Mark, and then Mark walked away in the same direction. CW clarified that while he was talking to Mark, he saw France walk out of the lumberyard, make a quick right, and cross the street to the corner at East 43rd and Church. Mark said talk to you later and left the pharmacy. CW then left and saw the Accomplice walking toward 42nd Street. the Accomplice crossed Church Avenue where he and the Accomplice reached the corner at the same time. They said, "What's up," and the continued.

CW reiterated that Mark and France visited him that evening, and that he told Mark he did not see anything.

CW told his parents what he had seen. His father told him to mind his business because he could get killed. As time went by, "the streets started talking," and confirmed what he saw. The Accomplice confirmed it as well. CW was not sure when defendant's trial occurred. He heard defendant was convicted. He did not get involved. He focused on his life, his city job, and his children.

CRU told CW that the police interviewed Zahid Khawaja of Robinson Pharmacy at noon after the crime. CW said that Khawaja was Mr. Khan. CRU then confronted CW with the police report indicating that Mr. Khan reported that he opened the store after 11:15 a.m. CRU noted that 11:15 a.m. was after the crime occurred.[77] CW said, "No." Mr. Khan opened "every day early." He was the only pharmacist, and the whole community relied on him. CW suggested that Mr. Khan did not want to be in the middle of it and told the police he opened later. CW said, "I wished my father was alive—Mr. Khan was open." Mr. Khan had been robbed in the past and would not "tell you the right story"—he would not cooperate with the police. There were a lot of robberies of the stores on Church Avenue. The Church Avenue Boys had taken over. It was a "hot bed" for drugs.

CRU asked about the Accomplice confession. The Accomplice told CW he stayed inside the store by the door acting as a lookout. Only France had a gun. The Accomplice did not see what happened. He mentioned a third guy was in the store, who was not Mark. He did not name defendant as that third person.

CW still saw the Accomplice often CW said, it was painful to put a friend in jail.. But CW wanted to do what was right. He would be willing to testify against the Accomplice and no longer wants to remain silent and protect him.

CRU showed CW the surveillance video. When Mark appeared wearing a camouflage jacket, CW repeatedly said, "That's Mark." He realized as he watched the video, "Mark actually came in and

[76] The aerial maps which CW marked during the second interview were not as clear regarding the pharmacy location.

[77] *See* above, The Police Investigation, Canvasses.

checked the place out." CW believed that he had told CRU that Mark had on a "funny green jacket," and asked whether he said it was camouflaged.[78] CW identified France "hands down" as the armed man behind the counter. CW appeared surprised and winced watching the crime unfold. CW said the other armed male could have been anyone because the video was unclear, and the face could not be made out. He "wouldn't put it past [the Accomplice]," if it was him.

The Accomplice CRU went to the Accomplice's address and discovered that he no longer lived there. CRU reached the Accomplice by phone and told him CRU was investigating defendant's case and was speaking to many individuals. The Accomplice denied knowing defendant until CRU mentioned that he did. . The Accomplice agreed to meet CRU at a certain time and location, but he did not show. Thereafter, he was unresponsive to CRU's calls and texts messages. CRU located and went to the Accomplice's mother's address. No one was home. CRU left a card for the Accomplice to contact CRU. He has not done so.

**Defendant**

Parole Hearing

On February 20, 2018, defendant repeatedly maintained his innocence before the parole board. Defendant was paroled.

Polygraph

On November 14, 2019, defendant's current attorney had defendant polygraphed. The test was administered by Mark P. Smith, Certified Polygraph Examiner, APA, NJP, and retired chief polygraph examiner for the Morris County Prosecutor's Office. The results showed "a reasonably high probability that [defendant] was truthful when he denied being the second person involved in the Lumber Headquarters incident."

Defendant's Call to The Accomplice

The defense informed CRU that defendant insisted on phoning the Accomplice in the defense's presence. With the defense listening, the Accomplice answered and said he was in Tennessee. Defendant said he had questions, and "spent a lot of time, you know." The Accomplice said "Yeah." Defendant said his questions would probably have to wait until the Accomplice returned. Soon thereafter, defendant ran into the Accomplice on the street and realized he lied about being in Tennessee.

CRU Interview

Defendant gave a sworn audiotaped statement to CRU in the presence of his attorney. He stated the following:

Mark was five years younger than defendant. They were never close. Defendant had no personal knowledge about the crime. He found out what happened from France when they were in Rikers during trial. France said that he, Eddie West, the Accomplice, and Mark were involved. Mark never

[78] During his phone interview with CRU CW described Mark's jacket as a brown "army fatigue." (*see* above)

talked to defendant about the Accomplice. It was difficult for defendant to obtain information about the Accomplice. Defendant explained that the Accomplice had a certain hairstyle at the time of the crime.

Defendant related the information he learned to his trial counsel. Counsel interviewed Mark but did not want Mark to testify and inculpate himself. Mark and France told defendant's parents the truth. The parents wanted to protect Mark. Mark is in poor health and on a donor list for a heart.

Defendant never hung out with Mark or France, except when it involved music. He met France in 1991 or 1992. From 1991 to 1995, Mark, France, and Eddie West were in a group, "Unique and the Fugitives." Defendant chauffeured them around. They converted his parents' basement into a music studio. Defendant spent the day there on January 1, 1995.

Defendant did not know the time of the crime, but believed he was home. That morning his girlfriend (Salisha Kahn) was home with him when his wife called about taking his daughter to the hospital. Neither his wife nor Kahn knew about the other, and defendant had to figure out a way to handle the situation. He told Kahn his son was sick because she knew he had a son with another woman. He walked her home and went to the hospital where he brought his daughter into the x-ray room. Defendant learned about the crime later that afternoon after he left the hospital.

Defendant's father told him that police wanted to speak to him. He was not told that the police wanted to arrest him. He did not speak to the police because he did not trust them, particularly since they falsely told his father that a rape had occurred in his basement. (*see* above, Mark Carrington Sr.'s trial testimony) Defendant was not hiding from the police. He went to school and to work until he was laid off two weeks after the crime.

**Mark Carrington**

Interviews With Private Investigators

The defense provided CRU with letters from private investigators ("PI") who had interviewed Mark. Defendant had retained the investigators before approaching his current counsel.

*Michael Race*

By letter dated May 21, 2003, and sent to defendant in prison, PI Race stated the following:

He had a "heart-to-heart conversation" with Mark at defendant's parents' house and it was clear what Mark's involvement was in the crime. Mark could make a deal for conspiracy and "testify about his knowledge about [the Accomplice]." Defendant's parents needed to support Mark's cooperation. "[W]e are at a standstill unless your brother cooperates fully and honestly. . . . It is quite obvious that you should not be there and replaced with [the Accomplice] who should be there."

CRU attempted to contact Race. He is no longer in business. CRU left a message at his possible current phone number but received no response.

*Evrard Williams*

By letter dated May 15, 2006, and sent to defendant in prison, PI Williams updated defendant on the progress of the investigation. Williams wrote the following:

He met with defendant's friend , who said he gave the tape he made of the Accomplice to defendant's family. Williams did not need to hear the tape because he was already convinced of defendant's innocence.

It was clear that Mark will not, "on his own, make out the necessary affidavit" to exculpate defendant.[79] Williams and defendant's friend discussed taping Mark to obtain a "proper admission," but they were aware of the danger and "there was a question of your feelings and the feelings of your family in this matter."

CRU could not locate any contact information for Williams.

CRU Interview

CRU interviewed Mark at his home, out-of-state. He is very ill. He admitted that he was in the lumberyard store before the crime. He said that he knew, for a fact, that the Accomplice was France's accomplice in the store. Mark refused to say more without speaking to a lawyer. At Mark's wife's suggestion, CRU emailed her questions for Mark to answer. CRU never heard back from them.

**Shannon France**

Lydga Broughton

Broughton stated in a 1997 affidavit that France had called her from Rikers after his arrest and said that defendant was innocent. (*see* above, The Motion To Set Aside the Verdict) Broughton is deceased and could not be interviewed. Rikers' retention policy for phone records is 18 months.

Proposed Affidavit to Attorney Lance Lazzaro

In 2010, France drafted a statement that defendant was innocent. In an accompanying letter, France asked an attorney to make necessary changes for an affidavit, noting that he was concerned about admitting guilt. (*see* above, Post-Conviction Proceedings, Motion to Vacate Judgment) There is no evidence that he executed an affidavit.

France's Interview With Attorney Damond J. Carter

The defense provided CRU with a letter dated August 12, 2011, Carter wrote to defendant in prison. Carter said that he interviewed and prepared an affidavit for France. France did not sign the affidavit because France "didn't want to tell on anyone (*i.e.* Mark Carrington, Jr. or Eddie West)." Carter stated since West is deceased, Mark should tell France to provide the affidavit.

CRU could not locate Carter. He is no longer registered as an attorney in New York and has no website. CRU called his last known office number, without success.

[79] Mark wrote a vague affidavit dated April 28, 2006. (*see* above, Post-Conviction Proceedings, Motion to Vacate Judgment)

France's Affidavit of Admission

Defendant's submissions to CRU included an "Affidavit of Admission" from France dated December 4, 2012. France stated the following:

He was not coerced, or promised anything, and received no benefit. He "c[a]me to terms with [his] conscience that it is absolutely wrong" to allow defendant to "sit in prison for a crime [France] know[s] that [defendant] did not commit or anyway participated." France "participated in the botched murder-robbery." Defendant was not present and did not participate or possess any knowledge of the crime. France was willing to cooperate in any judicial proceeding regarding his statement.

France's Parole Hearings

CRU obtained the transcripts of France's two parole hearings. At both hearings, France repeatedly admitted his guilt and maintained that defendant was innocent.

At his January 29, 2020 hearing, France stated that the robbery was planned by someone who had died. (Transcript at 5-7) That person was "deceased in the street." (*id.* at 5) France was at his late friend's home when another friend suggested the robbery. France committed the robbery with that other friend. When asked for the identity of his accomplice, France said, "they just call him [the initial of his first name" (*id.* at 6)

The parole board repeatedly asked about defendant's role. France answered as follows:

- Me and [defendant] was never together. Me and [defendant] was never together.
- Me and [defendant] was never together, ma'am. Me and [defendant] never committed this robbery together.
- But at no time did me and [defendant] commit a crime together.
- [Defendant] was falsely arrested.

(*id.* at 6-7)

At his July 27, 2021 hearing, the following colloquy ensued:

> Q Who was [defendant]? Was he a friend of yours?
>
> A A friend of mine, but like I told the last board that I appeared at, me and [defendant] did not commit any crime together.
>
> Q He was not involved in this?
>
> A No, he wasn't. And I believe I made that clear a while back ago.
>
> Q Are you saying you are alone?
>
> A No, . . . But at no time was [defendant] a part of any criminal actions.
>
> Q You entered that store with a gun yourself?
>
> A Yes, sir, not with [defendant]. At no time did I enter the store with [defendant].

> Q What did happen in that store?
>
> A Went into the store and it was a tussle because the clerk tried to disarm the weapon from me and it went off . . . and the other individual that entered the store with me, who was not [defendant], was the one who robbed the customer.

(Transcript at 6-7) France repeated, "that was all orchestrated by a third party that is no longer with us." (*id.* at 7)

CRU Attempts to Interview France

CRU learned that France was required to periodically report to the police in Georgetown, Guyana (to where he was deported). CRU repeatedly wrote the Georgetown Police Commissioner asking to facilitate a video interview between CRU and France. CRU received no response.

**CRU ANALYSIS**

Since his arrest, defendant has claimed he was mistakenly identified. It is now well known that mistaken eyewitness identifications play a significant role in wrongful convictions.[80] "A conviction which rests on a mistaken identification is a gross miscarriage of justice."[81] It is abundantly clear that is what happened here.

Defendant was convicted, acting in concert with Shannon France, of felony murder and robbery based on the identification of a single eyewitness, to whom defendant was a stranger. All of the evidence set forth above in CRU's investigation, taken together, establishes that another individual, and not defendant—was France's accomplice in the lumberyard store robbery.

The most powerful evidence are the surreptitious recordings of the Accomplice confessing and implicitly admitting to committing the crime inside the lumberyard store. CW, who has known the Accomplice his entire life, corroborates that the Accomplice committed the crime. He authenticated the Accomplice's voice on the audio recording, established that the Accomplice was in the neighborhood during his work furloughs, and observed the Accomplice and France leave the lumberyard after the crime. Although CRU was unable to interview Mark Carrington and Shannon France, they have taken convincing measures to prove defendant's innocence. Moreover, the Accomplice's refusal to speak to CRU is indicative of a consciousness of guilt. Accordingly, based on all of the evidence, alone, defendant's conviction should be vacated and the indictment dismissed.

Furthermore, it is evident that defendant's wrongful conviction resulted from Keizs's in-court identification of defendant, which mistakenly was never tested or proven reliable. The hearing court determined that the photo array identification procedure was unduly suggestive, but never determined whether the subsequent lineup identification attenuated the taint, or determined whether Keisz had

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[80] Garrett, *Convicting the Innocent; Where Criminal Prosecutions Go Wrong* (Harvard University Press 2011) p. 48 (researchers have found that eyewitness misidentifications have been a factor in 76% of the first 250 convictions [190 of 250] overturned due to DNA evidence since 1989); *see also People v. Marshall*, 26 N.Y.3d 495, 502 (2015) ("Wrongful convictions based on mistaken eyewitness identifications pose a serious danger to defendants and the integrity of our justice system").

[81] *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

an independent source for an in-court identification.. This violated defendant's rights to due process and a fair trial, requiring vacatur of the conviction.

Moreover, counsel and the People failed to alert the trial judge, a different judge from the pretrial hearing, about the mistake and move to reopen the *Wade* hearing. Notably, Keizs had no independent basis for his identification of defendant. For example, he admittedly did not observe the facial features of the individual who robbed him, and the only physical description he provided was that his robber was a "stocky" Black male.

Numerous other errors contributed to the unjust result. For example, Keizs was essentially told prior to viewing the lineup that defendant was the subject, thus reinforcing his photo array identification. And after he identified defendant at the lineup, Keizs was told his identification was correct, thus reinforcing his in-court identification of defendant. Furthermore, Keizs's in-court identification of defendant was bolstered by defense counsel improperly eliciting Det. Calabrese's identification of defendant on the surveillance video. Counsel committed other errors that contributed to the wrongful conviction, including failing to prepare the alibi witnesses and investigate their accounts.

Accordingly, for all these reasons defendant's conviction should be vacated, and the indictment dismissed.

**Evidence of Defendant's Innocence**

The Accomplice Confessed To Robbing Keizs of His Watch and Ring

On June 5, 1999, the Accomplice was secretly audiotaped confessing to the crime of which defendant was convicted. The person speaking to the Accomplice twice mentioned "the lumberyard," and asked him about taking a gold watch. The Accomplice admitted that he took a watch, adding that he also took a ring. He adamantly denied that the watch was gold, explaining it was a "Seiko." He described the ring as a "mini [sic] like a baby ring." These are the very two items France's accomplice took from Keizs—a Seiko watch and a pinky ring Keizs had trouble removing because it was too tight.

Although the person told the Accomplice that he read about the gold watch in the newspaper, there was just one news article about the jewelry. It mentioned that the shooter's accomplice robbed a watch and a ring from a customer—it did not mention the make of the watch or describe the ring. Only the robber would know this.

Keizs's testimony that the watch was gold is inapposite. (*see* above, The Trial, The People's Case, Hugh Keizs [T.476]) Keizs reported that the watch was "Gold colored," and valued at $100.[82] CRU learned that in the 1990s Seiko only made a limited 14 karat gold edition, which would have cost far more than $100.

The Accomplice Implicitly Admitted He Committed the Crime With France

On November 22, 1999, defendant's friend, who knew the Accomplice well, surreptitiously videotaped the Accomplice implicitly admitting to committing defendant's crime. Defendant's friend

[82] *See* above, The Police Investigation, Keizs's Interview.

specified that the crime occurred at the lumberyard on 43rd and Church Avenue. He aggressively interrogated the Accomplice, repeatedly accused the Accomplice of committing the crime, and pressured the Accomplice to give his side. At one point, he said to the Accomplice, you went into the store and as a result someone died. Defendant friend asked, "What did you get out of it?" and how the Accomplice felt about it. Defendant's friend said, "Another man is in jail for you," The Accomplice had to "right a wrong" and help take care of defendant's children. Defendant's friend said he wished he had been there to stop "both of you."

Not once did the Accomplice deny, protest, or question anything defendant's friend said. He mostly remained silent. When he spoke, the Accomplice said, "I don't want to talk about it"; "I don't like talking about that shit. Not right now . . . I hate it. I hate it"; "How do I feel? I don't feel good. I always think about it. I don't really talk about it. Every time I think about it, I don't talk about it."

The only denial the Accomplice made was being the shooter. When asked, "Who shot the guy?" Instead of denying any knowledge of that, the Accomplice said, "Not me." The Accomplice was able to deny just this one fact because Shannon France shot the deceased.

The change in the Accomplice demeanor was also telling. At first, the Accomplice believed he was at a job interview. He was animated, rapping, talkative, and laughing. When defendant's friend brought up defendant and the crime, the Accomplice became quiet, soft-spoken, and often lowered his head. At the end, the Accomplice rubbed his eyes, apparently crying, while agreeing to help take care of defendant's children.

The Accomplice silence, demeanor, and responses to being accused of committing the crime were tacit admissions.[83]

<u>CW Observed the Accomplice and France Exit the Lumberyard Together and the Accomplice Confessed to Him</u>

CW provided compelling evidence that the Accomplice was France's accomplice in the lumberyard store. CRU extensively questioned CW and, although there were certain discrepancies, CRU credits him based on myriad factors.

*CW's Account Was Detailed and Plausible*

CW did not profess to know anything about the crime. He stated that he knew what he had seen, and the rest he heard on the street or from the Accomplice. CW had not been interviewed at the time of the crime. He appeared to speak from his recollection, providing new facts.

CW told CRU he went to Robinson's Pharmacy to pick up his father's medication. He had no independent recollection of the date, day of the week, or the time. He understood it was January 2. Mark was in the pharmacy looking out the window on Church Avenue facing the lumberyard. CW saw the Accomplice and France walk out of the lumberyard, and Mark then left the pharmacy. CW went home and he heard the police were down the block. He returned to Church where he saw Mr.

[83] *See* Prince, Richardson on Evidence § 8-223 (Farrell 11th ed.).

Khan outside. CW then learned from word on the street about the crime. CW "put it together" at that point.

CW returned home and stayed there. Later that evening Mark and France came to see him. Mark mentioned that the crime must have occurred when he and CW were both in the pharmacy. He asked CW what he saw. CW said he did not see anything and did not recall seeing Mark.

First, it is credible that Mark would be in the pharmacy watching the lumberyard during the crime. The surveillance video shows him perusing the aisles inside the lumberyard store five minutes before the crime. Notably, Michelle from the Copper Pot told detectives that Mark was on Church Avenue before and after the crime. It is reasonable that he positioned himself somewhere on Church during the crime. The pharmacy was the ideal location for Mark to continue his role as lookout. A CSU photograph taken from the lumberyard driveway confirms CW's claim that the pharmacy window looks directly across the street to the lumberyard driveway. CRU's visit to the location, and Google Maps confirms this as well.

Lending weight to CW's credibility, he provided a detailed account and physically demonstrated the layout of the pharmacy and his, Mark's, and Mr. Khan's locations.

Furthermore, CW's observations of France and the Accomplice exiting the lumberyard on Church Avenue were credible, despite some discrepancies. (*see* below, CW, Discrepancies) CW stated, and Dieudonne testified at trial, that the only way in and out of the store was through the lumberyard driveway on Church Avenue. In each account he gave to CRU regarding the directions France and the Accomplice walked when they came out of the lumberyard, the Accomplice turned left on Church towards East 42nd Street, and France turned right on Church towards East 43rd Street.

Finally, it is believable that Mark and France would pay CW a visit at his home that evening to intimidate him. CW provided specific details about this visit, including that France paced back and forth on the steps, while Mark questioned him about what he saw.

The Accomplice's *Confession*

It is believable that the Accomplice confessed to CW, whom the Accomplice has known for his entire life.. Notably, CW wanted to call the Accomplice in CRU's presence to obtain another confession. (*see* above, CW, Second Interview) It is also not surprising that the Accomplice minimized his role to his friend. The Accomplice claimed to CW that he was a lookout at the door inside the store, there was only one gunman, and there was a third person in the store, who was not Mark.

CW did not know the facts of the crime. He believed the Accomplice account until he watched the surveillance video and was visibly surprised to see two gunman, one whom he identified as France and the other whose face was not discernable. At that point, CW remarked, "I wouldn't put it past [the Accomplice]."

*CW Did Not Equivocate or Change His Account When Challenged*

1. CW Saw the Accomplice for Months Prior to the Crime

CRU challenged CW's claim that he saw the Accomplice at a party about two weeks before the crime, and regularly in the neighborhood for months prior to that. CRU told CW that the Accomplice was incarcerated prior to the crime date. Perplexed, CW insisted he saw and spoke to the Accomplice for months before the crime, and even had the Accomplice do the flyers for CW's parties because the Accomplice was a great artist.

At the time, CRU knew that the Accomplice was on work release the day of the crime, but CRU had not yet learned that the Accomplice was out on work release during the months preceding the crime. (*see* above, CRU Investigation, CRU Discovered That The Accomplice Was on Work Release) The work release documents corroborate CW's account.

As stated above, CRU could not obtain the records of where the Accomplice went on work release. Significantly, CW's account that he saw the Accomplice regularly in the months preceding the crime reveals that the Accomplice went home and was working in the neighborhood during his 14 work furloughs, including the crime date.

2. CW's Recollection of the Weather

Next, CRU challenged CW's memory about the weather 27 years ago, which someone would only recall if he had reason to do so. He claimed it was a clear day when he observed the Accomplice and France, through the pharmacy window, walk out of the lumberyard driveway. CRU told CW it was raining. CW insisted that it was clear.

Later, CRU realized it was mistaken when it re-examined the surveillance video. Also, Dieudonne testified the lighting conditions were good. It was "nice and clear" out that day, but cold. (T.340)

3. Whether the Pharmacy Was Open During the Crime

CRU told CW that Mr. Khan reported to the police that he opened the pharmacy after 11:15 a.m., which was after the crime. CW said, "No." Frustrated, he said he wished his father was alive to corroborate him. He said Mr. Khan always opened early because he served the community. Opening a pharmacy at some unspecified time "after" 11:15 is unusual. However, to conclude otherwise—that the store was closed—would render CW's entire account fabricated. This seems improbable given the details provided by CW. CRU finds CW's explanation to be credible.

CW explained that Mr. Khan had lied to police about when he opened to avoid involvement. CW recalled that Mr. Khan had a history of refusing to cooperate with the police who had not helped him on the occasions he had been robbed. A 1995 Daily News article (in the trial file) confirms that Mr. Khan had, during one period, been robbed at least once a week and had to install plexiglass at the pharmacy counter because the police were not protecting his store and others on the block. Yet, Mr. Khan said he had "invested so much of [his] life" there, he "had no plans to leave." Under the circumstances, it is plausible that Mr. Khan's pharmacy had been open at the time of the robbery, but that he felt no obligation to help the police and/or he did not want to get involved, so he told the police he opened his store after 11:15 a.m.

*CW Did Not Overstate His Account in Defendant's Favor*

CW did not overstate defendant's virtues, volunteering that defendant was not always "a good person."

Furthermore, when CRU asked CW if defendant could have been the fourth person who the Accomplice said was involved in the crime, CW said no. He then immediately said yes—the fourth person could have been defendant, but he did not know. CW would not have volunteered this if he was intent on exculpating defendant. His candid response to this question gave his account additional credibility.

In addition, CW could have easily named Eddie West as the fourth person. CW strongly disliked West. West provided CW with a convenient person to blame for the robbery. When CW told CRU that West was killed, he added, "Thank the Lord." However, when CRU asked if West could have been involved, CW was surprised. He discounted West as the fourth person because West was a drug dealer. CW's response further suggested that defendant did not attempt to influence him. At trial, counsel maintained that West was involved in the crime. Clearly, CW did not know this.

*Demeanor/Character*

CW's credibility was supported by his demeanor. He was relaxed and affable during his interviews. CW became animated when he recognized the Accomplice's voice on the recording, and Mark and France on the surveillance videotape. He grimaced and was visibly affected when he observed the portion of the video showing France struggle with and shoot the deceased, and he was surprised upon realizing the Accomplice's confession to him was not accurate.

Like many witnesses, CW did not come forward at the time of the crime and defendant's trial out of fear of being killed. CW displayed a strong sense of justice in his interviews with CRU. He was no longer interested in protecting the Accomplice and appeared driven by doing what is morally right. He did not avoid the multiple interviews and phone calls with CRU. He even agreed to CRU discussing his interview with Mark. And he expressed how painful it is to "put a friend in jail," but said that he is willing to testify against the Accomplice. CW no longer wanted to remain silent and protect him.

*Discrepancies*

There were certain discrepancies in CW's account, some of which are troubling, but they do not change CRU's credibility determination.

1. CW's Affidavit

CW's account to CRU that France and the Accomplice went in different directions out of the lumberyard conflicted with his affidavit that, after they left the lumberyard, Mark left the pharmacy "heading in the same direction" as France and the Accomplice. In addition, CW's affidavit did not include that he spoke to the Accomplice, and Mark spoke to France, on Church Avenue after they came out of the lumberyard, which are significant facts.

Although CRU did not ask CW about these discrepancies, during CW's interview it became apparent that his affidavit had certain details he did not know, such as the date and time he was in the pharmacy,

and France's name. Because the affidavit had some details CW was unaware of and omitted other details provided by CW during interviews, the affidavit may not have been correct about the direction.

2. France's and the Accomplice's Separate Directions

CW consistently stated that France turned right out of the lumberyard to East 43rd Street, and the Accomplice turned left toward East 42nd Street. This contradicted Dieudonne's claim that he saw France and his accomplice turn right out of the lumberyard (toward East 43rd). CRU should have asked CW about this, although he was certain about the directions and drew them on Google Maps.

It is conceivable that Dieudonne was mistaken. Dieudonne said that France and his accomplice were not walking together when they came out of the store. Dieudonne did not specify if they were together when they walked out of the lumberyard. Thus, he might have seen one man turn right, became distracted when Keizs came out of the store, and assumed the other man went the same way.

Notably, Dieudonne was mistaken about certain things regarding France and his accomplice. For example, he testified that when they walked out of the store, the younger one (France) looked at him and was holding something. However, he told Det. Pergola that the older one looked at him and was holding something. (T.382, 429-30) Also, Dieudonne had testified that he was sure that no one entered the lumberyard after Keizs, but the surveillance video shows a woman inside by the door after Keizs went in. (T.375, 423) Moreover, Dieudonne identified defendant in a photo array as one of the two men he saw but did not identify defendant in a lineup.

3. CW's Conversation With The Accomplice and Mark's Conversation With France

CRU did not ask CW about two inconsistencies. First, in his initial CRU interview (by phone) CW said the Accomplice headed out of the lumberyard toward East 42nd Street, and then turned left on 42nd toward Snyder Avenue. In his second and third CRU interviews (in person), and in a follow-up phone interview, CW said the Accomplice crossed Church Avenue to CW's side of the street (the opposite direction of Synder), and they greeted each other.

Second, in his initial CRU interview, CW mentioned that after France made a right turn from the lumberyard toward East 43rd Street, France crossed Church Avenue and spoke to Mark outside the pharmacy (at the corner of East 43rd and Church). Thereafter, CW was consistent about France's direction of travel, but maintained that Mark made a "hot beeline" out of the pharmacy and turned right toward East 42nd. CW did not mention seeing Mark talk to France.

Weighing these discrepancies against CW's overall account, CRU does not consider them significant enough to cast doubt on CW's credibility.

Mark Carrington

Mark was captured on video walking through the lumberyard store five minutes before the crime, but that alone was insufficient to charge him as an accomplice. When CRU spoke to Mark, Mark feared implicating himself and refused to provide any information to exculpate his brother. It is certain that Mark was involved and had the information to help defendant, as evidenced by the letters private investigators wrote to defendant after meeting with Mark. (*see* above, Mark Carrington, Interviews

With Private Investigators), as well as the surveillance footage, and CW's account of Mark acting as a lookout from the pharmacy.

Nevertheless, Mark took two risks to help defendant, which he would not have done if defendant was involved in the crime. First, in 1999, Mark brought the Accomplice to the Marriott, under the pretense of a job interview, so that defendant's friend could extract a videotaped admission from the Accomplice. There was a risk that in admitting to the crime, the Accomplice would implicate Mark. In fact, the Accomplice came close to doing so when he stated that if he wanted to talk about the crime, it would be "with him" (indicating Mark), because "[Mark] was the closest thing to that back then."

Furthermore, in 2006, Mark supplied an affidavit in support of defendant's motion to vacate the judgment, stating that the Accomplice committed the crime. Mark stated he was with France and the Accomplice at Eddie West's house, both before and after the crime, when they discussed the crime. Here, Mark risked the court granting an evidentiary hearing at which he would have had to testify and explain his statement in greater detail.

Shannon France

France's attempts to exculpate defendant are irrefutable, and additional factors supporting the conclusion that defendant was innocent. Obviously, France would not have come forward at any time before the verdict because he would have had to admit his guilt. But sometime after the verdict, France made several calls to defendant's mother from prison. She connected the calls to the Accomplice while recording France's conversations with the Accomplice and attempts to obtain a confession. (*see* above, The Accomplice's Audiotaped Confession, The Recording)

Thereafter, France's efforts to help were limited because he did not want to provide any affidavit admitting guilt or risk being mistaken for an informant. In fact, in 2005, France asked one of defendant's attorneys for assistance in drafting an affidavit stating defendant was innocent, without implicating himself. (*see* above, Motion to Vacate Judgment, France's Letter and Proposed Affidavit) Apparently, this was not done. And in 2011, France refused to sign an affidavit, which apparently implicated Mark and Eddie West, even though West was deceased. (*id.* France's Interview With Attorney Damond J. Carter)

By 2012, France provided defendant with an "Affidavit of Admission" saying he "c[a]me to terms with [his] conscience that it is absolutely wrong" to allow defendant to "sit in prison for a crime [France] know[s] that [defendant] did not commit or anyway participated [in]." France said he was willing to cooperate in any judicial proceeding regarding his statement. However, France apparently reconsidered and would not cooperate with defendant's current counsel.

Rather than testifying in court, France found a better vehicle to clear his conscious and help exculpate defendant—his appearances before the parole board in 2020 and 2021, after which he would not face testifying at an evidentiary hearing. France admitted his guilt, and professed defendant's innocence. France also told the whole story and provided enough information about his accomplices without naming them. He provided the first initial of the first name of his accomplice in the store, claiming

that was what the Accomplice was known as. And someone who was "deceased in the street" planned the robbery. He avoided any reference to Mark Carrington.

There is no evidence that the Accomplice had been referred to in other contexts by the initial of his first name, but given the evidence that he was France's accomplice, the initial had to refer to the Accomplice. Moreover, France's reference to the person who was "deceased in the street" had to be Eddie West, who was gunned down in the street in 2009.

France had everything to gain by admitting his guilt and providing an account of the crime. However, he had nothing to gain by his repeated insistence that defendant was innocent, or by hinting at the identities of his accomplices, other than a clean conscious. In the end, CRU obtained France's parole minutes; the defense had no knowledge that France had made these statements.

The Accomplice

When CRU mentioned to the Accomplice by phone, that it was investigating defendant's case, he said he did not know defendant. After CRU reminded the Accomplice that he knew defendant, he agreed to meet CRU at a specific time and location that day. The Accomplice failed to show, and then ignored CRU's attempts to contact him. The Accomplice's conduct can be construed as consciousness of guilt.

**Evidence of Guilt Consisted of Keizs's In-Court Identification of Defendant**

The Reliability of Keizs's Photo Array Identification of Defendant Was Never Established; His In-Court Identification Should Not Have Been Allowed

A pretrial identification procedure that is unduly suggestive violates the Due Process Clause and is therefore not admissible to determine the guilt of an accused.[84] "It is the likelihood of misidentification which violates a defendant's right to due process."[85]

Where a preliminary determination has been made that a pretrial identification procedure was unduly suggestive—as here, an attenuation analysis is conducted, or an independent source hearing is required. For attenuation, the passage of time between a suggestive identification procedure, and a subsequent pre-trial identification procedure can negate the suggestiveness.[86] At an independent source hearing. the People must demonstrate, by clear and convincing evidence, that there is a reliable basis for the witness's identification of the defendant at trial.[87] "Reliability is the linchpin in determining the admissibility of identification testimony."[88]

Here, defendant's photo array consisted of six photos—three of which were contained in Mark's photo array. Both Dieudonne and Keizs viewed Mark's photo array just two days before viewing

[84] *People v. Chipp*, 75 N.Y.2d 327, 335 (1990), *cert. denied* 498 U.S. 833 (1990).

[85] *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

[86] *See e.g.*, *People v. Racine*, 28 Misc. 3d 1223(A) (Kings Cty. Sup. Ct. Aug. 17, 2010) (nine-week interval sufficient to attenuate lineup identification from tainted video surveillance identification).

[87] *See People v. Foster*, 200 A.D.2d 196, 199 (1st Dep't 1994); *see also People v. Brown*, 34 N.Y.2d 879 (1974) (An in-court identification of a defendant is permitted where a witness has an independent basis for identification).

[88] *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

defendant's. However, the hearing court determined that the photo array was unduly suggestive only with respect to Dieudonne. .The hearing court ordered an independent source hearing for Dieudonne.[89]

Because the hearing court, counsel, and the People mistakenly believed that Keizs did not view Mark's photo array, the court failed to conduct an attenuation analysis or independent source hearing for Keizs. (*see* above, The Hearing Court's Decision)

Accordingly, the reliability of Keizs's photo array identification of defendant was never tested or established to allow his in-court identification. Consequently, irrespective of the evidence of defendant's innocence, defendant was deprived due process and his conviction cannot stand.

The Subsequent Lineup Identification Did Not Attenuate the Suggestive Photo Array

Under the circumstances, the passage of almost four months between the photo array and lineup identifications did not attenuate the taint from the suggestive photo array procedure. Factors considered in determining sufficient attenuation include the victim's familiarity with the defendant, and the victim's opportunity to view the defendant during the crime. Here, defendant was a stranger to Keizs, and Keizs only knew that the robber was a stocky Black male.[90]

Indeed, Keizs's trial testimony established that his observation of his robber was insufficient to make an identification. Although he testified that he was face-to-face with his robber a few times and the lighting was good (T.463-64), he admittedly could not provide a description to the 911 operator, other than to say he saw two Black males. (T.585; *see also* Sprint) And the only description he reported to the police was that his robber was a Black male with a stocky build wearing a black jacket and hat. (*see* above, The Police Investigation, Keizs's Interview; The Defense Case, Det. Wright [T.971-73])

Keizs acknowledged that he only knew that his robber was Black, "heavy built," or "a little tall," which was not a "helpful description." (T.510) He could not determine age. Although he looked at the robber's face, he thought he was going to die and did not think about providing a description later. He did not notice any distinguishing facial features, including any scar, eyes, eye color, nose, lips, or eyebrows. (*see* above, Keizs's Description of His Robber)[91]

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[89] Ultimately, the hearing was not conducted for Dieudonne. Having not identified defendant at the lineup, the People did not intend to have him identify defendant in court.

[90] *See Racine*, 28 Misc. 3d 1223(a) (witness opportunity to view shooter's face is one factor to consider in determining attenuation); *cf. People v. Colon*, 39 A.D.3d 233 (1st Dep't 2007) (suggestive photo array identification did not taint lineup identification where there was a passage of four and a half months between the two identifications, and the victim was familiar with defendant); *People v. Johnson*, 106 A.D.2d 469 (2d Dep't 1984) (lineup identification, conducted two months after suggestive photo array identification, was sufficiently attenuated and was not itself suggestive where the victim's opportunity to view the defendant during the crime was sufficient to establish an independent basis).

[91] Defendant has a scar on the right side of his face. (*see* above, Unique is Determined to be Mark Carrington [footnote]) Moreover, Keizs was sure his robber did not have facial hair. (T.592) CRU believes that defendant had a moustache and goatee at the time of the crime—as he did in 1989 and when he was arrested. Defendant, his mother, wife, and girlfriend testified that he had a moustache and goatee at the time, and there is no evidence to the contrary. In fact, a 2002 DOC photo of defendant shows him with the same moustache and goatee. And defendant has the same look to date.

Moreover, Keizs had testified that the robber wore a hood, demonstrating on his own head how the hood covered the entire hairline. (T.462, 464-65) However, even this clothing description was not based on Keizs's independent recollection. He admitted that his memory was "refreshed" when he watched the surveillance video he viewed prior to his testimony. He did not recall if he told that to the police. (T.512, 548-50) Notably, Keizs never mentioned a hood before to the police or the People. (*see* above, Keizs's Interview and Keizs's Sworn Audiotaped Statement)

Finally, Keizs was not certain of his photo array identification. He did not recall whether he identified defendant's photograph, but he did not believe he was "positive" in any photo identification he made. (T.591) This was confirmed by Det. Calabrese who testified at trial—and not at the hearing—that Keizs said defendant "looked like" the person who robbed him. (T.622) In fact, confirming that Keizs was unable to provide any meaningful description of his robber, at the hearing when asked what description and information Dieudonne and Keizs had provided, Calabrese testified only about Dieudonne's description of defendant. (H.14-15)

As further confirmation of Keizs's inability to describe his robber, on summation the People mentioned at least half a dozen times that Keizs saw defendant's face, but they did not point to any physical description Keizs gave of his robber's face. (T.1502-04) It is evident that at the lineup, Keizs merely identified the person he had selected in the suggestive photo array rather than the person who had robbed him. "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in . . . memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."[92]

Moreover, Det. Calabrese told Keizs before he viewed the lineup "we think we have one of the guys." (T.485) Keizs was not shown France's photo array. The only person Keizs had identified was defendant, and he was the only subject Keizs would consider identifying in a lineup. Thus, Calabrese's comment undoubtedly assured Keizs that his prior photo array identification was accurate and guided his lineup identification, and subsequent in-court identification of defendant.

Finally, the hearing court's determination that the lineup was not suggestive, is troubling. The hearing court noted that the lineup photographs were "dark," "not very good," or "ideal." (*see* above, The Hearing Court Decision [T.105]) Upon examining the lineup photographs, CRU agrees. In fact, the faces of two of the fillers cannot be seen.

<u>Keizs Had No Independent Basis for His In-Court Identification of Defendant</u>

Notably, had an independent source hearing been conducted, the People would have failed to meet their burden to show a sufficient reliable basis for Keizs's in-court identification.[93] The determining factors include the witness's opportunity to view the criminal, the witness's degree of attention, the

[92] *Simmons v .United States*, 390 U.S. 377, 383-84 (1968).

[93] *Chipp*, 75 N.Y.2d at 335.

thoroughness and accuracy of the witness's description of the criminal at the time, and the level of certainty of the identification.[94]

As set forth above, all Keizs could describe about the robber was that the robber was a stocky Black male Accordingly, had there been an independent source hearing, Keizs's photo array identification of defendant would have been suppressed, and he would have been precluded from identifying defendant at trial. Although Keizs's robber was captured on the surveillance video, as the People stated in their opening statement, the video was of such quality that the face of the robber could not be made out. (T.27) Without any identification evidence at trial the People could not prove their case.

The In-Court Identification

*Keizs Was Told That His Lineup Identification Was Correct*

After Keizs identified defendant at the lineup, Det. Calabrese told Keizs he did a "good job." (T.487) Under the circumstances stated above—including that Keizs told Calabrese he was not certain about his photo array identification, and Calabrese effectively told Keizs defendant would be in the lineup—the improper remark secured Keizs's already unreliable subsequent in-court identification of defendant.[95]

*Keizs's and Calabrese's Improper Identification of Defendant on the Surveillance Video*

During their testimony, both Keizs and Calabrese identified defendant as Keizs's robber on the surveillance video. A lay witness may offer an opinion about the identity of a person in a videotape to aid the jury in cases where "the witness is more likely to correctly identify the [person]. . . than is the jury."[96] That was not the case here. It is also proper in certain situations for an arresting detective to give lay opinion testimony that defendant is the person depicted in surveillance videos.[97] Such testimony is most commonly allowed in cases where the defendant has changed his appearance since being taped, and the witness knew the defendant before that change of appearance.[98] That was also not the case here. The video identifications had no probative value and were improper. No curative instructions were given, and there is a significant likelihood that this testimony prejudiced defendant.

1. Keizs

The People maintained in their opening statement that defendant's face could not be seen due to the poor quality of the surveillance video. (T.27) Yet the People elicited Keizs's identification of the gunman who had approached him, on the video, as defendant. (*see* above, The Surveillance Video

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[94] *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

[95] *Cf. People v. Montanez*, 135 A.D.3d 528, 529 (1st Dep't 2015) (officer should not have told the witness that he picked out "the perpetrator," in a photo array, but any suggestiveness was attenuated by the passage of time between the photo procedure and the lineup); *People v. Wilson*, 111 A.D.2d 940 (2d Dep't 1985) (improper remark to witness that he selected the "right person" in photo array, did not taint the lineup identification where, among other things, witness was never told that defendant would be in the lineup).

[96] *People v. Morgan*, 214 A.D.2d 809, 810 (3d Dep't 1995).

[97] *People v. Challenger*, 200 A.D.3d 500 (1st Dep't 2021).

[98] *People v. Russell*, 79 N.Y.2d 1024, 1025 (1992).

[T.494-95, 498]) Keizs's unfounded opinion likely usurped the jury's function of determining on its own whether defendant was the person on the video who held Keizs at gunpoint.

2. Det. Calabrese

Counsel asked Calabrese whether he recognized anyone on the surveillance video, other than Mark Carrington. Apparently, counsel expected Calabrese to say no. Calabrese instead repeatedly testified that he was "convinced" defendant was on the video, based on "the height, the weight, the walk," after watching the video numerous times, including in slow motion and frame by frame. (T.709-10, 799)

This damaging testimony opened the door to the People eliciting on re-direct examination additional assurances from Calabrese that defendant was the gunman seen on video standing in front of Keizs. (T.926)

Clearly, in disbelief, co-counsel on re-cross examination challenged Calabrese's assertion that he could "tell just by looking at the video" that the person was defendant. Calabrese insisted that the person was defendant based on his height, weight, and walk. (T.932)

Calabrese's video identification of defendant was just as implausible as Keizs's. During the 10 seconds the person identified as defendant appears on the video, he is visible from either the waist up or neck up. His height, walk, and weight cannot be discerned. But Calabrese was an experienced veteran of the NYPD with six years' experience as a detective. (T.604) His persistence that defendant was on the video likely influenced the jury in determining defendant was the gunman in the video who approached Keizs, and bolstered Keizs's unreliable in-court identification of defendant.

**Counsel's Errors**

The record demonstrates that counsel strenuously advocated for defendant. For example, he argued that someone else committed the crime, requested a polygraph examination for defendant, and extensively cross-examined the People's witnesses. In questioning Keizs, counsel successfully demonstrated that Keizs could not describe his robber.

However, in addition to the error discussed above of having Det. Calabrese identify defendant in the surveillance video, counsel made other errors that were detrimental to the defense and contributed to the wrong result.

Counsel Should Have Known That Keizs's Viewing of Defendant's Photo Array Was Suggestive, and Moved To Reopen the *Wade* Hearing

At the pretrial hearing, Calabrese testified twice that he showed Mark Carrington's photo array to witnesses number one and two (Dieudonne and Keizs, respectively). Apparently, due to inartful questioning and responses, and confusions with the witnesses' designations, no one comprehended Calabrese's testimony about witness number two (Keizs). In fact, he was admonished to focus on witness number one. (H.52-53) As a result, the parties and the court erroneously concluded that Keizs did not view Mark's photo array. (*see* above, The Hearing Court's Decision [H.104-05])

Counsel had three opportunities to realize the error, but clearly never did.[99] Otherwise, at each opportunity, counsel would have moved to reopen the *Wade* hearing for an independent source hearing.[100] There was no strategic reason not to move to reopen the hearing, because it could have led to preclusion of Keizs's in-court identification of defendant. (*see* above)

First, well before the hearing, counsel was provided with all discovery, which included the DD5 stating that Keizs viewed Mark's photo array on January 5. (H.4; *see* above, The Police Investigation, Keizs and Dieudonne View Mark's Photo Array, and Do Not Identify Him)

Second, a review of the hearing transcript, alone, would have revealed the error. Calabrese plainly testified that Keizs viewed Mark's array, and the misunderstanding would have been apparent upon reading the transcript.

Third, at trial, Calabrese explicitly testified, on cross examination, that Keizs viewed Mark's photo array on January 5th, two days before Keizs viewed defendant's. (T.790, 794) Evidently, counsel did not comprehend the import of this fact. He asked Calabrese why a photo of Mark, and not defendant, was placed in the array. (T.781, 794) Calabrese explained that, at first, Mark was a suspect because he was seen on the surveillance video. (T.796-97, 924)

Counsel later asked Calabrese whether Keizs recognized the three duplicative photos from Mark's array when he viewed defendant's array. (T.800, 829-30) Calabrese testified that Keizs did not say he recognized them, and Keizs "went right for [defendant's] picture." (T.830) However, whether Keizs recognized the three photos was irrelevant. The hearing court determined that although Dieudonne might not have indicated he recognized the three duplicative photos from Mark's photo array, his viewing defendant's photo array was suggestive because the array was effectively reduced to three suspects. (H.104) Counsel failed to comprehend that Keizs's viewing of defendant's photo array was suggestive for the same reason.

Counsel's repeated failures were fatal to the defense because the only evidence of guilt was Keizs's in-court identification of defendant, which was never determined to be reliable and should have been precluded. (*see* above)

Alibi Defense

It is now known that defendant was not involved in the crime. Consequently, defendant had to have been elsewhere. There is no reason to doubt defendant's account that he was home and then met his wife and daughter at the hospital. The hospital records show that his daughter was treated at 10:55 a.m. It is reasonable that defendant would have been with his wife and daughter.

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[99] A different judge presided over defendant's trial, than at the hearing.

[100] A trial court has discretion to reopen a suppression hearing if additional facts, which cannot be discovered "with reasonable diligence" before the suppression ruling, would have affected the hearing court's determination (C.P.L. § 710.40[4]). Although counsel should have known before the hearing that Keizs viewed Mark's photo array, it is likely the trial court would have reopened the hearing under the circumstances. *See People v. Riley*, 70 N.Y.2d 523 (1987) (defendants entitled to new independent source *Wade* hearings and new trials because showup identifications were improper and in-court identifications lacked foundation due to People's failure at first *Wade* hearings to call witnesses to testify as to independent sources).

The precise time of the crime is unknown. Keizs testified that he called 911 at approximately 10:54 a.m. within five minutes of the incident. (T.572, 585) The Sprint indicates that Keizs called 911 at 10:56 a.m., reporting the crime occurred about five minutes ago. Presumably, the crime occurred around 10:50 a.m. Defendant would have been at the hospital just after or around the time of the crime.

Accordingly, counsel's decision to present an alibi defense might have been sound strategy. However, the presentation was problematic. In particular, counsel did not adequately prepare defendant's girlfriend or wife, or investigate their accounts, which were easily disproved by the People. "If the prosecution can establish the falsity of an alibi . . . , [a defendant's] case is as good as lost."[101]

Defendant's girlfriend, Salisha Kahn, testified she and defendant left his house after 10:00 a.m. and he walked her home. She was certain she arrived home just before 11:00 a.m. because she looked at the clock. En route, when she and defendant were at the corner of Church and East 42nd Street, she saw the lumberyard was completely taped off. (*see* above, The Trial, The Defense Case, Salisha Kahn) On summation, the People argued that CSU photographs taken after 12:35 p.m., showed the absence of crime scene tape. (T.1518, 1530) Counsel should have known that. In fact, counsel should have known that the surveillance video showed the entrance to the lumberyard was not cordoned off at any point. Law enforcement and EMS continuously drove in and out of the driveway on Church Avenue, as pedestrians walked by.

Moreover, counsel failed to prepare Kahn for cross examination about her prior statement to the ADA. For example, when confronted with her inconsistent account of the date of the crime, Kahn said, "I have no answer for that." (T.1068) When confronted with her two-hour discrepancy about the time she and defendant left, she testified that she "probably" remembered saying that. (T.1113)

Regarding defendant's wife, Tamara Carrington, she testified that she called defendant to meet her at the hospital at 7:00 or 7:30 a.m. because their daughter was ill. When she arrived at that time, the ER was crowded, and no doctor was there. Defendant did not show up until 10:45 a.m. Tamara was sure of the time. She looked at the clock because she was worried and angry that he was so late. The defense admitted into evidence medical records showing that the baby was seen by a doctor at 10:55 a.m.

On rebuttal, Gregory Ellis, Associate Director of Pediatrics ER, testified that a doctor was present at 7:30 a.m., and the patient log showed only nine patients were waiting. Ellis testified that it was not likely that Tamara waited all morning to been seen. (*see* above, The People's Rebuttal Case) This undermined Tamara's credibility as an alibi witness. Defense counsel should have corroborated her account by investigating the hospital records.

Presenting easily disprovable alibi testimony was not a plausible strategy.[102] Evidence that defendant had a wife and girlfriend did not portray him in the best light. It would have been a more reasonable

[101] *People v. Jarvis*, 113 A.D.3d 1058, 1060 (4th Dep't 2014), quoting *Henry v. Poole*, 409 F.3d 48, 65 (2005).

[102] *See*, *e.g.*, *Jarvis*, 113 A.D.2d at 1961 (presenting an alibi defense for the wrong time has been found, by itself, to constitute ineffective assistance of counsel).

tactic to rely on the misidentification defense. As mentioned, counsel successfully established that the single eyewitness did not observe the face of the gunman who robbed him.

The Accomplice At sentencing, counsel informed the court that he had told the People the name of France's accomplice.. (S.32-33 [emphasis added]) However, the name counsel, only had a first initial and the last name was either was not accurate or appeared as a typographical error in the transcript. Nevertheless, this was counsel's first mention of the Accomplice. To the extent that counsel knew about the Accomplice, counsel failed to establish any record about the Accomplice or ask the People or the court for help investigating the Accomplice.

In pertinent part, defendant told CRU that when he and France were at Rikers during trial, France informed him that the Accomplice, Eddie West, and Mark were involved in the crime. At some point Mark and France had told this to defendant's parents. It was difficult for defendant to obtain information about the Accomplice, but during trial he told counsel about the information he learned.

It is not exactly clear what information counsel had about the Accomplice or at what precise stage he learned it. Pretrial, in counsel's affirmation, in support of defendant's request for a polygraph, counsel stated he believed in defendant's innocence after interviewing defendant's parents, his "sibling" (presumably Mark), and France, and conducting a "field investigation." (*see* above, Counsel Claims that Defendant Was Innocent)

However, in the beginning of the trial, counsel stated that Eddie West was the "sole perpetrator of this particular crime." (*id.*) Interestingly, during his cross examination of Keizs, counsel asked whether the gunman who robbed Keizs had a distinctive hairstyle. (T.510-11) Apparently, counsel was referring to the Accomplice. Defendant told CRU that the Accomplice this distinctive hairstyle at the time of the crime. Neither defendant, nor Mark, nor Eddie West (whose photo was admitted into evidence) had this hairstyle.

When Calabrese subsequently testified, counsel failed to question him about the Accomplice or any type of hairstyle. Counsel only asked about Eddie West. (T.709, 784-85) If counsel had information about the Accomplice, he would have had a good faith basis to ask Calabrese whether he considered any other potential suspects, including the Accomplice.

Moreover, after the verdict, counsel wrote to the court, noting that neither Mark Carrington nor Eddie West had been arrested, even though both had been named by Michelle. (*see* above, Counsel's Letter to the Court) Counsel never mentioned the Accomplice until sentencing. Even at that point, counsel provided no information other than a name.

**The Prosecution**

<u>The Investigation</u>

For the reasons discussed above, CRU does not credit counsel's claims at sentencing that the People were given the name of the Accomplice and failed to investigate. To the contrary, the People did substantial investigative work on this case.

First, when defendant was arrested and named Salisha Kahn as an alibi witness, the People interviewed her the next day. Unfortunately, the account she provided (about four months after the crime) was

untenable. She placed herself and defendant by the lumberyard hours before the crime, indicating that the crime had already happened, the police had left, and there was just crime scene tape by the lumberyard. (*see* above, The Defense Case, Salisha Kahn)

After the conviction, the People investigated defendant's 2010 C.P.L. § 440.10 claim that the Accomplice committed the crime. The People determined that the Accomplice was incarcerated at the time of the crime. (*see* above, CRU Investigation, the Accomplice's Identity)

Moreover, at some unknown time after the conviction, the People investigated the claim that another individual (with a name similar to the Accomplice), committed the crime. That individual, however, was deceased at the time of the crime. (*id.* The Post-Trial Analysis Document)

The People's investigative efforts notwithstanding, they committed a couple of significant errors.

The Hearing Court's Erroneous Ruling

As discussed, the hearing court determined that defendant's photo array was suggestive as to Dieudonne because it contained three photos from Mark's array, which Dieudonne viewed two days prior. The court ordered an independent source hearing for Dieudonne. The court, counsel, and the People mistakenly believed that Keizs did not view Mark's array. (*see* above)

At the start of the hearing, the People made an extensive record of all discovery provided to the defense, including the DD5 indicating that Keizs viewed Mark Carrington's photo array two days before viewing defendant's. (H.2-6) The People were remiss in failing to know or acknowledge this fact at the pretrial hearing and correct the error.

At trial, when Det. Calabrese testified that Keizs viewed Mark Carrington's photo array two days before viewing defendant's and that defendant's array contained three of the same photos (T.781, 790), the People, like defense counsel, should have alerted the trial judge—who did not conduct the hearing—about the hearing court's erroneous ruling and moved to reopen the hearing.[103]

The Surveillance Video

It was improper for the People to have elicited Keizs's surveillance video identification of defendant as his robber because that was a fact for the jury to determine. (*see* above) Although the robber's appearance on the video corroborated Keizs's account of the crime, it did not establish defendant's identity as the robber. Nor could it, because the People themselves noted in their opening statement that the robber's face could not be seen. To the extent that the jury credited Keizs's video identification, defendant was prejudiced. The only evidence of defendant's guilt was Keizs's unreliable in-court identification of defendant.

[103] *See*, *e.g.*, *People v. Clay*, 132 A.D.2d 561 (2d Dep't 1987) (*Wade* hearing reopened to permit the People to inquire as to independent source for admission of witness' in-court identification where, among other reasons, People had not been given such opportunity at first hearing).

**The Police Investigation**

The Lineup

Regarding the lineup, as stated, under the circumstances presented here, it was improper to both suggest to Keizs that defendant would appear in the lineup, and then tell Keizs that he correctly identified defendant. (*see* above, The Trial, Hugh Keizs, The Lineup [T.589-91])

Tunnel Vision and Confirmation Bias

Tunnel vision and confirmation bias explains the tendency to focus in prematurely on a plausible theory of a case and then embrace information in support of that theory and reject information that contradicts it. Under these precepts, one acts with "unwitting selectivity in the acquisition and use of evidence. . . [T]hat people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so, is fundamental to the concept."[104] In the context of criminal justice, confirmation bias leads investigators (and prosecutors) to filter in evidence supporting their theory and to ignore or undervalue evidence that suggests their theory might be incorrect.[105]

Here, confirmation bias prevented Det. Calabrese from questioning or evaluating Keizs's equivocal photo array identification of defendant, and Dieudonne's failure to identify defendant in a lineup. Moreover, if Calabrese truly believed he recognized defendant on the surveillance video by the height, the weight, the walk (*see* above), it was due to confirmation bias.

However, there was no viable avenue of investigation which would have led the police to the Accomplice. Only those involved in the crime had direct knowledge of the Accomplice Shannon France certainly would not have implicated himself and cooperated with the police. After his conviction, France repeatedly refused to name his accomplices. Det. Calabrese believed Mark was involved (*see* above), but Calabrese never spoke to Mark. If he had, Mark also would not have implicated himself and provided any information about the Accomplice.

Based on a call to the police (*see* above, The Police Investigation, Anonymous Tips) and France's intimation to the parole board (*see* above, CRU Investigation, Shannon France, France's Parole Hearing), Eddie West was involved in the crime and organized it. Calabrese discounted West as a suspect because he did not appear on the video. In any event, if West was involved there is no reason to believe that he would have cooperated and the Accomplice.

Moreover, even if an investigation somehow led to questioning CW, it is likely that he would not have cooperated at that time for fear of being killed.

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[104] Raymond S Nickerson, *Confirmation Bias: Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol. 175, 175-76 (1998).

[105] Keith A. Findley, "Tunnel Vision," *Conviction of the Innocent: Lessons From Psychological Research*, ed. Bryan Cutler (APA Press, 2010); *see also* Keith A. Findley and Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. Law Review 291-340.

## CONCLUSION

CRU concludes that defendant was wrongfully convicted. The wealth of evidence developed after trial disproves the People's theory that defendant was France's accomplice inside the lumberyard store. Furthermore, there is no evidence that defendant was otherwise involved in the crime or had knowledge of it. For this reason, alone, defendant's conviction should be vacated, and the indictment dismissed.

Defendant's unjust conviction resulted from the fundamentally flawed single eyewitness identification. Most egregious, the hearing court mistakenly failed to test and determine the reliability of Keizs's identification independent of the suggestive photo array procedure. Defense counsel and the People compounded the error by failing to alert the trial court about the hearing court's mistake. Had the *Wade* hearing been reopened, an independent source hearing would have shown that Keizs only noticed that his robber was a stocky Black male. Keizs would have been precluded from identifying defendant at trial, effectively ending the People's case. These facts establish that defendant was deprived of his rights to due process and a fair trial. Consequently, defendant's conviction should be vacated, and the indictment dismissed on this basis as well.