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KINGS COUNTY

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REPORT ON THE CONVICTION
OF
KENNETH WINDLEY

By: The Conviction Review Unit

THE CRIME AND BACKGROUND

According to the People's case at trial, in the morning on April 1, 2005, 70-year-old Gerald Ross returned home to his building in Crown Heights, after he went to the bank and post office. Unbeknownst to Ross, defendant and an unapprehended accomplice followed him into his building where they robbed him in his elevator of cash and two money orders. The money orders were for $542.77 and $9.48. They were blank, unsigned, and had the tracking number stub attached.

Shortly thereafter, defendant used the larger money order to buy a stove at Big Daddy appliance store in Brownsville. Defendant was listed as the payer, provided his driver's license, and had the stove delivered to his address. The store manager testified that defendant was with two men. One of them explained that the money order had been for a car payment and was now being used to buy defendant's mother a stove.

Defendant testified at trial—as he told the prosecution prior to trial—that he left his girlfriend's apartment in the Howard Houses to buy his mother a stove and ran into two men he knew from the neighborhood. Defendant mentioned where he was going, and they offered to sell him a money order they no longer needed. Defendant agreed to give them some cash for the money order if the store manager accepted it. They walked to the nearby appliance store where one of the men handled the money order, which defendant used to purchase the stove.

Defendant did not know the men's true names. Before trial, defendant told the prosecution their names ("Suspect 1" and "Suspect 2") and Suspect 2's nickname.[1] At trial, defendant referred to Suspect 1 by nickname and first name. Defendant referred to Suspect 2 by nickname only, explaining that he learned the name he gave the prosecution prior to trial was incorrect.

Defendant is currently incarcerated. He will be eligible for parole in 2027.

OVERVIEW

CRU has determined the true names of Suspect 1 and Suspect 2 (collectively referred to "the Suspects"). Suspect 1's name and Suspect 2's nickname which defendant provided to the prosecution prior to trial were, in fact, correct. Defendant's references to them at trial (by nicknames and first name of Suspect 1) were correct as well.

The Suspects maintain that they robbed Ross and sold the money order to defendant. CRU discovered that from April 4, 2005—three days after Ross was robbed—through February 1, 2006, the Suspects committed a combined total of seven robberies, in and around the vicinity of Ross's bank and post office. The robberies had the same *modus operandi* as this case—following elderly men from establishments where the men withdrew cash and robbing them of the money when they reached their homes.

CRU concludes that had the jury known about the Suspects and their crimes, there is a reasonable probability it would have credited defendant's testimony over the testimony of Ross—to whom defendant was a stranger, and whose description of the robber he identified in court as defendant, was

[1] The suspects' names are confidential.

vague and confusing. At the very least, it is probable that the new evidence would have created a reasonable doubt as to defendant's guilt.

Accordingly, CRU has determined that defendant's conviction should be vacated. Because it is not feasible to retry the case 20 years later, given that Ross is deceased and memories have faded, the indictment should be dismissed.

THE POLICE INVESTIGATION[2]

Det. William Van Pelt of the 71st Precinct was the lead investigator assisted by Det. Michael Routledge.

The Radio Run

On April 1, 2005, at 11:01 a.m., a radio run reported that two Black men just robbed Ross in the elevator of his building. Both men were wearing dark clothes, tall, and in their 40s.[3] PO James Fox responded to the scene. At 11:07 a.m., Fox conducted a canvass with Ross and met with negative results.[4]

The Complaint Report

The handwritten complaint report indicated that, at 11:00 a.m., two men entered the elevator behind Ross, a 70-year-old Black male. One man grabbed Ross from behind, and the other went through his pockets and took $500 cash, the two money orders (*see* above), and a Chase bankbook. They fled in an unknown direction.

Both men were 40 years old. Without specifying which man, the handwritten complaint report indicated that one was 5'7" and 180 lbs., and one was 6' and 190 lbs.[5]

Det. Van Pelt's Interview of Ross

The next day, April 2, at approximately 3:00 p.m., Det. Van Pelt interviewed Ross by phone. Ross stated the following:

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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 "SH." refer to the pages of the *Sandoval* hearing; those preceded by "T." refer to the pages of the trial transcript; and those preceded by "S." refer to the sentencing minutes.

[3] *See* Sprint report. The 911 recording had been destroyed before the trial ADA received the case. (*see* below, T.194-95, 397) The jury was given an adverse inference charge for the People's failure to produce the recording. (T.498)

[4] *See* Complaint; *see also* T.327 (defense counsel stating that Fox responded to the 911 call and conducted a canvass with Ross).

[5] The typed complaint report was the same, except the 6' and 190 lbs. height/weight description was not included. Fox wrote both reports. Defendant's pedigree when arrested two months later included that he was 5'11", 215 lbs., and 40 years old.

At about 11:00 a.m., two men followed him into his building. In the elevator, one grabbed him from behind. They held him tight as they went into his pockets and took his property. The men fled in an unknown direction. Both men were between 30 and 40 years old. Their clothing was unknown.[6]

A Postal Alarm Was Placed on the Stolen Money Orders

On April 3, at approximately 3:30 p.m., Det. Van Pelt spoke to Postal Inspector Grace (full name not indicated). Van Pelt placed an alarm, known as a Rocket, on the money orders.[7]

Canvass

On April 10, at approximately 12:30 p.m., Dets. Van Pelt and Routledge canvassed the crime scene area and met with negative results.[8]

Det. Van Pelt Contacts Ross

On April 20, at about 5:00 p.m. (location unknown), Det. Van Pelt spoke with Ross. Ross stated that he has not seen the robbers since the robbery. He will notify Van Pelt if he sees them or receives information about the stolen money orders.[9]

Ross Is Notified That Defendant Used a Money Order at Big Daddy

On May 10 (time and location unknown), Ross gave Det. Van Pelt two letters he received from the post office. The letters indicated that both money orders had been cashed. One had been cashed by "Kenneth Windley" at Big Daddy.[10]

Interview With Big Daddy's Store Manager, Vernet

On May 10, at approximately 5:00 p.m., Det. Van Pelt went to Big Daddy, located at 457 Rockaway Avenue, where he spoke to the store manager, John Gary Vernet.[11] Vernet stated that on April 1, at 11:25 a.m., a male used a money order to purchase a stove. The male showed a driver's license with the name "Kenneth Windley" and an address in Queens. The stove was delivered to Francina Patterson at that address.[12]

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[6] Van Pelt DD5, "Initial Interview"; Van Pelt testified that the interview was by phone. (*see* below, The Trial)

[7] Van Pelt DD5, "Postal Inspector."

[8] Van Pelt DD5, "Canvass of [crime scene location]."

[9] Van Pelt DD5, "Conversation with c/w."

[10] Van Pelt DD5, "Money Orders."

[11] Vernet identified himself as Gary Gordon to the police and prosecution. At trial, he went by John Gary Vernet. He told CRU that he used the name Gordon at work. (*see* below) He is referred to herein as Vernet.

[12] Van Pelt DD5, "Money Orders." (Patterson is defendant's mother); *see also* ECAB sheet indicating that Vernet told Van Pelt that he remembered defendant, and that the stove was delivered to defendant's home.

The Photo Array

On May 15, Det. Van Pelt created a photo array using the photo manager computer system. He input defendant's NYSID number, and the system created an array of males similar to defendant's age, height, weight, and skin complexion. The system placed defendant in position number six.

At 5:30 p.m., Van Pelt went to Ross's apartment and showed him the photo array. Van Pelt placed the array on the kitchen table, which was well-lit with overhead lights. Van Pelt asked Ross if he recognized anyone. Ross pointed to number six (defendant), saying he recognized number six "[f]rom [the] robbery in the elevator he robbed me." Ross signed his name beneath defendant's photo.[13]

The Line-Up and Arrest

On June 7, Det. Van Pelt conducted defendant's line-up. At a shelter, Van Pelt used defendant's photograph to select five fillers of similar age, height, weight, and complexion. Van Pelt called Det. Routledge several times to say when he was bringing the fillers to the precinct, when he was entering the precinct, and to make sure that Ross was secured in room 201A.

Van Pelt told defendant that he was being placed in a line-up and to choose a position. Defendant chose position number four. Van Pelt then retrieved Ross from room 201A.

When Ross viewed the line-up, Van Pelt asked him if he recognized anyone. Ross stated that he recognized number four (defendant) from the robbery.

Van Pelt arrested defendant and charged him with robbery. The case was closed.[14]

The Early Case Assessment Bureau ("ECAB") Interview

On June 7, Ross was interviewed by ECAB. It was documented (for the first time), that Ross purchased the money orders at the post office before he walked home. Specifically, the ECAB sheet indicated that as Ross entered his building after buying money orders at the post office, defendant and another male came up from behind, grabbed him, and put him in a chokehold. They went into his front pockets and removed $480 cash, the two money orders, and a bankbook.[15]

Defendant Is Released from Custody

On June 10, defendant obtained a bail bond for $15,000 and was released from custody on or about that date.

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[13] Van Pelt DD5, "Photo Array."

[14] Van Pelt DD5, "Lineup and Arrest [defendant]."

[15] ECAB screening sheet.

THE INDICTMENT[16]

On March 8, 2006, defendant was charged, under an accomplice liability theory, with one count each of Robbery in the Second Degree (P.L. § 160.10[1]); Robbery in the Third Degree (P.L. § 160.05); Grand Larceny in the Fourth Degree (P.L. § 155.30[5]); and Petit Larceny (P.L. § 155.25).

THE PRETRIAL SUPPRESSION HEARING

On November 20, 2006, a *Dunaway/Wade* hearing commenced.[17]

The People's Case

Det. Van Pelt

On April 2, he was assigned the case and interviewed Ross. (H.17-18) Ross described the two robbers as Black males in their 30s, about 6' and about 5'8" or 5'9". (H.18) Det. Van Pelt did not recall Ross's description of their builds, but Van Pelt was of the impression the men had heavy builds and were bulky. Those were not Ross's words. (H.18-19)

An alarm was placed on the money orders. On May 10, Det. Van Pelt learned that one of the money orders had been cashed on April 1, at Big Daddy appliance store. Van Pelt went to the store where the manager said that "Kenneth Windley" showed his driver's license to purchase a "refrigerator" with the money order and had it delivered to Queens.[18] Van Pelt's testimony about the procedure he used to generate the photo array was consistent with that set forth in his DD5. (H.7-9, 16, 25, 33; *see* above, The Police Investigation)

On May 15, Det. Van Pelt called Ross to say he was going to see Ross to talk about the case. He did not mention the photo array. Det. Routledge accompanied Van Pelt but did not speak with Ross. (H.23) Van Pelt placed the array down on a table in a well-lit area and asked Ross if he recognized anyone. After viewing the array for 10 to 15 seconds, Ross pointed to number six (defendant) and said he recognized defendant from the robbery. (H.9)

Det. Van Pelt learned that defendant was on parole. He notified defendant's parole officer that he would pick up defendant at defendant's next parole visit for a line-up procedure. (H.16)

Det. Van Pelt's testimony about the procedure he used to conduct the line-up on June 7, was consistent with that set forth in his DD5, including that defendant chose seat number four. (*see* above,

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[16] Because grand jury proceedings are secret (CPL § 190.25[4][a]), discussions of the proceedings are redacted. Notably, the presumption of secrecy can only be overcome by demonstrating "a compelling and particularized need" for access to the grand jury material. *Matter of District Attorney Suffolk County*, 58 N.Y.2d 436, 444 (1983). If that threshold is met the court must then balance various factors to determine whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure. *James v. Donovan*, 130 A.D.3d 1032, 1039 (2d Dep't 2015) (refusing to release the grand jury transcripts in the investigation into the death of Eric Garner in Staten Island, citing the strong presumption in favor of grand jury secrecy and the "chilling effect" that a release of transcripts would have on witnesses before such a tribunal).

[17] The purpose of a *Dunaway* hearing (*People v. Dunaway*, 442 U.S. 200 [1979]), is to determine whether probable cause existed for a defendant's arrest. The purpose of a *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 of a defendant.

[18] The receipt indicates that the purchase was for a Frigidaire stove. (*see* below, Vernet's trial testimony, People's Exh. 5)

the Police Investigation) When Van Pelt drove Ross to the precinct to view the line-up, he did not tell Ross that he had someone in custody. He told Ross they were going to the precinct to discuss the case. En route, the conversation was "basic"— they discussed Ross's wife and children and the weather. (H.10-11, 14, 26-28)

Ross was in a windowless room when the fillers arrived and did not see defendant prior to the line-up. (H.10-11, 28) At the line-up, Det. Van Pelt instructed Ross to look through a one-way mirror to see if he recognized anyone. Ross viewed the line-up and said he recognized number four (defendant) from the robbery. (H.14-15)

Defendant provided his pedigree information, which included that he was 5'11" and 215 lbs. (H.15) Defendant had a "chocolate complexion," "clear skin," a mustache, and was 40 years old. (H.29-30)[19]

The Defense Case

The defense did not present any testimony or evidence at the hearing. (H.34)

Oral Arguments

Counsel argued that the array and line-up procedures were unduly suggestive, which led to a mistaken identity. Regarding the array, defendant had on a distinguishable jacket with white piping, was next to someone with a red t-shirt, and the others had on dark-colored shirts. Regarding the line-up, counsel argued that the fillers' ages, heights, and weights differed significantly from defendant. (H.35-37)

The People argued that the fillers in the photo array had skin tones, hairstyles, lips, and noses similar to defendant. The line-up fillers were close to defendant in age, height, and weight. (H.38-40)

The Hearing Court's Decision

The court viewed the photographs of the array and line-up (which had been admitted into evidence [H.8, 13, respectively]), and recounted Det. Van Pelt's testimony, including the procedures used to create the array and conduct the line-up. The court held there was "ample probable cause to generate the photograph of defendant," and that neither identification procedure was the product of improper police conduct nor unconstitutional. (H.42, 45, 47-48)

THE *SANDOVAL* HEARING[20]

On February 21, 2007, a *Sandoval* hearing was held.

The People sought to question defendant, if he testified, about the fact that he had three felony convictions: a December 2, 1988 second-degree robbery conviction; a June 22, 1992 attempted third-degree weapon possession conviction; and an August 24, 2000 third-degree criminal possession of a

[19] The fillers' heights, weights, and ages were as follows: 5'9", 245 lbs., 30; 6'1, 215 lbs., 29; 5'9", 170 lbs., 25; 6', 215 lbs. 33; and 5'10", 170 lbs., 35. *See* Line-up report.

[20] The purpose of a *Sandoval* hearing (*People v. Sandoval,* 34 N.Y.2d 371 [1974]), is to determine the extent to which the defendant, if he testifies, will be cross-examined about his prior bad acts or crimes.

controlled substance conviction.[21] Counsel argued to limit the inquiry to the 2000 conviction. (SH.3, 6-7)

The court granted counsel's request and ruled that the 1988 and 1992 convictions were too remote. The court cautioned counsel that, if during trial, including summation, he misleads the jury about defendant's criminal record, the prosecution could ask about the other two convictions. (SH.7-8)

THE TRIAL

Defendant's Proposed Alibi Witness, Carmen Gonzalez

On February 22, 2007, just prior to jury selection, the defense added Carmen Gonzalez to the witness list. (Voir Dire at 6-7) On February 26, before 12 jurors were sworn, counsel stated he "suspect[ed]" Gonzalez would be an alibi witness and asked to file a late alibi notice (pursuant to CPL § 250.20). The prosecution opposed, noting that the case was two years old, and defendant did not mention an alibi before. Counsel said Gonzalez lived out of state, and he had difficulty locating her for several months before February 22. (T.73-75)

Counsel explained that last week, when he was preparing defendant for trial, "a light bulb went off" and defendant realized he was with Gonzalez. (T.77-78) The court stated that it should have been raised when counsel added Gonzalez to the witness list. The court instructed that Gonzalez appear the next morning for a hearing, or she would be precluded from testifying. (T.80-81)

The next morning, counsel stated, as "suspected" Gonzalez was not able to appear. Counsel stated, "in any event, we are not going to offer any notice of alibi, so it's a moot issue." (T.237)

After the jury was sworn, the trial commenced on February 27, 2007.

Opening Statements

The defense argued that this was a case of mistaken identity. (T.94-96) The prosecution outlined its case and previewed the evidence. (T.97-99)

The People's Case

Gerald Ross

Background/Ross Purchases Money Orders

At the time of trial, Ross was 72 years old. He spoke English and Spanish. (T.105, 143, 220)

On April 1, 2005, in the morning, Ross walked to the bank on the corner of Nostrand Avenue and Empire Boulevard to get his social security payment. He then walked to the post office around the corner on Empire where he purchased a $542.77 money order for his rent, and a $9.48 money order for his life insurance. Ross had always paid his rent and insurance with money orders and always purchased them at the same post office from the "regular lady." (T.106-08, 145-47) Ross walked home a few short blocks. It was about a 10 to 15-minute walk. (T.108-09)

[21] An account of defendant's criminal history is set forth below. (*see* CRU Investigation)

The Robbery

Ross did not know he had been followed into his building. When he opened the building door, people went in and out. As he entered the building, a man was already inside, and a second man was behind Ross. The elevator was a short distance from the door. (T.109, 155, 158, 160)

At about 11:00 or 11:30 a.m., Ross entered the elevator. (T.216) The first man was in the elevator. As the elevator doors were closing the second man got on. Around then, Ross pushed the button for the third floor where he lived. Ross thought the men were visiting someone. Ross was alone in the elevator with them. (T.109-10, 119, 155, 162, 165-66)

When the elevator door closed one man went behind Ross, and one went in front of him. (T.119-20, 155) The man behind Ross held him by the throat "hard." Ross tried to move but could not do anything. (T.110) He tried to fight the man's hand. The man was choking Ross "very tight," and he had difficulty breathing at times. (T.140)

The man in front of Ross went through his pockets and removed everything. (T.119-20) The elevator stopped for a few minutes on the way up. Ross did not recall how the men stopped the elevator. No alarm went off. (T.175, 177)

The prosecutor asked Ross how long the incident lasted. Ross said, "A few minutes. I can't remember exactly how long it was, but it was a few minutes." The prosecutor asked Ross to guess. Ross said, "If I had to guess, about twenty to thirty minutes. Something like that, yes." (T.113-14) It could have been 22 minutes or 15 minutes. He did not know. He was in a chokehold the entire time. (T.141-42, 216)

Ross's two money orders and about $485 cash were taken from his pockets. When the elevator door opened on his floor the men quickly walked out and went down the stairs. Ross went to his apartment and told his daughter what happened. (T.114, 120, 187-90)

Descriptions of the Robbers

Ross never saw the two men before. He recalled "a little bit" of what they looked like. (T.110-11) The man who had Ross in a chokehold was a little shorter than him, and dark-skinned. (T.111) Ross was 5'7" so the man could have been about 5'6," but "not too short." (T.170) "[T]he [man's] face was fake, something like that" (T.111), and freckled. (T.142) He appeared to be in his 30s, or "a little less." (T.115) Ross did not know what the man was wearing, did not recall his weight, and did not notice any facial hair. (T.168)

The man who went through Ross's pockets appeared to be in his 30s or 40s. (T.114-15) The man was "a little clear skin," and "a little bit" taller than Ross. (T.112) On cross examination, counsel asked if the man "was like 5'8" and Ross replied, "Something like that." (T.171) Counsel asked Ross to explain what he meant by clear skin, and Ross testified about features and complexions changing over time. (T.143-44, 172) The man's complexion was "dark skin. Not too dark." (T.171-72) Ross did not know the man's weight or recall his clothing. (T.173)

As the man went through Ross's pockets, the man "was hiding his face," trying to cover his face, and turning away in different directions. During this time, Ross saw the man's face once or twice. When the man finished, Ross saw him "a little bit." They were very close, face to face. (T.112-13, 136, 180-

81)[22] They were "not exactly face-to-face all the time." (T.217) The lighting in the elevator was similar to the courtroom's lighting. (T.113)

Ross identified defendant in court as the man who went into his pockets. (T.133-34, 139-40)

After the Robbery

After the robbery, Ross went to his apartment and told his daughter what happened. He testified that he first went to the post office and then to the police station to report the robbery. (T.120-21, 123) Ross also testified that when he went into his apartment, he called 911, the police arrived, drove him around, and he later went to the post office. (T.189, 192-93, 200)

At the post office, Ross spoke to the woman who had sold him the money orders. Ross had not filled out the money orders and did not have the stubs with the serial numbers. He paid $3 to file a form to trace them. At a later date, Ross received two letters from the post office, each with a copy of one of the money orders indicating that it had been cashed. He brought the letters to Det. Van Pelt. (T.124, 128, 130-33)

On June 7, Det. Van Pelt told Ross that he was bringing him to the precinct to view a line-up. Everyone in the line-up was holding a number. Ross recognized number four, defendant, as the one who went through his pockets. (T.134-36) Ross was certain he did not make a mistake identifying defendant in the line-up. (T.215)

Whether Ross Discussed His Testimony With the Prosecutors During a Break

Counsel cross-examined Ross about whether, during the lunch break on his direct examination, he discussed his testimony with the prosecutor, or anyone from the DA's office, or Det. Van Pelt. Ross said he had not. (T.137-39)

Leroy

Leroy Williams, a USPS customer service supervisor, explained the procedure for tracing a money order from the receipt. In 2005, two forms of identification were required to cash a money order at the post office. Elsewhere, one form of identification was required. (T.222-25, 229-30)

He reviewed the postal records for two money orders, which were admitted into evidence. (T.224 [People's Exhs. 2A, 2B]) One was payable to Big Daddy, and defendant was listed as the payer. The other one was blank, and the back of it indicated that it was deposited by Pioneer Supermarket. (T.224-26)[23]

[22] The prosecutor had Ross face a court officer to demonstrate the closeness. The prosecutor said it was within an inch. The court said it was for the jury to determine. (T.112-13)

[23] Leroy Williams explained that Pioneer Supermarket gave the person the cash. The court struck the explanation from the record because he had no personal knowledge about that. (T.226) The supermarket address was 381 Mother Gaston (*see* back of money order), which was .2 miles from where Carmen Gonzalez lived.

Det. Van Pelt

On April 2, he was assigned to investigate Ross's robbery. He interviewed Ross by phone for about 10 minutes and conducted a canvass. (T.239-40, 253-54) Ross described the individual who went through his pockets as a Black male in his 30s or 40s with a heavy build. Det. Van Pelt did not know if Ross used the term "heavy build," but Ross described a thick, bigger male. (T.256) Ross described heights and "an idea" of weight. (T.299-300) Van Pelt acknowledged that his DD5 of the interview did not have a height or weight description. Van Pelt did not attempt to obtain more information. He did not ask about clothing because he interviewed Ross the day after the crime. (T.258-59, 301)

On April 10, Det. Van Pelt canvassed the area around Ross's home without Ross. Also, during his investigation, Van Pelt visited Ross at home about 10 times. He did not document the visits. The visits were to comfort and assure Ross that his case was being handled, because victims often think that nothing is being done, and Van Pelt puts a face to his voice. (T.260-61)

Det. Van Pelt contacted the postal inspector to confirm that an alarm was placed on the money orders. On May 10, Ross gave Van Pelt a letter he had received from the postal inspector indicating that the money orders were used. Van Pelt went to Big Daddy where he spoke to Vernet, who confirmed that defendant used the money order. (T.240-42)

On June 7, Det. Van Pelt told Ross, by phone, that he was going to bring Ross to the precinct to talk about the case. (T.245) Van Pelt's testimony about the line-up procedure was consistent with his prior account. (T.242-46, 249; *see* above, The Police Investigation; The Pretrial Suppression Hearing) He added that he asked defendant where he would like to sit and whether defendant wanted any of the fillers moved. Defendant chose the number four position. (T.245, 247-48; People's Exhs. 3A, B, C [photos of the line-up])

Defendant's pedigree included that he was 5'11", 215 lbs., born on August 27, 1964 (40 years old), and lived in Queens. (T.251)

John Gary Vernet

At the time of trial, Vernet had been working at Big Daddy for 14 years. He was the assistant manager. During his testimony, Vernet was shown a sales receipt dated April 1, 2005, for a stove. (T.305-07; People's Exh. 5) Vernet was present during the purchase, which was made with a money order dated April 1. A customer using a money order must show identification (ID). Vernet wrote the purchaser's ID information on the money order. Vernet did not recall whether the ID was a driver's license. (T.306-08, 317) Vernet identified defendant in court as the purchaser. (T.308-09) Vernet did not recall the exact time defendant purchased the stove, "but it was around midday." (T.310)

On cross examination, the defense elicited that defendant came to the store with two other men. They looked at stoves together, with a salesman's help. After deciding on a stove, defendant and the two men went over to Vernet at the counter. Vernet did not recall who handed him the money order. They were all together when Vernet spoke with them. (T.313-15)

Vernet questioned the men about the amount of the money order. (T.315, 316) One of them, Vernet did not recall which one, explained that it had been for a car payment, and they were now using it to buy defendant's mother a stove. (T.316-17)

The copy of the receipt in evidence was hard to read and partly illegible. It contained a phone number and delivery address, which defendant had provided without hesitation. The receipt also included $429.99 for the stove, $25 for installation, $50 for delivery, and tax. There was also a charge for a cordless Coby CD player. Vernet did not recall who purchased the CD player. (T.309-10, 318-20)

Vernet did not know defendant, or whether defendant purchased anything at the store prior to April 1. About a month before his trial testimony, Kevin Hinkson (the defense investigator) interviewed Vernet at the store. Vernet did not recall Hinkson asking him whether he knew defendant. Vernet told Hinkson that defendant had been in the store after April 1. At that time, Vernet loaned defendant a hand truck for an item he purchased. (T.311-13)

The Defense Case

Counsel's Intent To Call Defense Investigator Kevin Hinkson and PO Fox

Hinkson

Defense counsel stated he intended to present the testimony of Hinkson, who interviewed Vernet on January 30, 2007. (T.325) Counsel recounted Vernet's statement to Hinkson as follows:

An ADA interviewed Vernet by phone. Vernet told the ADA that defendant came into the store with two men. One of the "two other males" explained that the money order was for a certain amount of money because it was purchased for a car payment. The man who handed Vernet the money order had a problem with one of his eyes. (T.326)

Counsel argued that Vernet's testimony that he did not recall who handed him the money order was inconsistent with his prior statement to Hinkson that it was the man who had a problem with one of his eyes—noting that defendant did not have an eye problem. When counsel began to address Vernet's testimony regarding the car payment, the court interrupted saying Vernet's inability to recall was not inconsistent with his prior statement and precluded the testimony. (T.326-27)

PO Fox

Counsel intended to call PO Fox to testify that he responded to Ross's 911 call and canvassed the area with Ross.[24] Counsel argued that Fox's testimony would contradict Ross's testimony that after the robbery he went to the post office and then to the precinct. The court precluded the testimony, holding that the evidence was a collateral issue and might confuse the jury. (T.377-28, 330)

[24] Fox was a sergeant at the time of trial. (T.327)

Defendant

Prior Conviction

At the start of defendant's testimony, counsel asked, "In August of 2000, August 24th, 23rd of 2000, were you convicted of a nonviolent felony?" Defendant replied, "Yes, I was." (T.332-33) There were no further questions or testimony about defendant's criminal history.

April 1, 2005 Background

On April 1, defendant occasionally worked for his stepfather's security company. (T.333) On direct examination, defendant testified that he recalled April 1 because he bought his mother a new stove. She told him her stove was "acting up." The prior evening, she had burned her hand on the stove. At the time, defendant lived with his mother in Queens. (T.334) On cross examination defendant testified that he recalled April 1 because his girlfriend's birthday was April 4, and the three nights before that, a Friday, they went out to celebrate. He did not recall April 4, because he did not believe they did anything that day. Defendant broke up with his girlfriend last year. She moved out of state at the end of the summer of 2006. (T.358-59)

Around 11:00 a.m., defendant was visiting his girlfriend in the Howard Houses. Defendant grew up in the Howard Houses, and his 17-year-old daughter lived there. Defendant visited his daughter every day at about 8:00 or 9:00 a.m. (T.334-36, 338)

Defendant Buys a Money Order From Suspect 1 and Suspect 2

Defendant left his girlfriend's apartment around 12:00 p.m., to buy his mother a stove at Big Daddy. Defendant had been there several times before. He purchased items from different salespeople, including Vernet, who once loaned him a dolly and a hand truck. (T.336-38)

When defendant went outside, the Suspects (who defendant referred to by nicknames) stopped him asking if "Country or Cowboy" was around. Defendant had seen them sell clothes and other things in the neighborhood. Defendant said he did not see Country or Cowboy, and he was going to buy a stove. Suspect 2 asked which store and whether defendant was paying by cash or card. Defendant said cash. (T.339-40)

Suspect 2 was about 6', dark-skinned, and had a "slow eye," which was "almost dead or something." (T.340-41) Defendant did not know his build because he wore baggy clothes. Suspect 1 was brown-skinned with gold front teeth, wavy hair, about 6'1", and "heavyset." (T.341)

Suspect 2 said he had a money order, and if defendant wanted to use it, they could go to the store together. Defendant asked if the money order was "good." Suspect 2 said he bought the money order for car insurance or a car payment, and he could not return it at the post office because he only had one form of ID. Defendant said if the store says the money order is good, he will give Suspect 2 money for it and use it to buy the stove. (T.342)

Defendant never used a money order before. He was only concerned about its validity. He did not ask if it was stolen. (T.359, 361-62, 370) The money order receipt was attached. Defendant did not know

anything about tracking a money order. He knew about cashing money orders because his son's mother worked for the post office. (T.363, 365)

Defendant Uses the Money Order To Buy a Stove

Defendant and the Suspects walked to Big Daddy. Defendant went to the back of the store to pick out a stove. The Suspects spoke to "Gary" (Vernet) at the counter. Defendant called his mother asking about the stove size and looked at stoves with a salesman. When defendant decided on a stove, the salesman told Vernet and Vernet wrote up the sale. (T.342-44)

Suspect 2 showed Vernet the money order. Because Vernet needed a valid ID, defendant provided his driver's license. Defendant also provided his address and cell phone number, which he believed were written on the receipt. (T.344-45) Defendant had the stove delivered to his mother. (T.347) Defendant never possessed the money order. (T.368)

Defendant testified that he had agreed to give Suspect 2 $380 or $400 if the store said the money order was good. (T.345-46) He also testified that before going to the store, the amount was not discussed because he did not know the cost of the stove. If he did not have enough money, he would have gotten more from his girlfriend's apartment, which was only two blocks away. (T.362-63)

After the stove was purchased, Suspect 2 asked for $400. Defendant told Suspect 2 that he would give him $380. Suspect 2 said, "this is $400." Defendant had about $450. (T.346) He did not recall telling the prosecution prior to trial that he had $370. When asked if his recollection improved since then, defendant testified that it had. (T.357)

After Defendant's Arrest He Learned the Money Order Was Stolen and Tried To Find the Suspects

Defendant first learned that the money order was stolen when Det. Van Pelt placed him in a line-up. (T.348-50) Van Pelt said, "Just go in the line-up and you'[ll] be out. Don't worry about it." (T.349-50) Defendant did not choose his line-up position. The fourth position was the only one available. Van Pelt's testimony that he gave defendant the option to change his seat was not true. (T.350-51)

After his arrest, defendant did not see the Suspects again and did not know how to contact them. (T.351) In 2005, the Suspects were in the area every other day hustling clothes and other items, possibly bootleg. Defendant did not know Suspect 2's full name. He wished he did. (T.353-55)

Defendant acknowledged that prior to trial, he gave the prosecution a name for Suspect 2. He explained that someone had told him that name, and he later learned it was wrong. (T.355, 364) At that time defendant knew them only by their nicknames. (T.367) Defendant did not know Suspect 1's full name, but thought that the first name he gave the prosecution was correct. Defendant did not know them for long. They came to the area, sold their clothes, and got high. (T.354)

Defendant did not need to use the money order to buy the stove. He knew the Suspects were hustlers and sold items on the street. He thought he was helping them out, but they were not his friends. (T.360) For several months after his arrest defendant attempted to find them. (T.367-68) When counsel asked defendant what he did to identify the Suspects, the court sustained the People's objection. (T.368)

Summations

The Defense Summation

Counsel argued that Ross was mistaken about who robbed him, due to the stress of the robbery. Ross was unable to describe his robbers or their clothing. Moreover, his account, including that the crime lasted 20 to 30 minutes, was implausible. (T.405, 407, 423-24)

It was "reprehensible" that Det. Van Pelt failed to get a description of the robbers—although he met with Ross 10 times. (T.418-19) Counsel noted that Van Pelt testified that when he picked up Ross to view the line-up, he did not tell Ross an arrest was made, but Ross testified that Van Pelt did tell him that. (T.420) Sometime between May 10, when defendant's name was learned, and June 7, when defendant was arrested, Van Pelt was "planting the seed in Ross's mind to identify defendant." At some point, he told Ross what defendant looked like and told Ross defendant's position in the line-up. (T.406-07)

Further, before Ross testified at trial, Det. Van Pelt and the prosecution told Ross to identify defendant in court. (T.406-07, 426) Ross was able to identify defendant because "they told him (Indicating [the prosecution]) and Detective Van Pelt told him." (T.426) Ross was "being led and was led by Detective Van Pelt and officers and lawyers from the Brooklyn District Attorney's Office," and "[Ross] got that information from someplace else other than his independent recollection." (T.427)

Counsel noted that defendant testified that he was convicted of a nonviolent felony in August 2000. Counsel mentioned defendant's conviction several times, telling the jury it should be disregarded because it did not bear upon his truthfulness or indicate that defendant was predisposed to committing a crime. (T.408-09)

Defendant had "common sense" and would not have provided his driver's license and information on a money order if he had stolen it. (T.410-11) "[The Suspects' nicknames], or whatever their names are, probably actually robbed Mr. Ross." They knew they could not negotiate that money order, and received more than half its worth, which was better than nothing. (T.412) Defendant was only guilty of poor judgment, "stupidity perhaps." (T.416-17)

The Court Addresses Counsel's Comments Regarding the Prosecutors and Defendant's Prior Conviction

Following counsel's summation, the court excused the jury. The court admonished counsel that he questioned the integrity of the trial in two ways. First, counsel mentioned four times that the DA's office told Ross what to say—twice pointing at the two prosecutors and once saying "they" while gesturing to the prosecutors. The court asked counsel if there was any evidence that the ADAs or the DA's office suborned perjury. Counsel said, "None whatsoever," but it was fair comment on the evidence. (T.430-31) The court asked if there was evidence to support that any prosecutor influenced Ross's testimony. Counsel said no, it was based on his personal belief and experience. (T.431, 433, 435-36)

The court asked the prosecutor for a response. The prosecutor stated, "there's nothing basically to respond to," and maintained, "as an officer of the Court," the People did not do anything to influence Ross. (T.431-42) The prosecutor added that the People did not speak to Ross about the facts during

the lunch break, as Ross testified on cross-examination. The court stated that counsel's baseless allegations were "irresponsible" and "reprehensible." (T.433-34, 437)

Furthermore, the court held that when counsel repeatedly mentioned defendant's "single conviction," he misled the jury because defendant had three felony convictions. The court held that counsel violated the *Sandoval* ruling and ignored the court's warning not to mislead the jury. (T.439-43, 445; *see* above) Prior to the People's summation, the court read to the jury two agreed upon stipulations. First, the court instructed that counsel conceded there was no basis in the record that the ADAs or anyone in the DA's office told Ross to identify defendant, and the comments were stricken from the record and should be disregarded. (T.449, 453) The court next instructed the jury, "Counsel was factually incorrect when he stated that the defendant had a single nonviolent conviction. The defendant has three felony convictions—one in 1988, one in 1992, and one in 2000." (T.449, 453-54)

The People's Summation

The People stated that while Ross might have been unable to identify the other robber, he had a good opportunity to see defendant's face, which was inches away from Ross's face in a well-lit elevator. Ross was focused on defendant's face the entire time and was unequivocal about his identification. It was of no import that Ross could not describe defendant's clothing because he focused on defendant's face. (T.462, 465-66, 468, 470)

That Ross was "off" regarding how long the robbery took place was inconsequential. During a stressful event, minutes can sometimes seem like hours. (T.466) The People repeatedly maintained that defendant cashed the money order within 45 minutes of the robbery. (T.471, 473-74, 482)

The People also stated that defendant knew how money orders were traced because his girlfriend worked at the post office. Defendant did not think he would be caught because he had the receipt portion with the serial number. However, defendant did not know that every month Ross purchased a money order to pay his rent from the same woman at the post office. Because she was familiar with Ross, she was able to obtain the serial number without the receipt. (T.474-75)

Regarding the Suspects, the People stated that defendant's story did not make sense because Suspect 2 could have found someone to cash the money order at the post office and would not have had to sell it at a lesser value and lose money. It was also unbelievable that the Suspects would sell the stolen money order to someone they knew because that person could lead the police to them. (T.476-77)

The *Galbo* Charge, the Verdict, and the Sentence

The court charged the jury on an acting in concert theory. (T.502) Pursuant to the People's request. (T.379, 515), the court gave a *Galbo* charge stating that if the jury found that defendant was in "recent and exclusive possession of the fruits of a crime and that the possession was unexplained or explained falsely" it may infer that defendant stole the property. (T.504)[25]

[25] *People v. Galbo*, 218 N.Y. 283, 290 (1916) (stating that the rule has most frequently been applied in cases of burglary and larceny and receiving stolen goods). Counsel objected to the charge arguing that the Suspects possessed the money order, and the manager did not testify that defendant exclusively possessed it. (T.380)

On March 1, 2007, defendant was found guilty of one count of Robbery in the Second Degree (P.L. § 160.10[1] [forcible steals property aided by another]). (T.535-36) Defendant was remanded. (T.542)

On March 21, 2007, defendant was adjudicated a persistent felony offender and sentenced to a prison term of 20 years to life. (S.17)

POST-CONVICTION PROCEEDINGS

The Direct Appeal

On his direct appeal to the Appellate Division defendant raised claims pertaining to the court's preclusion of Hinkson's testimony, the court's reversal of its *Sandoval* ruling, and the stipulations read to the jury. Defendant also claimed that trial counsel was ineffective regarding his summation comments that Ross was coached, and the mischaracterization of defendant's criminal record.

The Appellate Division affirmed defendant's conviction. *People v. Windley*, 70 A.D.3d 1060 (2d Dep't 2010). It held that any alleged error in the court's jury instructions regarding counsel's summation was harmless in light of the overwhelming evidence of guilt. Furthermore, although there were "isolated flaws" in counsel's performance, they were not serious enough to deprived defendant a fair trial, and as a whole, counsel's performance was effective. *Id.* at 1060-61.

The Appellate Division held that defendant's "remaining contention" (the confrontation clause claim) was unpreserved for appellate review and, in any event, meritless. *Id.* at 1061. Defendant's application for leave to appeal to the Court of Appeals was denied. *Windley*, 15 N.Y.3d 925 (2010) (Read, J.).

The *Habeas Corpus* Petition

On February 10, 2012, defendant, *pro se*, filed a writ of *habeas corpus* in the U.S. District Court for the Eastern District of New York ("District Court") raising the same claims he raised on appeal.

On May 23, 2013, defendant, by *pro se* letter, asked to hold his petition in abeyance so he could hire an investigator to locate and obtain affidavits from the actual robbers—Suspect 1 (using the correct name) and Suspect 2 (using the incorrect name he told the prosecution prior to trial). Defendant also sought to file a CPL § 440.10 motion raising additional claims of ineffective assistance of counsel, including the failure to timely file an alibi notice and contact Carmen Gonzalez.

The District Court denied defendant's request and denied the petition on the merits. *Windley v. Lee*, 2013 U.S. Dist. LEXIS 116449 (E.D.N.Y. Aug. 16, 2013). It held, among other things, that the trial court properly prohibited the defense from presenting extrinsic evidence of Vernet's prior statement. Furthermore, any error was harmless because the victim identified defendant in a line-up. Also, whether defendant actually handed over the money order was inconsequential since his name was on it, and he provided his own address for the delivery of the purchased item. *Id.* at *17, *18.

The District Court held that neither the alleged cross examination error, nor the alleged *Sandoval* error, constituted a due process violation, "In light of the substantial evidence of [defendant's] guilt" without the alleged errors. *Id.* at *22 (internal quotation marks and citations omitted).

Last, the District Court held, "Although counsel may have committed 'strategic errors' they did not establish that he was ineffective." Counsel was prepared and knowledgeable, effectively participated in pre-trial evidentiary hearings, and performed competently during trial. *Id.* at 25-26.

The CPL § 440.20 Motion

On October 20, 2024, defendant, through counsel, moved to set aside his sentence pursuant to CPL § 440.20, by challenging his persistent felony offender status. On September 5, 2025, the court denied the motion (Chun, J.). On December 26, 2025, defendant's application to the Appellate Division for leave to appeal was denied (Connolly, J.).

CRU INVESTIGATION

Defendant claims to CRU that he is innocent, and Ross's identification of him was mistaken. Defendant provides the true names of Suspect 1 and Suspect 2, who defendant claims sold him the money order. In support, defendant submits a written statement from Suspect 1 and an affidavit from Suspect 2, stating that they robbed the victim and convinced defendant to buy the money by lying about how they obtained it. (*see* below)

CRU's investigation included a review of defendant's trial and appeals files, criminal history, and prison emails and phone calls. CRU reviewed the Suspects' prison records, criminal histories, and files in their robbery cases. CRU interviewed defendant, and the Suspects, among others. Ross, PI Saunders, and Suspect 2's girlfriend died prior to CRU's investigation and were not interviewed.

Defendant

Defendant's Criminal History

Defendant has an extensive criminal history, including myriad burglaries in the 1980s. In most cases, defendant had accomplices. In relevant part, defendant's robbery and drug crimes include the following:

On September 16, 1983, when defendant was 19 years old, he and nine accomplices robbed a woman of her purse at West 40th Street and 6th Avenue in Manhattan.

On December 18, 1983, defendant was charged, acting with an unapprehended other, by Kings County Indictment Number 4306/84, with first-degree and second-degree robbery. Defendant pleaded guilty to first-degree attempted robbery. On November 2, 1984, he was sentenced to a prison term of one and a half to four and a half years.

On September 20, 1987, at 4:20 p.m., near the Howard Houses, defendant and an unapprehended other approached a 26-year-old woman on the street and took her handbag containing $100. The victim viewed photo books in the RIP office and identified defendant. On October 6, 1987, after defendant was arrested near the Howard Houses for intervening in the police apprehending his friend (later reduced to a violation), defendant was placed in a line-up and identified by the robbery victim. Defendant was charged by Kings County Indictment Number 8731/87, and convicted, after a jury trial, of second-degree robbery. On December 2, 1988, defendant was sentenced to a prison term of four to eight years.

On February 8, 1992, defendant was arrested for possessing a loaded firearm and resisting arrest. Defendant was charged by Kings County Indictment Number 1745/92. On June 22, 1992, defendant pleaded guilty to attempted third-degree weapon possession. He was sentenced to a prison term of three years to life, of which he served three years.

On April 25, 2000, defendant was charged, by New York County Indictment Number 3004/2000, with two counts of third-degree possession of a controlled substance and one count of attempted third-degree possession of a controlled substance On August 24, 2000, defendant pleaded guilty to the attempt charge and was sentenced to a prison term of three to six years.

On April 1, 2004, in front of a building in the Howard Houses (where defendant's girlfriend lived), defendant was arrested for selling heroin to two individuals at different times that morning. A quantity of heroin was recovered from each buyer.

CRU Interview of Defendant

CRU interviewed defendant at the start of its investigation about his account of buying the money order from the Suspects, and to understand how and when he determined who they were. CRU re-interviewed defendant at the end of its investigation to follow up on certain information it had learned. Both interviews were recorded in the presence of defendant's attorney. In sum, defendant stated the following:

Background/Criminal History

Defendant grew up in the Howard Projects with his mother and siblings. He believed his father had been in prison for bank robbery. At age 14, defendant hung out with an older crowd and started committing burglaries. Defendant admitted to most of his crimes. He denied that he committed the September 20, 1987 robbery of the 20-year-old woman.

Carmen Gonzalez

In 2003, defendant lived with his mother in Queens. Two or three months later, he also started staying with Carmen Gonzalez in the Howard Houses. At the end of 2004, Gonzalez moved out of state with her daughter's father. Defendant stayed in the apartment and paid the bills. CRU noted that if Gonzalez moved in 2004, it had been before his arrest in 2005. Defendant stated, "She was coming back, I guess, spying. I don't know what she was doing. She was coming back, popping up, unexpected[ly]. But she was coming back, frequently more than I can say."

Defendant was with Gonzalez at the time of the crime. She met with defendant's attorney prior to trial. Thereafter, during trial and to date, defendant urged Gonzalez to cooperate. Defendant believed that her daughter's father told her not to cooperate. Gonzalez has fibromyalgia.

Defendant Sold Heroin Wholesale at the Time of the Crime

Initially, defendant stated that around the time of the crime, he sold "a little drugs here and there," and had been working security for his stepfather and promoting parties. Thereafter, defendant admitted that he was a heroin dealer. In May 1995, he sold drugs wholesale—first marijuana, then both crack and heroin.

Defendant kept his heroin in various apartments in the Howard Houses complex. Defendant had three phones, one of which he used to receive calls for heroin. He never sold to anyone on the street. "Cowboy," who lived in Gonzalez's building, sold heroin for defendant on consignment.[26]

Defendant's Account of Purchasing the Money Order From the Suspects

The evening before April 1, defendant took Gonzalez to the Shadow Club on 28th Street in Manhattan for her birthday, which was April 4. They traveled by limo and returned to her apartment at about 5:00 a.m. and went to sleep. At about 10:00 or 10:30 a.m., defendant's mother called saying that her stove was acting up and she burned her hand on it. Defendant said he would buy her a new stove.

Defendant left close to 12:00 p.m. He knew the time because he saw he had a lot of missed phone calls since the prior day. Gonzalez probably left right after him because she had to pick up her daughters from her mother's house at the Marcy projects. She was not home when he returned.

Outside, defendant saw Suspect 1 and Suspect 2. They asked for Cowboy. They knew Cowboy sold heroin for defendant. Defendant said he had to get his mother a stove "real fast." Suspect 2 asked defendant how he was paying, and defendant said with cash. Suspect 2 "flashed out" a blank money order. Defendant told Suspect 2 that if the store manager says it was good, defendant will give Suspect 2 money.

CRU asked defendant whether he questioned Suspect 2 about the money order. Defendant said he did. Suspect 2 said it was for car insurance, but Suspect 2's girlfriend had paid the insurance, and he could not "take it back" because he had only one form of ID.

Defendant bought the money order to be nice and help the Suspects. Defendant was not a bad person, but he just did some bad things. He had enough money to buy 10 stoves and did not even save $100 using the money order. CRU asked why defendant did not just buy the money order from them for the full amount. Defendant said that made no sense, since he had to use the money order at the store.

Using the Money Order at the Store

The Suspects talked to Vernet while defendant picked out a stove. The Suspects worked out the payment, "[t]hey did everything." Neither Suspect had identification. Defendant provided his identification to Vernet and filled out the receipt with the delivery information. Defendant never touched the money order.

Suspect 2 agreed to defendant giving him $400 for the money order. Since there was money left over, the Suspects bought some CD players and other items, which were listed on the receipt. Defendant gave the Suspects the cash for the money order and left the store. Defendant then recalled he attempted to get the surveillance video of the street and thought he might have paid them outside.

Defendant did not see the Suspects after they all left the store. Defendant intended to tell Cowboy to come downstairs for them, but they did not return to the building with him.

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[26] Defendant said that Cowboy's first name was Leroy, is older than him, and does not have a criminal record. CRU determined Leroy's probable identity, but it appears he is now homeless or lives in a shelter, and there is no way to locate him.

Defendant thought the Suspects were just "boosters." If he knew they were robbers, he would not have bought the money order from them. CRU asked defendant why he trusted the Suspects since they were drug addicts. Defendant was not concerned because Vernet said the money order was good, and because defendant never touched the money order or was involved in the transaction. Defendant did not know until after trial that his name was on the money order. He did not see any police paperwork until after trial. He was not shown the money order even when it was admitted into evidence at trial.

CRU asked defendant whether he thought the money order was not traceable because the tracking receipt was attached. Defendant said it could be traced by the specific amount, without the receipt, if it was reported stolen the same day.

After April 1, and before his arrest, defendant purchased other items at the store, including a small refrigerator.

Defendant's Attempt To Learn the Suspects' True Names and Find Them After His Arrest

Defendant never knew the Suspects' true names. They did not live in the neighborhood but were often there. Defendant knew Suspect 2 since about 2004. Defendant bought clothes from Suspect 2 and played dice with him. Suspect 2 bought heroin from Cowboy and knew that Cowboy sold heroin for defendant. At times, Suspect 2 came around with his girlfriend, who also used heroin. Suspect 2 had a "slow eye" and wore shades. Defendant thought Suspect 2 was wearing sunglasses on April 1.

Defendant did not know Suspect 1 very well. Defendant saw him about three times, the last time involved the money order. Defendant might have seen Suspect 1 other times sitting in Suspect 2's Jeep.

Defendant denied that he sold heroin directly to the Suspects, but he may have given Suspect 2 a free sample. The Suspects did not need defendant to contact Cowboy for them. Suspect 2 knew where Cowboy lived and had been in his apartment.

When defendant was out on bail after his arrest, he did not see the Suspects in the neighborhood and thought they might have been arrested. Defendant had "people on the street" trying to learn their true names. He ran into Suspect 2's girlfriend, told her what happened, and asked her for the Suspects' government names to give to his attorney. She said she would find out. A couple of months later, when defendant saw her, she provided the Suspects' names, which were the names defendant mentioned to the People before trial. He later learned that Suspect 2's girlfriend did not provide Suspect 2's true name.

Defendant did not believe that his trial attorney or his trial investigator, Hinkson, attempted to find the Suspects. At trial, defendant referred to Suspect 1 by a nickname because defendant's trial attorney thought the true name defendant had stated prior to trial, might not be the correct name.

Donna Carter and Private Investigators Found and Interviewed Suspect 1

Defendant's old friend Donna Carter, a minister, helped him find the Suspects. Defendant reconnected with Carter when she visited another inmate. Around 2020 or 2021, Carter and defendant

hired Private Investigator ("PI") Loethel Crawford, whom they met when Crawford was visiting another inmate.

Defendant gave Crawford all the paperwork in his case. Around 2019, 2020, or 2021, they started looking for Suspect 1 by his true name. He was on parole. Carter gave her number to Suspect 1's parole officer and Suspect 1 called her about five or six months later, saying how sorry he was.

Defendant and Carter hired PI Alfred Saunders to locate Suspect 1. Suspect 1 was in the Bronx, where they had "good heroin," and where his parole officer was located. Thereafter, PI Crawford interviewed Suspect 1 at Sylvia's restaurant.

Suspect 1 provided Suspect 2's true name. Defendant located Suspect 2 around 2021. Neither Suspect wanted anything in exchange for his confession, and defendant did not offer them anything. Carter probably gave them stamps, but not money.

Prisoner Visitation Logs

During its investigation (before defendant's second interview), CRU obtained DOCCS prisoner visitation logs for defendant and the Suspects. Two visits raised questions about defendant's familiarity with the Suspects.

1. On March 31, 2007—10 days after defendant's sentence—defendant's mother, Francina Windley (Patterson), defendant's wife, Vernell Pendleton, and a "friend" Jesse Philpot, visited Suspect 1 in prison. CRU did not understand how this visit came about.

CRU interviewed Pendleton, Philpot, and Marvin McLaurin, who drove them to the prison. Although they all recalled going to talk to Suspect 1 about his involvement in the robbery, no one recalled how Suspect 1 was identified or located. Suspect 1 would not admit to the robbery and claimed that defendant and Suspect 2 were talking about the money order before he even showed up.

2. Visitation logs also showed that on February 5, 2013, a certain individual visited defendant in prison. CRU learned that on September 12, 2004, in Brooklyn, the individual was arrested with Suspect 2 for breaking into an abandoned hospital under construction. The prosecution was declined apparently because the eyewitness was uncooperative.

CRU traveled out of state to speak to the individual but was unable to find him. Before leaving, CRU reached him by phone. He said he visited defendant in prison because they were friends. He then hung up.

Defendant's Explanation to CRU

CRU asked defendant about the prison visitations. He stated that after he was convicted, with help from his family, he did his own investigation, looking up inmates on a site showing periods of incarceration and ages. Defendant believed that Suspect 1 was four or five years older than him, and they found a person with Suspect 1's name incarcerated for a robbery. When defendant's relatives visited Suspect 1, he was uncooperative and evasive. However, because he admittedly knew defendant, defendant was certain that Suspect 1 was the one who defendant knew by nickname. When Carter started to help defendant, Suspect 1 was out on parole and hard to find.

Defendant did not tell his trial attorney or investigator, Hinkson, that he found Suspect 1. Defendant had his attorney on retainer since 2003, on another matter. But in this case, defendant was not happy with his service.

Defendant explained that the individual who visited him on February 5, 2013 (*see* above) was his friend. Defendant knew him by his nickname only. He bought drugs and hung out in the neighborhood with defendant's brother, and knew McLaurin, Philpot, and defendant's wife. He also knew Suspect 1 and Suspect 2. They bought heroin in the same neighborhood and were in the "same circle."

When CRU told defendant that the individual should have known Suspect 2's true name, because the individual and Suspect 2 had been arrested together, defendant said he did not know about the arrest. He did not believe the individual knew the Suspects' true names.

Donna Carter

CRU interviewed Carter twice by phone and once in person. CRU stressed that it wanted to know how and when the Suspects' identities were learned, and how their written statements came about. In sum, Carter stated the following:

She knew defendant since the 80s. She lost touch with him, and they reconnected on August 31, 2017, when defendant called to wish her a happy birthday. In 2017, she visited defendant, and they became romantically involved. Defendant told her about the case, and she realized he was innocent.

In 2018 or 2019, Carter was intent on finding the Suspects—"it was a process." In 2019, while visiting defendant in prison, they met Crawford, a licensed PI, who was visiting an inmate. Carter hired Crawford for $1500. Crawford interviewed Vernet, and defendant's brother, William Windley. Crawford could not locate Carmen Gonzalez.

Defendant had determined Suspect 1's real name. Around October 2020, defendant told Carter that Suspect 1 was paroled in 2018. Carter contacted Suspect 1's parole officer, whom she located through a website and asked him to have Suspect 1 call her, which Suspect 1 did. Thereafter, Carter lost touch with Suspect 1 and did not know his whereabouts.

Crawford was not a "street PI" and had trouble finding Suspect 1. Carter and defendant hired PI Alfred Saunders, whose partner they met in prison, wearing a shirt with a slogan that guaranteed that anyone could be found. Carter initially paid Saunders $1000 or $1500. Saunders found Suspect 1 through word of mouth on the street.

Carter and Saunders interviewed Suspect 1 in Harlem. Carter recorded the interview on her phone. (*see below* PI Saunders and Carter Interview of Suspect 1) Suspect 1 then wrote a statement in PIs Crawford's and Saunders' presence. (*see* below, Suspect 1's Statement)

Defendant learned Suspect 2's real name and obtained his contact information. Carter did not know how defendant learned about Suspect 2. During the CRU interview, Carter looked through her phone to piece together the account and the timeline. Carter showed CRU hundreds of text messages between her, Crawford, Saunders, and Suspect 1 from about to 2020-23. Carter's phone also contained scores of recordings and screenshots of emails between her and defendant, Suspect 1, and/or Suspect

2, and some three-way recorded calls. The relevant text messages, recordings, and emails are discussed further below.

The Suspects' Pattern Robberies

With the information about the Suspects defendant provided, including their nicknames and where they were incarcerated, CRU obtained their criminal histories ("Rap Sheets") from the Division of Criminal Justice Services ("DCJS").

The Rap Sheets

Suspect 2's 2005 rap sheet reflects that he was 47 years old, used aliases with the same nickname defendant provided, and is "cross-eyed." He is 5'9" and was 204 lbs. He has an extensive criminal history beginning in 1976, which includes robberies, burglary, grand larceny, and weapon possession.

Suspect 1's 2006 rap sheet reflects that he was 47 years old in 2005, is 6'2" and was 200 lbs. An arrest report one month after this crime (*see* below May 4, 2005 arrest) indicates that Suspect 1 is 6'2" and was 210 lbs. The rap sheet also shows that he used aliases with the same nickname defendant provided. Suspect 1 has been a career criminal since 1975, when he was 16 years old. He committed nine robberies in various precincts, either while a case was pending or shortly after he was paroled.

Significantly, Suspect 1's and Suspect 2's rap sheets show that, between them, they were convicted in Kings County of seven robberies, which were committed from April 4, 2005—three days after Ross's robbery—to February 1, 2006. Specifically, Suspect 2 was charged, by Indictment Number 3239/2005, with three robberies. Suspect 1 was charged, by Indictment Number 3184/2005, with one robbery and by Indictment Number 900/2006, with three robberies.

The Suspects' Trial Files

CRU obtained the Suspects' trial files for those indictments. CRU discovered that each robbery involved the same *modus operandi* as Ross's robbery—following an elderly man home from a bank, or check cashing place, and robbing him. Moreover, the robberies occurred in and around the vicinity of Ross's neighborhood.

Suspect 2's Robberies

On April 15, 2005, at about 12:55 p.m., a 68-year-old man returned home from Banco Popular on Nostrand Avenue and Eastern Parkway. Suspect 2 approached from behind. When the victim turned, Suspect 2 displayed a handgun and removed $1,500 and the victim's bankbook from his shirt pocket. Suspect 2 fled in a dark-colored Jeep. The victim noted the license plate number. He described the robber as a Black male, 5'11" to 6'1", well built, about 200 lbs., with short hair.

April 30, 2005, at about 11:50 a.m., a 79-year-old man rode the bus home from Carver Savings Bank, on 1281 Fulton Street at Nostrand Avenue. Suspect 2, with an unapprehended other, pushed the victim into his vestibule and took $950. A dark-colored Jeep pulled up and the driver, who sounded female, told Suspect 2 and his accomplice to get in. The victim's niece noted the license plate number. The victim described one of the robbers as having a "big bottom lip," in his 30s, and about 6'. He could not describe the other robber. (Suspect 1 told CRU he was most likely the accomplice, *see* below).

On May 2, 2005, at about 2:45 p.m., Suspect 2 and an unapprehended accomplice followed a 75-year-old man from Astoria Federal Savings, at 1045 Flatbush Avenue, to his daughter's home. Suspect 2 and his accomplice jumped on the victim and took $750 from his pocket. They fled down the street and got in a dark colored Jeep. Someone noted the license plate number. The victim described one robber as a Black male, 5'11", 45-50 years old. He said he would not be able to identify the other robber.

Suspect 1's Robberies

On April 4, 2005, at about 4:40 p.m., Suspect 1 followed a 95-year-old man from a bank (unnamed) located at Nostrand Avenue and Eastern Parkway and a drug store to his granddaughter's home. Suspect 1 pushed the granddaughter out of the way and removed $1000 from the victim's coat pocket.

On May 4, 2005, at 11:00 a.m., Suspect 1 followed a 92-year-old man from a bank (unnamed) to his home. As the victim opened the door, Suspect 1 pushed him against a wall, displayed what appeared to be a gun in his pocket, and attempted to remove money from the victim's pocket. The victim's granddaughter ran out of the house. Suspect 1 fled, chased by the granddaughter, and was apprehended nearby at 409 Nostrand Avenue.

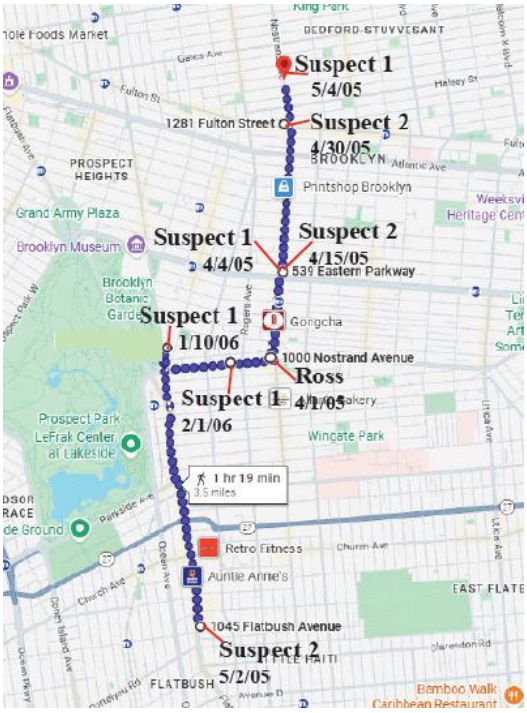
On January 10, 2006, Suspect 1 followed a 64-year-old man from a bank (unnamed) to his home. Suspect 1 followed the victim into the elevator, grabbed him, choked him, and knocked him to the ground. Suspect 1 took about $800 from the victim's pocket and left.

On February 1, 2006, Suspect 1 followed a 75-year-old man from a check cashing place to his home. As the victim entered his apartment building, Suspect 1 grabbed him from behind, choked him, and stated, "Don't make me shoot you." Suspect 1 removed $791 and a check cashing receipt from the victim's pant pockets. The victim chased Suspect 1 and flagged down the police. Suspect 1 was apprehended 17 minutes later, coming out of a bathroom of an automotive store at 209 Empire Boulevard. The police recovered $298.60 and a check cashing receipt from the bathroom.

The Proximately of Suspect 1's and Suspect 2's Robberies to Ross's Bank and Post Office

As demonstrated by the map below, Ross's bank and post office were located on Nostrand Avenue, in the center of the locations of the Suspects' robberies. Two of Suspect 1's robberies were in the immediate vicinity of Ross's bank (Jan. 10 and Feb. 1, 2006).

Two of Suspect 2's and two of Suspect 1's robberies were committed in the same area as each other, and north of Ross's bank on Nostrand Avenue (Apr. 15 and Apr. 4; and Apr. 30 and May 4, respectively). In addition, Suspect 2's May 2 robbery was south of Ross's bank.



The Brooklyn Robbery Squad (BRS) Pattern Investigation

Suspect 2's trial file revealed that on May 3, 2005, the BRS commenced an investigation titled "Robbery Pattern No. 77." The investigation was based on several open complaints ("61s"), which all showed that elderly men were followed from banks and check cashing places to their homes where they were robbed. Det. Wing was the assigned investigator, assisted by Dets. Wheeler and Belajack. (*see* Wing DD5, "Conferred with Det. From BRAM Unit. [Burglary/Robbery Apprehension Module]")

Notably, although Ross's robbery involved the same pattern robbery, it was not included in the BRS investigation. Defendant's 61, written by a patrol officer, only indicated that Ross was robbed in his elevator, and did not mention that Ross was followed home from the bank or post office.

Det. Wing testified at Suspect 2's pretrial hearing that three of the open 61s mentioned the license plate of the Jeep in which the robber fled. Wing determined that Suspect 2's girlfriend owned the Jeep. The address associated with the registration was an abandoned building. There were about eight or nine summonses issued for the vehicle. Wing and the other detectives set up surveillance around the area where the summonses had been issued, at Clarendon Road and Avenue D.

On May 4, 2005, at 1:50 p.m., Suspect 2 was arrested as he was getting into the Jeep. Among the items recovered from the Jeep included a Coby CD player. (*see* Suspect 2's trial file)[27] Suspect 2's three victims separately viewed Suspect 2 in a line-up and identified him as the robber.

[27] A Coby CD was purchased at the appliance store with the remaining balance on the money order. It is listed on the receipt. Other items recovered from the Jeep included 22 brown Timberland boots, and several designer wallets.

The April 4, 2005 victim viewed Suspect 2's line-up but did not identify him. (*see* Wing DD5, "Arrest" in "Robbery Pattern No. 77"; Det. Wheeler DD5, "Attempt to view Bank Surveillance Tape" regarding Robbery Pattern 77)

Suspect 2's file also shows that another elderly male robbery victim viewed Suspect 2's line-up (as well as others who were identified by a number, with no name or complaint number). There are also references to complaint numbers for two other elderly male robbery victims.

CRU obtained the complaints for these three robbery victims and learned they were robbed on April 12, 2005, April 19, 2005, and May 6, 2005, respectively (the Suspects were in jail on May 6). They were all followed home from Carver Bank, as in the April 30, 2005 robbery committed by Suspect 2.

Suspect 2's Trial and Sentence

Following a jury trial, Suspect 2 was convicted of one count of Robbery in the First Degree, two counts of Robbery in the Second Degree, and three counts of Robbery in the Third Degree, among other crimes (for the Apr. 15, Apr. 30, and May 2 robberies). On April 6, 2006, Suspect 2 was sentenced to an aggregate prison sentence of 40 years.

Suspect 1's Prosecution

CRU's review of Suspect 1's trial files revealed that on May 4, 2005, minutes after he robbed the 92-year-old victim (*see* above) he was apprehended near the scene. On May 19, 2005, Suspect 1 was charged by Indictment Number 3184/2005.

Suspect 1 then warranted and was arrested on February 1, 2006, near the scene of that robbery. (*see* above) At the precinct, Suspect 1 was confronted with a video of the January 10 robbery and confessed. Later that day, Det. Wing had the victim of the April 4, 2005 robbery—who did not identify Suspect 2—view Suspect 1 in a line-up. The April 4 victim identified Suspect 1 as his robber. On February 7, 2006, Suspect 1 was charged, by Indictment Number 900/2006, with these three robberies.

Notably, except for April 4, robbery, none of the 61s for Suspect 1's other robberies mentioned that the victim was followed home from a bank or check cashing place, and thus, were not included in the BRS investigation.

<u>Plea and Sentence</u>

On June 16, 2006, Suspect 1 pleaded guilty to both indictments. For the 2005 indictment, he pleaded guilty to Attempted Robbery in the First Degree. On the 2006 indictment, he pleaded guilty to two counts of Robbery in the Third Degree, and one count of Burglary in the Second Degree.

On August 2, 2006, Suspect 1 was sentenced on the 2005 indictment to 14 years in prison. On the 2006 indictment, he was sentenced to prison terms of three and a half to seven years on each robbery count and 14 years on the burglary count. All sentences were imposed to run concurrently.

Suspect 1's Recent Robbery with the Same *Modus Operandi*

On September 29, 2021, in Manhattan, Suspect 1 followed a 76-year-old man from a bank to his home. When the victim unlocked the front door to the apartment building and entered the vestibule, Suspect 1 ran in behind him, choked him from behind, and took the victim's cash. On April 12, 2023, Suspect 1 pleaded guilty, by NY County Indictment Number 2335/2021, to second-degree attempted burglary and was sentenced to a prison term of 12 years to life.

CRU Interview of Det. Wing

CRU spoke to Det. Wing by phone. He recalled Suspect 2's case. He no longer had the BRS pattern robbery file and believed it might have been destroyed in a storage facility fire. Wing did not know about Ross's robbery and did not know Det. Van Pelt.

CRU attempted to obtain the pattern robbery file from BRS and law enforcement personnel. CRU has not had any success.

CRU Interview of the ADA Who Prosecuted Suspect 2

The ADA who prosecuted Suspect 2 remembered the case. She never spoke to any ADA or detective who was not involved in Suspect 2's case.

Suspect 2's Emails and Affidavit[28]

Suspect 2's affidavit, submitted with defendant's CRU application, was obtained after a series of prison emails and calls with Carter. Carter gave CRU some of Suspect 2's email exchanges. CRU obtained other emails from DOCS (JPay), as noted below.[29]

On December 19, 2020, Carter, in defendant's name, emailed Suspect 2. Defendant told Carter to write that he was "Wise" from Howard Houses and was looking for "[Suspect 2]." "If this [Suspect 2] who was you CRIMEY IN HOWARD. WHAT'S HIS NAME." (capitalization in the original)

On March 14, 2021, Suspect 2 emailed that it was "about time." It was not that he did not want to write, but he had to consider "the situation," because he was "not going back and deal with any law liberty." Suspect 1 told him that defendant's "people" visited Suspect 1 in prison. Suspect 2 wrote, "Get your lawyer to type what you need, and I'll sign it." Why did you not "fix this" in 2005 when they saw each other in the C-95 bullpen. "I asked you and you just waved me off." Suspect 2 would have "worked something out."

Suspect 2 wanted to "clear the air" and said he spent a lot of money with defendant, and at times he got "jamm[ed] up" because of what he bought from defendant. Suspect 2 "apologize[d] for the lie."

"Write back . . . I do need a few stamps. . . I remain [Suspect 2]."

[28] The Suspects were referred to by their nicknames in the emails.

[29] JPay is a service used by inmates (and their families and friends) to send email style messages (with purchased "stamps"), transfer payments, and schedule video visitations, among other things.

On March 16, 2021, defendant replied, through Carter, that when he saw Suspect 2 in the bullpen, he did not think he would be convicted at trial. But defendant never doubted that the truth would come out. "I SPOKE TO YOUR PARTNER AND HE STATED THAT HE WILL DO EVERYTHING FOR ME TO GET MY FREEDOM. Defendant provided his "wife's" phone number, "Minister Donna Carter." (capitalization in the original)

On March 16 (JPay), Carter emailed Suspect 2 that she sent him 10 stamps from defendant. Suspect 2 then emailed defendant, through Carter, thanking him for the stamps. He wrote that for the past 10 years defendant's situation has been "burning through [his] heart." He went to church "to pray for direction concerning this matter." He knew he should do the right thing but has not done so for selfish reasons. Defendant should say what he needed. He was happy that "[Suspect 1] is willing to help." Defendant did not belong in jail. Defendant bought a money order that he and Suspect 1 stole. He could not move forward without fixing it.

On April 3, 2021, Suspect 2 emailed Carter that he was "brainstorming" but kept hitting a "brick wall." It has been more than 15 years. He asked if the robbery occurred on a Saturday. He was trying to recall the amount of the money order. He thought it was $250, and defendant gave him $150. The fact remained that he sold defendant the money order. He recalled two ladies offered him $50 for the money order, before he saw defendant.

On April 5, 2021 (JPay), Carter replied that the money order was $542, defendant gave him $370 for the stove, and the robbery occurred on a Friday. Carter asked Suspect 2 to send a notarized document to PI Crawford, whose address she provided.

On April 7, 2021, Suspect 2 emailed Carter that he committed a robbery in 2004-05, off Bedford Avenue, and someone else was arrested for it. He took $100 cash and a money order for $550. The next day he went to the Howard Houses to sell the money order. While bargaining with two women, he saw defendant. He lied to defendant about how he obtained the money order. The money order was for $542, and defendant gave him $350. He gave the store manager the money order and signed defendant's name.

By letter affidavit dated April 12, 2021, Suspect 2 stated the following:

The "strong arm" crime occurred on April 1, 2005, at Bedford and Montgomery Avenues. He and his accomplice followed the victim from a Nostrand Avenue check cashing place, and took $700 cash, and a money order in the amount of $500. The next day, he went to the Howard Houses to sell the money order.

He tried to sell the money order to two women, but they said the price was too high. While negotiating with the women, Suspect 2 saw defendant in front of the building. Suspect 2 used to sell clothes to defendant and sometimes played dice with him. Defendant always had money, which is what made him the "perfect candidate."

Suspect 2 approached defendant and said he had a money order for more than $500. Defendant questioned Suspect 2 about it, "but of course I lied to him as to where and how I obtained it." After convincing defendant to buy the money order, defendant gave Suspect 2 a little more than $300 for

it. Defendant wanted to buy something with the money order and wanted Suspect 2 and Suspect 2's friend to go with him.

They sent defendant to a store around the corner on Rockaway Avenue, off Pitkin Avenue. They told the manager defendant wanted a stove. Suspect 2 gave the money order to the manager or an employee. The manager told Suspect 2 that he had to fill it out and sign it. Defendant provided his name. Suspect 2 filled out the money order in defendant's name and signed it in defendant's name. Defendant filled out the receipt for the delivery.

On April 14, 2021, Suspect 2 emailed Carter informing her that he mailed his affidavit to Crawford.

CRU Interviews of Suspect 2

CRU interviewed Suspect 2 twice at the correctional facility where he was incarcerated. Suspect 2 was not notified in advance of the first interview. Both interviews were recorded.

CRU observed that Suspect 2 had a problem with <u>both</u> his eyes. At times, they independently moved in different directions. But at times, they appeared normal. He said he had this condition since birth.

<u>Suspect 2's First Interview</u>

Defendant sold "dope" in the neighborhood, and on April 1, Suspect 2 wanted to buy "a bundle of dope." Suspect 2 had seen defendant "for years" in the neighborhood.

Suspect 2 and his "partner," Suspect 1, who was known by his nickname, used to look for victims cashing checks. On April 1, 2005, he parked on Ocean Avenue for about half an hour, an hour. Suspect 1 returned to the car, saying he found a victim. They followed the victim for about an hour from Empire Boulevard. The victim stopped everywhere until he reached his building. Inside the elevator, Suspect 1 placed the victim in a chokehold, and Suspect 2 went through the victim's pockets, taking cash and a money order. The victim punched Suspect 2 in the face—the "old man" was a "hard hitter." Suspect 2 noted that his criminal records show that his victims described him as "tall and dark," as the victim in this case did.

About two days later, Suspect 2 tried to sell the money order to some ladies. Suspect 2 then saw defendant and asked defendant if he was interested in buying the money order. Defendant thought it was "hot" and refused but Suspect 2 convinced defendant to buy it.

At defendant's suggestion, they went to an appliance store on Rockaway and Pitkin Avenues where defendant used the money order to buy a stove or refrigerator. Suspect 2 did not recall if he or defendant signed the money order, or whose information was written on it. Suspect 2 thought that defendant put his mother's address on it. Suspect 2 did not know it would "come back and bite [defendant] in the ass." Suspect 2 felt "real[ly] bad for doing it to [defendant]."

When CRU asked if the Suspects worked together on other robberies. Suspect 2 said, "I'll take the Fifth."

Suspect 2 was arrested around the same time as defendant and saw defendant in the C-95 bullpen, but did not make anything of it. They were too far away to talk to each other.

CRU asked Suspect 2 how his 2021 statement came about. He explained that Suspect 1 contacted him and told him about the situation. Suspect 2 also said his girlfriend told him that defendant was arrested for the money order. Suspect 2 wanted to clear defendant's name because defendant had nothing to do with the robbery "at all."

CRU attempted to establish a timeline and obtain more details by asking—when did Suspect 2 learn about defendant's arrest; when did Carter contact him; did he try to exculpate defendant before he provided his written statement; and whether he and defendant were ever in the same prison. Suspect 2 did not recall anything except that they were never in the same prison.

CRU asked Suspect 2 whether he had a street name in 2005. He said, "This is enough," he was "real tired," was being asked the same questions, and thought it was "entrapment." He said defendant was not involved in the crime and should not be in jail. Suspect 2 was speaking to CRU only to explain that he and Suspect 1 committed the robbery. Suspect 2 had no other motivation.

Suspect 2's Call to Carter After CRU's Interview

The day after CRU's interview, in a recorded prison call, Suspect 2 called Carter informing her about CRU's visit. He said he ended the interview because CRU asked the same questions and only asked him about his relationship with defendant. CRU wanted to "box" him on the robbery.

He told CRU "how it went down." And "as far as the application, the letter, and everything that I wrote" I told them, "that's exactly what happened. . . . It's nothing to lie about. The whole interview is nothing to lie about because everything I said is the truth." Later in the call, he said, "I told [CRU] exactly what went down. And I know my story matched up with the complainant's story."

Suspect 2 said he had COPD. Carter asked if he needed anything. He replied, "a friend" to "communicate with." Carter said when defendant gets out, "you know he makes stuff happen." Carter mentioned that she paid the investigators a lot of money. Suspect 2 said it will "pay off."

Suspect 2 said defendant was a "a very good dude. That's why he [is] in that situation for being the type of dude he is. . . . he went for the bullshit that I told him. And he asked me, he said, yo, is these stolen? And I told him no, he went for it. That shit hurt, that shit hurt. Yeah, I think about that shit a lot. I'm like, damn, man, that's a good dude. Any time I go to the neighborhood, and I'm fucked up, I can go put the bag on him and he'll give me."

Suspect 2's Second Interview (Unbeknownst to CRU, defendant's attorney informed Suspect 2 that CRU would be re-interviewing him)

Familiarity With Defendant and Suspect 1

Suspect 2 met defendant through a friend and did not know him personally. He knew defendant as "Wise." Suspect 2 used to buy a lot of "dope," gamble, and play dice at the Howard Houses. He was not from that neighborhood. He did not play dice or gamble with defendant. Defendant might have sold drugs, and he might have bought drugs from defendant once or a few times.

Suspect 2 had known Suspect 1 since about 1981. He referred to Suspect 1 by his nickname only. They were from the same block. Suspect 1 never had gold teeth. Both Suspects were 6'2". They did

drugs together, which led them to commit robberies. They looked for victims who had just cashed checks at banks or check cashing places. They would park around the corner from a check cashing place. They did not want money orders.

The Robbery

Prior to the robbery, the Suspects drove around in a car belonging to Suspect 2's girlfriend, who was with them. She drove around with Suspect 2 during other robberies.

Suspect 1 went to a check cashing place and spotted the victim. They followed the victim in their car as he walked home. The victim took a long time. He went all around the neighborhood, stopping at stores, and talking to people at length.

During the robbery, the victim hit Suspect 2 in the face—like a boxer. Suspect 2 went through the victim's pockets. The robbery was quick. The elevator went up to the second or third floor, and he ran back down. A girl or the super was washing the stairs with a hose.

After the robbery, the Suspects returned to the car. Suspect 2's girlfriend, who was waiting in the driver's seat, moved over, and Suspect 2 drove off. Suspect 2 turned left on Rogers and right on Eastern Parkway.

Suspect 2 had a visible eye condition. He did not recall if he wore sunglasses that day, but he usually did during the robberies. He also told CRU that he did not cover his eye during the robbery. He did not understand why the victim did not have his description "down pat." The victim in this case did not describe Suspect 2. When Suspect 2 commits robberies, he would make a "big, puffed lip" because he has no front teeth.

Sale of the Money Order and Purchase of the Stove

The money order was blank. Suspect 2 was adamant that he sold the money order a day or two later when he and Suspect 1 went to the projects to buy dope. He did not need to sell it the day of the robbery because he had the victim's cash. He did not recall the amount.

CRU explained that the money order stamp showed it was used the same day as the robbery, and the manager confirmed that. Suspect 2 said it made no sense that he would have cash and sell the money order at the same time. They would use the money order only after the cash was gone. Suspect 2 then recalled that he sold the money order the same day because neither he nor Suspect 1 would trust the other to hold onto it because they were addicts.

Suspect 2 tried to sell the money order to two or three women, but they asked too many questions. He then saw defendant and convinced him to buy it. He told defendant that his wife (girlfriend) bought it so they would not spend the rent money. Suspect 2 did not care whether the money order could be traced, because he was an addict. Suspect 2 did not recall more than one money order, or a $9 money order used at Pioneer Supermarket. Maybe Suspect 1 used it and did not tell Suspect 2.

Defendant had the Suspects go to the appliance store with him. Suspect 2's girlfriend stayed in the car in the parking lot of a building in the Howard Houses. Suspect 2 did not recall if he wore sunglasses inside the store. After the purchase, he and Suspect 1 bought some dope at the Howard Houses and

drove home. Suspect 2 did not know where defendant went. Defendant was not part of Suspect 2's crew.

Defendant's Arrest

Suspect 2 next saw defendant when they were both in bullpen C95. Defendant did not say why he was there and Suspect 2 did not ask. Suspect 2 was "dope sick" and did not have a conversation. Suspect 2 then acknowledged his March 14, 2021 email, stating that he asked defendant why he was in jail and defendant waved him off (*see* above), and told CRU that was accurate (Suspect 2 said in his first interview that when he saw defendant in the bullpen, they were too far away to talk to each other, *see* above).

Suspect 2 first learned about defendant's arrest in this case from someone in prison. He then received an email in prison asking if he was Suspect 2, referring to him by nickname. (*see* above, 12/19/20 email) He knew it was about the money order.

Suspect 2's Claim That Defendant Is Innocent and His Affidavit

Suspect 2 insisted that defendant was not involved in the robbery, "as God is my witness." Neither he nor Suspect 1 committed any crimes with defendant. Defendant did not even know Suspect 1. Defendant was not the type to commit a robbery. Defendant "would never do that." Defendant had money from selling drugs and did not need to rob anyone.

Defendant's girlfriend/wife (Carter) wanted Suspect 2 "to fix the situation." He believed Carter found him through Suspect 1, who knew his real name.

CRU mentioned Suspect 2's April 3, 2021 email in which he stated that was "brainstorming" and could not recall the robbery, including the amount of the money order. CRU then noted that in his April 7, 2021 email, Suspect 2 stated the money order was $500. (*see* above, Suspect 2's emails) Suspect 2 said Carter told him the amount.

CRU then asked about the specific details of the crime mentioned in his April 12, 2021 affidavit. Suspect 2 interjected—"What are you saying now?" He said that he was talking to Carter, and "things [were] getting clearer." It became clear—"You'd be surprised how the subconscious works," and in between emails, he "brainstormed."

Suspect 2 did not care what the emails said. He repeated, "that man had no reason to be in jail," and it did "not sit right." Suspect 2 said, "you all created this mess." Defendant's line-up was "altered" because he had the money order. Suspect 2 was placed in multiple line-ups, and he believed that the victim viewed him in a line-up and should have identified him. He told CRU, "What you think, you cracking me? You're not cracking me." CRU explained that defendant was the only one placed in a line-up in this case. Suspect 2 was surprised that the police did not connect him to this robbery.

CRU questioned Suspect 2 about how his affidavit came about. He said he was required to provide it, and CRU did not need to question him about it. He drafted it and typed it out. Someone read it and made two spelling changes. He provided all the information. No one told him what to write. Suspect 2 said, "I don't know where you're going with that one. That man didn't do that." Defendant was in

jail for no reason—for something Suspect 2 sold him. "You can't hide that, you can't put no more shit on top of that."

CRU asked Suspect 2 about his comment during his phone conversation with Carter, the day after CRU's first interview—that his story matched the complainant's story. Suspect 2 did not recall what he meant, "but it's just conversation." He then said that he meant that CRU was matching his story. Suspect 2 said the fact remained that defendant did not commit the crime.

He was adamant that he was never offered anything for his cooperation.

The Defense Interview of Suspect 1, his Text Messages, Phone Calls, and Affidavit

PI Saunders and Carter Interview of Suspect 1

Carter told CRU that she and Saunders interviewed Suspect 1 in Harlem, which she recorded on her phone. (*see* above, Donna Carter interview) The recording (date unknown) begins in mid-sentence, and the substance and length of the initial unrecorded portion are unknown. Suspect 1 stated the following:

Suspect 1 was concerned about the statute of limitations because he was on parole. Saunders assured Suspect 1 that it was not an issue and Suspect 1's parole officer confirmed that.

Suspect 1 said he and Suspect 2 committed the robbery and defendant was not involved. At that time, he and Suspect 2 were "messed up on drugs," and defendant got "jammed up." Defendant went to trial because he was not going to "cop out" and admit to something he did not do. Defendant "blew it" at trial. At that time, Suspect 1 was out on bail for another crime and was "on the run" for about a year.

Two money orders were taken from the victim. Defendant's name was on the money order. Carter interrupted disagreeing. Suspect 1 then said that the two money orders were blank, so anybody could have put their name on them.

Suspect 2 approached defendant with two money orders each worth $300. Defendant said he could use them to buy his mother a stove for her birthday. Suspect 2 told defendant he obtained the money order to pay for work on his car, but the work had been done. They negotiated and defendant gave Suspect 2 $400 or $450 for the money order. Suspect 1 later said he was positive that defendant paid $400.

Suspect 1 said defendant filled out the money order. Again, Carter interrupted disagreeing. Suspect 1 said, "Well, my name wasn't on it. I'm just being truthful." Carter said, "The money order had to be filled out by you or the store manager," and not defendant. Defendant was the only one with an ID. Suspect 1 said, "Hmm."

PI Saunders told Suspect 1 that defendant is disputing the name on the money order. Suspect 1 said, "Let me finish." He believed defendant signed the money order because defendant purchased the stove, had it delivered to his mother, and "[t]hat's what brought him into the picture." Suspect 1 explained that he was standing off to the side and that defendant and Suspect 2 were dealing with filling out the money order. He said defendant was having the stove delivered to his mother's house,

so defendant had to give her name and delivery address, "so that is why I am figuring that he had to sign." Suspect 1 later said maybe the store manager filled out the money order.

Defendant joined in by phone (on Carter's phone). Saunders, defendant, and Carter discussed that the manager filled out the money order. Defendant said he paid for the cost of the stove and thought the manager gave Suspect 2 something for the remaining amount on the money order. Suspect 1 then said it was CDs, and that Suspect 2 gave the money order to the store manager.

PI Saunders told Suspect 1 he was going to have Suspect 1 sign an affidavit. Saunders was going to put the account together, including the account PI Crawford had.

Suspect 1 then said to defendant:

> I'm going to do everything in my power to try to help you because I know you know you had nothing to do with nothing and you got a raw deal and that's my word as man from my heart and I feel real bad.

He added that Suspect 2 should help, too. Suspect 1 said he was "real hurt" when he heard about defendant. He told Suspect 2 not to do anything with the money order, but Suspect 2 was "greedy."

Text Messages With Carter Agreeing To Meet PI Crawford

As Carter explained to CRU, she wanted Crawford to obtain Suspect 1's written statement because Crawford was a licensed PI and more experienced than Saunders, who was not a licensed PI. (*see* above, Donna Carter interview) Carter provided the following text messages from Suspect 1 to her:

On May 25, 2021, Suspect 1 texted Carter that he would meet Crawford because "I want to get Wise out of there cause he [is] in there for nothing/a crime he didn't commit."

On May 27, 2021, Suspect 1 texted Carter that he would meet Crawford and "we gonna get it done so by the grace of god Wise can get out/I really felt bad when they happen/I try to tell [Suspect 2] don't do it cause its gonna backfire."

PI Crawford Obtains Suspect 1's Statement (which defendant submitted with his application)

PI Crawford wrote a notarized statement (dated June 3, 2021), that he interviewed Suspect 1 at Sylvia's Restaurant in Manhattan, during which Suspect 1 made a statement regarding his involvement in an April 1, 2005 robbery.

Suspect 1's Statement

In a handwritten statement, dated May 27, 2021, Suspect 1 stated the following:

On April 5, 2005, he and his friend, Suspect 2, followed a man from the post office after he bought a money order. He did not recall the exact time—it was "around noon." They followed him "some blocks" to his house, waited for him to get on the elevator, where they robbed him of his cash and money orders.

The Suspects got away, went to the projects, and ran into Wise (defendant). They told defendant they had two money orders worth $600 and would sell them for $400. Defendant asked if they were stolen,

and they said, "No." They said the money orders were bought to get their car fixed. Defendant agreed to the deal because he wanted to buy his mother a stove.

They went to the appliance store where defendant picked out a stove. Defendant wanted it delivered to his mother. The man in the store asked defendant for his ID because defendant was paying with the money orders. At this time, defendant paid the Suspects $400. Suspect 1 was "sorry for what happened to [defendant] because he didn't know what he was getting into."

CRU Interview of Suspect 1

CRU conducted two recorded interviews with Suspect 1 at the state correctional facility where he is incarcerated. Suspect 1 was not notified in advance of the interviews. In sum, Suspect 1 stated the following:

Background

Suspect 1 knew Suspect 2 since they were teenagers. Suspect 2 was known by his nickname. Suspect 2 had a girlfriend, who used to pick pockets. He and Suspect 2 started committing robberies because they used heroin and needed the money.

Suspect 1 was known by his nickname. Suspect 2 knew defendant. Suspect 1 did not know defendant but had seen him before. Suspect 1 never bought drugs from defendant but Suspect 2 did. Suspect 2 brought Suspect 1 to Howard Projects to buy heroin from defendant. Suspect 1 thought defendant was living there and had a girlfriend. Suspect 1 never committed a crime with defendant. He did not know how long Suspect 2 knew defendant before Suspect 1 met him.

Suspect 1 never had a gold tooth or "gold fronts." Suspect 2, not Suspect 1, used to sell clothes in the neighborhood.

The Robbery

He and Suspect 2 committed the crime and sold the money order to defendant. Defendant was not involved in the crime. At the time of the crime, Suspect 2 drove a greenish Jeep Cherokee. They picked their victims randomly.

He believed that Suspect 2 picked out the victim in this case. Suspect 1 went into a grocery store to get a drink. Suspect 2 waited outside. There was a check cashing place nearby. When Suspect 1 came out of the store, Suspect 2 said he found a victim. They followed the victim from the check cashing place in the Jeep as the victim walked home. Just the Suspects were in the Jeep. Suspect 2's girlfriend was not there.

They "caught" the victim on the elevator. Initially, Suspect 1 stated that Suspect 2 went through the victim's pockets and took the money orders while he just stood there and really did not do anything. Later in the interview, Suspect 1 said that Suspect 2 choked the victim, and he went through the victim's pockets. Thereafter, he stated that Suspect 2 went behind the victim when the victim entered his building. Both Suspects went through the victim's pockets. Suspect 1 patted down one pocket and Suspect 2 patted down the other. No one was holding the victim. The victim did not put up a fight. He was just panicking.

Suspect 1 vaguely recalled they took about $200, $300 cash. The two money orders were for $500 or $600. Suspect 1 thought Suspect 2 might have been wearing sunglasses at the time because Suspect 2 was "kind of like cross-eyed." He also said that he did not believe, or recall, whether Suspect 2's eye was covered during the robbery.

Selling the Money Order / Buying the Stove

After the robbery, the Suspects drove to defendant to buy drugs from him. Both Suspects were using drugs at that time. They knew defendant would be in the projects (Howard Houses) in Brownsville by the park. Defendant said he was on his way to buy his mother a stove for her birthday. Suspect 2 told defendant that he had some blank money orders and would sell them at a lower price. Defendant asked where the money order came from. Suspect 2 said he bought it to pay a bill for his Jeep, but his girlfriend took care of the bill. Defendant agreed to buy the money order.

CRU asked if the Suspects encountered anyone else before they saw defendant. Suspect 1 said, "No, let me think," and again, said "No." They went straight to defendant. CRU informed Suspect 1 that other people CRU interviewed said that Suspect 2 approached two women before they approached defendant. Suspect 1 said Suspect 2 might have done that.

Suspect 1 did not recall the name of the appliance store. It was about two blocks from where they met defendant. All three went because the guy in the store wanted ID. Neither Suspect 1 nor Suspect 2 had ID, but defendant did.

Suspect 1 also said that they all went to the store because they were "browsing" for an appliance and other items. Also, defendant and Suspect 2 were still negotiating the price for the money order. They wanted to see the price of the stove. Suspect 1 believed defendant gave them cash while they were still in the store. He also said that defendant paid cash for the money order before they went into the appliance store.

They sold defendant two money orders, which were $300 each. Suspect 1 also said that the money order was about $400, and defendant paid $300 or $200 for it.

Suspect 2 handled the money order. Defendant gave his information to the store employee, and the employee filled out the money order. Defendant used the money order to buy a stove and that is when "everything fell on [defendant]." Defendant had the store deliver the stove to his mother as a present.

They might have bought a CD with the amount remaining on the money order. From the store, the Suspects went to Suspect 2's girlfriend's house. He did not know where defendant went.

Defendant's Arrest

About a month or so after the robbery, Suspect 2's girlfriend told Suspect 1 that defendant was arrested for the robbery. He heard that defendant was out on bail. Suspect 1 "had a feeling" the money orders would be traced and tried to tell Suspect 2 not to sell them. Suspect 2 "just didn't care," and was "money hungry." Because Suspect 1 did not really know defendant, he did not care either. That is why defendant "got jammed up." Suspect 1 could not do anything about it because he was too busy "running the streets at the time." Suspect 1 also said he did not come forward because he was scared.

Defendant's Family's Visit to Suspect 1 in Prison

After defendant was convicted in 2007, defendant's mother, the mother of defendant's baby, and defendant's cousin, Jesse Philpot, visited Suspect 1 in prison, unannounced. They said that defendant did not commit the crime, and the Suspects should "step up to the plate." Suspect 1 did not admit to committing the crime but indicated that he was there. Suspect 1 did not know how they found out his real name. He did not know Jesse Philpot. He did not hear from them again.

Suspect 1's Written Statement

Suspect 1 wrote out a statement (*see* above, Suspect 1's Statement) after defendant's girlfriend, Carter, called him. She told him what had happened, and "to step up to the plate." He did not know how she found him and did not ask. Carter told him that he knew defendant was not involved in the robbery. Suspect 1 said that he would help and agreed to meet. He first met her and defendant's investigator in Harlem, in a car.

Suspect 1 had not spoken to defendant. He decided to help because he felt bad that defendant was arrested for the robbery, which defendant did not commit. Suspect 1 did not speak to Suspect 2, but he told defendant how to find Suspect 2.

CRU showed Suspect 1 his written statement and he confirmed he had written and signed it. No one told him what to write. When asked about why it stated that the crime occurred on April 5, 2005, Suspect 1 said, "the lawyer" came to prison and gave him that date. But he remembered everything about the crime.

He decided to help defendant because it "ate at [him] a little bit" that defendant was charged with a crime he did not commit. Also, the statute of limitations expired.

He had not spoken to Suspect 2 about defendant until Carter got involved. He believed they spoke once on a call, and he told Suspect 2 to do the right thing. He spoke to Carter once more after he wrote the letter. He found out where Suspect 2 was incarcerated, but he did not recall whether he told that to Carter and the investigator, or they already knew that.

He was not offered any money or promises for helping defendant or saying that he committed the crime.

Criminal History

Suspect 1 admitted that he committed robberies on May 4, 2005 and February 1, 2006. (*see* above) He acted alone in each case. CRU provided Suspect 1 with an account of each of Suspect 2's three robberies. (*see* above) Suspect 1 said he was "most likely" Suspect 2's unapprehended accomplice on the April 30, 2005 robbery. But he did not commit the other two robberies with Suspect 2.

Suspect 1's Admission During a Recorded Phone Call From Jail

A day after CRU's second interview of Suspect 1, he called a female relative or friend. The call was limited to 15 minutes by the facility. For the first 12 minutes, they discussed Suspect 1's recent heart surgery and the woman's health. Suspect 1 then mentioned CRU's interview. The conversation, in pertinent part, was as follows:

> Suspect 1: I got a visit yesterday from a DA and detective because a case me and [Suspect 2] had, you know. It's been expired. The statute of limitations had ran out. So, you know, somebody got jammed up for it, you know. So, we wrote affidavits to try to get him off you know. Because he, what it was, we sold him something and then it backfired on him you know.
>
> Woman: Okay, are you able to help him?
>
> Suspect 1: Yeah, but you know, we wrote up an affidavit and everything, so they came to interview me and him. They came, they interviewed [Suspect 2].
>
> Woman: Because right now it's too long for y'all to get charged with it?
>
> Suspect 1: Right, the statute of limitations ran out on it.
>
> Woman: Right, you can't get charged with it. Y'all may as well help the person then, right?
>
> Suspect 1: Yeah.
>
> Woman: So y'all going to help him?
>
> Suspect 1: Yeah, I did that when I was in the street. When I was out, I wrote out an affidavit. They had an investigator come and see me and stuff, and I wrote it out. We went to Sylvia's and had lunch, and I wrote it out, you know. So, they told me yesterday that they went to see [Suspect 2] so 'yeah yeah your friend [Suspect 2] said hi oh.'
>
> Woman: Oh, wow where he at?
>
> Suspect 1: He's up at [prison].
>
> Woman: How long he got, [referring to Suspect 1 by his nickname]?
>
> Suspect 1: He got about 40-something years.

(emphasis added) They then discussed the length of Suspect 2's sentence, and the call ended a couple of seconds later.[30]

The Bullpen

Defendant and Suspect 2 exchanged emails in March 2021, stating that they saw each other in the bullpen in 2005. (*see* above) Suspect 2 told CRU that he saw defendant in the bullpen around the time they were arrested. Suspect 2 gave conflicting accounts about whether they spoke. CRU found that, on June 10, 2005, defendant and Suspect 2 had court dates on their respective robbery cases.

John Gary Vernet, the Store Manager

CRU conducted a recorded in-person interview with Vernet and then briefly spoke to him on the phone. He explained that he used the name Gary Gordon at work. He recalled testifying at trial,

[30] During the call, Suspect 2 was referred to by his nickname .

recalled defendant, and recalled the money order transaction. In pertinent part, Vernet stated the following:

Three tall men came into the store and looked around with a salesman. The one he identified during trial (defendant) had a big build and was slightly shorter than the other two. One of the other two men was wearing "dark glasses," and Vernet could not see his eyes.

They had a postal money order for a certain amount, which was "just made a few hours ago." The man with dark glasses said that defendant wanted to use it to buy a stove for his mother. The man with dark glasses explained that the money order had been for a car payment, but the deal fell through. Vernet asked why the man did not cash it. The man explained that defendant was going to give him cash. Vernet agreed to take the money order if someone provided ID. Defendant provided ID, which appeared to be legitimate.

Vernet believed that the man with the dark glasses handed him the money order. Vernet did not recall who filled out the (payer) information on the money order. The cost of the stove was less than the money order. The men—Vernet did not recall which ones—bought one or two items, "like a Walkman or something." The stove was delivered to the address provided.

Vernet had seen defendant in the neighborhood before April 1. CRU asked Vernet about his trial testimony that he had never seen defendant before April 1. Vernet explained that he meant that he did not know defendant, or his name. Vernet had never seen the other men before or after April 1.

After April 1, Vernet did not recall when, defendant returned and purchased a washer or refrigerator with cash. Vernet did not recall his trial testimony that defendant borrowed a dolly, but he said that defendant might have used it for the appliance he purchased.

A detective came to the store, told Vernet about the stolen money order, and questioned him. A prosecutor or "someone from the court" also came to the store. Vernet told them everything including, that defendant was with two others, and the explanation about the car payment. Defendant returned with his trial attorney. Vernet told them the same thing.

Vernet was never shown any photos, and he did not view a line-up. There were no surveillance cameras at the store in 2005.

Note in People's File

An undated handwritten note in the People's file, apparently of an interview of Vernet, or another store employee, indicates that defendant returned to the store after his arrest and asked if the store "had a video."

Carmen Gonzalez

Defendant's Emails to Carmen Gonzalez

Carmen Gonzalez apparently had been defendant's girlfriend. CRU obtained numerous emails (JPay) from defendant to Gonzalez between March 7, 2021 and July 22, 2024. In most emails, defendant implored Gonzalez to contact his investigator Crawford, his attorney, and/or CRU. He repeatedly stated that he needed her to help prove his innocence. In a November 19, 2023 email, defendant wrote

that she knew he was innocent, "and that we were together in bed." In other emails, defendant stated that he won one of his lawsuits and could get her an apartment.

Gonzalez rarely responded. When she did, she complained about her health, and that defendant cheated on her and hurt her. In her last email, on March 12, 2024, Gonzalez wrote that she was not avoiding defendant, but her health was not good. She stated, "I'm very aware of your situation and you being in there and wanting to get out. The whole you [sic] wanting me to call [yo]ur lawyers & stuff it's difficult for me do with my health like this. I will write the letter and send it to your son." (CRU did not locate any such letter, and defendant did not mention one)

CRU's Attempt to Interview Carmen Gonzalez

CRU found that at the time of the crime Gonzalez maintained an address in the Howard Houses, and confirmed her birthday is April 4 as defendant testified. (*see* above) CRU had no success in its numerous attempts to speak with Gonzalez. CRU left messages on Gonzalez's and her daughter's phones. CRU traveled out of state to her two last known addresses, but she no longer lived at either address.

Francina Windley Patterson, Defendant's Mother

CRU conducted a recorded interview of defendant's mother at her home. She stated the following:

On the morning of April 1, her stove went out. She called defendant, who said he would call her back because someone was selling him a money order he purchased for car insurance. Defendant then called her from a store and she heard a man say, "I'm selling him my money order."

At the time of the crime, defendant was a drug dealer and did not rob anyone. Defendant's girlfriend at the time was Carmen Gonzalez. She is ill and lives out of state.

Defendant's Trial Attorney

CRU interviewed defendant's trial attorney twice by phone. He stated the following:

He recalled that the crime involved the robbery of a money order from an elderly man, and that defendant maintained he ran into two people he knew from the street, who had a money order. Because they did not have identification, defendant helped them out. Defendant testified at trial. The attorney did not recall that defendant spoke to the prosecution before trial.

The attorney must have spoken to Carmen Gonzalez, but he did not recall. He did not recall telling the court he had trouble producing her. He believed that Hinkson interviewed Gonzalez.

He believed that Hinkson "pounded the payment" looking for Suspect 1. Suspect 1 had no identifying characteristics.

Unlike most of his clients, the attorney believed defendant was innocent. The robbery was not defendant's "MO," and he had no motive because he made plenty of money selling heroin. He could have made $600 in a minute. Defendant wore thousand-dollar suits and shoes to court.

The attorney believed that Ross's photo array identification of defendant was suggestive. Defendant was "low-hanging fruit" for the police. He had a criminal record, and his name was on the money order.

Kevin Hinkson, Defense Investigator

CRU interviewed Hinkson twice. He stated the following:

He was hired soon after defendant's arrest. He no longer had his files or report. The store manager refused to speak to him. He made numerous efforts to interview Carmen Gonzalez, but he did not recall if he spoke to her. He interviewed defendant's mother, who told him that her stove broke.

Hinkson did not recall looking for the Suspects. If he had any information about them, he would have tried to find them.

Hinkson believed that defendant was making plenty of money at the time, and the money order would have been "petty" to him. He did not believe that defendant committed the crime, because defendant was too smart to use a stolen money order with his name on it.

PI Loethel Crawford

CRU interviewed PI Loethel Crawford by phone. He stated the following:

He obtained Suspect 1's contact information from Carter. He met Suspect 1 at Sylvia's Restaurant in Harlem where Suspect 1 handwrote a statement. Thereafter, Crawford could not reach Suspect 1.

He did not interview Suspect 2. Suspect 2 sent his affidavit to Crawford.

Ross had been deceased at the time of Crawford's investigation and was not interviewed. Crawford attempted to interview Carmen Gonzalez. He spoke to her daughter, asking her to have Gonzalez call him, but Gonzalez did not call.

The Trial ADA

CRU conducted a recorded interview of the trial ADA. CRU provided an account of the case and defendant's application to CRU. The ADA did not recall all the details of the case. It was one of the ADA's first felony cases.

The ADA recalled Ross. English was not his first language, but he was comfortable speaking English. An interpreter was not needed for the interview or for his trial testimony. He was a typical older man, a hard worker, and "matter of fact about what had happened."

The ADA interviewed Ross at his apartment and photographed the elevator. At trial, when the ADA questioned Ross about distance and other things, he said, "You know, you remember, you were there." Ross did the same on cross examination saying, "Ask [the ADA], [the ADA] was there."[31] The ADA believed it was probably easier for Ross to have someone else explain because English was not his first language.

[31] When Ross was questioned about the distance between his lobby and elevator, he mentioned that the ADA was there suggesting the ADA would know the answers. (T.160)

The ADA vaguely recalled that defendant claimed that he bought the money order from one or two people. The ADA did not recall their names. The ADA would not have investigated Suspect 1's name because it was too common, and the ADA would have needed more information.

The ADA worked with Det. Van Pelt on several cases but did not recall working with him on this case. He was a good detective, and the ADA did not recall having any concerns about him. The ADA did not recall speaking to the detective about following up on the robbery accomplice, or the two people who went to the store with defendant. The ADA did not recall the store manager, Vernet.

The ADA recalled defense counsel's verbal attack against the prosecution during summation. The judge was angry at the ADA for not objecting and told the ADA's supervisor. The ADA explained to CRU that the ADA believed that any objection would have looked terrible in front of the jury and given credence to counsel's argument.

Det. Van Pelt

CRU interviewed Det. Van Pelt by phone. He stated the following:

Ross was an older man who purchased a money order at the post office and placed the money order and cash in his shirt pocket—which was not a good place because it was visible to others. He recalled the facts of the robbery, putting an alarm on the money order, and learning it was cashed at an appliance store in Brownsville.

Det. Van Pelt obtained defendant's name and address from the money order and showed it to a store employee (Vernet), who confirmed that defendant had been there. He did not recall whether he showed defendant's photo array to Vernet. Vernet did not want to be involved.

He recalled picking defendant up at his parole officer's office, the photo array, and the line-up. Defendant did not make any statements, which Det. Van Pelt thought was strange because defendants usually deny the allegations or try to distance themselves from the crime. Defendant did not request an attorney. He sat and stared.

During his investigation, Det. Van Pelt drove from the post office to the appliance store a couple of times. The drive was 11 to 16 minutes, going down Empire, East New York, and Pitkin.

Det. Van Pelt never knew about defendant's claim of purchasing the money order from two men whom he knew from the neighborhood and that he did not know it was stolen. Van Pelt said, given the time that the crime was committed (about 11:00 a.m.) and when the money order was used at the store (Van Pelt's DD5 indicates 11:25 a.m., *see* above), it was impossible to drive from the post office, sell the money order somewhere, and then go to the appliance store.

Det. Van Pelt only prepared DD5s. He did not write the complaint report, patrol did that. The case was simple—he placed an alarm on the money order, interviewed Ross, did a photo array, and then conducted a line-up.

CRU ANALYSIS

Defendant was convicted, acting in concert with an unapprehended accomplice, of robbing Gerald Ross of cash and a money order in his building elevator, after Ross returned from the bank where he withdrew cash, and the post office where he purchased a money order.

The People's evidence consisted of Ross's in-court identification of defendant, who was a stranger to Ross. The People also presented the testimony of the appliance store manager, Gary Vernet, that the same day the money order was dated, defendant used it to purchase a stove and was listed as the payer. On cross examination, Vernet testified that defendant was with two other men. Moreover, the trial court gave a *Galbo* charge, allowing the jury to infer that recent and exclusive possession of the stolen property—if unexplained or falsely explained—justified the inference that the possessor of the stolen property committed the robbery.

Defendant testified at trial—as he told the prosecution prior to trial—that he bought the money order from the two men with whom he went to the appliance store and used it to purchase a stove for his mother. Prior to trial, defendant told the prosecution the name of Suspect 1 and the name and nickname of Suspect 2. At trial, defendant referred to Suspect 1 by nickname, and his first name. Defendant referred to Suspect 2 by his nickname, explaining that he learned that the name he provided prior to trial was not correct.

CRU recommends vacatur of defendant's conviction. What the jury did not know was that Suspect 1 and Suspect 2 were not fictitious. Significantly, the Suspects committed numerous robberies, with the same *modus operandi* as Ross's robbery, around the time of Ross's robbery, and in or near the same vicinity. In fact, during the pendency of defendant's case, the Suspects were being prosecuted by KCDA for these robberies.

CRU concludes that had the jury known about the Suspects, there is a reasonable probability that it would have credited defendant's testimony over the testimony of the single eyewitness—whose testimony about the descriptions of his robbers was vague and confusing. Alternatively, there is a reasonable probability that the new evidence would have created a reasonable doubt as to defendant's guilt.

The Newly Discovered Evidence[32]

Defendant submitted to CRU statements from Suspect 1 and Suspect 2, in their true names, admitting that they committed the robbery and claiming that they sold the stolen money order to defendant. As a threshold matter, CRU has no doubt that Suspect 1 and Suspect 2 are the two men whom defendant referred to by their nicknames at trial, and who defendant claims sold him the money order.

Furthermore, CRU's interviews of the Suspects, their prison emails, recorded calls, and text messages are compelling and tend to support their admissions.

[32] Newly discovered evidence is evidence that is discovered after the conviction, and which is such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant. *See* CPL § 440.10(1)(g).

However, the most significant evidence supporting the Suspects' admissions is the fact that they were convicted of multiple robberies with the same *modus operandi* as the robbery for which defendant was convicted in this case.

Defendant Did Not Fabricate Suspect 1 or Suspect 2

Defendant's Investigation

Defendant's account to CRU of buying the money order from the Suspects was consistent with what he told the People prior to trial, and with his trial testimony. Notably, when defendant testified at trial that he could not find the Suspects after he was arrested, he was precluded from explaining his investigative steps. Specifically, when counsel asked defendant about what steps he took, the court sustained the People's objection. (T.368)

Defendant gave CRU a cogent explanation as to how he determined the Suspects' true names, and how he found them. CRU considers it significant that defendant conducted his own investigation to locate the Suspects—a person trying to prove his innocence would be highly motivated to exculpate himself by identifying and finding the actual guilty persons.

Briefly stated, after his arrest (and when out on bail), defendant went to the appliance store to see if there was surveillance video of the Suspects in the store with him. A notation in the People's file regarding an interview of someone from the store, corroborates that defendant returned to the store asking about a video. (*see* above) Vernet told CRU that the store did not have a surveillance video.

Defendant ran into Suspect 2's girlfriend, who provided Suspect 1's true name and gave a false name for Suspect 2. Two weeks after his conviction, defendant, with the help of his family, looked for an individual with Suspect 1's name through the public Department of Corrections (DOCCS) website of incarcerated individuals. Defendant believed that Suspect 1 was a bit older than defendant, who was 40 years old (in 2005). Defendant found Suspect 1, in an upstate correctional facility, who was 47 years old (in 2005), and incarcerated for a robbery. Defendant sent family members to question Suspect 1. While Suspect 1 essentially acknowledged his nickname and that he knew defendant, he refused to cooperate.

In 2013, defendant asked the District Court to hold his *habeas* petition in abeyance so he could hire an investigator to locate and obtain affidavits from the actual robbers, referring to them by the names he provided to the prosecution—the correct name for Suspect 1, and the incorrect name for Suspect 2—because defendant still did not know Suspect 2's real name. Defendant's request was denied. (*see* above, Post Conviction Proceedings)

In 2018 or 2019, defendant's girlfriend, Donna Carter, started the "process" of locating the Suspects. She and defendant hired private investigators and eventually located Suspect 1, who provided Suspect 2's true name. (*see* above Donna Carter and Defendant's Interviews)

CRU Confirmed That the Nicknames Defendant Provided Were Suspect 1 and Suspect 2

Referring to Suspect 2 by nickname, defendant testified at trial that Suspect 2 was about 6', dark-skinned, and had a "slow eye," which was "almost dead or something." (T.340-41) Suspect 2's rap

sheet from 2005 reflects that he used that nickname as an alias. His 2005 rap sheet arrest photo shows he is 6'1" and corroborates defendant's description of his eye.

Referring to Suspect 1 by nickname, defendant testified at trial that he believed Suspect 1's first name was the one he provided to the prosecution prior to trial. Defendant described Suspect 1 as brown-skinned, about 6'1", and "heavyset." (T.341) Suspect 1's rap sheet from 2006 reflects that he used that nickname as an alias. An arrest report one month after this crime (May 4, 2005 arrest) indicates that Suspect 1 is 6'2" and was 210 lbs.

Furthermore, prison emails, recorded phone calls, and CRU's interviews of the Suspects confirm their identities. For example, defendant said in his first email to Suspect 2 that he was looking for someone with Suspect 2's nickname, Suspect 2 replied that he was that person. (*see* above, Suspect 2's Emails 12/19/2020, and 3/14/2021)

Moreover, the Suspects confirmed their nicknames to CRU. They said they had known each other since their teens. Suspect 1 told CRU that Suspect 2 was always known by his nickname. Suspect 2 referred to his "robbery partner" by nickname.

Suspect 1 referred to Suspect 2 by his nickname during his interview with PI Saunders and Carter (*see* above, PI Saunders and Carter Interview of Suspect 1), in his phone call to a female relative or friend. In that call, the female referred to Suspect 1 by his nickname.

<u>The Suspects' Admissions in Interviews, Emails, and Calls Are Compelling</u>

CRU Interviews

Both Suspects told CRU that they used to rob individuals leaving banks and check cashing places. While certain portions of their accounts about Ross's robbery were inconsistent and inaccurate, such as following the victim from a "check cashing place," and their roles in the robbery (*see* above), it is not dispositive. It is understandable that they do not recall the details of all the similar robberies they committed 20 years ago. (*see* above, The Suspects' Pattern Robberies) Indeed, during a CRU interview, when Suspect 2 was confronted with his inability to recall details of the robbery, Suspect 2 shouted at CRU that it did not matter because the fact remained that he sold defendant the money order.

More importantly, their accounts of how they came upon defendant and convinced him to buy the money order were consistent and plausible. Both Suspects admitted that at the time of the crime they were heroin addicts who committed robberies to support their addition. Both stated they bought heroin from defendant. Suspect 1 stated that after the robbery they drove directly to the Howard Houses to buy heroin from defendant. They knew defendant would be there selling heroin because that is where they bought heroin from defendant on prior occasions.

Defendant stated that the Suspects approached him in front of his girlfriend's building in the Howard Houses looking to buy heroin from "Cowboy." Defendant told CRU that Cowboy sold heroin for him, and he never sold heroin on the street. However, in 2004, defendant was arrested for selling heroin in front of his girlfriend's building. (*see* above) Thus, it is reasonable to credit the Suspects' accounts that they drove to the Howard Housing to buy heroin from defendant after committing the robbery.

Suspect 1, Suspect 2, and defendant each independently told CRU that Suspect 2 convinced defendant to buy the stolen money order by claiming it had been for a car payment. This is believable for several reasons. First, defendant conditioned buying the money order on the Suspects going with him to the store to confirm that it would be accepted. There is no other apparent reason for the Suspects to go with defendant. They did not go to the store intending to purchase anything. Only after the purchase of the stove, a nominal amount remained on the money order, which was used to buy a Coby CD player. Notably, a Coby CD player was recovered from Suspect 2's Jeep when he was arrested on May 4, 2005. (*see* above, BRS Pattern Investigation; Suspect 2's trial file)

Furthermore, the trial testimony of Gary Vernet, the store manager, corroborated that defendant came to the store with two men, and one of them explained that the money order had been for a car payment, and they were now using it to buy defendant's mother a stove. (T.316-17)

Moreover, Vernet told CRU that one of the two men with defendant had on "dark glasses" and Vernet could not see his eyes. The man with dark glasses explained that the money order had been for a car payment, but the deal fell through, and defendant was going to give him cash. Vernet believed that the man with the dark glasses handed him the money order. It is more likely than not that Suspect 2—who had a visible eye problem—was the man with the sunglasses. Defendant and Suspect 1 thought Suspect 2 wore sunglasses. Suspect 2 did not recall.

Emails and Calls

First, Suspect 1 called a female friend or relative, and after discussing their health for the first 12 minutes of a 15-minute prison call, Suspect 1 mentioned that CRU visited him regarding "a case me and Suspect 2 had," and "somebody got jammed up for it" because "we sold him something and then it backfired on him you know." (*see* above, Suspect 1's Admission During a Recorded Phone Call From Jail)

Furthermore, when defendant joined Suspect 1's recorded interview with Carter and PI Saunders, Suspect 1 told defendant that he would "do everything in his power" to help because defendant had "nothing to do with nothing, and "got a raw deal." Suspect 1 gave his word to help "as man from [his] heart" and felt "real bad."

Regarding Suspect 2, in a March 16, 2021 email to defendant, which CRU had obtained from the prison, Suspect 2 "apologize[d] for the lie"; said that for the past 10 years defendant's situation was "burning through [Suspect 2's] heart"; he went to church "to pray for direction concerning this matter"; and defendant did not belong in jail because defendant bought a money order that the Suspects stole.

Moreover, in a recorded prison phone call to Carter, after CRU's first interview, Suspect 2 said there was "nothing to lie about"; defendant "went for the bullshit that I told him. And he asked me, he said, yo, is this stolen? And I told him no, he went for it. That shit hurt, that shit hurt. I think about that shit a lot." (*see* above, Suspect 2's Call to Carter after CRU's Interview)

Finally, CRU credits that the Suspects are not being paid for their help. Although Carter sent Suspect 2 10 "stamps," (*see* above, Suspect 2's e-mails) and may have sent Suspect 1 stamps (*see* Defendant's

Interview), it is not a strong motive to lie for defendant. Moreover, that the Suspects have come forward after the statute of limitations expired does not affect CRU's determination regarding their credibility in light of their pattern robberies.

The Suspects' Pattern Robberies Support the Credibility of Their Admissions

The most significant new evidence is the Suspects' pattern robberies. As set forth above, after reviewing their rap sheets and case files, CRU discovered that from April 4, 2005—three days after Ross was robbed—through February 1, 2006, the Suspects committed a combined total of seven robberies. (*see* above, The Suspects' Pattern Robberies) Suspect 1 told CRU that he was Suspect 2's accomplice in one of the robberies where Suspect 2 acted with an unapprehended other.

All of their robberies had the very same *modus operandi* as Ross's robbery—following elderly men from establishments where they obtained money or a negotiable instrument, to their homes, and robbing them. Moreover, when victims reached their homes, they were approached either at the entrance of their residences, or inside a vestibule, or in one case—like here—inside an elevator where the victim was choked.

At the time of Ross's robbery, defendant had not committed a robbery in 20 years, and none of the robberies he committed are similar to the pattern robberies. (*see* above, Defendant's Criminal History) In addition, it does not appear that defendant had motive to commit a robbery in 2005. He had the financial means to obtain a $15,000 bail bond, retain his trial attorney on this case and prior civil cases, and both defendant's trial attorney and investigator Hinkson, in separate interviews 20 years later, remarked that defendant had no need to commit this crime, recalling that he was very well off.

The Newly Discovered Evidence Creates a Reasonable Probability that the Jury Would Have Credited Defendant's Account Over Ross's. Alternatively, There Is a Reasonable Probability That the New Evidence Would Have Created a Reasonable Doubt.

The Jury Probably Would Have Credited Defendant's Account or Have a Reasonable Doubt

The new evidence that the two Suspects named by defendant at trial committed robberies, around the same time, and in and around the same area with the same *modus operandi*, could connect them to Ross's robbery and support defendant's claim that those two individuals, and not defendant acting with some unapprehended other, committed the robbery.

It is well-settled that where a defendant claims mistaken identity and that a third-party committed the crime, "reverse *Molineux* evidence"—evidence of the third-party's bad acts or crimes similar to those the defendant is charged with committing—is relevant to and can support the defendant's claim.[33] In determining whether the third-party's crime shows "a *modus operandi* connecting the third party to the charged crimes," courts look to whether the similarities were unusual enough to compel the inference that the same individual committed both. Thus, the *modus operandi* must be sufficiently unique to make the evidence of the uncharged crimes probative of the fact that the individual committed the crime

[33] *People v. DiPippo*, 27 N.Y.3d 127, 136 (2016) (while unlikely standing alone, *modus operandi* is relevant to, and can support, a third-party culpability proffer where the crimes reflect a 'modus operandi' connecting the third party to the charged crimes).

with which the defendant is charged.[34] The *modus operandi* is unique if the crimes were committed around the same time and place.[35]

Here, the Suspects committed multiple robberies of elderly men after following them home from a bank (or check cashing place in one instance). This is the same *modus operandi* as Ross's robbery, of which defendant was charged. The robberies were unique enough in that they were committed around the same time and place. (*see* above, The Suspects' Pattern Robberies)[36]

Therefore, had the jury known about the pattern robberies there is a reasonable probability that it would have credited defendant's testimony that he purchased the money order from the Suspects. Consequently, the new evidence could have created a reasonable probability that Suspect 1 and Suspect 2—and not defendant and some unknown accomplice—robbed Ross.

This evidence would have been admissible at trial (or a new trial) as probative to defendant's defense. The defense could have presented the testimony of the Suspects' victims, the testimony of Det. Wing regarding the facts of the Suspects' robberies, and evidence of their convictions.

Furthermore, Vernet's testimony would have been more favorable to the defense. The prosecution presented Vernet's testimony to establish that defendant used the money order to purchase a stove. But the defense established on cross examination that defendant came into the store with two other men, one of whom explained that the money order was for a car payment, and they were now using it to buy defendant's mother a stove. Had the jury known about Suspect 1 and Suspect 2, Vernet's testimony would have corroborated defendant's testimony.

Moreover, to the extent that the jury inferred guilt pursuant to the *Galbo* charge, it probably would not have done so. The *Galbo* charge allowed the jury to infer that defendant committed the robbery if it determined his possession of the stolen money order was "unexplained or falsely explained." (T.504) As set forth above, there is a reasonable probability that, with the new evidence of the Suspects' identities and similar robberies, the jury would have credited defendant's explanation that he bought the money order from them. In fact, with the new evidence supporting defendant's defense, the court might not have given the *Galbo* charge.

The Jury Probably Would Have Found Ross's Identification of Defendant at Trial Unreliable

To the extent that the jury credited Ross's in-court identification of defendant as the man who went through his pockets, had the evidence of the Suspects been presented, the jury could have found Ross's identification unreliable, or had a reasonable doubt as to its reliability.

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[34] *Id.*

[35] *People v. Montgomery*, 158 A.D.3d 204 (1st Dep't 2018) (as a matter of due process and the right to present a defense, a defendant can present reverse *Molineux* evidence showing that another person had committed three uncharged robberies similar to the four robberies for which he was indicted; the facts of the unindicted robberies reflected a *modus operandi* connecting a third party to the charged crimes; the *modus operandi* was unique in that it was committed around the same time and place).

[36] *Id.*

Eyewitness identification can be one of the most unreliable forms of proof and may result in wrongful convictions.[37] Here, defendant was a complete stranger to Ross.[38] There was a combination of factors negatively affecting Ross's ability to recognize and accurately identify an unfamiliar face.

For example, Ross had only a brief opportunity to see his robber's face. Ross testified that as the man went through his pockets, the man "was hiding his face," and trying to cover his face. (T.112, 136) The prosecutor asked whether anything was blocking his view when the man was in front of him going through his pockets. Ross said, "Yes, yes, he was trying to turn, turn, turn different ways." (T.136) Furthermore, when the man finished going through his pockets, Ross only saw him "a little bit." (T.112) They were very close, face to face (T.113, 180-81), but "not exactly face-to-face all the time." (T.217)

Furthermore, Ross was under a great deal of stress throughout the robbery. The man behind him was choking him "very tight," holding his throat "hard." Ross could not move and had difficulty breathing at times. (T.110, 140) Ross initially testified that he thought the robbery lasted "a few minutes." He then estimated it lasted 20 to 30 minutes (T.113-14), and agreed that it could have been 22 minutes, or 15 minutes. He did not know because he was in a chokehold the entire time. (T.141-42, 216) Both the defense and the People acknowledged on summation that Ross was under stress during the robbery. The defendant argued it resulted in a misidentification. (T.405, 407, 423-24) The People argued that it caused Ross to be "off" about the duration of the robbery. (T.466)

Moreover, Ross provided only a general age description of the man who went through his pockets. Ross testified that the man appeared to be in his 30s or 40s. (T.114-15) Notably, this also describes the Suspects, who were both 47 years old.

In addition, Ross's description of the robber, who went through his pockets, was confusing. He was "a little clear skin," and "a little bit" taller than Ross, who was 5'7" (T.111-12), "[s]omething like" 5'8". (T.171) In explaining what he meant by clear skin, Ross made little sense testifying about features and complexions changing over time. (T.143-44, 172)

Thus, with the evidence of the Suspects, and the factors hindering Ross's observation of the robber, the jury could have found that Ross's identification of defendant was unreliable.

Ross's Descriptions of His Robbers Immediately After the Crime

Although not before the jury, Ross's description of his robbers immediately after the crime was generalized and inconsistent regarding their ages. According to the radio run, both men were tall, and

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[37] *Stovall v. Denno*, 388 U.S. 293, 297 (1967) ("A conviction which rests on a mistaken identification is a gross miscarriage of justice"); *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"); 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).

[38] The People acknowledged on summation that Ross would probably not be able to identify the man holding him in a chokehold. (T.462)

in their 40s. According to the complaint report, both men were 40 years old—one was 5'7" and 180 lbs., and one was 6' and 190 lbs.—without indicating which description was attributed to which man. According to Det. Van Pelt's interview of Ross the day after the robbery, both men were between 30 and 40 years old.

Notably, the descriptions matched the Suspects and defendant. In 2005, Suspect 2 was 47 years old, 5'9" and 204 lbs.; Suspect 1 was 47 years old, 6'2" and 200 lbs., and defendant was 40 years old, 5'11" and 215 lbs.

The Identification Procedures

Ross identified defendant in a photo array on May 15, 2005—a month and a half after the robbery. That Ross identified the one whose name was on the money order does not warrant the conclusion that Ross was not mistaken. "Even employing the most correct photographic identification procedures, displays conducted by the police contain some danger that the witness may make an incorrect identification."[39]

Moreover, "[r]egardless 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."[40] Thus, a witness can commit to an initial misidentification in a photo array, and result in the witness selecting the same innocent person in a subsequent line-up, and in court.

CONCLUSION

The new evidence establishes that the individuals, who defendant had testified sold him the money order, are Suspect 1 and Suspect 2, and that they committed robberies with the same *modus operandi* as this case, around the same time and in and around the same vicinity. CRU concludes that if the jury had known about this evidence, there is a reasonable probability that it would have credited defendant testimony over the single eyewitness, to whom defendant was a stranger. Alternatively, there is a reasonable probability that it would have created a reasonable doubt. Accordingly, CRU recommends that defendant's judgment of conviction be vacated. CRU also recommends that the indictment be dismissed due to the passage of time and loss of witnesses.

[39] *People v. Marshall* , 26 N.Y.3d 495, 503 (2015) (internal quotation marks and citation omitted).

[40] *Id.* at 503.