SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,	:	
-against-	:	**Ind. No. 693/98**
JON-ADRIAN VELAZQUEZ,	:	
Defendant.	:	

MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

On March 7, 2000, Jon-Adrian Velazquez was convicted, after a jury trial, of one count of second degree murder in violation of Penal Law ("PL") § 125.25(3); one count of attempted second degree murder in violation of PL §§ 110/125.25(1); three counts of first degree robbery in violation of PL § 160.15(2); and one count of attempted first degree robbery in violation of PL §§ 110/160.15(2). He was sentenced to a 25-year-to life term of imprisonment on the murder count, 8 1/3 to 25 years on the attempted murder count, 12 ½ to 25 years on each count of robbery, and 7 ½ to 15 years on the attempted robbery, all terms to run concurrently. Mr. Velazquez remains incarcerated on these sentences.

Mr. Velazquez respectfully submits this Memorandum of Law in support of his motion seeking an order vacating his convictions pursuant to Criminal Procedure Law ("CPL") §§ 440.10(1)(g) and (h) on the ground of newly discovered evidence; on the ground that trial counsel provided ineffective assistance within the meaning of Article 1, Section 6 of the New York State Constitution and the Sixth Amendment to the United States Constitution; and on the ground that Mr. Velazquez is actually innocent, and, therefore, his conviction and continued incarceration violate Article 1, §§ 5 and 6 of the New York State Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

As set forth below, based upon a review of the trial testimony, the evidence that was presented at Mr. Velazquez's trial and the police investigation, together with the significant evidence uncovered as a result of our own investigation, including eyewitness recantations and deviations in witnesses' trial testimony that confirm the unreliability of the initial eyewitness identifications, it is clear that Mr. Velazquez is an innocent man and that his conviction must be vacated. Moreover, the identification process used by the police in this case, when viewed in the

context of scientific studies which have raised serious doubts about the accuracy of eyewitness identifications in general, render the eyewitness identifications in this case of no probative value, highly unreliable, and grossly insufficient to support a guilty verdict in the absence of ***any*** other evidence to indicate that Mr. Velazquez was involved in the murder.

STATEMENT OF FACTS

A. THE MURDER OF ALBERT WARD

On January 27, 1998, at approximately twelve o'clock in the afternoon three individuals, Robert Jones (AKA "Ricky"), Joe Scott and James Smith (AKA "River Jack"), were hanging out at a numbers spot located on the second floor of 2335 Eighth Avenue. The spot was owned and operated by a retired police officer from the 28th Precinct, Albert Ward. While Robert Jones was on the phone taking numbers, Joe Scott left to buy cigarettes. When he opened the door to leave, a young man walked in and sat down at a table to play a number. Robert Jones put the phone down and asked the man what he was doing there, as they did not take bets from people they did not know. The man responded that he had been sent by the guy downstairs who told him that there was a numbers spot upstairs. When Robert Jones pressed him further the man said he was from the St. Nicholas Projects (known to police as the "St. Nick Houses"), that his name was "Tee" and that he played numbers on the east side. (R. Jones Tr. 469).[1]

In an effort to get rid of him quickly, Robert Jones agreed to take his number. The man handed Robert Jones a slip of paper with a number and the name "Tee" written on it. Robert Jones told the man that he had written the number on the wrong slip and threw it away in the garbage. Robert Jones then wrote the number on a new slip, gave him a copy and the man walked

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[1] References to the transcript of Mr. Velazquez's trial will be as follows: "[Witness] Tr. [Page]."

out.

A short time later the owner of the numbers spot, Albert Ward, and a number of individuals who frequented the spot arrived to wait on the numbers. These individuals included Lorenzo Woodford (AKA "Red"); Dorothy Canady (AKA "Miss Cee Cee"); Matty Alex (AKA "Miss Matty"); Robert Jones' brother, Phillip Jones; his uncle, Richard Jones (AKA "Hammy"); and a young man named Augustus Brown (AKA "A.J.") who arrived with Lorenzo Woodford, but who was unknown to the others. Lorenzo Woodford and Augustus Brown went into an adjoining room to conduct a drug deal.

Approximately an hour after "Tee" left the numbers spot, the doorbell rang and Richard Jones answered the door. The same man, "Tee", appeared at the door and again said that he wanted to play a number. When Richard Jones stated that he did not know the man and that he could not let him in, the man replied that he had been let in earlier. While they were engaged in this discussion, Robert Jones looked over and asked who was at the door. The man peeked his head in the door and Robert Jones confirmed that the man had been there about an hour earlier. (R. Jones Tr. 478). "Tee" then went over to the desk where he had played the number earlier and started to write as if to play another number. Robert Jones told him it was too late to play another number. Everyone sat around for a minute or two looking at the television and waiting for the number when there was a knock at the door. Richard Jones opened the door and asked, "Who are you?" Suddenly, "Tee" ran over and put a gun to Richard Jones' head and ordered him to open the door. A dark-skinned black man then entered the numbers spot and ordered everyone to get on the floor. Both men began yelling "where is the money?" Robert Jones gave them the money in his pocket and a chain. "Tee" went into the room where Lorenzo Woodford and Augustus Brown were playing the poker machines while the dark-skinned black man began tying up people

with duct tape. Albert Ward, the owner of the spot, then pulled a wad of money out of his shirt pocket and instructed Robert Jones to push it underneath his body as he lay on the floor. (R. Jones Tr. 485). Albert Ward then pulled out his gun, jumped up, put the gun to the back of the dark-skinned man's neck. The two men began to struggle and the dark-skinned man yelled "he's got a gun, he's got a gun." (Brown Tr. 199; P. Jones Tr. 741). As the two struggled, Albert Ward's gun went off. (R. Jones Tr. 489). The man named "Tee" then fired a shot at Robert Jones but missed as Robert Jones jumped over and hid behind the bar. (R. Jones Tr. 490). "Tee" then asked, "who's got the gun?" The dark-skinned man responded as he pointed to Albert Ward, "he does, shoot him, shoot him." "Tee" fired his gun killing Albert Ward. (Brown Tr. 201; P. Jones Tr. 741).

After the shooting, the two men immediately fled. Inside the numbers spot, some individuals ran toward an exit door that led to the roof and others ran downstairs. Robert Jones left and went downstairs where he asked a woman to call the police. He then approached a meter cop on the corner of 126th Street and told him that his friend who was an ex-cop had just been shot. The meter cop called for assistance and the police responded to the scene.

1. THE POLICE INVESTIGATION

Police Officers Carlos Hernandez, Shield No. 1872, and Sirlister House, Shield No. 28870, responded to a "10-30 man shot" radio call at around 1:33 p.m., at 2335 Frederick Douglas Boulevard on January 27, 1998. Upon entering the building, they found Albert Ward lying on the floor with a gunshot wound to his head and a gun between his legs. (*See* Affirmation of Robert C. Gottlieb ("Gottlieb Aff."), submitted herewith, Ex. A, p. 8 (DD5 #36), Ex. B; (Commanding Officer's Memo to Chief of Dep't, dated January, 27, 1998 ("Police Memo")). Officer Hernandez immediately called for Emergency Medical Services. Officer Hernandez then spoke

to a witness who reported that the shooters were ***two black males***, one with a green jacket and one with a yellow jacket. Hernandez called in the description of the perpetrators to "central." (Gottlieb Aff. Ex. A, p. 8 (DD5 # 36)).

The Crime Scene Unit conducted a search inside the numbers spot and recovered one spent round, two spent shells and one live round. The .38 caliber revolver belonging to Albert Ward was recovered and was found to contain one spent cartridge casing and four live rounds in the cylinder. Three pieces of duct tape, a roll of duct tape, two pieces of paper, two envelopes and a bundle of thirteen envelopes were removed from the scene for possible fingerprints. It was determined that there were no prints of value on these items. (Bekhit Tr. 526-534). Additionally, two latent palm prints were lifted from two mirrors, another latent palm print was lifted from the edge of the bar and a single latent fingerprint was lifted and later submitted to the Statewide Identification System ("SAIFIS") and determined to be the print of Philip Jones, one of the witnesses.[2] (Jitta Tr. 541-547).

Upon learning that the victim was a retired Member of The Service ("MOS"), the NYPD immediately established a Field Command Post on Frederick Douglas Boulevard between West 125th and 126th Streets. The command post was in place by 5:00 p.m. on the evening of the shooting and four lieutenants, eight sergeants, and thirty-seven police officers from the 28th Precinct and Manhattan North Task Force were assigned to the post to conduct enforcement activity at known gambling locations. In addition, one Vice Enforcement Module and one Narcotics Module were assigned to enforcement activity at known narcotics locations. Fifteen

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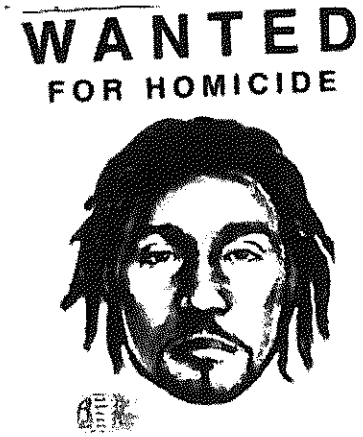
[2] Ultimately, the outstanding palm prints of value were compared against the known palm prints of both defendants in the case (Mr. Velazquez and Derry Daniels) with negative results. (Jitta Tr. 547).

arrests and seventy-five summonses were subsequently issued. (Gottlieb Aff. Ex. B (Police Memo)). By the evening of January 27, 1998, the police had interviewed five of the nine witnesses present at the location of the shooting, had leads on the whereabouts of the remaining four and had conducted approximately 150 debriefings of individuals. (Gottlieb Aff. Ex. B (Police Memo)).

At 5:00 p.m., the NYPD notified Citywide Communications Unit to broadcast a description of the two perpetrators. The description given of the shooter was "***male black, light complexion***, 20-25 yrs., 5'7" – 5'9", 150-155 lbs., beard, mustache and goatee, **braids**, wearing yellow or orange bubble jacket." (Gottlieb Aff. Ex. A, p. 10 (DD5 #42)). Hospitals throughout New York City, Northern New Jersey and Long Island were canvassed to check for individuals with gunshot wounds, based on the information they had that, although Albert Ward had fired his gun, no bullet had been recovered at the scene.

At 11:00 p.m. on January 27, 1998, witness Robert Jones was taken by the police to police headquarters and a sketch was drawn of the shooter based upon a description given by Mr. Jones. (Gottlieb Aff. Ex. A, p. 16 (DD5 #82)). The sketch, pictured below, was distributed to the surrounding precincts on a "WANTED" poster.



The poster described the shooter as "***male, black***, 20-25 yrs. Old, 5'7"-5'9", 150-160 lbs., **braided hair**, light complexion, thin mustache/beard, wearing an orange/yellow 3/4 length jacket." (*See* Gottlieb Aff. Ex. C ("WANTED" poster)).

Sweeps of policy locations revealed that there were several unreported robberies of these spots that may have been perpetrated by the same individuals. (Gottlieb Aff. Ex. B (Police Memo)). A robbery at one of these locations – 1412 Fifth Avenue – was found to have similarities to the incident in question and it was reported that one of the witnesses to that robbery identified the person depicted in the "WANTED" poster as being the perpetrator. (Gottlieb Aff. Ex. D (Undated Police Memo)).

2. THE POLICE RECEIVE TIPS REGARDING "MUSTAFA" AND OTHER LEADS

On January 28, 1998, ***one day after the homicide***, the police debriefed Robert Copney, who they had arrested for criminal possession of a controlled substance. When presented with the sketch of the shooter, Mr. Copney told the police he recognized the person depicted as **"Mustafa."** Mr. Copney said that he knew **"Mustafa"** from around the neighborhood and that he had been known to frequent the St. Nicholas Projects. He also stated that he had seen **"Mustafa"** in a numbers spot on the east side.[3]

Most significantly, Mr. Copney stated that at 10:00 a.m. that morning (the day after the homicide), he was having breakfast with friends at a coffee shop at E. 123rd Street and 3rd Avenue and that one of his friends, Chuck, told him that he knew who it was that committed the homicide at the numbers spot at 2335 8th Avenue. Mr. Copney stated that when he saw the sketch he

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[3] This is strikingly similar to what Robert Jones recalls about his initial conversation with the shooter. He recalls that after the shooter arrived at the numbers spot, the shooter stated that he was from the St. Nicholas Projects and that he frequented a numbers spot on the east side. (R. Jones Tr. 469).

immediately knew the man to be **"Mustafa."** (Gottlieb Aff. Ex. A, p. 18 (DD5 #85), p. 20 (DD5 #86)).

On the following day, January 29, 1998, the police interviewed another individual, Archie Phillips, who had been charged with a number of drug offenses. Phillips, having no known connection to Robert Copney, stated that he was at a smoke shop at W. 145th Street and 8th Avenue buying marijuana when he heard people inside the store stating that **"Mustafa"** shot a guy at a numbers spot on 125th and 8th Avenue. Phillips stated that he overheard one of the smoke shop employees state, "that mother fucker is crazy." Phillips further stated that he knew **"Mustafa"** and that he always saw him buying his marijuana at that smoke shop. He also informed the police that **"Mustafa"** sold blue bags of crack on West 125th, 126th and 127th Streets on 8th Avenue near the location of the homicide. Phillips said the last time he saw **"Mustafa"** was on January 25, 1998 – two days before the homicide – in front of the smoke shop. When asked where the police could find **"Mustafa"**, Phillips replied that he thought **"Mustafa"** lived in the St. Nicholas Projects.[4] Phillips also gave the police the following description of **"Mustafa"**: "***male black***, 30 years old, 5'8"-5'9", 170 lbs, must/Gotay **Black Dread Locks**." (Gottlieb Aff. Ex. A, p. 23 (DD5 #94)).

Additionally, **a third source**, independent of Copney and Phillips, contacted the police and informed them that he knew the shooter – **"Mustafa."** This is confirmed in police notes that were turned over to the defense attorneys prior to Mr. Velazquez's trial that read: **"C.I. called states Shaq was down with robbery/ ?? at spot, ran from loc – knows shooter –"** Immediately under that is written, **"Mustafa, M/B 5'9", 155-160lb, 34, thin sideburns go around like beard,**

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[4] As previously mentioned, the shooter told Robert Jones that he was from the St. Nicholas Projects.

hair braids, brown/tan complexion, pumps dope, 127 & 8 Ave, into doing robberies." (Gottlieb Aff. Ex. E (Undated Police Memo)). Police records reveal that **"Mustafa"** was a "Primary Target" of the investigation. (Gottlieb Aff. Ex. D (Undated Police Memo)).

Significantly, not only did Robert Copney identify the individual in the police sketch as **"Mustafa,"** but the description given by the confidential caller is virtually an exact match to the sketch and the physical description printed on the bottom of the "wanted" poster.

In addition to **"Mustafa,"** the police had received information with respect to two other individuals who were said to have information about the homicide. On January 29, 1998, two days after incident, the police received a tip from Crimestoppers that an individual had called identifying himself as codename "Rattlesnake" and stated that the person who ordered the hit on Albert Ward was a man named Victor Gibson. (Gottlieb Aff. Ex. A, p. 25 (DD5 #95 and attached police notes)). The police ran a check and identified two individuals with the name Victor Gibson. The mugshots of these individuals were attached to DD5 #95. Both individuals were black men with braids. (Gottlieb Aff. Ex. A, p. 25 (DD5 #95)). Based upon our review of the DD5s, it does not appear that the police did any further investigation regarding Victor Gibson.

The police also received information from a confidential informant that an individual named **"Shaq"** was involved in the robbery/homicide at the numbers spot, ran from the location and knows the shooter. (Gottlieb Aff. Ex. E (Police notes)). It appears from the police notes that the caller also stated that **"Shaq"** worked for a guy who sells "Elite" heroin and that **"Shaq"** had been arrested two or three months earlier between W. 127th and W. 128th Streets for selling "Elite Heroin." (Gottlieb Aff. Ex. E (Police notes)). Two separate computer checks were conducted on the name **"Shaq"** resulting in three hits on one and additional hits on the other. Based upon the DD5s and police reports we have in our possession, it does not appear that the police did any

further investigation regarding **"Shaq."** (Gottlieb Aff. Ex. A, p. 36 (DD5 #114)).

3. THE EYEWITNESSES

There was no physical evidence of any value recovered from the scene. The police investigation relied exclusively on the statements of witnesses present at the numbers spot at the time of the shooting. Five of the nine witnesses present at the time of the shooting were identified and interviewed within hours of the homicide. The remaining four witnesses were located and interviewed days later. The initial statements of the eyewitnesses to the police were as follows:

Robert Jones ("Rick")

At 1:34 p.m. on January 27, 1998, within minutes of the homicide, Police Officer Carlos Hernandez arrived on the scene and observed the victim lying on the ground with a gun between his legs. Officer Hernandez asked Robert Jones who shot the victim. Robert Jones stated that it was ***two male blacks***, one with a green jacket and one with a yellow jacket.

Approximately one hour later, at 2:50 p.m., Detective Robert Mooney interviewed Robert Jones at the 28th Precinct. Mr. Jones acknowledged that the location where the shooting occurred was an illegal gambling establishment owned and operated by Albert Ward. He told Detective Mooney that at approximately 12:30 p.m., he was manning the door of the numbers spot when a man approached and asked permission to enter. Mr. Jones stated that he had a brief conversation with the individual, eventually allowing him to enter the premises to place a bet. Mr. Jones stated that 45 minutes later, the same individual came back to the numbers spot, put a gun to the neck of his uncle, Richard Jones, and ultimately shot and killed Albert Ward. (Gottlieb Aff. Ex. A, p. 1 (DD5 #2)).

Less than two hours after the incident, Robert Jones described the shooter to Detective Mooney as a "***male black***, *light skinned, with* a *light beard and mustache* ***and braids***. He was

about 5'7 or 5'8 150-155 lbs. He had on a colorful coat, yellow and orange with some red around the sleeves." (Gottlieb Aff. Ex. A, p. 1 (DD5 #2)).

Phillip Jones

Within two hours of the shooting, Detective Thomas McCabe interviewed Phillip Jones, Robert Jones' brother. Phillip Jones was present the second time the shooter entered the numbers spot and described the crime in substantially the same way as Robert Jones, although his description of the shooter differed slightly. Nevertheless, he too described the individual as a *light-skinned* ***black male*** with red hair, 5'10", 150-160 lb., 30-35 years, wearing a wool hat, light colored jacket and black and white sneakers. (Gottlieb Aff. Ex. A, p. 4 (DD5 #15)).

Dorothy Canaday

Detectives Mooney and McCabe interviewed witness Dorothy Canady at her home on the evening of the shooting, January 27, 1998. Ms. Canady was 86 years old at the time of the interview. Ms. Canady told the detectives that she was at the spot talking with the victim and Robert Jones when two men announced a "stickup." Ms. Canady claimed to have looked the shooter "dead in the face" right before he shot Albert Ward. Ms. Canaday indicated to the detectives that she would never forget the shooter's face. She described the shooter as a *light skinned* ***male black*** wearing a dark green knitted hat. (Gottlieb Aff. Ex. A, p. 6 (DD5 #23)).

On January 28, 1998, Detective John T. Lafferty and Detective Joel Potter escorted Ms. Canady to the Catch Unit located at 3280 Broadway to view mug shots of persons arrested from the surrounding precincts. Ms. Canady did not identify anyone from the photos, but described additional details about the perpetrators.

She stated that the shooter, in addition to being a *light-skinned* ***black male*** with a dark green knitted hat, was clean shaven with a round face, 5'7" to 5'9", and 150 to 160 pounds.

Additionally, this time, Ms. Canady told police that there were three perpetrators instead of two. (Gottlieb Aff. Ex. A, p. 11 (DD5 #59)).

Matty Alex

Matty Alex, a 71 year old woman, was a regular patron at the numbers spot. She was interviewed by Detective McCabe at 9:50 p.m. on the night of the shooting and stated that she heard someone say this is a stickup and then heard the person tell everyone to get on the floor. She stated that she got down on the floor with her eyes closed and her head turned to the wall. She further stated that she did not look up and could not identify the shooter. (Gottlieb Aff. Ex. A, p. 7 (DD5 #24)).

Richard Jones

At 5:00 p.m. on January 28, 1998, the day after the shooting, Detective Thomas McCabe interviewed Richard Jones at the 28th Precinct. Like Phillip Jones, Richard Jones was present only the second time the shooter entered the numbers spot. Richard Jones described substantially the same facts with regard to the robbery and murder as Phillip Jones. On the DD5 pertaining to this interview of Richard Jones, Detective McCabe indicated, "Subject stated he can identify perps." However, the DD5 is devoid of any description of the perpetrators that may have been provided by Richard Jones. (Gottlieb Aff. Ex. A, p. 3 (DD5 #3)).

Lorenzo Woodford ("Red")

On January 30, 1998—three days after the homicide—the police located Lorenzo Woodford, known as "Red" to the other witnesses, and brought him to the 28th Precinct to be interviewed by the detectives. Mr. Woodford stated that, at approximately 12:30 p.m. on the day of the murder, he was in a bar at 135th Street and 8th Avenue named "The Clique," which was also owned by the victim, Albert Ward, when he won on the machines. The bar maid called Albert

Ward to report that Mr. Woodford had won and instructed Woodford to go to Ward's numbers spot at 2335 Eighth Avenue in order to collect his winnings. Woodford stated that on his way there he ran into Augustus Brown, known to him as "Blood," coming out of a candy store two doors down from the numbers spot. Brown told him he had some dope and followed Woodford into the stairwell of the numbers spot. Brown told Woodford that he had the dope in his pants, so Woodford instructed him to come with him into the numbers spot so that Brown could go to the bathroom and remove the dope from his pants. Woodford stated that they went upstairs to the numbers spot and after Al Ward paid him his winnings from The Clique, he and Brown went into a back room to play the poker machines. He stated that after about ten minutes he heard yelling and banging and when he went to see what was going on a *light-skinned* ***black male*** stuck a gun in his face. Woodford and Brown were then ordered into the other room where the rest of the witnesses were on the ground. From that point on, Woodford's version of events with respect to the homicide was substantially similar to that of the other witnesses. Woodford stated that since he never saw the dark skinned male with a gun he guessed it was the light skinned male who shot Al Ward. Woodford further stated that following a sequence of shots he looked up and saw the door to the stairs closing. Woodford and Brown left the location immediately after Al Ward was shot. The two men then separated and Woodford went across the street and immediately bought heroin. (Woodford Tr. 1009-12). From across the street, Woodford observed the police respond to the scene, but he neither approached the police nor informed them that he had witnessed the shooting. It was not until three days after the shooting, when Woodford was forcibly brought to the precinct by one of the other witnesses, that he spoke with the police for the first time. (Woodford Tr. 1033).

Woodford gave the following description of the shooter – "***male black***, *5'8" – 5'10", light skinned, he might have had* ***braids***, a light mustache, brown eyes. Mostly I remember his eyes and his gun. I may have seen him before by Drew Hamilton projects and his hair was in corn rows. 20-25 years old, 180-190lbs." (Gottlieb Aff. Ex. A, p. 29 (DD5 #97)).

James Smith ("River Jack")

James Smith was interviewed at the 28th Precinct on January 30, 1998, three days after the homicide. Smith stated that on January 27, 1998 at approximately 11:30 a.m. he was present at the numbers spot when the bell rang. He stated that Joe Scott said, "I don't know this guy," but that Rick told him to let him in and the guy came in to play a number. Smith stated that Rick asked the guy where he played his numbers and the guy responded that he played on the east side. Smith said that Rick then wrote the number for the guy on a slip of paper and the guy left. Smith left the numbers spot a short time later and was not present when the perpetrator returned and committed the robbery and homicide.

Smith described the perpetrator as being a *light skinned* ***male black***, 25 years old wearing blue jeans and a black hat. (Gottlieb Aff. Ex. A, p. 37 (DD5 #115)).

Joe Scott

On January 30, 1998, the police also interviewed Joe Scott at the 28th Precinct. Scott stated that he was at the numbers spot on January 27, 1998 at approximately 11:30 a.m. when the bell rang. He told Rick that he did not know the guy, but Rick said to let him in. The man then came in and wrote a number on a slip of paper, but Rick told him it was the wrong piece of paper and threw the slip of paper in the garbage, writing a new slip for him. Scott said that the man told Rick that he was from the projects around there and that he plays his numbers on the east side. When asked who sent him to the numbers spot, the man replied the guy downstairs. After the man

left, Scott left as well and was not present during the robbery or homicide. (Gottlieb Aff. Ex. A, p. 38 (DD5 #116)).

Scott described the man as being a very *light skinned* ***black male***, 23-25 years old, wearing blue jeans with big pockets that looked like they were falling off of him, a dark green sweater shirt with a zipper by the neck with white on the sleeves, a black knit hat ***with braided hair*** sticking out, and black and white high top sneakers. (Gottlieb Aff. Ex. A, p. 38 (DD5#116)).

Augustus Brown ("Blood")

Augustus Brown, known to Lorenzo Woodford as "Blood," was 20 years old at the time of the homicide. Like Lorenzo Woodford, despite being a witness to the homicide, Brown fled the premises and immediately returned to his daily routine of hanging out on the street and selling drugs. He was not interviewed by the police until three days after the incident, on January 30, 1998, after Woodford brought the police to the location where Brown was selling drugs. Brown was taken into custody by the police and interrogated about the homicide. He told the police that he saw Lorenzo Woodford, known to him as "Red," on 8th Avenue and went to sell him drugs. He stated that Red brought him up to the numbers spot and introduced him to some people. He and Red went into a back room to play poker machines when they heard scuffling and voices from the other room. He thought a fight had broken out so he and Red looked out to see what was happening. A dark skinned ***black male*** then pointed a gun at them and ordered them into the main room with the rest of the people. Brown's version of events is substantially similar to the other witnesses. Brown described the gunman as being a *light skinned* ***black male****, 5'8" tall, 165lbs with jet black* ***curly hair****,* a light mustache, side burns and light brown eyes. (Gottlieb Aff. Ex. A, p. 31 (DD5 #98 and attached handwritten statement)).

4. DERRY DANIELS IDENTIFIED AS THE "DARK-SKINNED MALE BLACK"

On January 28, 1998, one day after the homicide, Phillip Jones was present at the 28th Precinct for the purpose of viewing photo books in an effort to identify the perpetrators. (Gottlieb Aff. Ex. A, p. 12 (DD5 #74)). Upon viewing the tenth book shown to him, Mr. Jones identified a photo of an individual named Derry Daniels. Upon seeing the photograph of Daniels, Mr. Jones stated, "I'm telling you that's him. Check him for a bullet hole." (Gottlieb Aff. Ex. A, p. 14 (DD5 #75)). A criminal records check revealed that Daniels had 14 prior arrests and 12 convictions dating back to 1984 which included arrests for drugs, assault and robbery. He also had an open warrant for a drug charge on March 19, 1997. Most significantly, he had been arrested on April 6, 1990 within the confines of the 28th Precinct for a robbery with a gun at a policy location. (Gottlieb Aff. Ex. D (Undated Police Memo)).

The next day, January 29, 1998, at 12:20 a.m., detectives went to the home of Juanita Daniels, the mother of Derry Daniels, and placed Derry Daniels under arrest for murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree. (Gottlieb Aff. Ex. A, p. 14 (DD5 #75), p. 35 (DD5 #111)). At 4:38 p.m. on that same day, Derry Daniels was interviewed at the 28th Precinct. Daniels denied involvement in the robbery and homicide and stated that he was in his mother's apartment at the time of the shooting. (Gottlieb Aff. Ex. A, p. 21 (DD5 #90)). After being confronted with his brother's statement to the police that Derry was not home during the time in question, Daniels stated that he did not want to answer any more questions. (Gottlieb Aff. Ex. A, p. 21 (DD5 #90)). At no time during his interrogation did Derry Daniels mention the name Jon-Adrian Velazquez.

Daniels was subsequently identified in a lineup and indicted for Murder in the Second Degree, Attempted Murder in the Second Degree, two counts of Robbery in the First Degree and

Burglary in the Second Degree. On September 30, 1999 – over eighteen months after he was arrested – Daniels pled guilty to a single count of Robbery in the Second Degree in satisfaction of the indictment and was sentenced to twelve years of incarceration as a predicate felon.

During Derry Daniels' allocution, he was asked the following questions by the Court:

Q: Can you tell us what was your role and what was Mr. Velazquez's role?

A: My role, I was duct taping.

Q: What was Mr. Velazquez doing?

A: His role was the gunman.

The Assistant District Attorney then asked:

Q: And you two had agreed to this plan together; is that correct?

To which Derry Daniels responded:

A: Yes.

(Gottlieb Aff. Ex. F (Derry Daniels Plea Transcript)).

This was the first and only time Daniels identified Jon-Adrian Velazquez as his accomplice. Curiously, but also significantly, **the People did not call Derry Daniels as a witness at Mr. Velazquez's trial.**

5. AUGUSTUS BROWN IDENTIFIES JON-ADRIAN VELAZQUEZ

On January 30, 1998, the police interviewed Augustus Brown. That same night, the police brought him to the CATCH unit to view photographs of individuals who previously had been arrested. After viewing hundreds of photographs over the course of many hours, Augustus Brown selected a photograph of Jon-Adrian Velazquez.[5] This was the first time that Augustus

[5] Jon-Adrian's photograph was in the CATCH photos as a result of an arrest on April 9, 1997 within the confines of the 17th Precinct for Criminal Possession of a

Brown mentioned that he recognized Mr. Velazquez from the area of 95th Street and Amsterdam Avenue. Augustus Brown told the police that the last time he had seen Jon-Adrian Velazquez was two years prior to the incident. Prior to viewing the CATCH photographs, however, when asked about the perpetrators, Augustus Brown made no mention of having previously seen or having recognized either of the perpetrators. In fact, when initially asked to describe the perpetrators, Brown described the light-skinned individual as being ***black***.

But for Augustus Brown's identification of the CATCH photograph, there was absolutely nothing linking Jon-Adrian Velazquez to this crime.

6. THE PHOTO ARRAY

On January 31, 1998, a photo array was prepared with Jon-Adrian Velazquez's photograph placed in position #5. Detectives Johnson and Moore took the photo array to the home of witness Dorothy Canady and asked her if she recognized anyone in the photo array as one of the perpetrators. Ms. Canady stated that the individuals in positions #1 or #2 appeared to be the person. **She did not identify Jon-Adrian Velazquez**. (*Wade* Hearing Tr. 60).

7. THE LINEUP

Following Augustus Brown's identification of Jon-Adrian's CATCH photograph, the police contacted Jon-Adrian's family members who informed Jon-Adrian that the police wanted to speak with him. On February 2, 1998, Jon-Adrian voluntarily went to the 28th Precinct with his attorney, Susan Walsh, Esq. A number of hours later, Mr. Velazquez was placed in a lineup in the #2 position for the following witnesses to view: (1) Phillip Jones, (2) Robert Jones, (3) Lorenzo Woodford, (4) Joe Scott, (5) Augustus Brown, and (6) Dorothy Canady.

Controlled Substance.

Of the six witnesses who viewed the lineup, three of the witnesses positively identified Mr. Velazquez – Philip Jones, Robert Jones and Augustus Brown (who had already viewed and selected Mr. Velazquez's photograph from the CATCH unit). Lorenzo Woodford initially selected number 3 and then stated maybe number 2, but that he was not positive.[6] Joe Scott identified another individual, number six, stating, "that's him," and Dorothy Canady stated that she did not recognize any of the individuals.[7] (Gottlieb Aff. Ex. A, p. 40 (DD5 #119), Ex. G (lineup notes produced by the People in discovery)).

However, based on the positive identification by the three aforementioned witnesses, Mr. Velazquez was charged with the first degree murder of Albert Ward.[8]

Aside from the identification by Phillip and Robert Jones, arising from the selection of Jon-Adrian's photograph by Augustus Brown, there was not one piece of evidence, physical or circumstantial, linking Mr. Velazquez to these crimes.

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6 At trial, Woodford testified that when he was leaving the lineup room Detective LiTrenta asked him if he knew which guy "stuck [him] up." He said that at that time he told LiTrenta that it was the person in position number #2 and not #3 and that he identified #3 because he was afraid to identify #2 because he thought the guy could see him through the glass and might confront him on the street if he was released. Woodford was wearing a ski mask that covered his entire face while viewing the lineup. (Woodford Tr. pp. 975-977, LiTrenta Tr. 1162).

7 On February 13, 1998, eleven days after the lineup and more than two weeks after the homicide, Dorothy Canady was brought to the District Attorney's Office and reported that after leaving the lineup she realized that she recognized the individual in position #2 as the light skinned black male perpetrator. (Gottlieb Aff. Ex. A, p. 42 (DD5 #124)).

8 Mr. Velazquez was also charged with Murder in the Second Degree, Attempted Murder in the Second Degree, Robbery in the First Degree and Criminal Use of a Firearm.

B. THE TRIAL

The trial in *People v. Jon-Adrian Velazquez*, Indictment Number 693/98, commenced before the Honorable Jeffrey M. Atlas on October 14, 1999 and lasted approximately two weeks. The People called twenty witnesses which included seven witnesses present at the time of the incident, the victim's sister and twelve police witnesses. The defense called six witnesses, including Mr. Velazquez.

1. THE PEOPLE'S WITNESSES

The first of the seven witnesses present at the scene to be called was Augustus Brown. Mr. Brown did not testify at the trial voluntarily. After ignoring telephone messages from the ADA informing him that he was needed as a witness at trial, Augustus Brown was physically taken into custody in Pennsylvania by New York City detectives and transported to New York pursuant to a material witness order. Brown was held at the Bronx House of Detention for six days before he testified as a People's witness. (Brown Tr. 305-306). It was only after Augustus Brown's direct examination was completed that the People consented to him being permitted to voluntarily return to court the next day.

Augustus Brown testified that on the day of the incident, January 27, 1998, he was 20 years old and was on probation for a conviction of criminal possession of a controlled substance, having pled guilty on November 8, 1995. (Brown Tr. 255, 273). At that point Brown's criminal history included multiple arrests for Criminal Possession of a Controlled Substance in the Third Degree, Criminal Impersonation in the Second Degree, Reckless Endangerment, Resisting Arrest and Rape in the First Degree.[9] Brown testified that he had stopped reporting to his probation officer at some

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[9] In 1998, Brown was arrested and charged with Rape in the 1st Degree and Unlawful Imprisonment in the 2nd Degree. At the trial, Brown testified out of the presence

point in 1996 in violation of his probation conditions and that the detective questioning him about the murder indicated that they were aware of his criminal record. (Brown Tr. 273).

Brown testified that immediately after the shooting at the numbers spot, he fled the scene and went home. (Brown Tr. 328). He did not wait for the police to arrive or make himself available for questioning. Instead, he stayed in his house for two days and then resumed selling drugs on Eighth Avenue. (Brown Tr. 333).

Robert Jones testified that he saw Augustus Brown the day after the shooting and told him, "You better go to the precinct because they're looking for you, you know." Robert Jones testified that Augustus Brown responded, "I can't go to the precinct. I have a warrant." (R. Jones Tr. 587). In stark contrast to Mr. Jones' testimony and despite acknowledging that he had willfully stopped reporting to his probation officer, on cross-examination, Brown denied any knowledge that he was in violation of his probation at the time of the shooting. (Brown Tr. 276).

While selling drugs on Eighth Avenue on January 30, 1998, Brown was approached by plainclothes detectives and taken to the 28th Precinct for questioning regarding the homicide of Albert Ward. (Brown Tr. 333-334). Brown testified that he was questioned by the detectives for hours and that from the beginning of the interrogation he was told that if he did not cooperate he was "going down" or words to that effect. (Brown Tr. 338). At trial, when asked if he threatened Brown in any manner, Detective LiTrenta responded, "I had a conversation with him. How he took it, I don't know." (LiTrenta Tr. 1133).

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of the jury that he was acquitted after a trial on the Rape charge. (Brown Tr. 246-47). Although Brown's NYSIS at the time of the trial did not indicate a disposition as to the rape charge, Judge Atlas refused to permit the defense from eliciting any testimony relating to the rape charge.

Brown initially testified that his first description of the shooter was simply "light-skinned." However, on cross-examination Brown admitted that the first description he gave to Detective Mooney was of a light-skinned "***male black.***" Brown's initial description was recorded by Detective Mooney in both a written statement signed by Brown and DD5 #98. (Brown Tr. 359-360; Gottlieb Aff. Ex. A, p. 31 (DD5 #98)).

Detective LiTrenta, the lead detective on the case, testified that Augustus Brown told him that the shooter was a light-skinned Hispanic male. LiTrenta further testified that he had not read Brown's statement to Detective Mooney describing the gunman as "male black" prior to showing Brown photos of Hispanic males in the CATCH unit. (LiTrenta Tr. 1237).

Detective LiTrenta testified that Augustus Brown looked at approximately 1600 CATCH photos and identified the photograph of Jon-Adrian Velazquez after viewing approximately 800 of those photographs. (LiTrenta Tr. 1240). Detective LiTrenta stated that after selecting Mr. Velazquez's photograph, Augustus Brown stated that he recognized him from a few years earlier in the area of 95th Street and Amsterdam. (LiTrenta Tr. 1241). If this was even said, **this was the first time** Brown indicated to anyone that he recognized Mr. Velazquez from somewhere other than the location of the crime.

Detective Robert Mooney took Brown's initial statement when he was brought to the 28th Precinct. Detective Mooney was called as a defense witness and was asked:

Q: Did he tell you anything at all about the fact that he supposedly had seen that person on a prior occasion?

Detective Mooney answered:

A: No, he didn't.

(Mooney Tr. 1310).

Nevertheless, Brown told the detective that the perpetrator's eyes were light brown and that the shade of Velazquez's eyes in the CATCH photo was not what he remembered of the perpetrator's. (LiTrenta Tr. 1247; Brown Tr. 359-361). Additionally, on cross examination, Brown confirmed that the perpetrator had light brown eyes and when looking at Mr. Velazquez in the courtroom stated, "No, from over here they don't look light." (Brown Tr. 361). In addition to the gunman having light brown eyes, Brown also testified that when he pointed the gun at Brown he was holding it in his right hand with his arm extended. (Brown Tr. 292). Jon-Adrian Velazquez is left-handed.

Detective LiTrenta conceded that once Mr. Velazquez was arrested he did not focus on the initial descriptions given by the witnesses. (LiTrenta Tr. 1245).

The second eye-witness to be called by the People was Dorothy Canady. Ms. Canady's testimony was confused and inconsistent with the prior statements she had given to the police. Initially, she told the police that there were three perpetrators. At trial she testified that she did not think there was a third man, but that when it happened she remembered more clearly, as she had tried to "throw it out" of her mind since then. (Canady Tr. 413). Ms. Canady testified in detail as to a conversation she had with the gunman when he told them to lay on the floor and again when the men asked for their money. Specifically, Ms. Canady testified that when the gunman told them to lay down she said, "I cannot lay on the floor . . . may I sit up and speak to you?" to which the gunman responded, "yes." (Canady Tr. 389). She further testified that in response to their demanding money she stated, "Did you see me come up here with a pocketbook?" and when the gunman responded "no" she said, "My pockets got holes in it. It won't even hold the keys, so how can you ask me for some money?" (Canady Tr. 390). In contrast to Ms. Canady's description of the dialogue between herself and the gunman, another witness, Matty Alex, testified

that Ms. Canady was begging for her life and telling the perpetrators about her children. (Alex Tr. 425). Ms. Alex further testified that the perpetrators told Ms. Canady "I'm not going bother you." (Alex Tr. 425).

When asked to describe the gunman at trial, Ms. Canady said he was light skinned with a round face with thin side-burns and a goatee. (Canady Tr. 391). When asked by the prosecutor if he was black, white, Hispanic or Asian, Ms. Canady said Spanish. (Canady Tr. 398). However, a short time later on cross-examination she conceded that the day after the incident, when asked to describe the gunman, she described him as being a ***black male***. (Canady Tr. 411). When questioned about the second perpetrator that she had described as a male black with a dark complexion she responded, "Yes, that's the other Spanish fellow, dark." (Canady Tr. 412). The second perpetrator, Derry Daniels, is dark-skinned and very clearly a black male.

The most striking testimony of Ms. Canady was when she was asked to identify the shooter in the courtroom. **Ms. Canady identified juror number six as the gunman**. The exchange was as follows:

Q: I'd like you to look around the courtroom and tell us whether you see the fellow who had the gun in court right now?

A: The one with the white shirt on (indicating).

Q: Over here in the jury box?

A: Yes.

Q: I'd like you to look at the whole courtroom –

MR. GOULD: For the record.

THE COURT: Yes, we have to make a record.

Ma'am, you said the one with the white shirt one. Are you looking over here to the right in the jury box in this box, this group of people?

THE WITNESS: Right here.

THE COURT: The fellow with the white shirt, indicating juror number six?

THE WITNESS: Yes.

Q: Ma'am, I'd like you to look around the whole courtroom, Miss Canady. I'd like you to look around the whole courtroom.

(Brief pause.)

Q: And what's your answer?

A: I still say –

Q: Do you believe this person is the person that's –

A: Yes.

(Canady Tr. 294-95).

In addition to failing to identify Mr. Velazquez at trial, Ms. Canady had previously failed to identify him in a photo-array and in a lineup, as mentioned above. However, at trial she testified that at some point in the days after the lineup she remembered what the gunman looked like and that he had been in position two at the lineup. On cross-examination she testified, "Then it come to me. I remember the guy, what he look like . . . The dark fellow." She was then asked, "The dark fellow is the one you recognize?" To which she replied, "Yeah, I remember, but I can't remember the third fellow. I don't think it was a third one. I don't think so. I don't know." (Canady Tr. 416-417). In sum, Ms. Canady's testimony at trial did nothing to inculpate Mr. Velazquez as one of the perpetrators.

The next eyewitness called by the People was Matty Alex. At the time of trial Ms. Alex was sixty-nine years old. Ms. Alex testified that she did not see either of the perpetrators because she had her back to them when she heard "It's a hold up" and she just eased down to the floor. (Alex Tr. 423-424). She testified that she was facing the wall with her eyes closed the entire time and never saw either of the perpetrators. Clearly, Ms. Alex's testimony did nothing to inculpate Mr. Velazquez in the murder of Albert Ward.

Joe Scott was the next eyewitness called by the People. Mr. Scott testified that he was at the numbers spot that day to play a number. He stated that he was present when the person, later identified as the gunman, initially came to the door to play a number. Mr. Scott testified that this man was present at the numbers spot for approximately five minutes and that when the man left he walked out right behind him. (Scott Tr. 433). When asked by the People if he could describe the man for the jury, Mr. Scott replied, "I don't know." (Scott Tr. 433). Mr. Scott was not present when this individual returned to the numbers spot later that afternoon. Mr. Scott also testified that he was asked to view a lineup and that he selected the individual in position six because he "looked like the person that was there." (Scott Tr. 434). Mr. Velazquez was not the individual standing in the sixth position. Mr. Scott's testimony did not inculpate Mr. Velazquez in the murder of Albert Ward.

The next eyewitness to be called by the People was Robert Jones. Robert Jones was working at the numbers spot taking numbers on the day of the homicide and was the person who interacted with the gunman when he first entered to play a number at approximately 12:00 p.m. on January 27, 1998. (R. Jones Tr. 467-474). Robert Jones was also present when the gunman returned with the dark-skinned male and eventually shot Albert Ward. (R. Jones Tr. 477-493). Robert Jones had a few prior arrests, all related to illegal gambling.

When asked if he saw the light-skinned male in the courtroom, Robert Jones stated, "That's him," indicating Mr. Velazquez. (R. Jones Tr. 493). The prosecutor then asked Mr. Jones if he recognized the person who he had picked out of a lineup on February 2, 1998. Mr. Jones began to identify Mr. Velazquez and then asked Mr. Velazquez if he could stand up. (R. Jones Tr. 494). After a brief pause, Mr. Jones stated, "Looks like him, okay." (R. Jones Tr. 495).

Robert Jones acknowledged that he told the police that the shooter was a light skinned ***black male*** when he was initially questioned and that he signed a written statement to that effect. (R. Jones Tr. 606-607, 625, 633-634). He further acknowledged that it was from his description that a sketch was prepared, in his presence, of the shooter. He also testified that he reviewed the sketch when it was complete and that below the sketch was a section that described the individual as a "***male black***" He made no correction to the description. (R. Jones Tr. 613, 636). Additionally, Mr. Jones picked out a CATCH photo of another individual that he stated resembled the shooter. The CATCH photo depicted a black male. (R. Jones Tr. 611-612). Despite these facts, during his testimony at trial Robert Jones repeatedly referred to the shooter as a light-skinned "Puerto Rican." Robert Jones also testified before the Grand Jury. Not once during his Grand Jury testimony did he describe the shooter as Puerto Rican.

Additionally, Detective Mooney, called as a defense witness, testified that when he questioned Robert Jones within a few hours of the crime, Mr. Jones described the gunman as a ***black male*** and at no time described him as being Puerto Rican. (Mooney Tr. P. 1306-1307).

Phillip Jones testified next for the People. Mr. Jones had a history of drug arrests and was admittedly using crack cocaine in January 1998. At the time he testified, Jones was serving a state prison sentence for felony possession of narcotics. In exchange for his testimony, the People provided Mr. Jones with a cooperation agreement wherein the District Attorney's Office agreed to

make it known to the Parole Board, within 30 days of the completion of the trial, that Mr. Jones testified as a witness for the People. Additionally, the People agreed to make arrangements for the expeditious transport of Mr. Jones back to the State Prison to which he was assigned stating that "[t]he parties contemplate that police detectives may be assigned to drive Phillip Jones from New York City to the State Prison." (P. Jones Tr. 733; Gottlieb Aff. Ex. H (P. Jones Cooperation Agreement)).

Phillip Jones testified that in speaking to the police after the shooting he described the shooter as a light skinned ***black male***. (P. Jones Tr. 807). He also testified that the shooter had ***long braided hair***. (P. Jones Tr. 745). Nonetheless, when asked if he had any doubt that Mr. Velazquez was the man with the gun, despite him being a Hispanic male and despite evidence introduced at trial that established that Mr. Velazquez had short, cropped hair at the time of the incident, Phillip Jones replied "[t]here's no doubt about it." (P. Jones Tr. 755, 812). Not surprisingly, Phillip Jones also testified that he was "[a]bsolutely a hundred percent certain" that Al Ward's gun never went off, despite the testimony of his brother Robert Jones and physical evidence to the contrary. (P. Jones Tr. 745-746, 776).

The final eyewitness to testify for the People was Lorenzo Woodford. In the months following the homicide, Mr. Woodford was homeless, unemployed and regularly injecting himself with heroin. He would occasionally check-in with Detective LiTrenta and spoke with LiTrenta on a few occasions about being a cooperating witness on various narcotics cases. (Woodford Tr. 987-1000). One month after the homicide, the People sent a letter to Grand Central Station Partnership for the Homeless ("GCSPH") describing Mr. Woodford as a witness in a homicide case who has become homeless as a result of "victimization." The letter requested that the agency provide him with assistance as he "has also been having financial difficulty and is in desperate

need of emergency services." (Gottlieb Aff. Ex. I (Letter, dated Feb. 19, 1998, from the Distict Attorney's Office to GCSPH)).

As the trial approached, the People had difficultly locating Woodford and eventually found him living in an abandoned building. In exchange for Woodford's agreement to testify at trial, the People provided him with a hotel room, meal money and clothes. (Woodford Tr. 947-948, 984-986, 999-1001, 1057-1058). At trial, Woodford admitted that he used heroin from the time he was twelve years old until approximately one year prior to his testimony, at which time he was fifty-five years old. (Woodford Tr. 949-950). Woodford testified that in January 1998, during the time of the homicide, he was using a couple of bags of heroin a day. (Woodford Tr. 950).

Woodford testified that earlier in the day on January 27, 1998, he was hanging out at a bar, also owned by Albert Ward, playing a poker machine. (Woodford Tr. 954). When he won on the poker machine the barmaid called Albert Ward at the numbers spot and Ward told her to have Woodford come there to pick up his winnings. On his way there he ran into Augustus Brown (known to him as A.J.) from whom he frequently purchased drugs. He told Brown to go with him to the numbers spot so that he could buy drugs from him. (Woodford Tr. 954).

Upon entering the numbers spot, Woodford introduced Augustus Brown to Al Ward and the two of them went into a back room to play the poker machines. (Woodford Tr. 954). While in the back room Woodford stated he heard loud voices yelling, "where's the money" and he and Brown got up to see what was going on. (Woodford Tr. 956). Woodford testified that when he stepped out of the back room, he saw a man with a gun and another man taping everybody's hands up. Woodford stated that one of the men told him to "get over here on the floor" and pointed the gun in his face while the other man, who was dark-skinned, took a twenty-dollar bill out of his hand. (Woodford Tr. 957). Woodford testified that he and Brown got down on their hands and

knees while the dark-skinned man continued to tape the others and the man with the gun went into the back room. (Woodford Tr. 957).

Woodford further testified that the dark-skinned man then began searching Brown and yelled to the other man, "they got a gun." Woodford stated that the gunman then came running out of the back room, shot at someone in back of him and upon seeing the dark-skinned man holding Al Ward and yelling "this one, this one," reached over and shot Ward. (Woodford Tr. 959). Woodford testified that when the gunman shot Al Ward it was "real close," so close that Al Ward's hair caught on fire. (Woodford Tr. 959-960). In response to the question by the prosecutor, "Now, did you see him actually fire the pistol?," Woodford responded "Yes, I did...twice." He stated that he saw him fire one time in the direction of someone diving over the bar, and one time in Al Ward's head. (Woodford Tr. 967). On cross-examination Woodford again testified that he saw the gunman shoot Albert Ward – specifically, his testimony was as follows:

Q: Now, now, sir, you told us what you say happened in that spot. You told us how, and you said this young man you're positive of fired a gun, is that right?

A: Yes.

Q: Did you see him fire the gun?

A: Yes, I did.

(Woodford Tr. 1022).

Woodford further testified that he never saw Al Ward with a gun and that he never heard another gun go off before the gunman fired his gun. (Woodford Tr. 1023-1024). Specifically, Woodford testified as follows:

Q: Did you see Mr. Al with a pistol in his hand?

A: No.

Q: Did you hear a pistol shot go off before you say you saw this young man do anything?

A: No.

(Woodford Tr. 1023).

Woodford's testimony at trial blatantly contradicted his testimony before the grand jury. In the grand jury Woodford testified that the first shot he heard was Al Ward's gun when Al and the dark-skinned man were wrestling over it. Specifically, Woodford testified:

A: As he was searching AJ, when he saw Al with the gun, he step over me, Al stood up, Al had the gun in his hand, he was trying to get it from Al . . .

(Woodford Grand Jury Tr. 45).

Additionally, in the grand jury, Woodford testified that he did not see who fired the shot that hit Al Ward. Woodford's grand jury testimony was as follows:

Q: Mr. Woodford, you have indicated that you heard shots being fired and that Al was shot, did you see and were you watching when the shot was fired that hit Al, did you see who fired that shot?

A: No.

(Woodford Grand Jury Tr. 43).

Immediately following the shooting, Woodford testified that he walked out of the building, went across the street and bought a few bags of heroin, all of which he injected that evening. (Woodford Tr. 1011-1012, 1032). Woodford testified that although he saw police gathering and knew they were investigating the shooting, he did not voluntarily speak with the police. In fact, Woodford did not speak with anyone who had been present at the time of the shooting until Robert

Jones found him three days later, told him the police were looking for him, and forced him to go with him to the police station. (Woodford Tr. 1033-1034).

Woodford could not recall the description of the gunman he initially gave to the police. However, upon having his recollection refreshed with a document, he confirmed that his initial description to the police was of a light-skinned ***black male*** *with two to* ***two and a half inch braids.*** (Woodford Tr. 1042-1043). Woodford stated that Mr. Velazquez looked a lot different at trial than he did on January 27, 1998. (Woodford Tr. 1064).

2. THE DEFENSE CASE

a. <u>The Alibi</u>

On the defense case, evidence was offered of an alibi. Specifically, Mr. Velazquez and his mother both testified that they were on the telephone with one another for seventy-four minutes beginning at 11:44 a.m. and ending at 12:58 p.m. (M. Velazquez Tr. 1393, 1402; J. Velazquez Tr. 1467-1469). Mr. Velazquez stated that he was speaking to his mother from home, specifically, the home of his girlfriend, Iris Cepero, with whom he lived at the time. (J. Velazquez Tr. 1469). Telephone records introduced as Defense Exhibit G at trial confirm as that a seventy-four minute call was made from Ms. Cepero's home phone number in the Bronx to Maria Velazquez's phone number at 11:44 a.m. (Gottlieb Aff. Ex. J (phone records)). Consequently, Mr. Velazquez could not have been present at the numbers spot at 12:00 p.m., the time at which Robert Jones testified the gunman first entered to play a number. (R. Jones Tr. 467).

Both Mr. Velazquez and his mother testified that the reason they remember the telephone call was that Mr. Velazquez's father had died nine months earlier and they were planning to go to the cemetery the next day, January 28, 1998, as it was his father's birthday. (M. Velazquez Tr. 1391-1392; J. Velazquez Tr. 1466-1467). They testified that the reason their telephone

conversation lasted seventy-four minutes was because Mr. Velazquez's mother and his girlfriend, Iris Cepero, had previously had an argument and were not speaking to one another. Mr. Velazquez's conversation with his mother largely consisted of his trying to iron things out between the two women so that they could go to the cemetery together the next day. (M. Velazquez Tr. 1421; J. Velazquez Tr. 1466-1467).

Ms. Cepero testified consistent with Mr. Velazquez and his mother that Mr. Velazquez was home with her that day until approximately 3:30 p.m. when she left the apartment. (Cepero Tr. 1337-1338). However, on cross-examination the People questioned Ms. Cepero regarding a statement she allegedly gave to Detectives Giorgio and LiTrenta in May 1998. Specifically, Ms. Cepero was asked if she told the detectives that she was asleep from approximately 8:00 a.m. the morning of January 27, 1998 until 1:30 in the afternoon. Ms. Cepero denied having made such a statement to the detectives and further testified that when the detectives came to her apartment that day they were banging on her door talking very loudly and said that if she didn't let them in they were going to say her business in the hallway. Ms. Cepero testified that she let them in, but refused to answer their questions on the advice of her lawyer. (Cepero Tr. 1371).

The People called Detectives Giorgio and LiTrenta as a rebuttal witnesses. Detective Giorgio was the District Attorney's investigator and affirmed that he was aware the People had received Alibi Notice and that the purpose of their visit to Ms. Cepero's apartment was to see what she was going to say at trial. Specifically, Detective Giorgio testified:

Q: You and Detective LiTrenta went out would it be fair to say in order to see if you could interview the alibi witness?

A: Yes.

Q: With a view towards gathering evidence that could be used by a prosecutor?

A: To gather evidence. I don't know if it was – used or not used by the prosecutor is an opinion. We were out there to ask him what it was that they were going to testify at trial.

(Giorgio, Tr. 1559). Detective LiTrenta, on the other hand, denied having gone to Ms. Cepero's apartment to interview her as an alibi witness. LiTrenta's testimony was as follows:

Q: Why?

A: Why did I go to speak to Iris?

Q: Why did you go?

A: Yes, that was several months after the incident and after reviewing the case I realized I never spoke to her, so I made a decision to maybe speak to her to see what she had to say.

Q: You made the decision, sir?

A: Yes, I did.

Q: And do you know why the District Attorney's investigator – withdraw that. Did you ask the District Attorney's investigator to be sent with you?

A: I personally asked Detective Giorgio to accompany me. I used to work with Detective Giorgio in the 3-4 Squad before he retired and is now working in the District Attorney's office.

(LiTrenta Tr. 1575-1576).

Detectives Giorgio and LiTrenta testified that they knocked on the door, Ms. Cepero let them in and was very cooperative, answering all of their questions. They stated that she said on January 27, 1998, she was sleeping from approximately 8:00 a.m until 1:30 p.m. and that Mr. Velazquez was home with her and their children the entire time. Although nothing in Ms.

Cepero's alleged statement to the detectives rebutted Mr. Velazquez's alibi, the People characterized it as a "fundamentally inconsistent" alibi in their closing arguments. (People's Summation Tr. 1757).

b. Photograph of Mr. Velazquez Taken Two Weeks Before the Incident

In addition to offering evidence of an alibi, the defense introduced as Defense Exhibit C a photograph of Mr. Velazquez taken two weeks prior to the incident when his infant son was hospitalized shortly after his birth for an infection. In the photograph, set forth below, Mr. Velazquez's hair is cut very short. It would have been impossible for him to have grown hair long enough to braid, as the witnesses described, within two weeks of the date of the photograph.

(Gottlieb Aff. Ex. K (photograph of Jon-Adrian Velazquez)).

3. THE VERDICT AND SENTENCE

After three days of deliberations, despite a complete lack of credible evidence of his involvement in the murder of Albert Ward, after three days of deliberations, he was acquitted of first degree murder, but convicted of second degree murder, robbery and attempted robbery – based solely on eyewitness testimony. On March 7, 2000, Mr. Velazquez was sentenced to an indeterminate sentence of 25 years to life on the murder and concurrent terms of imprisonment on the remaining counts.

Mr. Velazquez appealed his convictions.

C. THE APPEAL AND WRIT OF HABEAS CORPUS

In his brief to the Appellate Division, Mr. Velazquez raised four issues: 1) that the prosecution had presented insufficient evidence to support the verdict; 2) that the verdict was against the weight of the evidence; 3) that the prosecution failed to disprove Mr. Velazquez's alibi beyond a reasonable doubt; and 4) that the court erred in permitting the people to present alibi rebuttal evidence that amounted to nothing more than impeachment of Mr. Velazquez's alibi witness on wholly collateral matters.

The Appellate Division, First Department, affirmed Mr. Velazquez's convictions and sentence. In a decision dated December 16, 2004, the Court held that the verdict was based on legally sufficient evidence and was not against the weight of the evidence. The Court further held that the jury properly rejected defendant's alibi defense and that the trial court properly admitted the People's alibi rebuttal evidence. *See People v. Velazquez*, 13 A.D.3d 184 (1st Dep't 2004).

On December 16, 2004, the New York Court of Appeals denied Mr. Velazquez's leave to appeal. 4 N.Y.3d 857 (2004). He then filed a writ of habeas corpus, *pro se*, in the United States District Court, Southern District of New York which was denied on November 28, 2007. *Velazquez v. Fischer*, 524 F.Supp.2d 443 (S.D.N.Y. 2007).

D. NEWLY DISCOVERED EVIDENCE

Following his conviction, Mr. Velazquez filed a *pro se* motion seeking appointment of appellate counsel. The Center for Appellate Litigation was assigned to represent Mr. Velazquez on appeal. In the course of its representation of Mr. Velazquez, the Center for Appellate Litigation commenced an investigation, beginning with an interview of eyewitness Augustus Brown, the young drug dealer, who after hours of questioning and threats by the police, picked Mr. Velazquez's photograph out of thousands in the CATCH unit. Prior to that identification, the

name Jon-Adrian Velazquez had not been mentioned by anyone nor did it have any significance in the investigation of Albert Ward's murder.

1. AUGUSTUS BROWN'S CONSISTENT RECANTATIONS IN 2004, 2005, 2009 AND 2010

AUGUST 2004

In August 2004 an investigator working for the Center for Appellate Litigation, Joseph Spadafore, interviewed Augustus Brown at Riverview Correctional Facility in Ogdensburg, New York. During the interview Mr. Brown stated that he was coerced by the police to make the statement against Jon-Adrian Velzquez. Mr. Brown told Mr. Spadafore that he could not live with himself knowing that he made this false statement and what he did was wrong. Mr. Brown stated that he no right to testify against Jon-Adrian Velazquez since he did not even know him. Mr. Brown stated that he was only trying to save himself. He said the police were pressuring him to say that he set up the robbery. He said he was repeatedly told "you have to know them! You set it up!" and "We can make you an accomplice to this!" He stated that he would not be able to identify the alleged defendant because he was lying face down on the floor of the club. He told Mr. Spadafore that he was on probation at the time of the homicide and he had pending rape charges. He said the police kept bringing that case up to him and they stated that if he did not cooperate they would charge him with drug possession. He also stated that when he was picked up by the police he was using heroin and had a sixty to seventy dollar a day habit. (*See* Affidavit of Joseph Spadafore ("Spadafore Aff."), attached as Exhibit L to Gottlieb Aff.).

Following Augustus Brown's release from Riverview Correctional Facility, the Center for Appellate Litigation attempted to contact Mr. Brown so that Ms. Zolot could speak with him directly and in more depth. They attempted to reach him multiple times through his parole officer, but were unsuccessful.

MARCH 2005

In March 2005, Ms. Zolot located and interviewed Augustus Brown at Rikers Island where he was incarcerated. Mr. Brown repeatedly told Ms. Zolot that he felt pressured into cooperating because the police threatened to tie him into the murder as an accessory. They tried to suggest that he was there scoping the place out for the perpetrators. He said that he was young and scared and thought he would wind up in prison for a crime he didn't commit if he didn't cooperate. Mr. Brown also said that he chose Mr. Velazquez's photo after hours of viewing many, many pictures in the CATCH unit, and that he just wanted to get out of there. He stated that it passed through his mind that he possibly knew Mr. Velazquez, which he then informed the detectives so that his identification would sound stronger, but he did not believe Mr. Velazquez was the perpetrator whom he did not see for more than a few seconds. Mr. Brown relayed that he did not share his doubts with the District Attorney because he was still afraid they would try and pin the crime on him if he backed away from the identification. He said that he did not want to testify at Mr. Velazquez's trial, however, and only testified pursuant to a material witness order. Mr. Brown told Ms. Zolot that he would be willing to sign an affidavit. (*See* Affidavit of Barbara Zolot ("Zolot Aff."), attached as Exhibit M to Gottlieb Aff.). After meeting with Mr. Brown, Ms. Zolot drafted an affidavit for Mr. Brown's signature containing the information he had provided. She sent the affidavit to Mr. Brown at Rikers Island, along with Mr. Brown's written police statements and his testimony. Ms. Zolot did not hear back from Mr. Brown. Mr. Brown was released from Rikers shortly after his meeting with Ms. Zolot. Ms. Zolot attempted to contact him numerous times through his brother, but was unsuccessful. (Zolot Aff.).

AUGUST 2009

In August, 2009, *Dateline NBC* producer Daniel Slepian and reporter Luke Russert interviewed Augustus Brown on hidden camera while he was incarcerated at Elmira Correctional Facility. Brown told them that the police snatched him up off the street and questioned him at the precinct all day. He said that they threatened to charge him with conspiracy to commit the murder, saying that he set it up for the others to come in and rob the place. Brown stated, "me, having that on my record, young black man, I ain't got no job, I'm not in school or nothin', so that's what came about me pointin' the finger at somebody." Brown said that he doesn't know if he really picked out the right person – he doesn't know if it was him or not and that that is something he's been struggling with. (*See* Gottlieb Aff. Ex. N, at 31:28 minutes (*Dateline NBC* piece, entitled "Conviction" broadcast on February 12, 2012)).

AUGUST 2010

On August 6, 2010, a private investigator, Joseph Dwyer, working on behalf of this law firm interviewed Augustus Brown at the Queensboro Correctional Facility. The sum and substance of that conversation is as follows:

Brown stated that a few days after the incident he was arrested by the police and taken to a police precinct in Manhattan. Brown said that the detectives told him that they knew he was at the scene of the robbery/homicide. He was at the precinct for many hours and was instructed to look at photographs on a computer to see if he could recognize anyone involved in the robbery. Brown said that he looked at hundreds, if not thousands, of photographs. As he was viewing the photographs the police spoke to him as if he had something to do with the robbery. They told him that they knew he was involved in the murder and that if he did not give up the shooter he would go down for the murder.

Brown told the investigator that he was a young kid at the time and was very scared. He said that he felt that he had to select someone from the photographs or he was going to be blamed and arrested for the murder. Brown stated that he picked out the photograph of Jon-Adrian Velazquez because he just wanted to leave the precinct. He said that although Mr. Velazquez looked similar to the shooter, he had only seen the shooter's face for a few seconds and there was no way that he could be sure. Brown said that after he picked Mr. Velazquez's CATCH photo, the police immediately backed off and stopped threatening him and making him feel like a suspect in the murder.

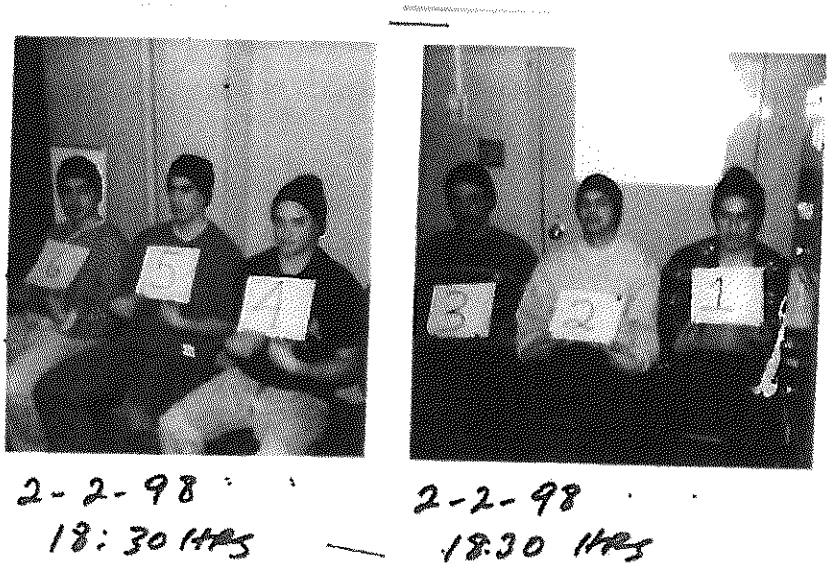
Our investigator requested that Mr. Brown provide us with an affidavit attesting to the above facts. Mr. Brown declined stating that he does not want to be involved to that extent. (Affidavit of Joseph Dwyer ("Dwyer Aff.") attached as Exhibit O to Gottlieb Aff.).

2. AUGUSTUS BROWN STANDS BY RECANTATION TO MANHATTAN DISTRICT ATTORNEY'S CONVICTION INTEGRITY PROGRAM IN 2012

As discussed more fully below, our office presented this case to the Manhattan District Attorney's Conviction Integrity Program in October 2011 requesting that they reinvestigate the case and move to vacate Mr. Velazquez's conviction. On June 29, 2011, we received a letter from ADA Bonnie Sard, Chief of the Conviction Integrity Program stating, ***"...Augustus Brown was interviewed by members of this office. During that interview, Mr. Brown stated in sum and substance that he believed Mr. Velazquez was not the man involved in the robbery and murder of Mr. Ward."*** (Gottlieb Aff. Ex. P (Sard letter, dated June 29, 2011)).

Mr. Brown's recantation is enormously significant. Prior to Mr. Brown's identification of Mr. Velazquez's CATCH photograph, there was not one piece of evidence connecting Mr. Velazquez to the crime. Prior to his photo identification, every eyewitness had described the

shooter to police as **"male black."** Now, with Mr. Brown's selection of Jon-Adrian Velazquez, a Hispanic male, the remaining eyewitnesses were told to view a lineup consisting of Mr. Velazquez and five fillers, **none of whom were "male blacks."** In fact, even though the five fillers in the lineup were described as "Hispanic," three of them appear Caucasian. Even more significantly, as can be seen from the photograph of the lineup below, none of the fillers even remotely resembled a light skinned "black male."



(Gottlieb Aff. Ex. Q (Lineup Photograph)).

One needs only to look at the photograph of the lineup to recognize the unfairness, prejudice and absurdity of this identification procedure. Again, every eyewitness, **all of whom were black**, identified the shooter as a light-skinned "**BLACK** male" when first questioned by the police within hours or days of the incident. However, once Augustus Brown identified Mr. Velazquez, a Hispanic male, as the shooter, the eyewitnesses' initial descriptions were disregarded by the police and they were instructed to view only a lineup that did not include any black males.

Mr. Brown's recantation, therefore, begins to explain the chain of misidentifications of Mr. Velazquez that ultimately lead to his wrongful conviction. By the time the eyewitnesses testified at trial, they too "forgot" about their initial descriptions to the police, and instead adopted the description of the person who had been selected from the lineup. Some of the witnesses even went so far as to describe the shooter for the first time at trial as the "Puerto Rican" guy although not one of the eyewitnesses referred to the shooter as either Hispanic or Puerto Rican in their initial statements to the police. It is curious how each of these witnesses, black people themselves, suddenly changed their description of the gunman from a black man to a "Puerto Rican." Perhaps most telling was when the witness Dorothy Canady referred to the other perpetrator as the "dark-skinned Puerto Rican guy" during her trial testimony – referring to Derry Daniels who is very clearly a black man and in no way could ever be mistaken for Puerto Rican. It is apparent that she, and the other witnesses, were told that Mr. Velazquez was "Puerto Rican" and simply adopted that description and abandoned their initial identifications. Mr. Brown's recantation renders the subsequent identifications of the remaining eyewitnesses who viewed the same lineup, highly suspicious and of very little value.

3. PHILLIP JONES' SWORN RECANTATION

Phillip Jones was interviewed by this firm's investigator on April 21, 2010. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Mr. Jones told the investigator that he has thought about this case every day because he feels that the person he picked from the lineup was **not the shooter**. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Mr. Jones described his feeling that when the detectives questioned him, he felt that they were trying to manipulate him into admitting that he and his brother stole money that had been lying next to Albert Ward after he was shot. (Gottlieb Aff. Ex. O (Dwyer Aff.)).

Phillip Jones stated that a few days after the shooting the police called him, said "we got 'em" and told him he needed to go to the precinct to view a lineup. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Mr. Jones said he felt pressured to pick someone at the lineup and that when he picked Mr. Velazquez out of the lineup, it was because he thought he looked like the shooter, but he was not positive.

Mr. Jones said that when the police picked him up from prison, contrary to proper identification protocol, they assured him that they had the "right guy." (Gottlieb Aff. Ex. O (Dwyer Aff.)). He said that the police promised to talk to the parole board about getting him released early and that he felt he had no choice but to testify against Mr. Velazquez. Mr. Jones stated that when he testified at trial he felt something was wrong. He admitted that he remembers saying to himself, "God, I got the wrong guy." (Gottlieb Aff. Ex. O (Dwyer Aff.)).

Phillip Jones agreed to sign a sworn written statement, which is set forth below:

> **Under the penalties of perjury I declare the following is true and I am under no duress providing this statement. I have asked Private Investigator Joseph P. Dwyer to write this statement and will provide my signature indicating the accuracy of this statement.**
>
> **On 1/27/98 I was present at 2335 8th Ave. NY, NY. I witnessed my friend Albert Ward get shot and killed. On 2/2/98 I viewed a lineup in which I picked out an individual as being the shooter. I picked out this man because I thought the man looked like the shooter but I was not sure. I told the police this was the guy and I was sure, but this was not the truth. I felt pressured because the police were threatening to arrest me and my brother Robert for stealing money that Albert dropped on the floor after being shot. I was arrested sometime after Albert Ward was killed and two (2) detectives came to visit me upstate in Groveland Prison. The detectives told me they got the right guy and would help me get parole. I decided to testify at the trial because I felt pressured by the police. When I saw the deft. in court, I looked in his eyes and knew I had picked out the wrong guy, and the guy on trial I had never seen before. I**

also remember prior to viewing the lineup the police told me the shooter had a twin brother, but they were sure they had the right guy.

(Affidavit of Phillip Jones ("P. Jones Aff."), attached as Ex. R to Gottlieb Aff.).

Mr. Jones' recantation is consistent with the recantation of Augustus Brown.

4. Lorenzo Woodford Believes He Might Have Made a Mistake In Identifying Mr. Velazquez

In May 2010, this law firm's investigator met with Lorenzo Woodford. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Mr. Woodford stated that at the time he identified Mr. Velazquez he was strung out on heroin and cocaine and was extremely angry because the shooter had pointed a gun in his face and stolen his money. (Gottlieb Aff. Ex. O (Dwyer Aff.)). He said that he was blinded by anger and hate then but now he is now older, more open-minded and can think more clearly. He said that there are a lot of factors in his life that would be different if he had to identify a person today. Mr. Woodford concedes that he certainly could have made a mistake in identifying Mr. Velazquez. (Gottlieb Aff. Ex. O (Dwyer Aff.)). In fact, after being shown the photo array that was shown to Dorothy Canady, Mr. Woodford stated that he would have said the shooter looked more like two of the other individuals depicted in that photograph than Mr. Velazquez. (Gottlieb Aff. Ex. O (Dwyer Aff.)).

5. Robert Jones Remembers Thinking That Mr. Velazquez's Brother Looked More Like The Shooter Than Mr. Velazquez

This law firm's investigator also met with Robert Jones. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Mr. Jones stated that prior to the lineup he received a call from a detective informing him that they had the shooter and wanted him to come down to the precinct to look at him in a lineup. Robert Jones conceded that based upon what the police said to him, when he looked at the individuals in the lineup he assumed that one of them was the shooter. He said that when he

viewed the lineup and noticed that he didn't have braids he had a discussion with the cops and they said "he must've cut his hair and gotten rid of the braids." (Gottlieb Aff. Ex. O (Dwyer Aff.)). Robert Jones stated that he asked how they got him and was told that Augustus Brown knew him and told them where he lived.

Robert Jones also remembers that at some point the police told him that Mr. Velazquez's father was a transit cop and that the gun that was used to shoot Albert Ward was Mr. Velazquez's father's.[10] (Gottlieb Aff. Ex. O (Dwyer Aff.)).

Robert Jones said that he was sure he picked the right man from the lineup until he was at the trial and saw Mr. Velazquez's brother in the hallway. He said that when he looked at the brother in the courtroom things started to change in his mind. He said that he thought to himself, "maybe I have the wrong guy." The cops told him that Mr. Velazquez had a twin brother and when he saw the brother in the hallway he immediately thought, "why didn't they grab him?" He distinctly remembers looking at the brother in the audience and thinking, "that's him." Mr. Jones said that when he looked at Mr. Velazquez in the courtroom he looked slimmer and taller than the shooter. He went on to state that if the brother had been placed in the lineup with Mr. Velazquez, he would have picked the brother. (Gottlieb Aff. Ex. O (Dwyer Aff.)).

Mr. Jones told our investigator that the brother should be investigated. In fact, he said it has always been in the back of his mind that Mr. Velazquez could be the wrong man. (Gottlieb Aff. Ex. O (Dwyer Aff.)).

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[10] Mr. Velazquez's father was in fact a retired police officer with Amtrak. The police recovered Mr. Velazquez's father's gun and it was determined that it was not the gun used to shoot Albert Ward.

6. THE POLICE AND DEFENSE COUNSEL FAILED TO FOLLOW-UP ON LEADS THAT AN INDIVIDUAL NAMED "MUSTAFA" WAS THE GUNMAN AND VICTOR GIBSON "ORDERED THE HIT" ON ALBERT WARD

As discussed above, within two days of the homicide, **three independent sources notified the police that an individual named "Mustafa,"** who matched the description given by all the eyewitnesses, **was the person who shot and killed Albert Ward**. Nonetheless, based upon the DD5s turned over to the defense, **the police did nothing of substance to pursue this lead**. Once Augustus Brown selected Mr. Velazquez's photograph in the CATCH unit, it appears that the police ceased any investigation to locate **"Mustafa."**

Our review of the DD5s reflect that on January 28, 1998, the police, in response to the information received from multiple sources that **"MUSTAFA"** was the shooter, did a search, they ran a nickname search for "MUSTA***PH***A." (Gottlieb Aff. Ex. A, p. 15 (DD5 #78)). This search using this spelling resulted in only three names. Presumably, had the police run a search of the name using various other spellings, additional suspects may have been identified.

The defense was provided with copies of the DD5s prior to trial. However, no defense investigation was ever conducted to determine who this individual was or if he was in fact the gunman. David Barrett, the investigator hired by Mr. Velazquez's trial attorneys, states in his affidavit that the work he was asked to do was very limited and was strictly task based. He was not given a copy of the file to review, nor was he asked to review the DD5s. He states that he does not recall being asked to do anything other than locate witnesses and has no recollection of being asked to look for an alternative suspect named Moustapha. (Affidavit of David Barrett ("Barrett Aff.") attached as Exhibit S to Gottlieb Aff.).

Just as shocking, the name **"Mustafa"** was never uttered during Mr. Velazquez's trial – either by the People or by the defense. There was nothing mentioned at all during the trial about

the two individuals, Archie Phillips and Robert Copney, who indicated that they had heard that **"Mustafa"** was the shooter, nor was there any mention of the police notes reflecting that someone had given them information about an individual named **"Mustafa"** who was a light skinned black male with dread locks. In fact, as Mr. Velazquez states in his affidavit, the first he learned of an individual named **"Mustafa"** having been implicated in the murder was just prior to his appeal when he received his file from his attorneys. (Affidavit of Jon-Adrian Velazquez ("Velazquez Aff.") attached as Exhibit T to Gottlieb Aff.).

As mentioned above, the police received an anonymous tip that an individual named Victor Gibson ordered the hit on Albert Ward. The police identified two individuals with the name Victor Gibson, but based on the DD5s, it does not appear that any additional investigation was conducted. Moreover, despite having received this information prior to trial, Mr. Velazquez's attorneys did nothing to investigate this lead.

Through our investigation, we have identified a third Victor Gibson. This individual is a **light-skinned male black with braids** and facial hair who in 2011 was incarcerated having been arrested for Criminal Possession of a Controlled Substance in the 5th Degree (with intent to sell), Criminal Possession of a Weapon in the 2nd Degree (Loaded Firearm), Criminal Possession of a Weapon in the 3rd Degree (Defacing Weapon), Criminal Possession of a Weapon in the 3rd Degree (Previous Conviction) and Criminal Possession of a Weapon in the 4th Degree. (Gottlieb Aff. Ex. U (Webcrims Printout)).

7. MR. VELAZQUEZ HAD NO CONNECTION TO DERRY DANIELS

Aside from the bare bones allocution of the co-defendant, Derry Daniels, to this day, **no connection has ever been made between Daniels and Jon-Adrian Velazquez.** Derry Daniels' initial statements to the police are memorialized in a DD5 and there is no mention of Jon-Adrian

Velazquez. Strikingly, despite having pled guilty prior to Mr. Velazquez's trial, Mr. Daniels was not called as a witness by the People.

In 2003, Claudia Trupp, Director of the Justice First Project at the Center for Appellate Litigation, met with Derry Daniels at Eastern Correctional Facility. She was interested in speaking with Mr. Daniels because his trial lawyer had mentioned during a conversation about the case that Mr. Daniels and Mr. Velazquez did not look like "they belonged together." Mr. Daniels was extremely hostile and did not want to speak with Ms. Trupp at all. He blamed Mr. Velazquez for his predicament and asked Ms. Trupp why Mr. Velazquez never told the prosecutor that he did not know him. Mr. Trupp told him that Mr. Velazquez testified in open court that he did not know him, but Mr. Daniels would not speak with her any further and did not want to be bothered. Ms. Trupp states in her affidavit that in her "20 years as a criminal defense attorney, the meeting stands out as the most hostility [she] has confronted from a witness." (Affidavit of Claudia Trupp (Trupp Aff.) attached as Exhibit V to Gottlieb Aff.).

In March, 2010, our investigator spoke with the co-defendant's brother, Dennis Daniels. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Dennis Daniels stated that his brother did not know Jon-Adrian Velazquez and that his brother pled guilty and implicated Mr. Velazquez for fear of facing a life sentence if convicted at trial. This, combined with the lack of any statements by Derry Daniels implicating Mr. Velazquez and his failure to testify at Mr. Velazquez's trial, speaks volumes. The fact that Daniels and Jon-Adrian Velazquez did not know each other before the day of Albert Ward's murder makes it absurd to think that they would commit, as a team, a planned robbery of the numbers spot, as alleged by the People.

E. MR. VELAZQUEZ'S CASE IS PRESENTED TO MANHATTAN DISTRICT ATTORNEY'S CONVICTION INTEGRITY PROGRAM

On October 5, 2011, based upon the aforementioned newly discovered evidence and the totality of the circumstances surrounding Mr. Valezquez's conviction, we presented a lengthy written submission to the Manhattan District Attorney's Conviction Integrity Program in hopes that they would conduct an independent, re-investigation of the murder of Albert Ward. We were confident that such an investigation would confirm that Mr. Velazquez was wrongfully convicted and compel the District Attorney to move to vacate his conviction. Unfortunately, it became clear over the course of the next year and a half that the Conviction Integrity Program had no intention of conducting an independent evaluation of the case and the new information we had presented, but rather focused solely on protecting the conviction itself. This became readily apparent when we informed the District Attorney's Office that we had received information that an individual named **Moustapha**, a light-skinned **black male** with **braids**, a known drug dealer, who once lived in New York City and now lived in [redacted], had confessed to killing Albert Ward. Not only did they fail to conduct an adequate investigation of this individual, despite our repeated pleas that they do so, but they treated the witnesses who came forward with the information as if they were criminals and had done something wrong by reporting what they had learned.

F. WE RECEIVE UNSOLICITED CALL FROM PERSON WHO SAYS [redacted] KNOWS THE ACTUAL KILLER - A MAN NAMED *MOUSTAPHA* WHO HAS REPEATEDLY CONFESSED TO [redacted] AND OTHERS

On Tuesday, [redacted] after we filed our written submission with the Conviction Integrity Program and prior to its decision, we received an unsolicited call from [redacted] who identified [redacted] as [redacted] from [redacted] [redacted]. In sum and substance, [redacted] told us that [redacted] knew the Moustapha we were looking

for. [redacted] said his name was Moustapha [redacted], that he lived in [redacted], and that approximately two years ago he had confessed to [redacted] that he had shot and killed a retired police officer in New York City. [redacted] also informed us that he repeatedly told [redacted] that someone else was "doing his time." Additionally, [redacted] informed us that in approximately [redacted], he [redacted] and told [redacted] that Mr. Velazquez was the person "doing his time." [redacted] relayed that [redacted] had wanted to call us since that time, but was afraid of the repercussions should Moustapha learn of [redacted] call. [redacted] said that [redacted] could not stop thinking about the fact that an innocent man was sitting in prison and that [redacted] had the knowledge to help him. [redacted] said [redacted] finally felt compelled to come forward and share the information.

After speaking with [redacted] on the telephone, we immediately contacted and spoke to District Attorney Cyrus Vance to inform him of this new information in order to provide his office the opportunity to investigate. Mr. Vance said that someone from his office would be in touch with us shortly. A few hours later, we received a call from ADA Bonnie Sard. We informed her of the details of our call with [redacted] and when asked what we thought should be done, we said that we thought someone from the District Attorney's Office should fly to [redacted] and interview the witness immediately. We were ultimately informed that no one from the District Attorney's Office was available to fly to [redacted] and she suggested, instead, that the witness fly to New York over the coming weekend. Believing that that was ill-advised, as the witness' safety would be jeopardized should Moustapha learn of [redacted] trip to New York, and fearing that we could lose the witness if we waited to meet with [redacted], on Saturday, [redacted] we flew to [redacted] to meet with the witness.

On Sunday, [redacted] we met with [redacted] at a law office in [redacted] with a local private investigator present. During the next few hours, the witness was entirely cooperative as [redacted] provided details of [redacted] conversations with Moustapha, during which he confessed to the Albert Ward murder. [redacted] stated that Moustapha was a known drug dealer who robs people for a living. [redacted] relayed that approximately 1 ½ years earlier he told [redacted] that he shot and killed a retired police officer in New York City. [redacted] said that it was when [redacted] raised questions as to whether or not he was telling the truth that he [redacted] and informed [redacted] that Jon-Adrian Velazquez was the person doing his time for the murder he had committed. Moustapha told [redacted] that he went to the numbers spot to do a robbery with his friend, but that he wound up shooting the cop. He told [redacted] that his friend's name was Shaq and that Shaq ran out of the building after the shooting.

[redacted] also provided us with the names and contact information for a number of other people to whom Moustapha had also confessed to the Ward murder, including [redacted], who [redacted] stated had advised [redacted] to stay out of it, as Moustapha was a dangerous person. Further, [redacted] provided us with Moustapha's home address and the locations he frequented. [redacted] specifically told us about the clubs where he could be found on different days of the week, and even where he would be found that very evening. The witness told us that [redacted] would cooperate with the District Attorney's Office in an investigation of Moustapha and that [redacted]. [redacted] statements to us were memorialized in an affidavit. (*See* Affidavit of [redacted], dated [redacted] [redacted] Aff.") attached as Exhibit W to Gottlieb Aff.).

Immediately following our conversation, and while still at the law firm's office in [redacted], we called ADA Sard to inform her of our conversation with [redacted],

and that we found [redacted] credible. Ms. Sard asked us why we were calling her and what it is that we wanted her to do. We told her that we wanted her office to investigate this person and that we even had information on where he would be that very night. Ms. Sard stated that we should not be calling her on a Sunday to tell her to investigate the case, and that we knew where to find her during the week. We then stated that we were also concerned for the witness' safety, as there were other individuals with whom [redacted] shared [redacted] intention of meeting with us on that day. Ms. Sard then put us in touch with a D.A. investigator who informed us that they would put [redacted] up at a hotel for the night. We explained that that was ridiculous in light of the fact that [redacted] lived in [redacted] and decided to come up with another plan on our own.

On Monday morning, [redacted], before leaving [redacted] we emailed the witness' affidavit to ADA Sard. On Tuesday, [redacted], at 5:54 p.m., two "business" days after we alerted the District Attorney's Office to the information we had obtained from the witness regarding Moustapha, we received an email from ADA Sard relating only to the "threat issue" and making no mention of the affidavit we had forwarded or the details we had obtained from the witness regarding Moustapha. It was not until we sent an email to ADA Sard voicing our concerns regarding their complete lack of interest in the information we had obtained that we then received an email in response on [redacted], finally requesting that we provide such information. We then met with ADA Sard and ADA Agnifilo and provided the requested information.

On [redacted], despite our repeated requests that the District Attorney send an investigator to [redacted] to meet with the witness and possibly the other individuals to whom Moustapha had confessed, we were informed that the District Attorney's investigators would not

go to [redacted] and insisted that the witness fly to New York to be interviewed at the District Attorney's Office. Accordingly, we spoke with the witness and [redacted] agreed to fly to New York.

The witness flew to New York [redacted] to whom [redacted] provided a cover story as to why [redacted] was visiting New York. Knowing that [redacted] would refuse to accompany [redacted] if [redacted] knew the purpose of [redacted] visit to New York, [redacted] instead told [redacted]. ADA Sard was made aware of this cover story and of [redacted] prior attempt to dissuade [redacted] from coming forward regarding Moustapha's confession.

Despite having previously agreed that we would be present for their first interview of [redacted] ADA Agnifilo unsuccessfully attempted to nullify that agreement. [redacted] was then questioned by ADA Sard in an extremely adversarial, confrontational manner. In fact, her method of questioning upset [redacted] to the point that [redacted] stated during a break that [redacted] was sorry [redacted] travelled to New York because [redacted] felt that ADA Sard did not believe [redacted] and that [redacted] was being treated as if [redacted] had done something wrong. This was relayed to ADA Sard and the investigators. We broke for lunch and when we returned, Ms. Sard stated that their first interview with the witness was over and that I was not permitted to be present for the continuation of the interview that day.

We spoke with the witness the following morning, [redacted], and was informed that ADA Sard and the investigators had gone back to the hotel after they concluded their questioning of [redacted] and had, without warning, confronted [redacted]. [redacted] and [redacted] then informed us that [redacted] had not been truthful when speaking to ADA Sard, stating that Moustapha had never confessed to the Ward murder to [redacted],

because [redacted] was totally shocked by the entire situation, felt extremely intimidated by ADA Sard and the investigators and was not at all mentally prepared to discuss [redacted] knowledge of Moustapha's confessions with law enforcement. [redacted] and [redacted] agreed to meet us in our office that afternoon before their flight back to [redacted].

Immediately upon meeting with [redacted] admitted that Moustapha had in fact confessed to [redacted] 1 ½ years earlier to having shot and killed a New York City Police Officer in a robbery gone wrong. After speaking with [redacted], we immediately sent ADA Sard an email detailing our conversation with [redacted]. ADA Sard's response was "Thank you for letting me know." It was not until a month later that someone from the District Attorney's Office contacted [redacted] and confirmed that Moustapha had in fact confessed to the murder in conversations with [redacted]

Shortly after [redacted] returned to [redacted] trip to New York, [redacted] informed us that Moustapha had contacted [redacted] and inquired as to why [redacted] and [redacted] had traveled to New York. [redacted] stated that [redacted] thought that Moustapha was suspicious of [redacted] because of [redacted] trip to New York. [redacted] also stated that [redacted] heard from others that Moustapha was planning to leave [redacted] and move to [redacted] I immediately relayed this information to the District Attorney's Office, again concerned for [redacted] safety and that both we and the District Attorney's Office would lose Moustapha. Remarkably, no one from the District Attorney's Office or from law enforcement contacted the witness to discuss [redacted] conversation with Moustapha or to inquire as to whether or not [redacted] felt threatened in any way.

By early November it became clear to us that there was no sense of urgency on the part of the District Attorney's Office in investigating this matter, nor did we believe or have any information to indicate that the District Attorney's Office was conducting any meaningful

investigation into Moustapha [redacted]. Our belief was confirmed on April 2, 2013, when we received a letter from ADA Sard containing the decision of the Conviction Integrity Program denying our request that they move to vacate Mr. Velazquez's conviction. Remarkably, of the 15 pages of Ms. Sard's letter, most of which was simply a regurgitation of the background of the case, only two very small paragraphs detail their [redacted] "investigation."

We now bring the instant motion, pursuant to CPL § 440, so that Mr. Velazquez can finally receive the long-awaited justice and freedom he deserves.

ARGUMENT

I. MR. VELAZQUEZ'S CONVICTION SHOULD BE VACATED, PURSUANT TO CPL § 440.10(1)(g), BASED UPON NEWLY DISCOVERED EVIDENCE

CPL § 440.10(1)(g) permits a court to vacate a conviction upon the ground that "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part[.]" No time limitation is prescribed for a motion to vacate judgment under CPL § 440.10. *People v. Tankleff*, 49 A.D.3d 160, 178 (2d Dep't 2007).

In order to provide a basis for a motion to vacate, newly discovered evidence must meet the following requirements:

(1) It must be such as will probably change the result if a new trial is granted;

(2) It must have been discovered since the trial;

(3) It must be such as could have not been discovered before the trial by the exercise of due diligence;

(4) It must be material to the issue;

(5) It must not be cumulative to the former issue; and,

(6) It must not be merely impeaching or contradicting the former evidence.

Tankleff, 49 A.D.3d at 179 (internal citations and quotation marks omitted). In a court's determination of the "impact of evidence unavailable at trial, a court must make its final decision based on the likely cumulative effect of the new evidence had it been presented at trial." *Tankleff*, 49 A.D.3d at 181. The decision whether to grant a motion to vacate based upon newly discovered evidence rests with the sound discretion of the trial court. *People v. Deacon*, 96 A.D.3d 965, 967 (2d Dep't 2012).

Here, the new evidence consists of (1) Recantations of eyewitness Augustus Brown; (2) Recantation of eyewitness Phillip Jones; (3) Lorenzo Woodford's equivocation regarding his identification of Mr. Velazquez; (4) Robert Jones' equivocation regarding his identification of Mr. Velazquez; (5) Evidence that a man named Moustapha living in [redacted] admitted to several individuals that he is the real killer of Albert Ward; and (6) Statements made by the co-defendant's brother, Dennis Daniels, indicating that his brother never met Jon-Adrian Velazquez. Either the recantations or the confession of Moustapha [redacted] standing alone provide a basis to vacate Mr. Velazquez's conviction. However, when considered collectively, in light of the overwhelming absence of evidence against Mr. Velazquez, it becomes clear that a vacutur is the only logical, reasonable and just resolution of this wrongful conviction.

It has been held that reliability of witness recantations can be established

> if certain factors are present, including its inherent believability, the demeanor of the recanting witness, the existence of corroborating evidence, the reasons offered for the recantation of the previous testimony, the relationship between the recanting witness and the defendant, and the importance of facts established at trial as reaffirmed in the recantation.

People v. Deacon, 96 A.D.3d 965, 969 (2d Dep't 2012).

Before addressing the reliability of the witness recantations, however, it is imperative to

recognize and understand the inherent unreliability of eyewitness testimony in the first place, which in this case, was the only trial evidence connecting Mr. Velazquez to the murder of Albert Ward. This country's understanding of this issue has evolved and expanded significantly since Mr. Velazquez was convicted in 1999. It is no longer disputed that eyewitness misidentification is a real and significant problem that has infected the criminal justice system. Indeed, New Jersey's Supreme Court recently found that

> Study after study [has] revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identifications is real. Indeed, **it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.**

New Jersey v. Henderson, 27 A.3d 872, 877-78 (N.J. Aug. 24, 2011) (emphasis added).

Numerous studies published since Mr. Velazquez was wrongfully convicted provide important data regarding the frequency with which misidentifications occur in various settings. Depending on the particular study, the percentage of eyewitness misidentifications range anywhere from 33-50 percent. *See* Report of the Special Master, *New Jersey v. Henderson*, No. A-8-08, at 15-16 (September Term 2008) ("Special Master Report") (*See* Gottlieb Aff. Ex. X).

Furthermore, a compilation of DNA exculpation cases created by the Innocence Project shows that, as of April 29, 2013, 306 wrongfully convicted persons have been exculpated by DNA evidence nationwide and 72% of those convictions involved erroneous eyewitness identification.[11] The fact that Mr. Velazquez was identified by more than one person does not alter the reality of the high risk of misidentifications. Thirty-six percent (36%) of those

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11 *See* Innocence Project, Facts on Post-Conviction DNA Exonerations, *available at* www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php; *see also* Gary L. Wells, *et al.*, A Test of the Simultaneous vs. Sequential Lineup Methods, at 1 (2011), *available at* www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf.

exonerated by DNA evidence were misidentified by more than one eyewitness. *Henderson*, 27 A.3d at 886 (citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 50 (2011)). Similarly, the New York State Bar Association's Task Force on Wrongful Convictions concluded, following an exhaustive study, that erroneous identifications "were responsible for more wrongful convictions than any other single factor." Final Report of the New York State Bar Association's Task Force on Wrongful Convictions, at 44 (April 4, 2009) (finding 68% of 53 wrongful convictions involved misidentification by an eyewitness as contributing factor to wrongful conviction) (Gottlieb Aff. Ex. Y).

Recognizing the systemic and individual harms caused by wrongful convictions, New York Chief Judge Jonathan Lippman convened the New York State Justice Task Force (the "Task Force") on May 1, 2009. The mission of the Task Force, composed of prosecutors, defense counsel, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts and victims' advocates, is to "examine the causes of wrongful convictions and make recommendations for changes to the criminal justice system to safeguard against such convictions in New York State." Homepage of the Task Force, *at* www.nyjusticetaskforce.com. Because eyewitness misidentification is the leading cause of wrongful convictions, the Task Force's first priority was to examine and make recommendations to minimize the grave injustices that result from wrongful convictions based upon such misidentification. The Task Force published these recommendations in February 2011. *See* New York State Justice Task Force, *Recommendations for Improving Eyewitness Identifications*, February 2011, *available at* www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf.

In light of the breadth and depth of scientific studies revealing the inherent unreliability of eyewitness testimony, it has become a common defense strategy to present expert witness

testimony regarding this information. Had Mr. Velazquez been tried today, his case is a prime example of a situation that begs for the inclusion of such expert testimony. Indeed, the Court of Appeals has held that

> where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert, and (4) on a topic beyond the ken of the average juror.

People v. LeGrand, 8 N.Y.3d 449, 452 (2007).

In this case, the evidence shows that in addition to their inherent unreliability, the eyewitness identifications that lead to Mr. Velazquez's conviction were the result of improper, police procedures used both in the photo and lineup processes. Moreover, the credibility of all the eye witnesses at the time of the trial was highly suspect in as much as they were drug dealers, habitual drug users and career criminals and both Phillip Jones and Lorenzo Woodford received significant benefits from the District Attorney's Office in exchange for testifying at trial.

The obvious question is - if these witnesses were unreliable at trial, what makes their recantations or equivocations reliable now? The answer is simple. There was, and still is, not one stitch of evidence linking Mr. Velazquez to this crime. In fact, there was affirmative evidence from three independent sources that the shooter was someone other than Jon-Adrian Velazquez. When the recantations and equivocations are viewed together with the complete and utter absence of evidence against Mr. Velazquez, the recantations and equivocations make much more sense than the identifications and testimony of the witnesses at trial.

A. AUGUSTUS BROWN

For example, Augustus Brown stated during his testimony that he thought he recognized

the gunman from a few years earlier in the area of 95th Street and Amsterdam. (Brown Tr. 211). However, based upon the police reports, including Brown's initial statement to the police, as well as the testimony of Detective Mooney, it is clear that prior to selecting the photograph of Jon-Adrian Velazquez, Brown never mentioned that he might have seen the gunman before. Clearly, if Brown had in fact recognized the gunman from a previous occasion, he would have immediately reported that to the police upon being brought in for questioning. In his recantation to Barbara Zolot, Esq. in March 2005, Brown explained that he said he recognized Jon-Adrian Velazquez simply and solely to make his identification sound stronger so that he could go home. Moreover, just like all of the other eyewitnesses, Brown's initial description of the gunman was a light-skinned **black male**. It is preposterous to think that Brown, being a black man himself, would have mistaken a Hispanic man that he knew from the street for a black man. In light of the complete lack of evidence against Mr. Velazquez, together with the evidence pointing to someone else as the shooter, Augustus Brown's recantation makes much more sense than does his testimony at trial.

Furthermore, Augustus Brown testified at trial that he was questioned by the detectives for hours and that from the beginning of the interrogation he was told that if he didn't cooperate he was "going down" or words to that effect. (Brown Tr. 338). At trial, Detective LiTrenta did not deny having threatened Augustus Brown. When asked specifically if he threatened Brown in any manner, Detective LiTrenta responded, "I had a conversation with him. How he took it, I don't know." (LiTrenta Tr. 1133). Augustus Brown's statements to Mr. Spadafore, Ms. Zolot and Mr. Dwyer that he felt pressured to pick a photograph because the police threatened to tie him to the murder as an accessory if he didn't cooperate certainly rings true when looking back at his and Detective LiTrenta's trial testimony.

Augustus Brown stands nothing to gain by recanting his trial testimony. Yet, he has consistently recanted to at least five separate people – Joseph Spadafore, private investigator, Barbara Zolot, appellate attorney, Daniel Slepian and Luke Russert of Dateline NBC, Joseph Dwyer, private investigator and members of the Manhattan District Attorney's Office – and has asked for nothing in return. In fact, it became clear when our investigator spoke with him that although he firmly stands by his recantations, he would strongly prefer not to be involved to any further extent. This again establishes that he stands nothing at all to gain by recanting his trial testimony, other than a clearer conscience for having made the effort to correct an injustice for which he was in large part responsible.

B. PHILLIP JONES

With respect to Phillip Jones, like Augustus Brown, he also stated during his conversation with our investigator that he felt pressured to pick someone out of the lineup because the police were threatening to arrest him and his brother Robert for stealing money that Albert Ward dropped on the floor after being shot. The fact that two witnesses, independent of one another state that they felt pressured to identify someone certainly adds to the reliability of their recantations.

Additionally, like the other witnesses, Phillip Jones' initial description of the shooter was that he was a light-skinned **black male**, yet at trial he identified Mr. Velazquez, a Hispanic male, as the shooter. His recantation speaks to why he did not hesitate in identifying Mr. Velazquez at trial. As he states in his affidavit, " I was arrested sometime after Albert Ward was killed and two (2) detectives came to visit me upstate in Groveland Prison. ***The detectives told me they got the right guy*** *and would help me get parole.* I decided to testify at the trial because I felt pressured by the police." With the assurance from the police prior to the trial that they had

gotten "the right guy" there was little for Mr. Jones to question or contemplate when testifying, especially knowing he stood to benefit from his cooperation. Again, when viewed together with the facts and circumstances of this case, Phillip Jones' recantation makes much more sense than his testimony at trial.

C. ROBERT JONES

Robert Jones was the first to notify the police of the homicide, running downstairs and flagging a meter cop on the street immediately after the shooting. The very first description of the perpetrators given to the police was of two **black males**. The night of the homicide, Robert Jones gave a statement to the police describing the gunman as a light skinned **black male**. Also that same night, he assisted the police sketch artist in preparing a sketch of the shooter who he again described as a light skinned **black male**. Despite his repeated descriptions of the shooter as a black male immediately following the homicide, at trial Robert Jones repeatedly referred to the shooter as a light-skinned "Puerto Rican." It is perplexing that Robert Jones would not only change his description of the shooter, but also be so specific as to refer to him as "Puerto Rican" rather than Hispanic. His statement to our investigator, Joseph Dwyer, however, sheds light on how his change in the description came to pass.

Specifically, Robert Jones said that the police told him that they had captured the shooter and that he needed to come to the precinct to look at him in a lineup. Mr. Jones conceded that based upon what the police said to him, when he looked at the individuals in the lineup he assumed that one of them was the shooter. He said that when he viewed the lineup and noticed that the person he picked did not have braids, he had a discussion with the cops and they said "he must've cut his hair and gotten rid of the braids." Robert Jones stated that he asked how they got him and was told that Augustus Brown knew him and told them where he lived.

When Mr. Jones viewed the lineup he was not looking for the shooter, but rather, the person that most resembled the shooter, since the police had already confirmed to him that the shooter was one of the six men in the lineup. Consequently, it was no wonder that Robert Jones stated at trial that the gunman was the "Puerto Rican" guy who sat at the defense table. The police had told him so. This flagrant misconduct by the police most certainly contributed to the wrongful conviction of Mr. Velazquez. In light of Mr. Jones clear description of the shooter up until that point and his questions regarding the suspect's lack of braids, it is certainly fair to conclude that Mr. Jones would not have selected Mr. Velazquez in the lineup had he been permitted to view it without the taint of the suggestive comments of the police.

Despite having been assured by the police that Mr. Velazquez was the shooter, Robert Jones told Mr. Dwyer that he started to change his mind when he saw Mr. Velazquez's brother in the courtroom during the trial who he thought looked more like the shooter. He told Mr. Dwyer that he thought to himself, "maybe I have the wrong guy." He said that the cops told him that Mr. Velazquez had a twin brother and when he saw the brother in the hallway he immediately thought, "why didn't they grab him?" He distinctly remembers looking at the brother in the audience and thinking, "that's him." Mr. Jones said that when he looked at Mr. Velazquez in the courtroom he looked slimmer and taller than the shooter. This explains why Mr. Jones requested that Mr. Velazquez stand up when he was asked to identify him at trial. Specifically, the prosecutor asked Mr. Jones if he recognized the person who he had picked out of a lineup on February 2, 1998. Mr. Jones began to identify Mr. Velazquez and then asked Mr. Velazquez if he could stand up. (R. Jones Tr. 494). After a brief pause, Mr. Jones stated, "Looks like him, okay." (R. Jones Tr. 495). Mr. Jones also told Mr. Dwyer that if the brother had been placed in the lineup with Mr. Velazquez, he would have picked the brother.

Robert Jones also relayed to Mr. Dwyer that at some point the police told him that Mr. Velazquez's father was a transit cop and that the gun that was used to shoot Albert Ward was Mr. Velazquez's father's. Mr. Velazquez's father was, in fact, a transit officer, but his service revolver had been returned to the department upon his father's death, long before the homicide. The police repeatedly, improperly and outrageously volunteered information to Mr. Jones with the specific purpose of affecting his identification and ensuring the arrest and conviction of Mr. Velazquez. In light of the clear and flagrant misconduct of the police, Mr. Jones' identification of Mr. Velazquez is not only unreliable, but completely worthless. Moreover, based on Mr. Jones' statements to Mr. Dwyer, reason, logic and common sense tells us that Mr. Jones was not the only witness improperly influenced by the police to identify Mr. Velazquez as the shooter.

D. LORENZO WOODFORD

Unlike Robert Jones, upon running out of the numbers spot, Lorenzo Woodford was not concerned with alerting the police that his friend Albert Ward had just been shot. An admitted heroin addict, he immediately crossed the street and bought heroin, one of a number of bags he used that day. (Woodford Tr. 950, 1009-12). He then watched as the police responded to the scene, but never went back to the spot or alerted the police to what he had witnessed. It was not until three days after the shooting, when Woodford was forcibly brought to the precinct by one of the other witnesses, that he spoke with the police for the first time. (Woodford Tr. 1033). Woodford told the police at that time that he was ordered to get on the floor with a gun pointed to his face and robbed of twenty dollars that he had in his hand. (Woodford Tr. 957). Just like the other witnesses, he described the shooter as a **black man** and thought he might have had **braids**.

In speaking with our investigator in 2010, Woodford in sum and substance characterized himself as an extremely unreliable eyewitness. He admitted to Mr. Dwyer that at the time he

identified Mr. Velazquez he was strung out on heroin and cocaine and was extremely angry because the shooter had pointed a gun in his face and stolen his money. He described himself as being blinded by anger and hate and wanting someone to pay for having robbed him. Mr. Woodford agreed that it was quite possible he made a mistake in identifying Mr. Velazquez. While it should have appeared obvious to the police and the prosecutor in 1998 that Mr. Woodford was anything but a reliable witness, Woodford's statements to Mr. Dwyer in 2010 confirm beyond any doubt that his identification of Mr. Velazquez was worthless and should never have provided a basis for Mr. Velazquez's conviction.

The recantations and equivocations of each of the above witnesses are inherently believable based upon the facts as they existed at the time of the homicide. Their statements today make much more sense than their trial testimony when viewed together with the absence of any evidence against Mr. Velazquez and the circumstances under which each of the witnesses made their initial identification. Their current statements are also corroborative of one another in the similarities in their descriptions of how the police handled the investigation, both in threatening the witnesses to force them to cooperate and in giving the witnesses improper information in order to affect the identification process. None of the witnesses have any connection to Mr. Velazquez, nor do they stand anything to gain by recanting their testimony now. The recantations and equivocations of these witnesses alone provide ample basis to vacate Mr. Velazquez's conviction.

The facts of this case are very similar to those of *People v. Deacon*. In *Deacon*, the defendant had been convicted of several crimes, including two counts of murder, based upon a robbery and murder of a victim in the hallway of an apartment building. 96 A.D.3d 965 (2d Dep't 2012). He moved to vacate his conviction, which was denied by the trial court after a full evidentiary hearing. The Appellate Division reversed after conducting its own review of the

record.

At the defendant's trial, one witness who had seen the fleeing assailant initially had described the fleeing assailant to law enforcement as 19 years old and approximately 5'7" tall. The defendant, in fact, was 34 years old and 6'0" tall at the time of the murder. The eyewitness further testified at trial that she was unable to discern whether the defendant was in fact the person she saw fleeing because she had "barely glimpsed the person, [and] didn't look" because "she was scared." *Id.* at 965-66. In connection with the defendant's motion to vacate his conviction, the eyewitness provided an affidavit in which she recanted her trial testimony and declared unequivocally that the defendant was not the individual she had seen fleeing the scene and that she was untruthful at trial because she was scared of the real assailant. *Id.* at 966. In the subsequent evidentiary hearing, the eyewitness further testified that she had initially informed law enforcement that the defendant was not the assailant, but that she felt pressure from them to provide "vague" testimony at trial and also that they threatened to take her children away if she did not cooperate with them. *Id.* at 966.

In further support of his motion to vacate, the defendant obtained an affidavit of an individual who asserted that another person – the leader of a violent Jamaican gang – had confessed to him that he was the murderer. *Id.* at 966. This individual testified to the same at the evidentiary hearing.

The Second Department held that this evidence was sufficient to grant the motion to vacate. The Court specifically held that the recantation testimony of the eyewitness was reliable because she provided a credible reason why she testified differently at trial (*i.e.*, the fear of the real assailant), the testimony was consistent with other matters in the record, including the original description of the assailant (which is an accurate description of the person who confessed, as

opposed to the defendant), and there was no relationship between the defendant and the eyewitness such that she would have a motive to lie for the defendant. *Id.* at 969.

E. CONFESSION OF MOUSTAPHA [redacted]

Like the witness recantations, the confession of Moustapha [redacted] to two or more witnesses alone is sufficient to warrant the vacatur of Mr. Velazquez's convictions. In *People v. Bellamy*, the defendant had been convicted of murder and moved to vacate based upon new evidence. 84 A.D.3d 1260, 1260 (2d Dep't 2011). At the evidentiary hearing, an informant testified that someone named Ishmael had confessed to committing the murder and even provided an audio recording which he claimed to contain Ishmael's confession. The trial court granted the motion to vacate based upon this testimony. However, in a subsequent hearing at the People's request, the informant retracted his testimony regarding Ishmael's confession and admitted that he had faked the recording. Nonetheless, the trial court re-affirmed its vacatur of the conviction, which was affirmed by the Second Department, finding that "the likely cumulative effect of the newly discovered evidence, including the informant's original statements to investigators and counsel concerning Ishmael's alleged confession, his recantation of those statements, and the testimony concerning the faked confession tape, would have been a verdict more favorable to the defendant." *Id.* at 1262.

Here, two witnesses, independent of one another, informed the NYPD immediately following the homicide that they heard from others on the street that a drug dealer named **"Mustafa"** had shot and killed Albert Ward in the course of a robbery. There was also a note in the police files referring to a call from a confidential informant. The note contained the name **"Mustafa"** describing him as **black male** with a brown/tan complexion with thin sideburns that go around like beard, braided hair, and that he pumps dope on 127 & 8 Ave and is into doing

robberies. The same police note reads "**Shaq** was down with robbery/ ?? at spot, ran from loc – knows shooter." Police records indicated that **"Mustafa"** was a "Primary Target" of the investigation.

The two witnesses from [redacted] whose statements are discussed earlier, describe Moustapha [redacted] as a known drug dealer who robs people for a living. One of the witnesses, [redacted] describes in [redacted] affidavit that approximately two years ago **Moustapha** told [redacted] that he shot and killed a retired cop in New York City and that someone else was doing his time. He told [redacted] that he was supposed to just do a robbery with his friend, but that he wound up shooting the cop. He said his friend ran out of the building after the shooting and that his friend's street name was ***Shaq***. He is a black man with a brown/tan complexion with thin sideburns that go around like a beard and he wears his hair in braids. (*See* Gottlieb Aff. Ex. Z (photograph of Moustapha [redacted]). Undoubtedly, if this information were to be presented to a jury today – even absent the witness recantations - Mr. Velazquez would not be convicted of any of the crimes with which he was charged.

F. Statements Made by Co-Defendant's Brother

As previously discussed, aside from the bare bones plea allocution of the co-defendant, Derry Daniels, no connection was ever made between Mr. Daniels and Jon-Adrian Velazquez, nor was Mr. Daniels called as a witness at Mr. Velazquez's trial. In 2003, Daniels confirmed to attorney Claudia Trupp that he did not know Mr. Velazquez. (Gottlieb Aff. Ex. V (Trupp Aff.)). In March, 2010, Mr. Daniel's brother Dennis was interviewed by our investigator and he too confirmed that his brother had never met Mr. Velazquez. (Gottlieb Aff. Ex. O (Dwyer Aff.)). Both Derry Daniels and his brother were extremely hostile and were under the misimpression that Mr. Velazquez had failed to inform the prosecutor that the two had never met.

Accordingly, based on the foregoing, Mr. Velazquez's convictions must be vacated, or, in the alternative, a hearing must be held with respect to the newly discovered evidence. *See People v. Jenkins*, 84 A.D.3d 1403, 1407 (2d Dep't 2011) (holding error to deny motion to vacate without a hearing where trial eyewitness submitted affidavit recanting his identification of defendant and stated that his identification of defendant was product of pressure from the police).

II. MR. VELAZQUEZ'S CONVICTION SHOULD BE VACATED, PURSUANT TO CPL § 440.10(1)(h), BECAUSE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN VIOLATION OF ARTICLE 1 SECTION 6 OF THE NEW YORK STATE CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Pursuant to CPL § 440.10(1)(h), "[a]t any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . (h) [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." Courts have consistently held that criminal defendants who do not receive the effective assistance of counsel have had their rights violated under the Sixth Amendment to the United States Constitution and Article 1 § 6 of the New York State Constitution. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *People v. Linares*, 2 N.Y.3d 507, 510 (2004); *People v Stultz*, 2 N.Y.3d 277, 279 (2004); *People v Baldi*, 54 N.Y.2d 137, 146 (1981).

Accordingly, a motion pursuant to CPL § 440.10 is the proper avenue to challenge a conviction obtained in violation of a defendant's right to effective representation by counsel.

> Generally, the ineffectiveness of counsel is not demonstrable on the main record . . . . Consequently, in the typical case, it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or postconviction proceeding brought under C.P.L. 440.10.

People v. Brown, 45 N.Y.2d 852, 853-54 (1978).

Here, the failures of Mr. Velazquez's trial attorneys to adequately investigate the case, follow up on leads provided during discovery, consult with Mr. Velazquez regarding the case in any meaningful fashion, and otherwise properly prepare for trial were not placed on the record, and therefore this motion to vacate is the only possible avenue for Mr. Velazquez to challenge his conviction. *See, e.g., People v. Aizikowitch*, 30 Misc. 3d 130A, 2010 N.Y. Misc. LEXIS 6311, *2 (App. Term 2d Dep't 2010) (holding claim of ineffective assistance based upon trial counsel's failure to to investigate was grounded on matters dehors the record and could not be reviewed on direct appeal).

A. MR. VELAZQUEZ DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER NEW YORK LAW

Mr. Velazquez did not receive the effective assistance of counsel under New York law, which offers a "greater protection than the federal test." *People v. Caban*, 5 N.Y.3d 143, 156 (2005). Under New York law, a defendant need not "fully satisfy the prejudice test of *Strickland*." *Id.* at 155 (internal quotation marks and citation omitted). Rather, the inquiry focuses on whether the attorney provided "meaningful representation" in the proceedings. *People v. Benevento*, 91 N.Y.2d 708, 714 (1998). A defendant must "'demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct." *Caban*, 5 N.Y.3d at 153 (quoting *People v. Rivera*, 71 N.Y.2d 705, 709 (1988)). This determination is evaluated in light of the evidence, the law, and the circumstances of each particular case. *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). When a defendant fails to receive the effective assistance of counsel, the quantum of evidence at trial supporting guilt is irrelevant and his conviction must be vacated. *People v. Rodriguez*, 94 A.D.2d 805, 807 (2d Dep't 1983).

The "fundamental" right to effective assistance of counsel means more than a right to

"having a person with a law degree nominally represent defendant upon a trial and ask questions." *Benevento*, 91 N.Y.2d at 711. Meaningful and reasonably competent assistance includes the right to assistance by an attorney who has taken time to review and analyze the law and facts relevant to the defendant and who is familiar with and able to employ basic principles of criminal law and procedure. *People v. Droz*, 39 N.Y. 2d 457, 462 (1976). To provide meaningful representation, an attorney must "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed." *People v. Bennett*, 29 N.Y.2d 462, 466 (1972). "A complete abdication of the duty to investigate, for no strategic reason, renders counsel ineffective." *People v. Reid*, 31 Misc. 3d 712, 717 (Sup. Ct. N.Y. Co. 2011) (citing *People v. Fogle*, 10 A.D.3d 618 (2d Dep't 2004)).

Thus, even though defense counsel may appear to provide meaningful representation ***on the record*** by making proper objections, cross-examining witnesses and submitting motions, it is imperative that Courts also consider what defense counsel did or did not do ***off the record.*** Here, it is clear that Mr. Velazquez was deprived of meaningful representation because of defense counsel's complete failure to mount a thorough and complete investigation of the case. The failure to conduct an investigation in this case cannot in any way be considered a strategic decision.

Mr. Velazquez was charged with the most serious charge possible under the law – first degree murder. Although a defense attorney is obligated to present a vigorous defense on behalf of his client no matter what crime he is charged with, when the crime is murder and the client is facing the possibility of a life sentence in prison, defense counsel must especially ensure that he does everything possible to defend his client. This includes conducting a proper and thorough investigation of the People's witnesses, the crime charged, the client's alleged role in it and any

possible defenses.

From the very beginning, it was clear that Mr. Velazquez's defense was his actual innocence. The ***only*** evidence connecting Mr. Valazquez to the murder of Albert Ward consisted of equivocal eyewitness testimony. There was no forensic or circumstantial evidence implicating Mr. Velazquez. If there was ever a case in which the evidence convicting a defendant was ***not*** overwhelming, this is it.

The two main defenses presented by defense counsel at trial consisted of (1) attacking the credibility of the identifying eyewitnesses, and the suspect conditions surrounding their identification of Mr. Velazquez; and (2) presenting Mr. Velazquez's alibi that he was on the phone with his mother during the day when he was purportedly at the numbers spot playing a number as "Tee."

However, defense counsel utterly failed to investigate and pursue the line of defense that would have, without question, established Mr. Velazquez's innocence – identify the real killer. Despite having materials provided by the People in hand that offered numerous leads to possible suspects, defense counsel instead chose to ignore them. It was incumbent upon defense counsel to follow these leads. They failed Mr. Velazquez who is now paying the price for their failures.

As discussed at length above, within two days after Albert Ward's murder, the police received several tips from independent sources that someone named **"Mustafa"** was the killer. The tips went beyond just providing a name, however, they also provided ***detailed*** information regarding the whereabouts of **"Mustafa"** as well as information that other individuals could identify **"Mustafa;"** information that any investigator could use to conduct an adequate investigation.

For instance, only one day after the murder, Robert Copney informed law enforcement that

he recognized the police sketch as **"Mustafa,"** that **"Mustafa"** frequented the St. Nicholas Projects and the Abraham Lincoln Projects, and that he had personally seen **"Mustafa"** at a numbers spot on the east side and a heroin spot on the west side. (Gottlieb Aff. Ex., p. 18 (DD5 #85), p. 20 (DD5 #86)). This information is important, because it corroborates eyewitness Robert Jones' statement that during his initial conversation with the shooter, the shooter stated that he was from the St. Nicholas Projects and that he frequented a numbers spot on the east side. Moreover, Mr. Copney also informed law enforcement that his friend, Chuck, earlier that day, had told Mr. Copney that he knew who committed the murder at the numbers spot at 2335 8th Avenue. (Gottlieb Aff. Ex. A, p. 18 (DD5 #85), p. 20 (DD5 #86)).

The very next day (only two days after the murder), Archie Phillips, who has no known connection to Mr. Copney, told law enforcement that he overheard people at a smoke shop at 145th Street and 8th Avenue stating that **"Mustafa"** had shot someone at a numbers spot on 125th and 8th Avenue. (Gottlieb Aff. Ex. A, p.23 (DD5 #94)). Moreover, Mr. Phillips also stated that he had regularly seen **"Mustafa"** buying marijuana at that smoke shop; that he had last seen **"Mustafa"** two days before the homicide in front of the smoke shop; that **"Mustafa"** sold blue bags of crack on West 125th, 126th and 127th Streets; and that he believed **"Mustafa"** lived in the St. Nicholas Projects – again corroborating the statements of Mr. Copney and Robert Jones. (Gottlieb Aff., Ex. A, p.23 (DD5 #94)).

In addition, in the discovery provided to defense counsel by the People, there was information that a confidential informant has informed law enforcement that an individual named **"Shaq"** was involved with the robbery, ran from the location and knows the shooter. (Gottlieb Aff., Ex. E (police notes)). There was further notation that **"Shaq"** had been arrested two to three months earlier selling heroin between 127th and 128th Streets. (Gottlieb Aff., Ex. E (police

notes)). Further, based upon a tip from Crimestoppers, an individual reported that a man named Victor Gibson ordered the hit on Albert Ward. (Gottlieb Aff., Ex. A, p. 25 (DD5 #95)). All of this information would have assisted an investigator in pursuing leads.

David Barrett, a licensed private investigator, was retained by Mr. Velazquez's trial counsel in or around 1998 in connection with Mr. Velazquez's case. Mr. Barrett, however, was provided an incomplete picture of the case – he did not receive or review the case file or all of the DD5s, nor does he recall ever being asked to pursue **"Mustapha"** as a possible suspect. Indeed, his role was "very limited and was strictly task based." Mr. Barrett never interviewed Mr. Velazquez to discuss the case. Mr. Velazquez's only interaction with Mr. Barrett was shortly after Mr. Velazquez was arraigned, Mr. Barrett came to court to take photographs of him. (Gottlieb Aff. Ex. S (Barrett Aff.), Ex. T (Velazquez Aff.)).

Despite having specific names, locations and descriptions of possible suspects (*e.g.*, Victor Gibson, Shaq, Mustafa) and possible witnesses (*e.g.*, Archie Phillips, Robert Copney, "Chuck") who could easily have been pursued by an investigator, defense counsel entirely failed to follow these leads either through the investigator they hired or through some other means.

Courts have consistently held that defense counsel who do not properly investigate on behalf of their clients – such as the defense counsel in Mr. Velazquez's case – fail to provide meaningful representation. Indeed, "the failure to investigate is so fundamental to the deprivation of the effective assistance of counsel that it cannot be rationalized away with a post hoc construction of the theory of the defense." *People v. Fogle*, 307 A.D.2d 299, 301 (2d Dep't 2003) (internal citations omitted).

For instance, in *People v. Fogle*, the Appellate Division held that defense counsel was ineffective for failing to investigate the crime scene or pursue additional witnesses which "would

likely have revealed evidence favorable to the defense which could have been utilized at trial." 10 A.D.3d 618, 618-19 (2d Dep't 2004) (internal quotation marks omitted). In adopting and quoting the trial court's factual findings, the Appellate Division further held that "the People did not have an overwhelming case against the defendant and . . . the introduction of any credible source for reasonable doubt as to the defendant's identification as the dark-skinned gunman might have affected the outcome." *Id.* at 619 (alteration in original).

Similarly, in *People v. Reid*, the defendant had been convicted of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree based upon testimony that he was an accomplice to the pickpocketing of an undercover police officer on the subway. 31 Misc. 3d 712, 714 (Sup. Ct. N.Y. Co. 2011). A police officer testified he observed the defendant and two accomplices together on the subway platform at Grand Central Station and then enter a northbound train. *Id.* at 715. The officer further testified that, once upon the train, the defendant and one accomplice positioned themselves to conceal the second accomplice removing a cell phone from the undercover's backpack. *Id.* The three individuals were arrested at the next train station. After he was convicted, the defendant moved to vacate his conviction based upon his trial counsel's failure to investigate.

At the hearing on the motion to vacate, the defendant testified that he had informed his counsel that, in connection with his employment as a daycare provider, he was present at the offices of ACS in lower Manhattan the morning of the alleged theft. *Id.* at 715. After he left ACS, he ran into the two alleged accomplices, who he had not seen in 16 years. *Id.* Contrary to the testimony of the police officer, they boarded the train at a station in lower Manhattan and not at Grand Central. *Id.* at 716. The defendant further testified that he was on his way to a meeting on 125th Street. *Id.*

Despite having this knowledge prior to trial, defense counsel failed to investigate the defendant's claim that he was not on the subway platform at Grand Central. Defense counsel did not contact representatives at ACS to confirm the defendant's visit; did not attempt to confirm his Metrocard usage showing at which station the card was swiped; did not inquire whether there was available surveillance footage from within the subways; and did not reach out to individuals who could confirm he had a meeting at 125th Street. *Id.*

The Court held that these failures deprived the defendant of meaningful representation. *Id.* at 718.

> It behooved counsel [ ] to *consider* bringing forth evidence that would cast doubt on [the police officer's] testimony. This is where defendant's lawyer failed. Counsel had a duty to search for evidence potentially favorable to the defense which could have been utilized at trial. . . . An adequate investigation would have provided defendant's attorney with enough information to make an informed, deliberate decision about whether such evidence existed and whether to introduce it.

Id. (emphasis in original).

As is evident from the affidavit of Mr. Barrett, the "limited" investigation leading to Mr. Velazquez's trial was rudimentary at best. Solid leads pointing to the identity of the real killer were available and disregarded by trial counsel. Here, as in *Fogle* and *Reid*, counsel could have with minimal effort obtained evidence favorable to the defense, presented it to the jury, and contradicted the eyewitness identification testimony. By failing to pursue this evidence, without any strategic rationale, counsel failed in their obligation to provide the meaningful representation guaranteed by Article 6, § 1 of the New York State Constitution. *See also People v. Green*, 37 A.D.3d 615, 615 (2d Dep't 2007) (affirming vacatur of conviction where trial counsel, "without a reasonable strategic reason, failed to interview or even contact potential witnesses known to counsel prior to trial, including an eyewitness to the crime, who could have offered exculpatory

testimony substantiating the defense of misidentification"); *People v. Maldonado*, 278 A.D.2d 513, 514 (2d Dep't 2000) (vacating conviction and holding that "it is hard to perceive any trial strategy which would justify counsel's failure to interview and/or call witnesses who had exculpatory information which tended to exonerate the defendant and substantiate his defense").

Similarly indicative of their failure to provide Mr. Velazquez with meaningful representation, defense counsel also failed to share these leads with Mr. Velazquez, or discuss the case in any meaningful fashion with him. Indeed, during the entire pendency of the case, including before trial, the only time he met with his counsel was during court appearances, with one exception. Counsel visited Mr. Velazquez in jail the day before it was believed that Mr. Velazquez was to testify. Defense counsel did not apprise Mr. Velazquez regarding the status of his case outside of court appearances. (Gottlieb Aff. Ex. T (Velazquez Aff.)). *See People v. Simmons*, 110 A.D.2d 666, 666 (2d Dep't 1985) (holding counsel ineffective for only meeting with client one time before trial and failing to interview witnesses).

In fact, the very first time that Mr. Velazquez became aware that there were other suspects for the murder of Albert Ward was after he was convicted and sentenced. He obtained his case file from Irving Cohen, Esq.[12] and reviewed the DD5s himself years after his conviction. Defense counsel never shared with Mr. Velazquez the discovery materials – including the DD5s – they received from the People. Had Mr. Velazquez known at the time that there existed other suspects for the murder and that there were other leads to pursue to prove his innocence, he would have immediately directed his attorneys to investigate these leads. (Gottlieb Aff. Ex. T (Velazquez Aff.)). By failing share this information with Mr. Velazquez, trial counsel deprived

12 Mr. Cohen was Mr. Velazquez's initial appellate counsel, but later was replaced by the Center for Appellate Litigation.

Mr. Velazquez of the ability to participate in his defense, to pursue this defense, and, accordingly, deprived him of meaningful representation.

People v. DiPippo is instructive here. 82 A.D.3d 786 (2d Dep't 2011). In *DiPippo*, the defendant had been convicted of the murder and rape of a 12 year old girl. The defendant later learned that his trial counsel had previously represented an individual who was identified as an initial suspect for the murder and rape. Critically, trial counsel never "conduct[ed] even a minimal investigation into [the suspect] by sending an investigator to ascertain [his] possible involvement." *Id.* at 791. In vacating the defendant's conviction for ineffective assistance of counsel based upon a theory of conflict of interest, the Appellate Division specifically noted that it was likely that the defendant would have directed his trial attorney to investigate this suspect.

Moreover, during Mr. Velazquez's trial, defense counsel failed to question law enforcement witnesses regarding their investigation with respect to alternative suspects. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (acknowledging that it is a common defense trial tactic to attack law enforcement's investigation of suspects other than defendant). Here, defense counsel could have easily raised this critical defense strategy merely by pointing out during the examination of law enforcement witnesses that other suspects existed and exploring what, if anything, law enforcement did to pursue those suspects. Defense counsel failed to do this. Accordingly, the jury was left with the impression – even though it was not uttered at trial – that Mr. Velazquez was the only suspect of which law enforcement was aware. Certainly, it would have benefitted Mr. Velazquez's defense to elicit this evidence at trial.

The investigator retained by this law firm, Joseph Dwyer, sought out both Archie Phillips and Robert Copney as part of our post-conviction investigation. Unfortunately, Mr. Dwyer learned that Mr. Copney had passed away. (Gottlieb Aff. Ex. O (Dwyer Aff.)). This is precisely

why it was critical to have conducted this investigation at the time of the murder in 1998. As the Court knows, as time passes, the availability of witnesses becomes problematic. Based upon the DD5, Mr. Copney could have provided a lead to another individual with knowledge of **"Mustafa"** as the real killer – his friend "Chuck." However, because trial counsel failed to pursue any investigation into alternative suspects when it was critical to have done so, this lead has led to a dead end.

Mr. Dwyer, however, was able to locate and speak with Mr. Phillips, who now lives outside of New York. During their conversation, Mr. Phillips confirmed, in sum and substance, what he had conveyed to the police as indicated in the DD5, namely that he had overheard individuals at a smoke shop state that **"Mustapha"** had shot someone at a numbers spot at 125th Street and 8th Avenue – the location where Albert Ward was killed. (Gottlieb Aff. Ex. O (Dwyer Aff.)).

Here, Mr. Velazquez did not receive meaningful representation from his trial attorneys because they failed, without strategic basis, to properly mount an investigation, pursue leads regarding suspects, advise Mr. Velazquez of the existence of these suspects, and present to the jury the existence of these suspects in the context of the police investigation. Accordingly, Mr. Velazquez's trial attorneys failed to provide him with effective assistance of counsel in violation of Article 1, § 6 of the New York State Constitution, and the judgment of conviction must be vacated and the indictment dismissed. In the alternative, a hearing must be held to litigate the issues raised herein.

B. MR. VELAZQUEZ DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER FEDERAL LAW

This Court need not even reach the question of whether Mr. Velazquez was deprived the

effective assistance of counsel under federal law because he clearly did not receive "meaningful representation" as it is defined under New York law. However, even under the federal test, Mr. Velazquez clearly was deprived the effective assistance of counsel.

In *Strickland v. Washington*, the United States Supreme Court set forth a two-part test to determine whether a defendant in a criminal case received the effective assistance of counsel. 466 U.S. 668, 687 (1984). Pursuant to *Strickland*, a defendant must first show that counsel's performance fell below an objective standard of reasonableness rendering the performance deficient. *Strickland*, 466 U.S. at 688. Second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 698.

Strickland itself establishes that by failing to undertake certain investigative tasks, counsel's representation fell below an objective standard of reasonableness. Under *Strickland* counsel has a duty to make reasonable investigation or to make a reasonable decision that particular investigation is unnecessary. *Id.* at 690-91. No attorney could have made a reasonable decision that it was unnecessary to conduct an investigation into other possible suspects for the crimes for which Mr. Velazquez was charged and ultimately convicted – especially when the determination of his guilt or innocence depended solely upon dubious eyewitnesses testimony. And especially because information related to those other possible suspects was provided to defense counsel by the People. Defense counsel should have sent an investigator to speak with Archie Phillips and Robert Copney regarding their knowledge of **"Mustafa"** and his role in the murder of Albert Ward. *See Gersten v. Senkowski*, 299 F.Supp.2d 84 (E.D.N.Y. 2004) (granting habeas corpus petition where defense counsel's failure to conduct "an adequate investigation into

alternative, complementary defenses . . . or to make a reasonable decision that no investigation was necessary . . . fell below the objective standard of reasonableness required by *Strickland*").

Moreover, it cannot be said that trial counsel made a reasonable decision not to seek a way to present evidence of other suspects to the jury. This information was handed to defense counsel on a plate yet trial counsel, without any strategic rationale, failed to ensure that the jury heard that the police had received numerous tips that individuals other than Mr. Velazquez murdered Albert Ward. Certainly, the presentation of this evidence would not have, in any way, undermined the defense case; it would have only served to strengthen it. The decision not to present evidence of other suspects could not be described as "strategic" or "reasonable." Rather, it is demonstrative of defense counsel who did not fulfill their obligations to their client by failing to present the best possible defense at trial.

Trial counsel's failures demonstrably prejudiced Mr. Velazquez. Because counsel failed to present an alternative suspect or suspects (such as Mustapha, Shaq or Victor Gibson) to the jury, the jury was left with the impression that Mr. Velazquez was law enforcement's only suspect. The heart of the People's case was the eyewitness identifications. With the introduction of possible suspects – whose descriptions matched the initial descriptions provided by the eyewitnesses – defense counsel could have questioned law enforcement witnesses regarding the scope of their investigation. The jury would have likely learned that law enforcement did not perform any meaningful follow up on these leads, and ceased all investigative efforts into locating other suspects after Augustus Brown picked Mr. Velazquez's photograph at the CATCH unit. All of this information, if it had been elicited, would have supported the defense.

Moreover, trial counsel's own failures to investigate prejudiced Mr. Velazquez. As described at length above, this case turned on the credibility of the eyewitness identifications of

Mr. Velazquez. Trial counsel deprived him of the best possible defense, without any justification, by failing to pursue leads which could have led to the identification and apprehension of the real killer thereby proving Mr. Velazquez's innocence. At the very least, a minimal defense investigation would have uncovered additional material with which to examine the law enforcement witnesses regarding the police investigation.

Mr. Velazquez was accordingly deprived of the effective assistance of counsel under the Sixth Amendment to the Constitution and his conviction must be vacated, or, in the alternative, a hearing must be ordered to further litigate his claim.

III. MR VELAZQUEZ'S CONVICTION SHOULD BE VACATED, PURSUANT TO CPL § 440.10(1)(h), BECAUSE HE IS FACTUALLY INNOCENT AND HIS CONTINUED INCARCERATION VIOLATES HIS RIGHT TO DUE PROCESS UNDER ARTICLE 1, SECTIONS 5 AND 6 OF THE NEW YORK STATE CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Based upon the evidence that has been presented in support of this motion regarding the facts and circumstances of this case, it is clear that Mr. Velazquez is actually innocent and his conviction must be vacated and the indictment dismissed with prejudice. No jury, if apprised of the facts as they are now known, could – or would – convict Mr. Velazquez.

Although no New York appellate court has expressly determined that a claim of actual innocence is a viable claim pursuant to CPL § 440.10, virtually all of the trial courts which have addressed this question are in agreement that the conviction and incarceration of an innocent person violates the Due Process Clause of the New York State Constitution. *See People v. Wheeler*, 25 Misc. 3d 690 (Sup. Ct. Kings Co. 2009); *People v. Bermudez*, 25 Misc. 3d 1226A (Sup. Ct. N.Y. Co. 2009); *People v. Cole*, 1 Misc. 3d 531 (Sup. Ct. Kings. Co. 2003). These courts have universally required that the defendant demonstrate his actual innocence by clear and

convincing evidence – that is, by showing that no reasonable jury could convict him of the crime. In evaluating a claim of actual innocence, courts are not limited to newly discovered evidence. Rather, they may consider all available evidence, including evidence previously known to the defendant. *See Bermudez*, 25 Misc. 3d at *1 (granting motion to vacate on grounds of actual innocence based on, in part, "prior CPL 330.30 and CPL 440 submissions, prior court decisions, and numerous police reports and witness affidavits").

Here, there is clear and convincing evidence that Mr. Velazquez is actually innocent. The following evidence, which is set forth at length above, supports this finding:

- The multiple recantations and equivocations of the eyewitnesses who testified at trial and identified Mr. Velazquez as the shooter;
- The complete and utter lack of any physical, DNA or circumstantial evidence connecting Mr. Velazquez to the crime;
- The lack of any connection between Mr. Velazquez and his alleged accomplice, Derry Daniels, who did not testify at Mr. Velazquez's trial;
- The initial descriptions of the shooter by eyewitnesses as a **"male black"** with **"braids"** when Mr. Velazquez is clearly a Hispanic male and did not have braids at the time of the murder;
- The suspect circumstances surrounding Augustus Brown's initial identification of Mr. Velazquez;
- The information received by law enforcement that the shooter was **"Mustafa"** and law enforcement's and trial counsel's failure to investigate those leads; and

- **Moustapha** [redacted], an individual who closely resembles the initial descriptions provided to law enforcement by the eyewitnesses shortly after the murder, has confessed on multiple occasions to at least two individuals.

Mr. Velazquez has consistently and repeatedly maintained his innocence. At trial Mr. Velazquez testified in his own defense and asserted his innocence. (Velazquez Tr. 1460-1518). In connection with this motion, Mr. Velazquez again reaffirms his innocence. Mr. Velazquez did not shoot Albert Ward. Mr. Velazquez did not rob or attempt to rob anyone at the numbers spot. Mr. Velazquez does not know, nor has he ever met Derry Daniels, the man with whom the People allege he committed these crimes. (Gottlieb Aff. Ex. T (Velazquez Aff.)).

In addition, on August 1, 2012, Mr. Velazquez submitted to a polygraph examination, during which he was asked the following two questions: (1) Did you shoot Al Ward at the numbers spot on January 27, 1998; and (2) Were you present at the numbers spot on January 27, 1998, when Al Ward was shot. Based upon Mr. Velazquez's responses of "No" to each of these questions, the polygraph examiner's[13] conclusion that these answers were "not indicative of deception." (Gottlieb Aff. Ex. BB (J. Velazquez Polygraph Report)).

Similarly, Mr. Velazquez's mother, Maria Velazquez, submitted to a polygraph examination on July 26, 2012. She testified at the trial with respect to Mr. Velazquez's alibi defense that he was on the phone with her at the time it was alleged he was at the numbers spot. (M. Velazquez Tr. 1413-16). At the polygraph examination, she was asked the following questions: (1) Are you lying about being on the phone with Jay[14] for 74 minutes, from 11:44 am

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13 The polygraph examiner, Frank Lazzara, is a former Special Agent with the FBI and has been in private practice for over seventeen years. (Gottlieb Aff. Ex. AA (Frank Lazzara Resume)).

14 "Jay" is Mr. Velazquez's nickname.

until 12:58 pm on January 27, 1998; and (2) On January 27, 1998, between 11:44 am and 12:58 pm, were you on the phone with anyone other than Jay and your grandson. Ms. Velazquez responded "No" to each of these questions and the polygraph examiner concluded that these answers were not indicative of deception. (Gottlieb Aff. Ex. CC (M. Velazquez Polygraph Report)).

Although we recognize that polygraph evidence is not ordinarily admissible at a criminal trial to establish innocence, the Court of Appeals "has not set forth a rule of blanket exclusion of polygraph evidence," and some courts have allowed its admission on a limited basis. *People v. Kogut*, 10 Misc. 3d 245, 247 (Sup. Ct. Nassau Co. 2005) (polygraph evidence admissible on the limited basis regarding the voluntariness of defendant's confession). The inadmissibility of polygraph evidence at criminal trials is grounded, in part, because of the belief that the jury may be "unduly influenced by the reported test conclusions." *People v. Mondon*, 129 Misc. 2d 13, 15 (Sup. Ct. N.Y. Co. 1985) (ordering prosecutor to turn over to defense polygraph results of prosecution witnesses as part of discovery obligations). Here, there is no jury. We respectfully request that, in its discretion, the Court consider this exculpatory polygraph evidence in its determination of Mr. Velazquez's claim of actual innocence. *See People v. Miller*, 2 Misc. 3d 1006(A), 2004 N.Y. Misc. LEXIS 238, at *9 (Co. Ct. Chemung Co. 2004) (dismissing indictment pursuant to *Clayton* motion, based in part, after consideration of polygraph evidence of defendant).

It is plain that, based on the foregoing clear and convincing evidence, Mr. Velazquez is innocent of the crimes of which he was convicted and his continued incarceration violates his constitutional rights under Article 1, Sections 5 and 6 of the New York State Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, Mr.

Velazquez's conviction must be vacated and the indictment dismissed or a hearing ordered to address his claims.

IV. THE PEOPLE SHOULD DISCLOSE TO DEFENSE ALL *BRADY* MATERIAL AS PART OF THEIR CONTINUING OBLIGATIONS

As discussed above, we presented Mr. Velazquez's case to the District Attorney's Conviction Integrity Program. Representatives from that unit advised us that they conducted their own investigation. Accordingly, to the extent that, in the course of that investigation (or even before), the People uncovered any *Brady* material whatsoever that has not been previously disclosed, Mr. Velazquez respectfully requests that the Court order the People to immediately produce it, and any subsequently obtained *Brady* material, to defense counsel. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("[t]he duty to disclose [exculpatory evidence] is ongoing"); *see also Leka v. Portundo*, 257 F.3d 89, 100 (2d Cir. 2000) ("*Brady* requires disclosure of information that the prosecution acquires during trial itself, or even afterward."); *In re Dabbs v. Vergari*, 149 Misc. 2d 844 (Sup. Ct. Westchester Co. 1990) (granting discovery of exculpatory evidence in the context of a post-conviction motion).

CONCLUSION

We submit that the information set forth in this motion overwhelmingly supports the conclusion that Jon-Adrian Velazquez was wrongfully convicted and that justice cries out for Mr. Velazquez's complete and unequivocal exoneration.

Accordingly, based upon the foregoing, Mr. Velazquez respectfully requests that this Court grant his motion to vacate the judgment against him on the ground of newly discovered evidence (CPL § 440.10(1)(g)), on the ground that trial counsel provided ineffective assistance within the meaning of Article 1, Section 6 of the New York State Constitution and the Sixth

Amendment to the United States Constitution (CPL § 440.10(1)(h)); and on the ground that Mr. Velazquez is actually innocent, and, therefore, his conviction and continued incarceration violate Article 1, §§ 5 and 6 of the New York State Constitution and the Eighth and Fourteenth Amendments to the United States Constitution (CPL § 440.10(h)), together with such other further relief as the Court deems just and proper. In the alternative, Mr. Velazquez respectfully requests a hearing to litigate the claims raised herein. Mr. Velazquez also respectfully requests that the Court order the People to disclose any *Brady* material in their possession as part of their continuing discovery obligations.

Dated: New York, New York
May 1, 2013

Respectfully submitted,

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