MOTION TO VACATE JUDGMENT OF CONVICTION PURSUANT TO CPL §440.10

PEOPLE V. CHRISTOPHER PORCO

Albany County Indictment Number DA848-05

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

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CHRISTOPHER PORCO,
Defendant.

NOTICE OF MOTION TO VACATE JUDGMENT OF CONVICTION PURSUANT TO CPL §440.10 AND FOR DNA TESTING PURSUANT CPL §440.30(1-a)

Albany County Ind. No.: DA848-05

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PLEASE TAKE NOTICE, that upon the annexed Affirmation of Danielle Muscatello, Esq., dated the 3rd day of January, 2023, the Memorandum of Law, and all exhibits assembled in the Appendix being submitted herewith, the defendant, CHRISTOPHER PORCO, will move this Court, located at 6 Lodge Street, Albany, New York 12207, on the 24th day of February, 2023, at 10:00 a.m. in the forenoon, or as soon thereafter as counsel may be heard, for an Order:

(1) vacating his December 12, 2006, judgment of conviction, or, in the alternative, directing that an evidentiary hearing be held pursuant to CPL §440.30(5);

(2) ordering mitochondrial DNA testing of a hair that was removed from the alarm keypad inside the Porco home pursuant to CPL § 440.30(1-a); and

(3) for such other relief the Court may deem just and reasonable under the circumstances.

Dated: January 3, 2023
Garden City, New York

Barket Epstein Kearon
Aldea & LoTurco, LLP

By: _____

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TO: Hon. P. David Soares
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Albany, New York 12207

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Clinton Correctional Facility
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Dannemora, New York 12929

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

THE PEOPLE OF THE STATE OF NEW YORK, -against- CHRISTOPHER PORCO, Defendant.	AFFIRMATION IN SUPPORT OF MOTION TO VACATE JUDGMENT OF CONVICTION PURSUANT TO CPL §440.10 AND FOR DNA TESTING PURSUANT CPL §440.30(1-a) Albany County Ind. No.: DA848-05

I, DANIELLE MUSCATELLO, ESQ., an attorney duly admitted to practice law before the courts of this State, do hereby affirm under the penalty of perjury that the following factual statements are true, except for those stated to be made upon information and belief, which I believe to be true:

1. I am an attorney associated with Barket Epstein Kearon Aldea & LoTurco, LLP, counsel to the Defendant, Christopher Porco (hereinafter "Christopher"), and I am familiar with the factual and procedural history of this case.

2. I make this affirmation in support of a motion to vacate Christopher's conviction pursuant to section 440.10(1) of the Criminal Procedure Law ("CPL") on the grounds that he received ineffective assistance of counsel at trial, that the trial court permitted a grossly unqualified juror to serve on the jury in violation of Christopher's constitutional right to trial by an impartial jury, that police and prosecutors deliberately suppressed material exculpatory evidence in violation of *Brady v. Maryland*[1] and engaged in pervasive misconduct in violation of Christopher's due process rights and his right to be protected against unreasonable searches and seizures, and that Christopher is actually innocent.

[1] 373 U.S. 83 (1963).

3. Specifically, with respect to his ineffective-assistance-of counsel claim, this application establishes that:

> (a) counsel failed to conduct an adequate investigation and review of the disclosed discovery materials, and, as a result, failed to identify and utilize exculpatory and impeachment evidence to demonstrate the impossibility of the prosecution's "timeline" theory of Christopher's guilt;
>
> (b) counsel failed to retain a forensic pathologist to investigate and attempt to independently ascertain Peter Porco's time of death;
>
> (c) counsel failed to interview or call as a potential alibi witness a classmate of Christopher's at the University of Rochester ("UR"), who claimed to have been exchanging instant messages with him at the time prosecutors theorized that he was driving down the New York State Thruway towards Albany to attack his parents;
>
> (d) counsel failed to move to suppress the alarm data evidence that was illegally seized from the Porco home and used by prosecutors to argue that the perpetrator knew the system's master code and had, therefore, been able to disarm the alarm;
>
> (e) counsel failed to challenge the methods by which the government seized Christopher's emails, and the exchanges he had with his parents in the days and weeks leading up to their attack;
>
> (f) counsel elicited inadmissible and damaging hearsay testimony while cross-examining a close friend and co-worker of Peter Porco—namely, testimony that Peter had recently expressed concern that his son was a sociopath;
>
> (g) counsel failed to object to numerous instances of prosecutorial misconduct during the prosecutor's closing argument;
>
> (h) counsel failed to challenge the testimony that Christopher's mitochondrial DNA was deposited on the toll ticket that he used to travel on the New York State Thruway from Rochester to Albany on the ground that the testimony violated the confrontation clause;
>
> (i) counsel further failed to raise the issue of secondary or tertiary transfer to challenge the DNA evidence; and
>
> (j) the cumulative effect of counsel's errors and omissions deprived Christopher of his right to the effective and meaningful assistance of counsel and his due process right to a fair trial.

4. Next, this application establishes that upon receiving a report of potential juror misconduct, the trial court improperly questioned multiple jurors outside the presence of counsel, and then, without making a complete record, permitted a clearly unqualified juror to deliberate on the case through verdict.

5. Further, with regard to Christopher's claim that material evidence used against him at trial was seized in violation of his constitutional rights, this application establishes that the alarm event buffer data from his family's home security system, the email communications between Christopher and his parents, and the wills of Peter and Joan Porco were seized in violation of his right to be free of unreasonable searches and seizures; that all of this evidence was outside the scope of the November 15, 2004 search warrant, which was impermissibly overbroad, yet seized by police and used against him at trial; and that prosecutors also acquired the contents of Christopher's emails from Sprint via an improper *ex parte* subpoena rather than pursuant to a lawfully issued search warrant.

6. Additionally, the government suppressed exculpatory evidence and engaged in pervasive misconduct in violation of Christopher's Due Process rights and his right to be protected against unreasonable searches and seizures, in that:

a. prosecutors failed to disclose certain Lead Sheets to the defense;

b. prosecutors withheld favorable surveillance video evidence, notes related to the interviews of toll collectors Karen Russell and John Fallon, and a toll collector Tour of Duty Report sent to prosecutors by the Thruway Authority;

c. investigators intentionally suppressed exculpatory alibi evidence that had been provided to authorities by one of Christopher's UR classmates;

d. prosecutors withheld their knowledge of Bethlehem Police Detective Anthony Arduini's bias against Christopher from the defense, knowing that Arduini's bias should have precluded him from taking an active role in the investigation

e. investigators searched and seized the alarm system control panel from Christopher's family home without a warrant and then attempted to cover up their illegal conduct by applying for a post-hoc warrant supported by a perjured affidavit; and

f. the prosecutor engaged in a deliberate pattern of misconduct during his summation;

g. and Assistant District Attorney Michael McDermott lied to the court during a pre-trial inquiry into his involvement in Christopher's unconstitutional interrogation and later obtained illegal financial benefits from prosecution witness Joseph Catalano after trial, evidencing an undisclosed *quid pro quo* relationship.

7. And finally, Christopher's conviction must be vacated, or, at minimum, an evidentiary conducted, as there is clear and convincing evidence that he is actually innocent. Specifically, as this application establishes, the prosecution's timeline theory of guilt was false, as the roundtrip prosecutors theorized that Christopher made between Rochester and Albany in his yellow Jeep was impossible given (a) the lack of available refueling points at necessary locations along the timeline and (b) the Jeep's known fuel efficiency while traveling the same theorized route; Christopher's parents were attacked no earlier than 6:30 a.m., making it impossible that he could have perpetrated the attack given that he was on the UR campus at 8:30 a.m.; Christopher was communicating with classmates on the UR campus when prosecutors theorized that he was driving down the Thruway toward Albany; there was an unidentified fingerprint, as well as unidentified DNA at the crime scene, and not a shred of forensic evidence connecting Christopher to the attack; there was no "staged" break-in on the night of the attack as prosecutors argued to the jury; and the testimonies of toll collectors John Fallon and Karen Russell and neighbor Marshall Gokey were unreliable and false.

8. I also make this affirmation in support of an application pursuant to section 440.30(1-a) of the CPL for an Order directing that mitochondrial DNA testing be conducted on the human

hair shaft that members of the New York State Police collected from the surface of the smashed alarm keypad inside of 36 Brockley Drive, which, given the absence of a root, was never subjected to nuclear DNA analysis.

9. This affirmation is based upon a review of the trial and hearing record, New York State Police Reports, Investigative Lead Sheets generated by the Bethlehem Police Department ("BPD"), records of the New York State Thruway Authority and the University of Rochester, handwritten notes from various law enforcement agencies, consultation with experts, interviews conducted pursuant to an independent investigation, and materials obtained from investigative and other agencies through FOIL requests.[2]

10. Trial counsels were provided with a copy of this motion prior to filing and declined to provide an affirmation or affidavit.

11. No previous request has been made for the relief sought herein.

INTRODUCTION

12. On November 4, 2005, after investigating Christopher for almost one full year, the Albany County District Attorney's Office filed an indictment against him charging him with the November 15, 2004 murder of his father, Peter Porco, and the attempted murder of his mother, Joan Porco. Specifically, the People alleged that while Mr. and Mrs. Porco were asleep in their suburban home located at 36 Brockley Drive in Delmar, a small hamlet outside of Albany, New York, Christopher, in his yellow Jeep, drove over 232 miles down the New York State Thruway from the UR, where he was a student at the time, snuck into his parents' house using a key hidden

[2] When Christopher retained the undersigned in February of 2013, Terry Kindlon and Laurie Shanks, Christopher's former attorneys, promptly transferred to counsel, directly, some *forty* boxes of documents, which they represented to be Christopher's *entire* case file. Since that time, the undersigned has examined the case file thoroughly, and bases all representations in this application regarding missing materials -- or materials that were not otherwise disclosed to the defense by prosecutors -- upon that review.

under a flower pot, disarmed the family's alarm system, attacked both of his parents in their bedroom with an axe, and then drove back up the Thruway to Rochester to rest on a couch in a shared space in the campus building where he resided with other students and fraternity brothers.

13. The prosecution's theory of how the crime was committed, however -- unbeknownst to the jury -- was impossible, and, as set forth in this application, demonstrably false. Forensic Pathologist Cyril Wecht analyzed tissue slides from Peter Porco's autopsy and other crime scene evidence and determined that Peter was attacked *no earlier* than 6:30 a.m., which makes it impossible that Christopher could have perpetrated the attack given that he was on the UR campus at 8:30 a.m.; a private investigator has since tested the relevant driving routes in and around the relevant Albany area and verified the absence of any refueling locations, which Christopher would have needed to utilize in order to have completed the roundtrip between Rochester and Albany as prosecutors theorized; Steven Siko, the engineer from Daimler Chrysler, who testified about the mechanical capabilities of Christopher's Jeep, grossly overestimated the vehicle's fuel efficiency to make an otherwise impossible trip seem feasible for jurors; blood spatter expert, Herbert MacDonell, reviewed the crime scene and found no evidence whatsoever that the perpetrator made any effort to clean up inside the Porco home, contradicting the prosecution's explanation to jurors for why there was no forensic evidence linking Christopher or his Jeep to the crime scene—namely, that from his time working at the veterinarian office of John Kearney, Christopher was experienced at cleaning up bloody messes and access to cleaning agents; jurors never learned of the sworn statement of one of Christopher's classmates that Christopher was exchanging instant messages at a time prosecutors told jurors that he was driving down the Thruway toward Albany, or the statement of a fraternity brother who recalled having a conversation with Christopher on campus, again, at a time when Christopher would had to have already been on his way to Albany

if he were guilty; and jurors likewise never learned that it was Bethlehem Police Detective Anthony Arduini -- who hated Christopher and believed immediately that he was guilty -- who secured key inculpatory statements from toll collectors John Fallon and Karen Russell, and from members of Christopher's fraternity.

14. Christopher, in other words, ***did not attack his parents***; he was not even in Albany at the time of the attack. Had these facts been known to jurors and had the impossibility of the prosecution's theory of the crime been exposed, Christopher, who is innocent, would never have been convicted.

FACTUAL AND PROCEDURAL BACKGROUND

Pre-Trial Motions

15. From the outset, the investigation in this case -- massive in both scope and duration -- focused *exclusively* on Christopher, as law enforcement and medical personnel claimed that when BPD Detective Christopher Bowdish asked Mrs. Porco if her son Christopher was responsible for the attack -- as she lay gravely injured in her bed after she and Peter Porco were first discovered -- she nodded and gestured yes. Mrs. Porco, however, who, according to the uncontested trial testimony of Dr. Mary Dombovy, her treating neurologist, never formed *any* memory of the attack or of the hours that followed, wherein she allegedly identified her son as the perpetrator, vigorously maintained her son's innocence throughout the pendency of the case and continues to do so today.

16. Nevertheless, on April 17, 2006, the People made an application to the court seeking permission to present evidence to the jury that Mrs. Porco had identified her son as her attacker by nodding her head when police first discovered her in her home after the attack. By written submission dated April 28, 2006, as well as additional supplementary documentation, defense counsels Terry Kindlon and Laurie Shanks strongly opposed the application on the ground that (1)

the head nod was not an excited utterance and was thus not admissible under that common law hearsay exception, and (2) the admission of police testimony concerning the head nod was a violation of Christopher's confrontation rights under the Sixth Amendment to the United States Constitution.

17. Suppression hearings were conducted in a bifurcated manner on May 16, 17 & 18, 2006, addressing first the voluntariness and constitutionality of Christopher's six-and-a-half-hour videotaped interrogation, which began the evening of November 15, 2004 and lasted until November 16, 2004, and second, the admissibility of Mrs. Porco's "head nod." There was also an additional contention raised by the defense -- which was ultimately rejected -- that the indictment should be dismissed on the ground that the prosecutors who indicted the case, and were set to conduct the trial, had also witnessed -- and, in fact, *facilitated* -- Christopher's unlawful interrogation.[3]

18. On June 13, 2006, due to the intense, localized, continuing, and prejudicial publicity surrounding the case, the Appellate Division granted Christopher's motion for a change of venue and transferred the trial from Albany County to Orange County. Less than two weeks later, on June 26, 2006, the same day jury selection commenced, the trial court ruled that the People would be permitted to elicit testimony about Mrs. Porco's "head nod," reasoning that there would be no confrontation violation since Mrs. Porco was available to testify at trial. The court also ruled that Christopher's entire interrogation -- wherein he adamantly and repeatedly denied having anything

[3] Specifically, counsel moved to disqualify the Albany County District Attorney's Office under DR 5-102 and 22 NYCRR §1200.21, on the ground that both David Rossi and Michael McDermott, the two prosecutors handling the case, were at the BPD stationhouse when investigators questioned Christopher without his attorney, John Polster -- whom investigators deliberately prevented from reaching Christopher -- and that allowing ADAs Rossi and McDermott to prosecute the case would, therefore, violate the witness / advocate rule (Hearing: 161). The People, however, argued that the prosecutors had merely been present at the stationhouse during the interrogation in an advisory capacity, and thus while the court granted counsel the right to call the prosecutors as witnesses at the hearing, it otherwise denied counsel's application to disqualify their Office (Hearing: 169).

to do with his parents' attack but was questioned extensively about his whereabouts during the late-night hours of November 14, 2004 and the early morning hours of November 15, 2004 -- would be suppressed since it was obtained in violation of his Sixth Amendment right to counsel and his Fifth Amendment right to remain silent. At the same time, however, the court rejected Christopher's contention that the court must also hold a hearing to identify and suppress any evidence the People intended to present at trial that was obtained as a result of the unlawful interrogation. Instead, the court simply relied upon the representation of prosecutors that all of the government's evidence was the result of an independent investigation.

The Trial

19. During the course of the trial, the People called 73 witnesses, introduced over 400 exhibits, and called one rebuttal witness, weaving together what purported to be a minute-by-minute accounting of Christopher's whereabouts between approximately 10:30 p.m. on November 14, 2004 and 8:30 a.m. on November 15, 2004. This "timeline" presented a compelling narrative suggestive of Christopher's guilt, painting him as deceitful and narcissistic, but it consisted of no direct evidence, and as explained herein, ***it was completely false***.

20. Further, although Christopher did not testify in his own defense, the prosecution called numerous witnesses for the sole purpose of eliciting statements Christopher made regarding his whereabouts and activities between the evening of November 14, 2004, and the morning of November 15, 2004, and to expose inconsistencies between and among those statements. The People, in other words, were able to both raise and discredit the suggestion that Christopher had an alibi on their direct case, even though he exercised his constitutional right to remain silent and never advanced an alibi defense at trial.

21. The defense presented testimony from ten witnesses, argued that a small town rushed to judgment, and maintained that in focusing exclusively on Christopher, the police failed to pursue leads to alternative potential perpetrators. Further, the defense contended, while Christopher may have recently been in conflict with his parents over issues involving money and academics -- circumstances not uncommon to many college-aged individuals, but which prosecutors claimed motivated him to perpetrate the attack -- he had never displayed any violent tendencies and was incapable of carrying out the vicious acts with which he was charged. Counsel did not, however, make any meaningful attempt to discredit the prosecution's timeline, nor did counsel call -- or consult with in preparation for trial -- an independent forensic pathologist. As a result, the jury never learned that the prosecution's timeline was, in fact, impossible.

22. On August 10, 2006, after a mere six hours of deliberation, the jury found Christopher guilty of murdering his father and attempting to murder his mother.

The 330.30 Motions

23. Prior to sentencing, the defense made two motions pursuant to CPL §330.30(2) to set aside the verdict -- or, alternatively, to conduct a hearing -- on the grounds of improper and prejudicial juror misconduct. In support of the first motion, dated November 9, 2006, the defense cited to the fact that on August 11, 2006, the day after the jury handed down its verdict, the Albany Times Union newspaper published an article stating one of the jurors had used the detailed notes that she took during the trial to assist other jurors during deliberations.

24. Citing *People v. Hues*, 92 N.Y.2d 413 (1998), the defense argued that while juror note-taking is permissible, it is crucial that no juror be influenced by another juror's notes, which are only allowed for the personal use of the note-taker.

25. In the second motion, which was also made on November 9, 2006 -- and in camera *ex parte* due to the sensitive nature of some of the allegations -- counsel claimed that he had been advised by another local attorney, John Aretakis, that one of the jurors had harbored a pre-existing bias against one of Christopher's attorneys, Mr. Kindlon.

26. On December 12, 2006, the court orally denied both motions from the bench and sentenced Christopher to an indeterminate prison term of 25 years to life on the murder count and 25 years' imprisonment on the attempted murder count, to be served consecutively.

The Direct Appeal

27. Trial counsel perfected Christopher's direct appeal on January 27, 2009 and raised five claims on his behalf:

> (1) the trial court erred by allowing Mrs. Porco's head nod into evidence;
>
> (2) the trial court erred by permitting the prosecution to present evidence that Christopher staged a prior uncharged burglary at his own home in November of 2002 and stole two laptop computers from his parents;[4]
>
> (3) the trial court erred by refusing to conduct a hearing to identify and determine whether to exclude certain evidence as the fruit of Christopher's unconstitutional six-and-a-half-hour interrogation;
>
> (4) the conviction should be reversed based on four instances of prosecutorial misconduct -- namely, the prosecutor's question to Detective Bowdish whether it was true that all of Christopher's classmates at UR said Christopher was drunk all the time, the prosecutor's improper reference to the OJ Simpson and Scott Peterson cases, the prosecutor's comment, regarding the staged November 2002 burglary, that Christopher had been lying to his parents for quite a while and "we needn't go as far as back to the burglary in 2002 that he perpetrated on them," a comment made in clear violation of the court's *Molineux* ruling, and the prosecutor's invitation to the jury to speculate that something happened between Christopher and his father on the Saturday before the murder; and
>
> (5) none of these errors were harmless.

[4] Evidence uncovered during the course of the investigation revealed that Christopher had apparently endeavored to establish a business selling computers and other electronic devices over the Internet.

28. One year and two months later, in a Decision dated March 9, 2010, the Appellate Division affirmed Christopher's conviction and found that (1) his right of confrontation was not violated by the admission of the head nod testimony since Joan Porco -- who lacked any memory of the attack -- was available to testify at trial; (2) the trial court erred in admitting the head nod testimony as an excited utterance, but the error was harmless; (3) the evidence of Christopher's prior uncharged crime was properly admitted at trial since the identity of the perpetrator was in issue; (4) the trial court did not err by declining to conduct a hearing to determine whether certain evidence was inadmissible as the fruit of a poisonous tree; and (5) the alleged instances of prosecutorial misconduct did not deprive Christopher of a fair trial.

29. Counsel appealed the Appellate Division's Decision to the New York State Court of Appeals on the ground that the trial court erroneously admitted evidence of his mother's head nod, but by Decision and Order dated October 18, 2011, the Court held that even if the admission of testimony about Mrs. Porco's head nod violated Christopher's right of confrontation, the error was harmless since there was no reasonable possibility that the error affected the jury's verdict.

30. On January 10, 2012, counsel then sought on Christopher's behalf issuance of a *Writ of Certiorari* in the Supreme Court of the United States on the ground that the Court of Appeals erroneously applied the harmless error standard in violation of the Sixth Amendment, but on April 2, 2012, the Supreme Court rejected the petition. On May 21, 2012, the Supreme Court likewise denied Christopher's petition for rehearing.

The *Coram Nobis* Petitions

31. On March 29, 2013, Christopher, through counsel, petitioned the Appellate Division for a writ of error *coram nobis* on the ground that he was denied his right to the effective assistance of conflict-free appellate counsel, and that he should, therefore, be permitted to perfect a *de novo*

appeal with the assistance of an attorney who could fairly assess whether trial counsel's representation was meaningful and effective.

32. By Decision and Order dated September 11, 2013, the Appellate Division summarily denied the petition, and on December 11, 2013, the Court of Appeals denied leave to appeal.

33. On or about November 27, 2013, Christopher petitioned the Appellate Division for a writ of error *coram nobis* a second time, *pro se*, and argued that appellate counsel was also ineffective for failing to argue that trial counsel, by failing to move to suppress certain evidence on Fourth Amendment grounds or to object to the admission of certain hearsay evidence, provided him with ineffective assistance of counsel.

34. On May 14, 2014, the Appellate Division denied this petition as well.

The Present Motion

35. Now, based on an extensive post-conviction case review, and for the reasons set forth in the annexed memorandum of law, together with the affidavits of Christopher and Joan Porco, Investigator Edward Dowd, Forensic Pathologist Cyril Wecht, and Blood Spatter Expert Herbert MacDonell, and the appendix, exhibits, and addenda that are being submitted in support of this application, the defense moves this Court for an Order vacating Christopher's conviction on the grounds that he received ineffective assistance of counsel at trial, that the deliberate suppression of material exculpatory evidence by the prosecution violated his due process right to a fair trial, that evidence was seized and used against him in violation of his right to be protected against unreasonable searches and seizures, and that he is -- as he has always maintained -- actually innocent. In the alternative, the defense moves for an Order directing that an evidentiary hearing be held so that the Court can fully and fairly investigate these claims and determine whether an Order vacating this wrongful conviction must follow.

36. Christopher also moves the Court pursuant to section 440.30(1-a) of the CPL for mitochondrial DNA testing of the hair shaft collected from the alarm keypad inside his family home, as it is undeniable that his parents' attacker had contact with the keypad at or about the time of the commission of the crime, the hair was never subject to DNA analysis, as no root was present, and there exists a reasonable probability that the verdict would have been more favorable to Christopher had the exculpatory nature of this evidence been fully developed for the jury at trial.

WHEREFORE, for the reasons set forth herein, this Court should issue an Order (1) vacating Christopher's judgment of conviction and dismissing the indictment, or, alternatively, if it finds that there are material questions of fact presented, directing that an evidentiary hearing be conducted pursuant to CPL §440.30(5) to determine whether an Order vacating the conviction and dismissing the indictment must follow; and (2) directing that the hair shaft collected from the alarm keypad be subject to mitochondrial DNA testing pursuant to CPL §440.10(1-a).

Dated: January 3, 2023
Garden City, New York

Barket Epstein Kearon
Aldea & LoTurco, LLP

By: 

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

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENT PURSUANT TO CPL §440.10 AND FOR DNA TESTING PURSUANT TO CPL §440.30(1-a)

CHRISTOPHER PORCO,
Defendant.

Albany County Ind. No.: DA848-05

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POINT ONE

CHRISTOPHER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS CONVICTION, THEREFORE, SHOULD BE VACATED PURSUANT TO CPL §440.10(1)(h).

A criminal defendant's right to the effective assistance of counsel is guaranteed by both the federal and state constitutions. *See* U.S. CONST. AMEND VI; N.Y. CONST., ART. I, §6. To prevail on an ineffective-assistance-of-counsel claim under the federal standard, a defendant must show that there is a "reasonable probability" that an attorney's error or errors affected the outcome of the case, *Strickland v. Washington*, 466 U.S. 668 (1984). Under New York's standard, however, a defendant need not make any specific showing of prejudice to establish a deprivation of his constitutional rights. Instead, courts in New York consider the fairness of the trial overall and evaluate whether the defendant -- under the totality of the circumstances of the particular case -- received "meaningful representation." *People v. Turner*, 5 N.Y.3d 476, 479-80 (2005); *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). Under either standard, however, a defendant must establish that his attorney was ineffective and "demonstrate the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct," *People v. Caban*, 5 N.Y.3d 143 (2005), and a defendant can also -- under both the federal and state standards -- establish ineffectiveness

when counsel performs competently in some respects, but not in others. *See, e.g., Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003). *See also People v. Clarke*, 66 A.D.3d 694, 756 (2d Dept. 2009) (reversing attempted murder conviction where cumulative effect of counsel's errors, including failure to cross-examine witnesses or object to irrelevant and prejudicial evidence, deprived defendant of effective assistance); *People v. Lou*, 95 A.D.3d 1035 (2d Dept. 2012) (finding no procedural bar to defendant's mixed ineffective assistance claim based in part on matters appearing on the record and in part on matters outside the record).

Here, a combination of errors, some appearing partly on the record, and some appearing outside of the record, cumulatively deprived Christopher of his right to the effective and meaningful assistance of counsel at trial. Specifically:

> (A) counsel failed to conduct an adequate investigation and review of discovery materials, and therefore failed to identify and utilize exculpatory and impeachment evidence with respect to the prosecution's "timeline" theory of guilt;
>
> (B) counsel failed to retain a forensic pathologist to investigate Peter Porco's time of death;
>
> (C) counsel failed to interview or call a potential alibi witness;
>
> (D) counsel did not move to suppress the alarm data evidence that was seized from the Porco home in violation of Christopher's constitutional rights;
>
> (E) counsel did not challenge the methods by which the government seized his emails;
>
> (F) counsel elicited inadmissible and damaging hearsay testimony while cross-examining a close friend and co-worker of Peter Porco;
>
> (G) counsel failed to object to numerous instances of prosecutorial misconduct during the prosecutor's closing argument;
>
> (H) counsel failed to challenge the prosecution's mitochondrial DNA evidence on the ground that its admission violated the confrontation clause;
>
> (I) counsel failed to raise the issue of secondary or tertiary transfer to challenge the DNA evidence; and

(J) the cumulative effect of counsel's errors and omissions deprived Christopher of his right to the effective and meaningful assistance of counsel and his due process right to a fair trial.

A. Counsel Failed to Conduct an Adequate Investigation and to Identify and Use Exculpatory and Impeachment Evidence to Challenge the Prosecution's "Timeline" Theory of Christopher's Guilt.

The attack on Mr. and Mrs. Porco occurred in Delmar, a suburb of Albany, New York. Christopher, however, was attending college in Rochester, New York more than 230 miles from the crime scene. The prosecution, therefore, had to convince jurors that Christopher was able to complete the round-trip necessary to carry out the attack on his parents during a short and well-defined period of time. To accomplish this, prosecutors at trial pieced together a timeline that purported to account for Christopher's whereabouts from the evening of November 14, 2004 through the morning of November 15, 2004:

1. The video of Christopher's yellow Jeep Wrangler driving on the UR campus at 10:36 p.m.;

2. The testimony of Thruway toll collector John Fallon that he remembered giving out a ticket at Exit 46, located 8.2 miles from UR, at 10:45 p.m. to a young man in a yellow during November around the time of the murder;

3. The testimony of Thruway toll collector Karen Russell that she recalled collecting the above-mentioned ticket at Exit 24, located 9.3 miles from the Porco residence, at 1:51 a.m. from a young man in a yellow Jeep;

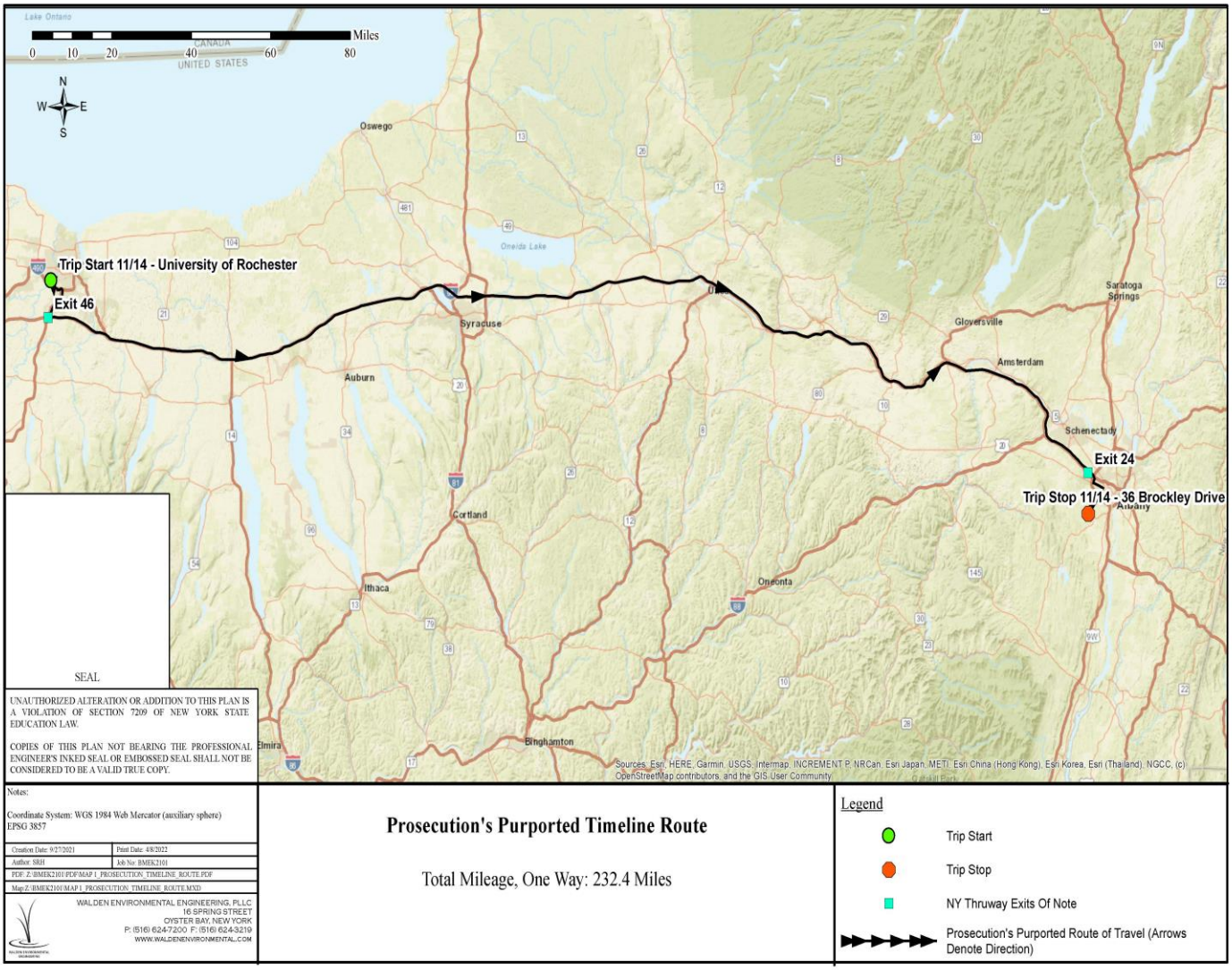
4. The testimony of Time Warner technician Kurt Meyer that the alarm system at the Porco residence was deactivated at 2:14 a.m.;

5. The testimony of Marshall Gokey, a neighbor who lived down the street from the Porcos, and claimed that he remembered seeing a yellow Jeep in the Porco driveway between 3:45 a.m. and 4:00 a.m. on November 15, 2004;

6. The alarm evidence that the phone wire leading to the residence was cut at 4:54 a.m.;

7. Video from UR showing Christopher's yellow Jeep driving on a public roadway in between campus buildings at 8:36 a.m. on November 15, 2004; and

8. The testimony of UR student Rachel Boylan that she observed Christopher jogging several hundred yards from his dorm room at 8:45 a.m. on November 15, 2004.



Prosecutors did not proffer this timeline as one of several possible scenarios; rather, they presented it to the jury as fact. Thus, given the timeline's specificity, the narrative it created was vulnerable to attack. Yet, trial counsel mounted no discernible challenge to the timeline, nor did counsel counter in any meaningful way the central tenet of the prosecution's case: namely that Christopher was (or could have been) present in Albany at the time the attack occurred.

- Counsel failed to recognize the significance of, and thereafter present to the jury, any portion of the vast amount of 'negative' timeline evidence amassed by police that tended to exculpate Christopher by illustrating that notwithstanding the investigation by law enforcement of every available gas station along the theorized timeline route, there was no evidence whatsoever of Christopher or his Jeep; nor did counsel retain an investigator to test drive the possible routes along the timeline;

- Counsel did not utilize available discovery material to impeach the testimony of prosecution witness Steven Siko regarding the Jeep's fuel efficiency and demonstrate that it was impossible for Christopher to have made the theorized trip in his Jeep between Rochester and Albany on the night of the crime;

- Counsel failed to effectively cross-examine NYS Thruway toll booth collectors John Fallon and Karen Russell, whose testimony purported to establish when Christopher allegedly entered and exited the Thruway on his way to Albany, and did not utilize prior inconsistent statements and other impeachment evidence to cast doubt on their dubious recollections;

- Counsel failed to effectively expose how a Bethlehem detective's animus against Christopher biased the investigation, or to challenge the prosecutor's attempt to minimize the key role the detective played in the investigation; and

- Counsel failed to question New York State Police Investigator James Kennedy regarding the government's failure to obtain *any* surveillance footage of Christopher or his Jeep along the timeline route, or to demand or introduce exculpatory surveillance evidence at trial.

Indeed, as detailed below, a basic investigation of the facts would have caused any competent attorney to present the jury with the available evidence that impeached the prosecution's timeline witnesses, undermined prosecutors' claims regarding the gasoline consumption of Christopher's Jeep, and demonstrated to jurors the absence of any possible refueling points near the timeline route, which Christopher would have been *required* to utilize if he were to have made the return trip to Albany as prosecutors theorized. Trial counsel, however, did none of this, and for failing to do so, counsel was ineffective.

While an attorney's performance is necessarily judged on a case-by-case basis, the right to the effective assistance of counsel requires an attorney, in any case, to investigate the law, the

facts, and the issues relevant to the case in order to determine the best course of action to take on behalf of the client. *People v. Oliveras,* 21 N.Y.3d 339 (2013). *See also Greiner v. Wells,* 417 F.3d 305, 320 (2d Cir. 2005) (*quoting Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) ("The duty to investigate is essential to the adversarial testing process '[b]ecause th[e] testing process generally will not function properly unless defense counsel has done some investigation into the People's case and into various defense strategies'"). Pre-trial investigation significantly impacts an attorney's trial strategy, and a defendant's right to effective and competent representation entitles him to have an attorney who "conducts appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial." *Oliveras*, 21 N.Y.3d at 346 (*internal citations omitted*). As such, "[a] failure of defense counsel to investigate or take further action with respect to information disclosed [by the prosecution] may, if sufficiently prejudicial to the defendant's defense or right to a fair trial, constitute ineffective assistance of counsel." *People v. Cyrus*, 48 A.D.3d 150, 157 (1st Dept. 2007) (reversing robbery conviction where counsel was ineffective for failing to properly investigate and prepare case for trial). *See also Garcia v. Portunodo*, 459 F.Supp.2d 267 (2006) (noting that "[defense counsel's] duty was to investigate, not to make do with whatever evidence fell into his lap"); *People v. Reid*, 31 Misc.3d 712 (Sup. Ct. N.Y. Co. 2011) (granting motion to vacate conviction on ineffective-assistance-of-counsel grounds where counsel failed to meet duty to search for evidence potentially favorable to the defense which could have been utilized at trial); *People v. Davis*, 193 A.D.3d 967 (2d Dept. 2021) (reversing denial of 440 motion and vacating conviction on ineffective-assistance-of-counsel grounds where counsel failed to investigate and interview defense witnesses). Here, there was a vast amount of evidence at trial counsel's disposal which established the impossibility of the timeline, but counsel failed to utilize this evidence and,

as a result, permitted prosecutors to knowingly present a false narrative. For this, counsel was ineffective, and Christopher's trial, as a result, was unfair.

1. **Counsel failed to identify and utilize 'negative' timeline evidence that tended to exculpate Christopher; counsel did not retain an investigator to test drive the possible routes along the timeline; and counsel did not demand *Brady* materials that the prosecution had obviously withheld.**

The People's "timeline," as illustrated below in Figure 1, consisted of specific points in time and place between Rochester and Albany where Christopher and his Jeep must have been present in order for the crime to have been committed the way prosecutors theorized.

Figure 1.

10:45 p.m.--1:51 a.m.---------- 2:14 a.m.--3:45 a.m.--4:54 a.m.--5:12 a.m.--8:12 a.m.
(Exit 46) (Exit 24) (alleged fuel purchase) (------36 Brockley Drive------) (Exit 24) (Exit 46)

Yet, despite being on clear notice of the way in which the prosecution intended to prove Christopher's guilt; counsel never retained an investigator to examine the feasibility of the timeline; counsel failed to make specific *Brady*[5] demands of the prosecution; and counsel further failed to identify exculpatory "negative" timeline evidence that was in their possession and to then utilize that evidence at trial. As a result, counsel was unable to demonstrate for the jury "the implausibility of the prosecution's theory of the crime," which certainly would have changed the outcome of the trial. *Thomas v. Kuhlman*, 255 F.Supp.2d 99, 109-110 (E.D.N.Y. 2003) (granting *habeas* petition on ineffective assistance grounds where trial counsel failed to investigate murder scene, thereby violating duty owed to defendant); *Green v. Lee*, 964 F.Supp.2d 237, 256-57 (E.D.N.Y. 2013) (granting *habeas* petition where counsel failed to make "a reasonable investigation of the relevant time frame" and denied the defendant effective assistance of counsel);

[5] *See Brady v. Maryland*, 373 U.S. 83 (1967).

People v. Park, 229 A.D.2d 598 (2d Dept. 1996) (finding ineffective assistance where trial counsel failed to present witnesses and other evidence which made it unlikely defendant had committed the crime).

The police and the prosecution spent countless hours trying to find evidence of Christopher's presence at any point along the over 465-mile round trip from Rochester to Albany, and their failed efforts were memorialized in the notes of several police officers, as well as in multiple 'Lead Sheets' annexing notes, receipts, and credit card records (Exhibit G [Locations Investigated by Police]; App. 30-84; 173; 185-194; 207-208). These documents demonstrate that investigators were acutely interested in discovering evidence of Christopher's presence at particular locations along the timeline route, and that they were specifically focused on gas stations given that Christopher would have needed to refuel in the Albany area in order to complete the trip as theorized. Indeed, within hours of the discovery of the crime scene, police officers were dispatched to gas stations and businesses along the necessary routes of travel in an attempt to find evidence of Christopher's presence and to identify the location where they believed he must have refueled. Investigators, who conducted their investigation in segments -- the trip on the Thruway, the trip to and from 36 Brockley Drive, and potential paths of travel in the surrounding Albany area -- checked *every* gas station and business that would have been open between 12:00 a.m. and 6:00 a.m. between Exits 23 and 46 on the Thruway (including possible routes of travel from the Thruway exits to 36 Brockley Drive and the surrounding area), yet they were unable to find any evidence whatsoever that Christopher had made a stop. In fact, despite spending two years questioning employees who worked at the businesses and gas stations along the route during the times in question, acquiring and reviewing video surveillance footage and transaction records, and issuing countless subpoenas to banks and credit card companies to verify the legitimacy of all

gasoline purchases on record, the government's investigation turned up absolutely nothing. Again however, because counsel failed to challenge the prosecution's timeline narrative, the jury never learned that despite a massive, organized, and amply funded police investigation, there was no evidence at all that Christopher or his yellow Jeep had stopped or been present anywhere along the timeline route. Indeed, it was not until well after Christopher's conviction and the denial of his direct appeal that Christopher retained the services of an investigator to drive the theorized routes of travel and identify possible refueling points.[6] This endeavor, achieved with minimal effort, together with the unutilized fruits of the investigation conducted by police, resulted in findings that undermine the viability of the prosecutor's timeline, and had the jury been presented with this evidence, the outcome of Christopher's trial possibly -- and probably -- would have been different.

a. There was no evidence that Christopher refueled his Jeep in Albany either before or after the prosecution asserted that the crime occurred.

According to the prosecutor's timeline, 23 minutes elapsed between the time Christopher exited the Thruway at Exit 24 in Albany and the time that he disabled the alarm at 36 Brockley Drive; the fastest and most direct route of travel between Exit 24 and 36 Brockley drive was tested by police and timed at 18 minutes (App. 93); and an examination of the two possible routes of

[6] After pre-trial hearings had been conducted, and approximately five weeks before trial commenced, defense counsel sent a letter firing the private investigator retained to assist in Christopher's defense (App. 89-91). The letter centered on an apparent dispute over the financial terms counsel and the investigator had agreed upon, and in it, counsel stated,

"As I expressed to you, I am confident that Christopher is innocent of the murder of this father and attack on his mother and I would never forgive myself if he is convicted of the crimes because of a lack of investigation or preparation for trial." Defense counsel then highlighted specific areas of investigation that the investigator was retained to address but that, to her knowledge, had not yet been completed, and she expressed her disappointment in the fact that the investigator was not going to be available during the trial:

> As there is still a tremendous amount of investigation to be done and as the trial is to begin at the end of June and will continue in July, and as you promised to do the investigation and be present for trial, I do not know what you were planning when you added additional commitments during this time frame.

(App. 91). Clearly, this "tremendous amount" of outstanding investigative work was never done.

travel between Exit 24 and 36 Brockley Drive confirmed that there was only one gas station open during the relevant time frame, within range, between 2:00 a.m. and 5:00 a.m.: the Campus Mobil at 1181 Western Avenue in Albany (*see* Dowd Aff: ¶6 [Exh. C]). The Campus Mobil, therefore, is the *only* place where Christopher could have possibly purchased gasoline in the 23-minute time period permitted by the timeline.[7] Yet, as memorialized in Lead Sheet 85 and parts of Lead Sheet 67, both of which were provided to defense counsel prior to trial, police visited the Campus Mobil two days after the crime, interviewed the attendant who was working there from November 14, 2004 to November 15, 2004, viewed surveillance tapes from the same relevant time period, seized the cash register tapes for all gas purchases between 10:00 p.m. and 3:00 a.m., and found no evidence whatsoever that Christopher had stopped there.[8] In fact, records indicated that there were only four sales of gasoline at Campus Mobil that could possibly have involved Christopher, yet investigators conclusively determined that Christopher had not participated in any of these transactions[9] (App. 50, 64-72).

Nevertheless, knowing definitively that Christopher did not purchase gasoline at the Campus Mobil on the night of the crime, the police used the station prior to trial to "simulate" a gasoline purchase to test and support the feasibility of the government's timeline (App. 95),[10] and prosecutors, too, despite knowing that Christopher had not refueled at the Campus Mobil or

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[7] *See* Exh. H5, a map of the Albany area highlighting the two possible routes of travel between 36 Brockley Drive and Exit 24, and along with the relevant gasoline stations investigators eliminated as refueling points.

[8] The gas pumps were not operational after 3:00 a.m.

[9] Although prosecutors concluded that the final credit card sale was legitimate -- after they issued a subpoena during trial -- they did not, as discussed *infra*, disclose the results of the subpoena to the defense (App. 50).

[10] Another obvious discrepancy between the investigative work of the police and the work completed by Christopher's investigator is the drive time for the secondary route between Exit 24 and 36 Brockley Drive. Detective Bowdish, for example, claimed that the "Delaware Avenue" route took 14 minutes to drive (App. 95), while Christopher's investigator determined the trip took 21 minutes to complete (Dowd Aff: ¶1-2 [Exh. C]).

anywhere else before 2:14 a.m. for that matter, falsely told the jury during closing arguments that the 23 minutes it took to travel the 9.3 miles between Exit 24 and 36 Brockley Drive, as per the People's 'timeline' theory, gave Christopher "*plenty of time*" to stop and refuel on his way to his family home (Summations: 4253).[11]

In addition, it would have been impossible for Christopher to have stopped to purchase gasoline *after* prosecutors alleged that he left the house, subsequent to when the crime was committed. Indeed, only 18 minutes elapsed between the time when the telephone wires at the house (4:54 a.m.) and the time when prosecutors theorized that Christopher must have entered the Thruway on the alleged return trip to UR (5:12 a.m.), and there were not, as previously discussed, any open gas stations at this time along the required route where he could have made such a purchase. Thus, contrary to the prosecutor's argument, there was insufficient time to purchase gasoline before *or after* Christopher allegedly attacked his parents, nor was there even an open gas station along the route (*see* Dowd Aff: ¶2 [Exh. C]). But again, because counsel overlooked these flaws in the timeline, counsel never argued to the jury that it was, in fact, impossible for Christopher to have refueled his Jeep in the Albany area at the time of the crime, and this aspect of the timeline, therefore, went completely unchallenged.

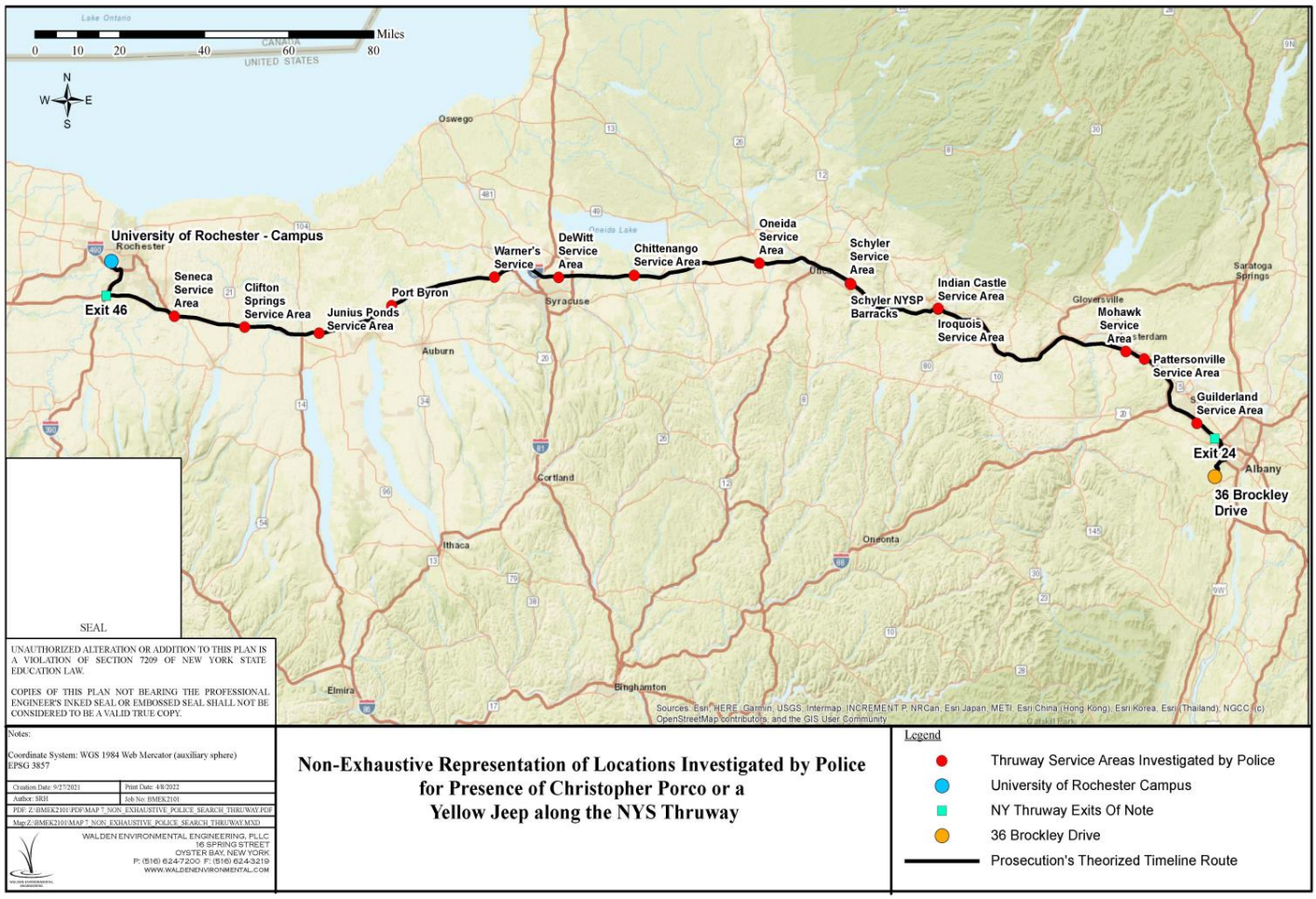
b. There was no evidence that Christopher refueled his Jeep at any point along the NYS Thruway.

Given that Christopher did not refuel between 36 Brockley Drive and the Thruway on the morning of the crime, the only other two possibilities were that: (1) he arrived at 36 Brockley Drive, committed the crime, left to purchase gasoline, and then returned to 36 Brockley Drive before leaving again, which is ridiculous; or that (2) he purchased gasoline somewhere along the Thruway. Again, however, disclosed discovery materials demonstrate that neither of these

[11] *See* Point Four (A)(1) and Point Six (A)(1).

alternative scenarios occurred. Much to the contrary, the materials establish that Christopher was simply not in Albany at the time his parents were attacked. Because counsel failed to utilize these materials, however, the jury never knew this.

Indeed, local and state police investigated every Thruway rest stop between Rochester and Albany, both eastbound and westbound (App. 32, 38-48, 77, 78, 185-192, 194)[12] -- reviewing surveillance tapes, retrieving gasoline purchase records, and interviewing employees at each individual stop -- and they found no evidence whatsoever that Christopher had stopped to refuel.[13]

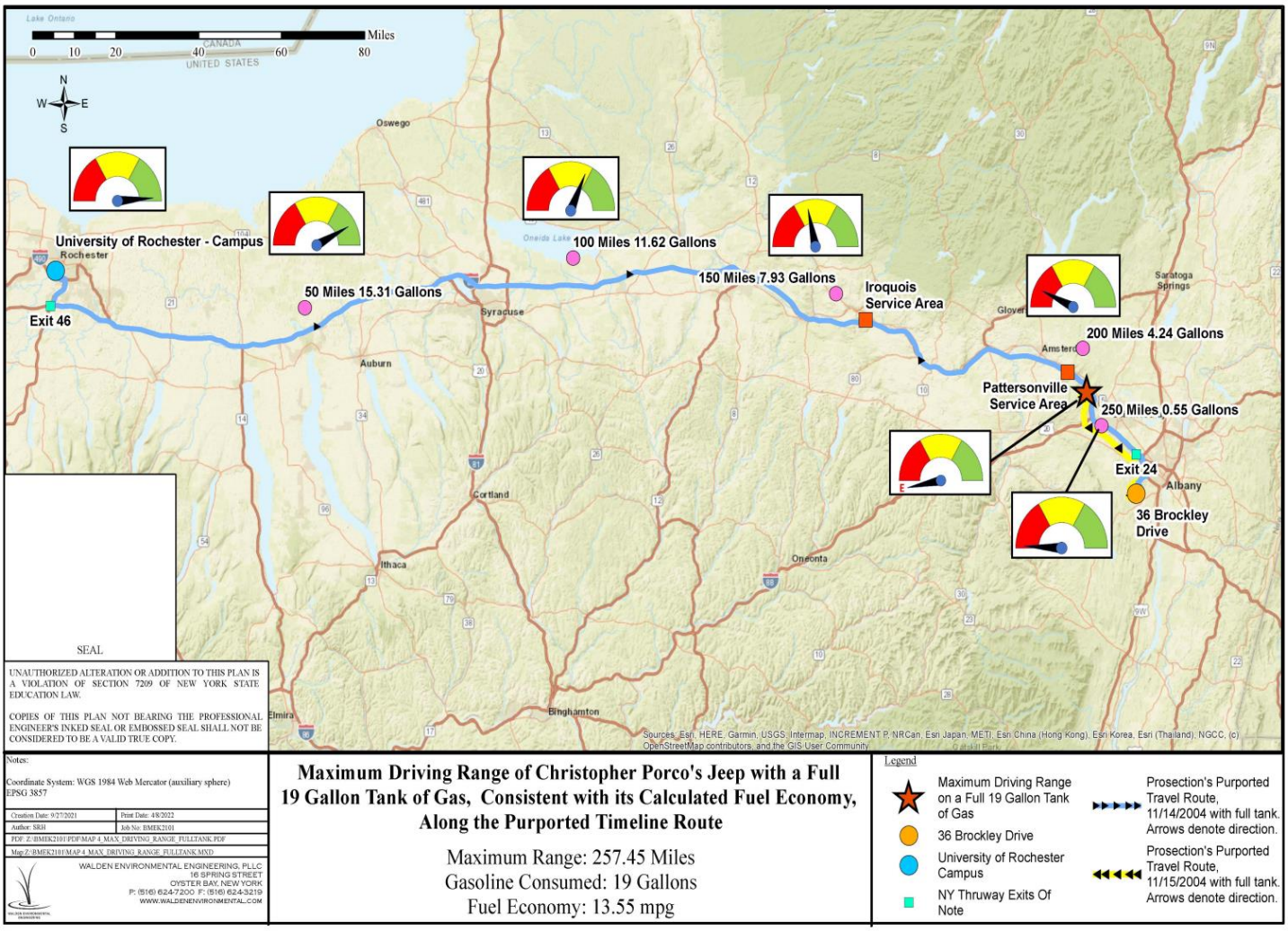


[12] Significant portions of this material were withheld from the defense. *See* Sections (A)(1)-(A)(4) of Point Four.

[13] Moreover, due to the fuel economy limitations of Christopher's Jeep, described *infra*, and the amount of fuel the police claimed was missing from the vehicle at the time they measured the tank after impounding it, Christopher could not have refueled his Jeep at a rest stop located a significant distance from Albany in either direction.

At the Guilderland Service Area, for example, which is the closest stop eastbound before Albany, there were no fuel purchases made between 12:15 a.m. and 2:00 a.m., the window of time allowed by the timeline (App. 32, 38-48). And similarly, investigators likewise determined that Christopher had not stopped to refuel at the Pattersonville Service Area, which was the closest stop heading westbound from Albany toward Rochester, located 20.3 miles from Exit 24 (*see* Dowd Aff: ¶7 [Exh. C]; App. 71, 77, 185). Moreover, even assuming Christopher had a full 19 gallons of gas[14] upon departing Rochester for Albany on November 14, 2004, the trip from UR to 36 Brockley Drive and then back to just the Pattersonville service area would have been 262 miles, a distance which exceeded the range of the Jeep's known fuel economy (262 miles / 13.55 mpg = 19.34 gallons needed) (s*ee infra*, Section A[2] of Point One). And Christopher could not have refueled at a service area past the Pattersonville service area since, again, there is no way he would have had enough fuel to drive 304 total miles from UR to 36 Brockley Drive and then continue onto the next service area, which was located 42 miles farther down the Thruway (*see* Dowd Aff: ¶9 [Exh. C]).

[14] In reality, Christopher's Jeep did not have a full tank of gas on Sunday (*see* Christopher Aff: ¶20 [Exh. E]).



These facts were well-documented and available to counsel in advance of trial, yet counsel took no steps to present this exculpatory evidence to the jury or to otherwise utilize these facts in Christopher's defense.

c. There was no evidence that Christopher refueled his Jeep at any point in time in the Albany area during the time in which the Porco security system was disarmed.

Finally, the documents memorializing the government's massive investigation gave counsel ample basis to likewise eliminate any possibility that Christopher purchased fuel between 2:14 a.m. and 4:54 a.m., the time frame when the crime is alleged to have occurred. In this respect, it has become abundantly clear since Christopher's conviction that not only did prosecutors

withhold a significant amount of *Brady* material from counsel prior to and during the trial, but that counsel's failure to conduct a diligent pre-trial review of the materials that prosecutors did disclose prevented counsel from realizing that exculpatory materials were being withheld and from making the appropriate demands, which, in turn, contributed to Christopher's wrongful conviction. Indeed, prosecutors withheld more than 40 pages of exculpatory timeline evidence contained within Lead Sheets 67, 86, 108, and 91, which detailed the investigation of over a dozen gas stations in the Albany area and countless other businesses (App. 30-55, 73-74, 75-76, 77-78).[15]

Lead 67, for example, which was memorialized in the Lead Sheet Index (App. 81), and referenced in numerous other Lead Sheets, documented the majority of the results of the timeline investigation, but was never turned over to counsel in its entirety. Furthermore, while there were two "Additions" to Lead 67, which were disclosed prior to trial -- and which clearly signaled that there was additional material the prosecution was withholding -- defense counsel never made a demand for these obviously missing materials (App. 66-72). Collectively, these documents demonstrate that the police investigated every gas station open in the Albany area between 1:00 a.m. and 6:00 a.m. within a feasible driving range, and checked every business between Exits 22, 23, 24 and 36 Brockley Drive for video surveillance evidence (or any evidence at all) of Christopher or his yellow Jeep (App. 30-84; 185-191; 194), but found no record of the necessary gasoline purchase, and no images of a yellow Jeep. In fact, only two gas stations in the area were open between 2:00 a.m. and 5:00 a.m. -- the Campus Mobil and the Exit 23 Mobil on Route 9W, both were checked, and investigators confirmed that Christopher did not refuel at either one (App. 31; 35-37; 49; 50; 64-72).

[15] The prosecution also suppressed an unknown amount of material and exculpatory surveillance video evidence from businesses and other locations in the Albany area and along the timeline route. *See* Sections (A)(2) of Point Four.

In sum, the government's documented investigation into the timeline, which extended into the middle of Christopher's trial (*see* App. 33-47; 66-72), gave counsel a solid basis to attack the feasibility of the prosecutor's theory of the crime, yet counsel did not call any of the officers involved in investigating the timeline, counsel never attempted to offer certain notes and/or reports into evidence, and counsel did not retain an investigator to independently evaluate and test the timeline route of travel. *See, e.g., In re McKanic*, 50 A.D.3d 1145, 1146 (2d Dept. 2008) (finding police officer's own observations contained in reports to be admissible); *Harris v. Artuz*, 288 F.Supp.2d 247, 260 (E.D.N.Y. 2003) (granting *habeas* petition on ineffective assistance grounds where counsel failed to impeach witness's testimony that he was stabbed, not shot, despite being in possession of witness's medical records). As a result, counsel failed to interpose *any* challenge whatsoever to the feasibility of the government's timeline, and the jury never learned of investigators' vast and ultimately failed efforts to find any tangible proof that Christopher or his Jeep were anywhere outside of the vicinity of UR on the night of his parents' attack. Had counsel shown the jury either that Christopher did not purchase gasoline in the Albany area on the morning of the crime as prosecutors alleged, or that the Jeep did not appear on any surveillance videos, the jury likely would have had a reasonable doubt about Christopher's guilt, and the outcome of the proceedings would have been different. Counsel's failure to utilize the negative timeline evidence, in other words, allowed prosecutors to argue -- without meaningful adversarial testing -- what was objectively a false theory of the crime. For this, counsel was ineffective.

2. Counsel failed to utilize available discovery material to impeach prosecution witness Steven Siko and demonstrate that it was impossible for Christopher to have made the theorized trip in his Jeep between Rochester and Albany on the night of the crime.

On December 23, 2004, five weeks after the police located and impounded Christopher's Jeep near the UR campus, the police determined that there were 4.82 gallons of gasoline in the

Jeep's 19-gallon tank, which, conversely, meant that the tank was 14.18 gallons of gasoline short of a full tank (App. 328). Prosecutors needed to persuade the jury that it was physically and mechanically possible for Christopher to have made the over 465-mile round trip between Rochester and Albany within the narrow parameters established by the timeline, so to help accomplish this, they presented testimony from Steven Siko, an engineer from DaimlerChrysler, who offered jurors his opinion as to the distance the Jeep would have been able to travel using the "missing" 14.18 gallons of gasoline. Overlooked by defense counsel, however, was the fact that Siko's testimony *overestimated* the Jeep's fuel efficiency, thereby permitting prosecutors to convincingly claim that the 'missing' fuel was evidence that the prosecution's timeline theory was true. In this regard, counsel's failure to impeach Siko's testimony, and to use available evidence to demonstrate that the theorized trip was physically and mechanically impossible, was another critical misstep that contributed to the overall deprivation of Christopher's right to the effective assistance of counsel.

At trial, Siko detailed for the jury the specifications of the Jeep, including its 19-gallon gas tank, the power train and gear configuration, and the aftermarket tires, which were wider than standard tires; he set forth eight separate factors that affect a vehicle's fuel efficiency, including its weight, tire pressure, a dirty air filter, aggressive driving, vehicle defects such as dragging brakes or a faulty CO2 sensor, bald tires, wind direction, and rain or snow; and in light of all of these factors, he testified that on the "missing 14.18 gallons of gasoline, Christopher's Jeep would have been able to travel between 210 and 345 miles" (Siko: 1824-27). Based on this testimony, together with other evidence in the case that Christopher had filled up the Jeep's tank the previous day on November 13, 2004, and the speculative assertion that he had not driven much during the day on November 14, 2004, prosecutors argued to the jury that Christopher must have left

Rochester on Sunday night, driven to Albany (consuming nearly a full tank of gas on the drive), purchased a full tank of gasoline along his route of travel somewhere in Albany, and then returned to Rochester Monday morning, consuming the 'missing' 14.18 gallons of fuel over the course of the more than 232 mile return trip, a chronology that needed to be true to establish his guilt.

Siko's testimony, however, was based solely on hypothesis, and not on an actual test drive of Christopher's Jeep. Indeed, while Siko prepared a PowerPoint presentation summarizing his findings (*see* App. 1-15), prosecutors did not utilize the PowerPoint presentation at trial, and Siko did not testify to any specific facts supporting the prosecution's theory of Christopher's guilt, even though, based on the discovery materials disclosed to defense counsel prior to trial, Siko had at his disposal all of the facts -- i.e., the *exact* route and travel time -- that needed to be true in order for the timeline to work. Furthermore, while prosecution notes indicate that Siko was clearly prepared to test the prosecution's theory by conducting an actual road test with a vehicle that was configured identically to Christopher's Jeep (*see* App. 16-18), Siko nevertheless offered only a general -- and *misleading* -- opinion regarding the Jeep's fuel economy at trial, which is inexplicable given the exacting detail in which the prosecution presented the timeline to the jury.[16]

Siko's PowerPoint presentation, for instance, provided "DCX Certification Test" data (fuel economy data for driving at constant speeds) for a stock Jeep configured in the exact same way as Christopher's Jeep (App. 6), and the data suggested that at a constant speed of 70 mph, the Jeep could achieve a fuel economy of 18.7 miles per gallon ("mpg"), decreasing to 14.8 mpg where the speed of the Jeep increased 80 mph. Siko, however, testified that the driving range for 14.18 gallons of gasoline was between 210 and 345 miles, which -- at the maximum range -- would

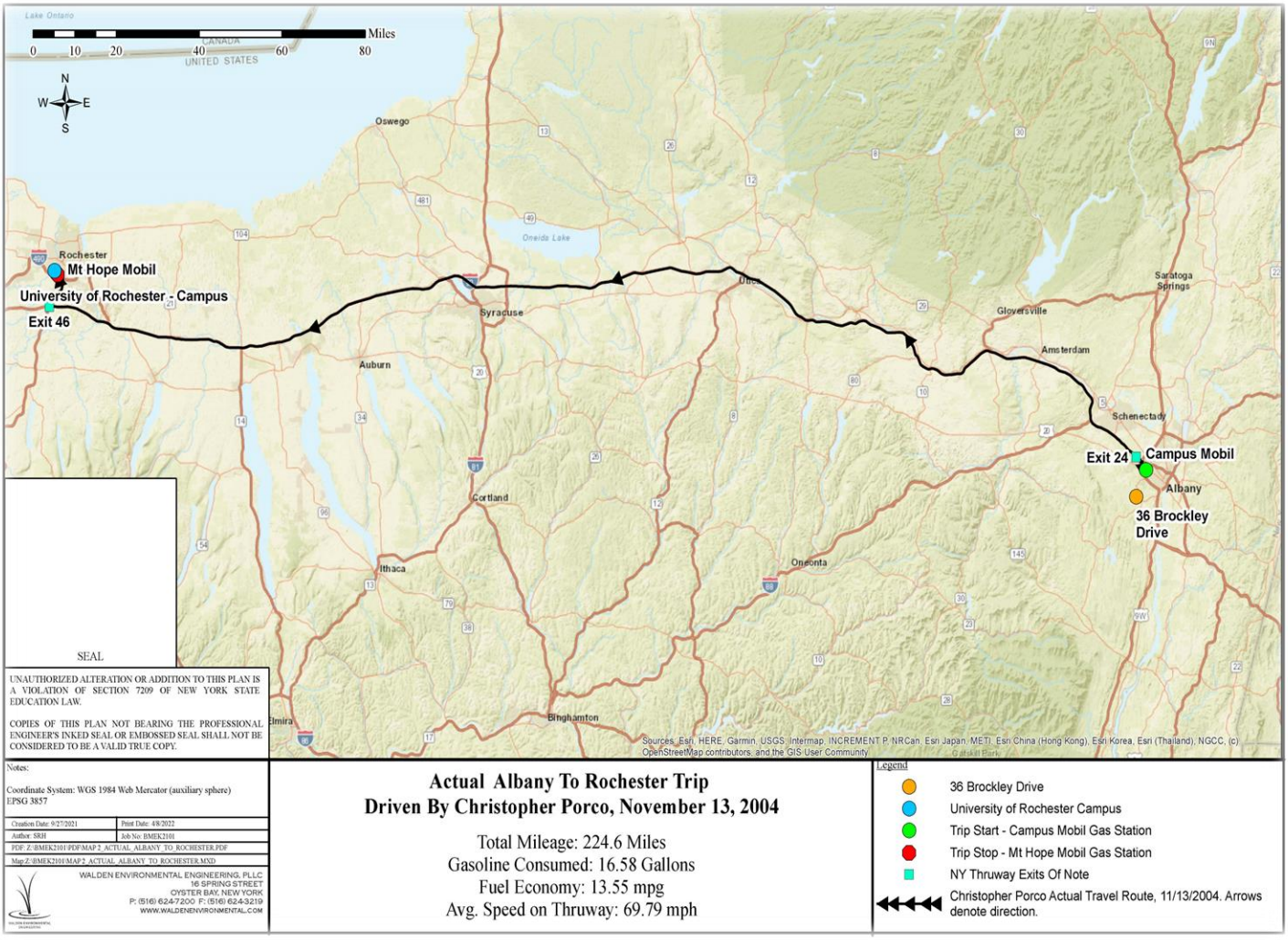
[16] While it is unclear whether an actual road test was ever conducted, it is clear that Siko was never asked to apply any findings from such a trip to the trip theorized by the prosecution.

require a fuel economy of 24.3 mpg, a number clearly inconsistent with Siko's own data (345 miles / 14.18 = 24.3mpg).

The theorized trip from Albany back to Rochester on the night of the crime would necessarily have consisted of 214.4 highway miles on the NYS Thruway, driven in 3.083 hours (App. 20, 93), and the average speed of the trip, therefore, would had to have been 69.54 miles per hour (214.4 / 3.083 = 69.54). The remainder of the trip, on mostly surface streets, would have been less than 20 miles, and because higher speeds decrease fuel economy (App. 6), the character of the trip (92% highway driving at a known speed), was just as important as the overall distance driven. In this way, Siko's testimony was not only misleading, it was factually incorrect. But again, this was never set out for the jury.

The trial record established that on Friday November 12, 2004, Christopher left UR and drove his Jeep to Albany to visit his girlfriend at the time, Sarah Fischer. After going out to dinner with Sarah and her sister, Christopher spent the night at Sarah's house and then left Saturday afternoon on November 13, 2004 to return to UR (Fischer: 924-25). This trip mirrored the round-trip prosecutors theorized that Christopher made on the evening of November 14, 2004 and the early morning of November 15, 2004, and with credit card and EZ-Pass records, which were disclosed to counsel prior to trial, it was -- and is -- possible to determine precisely how much gasoline Christopher's Jeep consumed on the drive. Credit card records from November 13, 2004, for example, established that before getting on the Thruway to return to Rochester, Christopher stopped to fill the Jeep's tank at the Campus Mobil, located at 1181 Western Avenue in Albany (App. 24-25), drove approximately two miles to the Thruway entrance, and -- according to EZ-Pass records -- entered the Thruway at Exit 24 at 3:44 p.m. (App. 27). From there, he drove to Exit 46, and got off the Thruway at 6:49 p.m. (*id.*). Christopher, in other words, was able to drive

214.4 miles on the Thruway in three hours, four minutes, and 32 seconds, and his average speed of travel was 69.79 mph (214.4 miles / 3.072 hours = 69.79 mph). After exiting the Thruway, he stopped to refill his tank again and purchased approximately 16.58 gallons of gasoline at the Mount Hope Mobil,[17] located 8.2 miles from the exit at 1810 Mount Hope Avenue in Rochester, which is adjacent to UR's campus ($35.64 / $2.15 / gallon = 16.58 gallons) (App. 25). The Jeep therefore used 16.58 gallons of gasoline to drive the 224.6 miles between the Campus Mobil in Albany and the Mt. Hope Mobil in Rochester.



[17] As per the Oil Price Information Service ("OPIS"), the highest price charged for regular unleaded gasoline on Mt. Hope Avenue in Rochester, New York during the weekend of November 13-14, 2004 was $2.15.

This trip illustrates the Jeep's actual fuel consumption driving a route identical in all relevant respects to the drive prosecutors alleged Christopher made between Albany and Rochester on November 15, 2004, and the data from this *actual* return trip, therefore, provided counsel with valuable information regarding not only the fuel economy of the Jeep generally, but the fuel economy of the Jeep making a trip identical to the one prosecutors argued Christopher made on the night of his parents' attack.[18] Had counsel conducted a careful side-by-side comparison of the two trips, as illustrated in (Figure 1), *infra*, counsel surely would have been able to elicit for the jury that (1) Siko's testimony regarding the Jeep's driving range on 14.18 gallons of gasoline was incorrect in the context of the case; and that (2) the 'missing' 14.18 gallons of gasoline would simply not have allowed the Jeep to complete the prosecution's theorized drive.

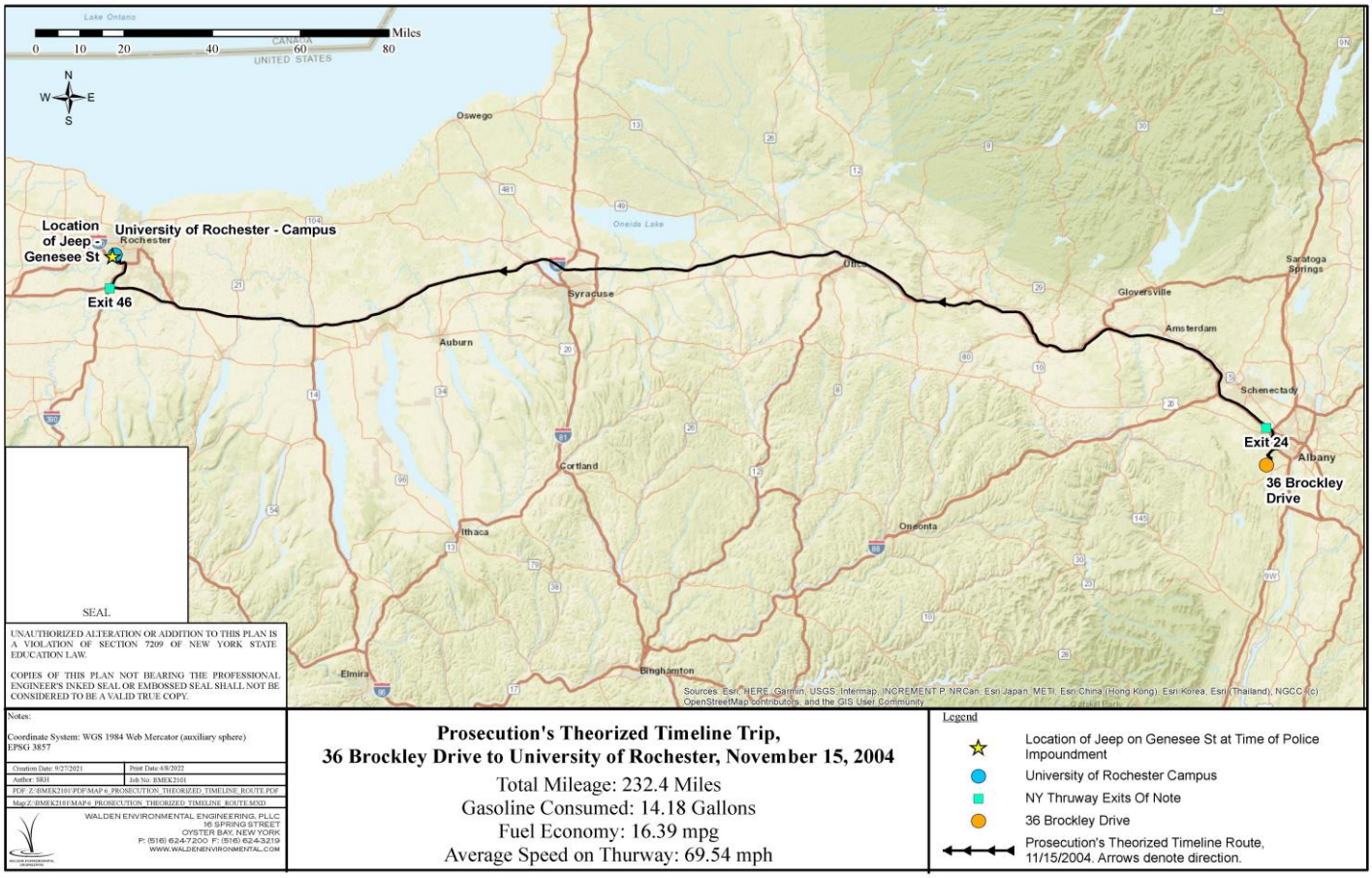
Figure 1.

November 13, 2004 (Actual Trip)

Campus Mobil ---------→ Exit 24 ----------→ Exit 46 ----------→ Mt. Hope Mobil
2 miles 214.4 miles 8.2 miles

Total Mileage: 224.6 miles
Gasoline Consumed: 16.58 gallons
Miles per Gallon: 13.55 mpg
Avg. Speed on Thruway: 69.79 mph

[18] The relevant distances are the same, the drive times on the Thruway are the same, the average speeds are nearly identical, and all of the fuel consumption factors described by Siko were consistent for both trips. Furthermore, the calculations for the purported November 15, 2004 trip are based on circumstances least favorable to Christopher, given that the total mileage for the November 15, 2004 trip must have been longer than 232.4 miles in order to account for a required detour to refuel, which, as detailed herein, would have increased the amount of fuel consumed for the return trip as a whole.

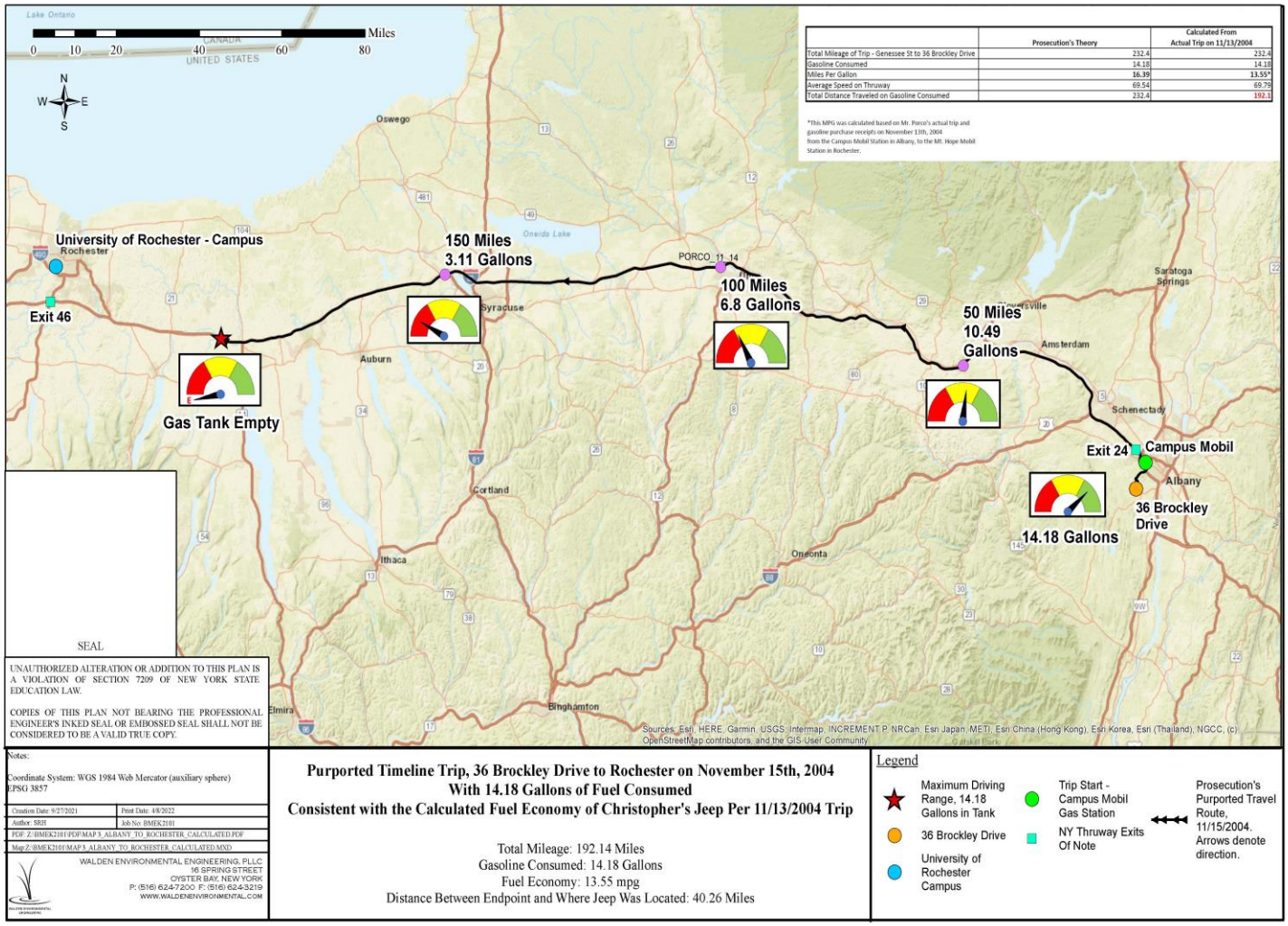


<u>November 15, 2004 (Prosecution's Theory)</u>

36 Brockley Drive ----------→Exit 24 ----------→Exit 46----------→ Genesse Street
9.3 miles 214.4 miles 8.7 miles

Total Mileage: 232.4 miles
Gasoline Consumed: 14.18 gallons
Miles per Gallon: 16.39 mpg
Avg. Speed on Thruway: 69.54 mph

In other words, given the fuel economy number Christopher's Jeep actually achieved on November 13, 2004 (13.55 mpg), and the fact that there were 14.18 gallons of gas missing from tank when it was measured after the Jeep was impounded on November 15, 2004, the Jeep would only have been able to travel approximately 192.14 miles on the theorized November 15th trip (14.18 gallons x 13.55 mpg = 192.14 miles), which is 18 miles short of Siko's low-end estimate, and would have stranded the Jeep *more than 40 miles short of UR* had the trip actually occurred.



Plus, since any trip Christopher could have made in the Jeep from Rochester to Albany and back would have required that he stop in the Albany area to refill the tank (which would have required driving a lengthy distance away from the timeline route), the theorized November 15, 2004 return trip to Rochester would necessarily have been longer than the 232.4 miles from the crime scene to the University, and significantly longer than the November 13, 2004 return trip that required 16.58 gallons of gas.

In sum, on November 13, 2004, 14.18 gallons of gasoline enabled the Jeep to travel approximately 192 miles, yet the prosecution's theory of guilt depended on that same 14.18 gallons of gasoline allowing the same vehicle, with the same driver, driving the same route, at the same

speeds, to travel more than 232 miles. The information necessary to highlight this impossible 17.3% increase in fuel efficiency was available to defense counsel, yet counsel -- due to a lack of preparation and investigation -- either failed to utilize it or overlooked it entirely. As a result, the jury never learned that the theorized trip was, in reality, physically and mechanically impossible.

3. Counsel failed to effectively cross-examine John Fallon and Karen Russell.

On November 18, 2004, investigators subpoenaed NYS Thruway toll tickets in order to identify all tickets documenting vehicular travel between Rochester and Albany between the evening of November 14, 2004 and the morning of November 15, 2004.[19] In response, the NYS Thruway produced over 30 tickets, each containing the identification number of the toll collector who issued the ticket imprinted on its face (App. 98). Investigators gave four of the tickets heightened scrutiny and eventually targeted one ticket in particular as the ticket they believed Christopher used during his trip down the NYS Thruway (App. 99). Members of the BPD then interviewed two toll collectors -- Karen Russell and John Fallon -- whose identification numbers appeared on the ticket in question, and both eventually made the incredible claim that they remembered seeing Christopher's yellow Jeep at the respective relevant times. Nevertheless, although there were indications in disclosed discovery materials that the purported recollections of Fallon and Russell were fabricated, and that the detective who obtained their statements -- Anthony Arduini -- harbored an intense personal dislike for Christopher, counsel failed to utilize this information to attack the People's case. For this, too, counsel's representation was constitutionally deficient.

[19] Each toll lane along the Thruway is equipped with a computer that imprints a unique serial number on every toll ticket processed in that lane. The serial numbers run consecutively from 1 to 9,999 before resetting to 1 (Fallon: 1410-12).

a. John Fallon

John Fallon testified at trial that sometime in the middle of November 2004, at a quarter to 11:00 p.m., he recalled giving a ticket to a "white male in his early to mid-20's, with a baseball cap on," driving "a yellow Jeep Wrangler with big tires on it" (Fallon: 1459). Fallon claimed that he remembered this specific vehicle because he and his family "like Jeeps," and they owned two (Fallon: 1458), yet Christopher's yellow Jeep was the only Jeep -- and the only vehicle for that matter -- that Fallon could specifically recall (Fallon: 1462-67). At trial, Fallon testified that the first time he was questioned about a possible yellow Jeep sighting was on November 27, 2004, and he specifically recalled the officer "ask[ing] "[him] if [he] could say it was November 14th." Fallon testified that he "told him [he] couldn't say that for sure, but [he] knew it was within the last week or two that [he] had seen the Jeep and given [the driver] a ticket" (Fallon: 1460). Continuing, Fallon stated,

> The first officer that came and talked to me I believe was from Bethlehem. I don't know his name right now. . . . He asked me if I could identify a vehicle. I told him I see 3,000 vehicles a day. And I kind of laughed at him. He said, 'I appreciate it if you take a look anyhow.' I said, 'okay.' And he showed me a picture of a yellow Wrangler and I said, 'yes, I recognize that vehicle.

(Fallon: 1462).

Contrary to Fallon's testimony, however, November 27, 2004 was not the first time he was questioned by police about a yellow Jeep sighting. As mentioned above, Page 13 of the "Lead Index," which was compiled by the BPD and disclosed to counsel prior to trial, indicates that Fallon was actually first questioned about the Jeep on or about November 18, 2004, and that at this time, he indicated that *he had no recollection of any Jeep*. Indeed, Lead Sheet 42 states:

> Subpoena was obtained for Thruway toll tickets for exits 23 & 24 and 45 & 46 for dates and times in question. Tickets were then obtained by Inv. Kelly Strack NYSP FIU. Thruway collector employees were identified for interviews. John Fallon

> Exit 46 Collector was interviewed and ***provided no useful information***. Karen Russell Exit 24 was interviewed -- *see* Lead #143 and #191."

(Exh. F, pp. 3-4). While there are no other known notes or memoranda detailing this initial interview with Fallon, clearly the only thing the police could have been questioning him about at this early stage of the investigation given his status as a toll collector was the yellow Jeep. And, while Lead Sheet 42 does not specify which BPD Officer interviewed Fallon on November 18, 2004, other case materials strongly suggest that it was Arduini, as Arduini's name appears next to Fallon's name and phone number on documents that were prepared by Kelly Strack after the toll tickets were picked up from the Thruway on November 18, 2004 and after various tollbooth workers were identified (Exh. F, pp. 5-10); Arduini called the Exit 46 Toll Plaza in Victor (as well as other Thruway locations), in the first days of the investigation; Arduini's notes from November 25th indicate that "John" was working at the Exit 45 Toll Plaza in Victor on Saturday, November 27th; and the only other Thruway employee in Arduini's notes referred to by first name was Karen Russell, who Arduini also spoke with in person at Exit 24 on November 18th (Exh. F, pp. 7, 9, 10, 46). Nevertheless, despite Fallon's initial inability to remember Christopher or his Jeep on November 18, 2004, Fallon later claimed that he recalled a "bright yellow Jeep" with "wide tires" during his subsequent interview with Arduini on November 27, 2004, a fact which calls the integrity and credibility of both Fallon and Arduini into serious doubt (Exh. F, pp. 11-12). Police, after all, interviewed more than a dozen other toll collectors from Exits 45, 46, 23, and 24 who had been reportedly working during the time period in question, and not one of them was able to recall seeing a yellow Jeep (App. 100-117). Discrediting Fallon's testimony, therefore, was critical, and counsel's failure to identify and confront Fallon at trial with the November 18, 2004 interview could not have been the result of any strategic choice.

In addition to counsel's failure to impeach Fallon's credibility with his initial inability to recall the yellow Jeep when he was first questioned on November 18, 2004 -- just three days after the crime -- counsel also failed to give jurors the complete picture regarding the nature and scope of Fallon's interactions with the police, and the inherently unreliable circumstances surrounding his improved recollection. Indeed, after the November 18, 2004 telephone interview with Arduini, when Fallon "provided no useful information," Detective Arduini visited Fallon in person on November 27, 2004 and showed him a photograph of the Jeep (Exh. F, pp. 11-12), he interviewed him again just five days later on December 2, 2004 (Exh. F, pp. 13-14), and only then, after interacting with Fallon *three times* in two weeks, did Arduini hand Fallon off to the State Police on December 16, 2004 so that they could memorialize his formal statement (Exh. F, pp. 15-19), which, although strikingly specific, was partially repudiated by Fallon during his grand jury testimony (*see* pages 177-78 *infra*), and was also contradictory to the far more ambiguous testimony he ultimately gave at trial. Indeed, in the statement Fallon made to the State Police on December 16, 2004, he claimed that on November 14, 2004, he was working at Exit 46 in Henrietta, New York, and that at about 10:45 p.m., he handed out a ticket to a young man who entered the Thruway at Exit 46 in a yellow Jeep Wrangler with oversized tires; in the grand jury, the very next day, Fallon contradicted his sworn statement, admitted that he could not be certain about when he saw the Jeep, and explained that it was "the gentleman from Bethlehem" who showed him a picture of the Jeep and supplied him with the date of November 14, 2004 and the description of the driver (Exh. F, pp. 30-31); and at trial, Fallon inaccurately recounted that he was first questioned about the Jeep on November 27, 2004, concealing the fact that when he was first interviewed on November 18, 2004, he was unable to recall anything of significance to the investigation and he claimed -- contrary to his grand jury testimony -- that he was sure that he told

"the first officer that came to see [him]. . . from Bethlehem" (Fallon: 1462) that he had seen the yellow Jeep within the past week or two (*see* Exh. F, pp. 3-4). Counsel, in other words, had ample grounds to argue that Fallon's purported recollection of a yellow Jeep was the product of coercive or otherwise suggestive contact with Detective Arduini, yet, again, counsel never presented this argument to jurors.

Also overlooked by counsel was the fact that Fallon had likely already been exposed to information about the Jeep by the time Arduini interviewed him on November 27, 2004. Detective Bowdish, after all, admitted that he put out a BOLO, indicating that Christopher may be armed and dangerous and that police should be on the lookout for his Jeep (Bowdish: 2526-27), and Trooper Gary Kelly indicated that Exit 46 "received some kind of notification about the yellow jeep (possibly from thruway or . . . NYSP dispatch) sometime during the week of 11/15 – 11/19/2004" (App. 118). Further, Trooper Kelly stated, "This would NOT have been a BOLO because we (the police already had located the jeep in Rochester . . . If there was some kind of notification put out there it would've most likely have been pertaining to asking toll collectors if they recalled a yellow jeep wrangler entering or exiting their toll plaza during the dates and times in question" (*id.*) (emphasis in original). Additionally, police notes reference Ed Collins, the supervisor at Exit 46, who "recalled receiving a phone call from Bethlehem Police date unknown reference to a yellow Jeep" (App. 120-121), and "stated that he did not generate any notice but would have passed the information along to other employees" (*id.*). Similarly, Mike Ptak, a toll collector at Exit 46 who was working during the morning of November 15, 2004, told the State Police that although "he did not recall seeing a yellow Jeep exit the Thruway on that date . . . he did recall seeing some kind of notice for a yellow Jeep (possibly posted somewhere at the toll

plaza), but he was uncertain of the date" (*id.*).[20] Thus, the credibility of Fallon's claim that he remembered seeing Christopher's yellow Jeep on the night of the murder is undermined not only by the fact that he had no memory of the Jeep during his initial November 18, 2004 interview with police, but also by the fact that he and other toll workers at exits 46, 45, 23, and 24 had already clearly been put on notice that there was significant police interest in a yellow Jeep.

And finally, there is credible evidence to suggest that Fallon may not have even been working in the entry lane at Exit 46 on November 14, 2004, as he claimed. Arduini's notes, for example, confirm that Arduini called Exit 46 the week after the crime, and in these notes, below the phone number for Exit 46, Arduini wrote the names of the supervisors who were working on November 14, 2004, as well as the names of the toll collectors who worked the shifts from 3:00 p.m. to 11:00 p.m. and from 11:00 p.m. to 7:00 p.m. (App. 189). Arduini's notes indicate that John Fallon's wife, Debbie Fallon, was working at Exit 46 with her husband during the three-to-eleven shift on November 14, 2004 (the time during which the prosecution claimed Christopher picked up his ticket) and, significantly, Arduini wrote the word "entry" next to Debbie Fallon's name -- not next to the name John Fallon (*id.*).[21] Counsel, however, apparently overlooked these entries, and, as a result, missed another critical point of cross-examination at trial.

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[20] These telephone communications, too, were likely initiated by Arduini, as his notes reference multiple phone contacts with Thruway personnel during this timeframe, and other materials, as indicated above, suggest that it was Arduini who assumed the initial responsibility of locating and speaking with Fallon and Russell (Exh. F, pp. 9, 11-14, 40-50).

[21] "Entry" is a reference to the entry lane at the toll plaza, and there was only one entry lane, "lane 3E," that was staffed during the relevant time period. The other lanes, including 4X, which was located on the opposite side of the same booth as Lane 3E, were exit lanes. Upon information and belief, it is not uncommon for toll collectors to swap assigned lanes during their shifts, and it would have been even less uncommon for a married couple to use the other spouse's identification card to log into his or her respective toll computer, whether inadvertently or intentionally. When confronted with questions about lane swapping in 2014, and whether Debbie and John Fallon ever availed themselves of the practice, Mrs. Fallon informed the undersigned that she had cautioned her husband "not to get involved."

Indeed, the only corroboration for John Fallon's claim that he gave out the toll ticket prosecutors claimed that Christopher used on the night of the crime was the fact that Fallon's toll collector identification number, which is automatically printed on a ticket whenever a given toll collector inserts his or her identification card into the computer inside the toll booth, appeared on the ticket, and the only document that could have verified whether John Fallon was actually stationed in the entry lane at Exit 46 at the time he claimed was his "Tour of Duty Report," or "TDR," a standard form that contains handwritten information about every shift worked by a toll collector and is kept among Thruway Authority records.[22] Yet, while the investigating authorities in Christopher's case obtained and disclosed to the defense the TDRs of numerous toll collectors assigned to Exits 45, 46, 23, and 24 during the relevant time frame -- including the TDR of Karen Russell, which prosecutors even entered into evidence -- notably absent from this disclosure were the TDRs pertaining to the shifts worked by John or Debbie Fallon at Exit 46 on November 14, 2004.

Indeed, Craig Slezak, a Thruway employee who testified for the prosecution at trial, responded to the District Attorney's request for toll collector TDRs by sending a 21-page facsimile to ADA Rossi, but of this 21-page transmittal, ***prosecutors withheld*** page (2) and turned over only 20 pages to the defense (App. 122-141). Prosecutors turned over a TDR pertaining to Fallon's shift at Exit 45 from 1:50 p.m. to 9:50 p.m. on November 15, 2004; the TDRs for the collectors who worked at Exit 24 from 10:00 p.m. on November 14, 2004 to 5:30 a.m. on November 15, 2004; the TDRs for the collectors who worked at Exit 23 from 10:00 p.m. on November 14, 2004 through 6:00 a.m. on November 15, 2004; the TDRs of the collectors who worked at Exit 45 from

[22] A TDR contains a variety of information such as the lanes where the collector works during the shift, any breaks taken, the toll collector's identification number, the number of cars the collector processes, the range of serial numbers on the tickets the collector gives out to motorists, and the names and identification numbers of the collectors who worked prior and subsequent shifts.

12:00 a.m. to 2:00 p.m. on November 15, 2004; and the TDRs of the collectors who worked at Exit 46 from 11:00 p.m. on November 14, 2004 through 3:00 p.m. on November 15, 2004. *Prosecutors never, however, turned over the TDR from Fallon's -- or his wife's -- November 14, 2004 shift at Exit 46, the crucial time at which prosecutors claimed Fallon allegedly handed out the toll ticket to Christopher*. In other words, while prosecutors disclosed Russell's TDR from Exit 24 as well as the attendant computer data for the relevant time period, with respect to Fallon, prosecutors only turned over his TDR from 24 hours *after* the time period in question when he was working at a different toll plaza altogether. Thus, to date, the defense has never seen John Fallon's TDR for the November 14, 2004 shift that he allegedly worked at Lane 3E of Exit 46, and there is no legitimate explanation for why prosecutors would withhold this document, which -- clearly -- they had access to during their investigation.[23]

In sum, while counsel was able on cross-examination to convey a sense of general disbelief that Fallon could possibly have remembered the one specific vehicle the police were asking him to identify, counsel never confronted Fallon with his initial November 18, 2004 interview, where he had no recollection of a yellow Jeep; he never questioned Fallon about the multiple interactions he had with Detective Arduini, or the discrepancies between his formal statement, his grand jury testimony, and his testimony at trial; he never questioned Fallon about his wife or raised the possibility that Fallon and his wife had swapped lanes; and he never confronted Fallon on whether he was even working at Exit 46 at the time in question, which seemed to be in serious doubt given his absence from the TDR records from the relevant time. In other words, had defense counsels properly scrutinized the discovery materials in their possession, they could have raised serious

[23] By the time the undersigned was retained and able to complete a careful review of the case file, any TDRs the Thruway maintained from 2004 had been destroyed (Letter from NYS Thruway, dated December 27, 2013 [Exh. E, p. 14]).

questions about the truthfulness of Fallon's testimony and the integrity of the government's investigation.

b. Karen Russell

Karen Russell, who -- unlike Fallon -- did not testify in the grand jury,[24] testified at trial that she was working at Exit 24 on November 15, 2004, and that she remembered collecting a toll ticket from a young man in a yellow Jeep somewhere around 2:00 a.m. She explained that on November 18, 2004, Detective Arduini visited her and showed her a copy of the toll ticket as well as a photograph of a yellow Jeep, and although there do not appear to be any notes documenting this November 18, 2004 interview, Russell was certain that the interview did in fact take place, and that it was at this time that she identified Christopher's yellow Jeep (Russell: 1484-85).

Nevertheless, notwithstanding the November 18, 2004 interview, Arduini did not obtain a sworn statement from Russell until November 23, 2004, at which time Russell swore that "at approximately 1:55 a.m., [she] turned [her] light red to process a vehicle in [her] lane and shut down" and that "[she] then noticed a bright yellow Jeep barreling down into [her] lane (13x) . . ." (Exh. F, pp. 45-50). And later, too, when police and prosecutors interviewed Russell again on December 17, 2005, she reiterated her claim that the yellow Jeep was the last vehicle she processed before her break (Exh. F, pp. 51-53).[25]

In late May or early June 2006, however, after prosecutors subpoenaed dozens of pages of records from the Thruway, including computer toll data and collector TDRs, prosecutors learned that contrary to Russell's claim, audited Thruway records confirmed that the vehicle that turned in

[24] After Fallon testified, a grand juror asked whether the grand jury was going to hear from someone from Exit 24, and the prosecutor answered that he was not sure (*see* Exh. F, p. 32), even though Karen Russell was present at the DA's office *in the same building* as the grand jury presentation on December 17, 2004, meeting with prosecutors as Fallon gave his testimony.

[25] The summary of this interview, which was contained in Lead 178, was not disclosed to the defense prior to trial; Rather, Christopher obtained this item pursuant to a post-conviction FOIL request.

the ticket in question was not the last vehicle that passed through Russell's lane prior to her 2:00 a.m. break. To the contrary, Russell turned her lane light to red at 2:01 a.m., and between 1:51 a.m. (the time stamped on the toll ticket) and 2:01 a.m. (the time she turned her lane light to red), she processed at least 19 other vehicles (Exh. F, pp. 57-58). The Thruway records, in other words, completely undermined Russell's claim at trial that she remembered the yellow Jeep because it was the *last* vehicle that she processed before her break (Russell: 1480-87).[26] However, while counsel did pick up on this discrepancy, and attempted to use it to undermine Russell's credibility (Russell: 1480-87), counsel's efforts were mostly ineffectual, as counsel was never able to establish that Russell's claim to have sighted the yellow Jeep developed just as did Fallon's claim -- after repeated contact with Arduini, nor was counsel able to demonstrate to jurors that even prosecutors harbored doubts about Russell's veracity and about the reliability of her purported recollection prior to trial.

And worse, this was not the only fabrication of Russell's that counsel failed to expose. Indeed, during Russell's initial November 18, 2004 interview, she apparently told Detective Arduini that Mark Washock, a part-time toll collector who worked in the same tollbooth on November 15, 2004 during the relevant time period, had also seen the yellow Jeep on the morning of November 15, 2004, but did not want to get involved in the investigation (Exh. F, pp. 40-42). When Investigators Gray and Baskerville interviewed Washock a month later, however, Washock acknowledged that while he had worked the shift in question as reported by Russell, he never saw any yellow Jeep nor did he ever "state[ ] to anyone that he did not want to get involved" (Exh. F, pp. 54-56). Russell's claim that her co-worker could corroborate her sighting of the Jeep was,

[26] After reviewing the Thruway records, prosecutors held a meeting with Russell, but no notes from this meeting -- if any notes ever in fact existed -- were ever disclosed to the defense (Russell: 1480-87).

therefore, also untrue,[27] yet counsel never questioned Russell about her claims with respect to Washock, nor did counsel call Washock as a defense witness, notwithstanding the fact that he was in a position to offer relevant and material testimony -- contradictory to that of Russell -- about the early morning events of November 15, 2004.

Overall, virtually every fact Russell offered regarding her identification of Christopher's Jeep -- the time the Jeep came through her lane, the fact that the Jeep came through after Russell turned her light to red, her claim that the Jeep was the last vehicle she processed prior to her break, and her contention that her co-worker saw the Jeep but told her he did not want to get involved -- was demonstrably false, and had counsel properly reviewed the discovery materials disclosed by the prosecution, counsel could have undermined Russell's credibility completely. *See People v. Jenkins*, 68 N.Y.2d 896 (1986) (granting defendant a hearing on motion to vacate where evidence suggested counsel failed to make use of police reports in support misidentification defense).

4. Counsel failed to effectively expose how a Bethlehem detective's animus against Christopher biased the investigation; nor did counsel challenge the prosecutor's attempt to minimize the key role the detective played in the investigation.

In 2004, at the time of Peter Porco's murder, the BPD employed four detectives: Christopher Bowdish, Charles Rudolph, Vince Rinaldi, and Anthony Arduini. Christopher and Arduini's two daughters, Courtney and Chelsea, attended the same high school, Christopher briefly dated Arduini's older daughter, Courtney, and Christopher's friendship with the Arduini girls was ongoing at the time of the crime (*see* Christopher Aff: ¶30 [Exh. E]). Christopher also spent time at the Arduini's summer camp and at the Arduini home, and he visited both of Arduini's daughters at college. Unbeknownst to Christopher, however, and prior to the attack on his parents, Arduini and his wife had expressed their dislike for Christopher to veterinarian John Kearney,

[27] When an investigator retained by the undersigned attempted to speak with Russell, she refused to answer any questions and called the state police (*see* Dowd Aff: ¶10 [Exh. C]).

Christopher's former employer, and had even suggested that Dr. Kearney should fire Christopher (Kearney: 3728; Laforte Hrg: 479). In fact, on the late morning or early afternoon of November 15, 2004, after the discovery of the crime scene, Arduini first made sure that his younger daughter had not "run off to Mexico" with Christopher, and then immediately went to see Dr. Kearney at the veterinary clinic, where he expressed his belief that Christopher was the person responsible for carrying out the horrific attack on his parents (Kearney: 3730; LaForte Hrg: 479-80).

Arduini died several months prior to trial, and, as a result, defense counsel never had an opportunity to cross-examine him. Counsel did make an application to the court to introduce certain statements Arduini had made to John Kearney prior to his death, but during oral argument on the issue (Proceedings: 3727-45), while ADA McDermott acknowledged Arduini's negative feelings toward Christopher, he falsely minimized Arduini's role in the investigation, telling the court:

> "Detective Arduini was upfront very early on in the investigation because he knew that his elder daughter knew the defendant, that he wanted to kind of step back and take a very ancillary role in the investigation. He did participate in interviewing some witnesses, but he was not the lead investigator, because he knew that his daughter had a friendship at one point in time with the defendant."

(Proceedings: 3733). Contrary to the prosecutor's representation to the court, however, the role Arduini played in the investigation can hardly be characterized as ancillary.

Prior to trial, the prosecution disclosed 101 pages of material relating to the investigative work performed by Detective Arduini (App. 142-243), 80 of which consisted of Arduini's handwritten notes. These notes memorialized the investigative steps Arduini took on at least 20 different days over a period of time spanning from November 16, 2004, the day after the crime, to at least June 9, 2005; they indicate that Arduini interviewed a minimum of 91 individuals, 20 of whom ultimately testified for the People at trial; and they further confirm that Arduini also re-

interviewed numerous witnesses for no apparent reason, in some cases, before other officers were able to officially memorialize their formal statements. He conducted the first interview, as well as several subsequent follow-up interviews, with tollbooth workers Karen Russell and John Fallon; he made the initial contact with UR students Luis Ortiz, Matthew Ambrosio, Marshall Crumiller, Shari Cuomo, Greg Whiteside, Jason Novak, Chris Halas, Tisha Abrams, and Eric Culverwell; he conducted multiple interviews with Sarah Fischer, Christopher's then girlfriend, as well as Dan Kidera, Christopher's friend; and he located and interviewed prosecution witnesses Dan Lafferty, Marcy Kraus, and Jason Wortham, who all claimed to recall facts that tended to inculpate Christopher *after* each had met with Arduini.[28] In other words, Arduini was intimately involved in the investigation from its inception; he played a central role in securing nearly all of the 'eyewitness' testimony relied upon by the prosecution at trial -- including that of toll collectors John Fallon and Karen Russell; and he obtained much of the most damaging evidence presented against Christopher at trial. Arduini, in other words, was not only well-positioned to obtain (or even coerce) information that inculpated Christopher, he was also in an equally optimal position to suppress exculpatory timeline evidence, much of which, as demonstrated by this application, was never disclosed to the defense. *See* Sections (A)(1) to (A)(4) of Point Four. Nevertheless, just as counsel made no effort to dismantle the People's timeline, counsel likewise failed to challenge the prosecutor's misleading representation regarding the extent of Arduini's involvement in the case, and counsel neither exposed -- nor apparently even recognized -- the depth of Arduini's bias against Christopher and the overall influence he had in the investigation. For this, too, counsel's representation of Christopher was constitutionally infirm.

[28] These witnesses testified at trial to things that Christopher allegedly said or did, or to places where they did or did not remember seeing Christopher at certain times and locations critical to the People's timeline, yet, with the exception of Marcy Kraus and Mr. Lafferty, none of these witnesses testified to facts that could be independently verified.

The law makes clear that extrinsic evidence related to the good faith or biased nature of a police investigation is admissible when necessary to protect the constitutional right of an accused to present a defense and to confront his accusers. *People v. Hudy*, 73 N.Y.2d 40 (1988) (finding error where trial court prevented counsel from examining two investigating officers about the manner in which they questioned child sex abuse victims and whether suggestive comments had been made). Furthermore, when the influence of police on the investigation or on other witnesses is in question or presents a potential motive to fabricate, the right of confrontation on this issue is *not* dependent on the relevant officer or officers taking the stand. *People v. Rios*, 223 A.D.2d 390, 391-92 (1st Dept. 1996). *See also People v. Szwec*, 271 A.D.2d 322 (1st Dept. 2000); *People v. Gaskin*, 170 A.D.2d 458 (2d Dept. 1991); *People v. Vigliotti*, 203 A.D.2d 898 (4th Dept. 1994); *People v. Smith*, 27 N.Y.3d 652 (2016).

Here, while counsel initially sought to elicit limited evidence of Arduini's bias against Christopher through John Kearney, he inexplicably abandoned this effort, and, as a result, failed to fully develop the extent of Arduini's bias and -- more importantly -- to detail for jurors the critical investigative work that was performed by Arduini. As a result, jurors learned only that a particular detective may have disliked Christopher but remained entirely unaware of the depth of Arduini's negative feelings for a person he suspected of murder, or the innumerable opportunities he had to influence the investigation in a direction that better conformed to his personal beliefs. *See, e.g., People v. Reyes*, 49 A.D.3d 565 (2d Dept. 2008) (police detective's statements admissible to show his state of mind and the evolution of the investigation).

In addition to John Kearney, for example, there were numerous witnesses at trial that counsel could have questioned about Arduini's involvement in the investigation and about his personal feelings toward Christopher. Joe Catalano, for instance, the leader of Christopher's

former church youth group, who knew Christopher since Christopher's junior year in high school, and was also the assistant vice president of financial aid services at New York State Higher Education services Corporation, testified about his conversation with Christopher at the hospital when the two were visiting Christopher's mother and also about the email Christopher had sent Catalano inquiring about securing a loan for school (Catalano: 1515-42). Christopher and Catalano, however, had also spoken months later, at length, in the spring of 2005, at the wake for the mother of one of Christopher's co-workers, Lisa Futia. Indeed, during this conversation, Catalano approached Christopher, expressed his disbelief that the police investigation was still focused on him, and made several statements regarding the possible influence Arduini was having over the investigation (Exh. E [Christopher Aff: ¶30]). In fact, during the wake, Catalano told Christopher that Arduini "had it in" for him, that Arduini knew that Christopher had visited his younger daughter Chelsea at college several weeks prior to the wake in February 2005, and that Arduini would do "whatever it took" to put Christopher "away" (*id.*). Christopher told counsel about the conversation between Catalano and Christopher prior to trial, yet counsel never confronted Catalano with the statements he made to Christopher about Arduini when Catalano was on the stand.

Additionally, while counsel elicited for the jury the fact that it was Arduini who contacted Karen Russell, conducted several interviews with her, and eventually obtained a statement from her, wherein she incredibly claimed that she was able to recognize Christopher's Jeep (Russell: 1485), counsel never made the jury aware that it was also Detective Arduini who "helped" John Fallon 'remember' Christopher's Jeep *after* Fallon had initially indicated that he was unable to do so, nor did counsel elicit that of the five UR students who testified about statements Christopher purportedly made on November 14, 2004 or November 15, 2004 regarding his inability to reach

his parents, each of these student had significant -- and in some cases *repeated* -- contact with Arduini, and often only remembered "facts" that were helpful to the prosecution *after* conversing with the detective.[29] *See* sections (A)(5) of Point One and (F) of Point Seven. *See also* Exh. F.

Page 13 of the "Lead Index," for example, which was compiled by the BPD and disclosed to counsel prior to trial, indicates that Fallon was actually first questioned about the Jeep on or about November 18, 2004, and that, at this time, he indicated that *he had no recollection of any Jeep* (Exh. F, pp. 3-4). Nevertheless, despite Fallon's initial inability to remember Christopher or his Jeep on November 18, 2004, Fallon later claimed, after his subsequent interview with Arduini on November 27, 2004, that he recalled a "bright yellow Jeep" with "wide tires" (*see* Exh. F, pp. 11-12). Arduini then met with Fallon again on December 2, 2004, and thereafter Fallon, whose memory had apparently *improved*, gave a sworn statement to State Police on December 16, 2004 in which he swore that he specifically remembered giving the toll ticket in question to the kid in the yellow Jeep at 10:45 p.m. *on November 14, 2004*. The very next day, after being questioned by grand jurors and admitting that he in fact had no idea what day he allegedly saw a yellow Jeep, he made it clear that the "gentleman from Bethlehem" (Arduini) had provided him with the date, time, vehicle and "description on the driver." (Exh. F, p. 30). In this regard, counsel had ample grounds to argue that Fallon's purported recollection of a yellow Jeep was the product of coercive or otherwise suggestive contact with Detective Arduini, yet, again, counsel never presented this argument to jurors.

Further, Arduini's influence over several of Christopher's fraternity brothers is also apparent. Jason Novak, for example, recalled in his initial statement to police that he had a

[29] Arduini's notes also reference "Marshall Gokey," the neighbor who claimed to have observed Christopher's Jeep in the family driveway at the time of the attack, however they do so above what appears to be an after-the-fact redaction (App. 207). Thus, while the extent and nature of the contact between Arduini and Gokey is unclear, counsel never endeavored to explore the suspect nature of Gokey's interactions with the police.

conversation with Christopher at approximately 10:30 p.m., roughly an hour after Novak returned to UR from his mock trial competition, and he mentioned nothing out of the ordinary (Exh. F, pp. 99-100). After several subsequent interviews with Detective Arduini, however, and with other police officers and prosecutors, Novak's recollection of the timing of his conversation with Christopher changed, and he ultimately testified at trial -- consistent with the prosecution's timeline theory -- that his conversation with Christopher had likely occurred earlier, at around 10:00 p.m. (Novak: 1637-41).

Similarly, the recollections of Jason Wortham, Matt Ambrosio, and Greg Whiteside also changed after being interviewed by Detective Arduini. Wortham, for example, the regional director of Christopher's fraternity, who slept in Christopher's room on Sunday, November 14, 2004, initially gave Rochester Police a detailed account of what he remembered Christopher saying and doing during the 24 hours preceding his parents' attack, he provided details about Christopher's appearance, attitude, and demeanor, and he made no mention whatsoever that Christopher had expressed concern on Sunday night between 9:30 p.m. and 10:00 p.m. that he was unable to reach his parents. He told police that Christopher had been working on his computer in his dorm room on Sunday night at about 7:30 p.m., he stated that after being introduced to Christopher, they went to the lounge and watched television together, he stated that he went to be around 10:30 p.m., and he recalled that he woke up at around 9:10 a.m. the next morning, went out to the lounge, and observed Christopher asleep on the couch. He remembered Christopher seeming congested, and stating that he felt a little sick, and he detailed how at about 3:00 p.m., Christopher received a phone call at which point, as he answered the caller's questions, his demeanor changed. Next, Wortham told police, Christopher then hung up the phone, fell back into his chair, and told Wortham and the others who were present, while seeming shocked, that his

parents were dead (Exh. F, pp. 64-67). At trial, however, 19 months later -- and *after* Wortham was interviewed by Detective Arduini on November 28, 2004 (*see* Exh. F, pp. 68-70) -- Wortham testified that he did not meet Christopher in the dorm until between 9:00 p.m. and 9:30 p.m., he stated that he went to be earlier, at around 10:00 p.m. or 10:15 p.m. (Wortham: 2018-20) -- a claim that was more consistent with the prosecution's timeline, which had Christopher entering the Thruway at 10:45 p.m., and he made the *new* claim -- a claim that was also consistent with the prosecution's theory that Christopher feigned concern for his parents just hours before he brutally attacked them -- that Christopher had indicated on Sunday night that he was having trouble contacting his parents and that a couple of the other brothers had suggested that he try to contact them at work or reach out to his neighbors (Wortham: 2020-21; 2051).

Similarly, Matt Ambrosio and Greg Whiteside also changed their recollections of their interactions with Christopher between the time of trial and when they were first interviewed by police in ways that portrayed Christopher as manipulative and deceitful. Indeed, like Wortham, when Ambrosio was first interviewed by Rochester Police on November 16, 2004, he made no mention of Christopher saying anything about not being able to contact his parents either on Sunday night, or the next morning at about 11:15 a.m. when he spoke to Christopher in the lounge (Exh. F, pp. 83-84); yet, when Detective Arduini interviewed Ambrosio just days later, Ambrosio suddenly remembered that Christopher had mentioned on both Sunday night and the next morning that he was worried because he could not get in touch with his parents (Exh. F, pp. 85-87). Further, Whiteside also claimed to remember Christopher expressing concern about trying to reach his parents, but he, too, did so only after being re-interviewed by Detective Arduini. Indeed, when Arduini first interviewed Whiteside on November 16, 2004, he claimed, specifically, that he saw Christopher in the lounge at about 10:00 a.m., at which time Christopher told him that he had just

returned from jogging, was tired and out of shape, and had not slept comfortably on the couch in the lounge the night before (Exh. F, pp. 104-107).

On November 28, 2004, however, Arduini re-interviewed Whiteside; five days later, on December 3, 2004, Whiteside testified in the grand jury that he, like the other fraternity brothers, recalled Christopher making statements about not being able to reach his parents (Whiteside GJ: 36-38); and then, at trial, Whiteside repeated his claim that Christopher had expressed concern that he had been unable to reach his parents on their cell phones or at their residence (Whiteside: 1687-88; Exh. F, pp. 108-109). In other words, after recalling nothing out of the ordinary regarding Christopher's behavior when they were initially interviewed by police, multiple witnesses claimed to recall Christopher making statements about his inability to reach his mother and father, *after* being interviewed by Arduini, and *after* being told that Bethlehem Police were convinced that Christopher had killed his parents.

Finally, counsel never challenged McDermott's misleading statements regarding Arduini's "ancillary" role in the investigation, nor did he move for a mistrial when the prosecutor belatedly disclosed that Arduini had acknowledged that his bias should have precluded him from having an active role in the case.[30] Indeed, given McDermott's on-the-record statements (*see* Proceedings: 3732-33), McDermott was perhaps best positioned to articulate Arduini's hostility toward Christopher, yet counsel did not move on this ground to disqualify McDermott nor did counsel call McDermott to the stand.

Under the advocate-witness rule, the law is well-settled that where a prosecuting attorney is to be called as a witness by the defense, and his testimony will be adverse to the People, the

[30] Counsel likewise did not correct the record when McDermott represented to the court that Arduini did not testify in the grand jury (Proceedings: 3733; 3741). Arduini did testify in the grand jury, but because he was not called to testify at trial, his grand jury minutes were never provided to the defense (App. 245).

attorney should be disqualified from the case. *People v. Paperno*, 54 N.Y.2d 294 (1981). Further, where counsel makes a showing that the prosecutor's potential testimony would be (1) material to the case, (2) adverse to the People, and (3) unobtainable from any other source, counsel is generally permitted to call a prosecuting attorney as a witness, thereby triggering disqualification. *Id.* Here, McDermott's testimony about Arduini's conceded bias -- which was clearly *Brady* material, would have been both material and adverse to the prosecution, and Arduini's communications with McDermott would have laid bare the information counsel sought to elicit from John Kearney -- namely, that Arduini's intense dislike for Christopher pre-dated the attack on Joan and Peter, and that Arduini himself knew his feelings would improperly color the investigation. Nevertheless, although these details were probative and admissible under *Hudy, supra,* counsel failed to explore the circumstances of Arduini's communications with McDermott -- or whether other members of the District Attorney's Office were present for the conversations(s) -- and counsel therefore forfeited the opportunity at trial to fully elicit for the jury the extent to which Arduini's hostility toward Christopher impacted the investigation. *C.f.*, *People v. Perry*, 127 Misc.2d 562 (Sup. Ct., NY Co. 1985). Furthermore, because the prosecution failed to make a timely disclosure of the seriousness of Arduini's feelings or the scope of his role in the investigation, thereby violating the People's responsibilities under *Brady* and *Kyles v. Whitley,* 514 U.S. 419 (1995), the prosecutor's midtrial disclosure should have triggered a motion for a mistrial. *See also United States v. Thomas*, 981 F.Supp.2d 229 (S.D.N.Y. 2013) (holding *Brady* disclosure during sidebar after prosecution rested was prejudicial and mandated reversal). Counsel's failure to so move was yet another example of his ineffectiveness, as was his failure to, at minimum, move the court for a hearing to discover the facts, circumstances, and timing of Arduini's disclosure to McDermott.

In sum, the small-town detective, who overtly expressed his dislike for Christopher, single handedly procured two of the prosecution's most important witnesses -- Russell and Fallon -- as well as at least five other crucial facts witnesses from the UR, yet counsel failed to make the extent of Arduini's bias known to the jury, he did not highlight for the jury the troubling opportunity that Arduini had to influence the investigation, he never argued to the court that that McDermott's misleading statements regarding Arduini's "ancillary" role in the investigation were patently belied by the facts, and he did not move for a mistrial when the prosecutor disclosed -- midtrial -- that Arduini himself had openly acknowledged his own bias. These failures, too, when considered cumulatively, and in the context of counsel's other omissions, contributed to the deprivation of Christopher's constitutional right to the effective assistance of counsel and his due process right to a fair trial.

5. Counsel failed to thoroughly cross-examine James Kennedy and did not demand or introduce exculpatory surveillance evidence at trial.

As part of their direct case, the prosecution presented testimony from James Kennedy, Director of Forensic Video and Multimedia Services for the New York State Police, for the limited purpose of authenticating and establishing a chain of custody for the introduction of certain video surveillance tapes that the police recovered from UR. Kennedy testified on direct examination that he began working with prosecutors in early April of 2006, but he maintained that he did not work "extensively" on the case, and he denied ever being asked by members of the BPD to videotape the crime scene at 36 Brockley Drive in November of 2004 (Kennedy: 1846; 1854). Contrary to Kennedy's testimony, however, discovery materials indicate that prosecutors pulled Kennedy into the investigation within a week of Peter Porco's murder. Detective Arduini's notes, for example, suggest that in addition to the UR videos, the police also obtained multiple

surveillance videos and pictures from various businesses along Christopher's suspected route of travel, which they then dropped off to Kennedy for examination on November 24, 2004:

> Jim Kennedy Academy Dropped off 3 Tapes
> 10 Video 1 - Snow BK
> Photos
> +
> CD
> Not Labeled 1 – All
> Tape 1 Rid – dup 2 tapes 2nd 45 sec to min
> Tape 2

(App. 193).[31] Nevertheless, despite being put on notice that these materials existed, defense counsel neither demanded access to them nor inquired about their content, and, as a result, counsel missed another critical opportunity to discredit the prosecution's timeline.[32]

Police, for instance, recovered video surveillance tapes from the Sunoco Station at 1465 Washington Avenue in Albany as well as from the Dunkin Donuts at 1232 Western Avenue, locations along the potential "timeline" routes of travel; officer notes confirm that there was no evidence that Christopher or his Jeep was at either location during the time period in question; and neither of these surveillance tapes was turned over to the defense (App. 31, 74). Further, Lead Sheet 108 makes clear that investigators scrutinized "all" businesses along the possible routes of travel searching for video surveillance, yet they found no evidence of a yellow Jeep (App. 75-76). In this respect, Lead Sheet 91 (App. 77-78), entitled "SP Thruway Schyler," memorializes an investigative directive to secure "possible video at SP Barricks [sic] at Schyler," which is a reference to the State Police sub-station at 263 Carder Lane Road in Frankfort, New York, which sits directly on the shoulder of the Thruway and is staffed by members of the State Police Thruway

[31] Kennedy testified in the grand jury that he also videotaped the two interviews that prosecutors conducted with Joan Porco while she was being treated at the Sunny View Rehabilitation Center -- one on December 20, 2004, and the second on December 21, 2004 (Kennedy GJ: 4-6).

[32] Counsel filed only a generic Demand for Discovery and Inspection on November 22, 2005.

Patrol, "Troop T." Further, post-conviction FOIL requests confirm that this facility did in fact have exterior video surveillance cameras facing the Thruway during the time period in question (Exh. I, pp. 1-3). If those surveillance cameras captured images of vehicles passing on the Thruway just yards away -- and Christopher's vehicle was not among them -- those images would have constituted *Brady* material. But while prosecutors made a point at trial to inform the jury that both the Thruway Authority and the Department of Transportation did not have surveillance cameras operating on the relevant portions of the Thruway at the time of the crime (Christensen: 2318-19), there was no mention at all of whether the State Police had any comparable surveillance capability along the theorized Thruway route.

And finally, Arduini's notes make another specific reference to the Charter One Bank at Route 20 and Schoolhouse Road, *see* (App. 208), an intersection through which Christopher would *had* to have driven after exiting the Thruway at Exit 24 if he were indeed in Albany on November 15, 2004. However, while the notes list phone numbers and the name of bank security personnel, there is no mention at all of whether investigators reviewed or recovered any surveillance footage from the bank, and counsel never demanded an answer to these questions.

In sum, the authorities scrutinized every business along the timeline route, every rest stop on the Thruway, and various State Police facilities, but they did not find any surveillance video of Christopher's Jeep. Counsel, however, never argued to the jury that the absence of inculpatory surveillance images along the timeline route actually tended to exculpate Christopher. Had counsel made the proper discovery demands, thoroughly reviewed the documents that were disclosed, and conducted a proper cross-examination of James Kennedy, counsel could have determined what surveillance evidence had been reviewed and/or taken into custody by police and what if any of that evidence was exculpatory, and then argued to the jury that the absence of any

surveillance footage along the timeline route supports the defense's contention that Christopher simply never took the trip. This oversight was consistent with counsel's overall failure to challenge the timeline, and it contributed to the deprivation of Christopher's constitutional rights.[33]

* * * * *

Prosecutors presented the 'timeline' -- the most compelling evidence of Christopher's guilt -- as unassailable fact. Defense counsel, however, made no discernable effort to investigate or challenge *any* material portion of the timeline and thus likewise failed to advance the argument that Christopher was simply not -- and indeed could not have been -- present in Albany on November 15, 2004 when his parents were attacked. *See United States v. Matthews*, 999 F.Supp.2d 352 (N.D.N.Y. 2014) (vacating defendant's robbery conviction on ineffective assistance grounds where counsel failed to adequately challenge the prosecution's timeline of events). In *Matthews*, the District Court for the Northern District of New York concluded that counsel's overall investigative efforts were objectively unreasonable where counsel failed to conduct a "time study" to determine whether the defendant's movements around the time of the crime had been accurately theorized by prosecutors and also neglected to utilize police reports and witness statements, which, together, could have enabled counsel to convince the jury that the defendant could not possibly have been at the bank at the time of the robbery in question. Likewise in this case, counsel did not challenge Siko's testimony regarding the fuel consumption of Christopher's Jeep, counsel failed to utilize enormous amounts of exculpatory 'negative' timeline evidence, counsel overlooked key points of cross-examination with respect to James Kennedy, John Fallon, and Karen Russell, counsel failed to make adequate demands for missing discovery and *Brady* material, and counsel

[33] Even now, after securing much of the withheld surveillance material through various FOIL requests (*see, e.g.*, Exh. E, pp. 15-17 [request for Lead Sheet Numbers 67, 90, and 108), it is not entirely clear what surveillance evidence actually exists and how much of it was examined by Kennedy or others.

-- unlike the attorney in *Matthews* -- never even retained an investigator to test the timeline route and demonstrate for the jury that the prosecution's theory of how they believed Christopher perpetrated this horrible crime was simply not possible. For this, counsel's representation of Christopher was constitutionally infirm, and this Court, therefore, must either vacate his conviction or, to the extent the People's response papers raise a factual dispute, conduct an evidentiary hearing pursuant to section 440.30(5) of the CPL to determine whether an order vacating his conviction must necessarily follow.

B. Counsel Failed to Consult With or Retain an Independent Forensic Pathologist to Challenge the Government's Conclusion Regarding the Time at Which the Attack Must Have Occurred or The Time at Which Peter Porco Succumbed to His Injuries.

Under the prosecution's timeline theory -- and, indeed, under any conceivable scenario in which Christopher could possibly be guilty -- the attack on Peter and Joan Porco must have occurred between 2:14 a.m. and 4:54 a.m. on November 15, 2004. Accordingly, it was incumbent on counsel to take reasonable steps to examine whether the medical evidence, and, specifically, whether the forensic pathology evidence gleaned from the circumstances of Peter's death, was consistent with the People's theorized time and manner of attack. In this respect, counsel's failure to even consult with an independent forensic pathologist -- which would have revealed that Peter could not have been attacked earlier than 6:30 a.m., and that Christopher, therefore, could not be guilty since he was on the UR campus at 8:30 a.m. -- was objectively unreasonable, and, by any measure, inexcusable.

While it is rare that an attorney's strategic decision not to present expert testimony amounts to ineffective assistance of counsel, *see People v. Caldavado*, 26 N.Y.3d 1034, 1036 (2015), a defendant's right to meaningful representation nevertheless entitles him to have his attorney "conduct appropriate investigations . . . to determine if matters of defense can be developed, and

to allow himself time for reflection and preparation for trial." *People v. Bennett*, 29 N.Y.2d 462, 466 (1972). In every case, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691, and when assessing whether counsel exercised "reasonable professional judgment," the court's "principle concern . . . is not whether counsel should have presented" the additional evidence that further investigation would have revealed, but rather, "whether the investigation supporting counsel's decision not to introduce" the additional evidence "was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). In this respect, the court examines "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, at 527. *See Rivas v. Fischer*, 780 F.3d 529 (2d Cir. 2015) (where defendant's alibi was uncorroborated and defense turned on rebutting prosecution's theory as to time of death, there was no sound strategic reason for counsel's failure to enlist services of a forensic pathologist to investigate findings of government's expert); *People v. Caldavado, supra* (where casting doubt on prosecution's medical proof is the crux of the defense, a hearing was required to resolve ineffective assistance claim based on attorney's failure to call an expert pathologist); *People v. Cosey*, 54 Misc.3d 1208(A) (Sup. Ct. N.Y. Co. 2016) ("Had the defendant's trial attorneys consulted with and called a forensic medical expert, they would have been in a firm position to effectively challenge the People's version of the decedent's death.").

So, too, in this case, there is simply no strategic or tactical reason for counsel's failure to consult with an independent forensic pathologist and to challenge the conclusion of the state's pathologist with respect to Peter Porco's post-attack survival time and time of death -- especially in light of the narrow time frame during which the attack would have had to occur in order for Christopher to be guilty. Thus, similar to the cases of *Gersten v. Senkowski*, 426 F.3d 588 (2d Cir.

2005) (counsel ineffective for failure to investigate medical findings and consult with medical experts prior to trial), *People v. Fogle*, 307 A.D.2d 299, 301 (2d Dept. 2003) (counsel ineffective for failure to investigate the possibility of witnesses favorable to defense), *Eze v. Senkowski*, 321 F.3d 110 (2d Cir. 2003) (counsel ineffective for failure to investigate and consult with an expert), and *People v. Oliveras*, 21 N.Y.3d 339 (2013) (counsel ineffective for failing to obtain client's psychiatric records when defense centered on client's inability to understand *Miranda* based on mental illness), trial counsel's error in not consulting with an expert, in this case, too, deprived Christopher of his right to the effective assistance of counsel.

At trial, after detailing the number, location, and severity of each of Peter Porco's injuries, the prosecutor asked Doctor Jeffrey Hubbard, the state's pathologist, whether he could state, to a reasonable degree of medical certainty, how long Peter would have been able to survive after his wounds were inflicted. The doctor answered that he could -- albeit within broad limits -- and explained that none of Peter's injuries were "instantly or even very rapidly fatal, like the wound to the aorta or cutting across the spinal cord." Hubbard described "visible cell necrosis" around Peter's frontal lobe injuries, which lead him to believe that Peter had lived for a period of time as the cells underwent the dying process, and he testified, "So, I would say that the survival here could have been many hours and the injuries are even consistent with prolonged survival . . . ." (Hubbard: 2727-29; 2759). Hubbard then testified, "There is nothing here that would be guaranteed to cause death in one hour, two hours or anything," and he offered his opinion that Peter could have survived for "several hours" (Hubbard: 2728) or "at least several hours" (Hubbard: 2729).

On cross-examination, counsel elicited the fact that Hubbard did not compare the injuries sustained by Peter and Joan (Hubbard: 2730-32), nor did he attempt to determine the amount of

blood Peter lost (Hubbard: 2734-35). Counsel also raised the possibility that a weapon with a shorter handle -- like a hatchet -- could have been used to cause Peter's injuries (Hubbard: 2736-39), and he established that Dr. Hubbard really had no way of knowing whether more than one weapon had been used (Hubbard: 2739-40) or whether there could possibly have been more than one attacker (Hubbard: 2743).

Next, with respect to Peter's time of death -- an issue about which the prosecution presented no testimony at all -- counsel elicited that Hubbard took Peter's temperature at approximately 1:30 p.m. (Hubbard: 2735), and that Peter's wounds would have bled a great deal (Hubbard: 2753). When counsel queried Hubbard on Peter's time of death, however, although the doctor answered, "There is a method by which that can be done. I tried it" (Hubbard: 2759), he stated that he could not be sure regarding the time of death. Specifically, while Hubbard agreed that "the method" involved taking the temperature of the body and considering factors such as the way the body is clothed, and the temperature of the ambient air, when counsel asked whether he could give an opinion -- to a reasonable degree of medical certainty -- as to the time of Peter's death, he answered that he could not (Hubbard: 2761).[34]

At the conclusion of Hubbard's cross-examination, counsel made a record that the notes Hubbard made in connection with Peter Porco's autopsy report indicated that, contrary to his testimony, he had apparently calculated Peter's time of death using Mr. Porco's rectal temperature, the temperature of the ambient air, the clothing Peter was wearing, and Peter's weight, to 2:30 a.m. (Hubbard: 2766-67), and that given this, counsel should be permitted to make further inquiry of

[34] The doctor likewise offered no opinion on Peter's level of consciousness after the attack or on his ability to communicate (Hubbard 2757-58).

the doctor.[35] Specifically, counsel argued that given Hubbard's testimony that Peter had survived for several hours after the attack, if Peter died at 2:30 a.m., the attack would necessarily have occurred *prior* to Christopher's alleged arrival at 36 Brockley Drive (Proceedings: 2767). In response, the prosecutor argued that Doctor Hubbard's notes regarding the time of death calculation were not part of his official autopsy report, that Hubbard believed that the calculation was "junk science," and that any further testimony on the subject should not be permitted because the calculation did not establish anything to a reasonable degree of medical certainty (Proceedings: 2770-72). Counsel, however, noted that the prosecution had elicited testimony in the grand jury that Hubbard believed that Peter died somewhere between seven and ten or twelve hours before his body was found, which would be between 2:00 a.m. and 7:00 a.m. (Hubbard GJ: 28; Proceedings: 2772), and so ultimately, after conducting a brief inquiry of the doctor outside the presence of the jury (Hubbard: 2776-82), the court permitted counsel to elicit from Hubbard that he had in fact estimated -- to a reasonable degree of medical certainty -- that Peter died sometime between seven and twelve hours prior to 1:30 p.m., or between 1:30 a.m. and 6:30 a.m. (Hubbard: 2798). Defense counsel, having failed to consult with an independent forensic pathologist, offered jurors no alternative, and therefore left Peter's purported time of death fitting squarely within the People's timeline theory.

After Christopher's conviction, however, re-cut tissue slides from Peter Porco's autopsy, along with crime scene photos and video, were sent to Doctor Cyril Wecht, an expert in the field of forensic pathology, for analysis, along with photographs of Peter's autopsy, Dr. Hubbard's autopsy report, the above-described notes Dr. Hubbard made regarding his time of death calculation, and Dr. Hubbard's trial testimony (*see* Wecht Aff: ¶10 [Exh. A]). Dr. Wecht

[35] Notably, Dr. Hubbard calculated Peter's time of death using a body weight of 250 pounds, even though Peter actually weighed less than 230 pounds at the time of autopsy.

conducted a review of the materials and reached a starkly different conclusion from that of Dr. Hubbard. As noted by Dr. Wecht, Peter's rectal temperature was 92 degrees Fahrenheit at 1:30 p.m., the temperature in the foyer of 36 Brockley Drive was 62 degrees Fahrenheit,[36] there was no indication that Peter's body temperature would have been elevated prior to his death from the normal 98.6 degrees Fahrenheit due to illness or physical activity or cooler due to environmental conditions, Peter was wearing only one layer of average weight clothes, he was obese, and he was positioned mostly on a carpeted surface. Furthermore, under average conditions -- which Dr. Wecht assumed -- the human body cools either between 1 and 1.5 degrees per hour or 1.5 degrees the first hour and 1 degree each additional hour. And, while Dr. Wecht, like Dr. Hubbard, observed cell necrosis in Peter's right frontal lobe near the wound cite, Dr. Wecht disagreed with Dr. Hubbard's conclusion that visible cell necrosis meant that Peter must have survived for several hours. Much to the contrary, Dr. Wecht reports, "necrosis of the neurons . . . particularly in a vicinity of an injury, can occur very quickly -- typically within a matter of minutes, not hours" (Wecht Aff: ¶26 [Exh. A]). It is inflammation, Dr. Wecht stated, as opposed to mere necrosis, which takes more time to develop (*see id.*). Thus, given these factors, Dr. Wecht first concluded -- to a reasonable degree of medical certainty -- that Peter's time of death occurred before 11:30 a.m. *but no earlier than 6:30 a.m.* (Wecht Aff: ¶12–20, 27 [Exh. A]). Second, given that Peter had significant heart disease, which would have made him susceptible to death from the loss of less than half of his blood volume, as his heart had an increased demand for oxygen, and given that Dr. Wecht did not detect inflammation around Peter's wound sites after reviewing Peter's re-cut autopsy tissue slides, Dr. Wecht also concluded -- to a reasonable degree of medical certainty

[36] Dr. Wecht opined, as did Dr. Hubbard, that it was quite likely that the home was warmer, and that it cooled to 62 degrees once responders entered the home and began opening and closing the door (*see* Wecht Aff: ¶18 [Exh. A]). Dr. Hubbard testified that the temperature inside the home felt the same as the temperature outside the home, which was 62 degrees Fahrenheit (Hubbard: 2779-80; 2792-94).

-- that although Peter's injuries would not have caused his immediate death, Peter would not have survived more than 30 minutes before succumbing to blood loss from his injuries (Wecht Aff: ¶24-26, 28 [Exh. A]). And finally, based on his time of death calculation and his estimated time of survival, Dr. Wecht formed the opinion -- again, to a reasonable degree of medical certainty -- that Peter Porco was attacked less than seven hours from the time Dr. Hubbard took his temperature at 1:30 p.m. -- or *after 6:30 a.m.* -- more than an hour and a half after prosecutors theorized Christopher was already on his way back to the UR campus.

Dr. Wecht's conclusions do not simply differ from those of Dr. Hubbard; they turn the prosecution's timeline theory of the crime completely on its head; and had Dr. Wecht's findings been ascertained by counsel prior to trial and properly presented, his testimony would have offered jurors a powerful, alternative, exculpatory narrative, which surely would have changed the outcome at trial. Indeed, according to the People's timeline -- which, again, was presented to the jury, unchallenged, as fact -- Christopher exited the Thruway at exit 24 at 1:51 a.m., disarmed his family's alarm system at 2:14 a.m., attacked his parents, cut the telephone wires at 4:54 a.m., entered the Thruway on his way back to Rochester at 5:12 a.m., and reached exit 46 in Rochester at 8:12 a.m. As such, in order for Christopher to be guilty, Peter and Joan must have been attacked between 2:14 a.m. and 4:54 a.m. Initially -- before broadening his estimated time of death range in the grand jury and then at trial -- Hubbard indicated in his autopsy report notes that Peter's time of death must have been sometime around 2:30 a.m. He also concluded, however -- based on his review of the autopsy tissue slides and the observation of cell necrosis -- that Peter had survived for "several hours," a theory which helped prosecutors explain why a significant amount of Peter's blood was identified throughout the Porco home, but which also necessarily placed the time of the attack *earlier* than Christopher's alleged arrival at the home. By deliberately eliciting Hubbard's

opinion with respect to Peter's survival time, but not his time of death, and then arguing to the court that the calculation was "junk science," prosecutors obscured the time of death question from jurors in order to maintain the integrity of their timeline. And while counsel appeared to have recognized this issue at trial, counsel's elicitation of Hubbard's estimation that Peter died sometime between 1:30 a.m. and 6:30 a.m. was simply too little, too late. Without the testimony of an independent forensic pathologist to challenge Dr. Hubbard's findings and offer jurors an alternate expert opinion founded in medicine and science, counsel was simply never able to make this critical point for the jury. *See People v. Taft*, 145 A.D.3d 1090 (3d Dept. 2010) (reversing conviction on weight of the evidence grounds where pathologist determined that attack occurred during a time that defendant was not present at the crime scene).

In sum, had counsel consulted with a forensic pathologist, had Dr. Wecht testified for the defense, and had jurors credited Wecht's testimony, there is a reasonable probability that jurors would have concluded that the attack on Christopher's parents occurred at a time when it was simply impossible for Christopher to have been present, and that the verdict, therefore, would have been different. Counsel's failure to call, or even consult with, his own pathologist further exemplifies the inadequacy of counsel's pre-trial investigation, and for this, too, counsel was ineffective, rendering Christopher's conviction illegal in violation of his Constitutional Rights.

C. Counsel Failed to Interview or Call as a Witness a Classmate of Christopher, Who Possessed Exculpatory Alibi Evidence, and Failed to Expose the Government's Efforts to Suppress This Evidence.

Rachel Slater, a classmate of Christopher's at UR, alerted both a confidant and school authorities after Christopher's parents were attacked that in the early morning hours of November 15, 2004, when prosecutors theorized that Christopher was racing down the Thruway toward Albany, she received an instant message from him on AOL Instant Messenger. Counsel, in turn,

was advised about what Slater had reported, yet, inexplicably, conducted no investigation with respect to Slater whatsoever.[37] Counsel, therefore, was also ineffective in this regard.

Absent "either a plausible strategic calculus or an adequate pre-trial investigation" an attorney's decision not to call a witness who would have provided "non-cumulative testimony 'akin to an alibi,' " can and will often deprive a defendant of the effective assistance of counsel. *Pavel v. Hollins*, 261 F.3d 210, 222 (2d Cir. 2001); *People v. Maldonado*, 278 A.D.2d 513, 514 (2d Dept. 2000) (stating "it is hard to perceive any trial strategy justifying counsel's failure to interview and/or call witnesses who had exculpatory information tending to exonerate the defendant and substantiate his defense"). It is also "well-established that the refusal to even interview a witness with potentially exculpatory information cannot be considered 'strategic' and thus generally constitutes deficient performance." *Lopez v. Miller*, 915 F.Supp.2d 373, 427 (E.D.N.Y. 2013). *See also People v. Fogle*, 307 A.D.2d 299 (2d Dept. 2003) (reversing summary denial of 440 motion where trial counsel failed to conduct pre-trial investigation, which would have uncovered two witnesses); *People v. Bussey*, 6 A.D.3d 621 (2d Dept. 2004) (finding ineffective assistance where counsel failed to investigate defendant's alibi or to call any of the alibi witnesses due to fear that damaging information would be elicited on cross-examination); *People v. Jenkins*, 84 A.D.3d 1403 (2d Dept. 2011) (reversing summary denial of 440 motion where trial counsel failed to investigate two alibi witnesses); *People v. Jones*, 65 A.D.2d 802, 802 (2d Dept. 1978) (failure to interview and call two exculpatory witnesses deprived defendant of meaningful assistance of counsel).

In this case, seven days after the crime scene was discovered, and five days after Christopher retained counsel, defense counsel received a communication from Peter Porco's best

[37] The undersigned spoke on the telephone with Ms. Slater, who stated she no longer had any specific memory of the events and asked that she not be contacted again.

friend, attorney John Polster -- the same attorney whose efforts to stop Christopher's unlawful interrogation were thwarted by Bethlehem Police and prosecutors -- who indicated that a UR student, Rachel Slater, received an "instant message" via AOL Instant Messenger on her computer from Christopher during the early morning hours of November 15, 2004, at the time prosecutors theorized the crime was already in progress (App. 246).[38] Polster's email, which appears to be one of several in a series, suggests that Polster received information about the message from someone close to Slater, who asked that the information not be divulged, characterizing Slater as "very nervous." Polster also told defense counsel that he would need to get Slater's contact information from Christopher so that there would not be "any indication that any confidences were violated." Counsel then wrote "File as Rachel Slater" at the top of the printed email message.

Indeed, disclosed discovery materials made clear that by mid-March 2005, Rachel Slater had not only informed a confidant about the email she received from Christopher, who then told John Polster, but she had also informed UR staff about the message. Staff notes of UR Investigator Dan Lafferty, for example, dated March 14, 2005, indicate that there was a meeting at 4:00 p.m., wherein a UR staff member named Jody Asbury advised other staff members that "Rachel Slater told her she had received an email from Porco -- or who she believed was Porco -- at around 2:00 a.m. on November 14, 2004 when the house was being broken into" (App. 248). Continuing, the notes state, "RO notes Slater was one of the names supplied earlier in the investigation by

[38] This message would have had to have been sent from Christopher's computer -- not his cell phone -- because while it was theoretically possible to send an instant message from a cell phone in the pre-smartphone age, the testimony at trial, as well as Christopher's cell phone records, established there was no activity on Christopher's phone for 16 days prior to his parents' attack because he had lost his phone (App. 249-50). Furthermore, Arduini's notes confirm that Christopher's phone became inactive in October (App. 183), and there is no evidence that Christopher had another phone or had acquired a new phone until a phone was activated to his account two weeks after the crime.

Bethlehem Detectives but to RO's knowledge there was no follow up interview with her to [that] point" (*id.*).[39]

Seven days later, members of the BPD interviewed Slater, who provided a sworn deposition detailing the contents of the message, which she received from Christopher between 12:00 a.m. and 12:30 a.m. on the morning of November 15, 2004 (App. 255-56). Slater further stated in her deposition that it appeared that Christopher had signed off AOL Instant Messenger at approximately 1:00 a.m.

Within an hour of signing her deposition, "S/I Dombrowski," of the New York State Police, contacted Slater by telephone "to see if she still had the IM on her computer." But although Slater stated that she had initially saved the message, she informed Dombroski that her computer had since been infected with a virus, and that as a result, she re-formatted the hard drive, and the message was lost (App. 264). Dombroski's notes indicate that he then provided this information to Investigator Randy Newcomb in the computer crimes unit to see whether or not the message could potentially -- albeit belatedly -- be recovered.

There are also notes from Investigator Lafferty, dated March 21, 2005, which memorialize a discussion among UR staff and investigators about Slater's instant message and state, "RO to check with M. Dalton to see if IM from Porco to a student on campus could be captured in the system" (App. 265); and there is a fax from Lafferty to NYSP Investigator Dave Madden, dated April 7, 2005, which includes a question mark and -- next to Slater's name -- the notation, "11/28/04 Notes," alongside two other undated typewritten notes indicating that Slater may have been emailing with Christopher on the night of Sunday November 14, 2004 into early Monday morning on November 15, 2004, yet no one had spoken to her (App. 266-69). At the same time,

[39] In the voluminous staff and personnel notes investigators gathered from the University, UR Investigator Dan Lafferty referred to himself as 'RO' for 'Recording Officer.'

however, handwritten notes of UR's Richard Crimmins, dated November 28, 2004, indicate a meeting was held with BPD Detective Anthony Arduini and other members of the BPD and state police to identify students the police wanted to interview, and that thereafter, calls were made to multiple students, including Rachel Slater. Crimmins' notes further indicate, "Rachel came up in conversation between Walter M. and Jody Asbury" (App. 271).

This evidence -- although never brought up at trial -- was critically important for three reasons. *First*, if Christopher sent an instant message to Slater between 12:00 a.m. and 12:30 a.m., he could not have been driving down the New York State Thruway to Albany to murder his parents. Both the instant message and Slater's statements regarding the message were, in other words, exculpatory, as they called into doubt the prosecution's theory that Christopher traveled from Rochester to Albany to commit the crime.

Second, although State Police promptly attempted to retrieve the instant message upon learning of its existence, members of the BPD, by contrast, had apparently learned about Slater's message prior to March of 2005, yet no one ever bothered to conduct a follow-up interview with her or to inspect her computer. Indeed, while UR notes confirm that UR Security and the State Police were immediately interested in investigating the message Slater claimed that she had received (App. 264, 265, 273), the BPD -- who believed that Christopher was guilty from the start -- actively attempted to minimize or eliminate evidence of the message given its incompatibility with the prosecution's timeline theory of Christopher's guilt.[40]

[40] Although someone from the BPD was initially scheduled to interview Slater on or about November 28, 2004 (App. 270-71), there is no evidence that this interview ever took place, or that anyone from the BPD took any investigative action with respect to Slater over the next several months. It is clear, in other words, that had UR staff and State Police not gotten involved, the exculpatory information that Slater shared with multiple UR staff and investigators would likely have remained obscured. It was Lafferty, after all -- not members of the BPD -- who contacted State Police Investigator Thomas McHugh in March of 2005 after he spoke with Jody Asbury regarding her conversations with Slater, and who then inquired as to whether anyone had ever followed up with Slater, *see* (App. 273) ("Rachel Slater, UR student, supposedly received an email from Porco 11/15/04 @ 2:00 a.m. Was she ever interviewed?"), and it was Lafferty's email that led to the conversation among investigators several days later (App. 265), which prompted

Third, despite the BPD's apparent efforts to keep Slater's instant message concealed, defense counsel was alerted of the message's existence well in advance of trial -- and to the government's failure to preserve it -- both by John Polster's email, and by the numerous other discovery materials described above, yet counsel made no attempt whatsoever to contact Slater or to arrange a timely inspection of her computer, nor did counsel make any legal argument regarding the government's failure to preserve the message or the BPD's seemingly deliberate attempt to bury it.[41] It is well established that these lapses, and the failure of counsel to even 'contact or interview' potential alibi witnesses 'cannot be characterized as a legitimate strategic decision since, without collecting that information, counsel could not make an informed decision as to whether the witness' evidence might be helpful at trial." *People v. Davis*, 193 A.D.3d 967, 970-71 (2d Dept. 2021) (reversing denial of defendant's 440 motion where counsel failed to investigate potential alibi witnesses).

In sum, counsel had a duty to investigate and prepare potential defense witnesses, including Rachel Slater, and his failure to do so, especially after being advised that Slater had information potentially helpful to the case, contributed cumulatively to the deprivation of Christopher's right to the effective assistance of counsel and his due process right to a fair trial.

Investigator Toro of the State Police to finally interview Slater and take a sworn statement from her (App. 251-63; 273-74). Furthermore, even though Toro did finally take a statement from Slater, the typed version of the statement erroneously recorded the date of the instant message, which Slater corrected upon later review (App. 256), and nowhere in Toro's typed notes of his interview with Slater, which are memorialized in "Lead 279," does Toro even mention the instant message Slater received from Christopher despite its obvious importance to the case and its exculpatory value (App. 275). Thus, in the context of the investigation overall, Toro's "mistakes," appear neither innocent nor inadvertent. Much to the contrary, his treatment of Slater's instant message further evidences the extreme bias that even the State Police had against Christopher, and exemplifies, more broadly, the tenor of the government's massive yearlong investigation overall.

[41] As set forth below in Point Six, Ms. Slater was not the only student who had contact with Christopher during the 'timeline period.' There is also evidence of a conversation Christopher had with fraternity brother Jason Novak on the fraternity floor after 10:30 p.m. on Sunday night, November 14, 2004.

D. Counsel Did Not Move to Suppress the Residential Alarm Data, Which Police Seized from the Porco Home without a Warrant in Violation of the Fourth Amendment.

Pursuant to the discovery and establishment of the crime scene at 36 Brockley Drive, police searched the residence and, with the assistance of Time Warner technician Kurt Meyer, downloaded the alarm "event buffer" data pertaining to the home's security system, which was stored in a device located in the basement. This alarm data, which recorded events such as when the security system was armed and disarmed, was a critical component of the prosecution's timeline at trial for it purported to narrow the time of Joan and Peter's attack, and, as prosecutors argued, to personally connect Christopher to the crime scene. Indeed, during the prosecutor's closing argument, he characterized the alarm data as functionally equivalent to Christopher "dropping his wallet at the crime scene" (Summations: 4210). Further, the testimony of alarm technician Kurt Meyer was one of only two read-back requests by the jury during deliberations, and the jury also requested the opportunity to review the alarm data in the jury room (Deliberations: 4346-4397). Nevertheless, although defense counsel filed a lengthy omnibus motion, which sought the suppression of certain physical evidence, counsel failed to make any argument at all with respect to the warrantless download of the alarm "event buffer" data, or the constitutionality of the *first* Brockley Drive warrant executed on November 15, 2004 (App. 281-303).[42] As a result,

[42] There were twelve different search warrants in the case, including two warrants for 36 Brockley Drive, one for Christopher's UR dorm room, one for his Jeep, at least three for placing a GPS device on the Nissan Sentra Christopher used during the pendency of the case, two for searches of the Abba House at 647 Western Avenue, where Christopher and his brother stayed temporarily, and two for searches of Peter Porco's office. Counsel argued that the two statements referenced in the warrant applications -- Joan Porco's alleged 'head nod' where she identified her son as her attacker, and the statement of Judge Joseph Cannizaro that Peter Porco told him that his son had tried to take a loan out in his name without his permission -- were speculative and unreliable and did not supply probable cause for issuance of any of the search warrants; that material statements Detective Bowdish made in the affidavit he submitted in support of the warrant application -- particularly the statement with respect to Joan Porco's head nod -- were either false or made with reckless disregard for the truth; that the warrant with respect to Christopher's dorm room failed to state a sufficient nexus between Christopher and the location; that the judge who signed at least eight of the search warrants in the case, acting Bethlehem Town Court Justice Joseph C. Teresi, was friends with Peter Porco and therefore biased in favor of the police; and that the search conducted at 36 Brockley Drive pursuant to the November 26, 2004 warrant -- the second 36 Brockley Drive warrant -- exceeded the scope of the search authorized by the warrant, in that the police seized items such as "mail, Peter Porco's wallet, and a PDA from Christopher Porco's

illegally obtained evidence, which substantially contributed to Christopher's conviction, was admitted against him at trial in violation of his Fourth Amendment right to be protected against unreasonable searches and seizures. Given the obvious importance of the alarm evidence to the prosecution's timeline theory, had counsel identified these illegalities, timely moved for the appropriate relief, and successfully obtained exclusion of the alarm evidence, the evidentiary landscape of Christopher's trial would have been significantly different, and the ultimate outcome, therefore, more favorable to him.

1. The 11/15 search warrant -- the *first* Brockley Drive warrant -- did not authorize the search and seizure of the alarm data.

Approximately eight hours after authorities entered the Porco residence and discovered Joan and Peter Porco, Bethlehem Police officers applied for, and were granted, a warrant to search the home. This first warrant, (hereinafter, the "11/15 warrant"), however, was a general warrant, and it authorized the search and seizure of the following broad categories of items:

> Biological evidence consisting of blood, hair, semen, saliva, or any other biological evidence; trace evidence; weapons including, but not limited to, any guns or blunt or sharp edged objects; any fiber evidence; any computer data including, but not limited to any computers, software, or files; any tools; cell phones; documents including, but not limited to any bank records, financial records, telephone records or business records; clothing; file cabinets and the contents thereof; and any safes.

(App. 276).

Neither the warrant nor its referenced application authorized -- or even contemplated -- a search of the home's residential alarm system (s*ee* App. 276-80), yet on November 16, 2004, the police requested a technician from Time Warner Security to come to 36 Brockley Drive to examine the home's security system and determine whether it had any evidentiary value. Shortly thereafter, technician Kurt Meyer arrived at the scene, and after observing the smashed keypad in the kitchen,

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bedroom" (App. 298-302). Prosecutors conceded that Christopher had standing to challenge the searches of his residence and consented to a *Mapp* hearing, but a *Mapp* hearing was never held.

and going down to the basement utility room with other officers to access the system's "control panel" (Meyer: 972), Meyer connected his laptop to the control panel, and at approximately 3:45 p.m., downloaded to his computer "the event buffer and any programming that was in the panel" (Meyer: 976). When the download was complete, Meyer left the residence, and the police memorialized the afternoon's events in various Lead Sheets (Meyer: 976-1002). *See also* App. 304-08.

Six days later, on or about November 22, 2004, Detective Bowdish removed the alarm keypad and control panel from the residence and filled out a Property Return form (App. 309), which confirms that the police seized the alarm system pursuant to the 11/15 warrant, but which was never turned into the issuing court. Instead, four days later, at the apparent direction of Police Officer McMillen (App. 310), Bowdish applied for and was granted a second warrant (hereinafter the "11/26 warrant"), authorizing the seizure of "[a]ny security system devices, including any computer data and computer data storage devices" (App. 311), and in the affidavit filed in support of the application for this second warrant, Bowdish falsely represented that the keypad and storage device were still inside of 36 Brockley Drive (App. 314), when, in fact, the police had already removed and taken custody of the device and recovered the pertinent data ten days *prior* to the application. Then, three days after securing the 11/26 warrant, on November 29, 2004, Bowdish filled out a second Property Return form for the alarm system -- which mirrored the previous return form that Bowdish never submitted to the court -- and, citing the 11/26 warrant only, turned in this second return form to the issuing magistrate (App. 315).[43] In other words, the police not only

[43] Specifically, in his affidavit, Bowdish stated:

> On November 15, 2004, while investigating the scene at 36 Brockley Drive, I learned that the home is equipped with a Time Warner home security system. I also observed damage to an alarm keypad inside the house. While speaking with a Time Warner Security technician named Kurt Myer [sic] I learned that the security system was disarmed on the morning of November 15, 2004. *I also learned*

searched the control panel and seized the alarm data without a warrant authorizing them to do so, they then deliberately attempted to obscure their illegal conduct from judicial scrutiny after the fact. For this, counsel had a solid basis to argue that the admission of the alarm data at trial violated the Fourth Amendment, but, inexplicably, counsel overlooked these meritorious arguments entirely.

The Federal and New York State Constitutions protect all persons against *unreasonable* searches and seizures. N.Y. CONST. ART. I, § 12; U.S. CONST. AMEND IV; *Katz v. United States*, 389 U.S. 347 (1967). In this respect, general warrants which authorize widespread rummaging and exploratory searches are generally prohibited as unreasonable. Accordingly, a search warrant must be specific enough to enable the executing officers to ascertain and identify with reasonable certainty those items the magistrate has authorized them to seize. *Maryland v. Garrison*, 480 U.S. 79 (1987). After all, "[a] search warrant exists and is required not simply to permit, but to circumscribe police intrusions," *People v. Mothersell*, 14 N.Y.3d 358, 367 (2010), and "[t]he right to search for and seize one item does not permit the inference that there is probable cause for other items." A contrary rule would eliminate the constitutional requirement of 'particularity' and would open the door to the type of general searches against which the Federal and State Constitutions are intended to protect. *People v. Baker*, 23 N.Y.2d 307, 321 (1968); *Marron v. United States*, 275 U.S. 192 (1927). Quite simply, "if something is not described in [a] warrant, it cannot be seized," *United States v. Dzialak*, 441 F.2d 212, 216 (2d Cir. 1971), nor is it sufficient that an item sought to be searched or seized be 'similar' to an item specifically listed in the warrant. *People v. Dwork*, 116 Misc.2d 411 (Nassau Co. Ct. 1982).

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that alarm activity data is stored on a device within 36 Brockley Drive. It is believed that if the keypad and storage device are secured, the data can be preserved.

(App. 314) (*emphasis added*).

Moreover, while the failure of defense counsel to make a particular pretrial motion is generally insufficient, standing alone, to support a claim of ineffective assistance of counsel, *see People v Rivera*, 71 N.Y.2d 705, 709 (1988); *People v. Lockhart*, 167 A.D.2d 427 (2d Dept. 1990) (failure to move to suppress physical evidence does not per se compel a finding that the defendant received less than effective assistance of counsel), and while ineffectiveness likewise will not be found where a motion that was not made had little likelihood of success, *see People v. Phelan*, 82 A.D.3d 1279, 1282 (3d Dept. 2011) and *People v. Schumaker*, 136 A.D.3d 1369 (4th Dept. 2016), counsel's failure to make a pretrial motion to suppress may contribute to a finding of a lack of meaningful representation where the evidence -- such as in this case -- is of such a critical nature that its admission must be challenged. *See People v. Montgomery*, 293 A.D.2d 773 (3d Dept. 2002) (granting motion to vacate conviction where there was no legitimate strategic or tactical explanation for defense counsel's failure to seek a *Dunaway* hearing to determine whether defendant's arrest was supported by reasonable cause). *See also People v. Velez*, 138 A.D.3d 1041 (2d Dept. 2016) (defense counsel's failure to move to suppress drugs seized as result of a warrantless search of a shed located on defendant's property prejudiced defendant, and thus amounted to ineffective assistance). *People v. Donovan*, 184 A.D.2d 654 (2d Dept. 1992) (counsel's failure to move to suppress drugs seize from defendant as a result of illegal search and seizure constituted ineffective assistance); *People v. Carter*, 142 A.D.3d 1342 (4th Dept. 2016) (remitting the matter to the trial court for further proceedings, where defense counsel, who otherwise competently represented defendant, failed to seek suppression on ground of unlawful police action, failed to preserve the issue for appeal, and, as a result, denied defendant effective assistance).

Here, because the issuing court did not specifically authorize a search of the alarm system, counsel should have argued that the search and subsequent seizure of the alarm system data fell squarely outside the scope of the warrant. The 11/15 warrant authorized the search of broad categories of items such as "computers" and "data storage devices," but the alarm system was not a "computer" or "data storage device," and any attempt by the People to justify seizure of the alarm system under these overbroad categories should be firmly rejected. Indeed, if the opposite were true, *any device* capable of storing data -- including televisions, calculators, microwaves, or even coffee pots -- would have been authorized for seizure under the 11/15 warrant. Moreover, the police had been inside the Porco home for over eight hours when they applied for the 11/15 warrant, they knew that the home had an alarm system (*see* App. 279), and there is, therefore, no legitimate reason that law enforcement officials could not "parse out" and specifically delineate the items for search and seizure that related solely to their investigation. *People v. Couser*, 303 A.D.2d 981 (4th Dept. 2003).

On this point, the facts of *People v. Baker*, *supra*, are instructive. There, the police obtained a warrant to search a residence for a knife used in a murder, and during the course of the search, they discovered and seized a beige cardigan sweater that fit the description of the clothing worn by the attacker. The sweater was ultimately admitted into evidence against the defendant at trial and he was convicted. On appeal, the defendant argued that the seizure of the sweater was unauthorized since it was not described in the warrant, and the court agreed and concluded that the sweater never should have been admitted. *Baker*, at 320-22 ("an authorized search for a particular item is not . . . a device to gain access for general exploratory searches for evidence"); *see also Couser*, *supra*, at 981 (suppressing evidence where police seized items not authorized by the search warrant, even though the warrant was otherwise supported by probable cause). So, too, in this

case, the magistrate's probable cause determination with respect to the government's right to search for and seize biological evidence, trace evidence, weapons, fiber evidence, computer data, cell phones, clothing, safes, or bank, financial, telephone, and bank records (*see* App. 276-80), did not extend to the alarm security system.

Furthermore, the search of the alarm system was not merely confirmatory, nor was the discovery of its stored data otherwise 'inevitable,' and its seizure pursuant to the 11/15 warrant, therefore, cannot be justified on these grounds either. To start, permitting the police "to search first," as they did in this case, "and obtain a warrant only if their search uncovers or 'confirms' that there is incriminating evidence" obviates the fundamental requirement that in order to obtain a warrant the police must first establish probable cause. *See People v. Burr*, 70 N.Y.2d 354, 362 (1987). Moreover, as the Court of Appeals held in *People v. Stith*, 69 N.Y.2d 313 (1987), the inevitable discovery rule cannot be used as a basis to admit evidence that is obtained as a direct result of illegal government action. Otherwise, the Court explained, inevitable discovery "would amount to a *post hoc* rationalization of the initial wrong," it "would be an unacceptable dilution of the exclusionary rule," and it "would defeat a primary purpose of that rule, deterrence of police misconduct." *Stith*, at 319 (*internal citations omitted*) (rejecting argument that loaded gun, recovered after an illegal search, would have inevitably been discovered in the cab of a stolen truck pursuant to an inventory search since the inevitable discovery rule only applies to secondary evidence and not to evidence obtained as a direct result of the initial police misconduct); *See also People v. Farmer*, 198 A.D.2d 805 (2d Dept. 1993) (warrant authorizing search for cocaine did not support seizure of 'buy money' found in defendant's apartment, even where police claimed the money was found inadvertently in plain view, since police knew buy money would be there); *United States v. Veltman*, 869 F. Supp. 929 (M.D. Florida 1999) (suppressing evidence gathered

through fire marshal's inspection of residential alarm to determine why alarm had not alerted the monitoring company to the fire since the search was conducted to gather evidence of criminal activity, and the evidence was, therefore, not subject to the inevitable discovery rule).

And while the People will likely claim -- as they previously claimed in response to Christopher's *pro se coram nobis* petition -- that the second warrant, the 11/26 warrant, was simply obtained as a matter of routine to satisfy the protocol of the NYSP Forensic Investigation Center, which requires a search warrant to contain certain language prior to conducting a forensic examination on computer–related equipment, including naming NYSP as the agency authorized to conduct the search, and specifying with particularity the place to be searched, this rationale cannot withstand scrutiny (App. 317-18). In fact, it undermines completely any assertion that there was nothing improper about seizing and searching the alarm system and storage devices pursuant to the 11/15 warrant in the first place,[44] and makes clear that someone must have recognized that the 11/15 warrant did not authorize the search and seizure of the alarm system and directed Bowdish to apply for a second warrant in an effort to conceal the government's illegal conduct (App. 310) (referencing the need for a "Poss. Search Warrant" for the alarm system).

This is true for three reasons. First, *every* search warrant issued in Christopher's case, including the 11/15 warrant, contained the heading, "To: Any sworn officer of the Division of the State Police of the State of New York, the Sheriff, Under Sheriff, or any Deputy Sheriff of the Albany County, Any Sworn Officer of the Town of Bethlehem Police Department . . ." (App. 276, 311, 318, 324) (*emphasis added*). The State Police, in other words, were already specifically named on the 11/15 warrant, and there was, therefore, no need to request a second warrant for that purpose. Second, notwithstanding the People's previous assertion that the State Police require

[44] The 11/26 warrant, unlike the 11/15 warrant contains the additional language "including a Time Warner Security System and any devices associates with the system that may be found on said property" (App. 311).

"specific language" prior to conducting a "forensic examination on computer-related equipment" (App. 317), there is no explanation for why the more than seven computers that were seized from 36 Brockley Drive and from Christopher's dorm room pursuant to identically worded search warrants (App. 330-31), did not also require this "specific language" before the stored data could be examined. And third, the "computer-related" data search conducted on the alarm system was not even carried out by the State Police in the State Police Laboratory. Rather, Time Warner technician, Kurt Meyer, downloaded the data from the system on November 16, 2004, inside the Porco residence, at the behest of members of local police. Indeed, while Bowdish submitted the alarm system keypad to the State Lab -- after Meyer had already downloaded the event buffer data -- he did so for the sole stated purpose of conducting an external examination of the keypad and comparing its damage to a flashlight that the police had also seized and submitted to the lab for testing (App. 332).[45]

In sum, while the failure to move to suppress evidence may not compel a finding of ineffective assistance of counsel in every case, counsel will be considered ineffective where the defendant can establish that there was no strategic or other legitimate explanation for counsel's failure to seek a suppression hearing with respect to evidence . Accordingly, because counsel had ample basis upon which to challenge the search and seizure of the alarm system equipment and to exclude its stored event data at trial, yet, inexplicably failed to do so,[46] and because the alarm system data constituted an indispensable component of the prosecution's timeline, counsel's error in this regard likewise worked to Christopher's detriment, and further contributed to the denial of

[45] On December 2, 2004, Bowdish submitted the alarm system to the New York State Police Crime Lab "to compare marks, dents [on the keypad] with submitted flashlight" (App. 332).

[46] Trial counsel's notes regarding the 11/26/04 warrant even bear the words, "waited 11 days?", signaling counsel's recognition that the police had applied for the warrant well after they had entered and searched 36 Brockley Drive, yet, nevertheless, counsel completely overlooked the key fact that the police seized, searched, and removed the alarm system from the house all prior to having a valid warrant authorizing them to do so (App. 333).

his right to the effective assistance of counsel and to a fair trial. *See People v. Tindley*, 202 A.D.3d 838 (2d Dept. 2022) (finding ineffective assistance where counsel failed to move to controvert search warrant)

2. The 11/15 search warrant lacked particularity and was unconstitutionally overbroad.

The alarm evidence was seized from the Porco home without proper judicial authorization, and counsel, therefore, erred by failing to move on these grounds for suppression. Not only did the 11/15 warrant fail to make any mention of the alarm system, however, the 11/15 warrant also lacked particularity with respect to the property the warrant did authorize for seizure, and it was, therefore, also unconstitutional on its face. Indeed, the warrant contained only general catch-all paragraphs authorizing the seizure of "any" types of property, it failed to link any of the property to be seized with specific criminality, it contained no temporal limitations on the property to be seized, and, as a result, it fell far short of establishing the probable cause for the search and seizure of any of the listed items. Counsel, in other words, further erred by failing to identify these patent deficiencies as an additional ground upon which to move to suppress the alarm data, and this error, too, cannot be explained as strategic.

The Fourth Amendment states in part that, "no Warrants shall issue, but upon probable cause . . . *particularly describing* the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND IV. To determine whether there is probable cause to support the breadth of a warrant, the court must consider the totality-of-the-circumstances, *see Illinois v. Gates*, 462 U.S. 213, 239 (1983), and ascertain whether, "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id. United States v. Hernandez*, 2010 WL 26544 at *8 (S.D.N.Y 2010); *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007). The particularity requirement calls for a sufficient description of the

evidence to be seized in order to prevent general exploratory searches, *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992), and it requires that "[a] warrant . . . specify the items to be seized by their relation to designated crimes." *United States v. Galpin*, 2013 WL 3185299 (2d Cir. 2013). In other words, when search warrants use exclusively "boilerplate terms, without either explicit or implicit limitation on the scope of the search," they violate the Fourth Amendment of the U.S. Constitution and Article I, § 12 of the New York State Constitution. *United States v. Buck*, 813 F.2d 588, 591 (2d Cir. 1987). *See also Groh v. Ramirez*, 540 U.S. 551 (2004); *People v. Brown*, 96 N.Y.2d 80 (2001).

Here, the 11/15 warrant authorized the seizure of every computer data byte in the Porco residence, stored in any medium, without any showing of relevance or justification. Detective Rudolph did reference email or instant message exchanges between Christopher and his father in the affidavit he submitted in support of the 11/15 warrant application, *see* (App. 280), but this reference was indisputably insufficient to sustain a blanket probable cause justification to search and seize every piece of electronic data in the home, especially given the fact that the warrant application did not even mention that officers had observed computers in the home. *See United States v. George*, 975 F.2d at 76 ("[m]ere reference to 'evidence' of a violation of a broad criminal statute or general criminal activity provides no readily ascertainable guidelines for executing officers as to what items to seize"); *United States v. Graziano*, 558 F.Supp.2d 304, 316 (E.D.N.Y. 2008) (stating, "law enforcement must establish a basis for searching the computer and particularize the evidence being sought"); *People v. Brown*, 96 N.Y.2d 80 (stating "to meet the particularity requirement, the warrant's directive must be specific enough to leave no discretion to the executing officer"); *People v. Smith*, 138 A.D.2d 932 (4th Dept. 1988) (finding warrant authorizing seizure of "soiled men's clothing" without identifying type, color, or size to be

insufficiently particular); *People v. Mangialino*, 75 Misc.2d 698 (Monroe Co. Ct. 1973) (finding language in warrant authorizing search for "records, mail, correspondence, and communications" to be insufficiently particular).

> There are Fourth Amendment limits to every search that apply with equal force to searches of computers. Thus, although courts are ill-suited to micromanage in advance how the computer will be searched, law enforcement must establish a basis for searching the computer and particularize the evidence being sought during such search. Specifically, in obtaining the warrant, the government must show that there is probable cause that the computer will contain evidence of a crime and then state with reasonable particularity the materials to be seized.

United States v. Graziano, supra, at 316. In Christopher's case, no showing was ever made as to what particularly the police were seeking or what evidence of criminality they believed they would find. Instead, the 11/15 warrant authorized an unrestricted general search of the Porco home, the very type prohibited by the Federal and State constitutions, and yet counsel never invoked this fundamental principle to challenge the warrant as facially deficient.

In this respect, the Second Circuit's decision in *United States v. Rosa*, 626 F.3d 56 (2d Cir. 2010), where the defendant successfully challenged a warrant containing language nearly identical to the language of the 11/15 warrant in this case, is instructive. In *Rosa*, the police seized multiple computers, thumb drives, cameras, hard drives, game systems, and numerous other items belonging to the defendant, and discovered thousands of images and videos containing child pornography. The defendant argued that the warrant failed to state with particularity the specific criminal activity alleged or the type of digital evidence being sought and therefore authorized the officers to conduct an illegal limitless search of the contents of numerous electronic devices, any one of which could contain sensitive personal information unrelated to the crimes the defendant was suspected of committing, and the Second Circuit agreed and concluded that the warrant was invalid. Specifically, the court held, the warrant "lacked the requisite specificity to allow for a

tailored search of [the defendant's] electronic media" and was defective in that it failed "to link the items to be searched and seized to the suspected criminal activity . . . and thereby lacked meaningful parameters on an otherwise limitless search . . . ." *Rosa*, 626 F.3d at 62. *See also United States v. Zemlyansky*, 945 F.Supp.2d 438 (S.D.N.Y. 2013) (invalidating warrant authorizing search of all computers and thumb drives that did not link property sought to specific crimes); *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987) (invalidating warrant that only described crimes and gave no limitation whatsoever on the kind of evidence sought); *United States v. Riccardi*, 405 F.3d 852, 863 (10th Cir. 2005) (invalidating search warrant for computer that failed to limit search to evidence of specific crimes).

Similarly, in *People v. English*, 52 Misc.3d 318 (Sup. Ct. Bronx Co. 2016), the police obtained a warrant authorizing them to search "the contents of any computer equipment and related paraphernalia, including, but limited to, hard drives, flash drives, compact discs and DVDs, recording cameras and related equipment," *English*, at 324, and upon executing the warrant, the police therefore seized multiple devices and conducted "complete searches, without restriction, of the computers and cellphones." *Id.* Citing *Rosa*, the court suppressed all material recovered from the computers and the other devices on the ground that the warrant "authorized a general search of the defendant's electronic devices [and] failed to link the evidence sought on defendant's cellphone and computers and the criminal activity supported by probable cause." *Id. See also People v. Melamed*, 178 A.D.3d 1079, 1081-82 (2d Dept. 2019) (reversing conviction and granting motion to controvert search warrant and suppress evidence where warrant failed to satisfy particularity requirement, thereby permitting law enforcement to illegally search and seize "all computers, hard drives, and computer files . . . without any guidelines, parameters, or constraints . . . .")

Here, while the People may argue that the application for the 11/15 mentioned section 125 of the Penal Law, that the police believed the property sought would evidence commission of a murder, and that a pre-trial particularity challenge by counsel would have been unsuccessful, "[m]ere reference to 'evidence' of a violation of a broad criminal statute or general criminal activity provides no readily ascertainable guidelines for executing officers as to what items to seize." *George*, 975 F.2d at 76. Nor should the People be heard to argue that the warrant application somehow cured the constitutional deficiencies inherent in the 11/15 warrant itself since the government "cannot rely on language in a warrant simply referencing the underlying affidavit to satisfy the particularity prong of the Fourth Amendment." *See United States v. Cohan*, 628 F.Supp.2d 355, 363 (E.D.N.Y. 2009). Rather, the government "must attach the affidavit to the warrant and incorporate it by reference using deliberate and unequivocal language." *Cohan*, 628 F.Supp.2d at 363.

Here, the 11/15 warrant contains the following reference to its application:

> Detective Christopher Bowdish of the Town of Bethlehem Police Department, indicating that there is reasonable cause to believe that property of a kind or character referred to in section 690.10 of the Criminal Procedure Law, *and more particularly described in said application*, may be found in or upon the place, premises, vehicle, person, or persons described therein.

(App. 276) (emphasis added). However, while the warrant refers to the application and suggests that the property authorized for seizure would be more "particularly described" in the warrant application, the language used to describe the property listed in the application is identical to the overbroad and deficient boilerplate language used in the warrant itself (App. 277).[47]

[47] The deficiencies in the 11/15 warrant are laid bare by an email sent to investigators by the state police computer forensic laboratory technician, who advised that he had "no direction" as to what materials were sought from the seized computers (App. 334).

In *In Re 650 Fifth Avenue and Related Properties*, 830 F.3d 66 (2d Cir. 2016), the Second Circuit scrutinized a search warrant, which -- just like the 11/15 warrant here -- failed to specify the alleged subject criminal offenses and likewise authorized the seizure of "[a]ny and all computers . . . external and internal storage equipment or medium . . . floppy discs . . . CD Rom[s]." *650 Fifth*, 830 F.3d 100. The warrant in *650 Fifth* also referred to underlying documents that described the particular charges against the defendant and some of the property authorized for seizure, but the supporting materials were not attached to the warrant, nor were they incorporated by deliberate and unequivocal language. Instead, the warrant merely referenced the affidavit. As a result, the Second Circuit concluded that the warrant "plainly lacked particularity as to the crimes at issue," and did not "particularize categories of computerized information for which there was probable cause to seize, or the temporal scope of the materials that could be seized." *Id.* at 100-01. So, too, in this case, the 11/15 warrant referenced -- but failed to incorporate -- any supporting documents, and it, too, therefore impermissibly gave the government authorization to exercise unfettered discretion to seize any and all property regardless of its nexus to any relevant criminal activity.[48]

[48] The police in this case conducted a multi-day ransacking of the Porco home, and as evidenced by a brief perusal of the recovery logs, seized property without any regard for the terms of the warrant. They seized a pocketbook and its contents, a dead-bolt key, a Timex watch, a digital camera, a drinking glass, two different coffee mugs, a dog collar, mail from the kitchen, a wallet, a Seiko watch, court paperwork, miscellaneous paperwork, a photo album from the basement, contents of a drawer from the basement floor, contents of other drawers, books, wires, an Iron Man watch, a plastic box with assorted papers, a book cover and research papers, a locksmith tool and instructions, a cordless phone, and a postal shipping order (App. 309, 315, 331, 335-37). Even under the overbroad and non-particular terms of the 11/15 warrant, these items -- like the alarm system -- were well outside the scope of the property authorized for seizure, and any reasonable law enforcement agent would have known that the search conducted on the Porco residence was not authorized under the Fourth Amendment, especially given the catch-all description of the property to be seized. Indeed, while the residence was no doubt a crime scene, which the authorities had a right to process, the police did not -- nor do they ever -- have the right to conduct a search as limitless and indiscriminate as the search conducted in this case, where investigators literally dumped the contents of desk and cabinet drawers into evidence bags for seizure without any regard for the terms of the warrant or the relevance of the items to the commission of any crime. Nevertheless, despite the blatantly illegal search, counsel did not move to suppress a single item that was recovered from the home, and for this, too, counsel was ineffective. *See U.S. v. Matias*, 836 F.2d 744, 748 (2d Cir. 1988) (when government agents carry out a widespread seizure of items not within the scope of a search warrant -- and act in bad faith while doing so -- the court may find that there was a flagrant disregard for the terms of the warrant and that wholesale suppression is required). *See also Davis v. U.S.*, 564 U.S. 229 (2011) (stating the government acts

In sum, the 11/15 warrant authorized the seizure of every digital data byte of from the Porco residence, stored in any medium, without any showing of relevance or justification in the supporting affidavit; it authorized the seizure of guns -- even though the warrant application provided no information as to how a firearm might relate to the crime, nor did it even indicate whether any firearms were observed inside the home; and it authorized the seizure of every document in the residence, every piece of clothing, every tool, every safe, and the contents of every file cabinet without making any showing of probable cause whatsoever as to how any of these items were related to or contained evidence of the crime. *See People v. Carter*, 31 A.D.3d 1167 (4th Dept. 2006) (finding warrant overbroad where it allowed police to obtain evidence not specifically connected to the alleged crimes). Thus, not only did defense counsel fail to scrutinize the search warrant for the alarm system prior to trial and make the appropriate pre-trial motions to exclude the alarm data from evidence, counsel also failed to discern and challenge the 11/15 warrant's failure to meet the Fourth Amendment's particularity requirement. This error, too, combined with counsel's other failures to deprive Christopher of his right to the effective assistance of counsel and to a fair trial.

E. Counsel Did Not Move to Suppress the Email Evidence Illegally Seized from the Porco Home. U.S. Const. Amends IV, V, VI, and XIV; N.Y. Const. Art. I, §12

The government seized Christopher's emails on at least five separate occasions, by four different methods, and each time, it did so in violation of his federal and state constitutional rights and in contravention of statutory guidelines. U.S. amends IV, XIV; N.Y. Const. art. I, §12. Nevertheless, trial counsel failed to identify the illegal manner in which Christopher's emails were

in good faith when officials perform "searches conducted in objectively reasonable reliance on binding appellate precedent"); *U.S. v. Shi Yan Liu*, 239 F.3d 138, 140, fn. 3 (2d Cir. 2000) (stating a showing of bad faith is premised upon whether or not a reasonable officer would have known that the search resembled a general search and was thus illegal).

seized and used against him, and as a result, never moved to have them excluded. Counsel's failure in this respect was multi-faceted, it was inexcusable, and, cumulatively, this error, too, contributed to the deprivation of Christopher's right to counsel and his right to a fair trial.

The government seized email evidence from Christopher in the four following ways: (1) upon the uncounseled consent Christopher gave members of the BPD during his unconstitutional interrogation; (2) via two *ex-parte* grand jury subpoenas dated December 8, 2004 and January 4, 2005, which were directed to Sprint PCS, Christopher's email service provider (App. 339-340); (3) pursuant to a search of Christopher's home computer without authorization from a valid search warrant; and (4) pursuant to a pre-trial, extrajudicial "request" directed to Sprint PCS from the Albany County District Attorney's Office (Dean: at 2659). In fact, the emails that were ultimately introduced into evidence against Christopher at trial as Exhibit 43 were obtained through an extra-judicial request that was apparently made in March of 2005 and involved no formal court process whatsoever.

1. Prosecutors obtained Christopher's emails pursuant to his uncounseled consent.

It has long been the rule in New York that once a defendant invokes the right to counsel, any waiver obtained in the absence of counsel is ineffective. This rule applies not only to statements obtained as a result of police questioning, but also to evidence seized as the result of an uncounseled consent to search, even where the defendant's provision of the evidence is otherwise willing. *See People v. Esposito*, 68 N.Y.2d 961 (1986) (granting suppression and finding defendant may not consent to any search after invoking right to counsel). As the court stated in *People v. Garcia*, "the inevitable discovery doctrine does not apply where the evidence sought to be suppressed is the very evidence obtained in the illegal search and seizure." *Garcia*, 101 A.D.3d 1604, 1606 (4th Dept. 2012).

Here, counsel moved prior to trial to suppress the statements Christopher made to Bethlehem police during his six-and-a-half-hour interrogation, and after conducting several days of pre-trial hearings, the trial court concluded that the interrogation was unconstitutional and that Christopher's statements, therefore, must be suppressed. In doing so, the Court made detailed findings of fact regarding the length of the interrogation, the fact that attorney John Polster invoked Christopher's right to counsel after Bethlehem Police took him into custody and prior to the commencement of the interrogation, and the fact that the police thereafter also actively prevented Polster from consulting with Christopher. Further, the court concluded, the police failed to properly *Mirandize* Christopher, and they never informed him that Polster had actually been present at the police station for the duration of the interrogation, during which the police obtained Christopher's uncounseled consent to check his body for scratches, to obtain his fingerprints and his DNA, and to access his Sprint PCS email account (App. 341-50). Nevertheless, although defense counsel appropriately moved to suppress Christopher's statements, counsel erred yet again by failing to move to suppress the rest of the evidence that Christopher provided to police during his unlawful interrogation, including his consent to access to his email account, which was indeed subject to suppression.

In sum, Christopher's emails were seized without his lawful consent; the evidence was not subject to the exclusionary rule's independent source, inevitable discovery, or attenuation exceptions; and counsel therefore should have moved to suppress the emails on the ground that they were obtained pursuant to Christopher's uncounseled consent.[49]

[49] Although there were potential independent sources for the email evidence, including the Porco residence computer and the Sprint PCS email server in Kansas City, the search of the Porco family computer was nevertheless constitutionally infirm, and the police seized the emails from Sprint without a warrant.

2. Prosecutors obtained Christopher's emails through the improper use of *ex parte* grand jury subpoenas.

Prosecutors not only accessed Christopher's emails by obtaining his invalid and uncounseled 'consent' during his interrogation, they also obtained "any and all text message activity, email activity, voicemail and call detail" through the use of *ex parte* grand jury subpoenas issued to Sprint in violation of federal and state statutory and constitutional law. Defense counsel, however, also failed to identify these illegalities, and, as a result, overlooked this additional avenue for suppression.

The search and seizure of the contents of private papers and communications -- in which the owner has a reasonable expectation of privacy -- is subject to Fourth Amendment limitations. Indeed, even where a subpoena is signed by a justice of the supreme court, as the subpoenas were in this case, a "court's endorsement of [a] subpoena [does] not serve to convert it into a search warrant." *Interfaith Hospital v. People*, 71 Misc.2d 910, 913 (Sup. Ct. Queens Co. 1972). The use of a subpoena, in other words, may have been an appropriate way to obtain non-content information about Christopher's email account, such as login IP addresses, contact lists, or lists of emails sent or received, *see, e.g., City of New York v. Public Service Comm.*, 84 Misc.2d 1058 (Sup. Ct. Albany Co. 1976) (finding no privacy interest in telephone toll records, which contain places and numbers rather than personal conversations and are therefore properly accessed by subpoena), but the subpoena process in this case was used to seize the content of the communications, and, as a result, violated the Stored Communications Act of 1986, 18 USCA §2703(a), ("the SCA").

The SCA provides:

> A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred

> and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a state court, issued using state warrant procedures) by a court of competent jurisdiction.

18 USCA §2703(a). The statute, in other words, creates Fourth Amendment-like privacy protections for email and other digital communications stored on the Internet, and it "limits the ability of the federal or state government to compel an ISP to turn over content information and non-content information." *In re 381 Search Warrants for Facebook, Inc.*, 132 A.D.3d 11, 20 (1st Dept. 2015) (stating, "[t]he less privacy protection afforded to the type of record, the less intrusive the legal process required"). Thus, under the SCA, in order to obtain subscriber information, the police need only a subpoena; to obtain transaction data, such as when an individual accessed his account, what services he used, and how long he was online, the police need a court order; and to obtain the content of stored communications, the police must obtain a warrant. USC §2703; *In re 381 Search Warrants for Facebook, Inc.*, 132 A.D. at 21-22. Further, while content held by an electronic communication service for more than 180 days may be disclosed to a government entity via warrant or a subpoena if prior notice is given to the subscriber or customer, *see* 18 USC §2703(b), in Christopher's case, a warrant for the seizure of his emails was neither requested nor issued, and he was certainly never given notice of the grand jury subpoenas.

In sum, the government's use of grand jury subpoenas to obtain Christopher's emails violated the SCA, *see People v. Doty*, *supra* (precluding use of bank records in grand jury proceeding where district attorney seized records via subpoena without notice to the owner in violation of federal law); *People v. Harris*, 36 Misc.3d 868 (Crim. Ct. N.Y. Co. 2012) (stating warrant is required to access content of private emails, private direct messages, private chats, and any of the other readily available ways to have a private conversation via the Internet), and while the statute may not provide a specific suppression remedy for government transgressions of its

proscriptions, New York courts have nevertheless recognized that the "violation of a statute may warrant imposing the sanction of suppression . . . where a constitutionally protected right [is] implicated." *People v. Patterson*, 78 N.Y.2d 711, 717 (1991). In fact, suppression as a remedy is most often utilized where the statute at issue, like the SCA, was designed to provide Fourth Amendment-like protections. *Matter of Warrant to Search a Certain Email Account*, 829 F.3d 197, 217 (2d Cir. 2016) ("[T]he privacy of stored communications is the object of the [SCA]'s solicitude and the focus of its provisions."). Accordingly, given the prosecution's complete disregard for the SCA and its Fourth Amendment-like protections, defense counsel should have moved to suppress the illegally seized emails pursuant to CPL §710.20.

3. Prosecutors obtained Christopher's emails pursuant to a search of his home computer that was not authorized by a valid search warrant.

Pursuant to what is commonly referred to as the "envelope-content" doctrine, a person who reveals information to a third party nonetheless maintains a legitimate privacy interest in the information if it is of a substantive nature or otherwise qualifies as 'content,' and the third party is utilized merely to deliver the information or facilitate its communication." *United States v. Polizzi*, 549 F.Supp.2d 308, 389 (E.D.N.Y. 2008). In *Katz v. United States*, for example, the Supreme Court found that before government officials can monitor the contents of a phone conversation, they must first obtain a warrant, regardless of whether the phone company has the ability to monitor the calls. In much the same way, citizens have enjoyed an expectation of privacy in the contents of letters they exchange through the postal service for almost 150 years, and "[g]iven the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection." *United States v. Warshock*, 671 F.3d 266, 286-87 (6th Cir. 2007) (analogizing an Internet Service Provider to a post office or telephone company and stating the government cannot compel an ISP to turn over the content of

a subscriber's email, absent some exception, unless it complies with Fourth Amendment warrant requirements). In other words, while the government may examine metadata and other non-content records such as routing information or IP addresses, the content of personal emails remains protected from scrutiny by the Fourth Amendment. *See, e.g., City of Ontario v. Quon,* 560 U.S. 746 (2010) (implying that "a search on [an individual's] personal email account' would be just as invasive as "a wiretap on his home phone line); *United States v. DiTamaso,* 56 F.Supp.3d 584 (S.D.N.Y. 2014) (discussing the expectation of privacy in the contents of emails and the inapplicability of the third party doctrine). *See also Matter of United States Requesting an Order for Historical Cell Site Information, In Re,* 809 F.Supp.2d 113 (E.D.N.Y. 2011).

Here, Christopher not only had a reasonable expectation of privacy in his emails, he had a separate expectation of privacy within his home, which included the contents of his shared family computer. The 11/15 warrant was, as discussed above, patently unconstitutional, and, even if the warrant were able to withstand constitutional scrutiny, the warrant nevertheless neither authorized the seizure of -- nor even made mention of -- emails of any kind. Quite simply, the seizure of Christopher's emails from his home and via his Sprint email accounts without a valid search warrant violated his constitutional right to be free from unreasonable searches and seizures.

4. Prosecutors obtained Christopher's emails pursuant to a direct extrajudicial request to his service provider.

New York has an extensive statutory scheme that regulates the search, seizure, and admissibility of the content of private electronic communications. These statutes confer broader rights to criminal defendants than do constitutional proscriptions, and specifically provide for the suppression of improperly or unlawfully obtained communications evidence. Here, Assistant District Attorney David Rossi improperly issued two separate subpoenas, returnable to the grand jury, demanding two months' worth of Christopher's emails, without providing him the requisite

notice (App. 339-340). Then, two months later, the prosecutor made another *ex parte* extrajudicial request directly to Sprint, requesting the content of all the emails sent by Christopher between August 2004 and December 2004 (Dean: 2657; 2666). Sprint representative Lawrence Dean testified on direct examination that the emails contained on the disc he provided to prosecutors were kept in the ordinary course of Sprint's business, but he admitted during counsel's *voir dire* that he did not, on a regular basis, make CDs of each and every email since the data is collected on a server in Kansas City (Dean: 2657-59). Thus, defense counsel not only failed to recognize that the seizures of Christopher's emails during his interrogation, from his house, and pursuant to the *ex parte* subpoenas violated constitutional and statutory law, counsel likewise failed to protest this additional ultra vires method prosecutors used to seize the emails, which they ultimately entered into evidence against Christopher at trial.

* * * * *

Overall, defense counsel's failure to move to suppress the emails on any of the aforementioned grounds contributed overall to the deprivation of Christopher's right to counsel and his right due process right to a fair trial.

F. Counsel Elicited Damaging Hearsay Testimony While Cross-examining Prosecution Witness Michelle McKay, A Former Co-worker of Peter Porco.

In a series of questions posed to Michelle McKay, a colleague of Peter Porco, and a fellow clerk to Justice Anthony Cardona, counsel deliberately elicited the following hearsay statements that Peter Porco allegedly made about his son to McKay prior to his death:

> Q: Now, there came a time that around the fall of 2004 that Peter shared with you that he was upset with his younger son, Christopher, is that right?
>
> A: Absolutely.
>
> Q: And he told you that he started receiving notices that Christopher's Jeep loan was overdue?
>
> A: Correct.

Q: And that was upsetting to him?

A: He was mystified.

Q: First, he was mystified and perplexed, right?

A: Yes.

(McKay: 2142). Continuing with the same line of questioning, counsel then asked:

Q: And he was very upset?

A: Extremely upset.

Q: And did he also tell you some time in the first week of November of 2004 that he was very upset to learn that a loan he had agreed to co-sign with Christopher was for far more than he thought it was going to be?

A: Yes.

(McKay: 2144). Inexplicably, counsel persisted,

Q: And he was very upset about that?

A: Yes, he was.

Q: And he was visibly worried and upset for Christopher, is that right?

A: He was visibly worried about many things and Christopher would have been one of them.

Q: He told you that he was trying to call Christopher or email him and, he, Christopher, was not getting back to him?

A: He was not responding, absolutely.

Q: In fact, at one point he told you he was afraid his son was a sociopath?

A: Absolutely

Q: But he didn't –

A: He didn't say it that way.

Q: You didn't think – you didn't put a lot of stock in it.

A: I was shocked by him saying it. That was such an uncharacteristic thing for Peter to say. I was stunned.

(McKay: 2145-47). On redirect examination, the prosecutor naturally seized on what counsel elicited from McKay on cross-examination, prompting the following exchange:

Q: Now, was Peter Porco the type of man who would call people names?

A: Never.

Q: All right. Yet a week before his murder he told you he thought his son, Christopher Porco, was a sociopath, didn't he?

A: Yes.

Q: And describe to the members of the jury Peter Porco's demeanor when he told you

that?

A: He was dead serious.

(McKay: 2155).

This testimony was devastating to Christopher, and there was no reason for counsel to elicit it. Joan Porco testified at trial -- as did countless others -- that her son had always been gentle and kind and that he was incapable of violence; there was no testimony that Christopher had ever suffered from any mental illness; and while there were indications that Christopher's parents were upset with him over academics and finances, there was no testimony that they had reached the point of seeking intervention. Much to the contrary, Mrs. Porco testified that Peter had actually decided to offer Christopher financial assistance, which relieved some of the tension the family had apparently been feeling. Worse yet, the testimony counsel elicited from McKay regarding statements Peter made about his son was inadmissible hearsay. Yet -- for reasons unknown -- defense counsel deliberately elicited it. *See People v. Lee*, 129 A.D.2d 587 (2d Dept. 1987) (reversing defendant's conviction on ineffective assistance grounds where trial counsel elicited damaging evidence through the cross-examination of prosecution witnesses and repeatedly failed to object to highly damaging hearsay testimony). *See also People v. Riley*, 101 A.D.2d 710 (4th Dept. 1984) (reversing defendant's conviction on ineffective assistance grounds where counsel elicited damaging testimony that defendant was under surveillance because he was a suspected drug dealer); *People v. Danraj*, 75 A.D.3d 651 (2d Dept. 2010) (finding no strategic or other legitimate explanation for defense counsel's elicitation of unfavorable hearsay testimony from a prosecution witness during cross-examination).

In sum, counsel's elicitation of hearsay testimony that Christopher's own father told a trusted colleague, days before his death, that he feared that his son was a sociopath was a grave error that combined with others to deny Christopher meaningful representation.

G. Counsel Failed to Object to Numerous Instances of Prosecutorial Misconduct During The People's Closing Argument.

During the prosecutor's closing argument, counsel objected to four instances of prosecutorial misconduct, which he then also argued in support of Christopher's direct appeal: (1) the prosecutor's question to Detective Bowdish whether it was true that all of Christopher's classmates at UR said he was drunk all the time (Bowdish: 2616); (2) the prosecutor's statement that, "Doctor Shields [Christopher's expert] who is not even qualified to work in Doctor Melton's [the government's expert's] laboratory, disagrees and he disagreed in the OJ case, and he disagreed in the Peterson case" (Summations: 4242-51); (3) the prosecutor's comment with respect to the staged November 2002 burglary that Christopher had been lying to his parents for quite a while and "we needn't go as far as back in the burglary in 2002 that he perpetrated on them" (Summations: 4256-4257); and (4) the prosecutor's rhetorical question to the jury wherein he stated, "Think something happened Saturday when [Christopher] stopped by to see Peter Porco on his way back to the University of Rochester?" (Summations: 4266-67). At the same time, however, counsel inexplicably failed to register proper objections to a host of other improper comments, mischaracterizations of evidence, and instances of prosecutorial misconduct, and counsel, therefore, was also ineffective in this regard.

It is a fundamental principle in all criminal trials that a jury must decide the issues solely upon the evidence, and that when an attorney is giving a closing argument, he or she must stay within the four corners of the evidence presented. *People v. Ashwal*, 39 N.Y.2d 105, 109–110 (1976). Prosecutors, in particular, are not permitted to refer to facts that are not in evidence -- or to call upon the jury to draw conclusions that are not fairly inferable from the evidence -- and prosecutors, likewise, must never attempt to lead the jury away from the relevant issues by drawing inflammatory conclusions that tend to unfairly prejudice the jury against the defendant.

That being said, when a prosecutor does make improper arguments, it is incumbent on defense counsel to make the proper objections. *People v. Dien*, 77 N.Y.2d 885 (1991); *People v. Rivera*, 19 A.D.3d 620 (2d Dept. 2005) (stating a general objection is insufficient to preserve an issue for appeal). Failure to do so, the Court of Appeals has stated, can deprive a defendant of effective representation. *See People v. Fisher*, 18 N.Y.3d 964 (2012) (finding ineffective assistance where prosecutor encouraged jurors to infer defendant's guilt based on facts not in evidence and made materially misleading statement during summation, and counsel failed to register the appropriate objections). Specifically, the *Fisher* Court stated:

> Even when viewed in the totality of the representation provided defendant, defense counsel's failure to object to any, let alone all, of the prosecutor's egregiously improper departures during summation, particularly in the highly charged, potentially outcome determinative context in which they occurred, deprived defendant of the right to effective assistance of counsel.

Fisher, 18 N.Y.3d at 967.

In *People v. Brown*, 17 N.Y.3d 742 (2011), the Court of Appeals stated that to prevail on an ineffective assistance of counsel claim on the basis of a single failure to object, a defendant must show that the objection omitted by trial counsel was a winning argument and that the objection was one that a reasonable defense lawyer in the context of the trial would have thought worth raising. Here, however, defense counsel did not just fail to raise one particular objection; counsel failed repeatedly to object to improper statements made by the prosecutor, and in the context of the heinous factual allegations against Christopher, the widespread publicity, and the government's persistent and pervasive efforts to find and introduce negative character evidence against Christopher, a reasonable defense lawyer would have interposed a firm objection at each appropriate instance. *See People v. Dean*, *supra* (finding ineffective assistance where counsel failed to register proper objections to prosecutor's misstatements of fact).

1. The prosecutor misstated forensic evidence.

Courts have long recognized the profound influence that scientific evidence has upon a jury, "with the weight of an impressively credentialed expert behind it," and the care that must be exercised to prevent its misuse. *See Parker v. Mobil Oil Corp*., 7 N.Y.3d 434, 447 (2006). Thus, because of its persuasive force, and "the potential danger posed to defendant when DNA evidence is presented as dispositive of guilt," it is essential that defense attorneys, prosecutors, and courts guard against its mischaracterization and misuse. *See People v. Wright*, 25 N.Y.3d 769, 783 (2015) (holding counsel's failure to object to the prosecutor's misrepresentations about DNA evidence in summation constituted ineffective assistance). Accordingly, a prosecutor's misrepresentation on summation of the scientific import of DNA evidence constitutes misconduct, and a defense attorney's failure to object to that error constitutes clear and prejudicial error requiring reversal. *People v. Rozier*, 143 A.D.3d 1258 (4th Dept. 2016) (failure to object to prosecutor's exaggeration of the DNA evidence during summation constituted ineffective assistance of counsel).

Here, with respect to the DNA evidence allegedly recovered from the NYS Thruway ticket, the prosecutor stated during his closing argument:

> They submitted a number of tickets for DNA testing and this ticket is the only ticket that they developed a DNA profile on at the state police lab came back to a male. Remember Urfan Mukhtar said all I can tell you about that ticket is that there is a little bit of DNA on it. It's male DNA.

(Summations: 4239). Mukhtar actually testified, however, that "no amplified DNA product was obtained," and explained, "[a]s far as the sex mark or amelogenin goes, we did get a result -- we got an XY. *Doesn't mean that this was a male contributor on this toll ticket*. And that's all we can really tell from the DNA results, that there was a male on here. As far as the profile goes, *we have no profile, no STR profile*." Mukhtar then clearly stated:

> I don't think anybody would ever interpret a profile as degrading on a toll ticket as to whether there were males or females. All that anyone I think in my opinion could say that there is at least one male in there. As far as anyone else, I would never make an interpretation of that sort on the toll ticket, because of the degradation.

(Mukhtar: 2930). In other words, by telling the jury that a male profile was developed on the toll ticket, the prosecutor misstated scientific facts. Counsel, however, did not object.

Second, the prosecutor told jurors during his opening statement that the police "didn't find any mysterious or unaccounted for DNA" at the scene (Opening: 624-25). But, this claim, too, was clearly inaccurate. There were two watches found in Joan and Peter's master bedroom, a broken Timex watch that was in the bed, and a Seiko watch beside the bed on the nightstand (Mukhtar: 2545). With respect to the Timex watch, Dr. Mukhtar testified that the DNA samples taken from the collected swabs indicated that Joan and Peter Porco were the contributors, but with respect to the three swabs taken from the Seiko watch, Dr. Mukhtar's analysis revealed a different result. Indeed, the DNA profile taken from the faceplate of the Seiko watch was consistent with that of Peter Porco, but the swab from the inside of the watchband indicated the presence of DNA from three people, with only one profile being consistent with that of Peter Porco, and Mukhtar excluded Joan and Christopher Porco as contributors of the other two profiles (Mukhtar: 2870-72). The third swab, which was also from the faceplate of the Seiko watch, was a mixture as well. Again, however, while Peter Porco was the major contributor, and one allele belonged to Joan Porco, there was another allele present that belonged to neither Christopher nor Joan Porco (Mukhtar: 2873). In other words, by telling the jury that there was no unaccounted-for DNA at the crime scene, the prosecutor again misstated scientific facts. But still, counsel did not object.

In sum, the prosecutor's claim on summation -- namely, that there was a DNA profile on the toll ticket and that the profile was male -- was an intentional distortion of Mukhtar's testimony, made for the specific purpose of bolstering the assertions of Dr. Terry Melton, who claimed that

technicians in her lab were able to develop a mitochondrial DNA profile from the same ticket that was consistent with Christopher's DNA, and persuading the jury to give the DNA evidence weight that it never deserved. And, contrary to what the prosecutor told jurors in his opening statement, there *was* unaccounted for DNA at the scene -- in Peter and Joan's bedroom -- yet prosecutors purposely obscured this fact to avoid the inconvenient suggestion that someone other than Christopher was in his parents' bedroom on the night that they were attacked. It was incumbent on defense counsel to object to these remarks, and for failing to do so, counsel was ineffective.

2. The prosecutor marshaled evidence in his closing argument, which the court had stricken from the record.

The crime in this case -- and the injuries inflicted upon Christopher's parents -- were incredibly violent, and, as a result, a large amount of blood was present both in the bedroom where Peter and Joan were sleeping prior to being attacked, and also throughout the Porco home, given that Peter, according to prosecutors, had apparently moved throughout the home *after* sustaining his injuries. Nevertheless, notwithstanding the extensive blood staining and blood spatter throughout the house, the prosecution did not present the testimony of a blood spatter expert. Instead, without ever qualifying him as an expert, they improperly elicited opinion testimony about how the attack occurred -- and about how the perpetrator was able to carry out the attack without becoming bloodstained himself -- from a member of the state police, prompting the court to strike the faux expert testimony, after counsel's belated objection, and to instruct jurors to disregard it. Nevertheless, when the prosecutor marshalled the stricken testimony during his closing argument, offering jurors an explanation of how Christopher could still be guilty notwithstanding the fact that the police found not a shred of blood evidence in his Jeep or on his clothing, counsel, again, inexplicably failed to object.

Investigator Drew McDonald of the State Police Troop G. forensic identification unit testified that on November 15, 2004, all six members of his unit went to the Porco residence and remained there for six days analyzing and documenting the crime scene and scouring the home for evidence (McDonald: 1029-1289). The prosecution, however, never moved to qualify McDonald as an expert in any field, and McDonald, therefore, should not have been permitted to offer any forensic opinions. Nevertheless, when McDonald stated, "It is my opinion that the assailant struck most of those blows on the left-hand side of the bed or Joan Porco's side of the bed" (McDonald: 1177-78), defense counsel did not object.

Then, when the prosecutor asked McDonald whether he was able to differentiate between blood evidence that was contemporaneous with the assault versus blood evidence that was generated afterwards by certain actions that may have been taken by Peter or Joan Porco -- an opinion McDonald was equally unqualified to offer -- McDonald testified:

> Yes. It was not a significant amount of spatter or impact spatter or any other cast-off spatter as a result, in my opinion, as a result of the actions of the attack, itself . . . The majority of the blood in the photographs yesterday, in my opinion, is blood that was put in those locations after the act, itself . . . In my opinion I believe that the attack happened while the two victims are in their bed and they spent some time in their bed bleeding.

(McDonald: 1176-77). Still, however, counsel did not object. In fact, it was not until McDonald began theorizing that Peter Porco had actually gotten up and started moving around after the attack that counsel finally registered an objection (McDonald: 1177-78), at which time the court appropriately sustained counsel's objection, struck a substantial amount of McDonald's testimony, and instructed the jury to "disregard the last question and all the opinion evidence" (McDonald: 1178-79). *See People v. Veeney*, 197 A.D.3d 578 (2d Dept. 2021) (reversing conviction on ground of prosecutorial misconduct where, during summation, prosecutor referred to extra-record and

stricken evidence when attempting to explain why no shell casings were recovered at the crime scene).

The jury, however, had of course already heard the testimony, and then later, on summation, the prosecutor improperly reminded jurors of McDonald's stricken conclusions -- namely, that there had only been one assailant, and that based on McDonald's analysis of the blood spatter, the assailant was standing on Joan Porco's side of the bed during the attack, much of Mr. and Mrs. Porco's bleeding came after the attacker had already left the scene, there was no evidence that the attacker could have gotten any more than a minimal amount of blood on him, and it therefore made sense that there was no blood in Christopher's Jeep (Summation: 4203-06, 4208, 4224, 4225). And then, in an effort to further downplay the significance of the fact that there was no blood found in Christopher's Jeep, the prosecutor improperly told jurors that this fact was "not an issue with respect to reasonable doubt." In fact, given the People's need to explain to the jury why there was extensive bloodshed at the scene yet no blood evidence whatsoever found on any of Christopher's clothing or in his Jeep, the prosecutor even went so far as to suggest that Christopher could have gone into his room to change clothes, notwithstanding the fact that every police officer and investigator that entered the Porco home testified that every other bedroom in the home had remained untouched. Yet still, counsel did not object.

In sum, neither the government nor defense counsel called a blood spatter expert, yet defense counsel's silence during this critical portion of the prosecutor's summation allowed the prosecutor to make the argument of a forensic expert -- in essence offering his own opinion -- based on the stricken, non-expert testimony of State Police Officer McDonald. By failing to register the proper objections, defense counsel was therefore also ineffective in this respect.

3. The prosecutor misstated Christopher's financial position.

The prosecutor told jurors during his summation that "[Mr. Porco] was two months behind payments at the time of the murder" (Summations: 4201), and that he "hadn't paid a dime on [the Jeep]" (Summations: 4259). This, however, was simply untrue. Christopher had made several payments on the Jeep since securing a loan to finance its purchase, and on the day his parents were attacked, the Jeep loan was current (Lopez: 2051). Julio Lopez, a representative from Capital One Auto Finance, testified that Christopher applied for the loan over the Internet on May 17, 2004, that the loan was approved, and that later that same day, $17,000 was dispersed. The loan did become delinquent in November 2004, but at that time, Christopher's father made the two overdue payments. Thus, notwithstanding the prosecutor's theory that Christopher's attack on his parents was fueled by a desperate need for money to fund his fun-loving, partying college lifestyle, Peter paid the loan, and Christopher, as a factual matter, therefore knew that he was in no danger of losing his Jeep.

The prosecutor also claimed during his closing argument that Christopher's father had only agreed to pay for the semester at college that Christopher had "already attended," and he further told jurors that Christopher's ability to register for school was contingent on paying unrelated debts owed to "American Express, Capital One, [and] Sprint" (Summations: 4259-60; 4201). In truth, however, Christopher had taken out a Parent Plus Loan for Christopher, which covered tuition for the fall and spring semesters, and Christopher knew this (Hanna: 2270-71; 2284-85). The prosecutor, in other words, improperly distorted facts to fit a false narrative, *see People v. Lyons*, 106 A.D.2d 471 (2d Dept. 1984) (prosecutor must not advance a motive based on assumptions that are not supported by a fair reading of the record), and counsel's failure to object constitutes another critical omission.

4. The prosecutor made improper burden shifting comments.

During the climax of the his closing argument, the prosecutor improperly presented jurors with a classic Hobson's choice, telling them: "When you're asked to look at the circumstantial proof, I submit to you, ladies and gentlemen, that there are two inferences which you could reasonably make: (1) that Christopher Porco is guilty, or (2) that Christopher Porco is the unluckiest man on the face of the planet" (Summations: 4273). This comment was extremely unfair and prejudicial to Christopher, and strikingly similar to comments that have been universally condemned by courts in other cases, and yet counsel, again, did not object.

Closing arguments are an opportunity to comment upon the evidence adduced at trial and argue inferences and conclusions that can logically and reasonably be drawn from the evidence. Counsels for either side are permitted not only to comment on whatever proof may be favorable to his or her side, but to also call the jury's attention to proof that contradicts opposing counsel's theory of the case. At the same time, however, counsel must always be careful not to become a witness, comment on matters not in evidence, or otherwise call upon the jury to speculate. *People v. Forbes*, 111 A.D.3d 1154, 1158 (3d Dept. 2013).

In *Forbes, supra*, the prosecutor told jurors during his summation that in order to find the defendant not guilty, they would have to believe that there was a conspiracy against the defendant and that every one of the witnesses came to court, swore on the Bible, and lied; that detectives got together and risked their careers to frame the defendant; and that the police then enlisted the prosecutor and the judges to participate in the conspiracy and lie to jurors. Reversing the defendant's conviction, the Appellate Division explained that by commenting on what "the jury would need to believe in order to find that the defendant was not guilty," prosecutors had improperly "shifted the burden of proof from the people to the defendant." *Forbes*, at 1159.

Similarly, in this case, it was clear that no juror was going to believe that Christopher was simply the unluckiest man in the world, and thus the only 'reasonable' option for jurors, according to prosecutors, was to find him guilty. In other words, by suggesting to the jury that it could believe in the defense theory of the case only if it also believed that Christopher was the most unlucky man in the world, the prosecutor shifted the jurors' focus away from their role of determining whether the People sustained their burden of proof beyond a reasonable doubt -- and instead suggested that Christopher had failed to carry his burden of offering jurors a plausible theory by which they could find him not guilty. *See People v. Alston*, 77 A.D.2d 906 (2d Dept. 1980). Again, however, counsel failed to object.

5. The prosecutor made an improper propensity argument

As part of the trial court's pre-trial *Molineux* rulings, the court permitted the People to present evidence that one of the computers taken from the Porco home during a "staged burglary" in 2002 had later been sold over Christopher's eBay account. The court also made clear, however, that the People were not permitted to present evidence that Christopher was the perpetrator of the "staged burglary." Nevertheless, untethered by the trial court's restraints, the prosecutor made the following arguments on summation:

> Well, what did we come to find out during the course of this investigation, the investigation into the murder of his parents, that Christopher is the one who staged that burglary back in November of 2002; that Christopher Porco cut the screen to make it look like it was a traditional burglary, and that Christopher Porco took his mother's laptop and using his computer company, he sold it over eBay.
>
> The computer was stolen; it was his mother's work computer. That's in evidence. The defense stipulated that Christopher did that.
>
> Now, back in Thanksgiving of 2002, ladies and gentlemen, Christopher Porco needed pocket money.
>
> Back in November 2004, he needed much more, and do you remember what Mrs. Porco said when asked about that November 2002 burglary? She said that it really

> wasn't a burglary because Christopher had lived there, and at the time she did not understand Christopher's needs.
>
> Christopher's needs had gotten substantially more than they were back in November of 2002. In November 2004 he needed a lot.

(Summations: 4215). These comments clearly -- and deliberately -- violated the trial court's evidentiary ruling, impermissibly suggesting to jurors that Christopher had a propensity to commit criminal acts against his parents to further his personal interests and that as his needs increased, his willingness to harm his parents intensified. *See People v. Anderson*, 83 A.D.3d 854 (2d Dept. 2011). *People v. Molineux*, 168 N.Y. 264 (1901); *People v. Alvino*, 71 N.Y.2d 233 (1987); *People v. Hudy*, *supra*. The law is clear, however, that a person "may not be convicted of one crime on proof that he probably is guilty because he committed another crime." *People v. Goldstein*, 295 N.Y. 61 (1946). *See also People v. Lyons*, 106 A.D.2d 471 (2d Dept. 1984) (characterizing as egregious the prosecutor's remarks that since defendant perpetrated a fraud on the police department to advance his own interests, he was likewise doing the same thing with respect to the charged crimes). Here, just like the repudiated conduct in *Lyons*, the prosecutor compared Christopher's prior bad act to the crimes for which he was on trial and suggested that because his financial needs in 2002 compelled him to engage in criminal conduct and steal from his parents, his increased financial needs in 2004 motivated him to commit far more serious and violent crimes. This argument was improperly made; it was purposefully made; and counsel was, therefore, duty-bound to object. *People v. Correal*, 160. A.D.2d 85 (1st Dept. 1990); *People v. Scott*, 217 A.D.2d 564 (2d Dept. 1995); *People v. Wilkenson*, 71 A.D.3d 249 (2d Dept. 2010).

6. The prosecutor violated the court's evidentiary rulings with respect to the emails.

Notwithstanding the rule against the admission of hearsay, the trial court admitted approximately 84 email exchanges between Christopher and his parents as evidence of their states

of mind. The emails were not admitted for their truth (Proceedings: 1922-41). Nevertheless, the prosecutor selectively referenced the contents of certain emails during his summation to support the government's false narrative of how and why this horrific crime occurred, while ignoring the emails between Christopher and his parents that suggested that there was, in fact, no familial strain at all. Indeed, referencing the emails, the prosecutor told jurors:

> [Christopher] was involuntarily separated at the University of Rochester because of his failing grades and the emails, again I ask you to read them over at your leisure. They're exhibits 406 and 44. Take a look at them. Again, we're running late on time. I don't want to read them all back to you, but Christopher Porco sends his parents emails saying the university screwed up, you know, you're going to be getting a letter in the mail saying they changed my grade I really got, but some professor lost the exam. We know in fact, that he did fail, but his parents accepted his representation that the university screwed up. Christopher Porco was going to get a free year of school, that tuition would be waived. Now, we know that's not true. We know that's not even plausible, but for some reason, Peter and Joan accepted that. They may have had reservations in their heart, but when Christopher went back to school in the fall of 2004, they were under the impression that he was getting a free ride, because the university had made a mistake. Again, different stories he gives to his parents about how he ends up with that yellow Jeep.

(Summations: 4257-58).

> That, ladies and gentlemen, Christopher Porco had not owned up to his deceit one iota. That Christopher Porco did not admit to his father that he forged the electronic signature on the car loan, that Mrs. Porco said that we were closing in on Christopher.

(Summations: 4261). The prosecutor then used Christopher's last email to make the following baseless and inflammatory argument:

> You will recall the testimony of the witnesses with respect to what Christopher Porco told them about trying to get a hold of his parents. What does the last email say? This is at 2:09. This, five minutes before he had a conversation with Sarah Fischer about, you know, something's wrong on Brockley Drive. 'Yo Dad.' This is the subject. 'Hey Dad, I talked to the financial office today and everything is set for next semester. So, I guess just the plus loan for this past one. I don't have time right now. I'll give you guys a call tonight. Give my love to mom. Love, Chris.' Where is the what's going on with you guys? I have been trying to get a hold of you at home since last night. Nobody answers. I've tried to call your cell phones. Nobody's answering. I called your secretary and they said you're not at work. If

> you look through the pack of emails, there are other occasions where he says I haven't been able to get a hold of you. Give me a call. Compare the testimony of the frat brothers about his statements, about trying to get a hold of his parents and how concerned he was regarding being unable to get a hold of his parents to this email. I submit to you ladies and gentlemen, that this is a brilliant stroke on the part of Christopher Porco when he knows that his parents' bodies are going to be discovered some time soon and he knows that if they. Look at the emails between parents and son, they are going to shed a lot of dissent. So, let's send off out into the Internet one email that basically is going to make it look like everything's been taken care of, everything's fine, no need to look any further.

(Summations: 4269-70). Not only did the prosecutor attempt to demonstrate that Christopher was a liar by pointing out factual discrepancies between hearsay testimony at trial and the contents of the emails, he also invited jurors to speculate about what Christopher should have said in an email, a form of prosecutorial misconduct courts have repeatedly condemned as prejudicial. *See, e.g.*, *People v. Woodrow*, 92 A.D.3d 1188, 1190 (3d Dept. 2012) (prosecutor engaged in misconduct by speculating on summation about a conversation she imagined the defendant might have had); *People v. Edwards*, 29 A.D.3d 1078, 1081 (3d Dept. 2007) (court properly sustained counsel's objections to prosecutor's speculation on summation about what defendant might have said in a certain situation); *People v. Morgan*, 66 N.Y.2d 255, 259 (N.Y. 1985) (prosecutor improperly offered his opinion to jurors about what he would have done had he been in defendant's position under the circumstances).

H. Counsel Failed to Argue That the Testimony of Doctor Melton Regarding Her Lab's Mitochondrial DNA Testing Results Violated Christopher's Right of Confrontation.

Christopher's trial commenced on June 26, 2006, and on their case-in-chief, the People presented the testimony of Doctor Terry Melton, President and CEO of Mitotyping Technologies, and an expert in mitochondrial DNA testing,[50] to establish that Christopher could not be excluded

[50] Mitochondrial DNA testing differs from the more traditional nuclear DNA testing because mitochondrial DNA - unlike nuclear DNA -- is only inherited from the mother and is therefore not unique to one person (Melton: 3270; 3274-75). The first step of the analysis is extraction or purifying the DNA out of the cells into a separate tube in an amount comparable to the size of a drop of water; the next step is amplification, or polymerase chain reaction; and

as the source of the DNA profile identified on the toll ticket that prosecutors alleged Christopher used on his trip to Rochester on the night of his parents' attack (Melton: 3380). Prior to trial, counsel moved for a *Frye* hearing to determine the admissibility of Melton's testimony, and after the court denied counsel's motion and concluded that mitochondrial DNA testing was accepted as generally reliable within the scientific community, counsel also objected to Melton's testimony on the ground that there was an insufficient factual basis on which her opinion could be offered. Specifically, counsel took issue with the fact that Melton's abstract statistical analysis failed to account for the possibility of heteroplasmy, which can, and often does, lead to false inclusions or exclusions (Proceedings: 3338).[51] At the same time, however, counsel overlooked the critical fact that Melton did not perform *any* of the mitochondrial testing of the evidence herself, that her opinion was based entirely upon the reports prepared by her staff technicians who did the actual testing (Melton: 3324), and that none of the work performed by the analysts and technicians had been done in the ordinary course of business. Much to the contrary, prosecutors hired Melton's lab for the specific purpose of reaching the conclusion that Christopher could not be excluded as

technicians then determine the order of the DNA bases, which is called sequencing (Melton: 3276). Once sequencing is done, analysts compare the two samples, and if the bases match, the conclusion is reached that the known sample cannot be excluded. From there, the sample is compared against the known samples in the mitochondrial DNA database, which contains 4,839 profiles, to see how rare the sequence is in the general population (Melton: 3279). To do this, two 'sampling equations' are used (Melton: 3296); a generalization is made from the database to the larger population; and "[b]ecause there is a little uncertainty," there is a built-in "confidence interval."

[51] Most, if not all, individuals are 'heteroplasmic' with respect to mitochondrial DNA, meaning that an individual's mtDNA sequence can differ among locations in the body or even within the same cell. Thus, due to heteroplasmy, samples from a suspect and a crime scene may exhibit mtDNA sequence differences even when the two are from the same individual or lineage, which, in turn, can lead to false exclusions. Conversely, samples from a suspect and a crime scene may exhibit sequence commonalities even when the two are from different individuals. Here, during the pendency of the case, two DNA samples were collected from Christopher -- one on November 15, 2004 during his interrogation, and one later in 2006 after the court suppressed the original sample. The samples, however, were slightly different in that one sample contained an additional base at one location of analysis (Melton: 3254-55), suggesting that Christopher was either heteroplasmic, or that one of the samples had been contaminated. Thus, from a statistical perspective, while 12 of the 4,839 profiles in the database exhibited the profile at issue, 3,002 profiles in the same database (more than 60% of the North American population) could not be excluded (Melton: 3359).

a contributing donor of the DNA sample found on the toll ticket.[52] Counsel, in other words, had meritorious grounds to exclude Melton's testimony and Mitotyping's laboratory report under *Crawford v. Washington*, 541 U.S. 36, 50 (2004), yet, inexplicably, counsel not only failed to object to Melton's testimony as violative of Christopher's confrontation rights, counsel actually introduced the laboratory report into evidence himself despite the fact that there was absolutely no strategic benefit for doing so. For these missteps, too, counsel was ineffective.

Both the federal and state constitutions provide for the right of the accused in all criminal prosecutions to be confronted with the witnesses against him, *see* U.S. CONST. AMEND. VI; N.Y. CONST. ART. I, §6. On March 8, 2004, however, the Supreme Court rejected the view that the Confrontation Clause applies to in-court testimony only, and finally acknowledged that the involvement of government officers in the production of testimony with an eye toward trial also "presents unique potential for prosecutorial abuse." *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (holding that an out-of-court testimonial statement made by a witness -- regardless of the purported reliability of the statement -- is inadmissible under the Confrontation Clause unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness). In *Crawford*, in other words, the Supreme Court retreated from its previous position that judicial determinations of the reliability of out-of-court testimonial evidence can often suffice, and unequivocally held that testimonial evidence presented to a jury by the government in a criminal proceeding must be subject to adversarial testing. *Crawford*, at 62. And, although the Court in *Crawford* declined to exhaustively define what does and does not constitute 'testimonial' evidence -- instead limiting its explanation to the core class of testimonial statements, such as prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements elicited

[52] Melton's conclusions were memorialized in a letter report addressed directly to Assistant District Attorney Rossi. *See* (App. 352-361).

during police interrogations, *Crawford*, at 51-52 -- the Court nevertheless made clear that "extrajudicial statements contained in formalized testimonial materials" qualified as testimonial. *Id.*

Then, in *Crawford*'s wake, New York courts also began to recognize that evidentiary reports, prepared for the primary purpose of prosecution, were also testimonial, yet counsel, despite having this case law readily available, never marshaled the law at Christopher's trial to either prevent the introduction of Melton's testimony or force the government to make available the analysts who actually conducted the testing. *See, e.g.*, *People v. Rogers*, 8 A.D.3d 888 (3d Dept. 2004) (finding confrontation clause violation where report in evidence, made by private lab and requested by and prepared for law enforcement for the sole purpose of prosecution, was testimonial); *People v. Hernandez*, 7 Misc.3d 568 (Sup. Ct. N.Y. Co. 2005) (latent fingerprint reports prepared at the request of law enforcement for the purpose of prosecuting defendant are testimonial); *People v. Bones*, 17 A.D.3d 689 (2d Dept. 2005) (counsel waived *Crawford* violation by admitting DNA report himself and failing to argue that report's admission violated defendant's confrontation rights).[53]

Here, Urfan Mukhtar of the New York State Forensics Lab concluded that the DNA on the toll ticket that prosecutors alleged Christopher used on his trip to Rochester on the night of the

[53] Since deciding *Crawford* -- and after Christopher's conviction became final -- the United States Supreme Court joined these courts interpreting *Crawford* and also held that forensic laboratory reports like the report admitted in Christopher's case -- created specifically to serve as evidence in a criminal proceeding -- are "testimonial" for Confrontation Clause purposes. *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). *See also People* v. *Rawlins*, 10 N.Y.3d 136 (2008); *People v. Freycinet*, 11 N.Y.3d 38, 41 (2008); *People v. Morrison*, 935 N.Y.S.2d 234 (4th Dept. 2011). Today, in other words, the government may not introduce a laboratory or forensic report into evidence without the testimony of the analysts who performed the test without first showing that these original analysts were unavailable and then offering a live witness competent to testify to the truth of the report's statements. See *People v. John*, 27 N.Y.3d 294, 315 (2016) (the testifying laboratory witness cannot merely serve as "a conduit for the conclusion of others"); *cf. People v. Pascall*, 164 A.D.3d 1265 (2d Dept. 2018) (testimony of DNA expert who was not original criminalist did not violate defendant's Confrontation rights where witness's testimony established that he independently analyzed the raw data and was not merely functioning as a conduit for the conclusion of others, and original criminalists had resigned and were thus unavailable).

attack included a male profile, but that the profile was too degraded to be identifiable (Mukhtar: 2930). Wanting more, the District Attorney hired Dr. Melton to conduct mitochondrial DNA testing on the ticket (Melton: 3267), and on March 9, 2006, prosecutors sent Melton the toll ticket along with Christopher's DNA sample for comparison and analysis (Melton: 3299-3000), making it clear that Christopher was the defendant, and that trial was soon to commence (Melton: 3352). Accordingly, at trial, Dr. Melton testified that analysts from her lab swabbed the toll ticket and, unlike Mukhtar, were able to recover "a very small amount of DNA," which she characterized as "minimal and degraded" (Melton: 3321). In fact, notwithstanding Melton's testimony that the DNA profile in Christopher's case was the most minimal profile her lab had ever analyzed (Melton: 3359), she claimed that her analysts were still able to recover 85 bases, which enabled them to develop a mitochondrial DNA profile "that was very partial, but nevertheless reproducible" (Melton: 3302). Melton acknowledged that, normally, she and her staff preferred to work with 783 DNA bases -- as opposed to the mere 85 bases recovered from the toll ticket in Christopher's case -- but still, she claimed, her analysts were able to determine that of the 4,839 profiles in the mitochondrial DNA database, only 12 individuals had the same stretch of 85 bases that her technicians recovered from the ticket.[54] Then, applying her sampling equation and 'confidence interval,' Melton characterized the profile as "rare" and drew the statistical conclusion that, "at most, .39% of North Americans might have this type" (Melton: 3316).[55] Melton, in other

[54] Melton's analysts also utilized what is known as an "ancient DNA approach," an amplification method that uses "mini-primer sets" to amplify DNA sequences with small amplicon products of 150 base pairs or less. The reliability of this unique amplification method, however, which is typically used to analyze highly degraded skeletal remains, was never explored at trial. Defense counsel never demanded Mitotyping's validation studies or testing protocols, nor did counsel at any point question whether Mitotyping's use of mini-primer sets in this context was "novel," or if the methodology, if performed properly, generated results accepted as reliable in the scientific community generally.

[55] Despite Melton's characterization of the partial profile as "rare," the profile, in truth, was not rare at all when considered in the proper context. Indeed, more than 50% of the mtDNA profiles contained within the SWGDAM reference database appear only once (*see* Addendum: Database Limitations, p. 34, fn 113), yet the profile at issue in this case appeared *twelve times* in the database. Further, Melton admitted on cross-examination that of the eight other

words, could not "say for sure that the DNA on the toll ticket [wa]s [Christopher's]" but she testified that based on the analysis performed by her technicians, Christopher could not be "excluded" as a contributor (Melton: 3380). Again, however, Dr. Melton did not personally conduct or observe the conducting of any of the testing at issue; nor was the lab's analysis conducted in the ordinary course of business. Accordingly, had counsel raised the proper objection, counsel have excluded Melton's testimony about the lab's conclusions.

In sum, Dr. Melton's employees conducted all the testing with the specific objective of connecting Christopher to the toll ticket, while Dr. Melton, as the head of the lab, simply relayed and explained their findings. Counsel, however, not only failed to recognize that this was a clear confrontation violation under *Crawford*, counsel actually introduced the doctor's otherwise inadmissible report into evidence himself. As there was no strategic reason for doing so, and because Melton's testimony, and the conclusions listed in the report, corroborated the claims of toll collectors John Fallon and Karen Russell that they both remembered a yellow Jeep passing through their toll lanes, this error, too, contributed to the overall deprivation of Christopher's right to the meaningful and effective assistance of counsel.

I. Counsel Failed to Raise the Issue of Secondary and Tertiary Transfer.

Dr. Melton's conclusions regarding the mtDNA evidence, even if probative, were hardly conclusive. After all, more than 60% of the people who handled the 1,619 toll tickets given out during Fallon's shift could not be excluded as contributors of the evidence profile, and more than six would be expected to have a profile identical to the profile at issue.[56] Moreover, this number

people that she was directed to test and attempt to exclude as contributors -- Kelly Strack, Michael MacIntosh, James G. Buono, Sr., Craig Sleazak, John Fallon, Karen Russell, Cheryl Moorehead, and Mr. Mukhtar -- individuals all believed to have possibly had contact with the ticket in question -- Melton was similarly unable to exclude MacIntosh, Sleazak, Fallon, Moorehead, or even Mukhtar (Melton: 3374-75).

[56] (.39% multiplied by 1619 equals 6.3).

does not account for the passengers in various cars who could have handled the tickets, or the fact that multiple Thruway employees touched the tickets without changing their gloves as they sorted them, likely spreading genetic material among the tickets (Strack: 2352-53).[57] Nor does it account for the possibility that secondary, or even tertiary, transfer occurred. Counsel, in other words, should have argued to the jury that even assuming the general reliability of the methods used by Mitotyping to develop and interpret the DNA from the toll ticket, Christopher's DNA could nevertheless have gotten on the ticket without him ever having touched it. Counsel's failure to do so cannot be considered strategic.

It is widely recognized and understood that a person's DNA can be readily transferred to a surface that they *never touched* by another individual who has either previously touched that person, or who has previously touched a surface that the person had previously touched. If, for example, a person sneezes onto a pair of gloves, and the gloves later touch an object, the person's DNA may be transferred to the latter object even though the person never actually touched it. *People v. Rodriguez*, 153 A.D.3d 235 (1st Dept. 2017). *See also People v. Graham*, 107 A.D.3d 1296 (3d Dept. 2013) (reversing conviction on weight-of-the-evidence review where People's proof consisted only of defendant's DNA on a gun handle, which could have been deposited through "secondary transfer" when police officer "touched defendant and then [touched] the gun").

Here, State Police Investigator Kelly Strack was present at 36 Brockley Drive processing evidence at 12:37 p.m. on November 18, 2004 (*see* App. 361), and approximately two hours later, at 2:35 p.m., she was present at the NYS Thruway Authority to pick up and ultimately help sort, photograph, photocopy, and fingerprint the ticket at issue (App. 362). The crime scene at 36

[57] Similarly, it does not account for the possibility that Debbie Fallon -- who was never tested for comparison purposes -- was the actual collector working in the entry lane of Exit 46 on November 14, 2004, and that she deposited her DNA on the ticket as well.

Brockley Drive was awash in massive amounts of transferrable biological material, including large amounts of blood from Christopher's mother, with whom he shares a mitochondrial DNA profile, and the ticket was handled and processed at a state police barracks facility that also played host to an unknown quantity of crime scene evidence and biological material. Nevertheless, despite the very real and concerning possibility that biological evidence from the crime scene may have been inadvertently transferred to the Thruway ticket through secondary or even tertiary transfer, trial counsel never raised the issue of DNA transfer, nor did counsel confront any of the government's witnesses about precautions taken to prevent cross-contamination and whether crime scene material from 36 Brockley Drive could have contaminated Melton's mtDNA results.

In sum, it is well within the realm of possibility that the minute amount of mtDNA on the toll ticket was deposited *after* it was taken into Investigator Strack's possession, either from her person, clothes, vehicle, a surface in the barracks, or other source unrelated to Christopher, and counsel, therefore, had a science-based way of explaining how such a small amount of mtDNA consistent with that of Christopher and Joan could be found on the toll ticket even though he himself had never touched the ticket. Yet despite the obvious significance of this theory to the case -- and the importance of discrediting the claims of Fallon and Russell that Christopher's yellow Jeep passed through their toll lanes -- counsel failed completely to identity this critical line of attack, and in this way, too, performed deficiently.

J. The Cumulative Effect of Counsel's Errors and Omissions, Deprived Christopher of His Right to The Effective Assistance of Counsel and His Right to a Fair Trial. U.S. Const., Amend VI; N.Y. Const. Art. I, § 6.

While the question of what does and does not constitute ineffective assistance of counsel necessarily varies with the facts of each case, *People v. Rivera*, 71 N.Y.2d 705, 708 (1988), "it is elementary that the right to effective representation includes assistance by an attorney who has

taken the time to review and prepare both the law and the facts relevant to the defense and who is familiar with, and able to employ at trial basic principles of criminal procedure." *People v. Droz*, 39 N.Y.2d 457, 462 (1976) (reversing conviction where it was evident counsel made little or no effort to properly prepare the case for trial). Furthermore, while a single error by defense counsel may be insufficient to constitute ineffective assistance, the cumulative effect of counsel's actions may in certain cases rise to the level of violating a defendant's fundamental rights. *People v. Ramos*, 194 A.D.3d 964 (2d Dept. 2021) (cumulative effect of defense counsel's errors deprived defendant of meaningful representation and a fair trial where counsel lacked strategic justification for failing to investigate defendant's alleged alibi defense, failed to properly impeach victim's testimony, and also failed to register important objections); *People v. Oathout*, 21 N.Y.3d 127 (2013); *People v. Arnold*, 85 A.D.3d 1330 (3d Dept. 2011) (cumulative effect of defense counsel's errors deprived defendant of meaningful representation where counsel failed to register proper objections, failed to make appropriate offers of proof, and failed to impeach a witness with a prior inconsistent statement); *People v. Clarke*, 66 A.D.3d 694 (2d Dept. 2009) (cumulative effect of counsel's errors rendered trial unfair); *People v. MacArthur*, 101 A.D.3d 752 (2d Dept. 2012) (finding ineffective assistance based on cumulative effect of counsel's errors, where counsel failed to object to prosecutor's improper summation remarks or to testimony concerning the defendant's post-arrest silence, and elicited prejudicial evidence).

Here, Christopher was no doubt represented by experienced attorneys, who made certain cogent legal and factual arguments on his behalf. At the same time, however, "[i]t is axiomatic that even if defense counsel . . . performed superbly throughout the bulk of the proceedings, [he] would still be found ineffective under the Sixth Amendment if deficient in a material way, albeit only for a moment and not deliberately, and that deficiency prejudiced the defendant. *Green v.*

Lee, 964 F.Supp.2d 237, 258 (E.D.N.Y. 2013). In this case, trial counsel failed Christopher in key ways at trial and, as detailed herein, in the critical months leading up to trial: counsel failed to adequately conduct an investigation and to identify and utilize exculpatory and impeachment evidence to challenge the prosecution's "timeline" theory of Christopher's guilt; counsel failed to utilize available discovery material to impeach prosecution witness Steven Siko and demonstrate that it was impossible for Christopher to have made the theorized trip in his Jeep between Rochester and Albany on the night of the crime; counsel failed to identify and utilize 'negative' timeline evidence that tended to exculpate Christopher; counsel did not retain an investigator to test drive the possible routes along the timeline; counsel did not demand *Brady* materials that the prosecution had obviously withheld; counsel failed to effectively expose how Detective Arduini's animus against Christopher biased the investigation, nor did counsel call out and challenge the prosecutor's attempt to minimize the key role the detective played in the investigation; counsel failed to thoroughly cross-examine James Kennedy, and did not demand or introduce exculpatory surveillance evidence at trial; counsel failed to effectively cross-examine John Fallon and Karen Russell; counsel failed to consult with or retain an independent forensic pathologist to challenge the government's conclusion regarding the time at which the attack must have occurred or the time at which Peter Porco succumbed to his injuries; counsel failed to interview or call as a witness Rachel Slater, a classmate of Christopher, who possessed exculpatory alibi evidence, and likewise failed to expose the government's efforts to suppress this evidence; counsel did not move to suppress the residential alarm data, which police seized from the Porco home without a warrant in violation of the Fourth Amendment; counsel did not move to suppress the email evidence or the wills of Joan and Peter, which were illegally seized from the Porco home; counsel elicited testimony from a prosecution witness that Christopher's father told her that he was afraid that

Christopher was a sociopath; counsel failed to object to numerous instances of prosecutorial misconduct during the People's closing argument; counsel failed to argue that the testimony of Doctor Melton regarding her lab's mitochondrial DNA testing results violated Christopher's right of confrontation under *Crawford v. Washington*; and counsel also failed to raise the issue of secondary and tertiary transfer with respect to the DNA and the toll ticket. These errors were not few and isolated; they were numerous and devastating, and cumulatively, they deprived Christopher of his right to the effective assistance of counsel and his due process right to a fair trial.

POINT TWO

THE TRIAL COURT PERMITTED A GROSSLY UNQUALIFIED JUROR TO SERVE ON THE JURY IN VIOLATION OF CHRISTOPHER'S CONSTITUTIONAL RIGHT TO TRIAL BY AN IMPARTIAL JURY. N.Y. CONST., ART. I, § 6, 2; U.S. CONST., AMENDS VI, XIV.

Approximately three weeks into Christopher's trial, Juror No. 6 reported to the trial court that Juror No. 2 had been discussing upcoming factual elements of the case with Juror No. 2's daughter, and that Juror No. 2 had then relayed the contents of the conversation (or conversations) with her daughter to other jurors. Specifically, Juror No. 6 informed the court that Juror No. 2 told one or more of the other jurors that her daughter was attending the trial and had advised her that there was a neighbor of the Porcos scheduled to testify for the prosecution who had supposedly seen Christopher's Jeep at the crime scene on the morning of the attack. Apparently, Juror No. 6 further reminded Juror No. 2 that it was improper for her and the other jurors to be speaking about the case and told her to stop talking.

With this information, the trial court apparently decided -- off the record -- to interview certain jurors *in camera*, outside the presence of either party. First, the court questioned Juror No. 11 as follows:

Q: I was informed by one of the jurors that one of the jurors was talking yesterday about her daughter being in court or something and you may have heard this.

A: I did hear that.

Q: What did you hear?

A: Her daughter was in court and that the trial court should be over again next week, but then you came in and said that to us. What else did I hear? *Something about a witness was going to come that lived near the house* and I picked up my book and started reading.

Q: Has anything been said that would cause you not to be fair and impartial?

A: Absolutely, positively not.

Q: When you say, one of the jurors, I thought it was Juror 2. Am I right on that?

A: Yes.

Q: All right. Fine. She was brought out with you I think?

A: Yes, sir.

Q: Well, the one who brought it to my attention was Juror No. 6.

A: Yes, because she actually said to stop talking. Yes, there was also another juror communicating with Heather that was (name). I think it's (name).

Q: Did she also say this shouldn't be going on?

A: No, but she -- it was a very brief conversation. I would say five seconds or ten seconds, maybe a little more.

Q: You can be fair and impartial?

A: Absolutely.

Q: Obviously, you're not to discuss what anyone says, even fellow jurors. You must keep an open mind.

A: Yes.

(Proceedings: 2631-32). Next, the court conducted an inquiry with Juror No. 2, again, in camera, and outside the presence of counsel.

Q: Now, a number of the jurors had brought to my attention that you had mentioned something about talking to your daughter in court or she conveyed information to you about what is going on in this case and that you had mentioned it.

A: Not in this case. She attended the court having done part of an internship here and we came -- that was Monday and said that before we came in that you heard several quick cases and attorneys brought you papers to sign.

Q: All right. Did you talk about a neighbor coming to court to testify and stuff?

A: I didn't say anything whatsoever about any neighbor, nor do I know anything about any neighbor.

Q: All right.

A: I don't have a neighbor or anything.

Q: Not your neighbor, no. A neighbor in the case was supposed to come to court about the opening statements of the district attorney and the defense attorney?

A: Mike said that his wife wanted to attend and he asked me does she have to have a special pass. I said no. It was my understanding that it's open to the public, meaning his wife could come, but she couldn't -- but there wouldn't be any way to know what she would hear.

Q: You can't discuss this case anything about this case until I give until I charges your you may [sic] retire to commence your deliberations.

A: When Flow heard our conversations, she said you can't be saying anything. I said you're right so immediately the conversation ended Courtney had responded.

Q: What else did your daughter, if anything else, say to you?

A: She said the mannerism of the defense attorney was repetitive.

Q: This is your daughter?

A: Yes, who sat in.

Q: All right. Anything else?

A: No, no facts at all.

Q: Is there anything about what's happened so far that would cause you not to be fair and impartial?

A: Not at all.

Q: Then just go back. You're not to discuss this case ever until I tell you, you can start deliberations, do you understand that?

A: Okay, I didn't.

Q: I mean period, period, all right, or anything related to it, okay? That's the rule. I tell you every day five times a day minimum. You have to adhere to it, all right.

A: Okay.

Q: Go and enjoy yourself. I'll get this thing started in a few minutes all right.

(Proceedings: 2634). Then, after finishing with Juror Nos. 11 and 2, the trial court questioned Alternate Juror No. 2.

Q: Yesterday there was a situation that occurred when I think Heather Martin was talking about talking to her daughter and she had garnered some information about the case or something. Did you hear any of that?

A: Not specifically. What her daughter said?

Q: Yes.

A: You know, I think the only conversation that I recall is regarding how long we were going to be here and you actually answered that.

Q: A few minutes later?

A: Later, yes.

Q: Because one of the jurors stated she had to tell Ms. Martin she couldn't talk about the case, that's the rule. Do you recall that?

A: That I recall, yes.

Q: Fine, that was to Ms. Martin I take it?

A: Right.

Q: You don't remember anything on that issue?

A: No.

Q: Fair enough. You can be fair and impartial?

A: Yes.

Q: All right. Good. Go on back.

A: Thank you.

Q: You're not to discuss this with anybody, not even your fellow jurors.

(Proceedings: 2635). At the conclusion of these three inquiries, the court invited the parties into chambers, and paraphrased the interviews as follows:

> Mike (Juror No. 11) just remembers Mr. Mooney told Juror No. 2, Ms. Martin, that we shouldn't talk about this case, period. He said it ended with that and he can be fair and impartial. Alternate No. 2 stated that she basically heard them talking about they shouldn't talk about the case and that's it. Now, when I brought in Juror No. 2, she stated her daughter was here Monday and stated that she told her about things that go on that don't apply to this case that occur in front of me and what I do and stuff like that, all right. I told her she is not to talk to her daughter anymore. She is not to talk to anybody about this case in any manner whatsoever, I asked her, you know, if she talked about any witnesses, any neighbor witnesses and that. She just didn't own up to any of that stuff. Now, my question here is: What do you want me to do with thus Juror No. 2?

(Proceedings: 2636). The prosecutors indicated that it did not appear to them that Juror No. 2 should be disqualified and deferred to the trial court's judgment. The court, however, expressed doubt about whether the juror was "being up front" with them (Proceedings: 2637), and counsel likewise indicated that she was "very nervous," stating that she was concerned about where the juror heard information about a potential neighbor witness and wanted to go online to see if there was some reference to a "neighbor" witness in the news, and to take some time to think about the best way to handle the situation. The court then advised counsel that Juror No. 2 had also indicated that Juror No. 2's daughter stated to Juror No. 2 that counsel was "very duplicitous" or "repetitive" when cross-examining witnesses, at which point the parties had an off-the-record discussion. When the parties went back on the record, counsel repeated that these revelations made her very nervous, stated that it was clear that Juror No. 2 had engaged in misconduct by improperly talking about the trial with her daughter, and reiterated her request that the trial court give counsel until noon to finalize her position on Juror No. 2's qualifications (Proceedings: 2637). Nevertheless, despite counsel's request to revisit the issue, no further discussion about the qualifications of Juror No. 2, who deliberated through verdict, appears on the record at any other point during the trial.

A criminal defendant has a fundamental right under both the New York and the Federal Constitutions to "be tried by the jury in whose selection the defendant himself has participated, and the right to an impartial jury." *People v. Rodriguez*, 71 N.Y.2d 214, 218 (1988). N.Y. CONST.,

ART. I, § § 6, 2; U.S. CONST., AMENDS 6, 14. To safeguard this right, both the defendant and the People are permitted to participate in jury selection, *see* CPL §270.05 to §270.25, and the Legislature has provided a mechanism by which a juror may be dismissed at trial for being "grossly unqualified" to serve. *See* CPL §270.35; *Rodriguez,* 71 N.Y.2d at 218. Specifically, section 270.35(1) provides that if at any time after the jury has been sworn and before the rendition of its verdict the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve or has engaged in misconduct of a substantial nature, the court *must* discharge the juror. A juror becomes "grossly unqualified" when it "becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict." *People v. Buford,* 69 N.Y.2d 290, 298 (1987).

In *Buford,* the Court of Appeals outlined the specific procedure a trial court must follow when determining whether a juror should be disqualified pursuant to section 270.35, and directed trial courts to "question each allegedly unqualified juror individually in camera *in the presence of the attorneys and the defendant*." *Buford*, 69 N.Y.2d at 299. The proceeding, the Court instructed, should be a "probing and tactful inquiry" into the "unique facts" of the case, and include a careful consideration of the juror's "answers and demeanor," *see id*., and while the defendant's presence during an *in camera* questioning of a juror may in certain circumstances be unnecessary, courts have been explicit that *counsel's presence is constitutionally required*. *See, e.g., People v. Darby,* 75 N.Y.2d 449, 453-54 (1990).

> We believe and conclude that an inquiry to determine the existence and extent of prejudice affecting the gross disqualification of a sworn juror . . . is inextricably related to defendant's entitlement to a fair hearing. Therefore, the unique, indispensable presence of at least the single-minded counsel for the accused is minimally necessary to safeguard that fundamental fairness to defendant, who will be judged as to his charged criminal conduct by a jury selected with his approval and participation.

Darby, at 454 (internal quotations and citations omitted). Furthermore, the *Buford* Court stated, the trial court should place the reasons for its ruling regarding a juror on the record, and "may not speculate as to the possible partiality of a sworn juror based on equivocal responses." *People v. Anderson*, 70 N.Y.2d 729, 730 (1987); *Buford*, at 298.

Here, the trial court erred in three keys ways. *First*, when the court made inquiry of the jurors in chambers, neither Christopher nor defense counsel was present, and there is no indication whatsoever that counsel consented to this procedure or otherwise waived the right to be present. *See People v. Johnson*, 189 A.D.2d 318 (4th Dep't 1993) (the absence of counsel alone during an *in camera* inquiry of a juror is grounds for reversal and not subject to harmless error analysis).

Second, once the trial court concluded its inquiry with the jurors, it provided counsel with an inaccurate recitation of its inquiry, thereby depriving counsel of material information that would have assisted counsel in making a meritorious argument that Juror No. 2 committed substantial misconduct and was therefore grossly unqualified to serve. *See, e.g., People v. Gale*, 79 A.D.3d 903 (2d Dep't 2010) (where trial court "summarizes" an off-the-record inquiry with a juror and fails to follow the *Buford* procedure, the reviewing court cannot determine whether the trial court's inquiry was "probing" and "tactful" as required). Indeed, while Juror No. 2 denied discussing the case with her daughter or having any conversation about a "neighbor" witness, Juror No. 11 -- without any prompting or suggestion by the court -- provided the court with contrary information about the nature of Juror No. 2's communications. Nevertheless, the trial court -- inexplicably -- did not convey this critical information to counsel. *See People v. Havner*, 19 A.D.3d 508 (2d Dep't 2005) (a juror who disregards the court's instructions by discussing the case outside the courtroom and then lies when questioned about the discussion by the court is grossly unqualified to serve on the jury and should be discharged); *People v. De La Rosa*, 233 A.D.2d 257 (1st Dep't

1996) (upholding discharge of juror as grossly unqualified to serve and for engaging in misconduct of substantial nature where juror engaged in flirtatious conduct with co-defendant's sister and then lied about it to the court). Instead, despite Juror No. 11's specific disclosure, the court merely paraphrased the information to the attorneys, and left out the critical fact that Juror No. 11 corroborated what Juror No. 6 initially reported and what Juror No. 2 explicitly denied, telling counsel, "[Juror No. 11] just remembers Ms. Mooney told Juror No. 2, Ms. Martin, that we shouldn't talk about this case, period (Proceedings: 2636). Counsel, as a result, never learned that a second juror had also heard what Juror No. 2 said about the upcoming 'neighbor' witness, and that Juror No. 2 had actually lied to the court about her misconduct when confronted. *See People v. Otigho*, 113 A.D.3d 637, 638 (2d Dep't 2014) ("[T]he absence of defense counsel from the in camera interview, coupled with the court's failure to disclose what the juror said, deprived the defense of the opportunity to inquire as to whether the juror made similar prejudicial statements to any other juror" and required a new trial). *See also People v. McGhee*, 103 A.D.3d 667, 668 (2d Dep't 2013) (characterizing deprivations of this character as "mode of proceedings" errors, which require reversal despite counsel's failure to object).

Finally, given the insufficient inquiry made by the trial court, conclusions about Juror No. 2's qualifications remain speculative at best. The juror who initially reported Juror No. 2's misconduct to the court -- Juror No. 6 -- was never interviewed on the record, and the precise content of the juror's communication to the court, or how Juror No. 6 even alerted the court to Juror No 2's misconduct in the first place, therefore likewise remains unknown. Indeed, while the sum and substance of Juror No. 6's communication can be inferred given the trial court's subsequent transcribed interviews with other jurors, this initial communication was never recorded or memorialized in any way, and there is therefore no record of any "probing and tactful" inquiry

of Juror No. 6 regarding the question of whether anything the juror may have witnessed or heard may have affected her ability to be fair and impartial or to decide the case based solely on the evidence. And, while the trial court did obtain superficial assurances from Juror No. 11, Juror No. 2, and Alternate Juror No. 2 that each could be fair and impartial, the record nevertheless reveals clear equivocation. For example, after the court interviewed Juror No. 2, the court expressed uncertainty as to whether the juror was being honest, stating, "I don't know if she's being up front with us -- not up front with us, somewhere in between or what" (Proceedings: 2637). The court also stated that it had not reached any conclusions (Proceedings: 2640), and when counsel told the court that the information about the jurors made her "very nervous," the court agreed to speak with counsel more about the issue later in the day. The issue, however, was never revisited on the record. Rather, the last word was the court stating: "I think right now there is enough fear in the jury room that no one is going to say anything about it" (Proceedings: 2641). The court, therefore, not only failed to conduct the requisite *Buford* inquiry, it failed to place its conclusions regarding Juror No. 2's qualifications on the record. *People v. Porter*, 77 A.D.3d 771 (2d Dep't 2010) (reversing conviction where trial court failed to probe whether juror's anticipated plea agreement with prosecution on juror's unrelated case would render juror biased in favor of or against the People).

In sum, the trial court's inquiry into reported juror misconduct failed to comply with the Criminal Procedure Law, and the record regarding juror misconduct is, as a result, incomplete. Thus, because the procedure utilized by the trial fell far short of the constitutional mandates delineated in *Buford* and *Darby,* Christopher's conviction should be vacated pursuant CPL §440.10(1)(h). Or, in the alternative, the court should conduct an evidentiary hearing to ascertain what transpired off the record and determine whether an order for vacatur should follow.

POINT THREE

MATERIAL EVIDENCE USED TO CONVICT CHRISTOPHER WAS SEIZED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS, AND HIS CONVICTION MUST, THEREFORE, BE VACATED. U.S. CONST. AMENDS IV, V, VI, AND IX; N.Y. CONST. ART. I, § 6; CPL § 440.10(1)(d) AND (1)(h).

As outlined above, the alarm event buffer data, and the email evidence were seized in violation of Christopher's right to be free of unreasonable searches and seizures. All of this evidence was outside the scope of the 11/15 warrant, yet seized by police and used against Christopher at trial; the 11/15 warrant was overbroad and lacked particularity with respect to the items authorized for seizure, which permitted the police to conduct an limitless, unconstitutional general search of the Porco home; and, finally, the prosecution acquired the contents of Christopher's emails from Sprint via an improper *ex parte* subpoena rather that pursuant to a lawfully issued search warrant. This evidence was material, it was procured in violation of Christopher's constitutional rights, and it contributed significantly to his conviction. *See* CPL §440.10(1)(d). Accordingly, because there is a reasonable probability that but for this unlawfully obtained evidence, the outcome of the trial would have been different, Christopher's conviction should be vacated, and a new trial ordered.

POINT FOUR

PERVASIVE POLICE AND PROSECUTORIAL MISCONDUCT, FRAUD, AND MATERIAL MISREPRESENTATIONS MADE BY PROSECUTORS THROUGHOUT THE COURSE OF THE PROCEEDINGS DEPRIVED CHRISTOPHER OF HIS RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL. U.S. Const. Amends, IV, V, VI, and XIV; N.Y. Const. Art. I, § 6; CPL §§440.10(1)(b), (1)(d), (1)(f), and (1)(h).

From the moment the police discovered Joan and Peter Porco inside 36 Brockley Drive, through the conclusion of closing arguments, prosecutors and law enforcement authorities focused their investigative resources exclusively on Christopher, adopting a 'win at any cost' approach. As a result, the government's paramount function to seek the truth was clouded, exculpatory and other evidence favorable to Christopher's defense was suppressed, illegal searches were conducted, and false representations were made to conceal those searches. For these reasons, too, Christopher's conviction must be vacated.

A. The People Withheld Exculpatory Evidence and Other Impeachment Material From the Defense in Violation of *Brady v. Maryland*.

Prosecutors have an affirmative duty to disclose to the defense evidence in their possession that is favorable to the defendant and material to guilt or punishment. This important responsibility extends not only to exculpatory or other favorable evidence, but also to "material evidence that impeaches the credibility of [a] prosecution witness." *People v. Alongi*, 131 A.D.2d 767 (2d Dept. 1987); *United States v. Bagley*, 473 U.S. 667, 690-92 (1985); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a *Brady* violation, the "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; th[e] evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued" because the evidence was material. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is favorable where it either tends to show that the accused is not guilty or where it impeaches a

government witness, *see People v. Garrett*, 23 N.Y.3d 878, 886 (2014), *citing United States v. Gil*, 297 F.3d 93, 101 (2d Cir. 2002), and evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In this context, a reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the suppressed evidence, it means only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith v. Cain*, 565 U.S. 73, 75 (2012) (*citations and quotations omitted*).

Here, pursuant to an apparent open file discovery policy, prosecutors provided the defense with a voluminous amount of materials prior to trial. None of the material, however, was labeled or otherwise flagged as *Brady* material. Additionally, prosecutors withheld at least 33 pages of documents related to the investigation of the timeline, and the government likewise declined to reveal exculpatory video surveillance that investigators seized from various locations along the timeline route, as well as notes memorializing the multiple interviews investigators conducted with Karen Russell and John Fallon. This evidence showed, or at least would have given defense counsel a solid basis to argue, that Christopher and his Jeep were never present at any of the times and places along the timeline, where he would have had to have been in order for the prosecutor's version of events to make sense, and thus by suppressing the evidence, the government deprived Christopher of his due process right to a fair trial.

1. The People failed to disclose lead sheet nos. 67, 91, and 108.

As discussed above, police and prosecutors conducted an exhaustive search along the timeline route of travel in an effort to discover evidence of Christopher or his Jeep, and the results of their searches were memorialized in several 'Lead Sheets,' including Lead Sheet Nos. 67, 91, and 108, which contained transaction records from businesses and gas stations along or near the

timeline route, notes documenting the removal of surveillance video, interviews with employees and business owners, and emails exchanged between prosecutors and credit card companies. Prior to trial, however, prosecutors did not disclose Lead Sheet Nos. 91 or 108 to the defense, and with respect to Lead Sheet No. 67, they provided only 8 of the Lead Sheet's 33 pages.[58] Indeed, because the defense did not receive or have any opportunity to review these documents until Christopher made a post-conviction FOIL request, defense counsel was denied the opportunity to argue to the jury that prosecutors were in possession of evidence that actually tended to contradict -- not corroborate -- their timeline theory of Christopher's guilt. *See People v. Vilardi*, 76 N.Y.2d 67 (1990) (reversing conviction where government withheld an exculpatory report by an explosives expert, which cast doubt on their claim at trial that an explosion had taken place).

On summation, for example, the prosecutor argued that Christopher had plenty of time to stop and purchase gasoline in the 23 minutes it took him to travel between the Thruway and 36 Brockley Drive (Summations: 4253) -- a fact which would necessarily had to have been true in order for Christopher to make the round trip between Rochester and Albany as prosecutors theorized. Information contained within the undisclosed lead materials, however, made clear that the trip between Exit 24 and 36 Brockley Drive took 18 minutes -- not 23 minutes -- which left even less time for Christopher to refuel, and that there was only one gas station that was open at the time and located within the vicinity of the necessary route of travel, but that Christopher did not refuel there. Still, because the lead sheets documenting these important facts were withheld, defense counsel had no basis to challenge the prosecutor's inaccurate representation to the contrary.

[58] While prosecutors did provide counsel with a Lead Sheet "Index" prior to trial, which listed the subject of each lead generally, prosecutors withheld the substantive exculpatory information contained within the Leads.

Further, with respect to Lead 67, which directed the police to "Follow up for 24 Hour Businesses" (App. 30-55) the prosecution only disclosed two "additions" to the Lead and one other page of officer notes labeled "Lead 85." The first addition contains the cover page, "Add to Lead 67", one page bearing a photocopied portion of cash register tape -- which reflects gasoline purchases made at the Campus Mobil at 1181 Western Avenue in Albany between 1:44 a.m. and 2:16 a.m. on November 15, 2004 -- and police/prosecutor notations (App. 67); the second includes an "Add to Lead 67" cover page, as well as a four-page fax from GE Consumer Finance to ADA Michael McDermott dated June 15, 2006, which appears to be a response to an undisclosed subpoena McDermott sent to the company several days earlier (App. 68-72). The fax is made up of a cover page, a one-page communication from Exxon Mobil to McDermott, and two pages of credit card statements belonging to "Steven Suskind," which include a gasoline purchase made using Mr. Suskind's credit card at the Campus Mobil on November 15, 2004 at 1:54 a.m. And, written on what was, at the time of trial, an undisclosed copy of the Campus Mobil register tape is the notation: "Legit sale to guy in Manilus" (App. 50). *Compare* (App. 50) (undisclosed)[59] with (App. 67) (disclosed). The remaining 26 pages of Lead 67 were never turned over to trial counsel (App. 30-55).

And finally, lead Sheets 91 and 108, which summarized law enforcement's fruitless search for video surveillance evidence along the Thruway and between the Thruway and 36 Brockley Drive, were likewise withheld from the defense (App. 75-76; 77-78).

In other words, just as in *Vilardi*, *supra*, the police in this case conducted a massive investigation that revealed no evidence whatsoever that Christopher had refueled his Jeep in the Albany area. Prosecutors withheld the results of the investigation of at least eleven gas stations in

[59] The redactions in black were completed before Christopher's 2013 FOIL request was honored.

the Albany area, the credit cards records from the investigation of a twelfth station, and the results of the investigations of rest stops along the Thruway. Had the documents memorializing these aspects of the investigation been disclosed to counsel, prosecutors would not have been able to make the contrary argument at trial, and counsel could have exposed a meaningful break in the government's timeline. Instead, the government's conduct prevented counsel from pursuing meaningful avenues of cross-examination and from presenting a more cogent defense, and this, too, violated Christopher's due process right to a fair trial. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (concluding withheld list of cars present in a parking lot where police alleged defendant left his car was "material" under *Brady* analysis as it tended to show the absence of defendant's car in a place important to the commission of the crime and the unreliability of the government's investigation).

2. The People withheld favorable surveillance video evidence.

In addition to the Lead Sheet materials, prosecutors also failed to provide the defense with the corresponding surveillance tapes the police obtained during the course of their investigation. These videos -- recovered from the Albany area and from locations along the Thruway -- support the argument that notwithstanding the prosecutor's version of the way Christopher committed the crime, there was, in reality, no evidence at all that he had actually been where the People theorized he had been.

For example, as noted above in Point I(A)(5), State Police employee James Kennedy took possession of numerous videotapes and pictures connected to the case at the behest of the police, and while it is unknown what exactly is depicted on the tapes since they were never disclosed, notes made by Detective Arduini suggest that much of the footage was taken from points along

the timeline route (App. 193).[60] In parts of "Lead 67," for example, which were never disclosed, there are two clear indications that the police removed specific tapes from gas stations for later viewing, *see* (App. 31, 74) (Sunoco 1465 Washington Ave., "Tape taken for viewing"); (Dunkin Donuts, 1232 Western Avenue, "Took tape to view @447").[61] These tapes, and any corresponding notes, constitute undisclosed *Brady* material, for while the mere viewing of exculpatory surveillance footage by investigating authorities may not amount to "possession" in the context of a *Brady* analysis, physically procuring and removing the tapes from a given establishment most certainly does. *Compare People v. Walloe*, 88 A.D.3d 544 (1st Dept. 2011) (people did not violate their *Brady* obligations where the prosecution failed to acquire an allegedly exculpatory surveillance tape that was at all times in the exclusive possession of a private party).

Furthermore, "Lead 90/91" contains a directive to officers to check on "possible video at SP Barricks [sic] at Scyler," (App. 78) -- a clear reference to the state police barracks building at milepost 277 westbound on the Thruway, which sits directly alongside the roadway -- and post-conviction FOIL requests have confirmed that this facility did indeed have exterior video surveillance facing the Thruway during the time period in question (Exh. I, pp. 1-3). Thus, just like the surveillance video from banks, rest stops, restaurants, gas stations, and other businesses along the theorized timeline route of travel, surveillance video from the barracks was also relevant to the investigation, for if the state police facility had surveillance cameras that captured any part of the nearby Thruway, but did not capture an image of Christopher's Jeep, which *must* have passed

[60] Prosecutors advised counsel in February of 2019 that Kennedy's only involvement in the case concerned surveillance video obtained from UR. Notes made by Detective Arduini, however, dated November 24, 2004, contradict this representation, and indicate that Arduini transferred video surveillance materials to Kennedy that were related to the timeline: "Jim Kennedy Academy . . . Dropped off 3 tapes . . . 10 video photos + CD . . . 1-Snow BK. Not labeled . . . Tape 1 Rid-dup 2 tapes tape 2 . . . 1 all 2nd 45 sec to min" (App. 193).

[61] @447 is a reference to police headquarters at 447 Delaware Avenue.

by the barracks for the prosecution's theory to be true, such images, too, would constitute undisclosed *Brady* material.

3. The People withheld the notes of police officers and prosecutors related to the interviews of John Fallon and Karen Russell.

By all accounts, Detective Arduini began investigating the attack on the Porcos within minutes of the discovery of the crime scene. On November 16, 2004 and November 17, 2004, he was in Rochester interviewing UR students; on November 18, 2004, he interviewed Karen Russell (and likely John Fallon); and he kept detailed notes of his investigative efforts (App. 142-243), including his repeated interactions with nearly every significant witness who testified for the prosecution at trial. Yet, despite Arduini's apparent practice of memorializing even the cursory contacts that he had with individuals over the course of the investigation, the prosecution never disclosed many of Arduini's notes regarding the investigative actions he took on the 15th, 16th, 17th, or 18th of November, including his initial interviews with Russell and Fallon, wherein the two toll booth workers both relayed information contradictory to information they provided on later dates.

First, with respect to Karen Russell, prosecutors disclosed to the defense prior to trial a statement Arduini took from Russell on November 23, 2004. When Russell took the stand, however, she testified that she had actually been interviewed on at least three other occasions: November 18, 2004, December 17, 2004, and in the spring of 2006. During the November 18, 2004 interview, Arduini apparently showed Russell a photograph of a yellow Jeep (Russell: 1472), yet the interview was not mentioned in any of the discovery materials provided to counsel; [62] no notes or other memorialization of the December 17, 2004 interview were ever disclosed, although

[62] The November 18, 2004 interview also appears to be when Russell falsely told Arduini that her co-worker, Mark Washock, had also seen the yellow Jeep (*see* Exh. F, pp. 40-52; pp. 54-56).

the interview was mentioned in the Lead Sheet Index; and with respect to the interview that took place in the spring of 2006, prosecutors never disclosed the fact that Russell had actually been interviewed a fourth time after the People obtained records from the Thruway authority in 2006, which contradicted Russell's previous statements to police regarding her recollection of Christopher's yellow Jeep (Russell: 1485-86).[63]

And regarding John Fallon, although he testified at trial that the first time he was interviewed by police was on November 27, 2004 (Fallon: 1460-62), the Lead Sheet Index contained the summary of an interaction an officer had with Fallon on November 18, 2004, nine days earlier, and the notes of this exchange, which were *not* disclosed to the defense prior to trial, indicate that during this initial interview, Fallon was asked about -- *but was unable to remember* -- a yellow Jeep.[64] Had counsel known about this critical inconsistency -- and about the fact that when Fallon was first questioned about the Jeep on November 18, 2004 he provided "no useful information," -- counsel surely could have used the notes to impeach Fallon's credibility on cross-examination (Exh. F, p. 4). Thus, while the Lead Index Summary should no doubt have alerted counsel to the existence of more detailed notes and prompted counsel to make a timely demand, the prosecution nevertheless had an affirmative duty to provide the notes under *Brady*, especially since the undisclosed notes make clear that Fallon made statements prior to trial that were inconsistent with the claims he made when he took the stand -- namely, that his first interview took place on November 27, 2004 (Fallon: 1460-62).[65]

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[63] While these Thruway records were disclosed to defense counsel, counsel never received any formal memorialization of Russell's fourth interview, which should have been disclosed and flagged as *Brady* material.

[64] And in Arduini's notes from November 25th, the day that he called the Thruway to find out Fallon's work schedule, Arduini indicated that "John" was working at the Exit 45 Toll Plaza in Victor on Saturday, signaling that he was familiar with Fallon and had already spoken to him (Exh. F, p. 10).

[65] The Lead Index Summary does not reference the name of the police officer who conducted this interview; however, all available evidence suggests that it was Detective Arduini (*see* p. 42, *supra*).

In sum, it is evident that Russell and Fallon were interviewed on or about November 18, 2004, a mere three days after the crimes were committed, that Detective Arduini conducted one -- and likely both -- of these interviews, and that these interviews -- like the re-interview of Russell in 2006 -- were the most important interactions Fallon and Russell had with police. By failing to disclose the notes memorializing these interviews prior to trial, the People violated their *Rosario* and *Brady* obligation, and further impaired Christopher's due process right to a fair trial.[66]

4. Prosecutors withheld page 2 of a June 1, 2006 fax from Thruway employee Craig Slezak to ADA Rossi.

During the late spring of 2006, as the People prepared for trial, prosecutors apparently became concerned about Karen Russell's veracity, and about her claim that she specifically recalled Christopher's Jeep because he came barreling into her toll lane after she had turned her lane light red (Exh. F, p. 49). Accordingly, in addition to subpoenaing the electronic data from the Thruway that corresponded to Russell's shift, prosecutors also obtained Russell's Tour of Duty Report (TDR) (*see* App. 363), as well as the TDRs of other toll booth workers believed to have been on duty at Exits 45, 46, 23, and 24 during the relevant timeline period between the evening of November 14, 2004 and the morning of November 15, 2004. Nevertheless, while Thruway employee Craig Slezak transmitted to prosecutors a 21-page facsimile (20 TDRs plus a cover page), dated June 1, 2006, only 20 pages of the transmittal were disclosed to the defense. *See* Section (A)(3)(a) of Point One, *supra*). Indeed, page 2, which was in all likelihood the TDR of either John or Debbie Fallon from November 14, 2004 through November 15, 2004, was missing from the disclosure, and to date, the page has never been disclosed. Moreover, page 3 of the facsimile was John Fallon's TDR from the evening of November 15, 2004, which memorialized

[66] There are also two clear and unexplained after-the-fact redactions related to Fallon and to prosecution witness Marshall Gokey in Arduini's notes, *see* (App. 196, 207), which provides yet another reason Arduini's original notes must be examined to determine whether these redactions concealed *Brady* material.

the shift that he worked at the Exit 45 toll plaza in Victor 24 hours *after* the 3-11 shift that he allegedly worked at Exit 24 on the evening of November 14, 2004, but the facsimile included no other TDRs belonging to either John or Debbie Fallon. Accordingly, the only logical conclusion is that the missing page was the TDR not of some random tollbooth worker with no relevance to the investigation, but, rather, that of either John or Debbie Fallon. Further, Debbie Fallon, Brenda Williams, and Joe Zangel each signed TDRs belonging to toll collectors who worked the November 14-15 overnight shift, which confirms their presence at Exit 46 working the 3-11 shift on November 14, 2004 (App. 137, 140). John Fallon, however, did not sign the TDR of a collector who worked the overnight shift, which could have proven that he was in fact present at Exit 46 when prosecutors alleged that he handed a ticket to Christopher at 10:45 p.m. In other words, of the four toll workers listed in Arduini's notes (App. 189), only John Fallon's presence at the Exit 46 toll plaza on November 14, 2004 cannot be verified.

In sum, John Fallon's TDR for the shift in question would have contained actual proof that he was working at the entry lane of Exit 46 on November 14, 2004 as he claimed, and yet to date, this critical report, inexplicably, has never been disclosed.

5. The police intentionally suppressed exculpatory alibi evidence.

As discussed above in Section (C)(1) of Point One, Rachel Slater, a classmate of Christopher's at UR, emerged very early on in the investigation as a witness with information that was potentially helpful to the defense. The government, however, ignored her claim until it became too late to verify, and then buried the exculpatory information that she had shared within tens of thousands of pages of discovery material. This, too, is another example of how prosecutors withheld information that was helpful to the defense, and in doing so, violated Christopher's due process right to a fair trial.

Rachel Slater told numerous individuals in the weeks after the crime that she received an instant message on her computer from Christopher between 12:00 a.m. and 12:30 a.m. on November 15, 2004, the time during which -- according to the prosecutor's timeline -- Christopher must have been driving east on the Thruway. This information was obviously exculpatory, yet the police endeavored to obscure it. First, for example, while disclosed BPD notes indicate that officers had attempted to contact Slater on November 28, 2004 (*see* App. 271), prosecutors did not disclose any notes regarding any interview that took place on this date. Then, months later, during a UR personnel meeting, Jody Asbury -- the individual who appears to have told the BPD about Slater back in November -- brought up Slater's name again, along with the instant message Slater claimed she received, and "RO," a member of UR security, noted that although "Slater was one of the names supplied earlier in the investigation by Bethlehem detectives" to RO's knowledge there had been no follow-up (App. 248). And pursuant to this conversation, UR security therefore contacted the State Police and inquired whether anyone had ever followed up with Slater about the instant message (App. 273).

Indeed, it was not until March 21, 2005 that Investigator Toro finally interviewed Slater and presented her with the questionnaire about Christopher that was given to all UR students. Still, however, as Toro transcribed Slater's sworn responses, he erroneously typed, whether intentionally or by mistake, "11/14/04," rather than 11/15/04 as the date of the instant message, which Slater fixed upon reviewing the statement for accuracy (App. 255). Additionally, in Toro's synopsis of his interview with Slater for the Lead Sheet pertaining to the interview, while Toro was careful to include Slater's description of Christopher as a lazy, drunk, liar who liked to drive over the speed limit, he omitted *any* reference whatsoever to Slater's report of the instant message (App. 275). Thus, notwithstanding defense counsel's negligence in failing to pursue Ms. Slater's

exculpatory assertions even after notification from John Polster, (*see* section C of Point One, *infra*), had counsel assumed the truth of Toro's synopsis of his interview with Slater -- without taking the time to wade through the thousands of pages in which Slater's *actual* statement was buried -- defense counsel overlooked her significance to the investigation, and missed an opportunity to utilize her statement in Christopher's defense at trial. [67]

In this regard, even where it is undisputed that certain contested documents were disclosed, where "the prosecutor deliver[s] the subject documents interspersed throughout a voluminous amount of other documentation, without specifically identifying the [exculpatory] documents . . . at the time of delivery," the defendant may nevertheless be deprived an adequate opportunity to fully utilize the documents to his benefit. *People v. Wagstaffe*, 120 A.D.3d 1361 (2d Dept. 2014) (vacating defendant's conviction pursuant to §440.10[1][b] where the manner in which the prosecution turned over exculpatory documents violated *Brady*). *See also United States v. Thomas*, 981 F.Supp.2d 229, 239 (S.D.N.Y. 2013) ("the government cannot hide *Brady* material as an exculpatory needle in a haystack of discovery materials").

In sum, the documents pertaining to Slater were disclosed among thousands of pages of documents and were prefaced by Investigator Toro's grossly misleading synopsis of her sworn statement, which omitted any reference at all to the instant message that she received from Christopher. For this, defense counsel's ability to investigate additional avenues of impeachment and exculpatory facts was impermissibly obstructed, and Christopher's due process right to a fair trial further violated.

[67] Additionally, while Lead Sheet 104 purports to be a comprehensive "University of Rochester Witness Timeline," and includes every minor alleged interaction that UR students had with Christopher on the weekend of November 12-15, this lead sheet conspicuously omits any reference to Rachel Slater as well (App. 364-367).

6. The prosecutor withheld his knowledge of Detective Arduini's bias against Christopher from the defense, knowing that the bias should have precluded Arduini from taking an active role in the investigation.

During the defense case, as outlined above in Section (B)(4) of Point One, counsel sought to question Dr. Kearney about the hostile feelings that Arduini had expressed to him about Christopher, and about Arduini's assertion to Dr. Kearney -- in the very first days of the investigation -- that Christopher was guilty. In response, ADA McDermott advised the court that "very early in the investigation," Arduini told prosecutors that he wanted to "kind of step back and take a very ancillary role" in the case because of his daughter's "friendship" with Christopher (Proceedings: 3733). The prosecutor's disclosure makes two points quite clear: first, prosecutors were aware of Arduini's bias; and second, they withheld this information from defense counsel until the People had rested and the prosecution's witnesses had already been subject to cross-examination. Indeed, despite the prosecutor's clear mid-trial effort to downplay the suggestion that Arduini's bias could have in any way tainted the investigation, Arduini's hostility constituted information that was clearly favorable to the defense and, and it therefore qualified as *Brady* material that should have been disclosed. Arduini played a vital role in the government's investigation, he obtained eyewitness identifications of Christopher's Jeep from toll booth workers John Fallon and Karen Russell, he took all or nearly all of the initial and subsequent statements from UR students who testified at trial, he conducted the initial interviews of many of Christopher's friends in Albany, and he took numerous investigative steps with regard to the 'timeline.' Evidence of Arduini's bias was, therefore, probative and admissible under *Hudy*, and had the detective's hostility toward Christopher -- and the true extent of his involvement in the investigation been timely and properly disclosed -- counsel surely could have made use of the information when cross-examining the People's witnesses. *See People v. Garrett*, 23 N.Y.3d 878

(2014) (allegations of misconduct against police witness in unrelated civil suit constituted *Brady* material as the allegations clearly had an impeachment character, which defendant could have used at trial to cast doubt on officer's credibility). *See also People v. Hubbard*, 45 Misc.3d 328 (Sup. Ct. 2014) (vacating murder conviction where prosecution failed to disclose evidence of prior misconduct of investigators involved in the case).

Here, Arduini acknowledged his bias, and apparently even disclosed it to prosecutors, but was nevertheless permitted to continue to play an active and central role in the investigation. This information about Arduini was clearly favorable to Christopher's defense, and the first component of *Brady* is therefore satisfied. Furthermore, because prosecutors failed to timely disclose the information -- which prevented counsel from effectively using the information to impeach certain prosecution witnesses and to impugn the overall good faith of the investigation -- the second component of *Brady*, which requires a showing that the prosecution 'suppressed' the evidence at issue or failed to disclose it "in time for its effective use at trial," is likewise satisfied. *See United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001). *See also Leka v. Portundo*, 257 F.3d 89, 101-03 (2d Cir. 2001) (stating "[d]isclosure first made during the defendant's case is often of lesser utility" and "[t]he opportunity to use under *Brady* is the opportunity for a reasonable lawyer to use the information with some degree of calculation and forethought"). And finally, with respect to *Brady's* third prong, it is clear that even standing alone, and absent reference to the other suppressed *Brady* material, had the information about Arduini been properly disclosed to the defense and presented to the jury, there is a reasonable probability that Christopher would have been acquitted.

In sum, had counsel been able to elicit evidence of Arduini's hostility toward Christopher and his acknowledgement of that bias to prosecutors, and had counsel likewise been able to

establish the active and central role Arduini nevertheless played in the investigation, the jury may very well have viewed the case through a different lens, and defense counsel's argument that the police rushed to judgment against Christopher, thereby foregoing investigative leads that would have identified the real perpetrator, would have been significantly strengthened.

B. Authorities Searched and Seized the Alarm System Control Panel in the Porco Home Without A Warrant and Then Attempted to Cover Up Their Conduct By Applying for a Post-Hoc Warrant Premised Upon A Perjured Affidavit.

The examples of the ways in which police and prosecutors bent and, at times, completely flouted the rules in Christopher's case, are many. The most blatant, illegality, however, is the manner in which the BPD searched and seized the Porco's home security system and then attempted to conceal their unlawful conduct by securing a second warrant. In fact, by doing so, the police perpetrated a fraud upon the court, which materially contributed to Christopher's conviction.

As outlined above in section (D) of Point One, when the police searched the Porco home following the discovery of the crime scene, they located and downloaded the data from the alarm system control panel in the basement on November 16, 2004 *prior* to obtaining a search warrant authorizing them to do so (App. 304-308). Next, on or about November 22, 2004, the police -- still without a search warrant -- removed the alarm keypad and control panel from the home entirely (App. 309). And then, instead of acknowledging the impropriety of this conduct, on November 26, 2004, ten days after the police extracted the alarm data from the system -- and four days after they cut the key pad and control panel out of the walls and removed them from the house -- Detective Bowdish applied for a search warrant authorizing the seizure of "[a]ny security system devices including any computer data and computer storage devices," located on the premises of 36 Brockley Drive (App. 311). In his affidavit, however, Bowdish concealed the fact that the

police were seeking authorization to seize property which they had already searched and taken into their possession, and in doing so, he made factual assertions that were false and misleading. For example, Bowdish stated, "I . . . learned that alarm activity data is stored on a device within 36 Brockley Drive," and "[i]t is believed that if the keypad and storage device are secured the data can be preserved" (App. 314). Clearly, however, these statements were false since the storage device had already been searched and was in police custody. Moreover, Bowdish intentionally misrepresented additional facts when he presented the warrant return form for the alarm system to the issuing court and represented that he removed the alarm equipment from 36 Brockley Drive pursuant to the 11/26/04 warrant, when -- clearly -- the property had already been removed pursuant to the 11/15 warrant (App. 315).

In sum, given Bowdish's misrepresentations, prosecutors were able to use the alarm 'event buffer' data -- effectively and without challenge -- against Christopher at trial. And while counsel should have recognized the deceptive nature of the search, as well as the fact that the search warrant for the alarm system was obtained ten days *after* police had already seized its data, counsel's negligence in this regard does not excuse Bowdish's purposeful and calculated efforts to circumscribe Christopher's Fourth Amendment rights and perpetrate a fraud upon the court. For this, Christopher s is entitled to a new trial.

C. The Prosecutor Engaged in a Deliberate Pattern of Misconduct During Summation.

As discussed above in Section (G) of Point One, during the prosecutor's summation, he misrepresented forensic and timeline evidence, he made comments designed to specifically shift the burden of proof, he violated the court's evidentiary rulings regarding the evidence of the emails exchanged between Christopher and his parents, he advanced a timeline theory that he knew to be false, he invoked Scott Peterson and OJ Simpson, he became an unsworn witness by

restating and arguing stricken blood spatter opinion testimony, he made an improper propensity argument utilizing non-record evidence, and he misrepresented the status of two of Christopher's loans in order to argue a false motive to the jury. Overall, in other words, the prosecutor's purposeful misconduct during his summation denied Christopher his due process right to a fair trial. *See People v. Pelchat*, 62 N.Y. 97 (1984) (every prosecutor "owes a duty of fair dealing to the accused and candor to the courts" and where a prosecutor advances a theory that he knows to be false, he abrogates this fundamental responsibility).

Here, as outlined above in Point One, because defense counsel failed to independently investigate the prosecutor's timeline, the jury never learned that it was in fact, impossible for Christopher to have made the roundtrip between Rochester and Albany as theorized. For this devastating oversight, counsel was ineffective and Christopher's trial, as a result, was unfair. At the same time, however, given that prosecutors were acutely aware of the problems with their timeline, they, too, failed to safeguard Christopher's right to a fair trial by arguing false facts to the jury and, as a result, violated their duty of fair dealing and candor *See People v. Cotton*, 242 A.D.2d 638 (2d Dept. 1997) (reversing conviction where, despite counsel's failure to object, prosecutors knowingly misrepresented important facts on summation).

During closing arguments, for example, the prosecutor told jurors that the 23-minutes between the time Christopher allegedly exited the Thruway and the time when the Porco alarm was deactivated using the master code gave Christopher *plenty of time to stop and refuel his Jeep* (Summations: 4252-53). The prosecutor knew, however, that the trip from the Thruway to the house took 18 minutes to complete, which left only five minutes to stop and purchase gasoline, and he also knew, contrary to what he argued to the jury, that it would not have been possible for Christopher to have purchased fuel on this portion of the trip. Indeed, the police's investigation

identified only one open gas station located anywhere near the timeline route between Exit 24 and 36 Brockley Drive during the relevant time frame -- the Campus Mobil on Western Avenue -- and given that investigators knew that Christopher had not purchased fuel there, the prosecutor, in turn, had no good faith basis to argue that he did. In reality, despite an expansive and careful investigation of every open gas station anywhere near the theorized timeline route of travel, prosecutors simply had no idea where Christopher could have possibly stopped to purchase gasoline, and they were, in fact, still trying to identify a feasible refueling point even after the trial was underway (App. 30-77).

Additionally, as argued in section (G)(2) of Point One, the prosecutor deliberately argued on summation the stricken forensic opinion testimony of Investigator McDonald, thereby becoming an unsworn witness, and relating to the jury his own forensic opinions about the crime scene (Summations: 4203-06; 4208; 4224-225). *See People v. Scheidelman*, 125 A.D.3d 1426 (4th Dept 2015) (condemning prosecutor's improper introduction of expert testimony through an investigator as well as his comments regarding the improperly elicited 'expert' testimony during summations), and, as detailed in section (G)(5) of Point One, he likewise argued non-record evidence in violation of the court's *Molineux* ruling during his closing argument, and made an improper propensity argument to the jury that Christopher perpetrated a burglary against his parents at his own home two years earlier when he needed pocket money, and that he must, therefore, have possessed a murderous motive at the time of his parents' attack, given that his financial needs were "substantially more" (Summations: 4215-16). This argument was egregiously improper in that it violated the court's *Molineux* ruling, and, moreover, there was not even any evidence in the record regarding Christopher's financial situation in 2002. And worse, the prosecutor knowingly misrepresented facts to support the argument-- he lied about the status

of Christopher's college tuition by telling jurors that Peter had only agreed to pay for the semester Christopher had already attended; he lied when he told jurors that Christopher was two months behind on his Jeep loan payments at the time of his parents' attack; and he falsely told jurors that Christopher's ability to pay for school was contingent on paying unrelated bills with "American Express, Capital One, [and] Spring" (Summations: 4260; 4201; 4259). In other words, the prosecutor fabricated a motive for an inexplicably horrific crime where no motive, in fact, existed.

D. ADA McDermott Lied to the Court During a Pre-Trial Inquiry into His Involvement in Christopher's Unconstitutional Interrogation.

During pre-trial hearings, ADA McDermott was questioned about the extent of his involvement in the collective effort that was made by BPD law enforcement officials to deny Christopher access to his attorney during his interrogation, and in response, he claimed that Bethlehem Police requested his presence at the station to assist in "preparing search warrant applications," and he explained that he continued to help with the warrants until he learned -- three or four hours into the interrogation -- that there was a video feed in another room that showed the police's interactions with Christopher in real time (McDermott Hrg: 516). This claim, however -- i.e., that McDermott was initially unaware of the video feed because he was too busy in the "detective's office" helping with the search warrant applications -- is belied by documentary evidence and thus plainly untrue; the search warrant applications had been completed *before* the interrogation even began.

There were three search warrants applied for and granted on November 15, 2004, the night of Christopher's interrogation: the warrant for 36 Brockley Drive, the warrant for Christopher's Jeep; and the warrant for Christopher's dorm room. Notwithstanding the testimony of the prosecutor, however, the court signed the last warrant -- the warrant for the Jeep -- at 8:18 p.m., *prior to* Christopher's arrival at the police station (App. 319). Moreover, Detective Bowdish,

who was an affiant in all three of these search warrant applications, testified that he had no conversations whatsoever with ADAs McDermott or Rossi on November 15, 2004 -- nor was he even aware that anyone from the Albany County District Attorney's Office had been present at the police station until after the interrogation was completed at 3:00 a.m. (Bowdish Hrg: 306-07). Further, Lieutenant Berben admitted that he spoke to ADAs Rossi and McDermott about the interrogation, that he told each of them that Mr. Polster had asserted that he was Christopher's lawyer and that Christopher could not waive his right to an attorney without him, and that Rossi and McDermott both nevertheless told the lieutenant not to permit Polster to enter the interrogation room (Berben: 111).

Counsel moved to disqualify the Albany County District Attorney's Office from prosecuting the case on the ground that Rossi and McDermott had become witnesses by personally involving themselves in Christopher's illegal interrogation, but counsel did not press any of the above-mentioned inconsistencies while the prosecutors were on the stand, and as a result, counsel failed to expose the active role the two prosecutors played in violating Christopher's rights from the very inception of the investigation. Still, however deficient counsel's performance in this respect might have been, what is far more troubling is that the two prosecutors who intentionally violated Christopher's constitutional rights within hours of his parents' attack, were the same two prosecutors who oversaw the entire investigation and tried the case through verdict.

E. ADA McDermott Obtained Illegal Financial Benefits from Prosecution Witness Joseph Catalano after Trial, Evidencing an Undisclosed Quid Pro Quo Relationship.

At the time Christopher's trial in 2006, as ADA McDermott was scrutinizing Christopher's financial circumstances, he was, at the same time, experiencing his own financial

troubles. In fact, according to an August 2010 report by the Office of the Inspector General, *see* (App. 368-420), McDermott had been in default on his student loans since 1991.

> Between 1994 and 2007, Higher Education Services Corporation (HESC) took various appropriate collection actions in regard to McDermott's failure or inability to make his loan payments. However, *after the Porco trial and Catalano's intervention, McDermott started receiving benefits to which he was not entitled*.

(App. 372) (*emphasis added*).

Indeed, after Christopher was sentenced, McDermott, who had "never made a voluntary payment against [his loan] principal" (App. 395), contacted Joseph Catalano, who was also the Assistant Vice President of Collection and Default Management of HESC, and Catalano thereafter took steps to help McDermott, which included reducing McDermott's monthly loan payment from $1,300 per month to $400 per month, and removing him from wage garnishment and collection costs, which, in total, saved McDermott between roughly $13,000 and $16,500 (App. 387). And, while the precise terms and timing of the agreement between McDermott and Catalano are unknown, what is clear is that Catalano's conduct was illegal, that he acted at McDermott's behest, and that there is, at minimum, an appearance of impropriety that warrants further exploration. "The role of the public prosecutor," after all, "is not merely to convict but to foster the trust of the public in the criminal justice system . . . [and] [i]n fulfilling that function it is essential that a prosecutor avoid even the appearance of impropriety." *People v. Gentile*, 127 A.D.2d 686, 688 (2d Dept. 1987). *See also People v. Conlan*, 146 A.D.2d 319, 329 (1st Dept. 1989).

In sum, there is no doubt that Catalano and McDermott entered into an improper relationship, and that despite their cooperation with the Inspector General's investigation, there are questions of when their relationship began, and whether and to what extent the relationship

influenced Catalano's testimony against Christopher at trial. These questions must be explored at an evidentiary hearing.

F. The Cumulative Effect of Prosecutorial and Police Misconduct Denied Christopher His Due Process Right to A Fair Trial and Constituted and Fraud upon the Court.

Where the cumulative effect of a prosecutor's misconduct substantially prejudices a defendant, his due process right to a fair trial is violated, *see People v. Calabria,* 94 N.Y.2d 519 (2000); *Darden v. Wainwright*, 477 U.S. 168 (1986), and when evaluating the severity of the alleged misconduct and its impact on the fairness of the proceeding, the court considers the extent to which the misconduct was intentional. *United States v. Valentine,* 820 F.2d 565, 570 (2d Cir. 1987). Here, police and prosecutorial misconduct was pervasive during Christopher's trial, it was deliberate, and until now, it has been wholly ignored. Detective Bowdish perjured himself in order to secure the alarm evidence without a warrant; the government withheld *Brady* material from the defense and other important impeachment material -- and, in fact, took active steps to conceal it; the prosecutor purposely misrepresented important facts during his summation to ensure that the jury rendered a guilty verdict; the government presented arguments about the way Christopher allegedly committed these horrible crimes, which they knew to be false; and police and prosecutors were able to illegally seize and admit evidence against Christopher at trial while almost completely avoiding judicial scrutiny. Cumulatively, these examples of misconduct rendered the proceedings against Christopher constitutionally infirm, and they entitle him to a new trial. *See Kyles v. Whitley, supra* (vacating conviction and granting new trial where net effect of favorable state-suppressed evidence raised a reasonable probability that disclosure would have produced a different result at trial).

POINT FIVE

THE CUMULATIVE AND COMBINED EFFECT OF COUNSEL'S NEGLIGENCE, NUMEROUS INSTANCES OF PROSECUTORIAL AND POLICE MISCONDUCT, AND ERRORS COMMITTED BY THE COURT DENIED CHRISTOPHER HIS DUE PROCESS RIGHT TO A FAIR TRIAL. U.S. CONST. AMEND. V, XIV; NY. CONST. ART. I, § 12.

Due in large part to procedural constraints, Christopher's direct appeal presented no issues of fact, it raised no questions with respect to the actions or omissions of counsel, and it likewise made almost no mention whatsoever of the flagrant government misconduct that pervaded his prosecution. Instead, appellate counsel was almost singularly focused on the improper admission of Joan Porco's head nod, which constituted the only direct evidence of Christopher's guilt. Furthermore, there were a number of facts and issues that counsel never addressed due to the simple fact that trial counsel continued to represent Christopher throughout the appellate process. In this respect, the head nod testimony was not merely damaging to Christopher because of the evidentiary impact it had on jurors, it also caused counsel -- both at trial and on appeal -- to devote a disproportionate amount of time, effort, and resources to attacking and countering the impact of the head nod testimony, to the exclusion of the identification and litigation other meritorious issues.

Nowhere is this fact more evident than when considering counsel's failure to challenge the timeline. Indeed, as this application makes exhaustively clear, almost every important piece of evidence comprising the prosecution's timeline was either false or obtained and admitted in violation of Christopher's constitutional rights, yet counsel mounted little, if any, meaningful challenge to the evidence. Counsel did not, for example, cross-examine Steven Siko -- whose testimony was, in part, both misleading and false, *see* Section (A)(2) of Point One; counsel never tested the feasibility of the timeline, or realized the fact that there was no evidence whatsoever

that Christopher had made the necessary refueling stop; counsel's cross-examination of John Fallon and Karen Russell was meager at best, *see* Section (A)(5) of Point One; counsel failed to consult with or call an independent forensic pathologist to evaluate Peter Porco's time of death and potential survival time; and counsel inadequately challenged the DNA evidence, and even admitted the reports from Dr. Melton's lab himself, which were otherwise excludable under *Crawford*. *See* Sections (B) and (H) of Point One. The alarm event buffer evidence -- which was key to establishing Christopher's identity as the perpetrator -- was seized by police in violation of Christopher's constitutional rights; Detective Bowdish applied for the 11/26 search warrant to conceal the illegal search and seizure of the alarm data pursuant to the 11/15 warrant, and, in doing so, made material factual misrepresentations in the affidavit he filed in support of the 11/26 warrant application, *see* Section (D) of Point One; prosecutors committed numerous *Brady* violations by concealing dozens of exculpatory documents, photographs, and surveillance video footage, much of which directly undermined the People's theory of the case, *see* Section (A) of Point Four; and, during summations, the People presented the jury with a narrative of events that they knew to be false. *See* Section (C) of Point Four.

Overall, had counsel performed his investigative duties as required, and had prosecutors adhered to their *Brady* obligations, the evidentiary landscape of the trial would have been drastically different. Counsel, for example, would have been able to demonstrate that (a) the fuel economy of Christopher's Jeep would simply not have allowed him to make the theorized round trip; (b) all possible refueling points along or near the required route of travel were checked for Christopher's presence and eliminated as possibilities; (c) there was no evidence of Christopher or his Jeep in any of the surveillance footage recovered from locations along the timeline route of travel; and (d) above all, it was physically impossible for Christopher to have been at the crime

scene at the time prosecutors claimed that the crime was being committed. *See* Section A(1) of Point One. Similarly, had counsel consulted with an independent forensic pathologist to investigate Peter's time of death and survival time, counsel could have presented the jury with powerful evidence -- from a medical and scientific perspective -- that it was simply not possible that Christopher attacked his parents at the time prosecutors claimed. *See* Section (B) of Point One. Counsel should not have elicited from Michelle McKay that Peter Porco expressed fear that his son was a sociopath, *see* section F of Point One; counsel should have exposed the critical ways in which Detective Arduini's bias influenced the investigation and the testimony of key witnesses, *see* Section (A)(4) of Point One; counsel should have objected to the numerous improper and misleading statements the prosecutor made during his summation, *see* Section (G) of Point One; and, despite the efforts of prosecutors and Bethlehem police officers to obscure the significance of Rachel Slater -- counsel, who was made aware of Slater's value as a potential defense witness within a week of the attack, should have at the very least contacted Slater and made efforts to have her computer inspected and the instant message preserved, *see* Section (C) of Point One.

Absent these errors, prosecutors would have been left without a motive for the crime or any feasible explanation for how Christopher could possibly have been present at the crime scene at the time of the crime, and they would have had no evidence from the Porco alarm system, no reliable eyewitness testimony with respect to the Jeep, no DNA evidence, and no emails. And conversely, had Christopher not been deprived of evidence that affirmatively established that he could not have been at 36 Brockley Drive at the time of his parents' attack -- due both to the negligence of his attorneys and to the numerous *Brady* violations committed by prosecutors -- he would have been able to present evidence establishing his innocence. None of the errors described herein, in other words, were harmless, and when considered in combination they had the

cumulative effect of depriving Christopher of his due process right to a fair trial. *People v. Mattocks*, 100 A.D.3d 930 (2d Dept. 2012). *See also People v. Asaro*, 22 N.Y.2d 842, 844 (1968). Accordingly, Christopher's conviction must be vacated, and a new trial ordered.

POINT SIX

CHRISTOPHER'S CONVICTION MUST BE VACATED BECAUSE HE IS ACTUALLY INNOCENT. CPL §440.10(1)(h), U.S. CONST. AMENDS V, VIII, and XIV; N.Y. Const. Art. 1, §§6, 5.

Here, as outlined above, Christopher was deprived of his right to the effective and meaningful assistance of counsel, and the government, through its numerous misdeeds and illegalities, procured his conviction in violation of state and federal law, thereby also depriving him of his due process right to a fair trial. For these reasons, his conviction must be vacated. His conviction must also be vacated, however, for an additional and paramount reason: Christopher is innocent.

Courts agree that "[i]t is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit." *People v. Tankleff*, 49 A.D.3d 160 (2d Dept. 2007). *See also People v. Hamilton*, 115 A.D.3d 12 (2d Dept. 2014) (recognizing a freestanding actual innocence claim in the context of a 440.10 motion). Indeed, "the greatest crime of all in a civilized society is an unjust conviction." *People v. Ramos*, 201 A.D.2d 78, 89-90 (1st Dept' 1994). To prevail on an actual innocence claim, however, a defendant must meet two requirements. First, the defendant must make a *prima facie* showing of actual innocence, or a sufficient showing of possible merit to warrant a fuller exploration by the court at a hearing. *Hamilton*, 115 A.D.2d at 26. Second, to earn dismissal of the indictment, the defendant must establish that he is innocent by clear and convincing evidence, using all reliable evidence, including evidence that was not

admissible at trial and evidence that is otherwise 'new,' but which may not satisfy the *Salemi*[68] factors or clear other legal barriers. *Hamilton,* at 24, 27. *See also People v. Hargrove,* 162 A.D.3d 25 (2d Dept. 2018) (stating a motion to vacate a conviction pursuant to CPL §440.10[1][g] should not be denied merely because the new evidence is "merely impeaching or contradicting" or cumulative to the evidence that was already presented to the jury). "Successful innocence claims are most often grounded in new evidence that directly supports a defendant's "factual innocence by indicating either that he did not commit, or *could not have committed*, the crimes of conviction." *Hyman v. Brown,* 927 F.3d 639, 664 (2d Cir. 2019) (emphasis added).

Here, there are three new, distinct, and unconnected set of facts that independently, and in combination, constitute clear and convincing evidence of Christopher's factual innocence. *First*, given Christopher's uncontested presence at UR on the evening of November 14, 2004 and the morning of November 15, 2004, the known fuel economy of his Jeep, and the exhaustive police investigation which determined, categorically, that he *did not* purchase fuel at the only gas stations opened near the purported timeline route, it was simply *not* possible for Christopher to have traveled from Rochester to Albany and back within the constraints of the timeline. *Second,* new scientific evidence establishes, to a reasonable degree of medical certainty, that the attack on Christopher's parents occurred *no earlier than* 6:30 a.m. on November 15, 2004, a time at which even the prosecution acknowledged it would have been impossible for Christopher to have been anywhere near the crime scene, as he would had to have been traveling back to UR. And *third,* Christopher had at least two confirmed interactions with fellow students after 10:45 p.m. on November 14, 2004, a time at which prosecutors claimed that he *must* have already left UR and began the trip to Albany. Thus, overall, when combining the evidence that was introduced at trial

[68] *People v. Salemi*, 309 N.Y. 208 (1955).

with the evidence which, as discussed herein, the jury never had the opportunity to consider, there is clear and convincing evidence that, notwithstanding the jury's verdict, Christopher is actually innocent.

A. There is Clear and Convincing Evidence that The Prosecution's Timeline Theory of Guilt Was False.

Through the use of Thruway toll records, the testimony of witnesses who claimed to have seen Christopher's Jeep in certain locations, video surveillance footage from UR, and recorded data from the Porco home security system, prosecutors were able to create a timeline theory of Christopher's guilt that proved to be powerful circumstantial evidence against him. This evidence, however, while undoubtedly compelling, was never subject to meaningful adversarial testing, and the jury, therefore, never learned that certain critical components of the timeline were -- in reality -- factually impossible.

First, for example, it is indisputable that Christopher was in Rochester at approximately 10:30 p.m. on November 14, 2014 and also at approximately 8:30 a.m. on November 15, 2004. Thus, because the attack on Peter and Joan occurred more than 230 miles away in Albany, his guilt was entirely dependent upon his ability to make the 460-mile-plus round trip in a strictly defined window of time, in a vehicle with fixed fuel efficiency requirements. This trip, however, as theorized by the prosecution's timeline, was simply not possible. Christopher's Jeep required a known amount of gasoline to complete the round trip route from Rochester to Albany, there were no open gas stations where Christopher would have been able to purchase the necessary fuel in the time allotted, and even if a fuel purchase had been possible, the amount of gas missing from the Jeep's tank at the time the police seized the vehicle would not have permitted the Jeep to make the return trip to Rochester.

1. The theorized trip between Albany and UR was impossible given the lack of available refueling locations at necessary points along the timeline route

The prosecution acknowledged that Christopher's presence at the crime scene -- and, thus, his guilt -- was entirely contingent upon his ability to purchase a full tank of gasoline in the Albany area (*see* Summation: 4227) ("[W]e know from the Mobil records that are in evidence that when [Christopher] travels from Rochester to Albany, Albany to Rochester, he's got to fill up on either end, okay"). Additionally, due to the strict temporal limitations created by the prosecution's timeline theory -- and by any scenario in which Christopher could have traveled from Rochester to Albany and back on November 14-15, 2004 -- the prosecution also acknowledged that any such gasoline purchase could only have occurred within a small, defined window of time. During his closing argument, the prosecutor contended that Christopher left the UR campus at 10:36 p.m. on November 14, 2004, picked up a Thruway toll ticket from John Fallon at Exit 46 at 10:45 p.m., turned in that same ticket to Karen Russell at Exit 24 at 1:51 a.m., disarmed his family's security system 23 minutes later at 2:14 a.m., left the house at 4:54 a.m., and got back on the Thruway at Exit 24 at 5:12 a.m. Then, knowing that this chronology needed to account for a fuel purchase, the prosecutor argued that the only logical time for the alleged stop to have occurred was during the 23-minute window between the time when Christopher is said to have exited the Thruway and the time when the home security system was disarmed, explicitly telling the jury that Christopher would have had "plenty of time" to drive the 9.3-mile route from Exit 24 to 36 Brockley Drive *and* to stop to refuel the Jeep along the way (Summation: 4227, 4253). However, while it is true that Christopher, in light of the Jeep's fuel economy, would have needed to refuel the vehicle after driving from Rochester to Albany, and while it is also true that the alleged 23-minute timeframe between 1:51 a.m. and 2:14 a.m. would have been the only plausible opportunity Christopher had to refuel; the proof that no such purchase did -- or even could have -- occurred in the Albany area

provides clear and convincing evidence of Christopher's innocence. Indeed, a careful examination of *all* of the evidence in the case -- including the evidence that was never presented or utilized at trial -- makes it overwhelmingly clear that there would have been no possible opportunity for Christopher to have purchased the gasoline that he would have needed to drive 460+ miles from UR to Albany and back on November 14-15, 2004, and that, accordingly, he cannot be guilty.

a. Christopher did not stop to purchase fuel Between 1:51 a.m. and 2:14 a.m. as prosecutors claimed he did.

The prosecutor explicitly asserted that Christopher stopped to refuel between the time he allegedly left the Thruway at Exit 24 at 1:51 a.m. and when he is said to have arrived at 36 Brockley Drive at 2:14 a.m., and he further claimed that he would have had "plenty of time" to do so. Both claims were knowingly false and demonstrably untrue. First, the 9.3-mile drive from Exit 24 to 36 Brockley Drive took approximately 18 minutes to complete, which would have left only approximately five minutes for Christopher to stop to refuel during the theorized 23-minute timeframe (App. 93). Second, there was only one gas station close enough to the necessary route of travel and open between 1:00 a.m. and 5:00 a.m. that could possibly have been utilized during the relevant 23-minute timeframe -- the Campus Mobil at 1181 Western Ave (*see* Dowd Aff: ¶6 [Exh. C1]; App. 49, 64-72) -- and police confirmed that none of the fuel purchases made at that station during the relevant time frame were made by Christopher. Indeed, police made exhaustive efforts to discover evidence that Christopher or his Jeep had stopped at the Campus Mobil to refuel during the time in question; they visited the gas station on November 18, 2004, interviewed the employee that was working the overnight shift on November 14-15, reviewed surveillance video from the station, and seized all transaction records from the same time period (*see* App. 49, 64-72). But the attendant did not remember Christopher or a yellow Jeep, the surveillance video showed that neither was present at any time during the early morning hours of November 15, 2004,

and investigators determined that all gasoline purchases that fit within the timeline were made by individuals other than Christopher (*see id.*). Thus, police and prosecutors knew that Christopher had not purchased gas at the Campus Mobil on November 15, 2004, yet they nevertheless used the Campus Mobil to "simulate" a gasoline purchase in an effort to mimic this necessary timeline event for jurors (*see* App. 95), even falsely telling jurors on summation that there would have been *plenty* of time for Christopher to refuel (Summation: 4253).

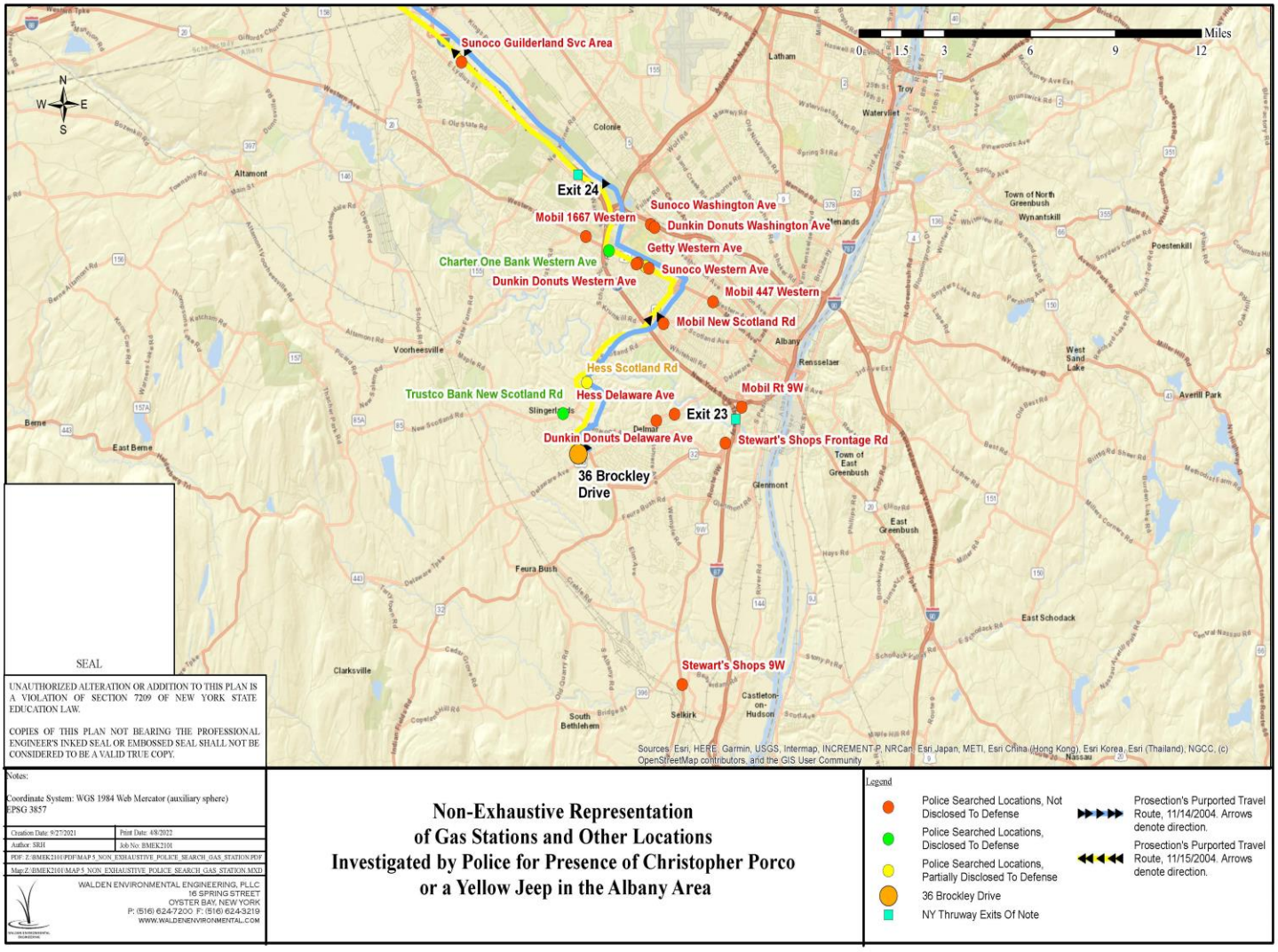
b. Christopher did not purchase gasoline between 4:54 a.m. and 5:12 a.m.

Prosecutors argued that Christopher allegedly cut the alarm wires in his backyard at 4:54 a.m. as part of the "staged burglary," and then entered the Thruway at the Exit 24 Toll Plaza 18 minutes later at 5:12 a.m. This 18-minute window of time, however, did not permit a sufficient amount of time for Christopher to stop, purchase, and pump a full tank of fuel. Further, as detailed above, there was only one open gas station along the driving route between 36 Brockley Drive and the Thruway -- the Campus Mobil, which did not sell any gasoline after 3:00 a.m. on November 15, 2004, as the station's pumps, at that time, were not operational (App. 64-72). Accordingly, this timeframe, too, can be ruled out as a possible window when Christopher could have refueled.

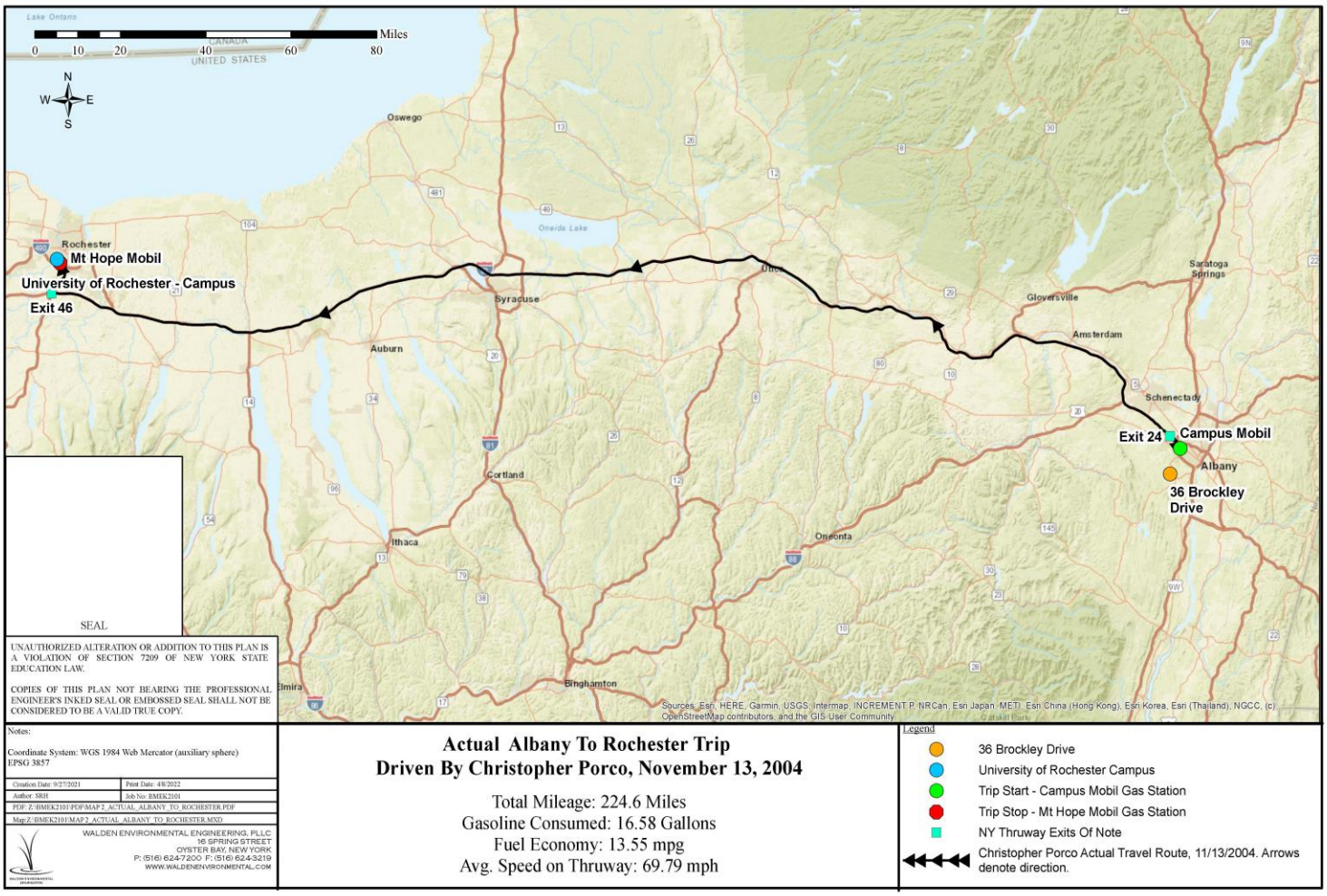
c. Christopher did not purchase gasoline between 2:14 a.m. and 4:54 a.m., during the time prosecutors claimed his parents were being attacked.

Prosecutors theorized that between 2:14 a.m. and 4:54 a.m. on November 15, 2004, Christopher was inside his family home at 36 Brockley attacking his parents, cleaning up, and staging the crime scene. Clearly, it would have been completely absurd for Christopher to have taken a break from committing this crime, left the house to purchase fuel, and then return again, before ultimately leaving again to return to Rochester. However, it is also certain that during this time, too, no such refueling stop occurred.

First, the documentation regarding the police investigation of gas stations in and around the Albany area, makes clear that there were only two 24-hour gas stations open anywhere near 36 Brockley Drive or the timeline route of travel: the Campus Mobil and the Exit 23 Mobil on Route 9W, both of which police determined Christopher had not visited on November 15, 2004 (*see* App. 31, 50, 64-72). Further, police also investigated more than a dozen gas stations in the Albany area that opened at 5:00 a.m. or later, and, after scrutinizing transaction records and surveillance video and interviewing employees, they established conclusively that Christopher had likewise not visited any of these locations (*see* App. 30-55, 64-72, 73-84).



Second, even if Christopher had managed to drive to some unknown gas station outside of the local, scrutinized area -- or had somehow found over 17 gallons of gasoline lying by the side of the road -- it still would not have been possible for his Jeep to have made the 232-mile return-trip to Rochester on the 14.18 gallons of gasoline prosecutors claimed was "missing" from his gas tank after it was impounded. Indeed, this "missing" gasoline, which prosecutors theorized was consumed by Christopher during his purported return trip from Albany to Rochester during the morning hours of November 15, 2004 (Summation: 4228-29), was, in reality, not nearly enough fuel to have permitted the alleged drive. In fact, notwithstanding the misleading testimony of Chrysler engineer Steven Siko, who testified at trial that Christopher's Jeep could have driven between an estimated 210 and 345 miles on 14.18 gallons of gasoline, a range that comfortably accounted for the 232.4-mile distance between 36 Brockley Drive and UR (Summation: 1824-27), analysis of the gasoline purchase and Thruway records from Christopher's *actual* trip back to Rochester from Albany two days before the crime demonstrates that the theorized return trip simply never occurred. On November 13, 2004, after visiting his girlfriend, Christopher filled the gas tank of his Jeep at the Campus Mobil in Albany and then traveled 224.6 miles to the Mt. Hope Mobil near the UR Campus in Rochester, where he stopped again and purchased $35.64 worth of fuel, or 16.58 gallons of gasoline. This means the Jeep achieved a fuel economy of 13.55 mpg.



This actual trip provides a reliable basis on which to calculate how much gasoline Christopher's Jeep would have required to make the alleged return trip to Rochester from Albany on November 15, as the two trips are nearly identical in every material respect:

Figure 3.

<u>November 13, 2004 (Actual trip, Albany to Rochester)</u>

Campus Mobil ----------> Exit 24 ----------> Exit 46 ----------> Mt. Hope Mobil
2 miles 214.4 miles 8.2 miles

Total Mileage: 224.6 miles
Gasoline Consumed: 16.58 gallons
Miles Per Gallon: 13.55mpg
Avg. Speed on Thruway: 69.79mph

November 15, 2004 (Alleged Trip, Rochester to Albany)

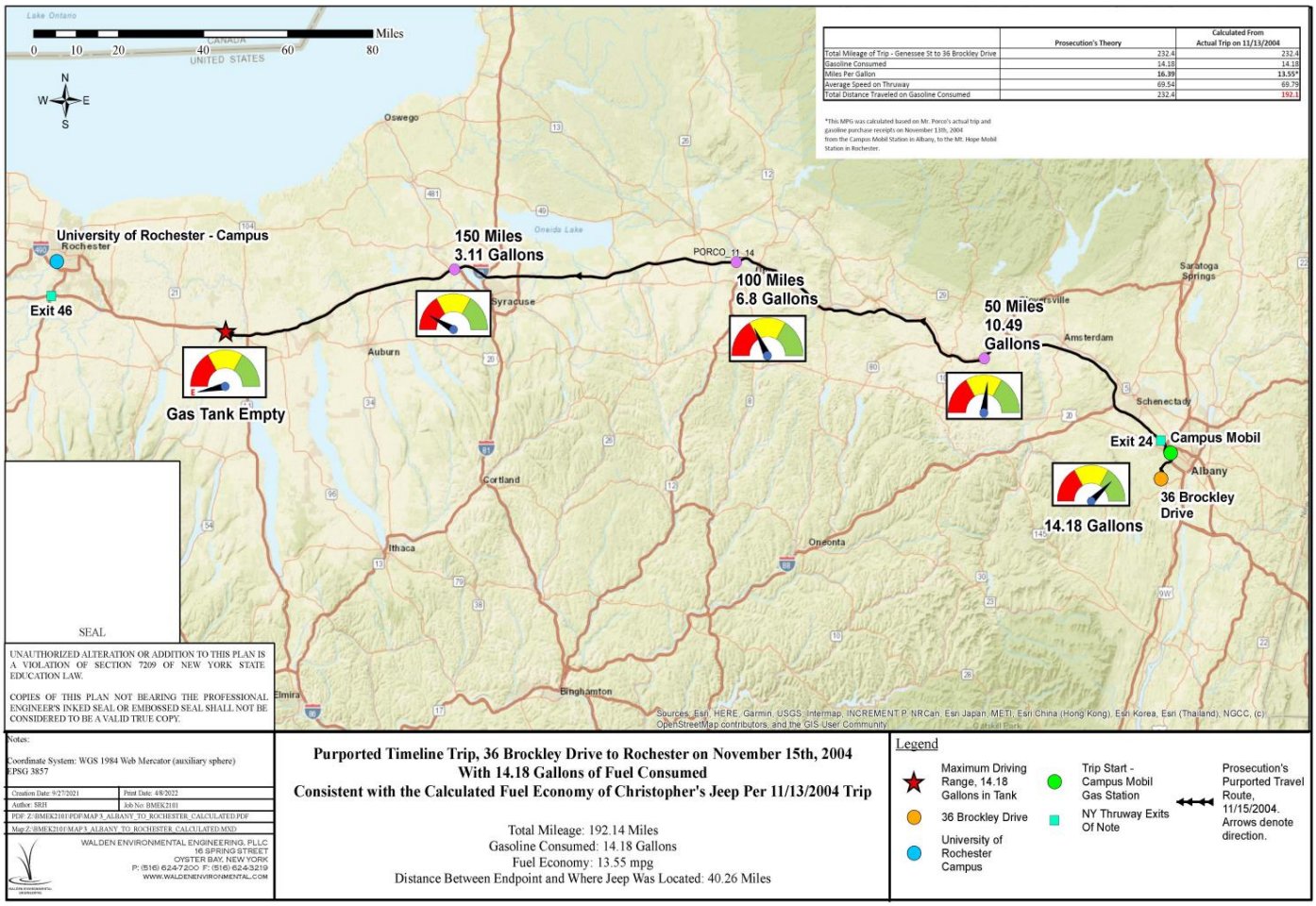
36 Brockley Drive ----------> Exit 24 ----------> Exit 46 ----------> Genessee Street
9.3 miles 214.4 miles 8.7 miles

Total Mileage: 232.4 miles
Gasoline Required: 17.15 gallons
Avg. Speed on Thruway: 69.54 mph

The 224.6-mile trip Christopher drove between Albany and Rochester on November 13, 2004 required 16.58 gallons of gasoline and was shorter than the trip he would had to have driven on the morning of November 15, 2004 in order for him to be guilty given the constraints of the timeline.

In the unlikely scenario that Christopher actually managed to refuel somewhere between 1:51 a.m. and 4:54 a.m. in the Albany area, given Marshall Gokey's claim to have seen Christopher's jeep in the driveway at about 3:45 a.m. and the prosecution's assertion that Christopher cut the telephone wires in the backyard at 4:54 a.m., Christopher would had to have returned to 36 Brockley Drive after refueling and *before* starting the 232.4-mile return trip back to Rochester. In this scenario, after filling up his tank he would then have consumed a certain amount of fuel driving from the unknown gas station back to 36 Brockley Drive and would thereafter had to have set out to make the drive back to UR using only 14.18 gallons of gasoline which known data noted above makes clear was an insufficient amount to get him back to Rochester. Thus, even assuming for the sake of argument that Christopher left 36 Brockley Drive at 4:54 a.m. to return to Rochester with a full 19-gallon tank of gasoline, the known fuel economy of 13.55 mpg calculated from the nearly identical trip Christopher actually had driven two days earlier makes clear that he could not have made it back to Rochester on the 14.18 gallons of gasoline prosecutors argued was "missing" from his jeep. 14.18 gallons of gasoline in fact would have only permitted

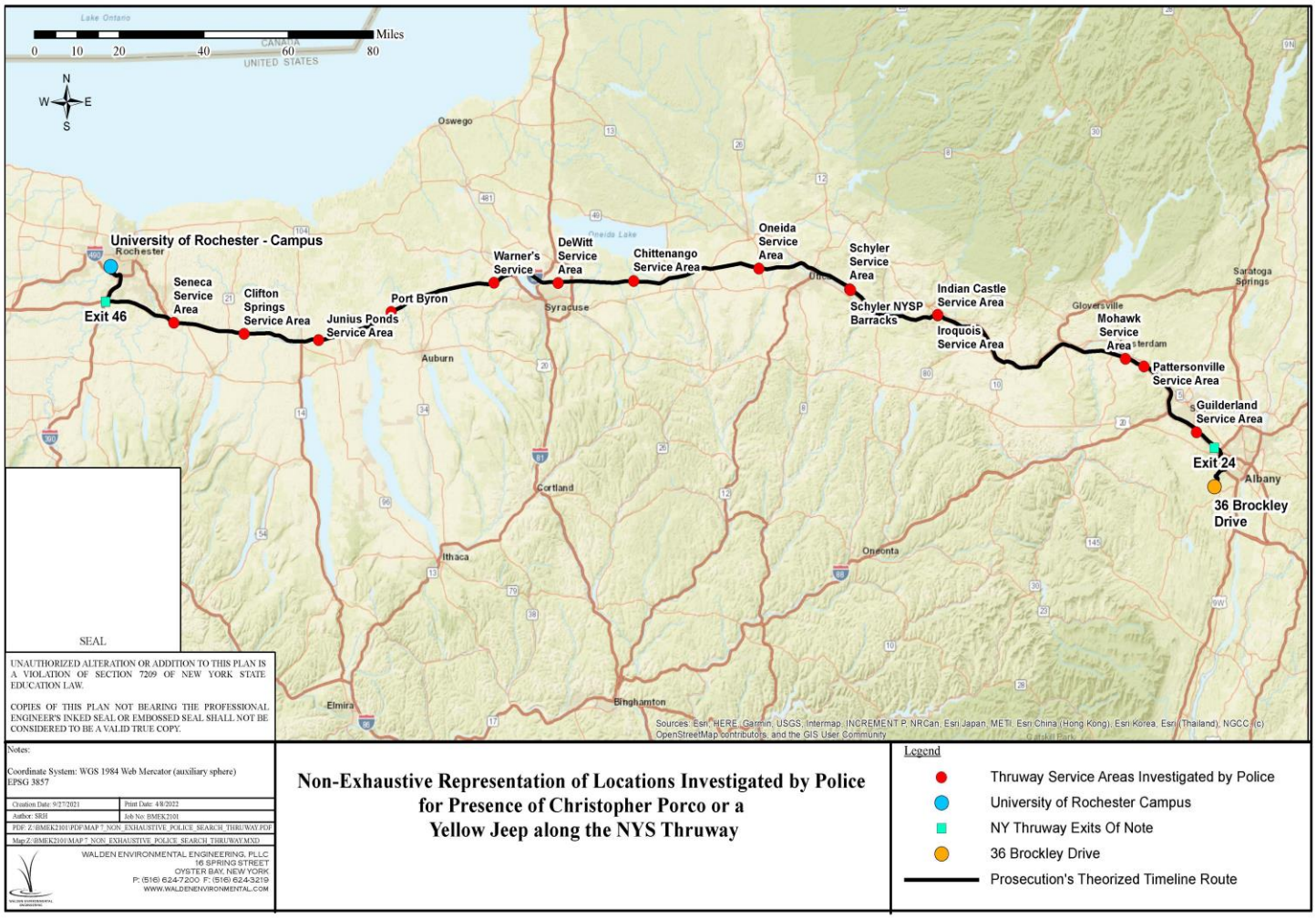
him to travel approximately 192 miles, stranding Christopher and his Jeep on the Thruway more than 40 miles from the location it was found on November 15th parked near the UR campus:



d. Christopher did not make the necessary fuel purchase along the NYS Thruway.

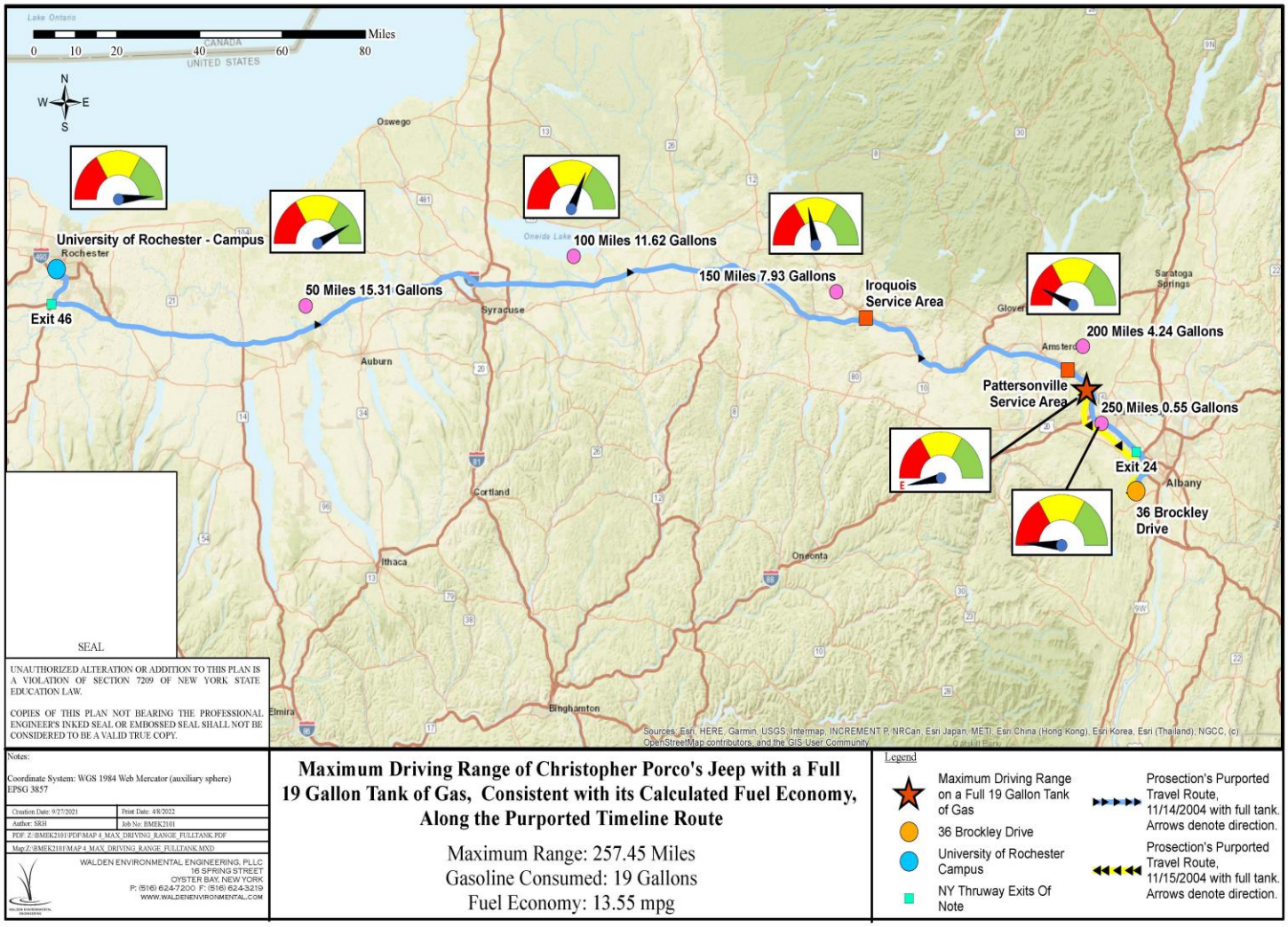
Finally, there is no plausible scenario in which Christopher could have obtained the fuel he would have needed to complete the trip somewhere on the NYS Thruway -- either on the purported drive Eastbound to Exit 24 or Westbound to Exit 46. Police thoroughly investigated all Thruway rest areas between Rochester and Albany in both directions, specifically scrutinizing those closest to Albany such as Guilderland (eastbound, where it was determined no fuel sales occurred during the required timeframe) and Pattersonville (westbound, approximately 30 miles from 36 Brockley

Drive) (*see* Dowd Aff: ¶Exh. C1; *see also* App. 32, 38-48, 61-63, 77-78, 186-92, 194), and they found no evidence whatsoever of Christopher or his jeep.



More importantly, the known fuel economy of Christopher's jeep precludes the possibility that he could have obtained the fuel he would have needed somewhere on the Thruway. *First*, even though police determined that no gasoline purchases took place at the Sunoco station within the Guilderland Service Area, which is situated just East of Exit 24, Christopher would not have had enough fuel to return to Rochester if he had refueled at Guilderland, driven to 36 Brockley Drive, and then started back towards Rochester. *Second*, even assuming Christopher left UR's campus on the night of November 14, 2004 with a full 19-gallon tank of gas, the 232.4-mile drive

to 36 Brockley Drive would have required approximately 17.15 gallons of fuel, meaning that he would have arrived at 36 Brockley Drive with about 1.85 gallons of gas left in his tank. Based on the known fuel economy of his jeep, this 1.85 gallons of fuel would have permitted him to drive approximately 25 miles, which would not have been enough to allow him to have reached the first service area Westbound on the Thruway from Exit 24, Pattersonville, which is nearly 30 miles from 36 Brockley Drive (Dowd Aff: ¶7 [Exh. C1]).



2. There is clear and convincing evidence that neither Christopher nor his Jeep were in Albany on November 15, 2004, and Christopher was, therefore, wrongfully convicted

Other than the testimony of Steven Siko, which misled the jury into believing that Christopher's jeep was capable of driving more than 230 miles, from Albany to Rochester, while consuming only 14.18 gallons of gasoline, prosecutors elicited no testimony whatsoever regarding any alleged fuel purchases made by Christopher. Indeed, it was not until summation, when the prosecutor stated: "Now, of course, ladies and gentlemen, if he burns off gas that he filled up in Rochester on the trip back to Albany to kill his parents, he's going to need to get gas in Albany or someplace on the Thruway, but do you think he's going to use that Mobil credit card to fill up his car?" (Summation: 4228). Defense counsel objected to these statements as "wholesale speculation," but the Court overruled the objection, and then subsequently stated, outside the presence of the jury: "I don't believe they're asking the jury to speculate. I seriously doubt that anyone would have gone out and purchased gasoline in the manner if, in fact, everything is true that they're painting this picture, where they would have used some type of an item that would have disclosed that gasoline was purchased, all right?" (Summation: 4232-33). Continuing, the Court stated that it would have been "virtually impossible for the people to prove if gasoline was purchased that it was purchased by the defendant and when he purchased it," and the Court then told counsel that the prosecutor was merely "trying to plug a loose hole by that suggestion that there must have been a purchase of gasoline with cash[.]" (Proceedings: 4233-34).

However, unbeknownst to the Court, to defense counsel, and, most importantly, to the jury, police and prosecutors had investigated every gas station that Christopher could have possibly utilized on November 15 2004 -- an effort that was still ongoing even during trial -- and they *knew* that he had not purchased fuel with cash or by any other means at *any* of them. Rather than

acknowledge this fact, prosecutors instead suppressed the majority of this exculpatory evidence, relied on defense counsel's passivity on the issue, and then, in closing, with the Court's allowance, made untrue claims about the Jeep's gas mileage, falsely assuring the jury that Christopher would have had "plenty of time" to complete a refueling stop that they *knew* had not occurred. In short, they lied.

Police decided that Christopher was guilty within minutes of their arrival at the crime scene on November 15, 2004, and over the next 20 months, they took extraordinary steps to prove that he was in Albany at the time the crime was committed. And yet, notwithstanding the dubious sightings of a yellow jeep by John Fallon, Karen Russell and Marshall Gokey, the government failed to discover a shred of *physical* evidence that Christopher or his Jeep were present in the Albany area during the relevant time frame. Both the local and State police conducted interviews and checked for surveillance video at every business along the routes of travel between exits 24, 23, and 22 of the Thruway and Brockley Drive; they interviewed well over 100 people living in the neighborhood surrounding 36 Brockley Drive and on the timeline route, setting up roadblocks on multiple occasions; they investigated numerous alleged yellow jeep sightings made in the Albany area; they checked dumpsters along the possible routes of travel in the hopes of finding bloody clothing or other evidence of the crime; they interviewed all of the toll collectors who worked relevant shifts at exits 45, 46, 23 and 24; they visited every rest area between Rochester and Albany, reviewing surveillance video and interviewing employees; and they even checked for surveillance footage at a State Police barracks located directly on the shoulder of the Thruway, positioned perfectly to capture images of all traffic that drove on the Thruway in either direction. (App. 30-84; 100-117; 421-442). Still, despite this massive effort, there was simply no credible evidence whatsoever that Christopher was ever in Albany on November 14 or 15, 2004.

* * * * * *

In sum, there was nowhere for Christopher to have obtained the gasoline he would have needed in Albany to return to Rochester, the 14.18 "missing" gallons of fuel would have been insufficient to enable the trip, and the expansive police investigation of potential refueling locations along the Thruway and in the Albany area yielded no evidence whatsoever of any stop. There is, therefore, ample, credible, clear, and convincing evidence that Christopher was never (and indeed could not have been) in Albany on November 15, 2004, and that he is, accordingly, innocent.

B. The Testimony of the Timeline "Eyewitnesses" Was Unreliable and Unworthy of Belief.

Three witnesses testified at trial that they saw a yellow Jeep at certain key locations on the night of the crime: Marshall Gokey, Karen Russell, and John Fallon. Each claimed to have taken special notice of the vehicle to the exclusion of all others, and each denied outside influence of any sort. At the same time, however, each witness was exposed to a barrage of information concerning a yellow Jeep from family, co-workers, police, and the media in the immediate hours and days after the crime -- both before and after police memorialized their formal statements -- and each was told when and where the Jeep was believed to have been at certain times. Their claimed Jeep sightings, in other words, were highly suspect and, as a result, of little probative value. *See, e.g., People v. Turnstall*, 5 A.D.338 (4th Dept. 1958) (finding little probative value in witness's claim that he recognized a photograph of a vehicle to be that of the perpetrator).

In *Turnstall*, the defendant was placed at the scene of a murder by his neighbor, who testified that he saw a car pass his house at about 25 miles per hour with one African American occupant, heading towards the crime scene. The witness was positioned approximately 60 or 70 feet from the road and saw the car for roughly one second. Admitting that there was "plenty" of

traffic at the time, and that "it was just another car," the witness nevertheless identified a photograph of the defendant's vehicle when it was shown to him by police, and claimed that he remembered the specific car because a man who had lived with him drove a car of the same color, the fenders were damaged and rusty (as were those on the defendant's car), and the driver "sat . . . very erect." *Turnstall*, at 341. On appeal, the court that was tasked with evaluating the sufficiency of the evidence was not convinced:

> The identification only by the marks on the fender of a car in which the witness had no special interest, on a heavily traveled road and which was under his observation for a period of about one second at a distance of 60 or 70 feet is highly dubious and not at all impressive or persuasive. In our opinion it has very little probative force and the very positive identification was undoubtedly influenced by the friendship of the witness and the deceased and motivated to some extent at least by a desire to be helpful in the establishment of guilt.

Turnstall, at 341-42.

Here, the People presented the same type of identification testimony condemned by the court over sixty years ago in *Turnstall*, and it did so with three different witnesses, each of whom had prior knowledge of the Jeep and its suspected connection to a horrific crime, as well as significant interactions with police that slanted their testimony. Indeed, the notion that three separate individuals, uninfluenced by any outside factor, remembered one vehicle, to the exclusion of all others, which happened to be the exact vehicle about which the police were questioning them, is incredible and inconceivable. *See People v. Boone*, 30 N.Y.2d 521, 527 (2017) (recognizing that mistaken eyewitness identifications are "the single greatest cause of wrongful conviction in this country").

1. John Fallon

Post-conviction FOIL responses confirm that John Fallon was first interviewed on November 18, 2004 -- not, as he claimed at trial, on November 27, 2004; that during that first

interview, he had no recollection of seeing a yellow Jeep; and that he did not give a sworn statement claiming to have seen the Jeep until *after* he received *two* additional visits from Detective Arduini. Furthermore, between November 15, 2004 and November 27, 2004, members of the BPD made numerous phone calls to the Exit 46 toll plaza inquiring about the Jeep, there was some kind of notice to employees about the yellow Jeep posted at the toll plaza itself, *see* (App. 120-21), and in the days immediately following the attack, the yellow Jeep was also the subject of near 24-hour news coverage in the Rochester area, where Fallon lived. It is unfathomable, in other words, that Fallon was neither exposed to -- nor specifically asked about -- the Jeep prior to being asked to give a sworn statement identifying the vehicle as the same vehicle he saw pass through his toll lane at 10:45 p.m. on November 14, 2004. *See People v. LeGrand*, 8 N.Y.3d at 458 (recognizing that witnesses who are questioned repeatedly grow more confident in the accuracy of the details they report to police, and feedback from the interviewer, in turn, can cause an eyewitness to distort his or her reports).

More troubling, however, is the fact that Fallon acknowledged in the grand jury that his sworn statement was simply not true. In his written statement, Fallon claimed: "On November 14, 2004, I was working as a toll collector at Exit 46 in Henrietta, New York. At about 10:45 p.m. on November 14, 2004, I waited on a young man who entered the Thruway at Exit 46. He was driving a yellow Jeep Wrangler that had oversized tires on it" (Exh. F, p.18). In the grand jury, however, when a juror questioned Fallon about his recollection, he admitted that he could *not* be certain about *when* he saw the Jeep:

Juror: Are you sure that was the date you noticed this Jeep?

Fallon: No.

Juror: I mean –

Fallon: You're asking me what am I doing on November 14th. I was at work in Henrietta, but-

Juror: But that's when you know specifically that was the actual date you saw the Jeep, and it wasn't the 11th or the 12th?

Fallon: Nope.

Juror: That day?

Fallon: I don't know, I'm assuming it was that day.

(Exh: F, pp. 30-31). The prosecutor attempted to rehabilitate Fallon, but Fallon was candid that while he believed that he recalled a yellow Jeep passing through his lane in Henrietta, he had no way of being certain of the date:

McDermott: Okay. Now, are you able to say that occurred on the date of this ticket?

Fallon: That I saw him come through?

McDermott: Right.

Fallon: No, I can't say that, that I saw him on the day of this ticket. Don't know that. When I first got questioned on this, the gentleman from Bethlehem came up and that's where I got the date from. He said, "were you working here on November 14th?" I go, "I don't know if I was. I would have to look at my schedule, you know. Then he asked me if I would look at a picture, if I could recognize to look at a vehicle. I said, "yeah." When he showed me the picture, I go, "yeah I remember that was night and I remember I was here in Henrietta and I remember seeing that Jeep and I remember the description on the driver; but if it was that day, I don't know.

(Exh. F, pp. 30-31). The written statement Fallon gave to State Police Investigator Schulz, in other words, memorializes not what Fallon actually remembers, but, rather, what Arduini told him; for while Fallon was able to specify the date that he allegedly saw the yellow Jeep in his sworn statement, his testimony makes clear that he really did not know the date until the "gentleman from Bethlehem" provided it to him. Furthermore, Fallon's testimony suggests that his recollection of a white male driving the Jeep was likewise supplied to him, as he stated, "I remember the description on the driver." *Id.* [sic].

Fallon also clearly conflated the location of where the alleged sighting took place. On November 25, 2004, for example, prior to visiting Fallon for the first time, Arduini contacted the Thruway and determined that on the following Saturday, November 27, 2004, "John" would be working the 3 p.m. to 11 p.m. shift at the Exit 45 toll plaza in Victor, New York (Exh. F, p. 10). Arduini therefore traveled to the toll plaza in Victor on November 27, 2004, where he met Fallon and spoke to him in person for the first time (Exh. F, p. 12). Fallon's testimony in front of the grand jury, however, suggests, incorrectly, that this in-person interview took place at Exit 46 in Henrietta, the same toll plaza where he allegedly saw Christopher's Jeep. This inconsistency is significant, for just as Fallon worked numerous shifts at numerous toll plazas, where at any time he could have seen a yellow Jeep pass through his lane, Christopher had driven through both the Exit 45 and the Exit 46 toll plazas on recent prior occasions (App. 27). Moreover, it is unclear whether Fallon was even working in the entry lane at Exit 46 on November 14, 2004, as there are indications that he may have swapped lanes with his wife, Debbie Fallon. *See* Section (B)(5)(a) of Point One. Regardless, what is both clear and convincing is that Fallon could not remember the yellow Jeep when he was first questioned about it, and that he instead "remembered" the vehicle when Arduini -- the detective who harbored an intense dislike for Christopher -- showed him a picture of the Jeep on two separate occasions, directed him to a date, time, and location where police believed he must have seen the Jeep, and then supplied him with a description of the driver. Only then was Fallon handed off to the State Police to have his sworn statement memorialized, which was suspiciously specific, and which he subsequently, at least in part, disavowed when he was questioned in the grand jury. For these reasons, Fallon's purported recollection of Christopher's yellow Jeep is unreliable and unworthy of belief.

2. Karen Russell.

Just like Fallon, the notion that Russell heard nothing about a yellow Jeep of interest prior to giving her formal statement on November 23, 2004 is also simply incredible. Russell, like Fallon, would have been exposed to continuous news coverage of the crime, as well as reports that it was Christopher who had committed the crime while driving his yellow Jeep, and she, too, was interviewed by Arduini and shown a picture of the Jeep on November 18, 2004, just days before she gave her sworn statement (Russell: 1884-85).

Furthermore, while Russell claimed in her statement that she was able to remember the Jeep -- notwithstanding all the other vehicles that would have passed through her lane as a toll worker -- because the Jeep barreled into her lane after she turned her lane light to red (Exh. F, p. 49), Thruway records, as detailed above in Section (A)(5)(b) of Point One, demonstrate that Russell actually processed a number of other vehicles before shutting down her lane to take her break; to bolster her own story, Russell falsely claimed that her coworker Mark Washock -- who disavowed Russell's claim upon being interviewed (Exh. F, p. 55) -- had likewise taken note of the Jeep; and finally, given that Russell, unlike Fallon, did not testify in the grand jury and was subject to at least four interviews before trial, there is a strong indication that prosecutors were aware of Russell's credibility issues but presented her testimony at trial anyway as an important link in the timeline chain of events.

In sum, Russell's purported recollection of Christopher's yellow Jeep is -- like that of John Fallon -- unreliable and unworthy of belief.

3. Marshall Gokey

The prosecution's final witness on their direct case was Marshall Gokey, a neighbor of the Porcos who lived at 53 Brockley Drive, a mere 400 feet from the Porco home, and made the

devastating claim that in the early morning hours of November 15, 2014, he observed Christopher's yellow Jeep parked in the driveway at 36 Brockley Drive (Gokey: 3412). Gokey testified that in November of 2004, he had been working on the Bethel Woods project for the past five months, since June of 2004, and that every Monday morning, he left his house between approximately 3:45 a.m. and 4:00 a.m., turned left out of his driveway, and traveled along Brockley Drive toward the nearby school on his way to the Thruway. His route, he testified, took him past 36 Brockley Drive -- and past a dirt road across the street that led to a water or sewage pumping station in a secluded, wooded area -- and on the morning of the attack, he claimed that he observed the back of a yellow Jeep parked in the driveway at 36 Brockley Drive, the same Jeep, he stated, that he had observed speeding up and down the street and pulling into the same driveway over the summer (Gokey: 3409-10; 3414). Gokey's claim was no doubt compelling, but his strained efforts to portray himself as an exceedingly vigilant observer cast doubt on his veracity and, in turn, on the credibility of his claim that he had in fact observed the Jeep parked in the driveway at the alleged time of the attack. *See* (Gokey: 3412) ("I always look around. I try to start my vehicle before I leave. Very aware of what's around me when I leave."); (Gokey: 3413) ("I didn't see any other vehicles that were abnormal or out of place on my way out of town.") Indeed, setting aside the sheer implausibility of Gokey's testimony, namely, that a person as deliberate and calculating as prosecutors portrayed Christopher to be -- who set out to murder his parents for money in the middle of the night, driving over 465 miles roundtrip between his college dorm room and the house where he grew up, hiding his EZ pass to avoid detection along the way, exercising an exacting level of care so as not to leave behind a shred of forensic evidence at the crime scene or in the Jeep, and then, after carrying out his homicidal mission, coolly returned to his college to rest on a couch among friends -- would park his bright yellow Jeep in his parents' driveway while he was

inside bludgeoning them with an axe, when he could have easily parked just across the street in a dark, wooded, secluded area near a water pumping station[69] -- Gokey's testimony also suffered critical inconsistencies.

First, for example, Gokey claimed at trial on direct examination that there was a lady in the neighborhood who fed deer near the pumping station, and that, as a result, Gokey utilized his high beams in the morning and was constantly on the lookout for deer crossing the street during his early morning commute (Gokey: 3410-12; 3420-22). In the written statement Gokey gave to BPD Sergeant James Kerr, however, just days after the attack, Gokey explained that he took notice of the Jeep in the driveway not because he was worried about deer in the road, but because he always checked Grantwood Road and pumping station road (the two roads between his home and 36 Brockley Drive) for parked cars (App. 445).

Second, while Gokey emphasized at trial that he was "very familiar" with all of the vehicles in his neighborhood, including a yellow Jeep, which he would observe speeding up and down the street over the summer and pulling into the driveway at 36 Brockley Drive (Gokey: 3409-10; 3414), Gokey's descriptions of the Jeep, just as his reasons for taking notice of it, were inconsistent. In his statement to police, for example, Gokey described the Jeep as "a yellow renegade newer model," and he said nothing about the Jeep having a brush guard or anything else on the front (Gokey: 3448-50 App. 445). On direct examination at trial, however, Gokey described the vehicle as "a yellow Wrangler late model" with wide tires, a canvas top, and a brush guard (Gokey: 3410). Then, just moments later, he described the vehicle as "the Jeep Cherokee, yellow Wrangler, or whatever style it was" (Gokey: 3413), stating that whether it was a Wrangler CJ7 or

[69] Pumping station road was dark (Gokey: 3429-30; 3439-40). It was a road that was only partially paved, turned to gravel, and then curved toward a completely unlit and secreted wooded area (Gokey: 3430-34; 3442), and it was, therefore, an ideal location for Christopher to park the Jeep had he in fact been the perpetrator, and also been stupid enough to utilize his bright yellow Jeep as a means of transport to carry out his vicious attack.

a CJ5, “they’re basically all the same” (Gokey: 3414), and then, after counsel reminded him that he first told police in his written statement that the Jeep was a Renegade, Gokey stated, “My mistake. It’s a Wrangler style of Jeep” (Gokey: 3415). Later, after being shown a photograph of the Jeep, Gokey changed his description yet again and acknowledged that while the Jeep did not have a brush guard on it, he knew from seeing the Jeep in the neighborhood over the summer that the Jeep had something in the front, like a winch or something (Gokey: 3447).

Third, as Gokey doubled down on his certainty that the Jeep he observed speeding up and down the streets on the weekends over the summer of 2004 was the same Jeep that he observed parked in the driveway at 36 Brockley Drive on the morning of November 15, 2004, it became clear during his testimony that there was actually *more than one yellow Jeep in the neighborhood*. On cross-examination, for example, defense counsel asked Gokey whether he told the officers who initially interviewed him that there was more than one Jeep in the neighborhood, and Gokey first responded that he was never asked that question (Gokey: 3450). Next, he expressed certainty that he was not aware of there being more than one yellow Jeep in the neighborhood, but he then quickly flip flopped, changed his answer, and admitted that he had actually recently seen more than one yellow Jeep in the neighborhood (Gokey: 3450-51).

Fourth, just as was the case with Fallon and Russell, Gokey’s testimony was not, contrary to the prosecutor’s claims on summation, obtained organically. In the grand jury, for example, Gokey admitted that on November 15, 2004, at about 11:30 a.m. or noon, his wife called to tell him that something had happened on the block, and that police and the media were present (App. 453), and he testified that shortly thereafter, while he was still away at the Bethel Woods construction site, his wife advised him specifically that *something had happened at 36 Brockley Drive, and that "it was the kid with the yellow Jeep"* (App: 453-454). In response, Gokey claimed

that he told his wife that he believed that he had seen the Jeep in the driveway, she then apparently spoke to her cousin, who worked in the Albany County Sheriff's Office, and on November 17, 2004, members of the BPD traveled to Bethel to show Gokey a photograph of the Jeep and take a statement from him.[70] Then, Gokey explained, when he came home from Bethel that week, after he had given his statement, he saw the crime scene tape at 36 Brockley and knew that it was the same house where he had seen the Jeep (App. 455-56).[71]

In sum, Gokey lived on Christopher's block, he was exposed to the media's coverage of the crime, he was familiar with Christopher's yellow Jeep, and, as a neighbor, he would have seen the Jeep parked in the family driveway countless times over the summer of 2004 (Gokey: 3409-10). Gokey admitted in the grand jury that he was told about the Jeep's significance to the case by his wife *prior* to ever communicating with police, the explanations he offered for how he remembered the Jeep were inconsistent and changed over time, and the structure of Gokey's sworn written statement reeks of police influence. Gokey's testimony, in other words, like the testimony of Fallon and Russell, was incredible and implausible, and even more so when considering the findings of Doctor Wecht, who concluded that the attack could *not* have occurred earlier than 6:30 a.m.

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[70] At trial, Gokey initially had trouble remembering if he was shown one photograph or two (Gokey: 3444) ("How many pictures *she* had, I'm not sure honestly."), then indicated that "they" showed him one picture of one Jeep (Gokey: 3445), and then later stated again that he was not sure whether he was shown one or two pictures (Gokey: 3452). In his statement to Bethlehem police, Gokey wrote that Sergeant Kerr showed him one picture of a yellow Jeep, which he identified as the same Jeep he saw in the driveway of the yellow house on Monday morning, but at trial, he could not recall whether he was shown the front or the back of the Jeep, how the Jeep in the photograph was configured (Gokey: 3445), or whether the Jeep had crime scene tape around it (Gokey: 3452). He simply stated, "[t]hey showed me a picture of the yellow Jeep and asked me if this looked like the one I saw in the driveway" (Gokey: 3452-53).

[71] Defense counsel never explored the conversations that took place between Gokey, his wife, or her cousin, nor did counsel even ask for the name of the wife's cousin. Counsel also failed to elicit who, in addition to Sergeant Kerr, traveled to Bethel, New York on November 17, 2004 to show Gokey a photograph of Christopher's Jeep and take his statement.

C. There is Clear and Convincing Evidence that Christopher's Parents Were Attacked No Earlier Than 6:30 a.m. on November 15, 2004, When Christopher Could not Possibly Have Been Present in Albany.

At 10:30 p.m. on November 14, 2004 and 8:30 a.m. on November 15, 2004, Christopher was indisputably in Rochester, more than 230 miles away from Brockley Drive. The time at which his parents were attacked, therefore, was critically important to the timeline. Dr. Hubbard testified at trial that Peter Porco died sometime between 1:30 a.m. and 6:30 a.m. on November 15, 2004, and that he survived the attack for "at least several hours" (Hubbard: 2798; 2728-29). According to Hubbard, Mr. Porco was therefore attacked between 10:30 p.m. (or earlier) on November 14, 2004 and 3:30 a.m. on November 15, 2004, which was consistent with the government's timeline. Hubbard's conclusions, however -- unchallenged by defense counsel -- have been refuted by Doctor Cyril Wecht, whose conclusions further demonstrate clearly and convincingly that Christopher is innocent.

According to Dr. Wecht, the average human body temperature is 98.6 degrees Fahrenheit, and there was no evidence that Peter Porco, whose temperature was measured at 92 degrees by Dr. Hubbard at 1:30 p.m., had an elevated body temperature prior to his death (Wecht Aff: ¶13-14 [Exh. A]). Additionally, after evaluating the conditions at the crime scene, Dr. Wecht determined that Peter Porco's body would have cooled post-mortem at an average rate of between 1 and 1.5 degrees per hour, or 1.5 degrees the first hour and 1 degree per hour thereafter (Wecht Aff: ¶19 [Exh. A].). According to Dr. Wecht then, "Peter Porco had been deceased for approximately seven hours or less from the time his temperature was measured, or *6:30 a.m. at the earliest*" (Wecht Aff: ¶20 [Exh. A]) (emphasis added). *See also People v. Martin,* 161 A.D.3d 777 (2d Dept. 2018) (medical examiner testified that the human body cools at 1.5 degrees per hour post-mortem). Furthermore, due to blood loss, "significant heart disease," and a lack of

inflammation upon his histological review of the wound cite, Dr. Wecht also concluded that "Peter Porco survived for only a short period of time before succumbing to the blood loss from his injuries, not more than 30 minutes" (Wecht Aff: ¶28 [Exh. A]), and not, as Dr. Hubbard concluded, for several hours. Thus, contrary to Dr. Hubbard, Dr. Wecht determined, "to a reasonable degree of medical certainty that Peter Porco was attacked less than seven hours from Dr. Hubbard's 1:30 p.m. measurement" (Wecht Aff: ¶29 [Exh. A]). And, if the attack on Christopher's parents occurred no earlier than 6:30 a.m., Christopher, quite simply, cannot be the perpetrator because by that time, according to the government, he would have been speeding back toward his fraternity.

The People argued that the latest possible time that Christopher could have been at 36 Brockley Drive was just prior to 5:00 a.m., more than an hour and a half before the earliest time Dr. Wecht concluded that the attack could have occurred. The prosecutor also argued, however, that "[t]his [was not an occasion . . . where the crime occurs, and you have minutes to run out of the house. This is somebody who has plenty of time" (Summations: 4207). Indeed, in order to account for the total lack of any physical evidence implicating Christopher, such as blood on his clothing or in his Jeep, the prosecutor emphasized that, "Christopher . . . ha[d] a house full of clothes, shoes, and everything that he would need to change if he had any blood on him . . . In addition to having committed this crime in his own house, with access to clothes and garbage bags and gloves, he's in the house for two hours and forty minutes" (*id.*).

This argument -- namely, that it would have taken Christopher a significant amount of time to deal with the "bloody mess[ ]", to stage a fake-break-in, and to then somehow dispose of all of his alleged blood-soaked clothing at some unknown location (Summations: 4208) -- is irreconcilable with Dr. Wecht's findings, for it requires the attack to have occurred well before

5:00 a.m. to account for Christopher's theorized post-attack conduct. In other words, it is fiction, and had jurors been apprised of Dr. Wecht's findings at trial, there is a reasonable probability that they would have voted to acquit Christopher. *See Rivas v. Fischer*, 780 F.3d 529 (2d Cir. 2015) (concluding determination reached by forensic pathologist that murder occurred at a time when the defendant had an alibi set forth a credible claim of actual innocence).

D. There is Clear and Convincing Evidence that There Was No "Staged" Break-in on the Night of the Attack.

The People maintained that Christopher attempted to conceal his crimes by making it appear as if a burglary had occurred at the Porco home. In support of their theory, they argued that he disarmed the home security system at 2:14 a.m. -- which was, they claimed, tantamount to "dropping his wallet at the crime scene," and they also argued, as part of their "staged-break-in-theory" that he smashed the alarm key pad, cut the phone wires in the backyard at 4:54 a.m., placed a spare key in the front door, and then cut the screen in a garage window on the side of the house before leaving the scene and heading back to UR. Indeed, the prosecutor argued, "[o]nly the person who knew the master code would bother smashing the code box . . . ." (Summations: 4210). This argument, however compelling it may have been at the time of trial, is demonstrably false in the context of the now discredited timeline.

First, contrary to the prosecutor's argument, the first definitive indicia of criminality at the Porco home was not when the security system was disarmed. Rather, it was when the telephone wires were cut at 4:54 a.m. If, as prosecutors argued, Christopher entered his family's home at 2:14 a.m., more than four hours, according to Dr. Wecht, *before* the earliest time his parents could have been attacked, this would mean that he entered the home, turned off the alarm, and then, for whatever reason, waited hours before striking. This is preposterous, and it simply did not happen. Instead, the true perpetrator cut the telephone wires at 4:54 a.m. -- also, according

to Dr. Wecht, *prior* to the time of the attack -- was greeted by a beeping alarm control panel upon entering the home, which would have begun sounding five minutes after detecting that the telephone connection had been severed (Myer: 971), and then smashed the control panel to silence the alarm. The fact that the alarm control panel in the kitchen was smashed, in other words, is not evidence that Christopher was trying to stage a burglary and conceal his identity; it is evidence that the intruder -- the actual perpetrator -- was trying to silence the device.

Second, the prosecutor argued that "[t]he killer knew where the spare key was" and that a screen on a garage window on the side of the house was "cut with a sharp instrument" (Summations: 4213). These assertions, too, however, when considered objectively, actually tend to establish that a break-in was not staged. Prosecutors argued that Christopher removed a small key from its hiding place under a flowerpot and left the key in the front door lock as part of a post-attack attempt to stage a burglary. A true 'burglar,' however, unknown to the family, would not have known where any spare key was hidden, and Christopher, in any event, lived at the house and had his own key. Moreover, given the identification of Peter Porco's blood on the porch (*see* McDonald: 1152-55), the far more plausible scenario is that Peter was on the porch after he had been gravely injured, and that in his brain-damaged stated, he thought he needed the spare key to get back inside of the house, and then left the key in the lock. Furthermore, there was no evidence presented at trial whatsoever that the "cut" screen was in any way connected to the attack on Christopher's parents. The garage window where investigators observed the damaged screen was on the infrequently traversed side of the Porco home, there was no way to tell whether the screen had been cut, torn, or ripped intentionally or inadvertently, there were no footprints or fingerprints near the screen or the window, adjacent surfaces were not swabbed for DNA, and, most

importantly, there was no way to establish *when* the damage to the window screen occurred (McDonald: 1252).

In sum, in light of Dr. Wecht's conclusions about the time of the attack, many of the prosecutor's arguments about the sequence of criminal events become speculative at best. In fact, they were illogical and untrue.

E. There is Clear and Convincing Evidence that Christopher Never Left Rochester on the Night of His Parents' Attack.

1. Rachel Slater indicated that Christopher was at a computer in the UR library at the time prosecutors theorized he was driving to Albany to carry out the attack.

The police questioned hundreds of UR students about whether they had seen or heard from Christopher during either the night of November 14, 2004 or the early morning hours of November 15, 2004. The exculpatory report of one student, however, Rachel Slater, who notified authorities that Christopher contacted her in the early morning hours of November 15, 2004, was not investigated until months after the crime. Slater, as outlined above in Section (C) of Point One, told numerous people in the days immediately after the attack that she had received an instant message from Christopher between 12:00 a.m. and 12:30 a.m. on November 15, 2004, a time when, according to prosecutors, Christopher would have been driving on the Thruway toward Albany; the police knew about the exculpatory nature of Ms. Slater's information; and yet, no one interviewed her until March of 2005. Indeed, while Slater had given a detailed description of the timing and content of the message she received, by the time she was interviewed, her computer had been infected with a virus, and the message that she had received from Christopher was gone. Worse yet, when Investigator Toro first memorialized Slater's statement, he incorrectly transcribed the date of the instant message and then omitted it entirely from his written summary of the interview, which effectively suppressed the message, given that

Slater's questionnaire was one among hundreds, and that the single page containing the information about the instant message was buried within thousands of pages of materials prosecutors provided simultaneously to the defense.[72]

Furthermore, Christopher's inability to recall sending a message to Slater is neither inconsistent with his innocence, nor surprising in light of the overall traumatic nature of his experience. In the hours after his parents' attack, Christopher was intensely interrogated, and the shock and emotional stress of the ordeal left his memory jumbled and incomplete. Christopher forgot that he had participated in a sorority charity event, that he attended a fraternity chapter meeting on the afternoon of November 14, 2004, and that he had visited with an ex-girlfriend on the afternoon of November 12, 2004 (Christopher Aff: ¶20 [Exh. E]), and he also forgot that he had eaten dinner with Marshall Crumiller, given Marshall a ride to his car on the evening of November 14, 2004, and moved his Jeep on the morning of November 15, 2004 (*id.*). And in this context, such memory lapses are hardly out of the ordinary:

> While a guilty suspect's repeated accounts may sometimes reveal one or more gross and material inconsistencies, an innocent suspect's accounts will contain nothing more than trivial omissions or additions that appear because of the normal variability attendant to repeating a complicated story or because he chooses to keep private something that he sees as related to the crime.

See Addendum: Social Psychology of Police Interrogation, at 201). The omissions or inaccuracies in Christopher's account of the days preceding the attack -- as well as of the night of the crime -- were, in other words, benign and explainable, and they have no bearing on his culpability.

[72] Counsel was ineffective for failing to investigate Slater's claim, especially in light of the November 22, 2004 communication that counsel received from John Polster, alerting him to Slater's information and describing her as "very nervous." Toro's misleading summary of Slater's claim, however, likewise played a significant role in keeping the exculpatory information suppressed.

In sum, Rachel Slater's sworn statement describing the timing and content of the message that she received from Christopher -- especially considered in the context of the discredited timeline -- constitutes clear, convincing, and reliable evidence that Christopher was not where prosecutors claimed that he was in the early morning hours of November 15, 2004. Slater had no motive to lie, her account of the message remained consistent over time, and as reflected by the email that John Polster sent to Christopher's attorney, she was nervous about the potential implications of the message and recognized its relevance to the investigation,[73] Thus, contrary to the government's narrative, there was evidence establishing that Christopher was actually at a computer in the UR library between 12:00 a.m. and 12:30 a.m. on November 15, 2004, and not driving down the NYS Thruway to kill his parents.

2. Jason Novak recalled having a conversation with Christopher inside UR's Munro hall between 10:30 p.m. and 11:30 p.m. on November 14, 2004, the time when prosecutors told jurors he was driving down to Albany.

In addition to the evidence that Christopher sent Rachel Slater an instant message when he should have been -- according to prosecutors -- barreling down the Thruway, there is also evidence that Christopher had a conversation with fraternity brother Jason Novak inside UR's Munro Hall sometime between 10:30 p.m. and 11:30 p.m. on Sunday night -- the same time prosecutors claimed that Christopher was picking up a Thruway ticket from John Fallon. This evidence, too, considered cumulatively, discredits the timeline, and establishes that Christopher is innocent.

In Novak's initial statement, Novak recalled having a conversation with Christopher, where Christopher asked him how his mock trial competition had gone that weekend. Novak also

[73] Christopher and Slater had casually dated in the weeks and months prior to the crime, and the two had at times spent time in each other's respective dorm rooms. It would not have been unusual for Christopher to send Slater a message from a UR computer to see if he could spend time in her room (Christopher Aff: ¶24 [Exh. E]).

initially remembered that this conversation took place at approximately 10:30 p.m. on Sunday night, roughly an hour after Novak returned to UR from the competition (Exh. F, p. 100). After several subsequent interviews with Detective Arduini, however -- and with other police officers and prosecutors -- Novak's recollection of the timing of his conversation with Christopher changed, and he ultimately testified at trial -- consistent with the prosecution's timeline theory -- that his conversation with Christopher had likely occurred earlier, at around 10:00 p.m. (Novak: 1637-41).

Nevertheless, despite the change in Novak's account, previous testimony from Marshall Crumiller, with whom Christopher had gone to dinner on Sunday night, makes clear that it was Novak's initial recollection -- i.e., that the conversation with Christopher occurred around 10:30 p.m. -- that was far more accurate. Crumiller testified that he, Christopher, and another fraternity brother, Travis Thompson, went to dinner together on campus at around 8:40 p.m. on Sunday night (Crumiller: 1550). He also testified that between the time the group left for dinner and the time that Christopher and Marshall moved their respective vehicles at about 10:30 p.m., neither Marshall nor Christopher returned to Munro Hall (Crumiller: 1579-80). Novak, who was out of town at his mock trial competition, did not return to campus until about 8:45 p.m. on Sunday night -- *after* Marshall, Christopher, and Thompson had already left for dinner -- and, as a result, Novak and Christopher must have spoken to each other in Munro Hall not at 10:00 p.m., as Novak was coached to testify, but sometime between 10:30 p.m. and 11:00 p.m., *after* Christopher returned from parking his Jeep, thereby making it impossible that he was simultaneously picking up a Thruway ticket from John Fallon nearly nine miles away at 10:45 p.m.

F. The Testimonies of UR Fraternity Brothers Regarding Statements Christopher Allegedly Made About Failed Attempts to Contact His Parents Were Fabricated and Resulted from Improper Police Suggestion.

In its decision upholding Christopher's conviction, the Court of Appeals specifically referenced the testimony of five fraternity witnesses who testified to statements Christopher allegedly made regarding his inability to contact his parents on November 14, 2004 and November 15, 2004, *before* he had learned of the attack. *People v. Porco*, 17 N.Y.3d at 879. This testimony, however -- that of Jason Wortham, Matt Ambrosio, Jason Novak, Luis Ortiz, and Greg Whiteside -- like much of the prosecution's case, went largely unchallenged by trial counsel, and, like the testimony of toll collectors John Fallon and Karen Russell, was clearly influenced by Detective Arduini. Indeed, despite being initially unable to provide any inculpatory information, or otherwise expressing uncertainty regarding information the police deemed pertinent to the investigation, the memories of these witnesses speciously improved in ways that were unfavorable to Christopher *after* they were interviewed by Arduini. *See* Section (A)(4) of Point One. There are, in other words, unmistakable indications that the statements of the UR witnesses, whose testimony at trial indisputably contributed to Christopher's wrongful conviction, was the product of improper police influence.[74]

1. Jason Wortham.

During the evening of November 15, 2004, prior to the arrival of the Bethlehem Police to UR, the Rochester Police took a detailed statement from Jason Wortham, the regional director of Christopher's fraternity, who slept in Christopher's room on Sunday night (Exh. F, p. 64-67). Wortham's statement contained verifiable and accurate details regarding what Christopher said

[74] Christopher unequivocally denies that he had -- or expressed -- any unusual concern for his parents on Sunday November 14, 2004 through the afternoon of November 15, 2004, or that he attempted to contact either of them during this period (Christopher Aff: ¶29 [Exh. E]).

and did during the 24 hours preceding the attack on his parents, and it likewise articulated Wortham's observations about Christopher's appearance, his attitude, and his demeanor during the relevant time frame. Wortham's initial statement to Rochester Police is the most detailed and near contemporaneous account of Christopher's description and whereabouts in the hours preceding and immediately following the discovery of the attack that police recorded, yet when compared to statements that Wortham made -- and to the testimony he gave -- *after* his interview with Arduini days later, stark contradictions emerge. Indeed, when Wortham gave his initial statement to Rochester Police on the night of November 15, 2004 -- knowing that Christopher's parents had been attacked and that the police considered Christopher to be a suspect -- he made no mention at all of the concern that he later claimed Christopher expressed on Sunday night between 9:30 p.m. and 10:00 p.m. about his inability to contact his parents. Indeed, when Wortham was first interviewed, he told police that when he arrived at Christopher's dorm room at about 7:30 p.m. on Sunday, November 14th, Christopher was "working on his computer." *Id.* Next, after he made his introduction, he stated that he went out to the lounge with Christopher, "to watch TV with some of the brothers," and he stated that he "didn't notice anything unusual about Chris's [sic] demeanor." Rather, he recalled, they "just sat around the couch chatting." *Id.* Continuing, Wortham stated that Christopher "stayed out in the lounge" while "[h]is roommate was in the room working on [his] computer, and that Wortham went to sleep in Christopher's bed at around 10:30 p.m., and got up the next morning at around 9:10 a.m. Next, after showering, checking email and doing some things in the room, Wortham stated that he went out to the lounge and saw Christopher asleep on the couch. Within a couple minutes, Christopher woke up, a couple of other guys came into the lounge, and the group just sat around watching television and talking. Wortham recalled that Christopher sounded a little congested, like he had a cold, and he

remembered Christopher stating that he did not feel very well. Wortham stated that he then left to go to lunch at around 11:00 a.m., and after lunch, at about noon, as he was walking back to the dorm, he passed Christopher and a couple other guys walking to lunch. He asked Christopher how he was feeling, and Christopher answered that he was still feeling kind of sick. Later, at around 3:00 p.m. or 3:05 p.m., Wortham stated that he was at the Chapter House working on his computer when Christopher came in and grabbed his cell phone and ID card. While he was there, Wortham recalled that the dorm room phone rang, that Christopher answered the phone and verified to the caller that he was Chris Porco, and that within moments, he noticed a change in Christopher's demeanor. Wortham stated that at first Christopher was answering the caller's questions, but that at some point, he stopped the caller and stated, "What's going on? What's this about?" Christopher then told the caller that he would have to call back, hung up the phone, and fell back into his chair. Then, when one of the other guys asked if everything was okay, Christopher just sat there and said, "My parents are dead." Wortham told Rochester Police that Christopher "looked like he was stunned and in shock" and that he got up and walked out into the lounge and into another hallway. After a few more moments, Wortham stated, he went back to his room to get some stuff for a meeting, at which time he saw Christopher sitting in his chair and looking at the computer, which displayed the Bethlehem Police website. While Wortham was in Christopher's dorm room, he told police that Christopher's room phone rang again, and he stated that Christopher picked up the phone and told the caller that he was waiting on a call from the police. By this time, Wortham recalled Christopher being visibly upset. Wortham then left the room for his meeting, and, according to his statement, this was his last contact with Christopher.

At trial -- 19 months later -- Wortham's recollection of events changed significantly. First, for example, he testified that he arrived at the university between 7:00 p.m. and 8:00 p.m., was

given a brief tour of the fraternity by then President Greg Whiteside, and then went to eat dinner with Whiteside and some other brothers (Wortham: 2017). He mentioned nothing about going to Christopher's room to meet him, as he had in his written statement, or about then sitting with him and some of the other brothers in the lounge talking. Then, after dinner, he testified that he came back to the fraternity to hang out and talk with some of the brothers in the lounge area, and sometime later, he stated, he contacted Whiteside to find out where he would be staying for the night. It was then, according to Wortham's trial testimony -- between 9:00 p.m. and 9:30 p.m. -- that Wortham went to Christopher's room and met him for the first time (Wortham: 2018). Next, Wortham testified, he went back to the lounge, where he stayed for 30-40 minutes, until he went to bed around 10:00 p.m. or 10:15 p.m. -- earlier, of course, than when he initially told Rochester Police he went to bed (Wortham: 2019-20).

The prosecutor then posed several leading questions to Wortham about possible conversations he may have had with Christopher (Wortham: 2019), at which point Wortham recalled Christopher indicating that he had been having trouble contacting his parents at home and that the phone was not working properly. Specifically, Wortham testified, "[Christopher] mentioned he hadn't been able to reach their cell phones," and he recalled that a "couple of other brothers said to contact them at work, or neighbors, and see if they were actually there" (Wortham: 2020-21). Then, Wortham claimed that this conversation occurred sometime on Sunday night (Wortham: 2051).

Aside from the obvious contradiction between Wortham's trial testimony and his original statement to Rochester Police, wherein he detailed Christopher's demeanor and said nothing whatsoever about Christopher complaining that he could not reach his parents, Wortham's trial testimony regarding Christopher's alleged statements is also inconsistent with other known facts.

Christopher, for instance, was unquestionably *not* in Munro Hall at 9:30 p.m. or at 10:00 p.m. on November 14, 2004, since the evidence established that on Sunday night, at around 8:40 p.m., he went to dinner on campus at the "pit" with fraternity brothers Travis Thompson and Marshall Crumiller (*See* Exh. F, p. 75; Crumiller: 1550). Further, after dinner, Thompson went to the library, Marshall and Christopher went to move their cars (*id.*), and Christopher dropped Marshall off at Munro Hall at about 10:30 p.m. and then parked his Jeep off campus (Crumiller: 1558; Exh. F, p. 75). Indeed, Crumiller's testimony made clear that at no time between 8:40 p.m. and 10:30 p.m., did Christopher or Marshall return to Munro Hall:

> Q: From the time you were at dinner at the commons until the time you walked to your car, did you go back into Munro dorm?
>
> A: No.
>
> Q: And from the time you went to your car and drove to Christopher's car on Genesee Street, did you go to Munro dorm?
>
> A: No.
>
> Q: And from the time Christopher and you both drove to Park Lot South, did you go into Munro Dorm?
>
> A: No.
>
> Q: And then after Christopher dropped you off, that's the first time you went in?
>
> A: Yes.

(Crumiller: 1579-80). In other words, at the very time Wortham claimed that he overheard a "side conversation" about Christopher's supposed inability to contact his parents, Christopher was not even in Munro Hall.

Moreover, the intervening factor between Wortham's statement to the Rochester Police and his fabricated recollection of events at trial was the same intervening factor that generated the false toll worker testimony and the similar false recollections of the four other UR fraternity

brothers discussed below: Detective Arduini. It was only after being interviewed by Arduini that Wortham was able to remember the supposed statements Christopher made about not being able to reach his parents on November 14, 2004 (Exh. F, pp. 68-70).

2. Matt Ambrosio

Like Wortham, other UR students also changed their recollections regarding statements Christopher made about his inability to reach his parents after being interviewed by Detective Arduini. Matt Ambrosio, for example, Christopher's roommate, testified at trial -- again, in response to repeated leading questions from the prosecutor -- that at about 11:30 a.m. on November 15, 2004, he spoke to Christopher either in their dorm room or in the lounge, and Christopher told him that he could not reach his parents, despite trying the house phone, their work phones, and their cell phones (Ambrosio: 1973-74). Ambrosio also claimed to have seen Christopher in their dorm room the night before at 10:00 p.m. or 10:30 p.m., at which time he stated he was acting "like the same old Chris" (Ambrosio: 1972-73; 1989). Nevertheless, in the statement Ambrosio gave to police on November 16, 2004, he made no mention of Christopher saying anything about trying to contact his parents and simply told police that he last saw Christopher on Sunday night at about 10:00 p.m., when Christopher told Ambrosio that he was going to sleep in the lounge (Exh. F, pp. 83-84). The statement then indicates that Ambrosio saw Christopher in the lounge the next day at about 11:15 a.m., before Christopher went to lunch, and, again, Ambrosio related nothing about Christopher trying to reach his parents.

Nevertheless, just days later, Ambrosio sat for one of many "re-interviews" with Detective Arduini, whose notes indicate: "Matthew said that on Sunday November 14, 2004 at about 10:30 p.m., Christopher said he was worried because he could not get in touch with his parents" (Exh. F, pp. 85-87). Again, however -- as detailed above -- this statement could not have been true

because Christopher was not in Munro Hall at this time. Then, Arduini's notes from the interview go further, and recite additional facts that are likewise untrue: "Trying to call parents after 10:00 p.m."; "Parents at 11:00" (Exh. F, p. 87); "Back in room 11/15 11:30 a.m. not being able to reach parents" (*id.*). In sum, Ambrosio, like Wortham, was only able to recall Christopher making statements about not being able to contact his parents *after* he was interviewed by Arduini, the detective who was convinced of Christopher's guilt and instrumental in shaping the narrative against him from the onset of the investigation.

3. Luis Ortiz

Luis Ortiz, much like Wortham and Ambrosio, testified at trial that between 11:00 a.m. and 11:30 a.m. on Monday November 15, 2004, Christopher told him and a group of other people in the lounge that he could not contact his parents.

Q: Now I want to direct your attention to a little bit later around 11:00 a.m., 11:30 a.m., did there come a time that you heard Chris complaining about something?

A: Yes.

Q: Tell the jury about that please.

A: He started mentioning that he couldn't get in contact with his parents.

Q: Okay, did he say how he had tried?

A: He said he had tried calling his parents' cell phones, calling his house, and also he said he called his father's job and he couldn't get in contact with his parents.

Q: Okay, did he indicate if he had spoke to someone at his father's job?

A: Yes, he said his father's secretary had not seen him all day.

(Ortiz: 2060-61). Ortiz also testified that the regional director, Jason Wortham, was present for this conversation and suggested that Christopher call a neighbor to see if anything was wrong (Ortiz: 2061).[75]

Ortiz's testimony, however, cannot be reconciled with the testimony of other students, nor is it consistent with other known facts. Rather, Ortiz's claims, too, appear to have resulted from a combination of improper police suggestion and from his discussion about the case with other students. Wortham, after all, maintained not only that no such conversation took place on Monday morning, he claimed that he never participated in such a conversation -- at any time (Wortham: 2053). In fact, Wortham's initial statement and testimony both make clear that he left for lunch at 11:00 a.m. and was not even in the lounge at the time Ortiz claimed the conversation took place (Exh. F, pp. 65-66; Wortham: 2036).

And, Ortiz's account of events is further contradicted by the testimony of Josh Felver-Grant, another UR student who testified that Christopher was not in the lounge at 11:00 a.m. Rather, Felver-Grant testified at trial that he sent Christopher an instant message at 11:00 a.m., that Christopher did not respond, and that he therefore went to Christopher's room to ask him in person if he wanted to go to breakfast (Felver-Grant: 1651). According to Felver-Grant, Christopher was in his room, but did not want to go, and instead gave Felver-Grant his ID card so that he could purchase lunch and treat Wortham to a meal on Christopher's meal plan. *Id*. Felver-Grant testified that he and Wortham then went to eat.

Thus, contrary to Ortiz's claim, it is clear -- based on the testimony of Felver-Grant and Ambrosio, who, as detailed above, claimed during at least one of his interviews with Arduini that

[75] Upon information and belief, Arduini was present when Ortiz gave his original statement and indicated that Christopher complained that he could not contact his parents "through their cell phones or their house phones." Later, after a subsequent interview with Arduini, Ortiz also claimed that Christopher mentioned being unable to reach his father through his father's job or through his secretary (Exh. F, pp. 93-95).

Christopher was in his room between 11:00 a.m. and 11:30 a.m. -- Christopher was in his room between 11:00 a.m. and 11:30 a.m., and not in the lounge having a conversation with Wortham about not being able to get in contact with his mother and father.

4. Jason Novak

Like Ambrosio, Wortham, and Ortiz, the accuracy and reliability of the testimony of Jason Novak, another UR student and member of Christopher's fraternity, suffers similar defects upon closer scrutiny. In Novak's initial statement, for example, he asserted that he arrived back to the UR campus from a trip at about 10:30 p.m. on Sunday evening, at which time he engaged in a five-minute conversation with Christopher about the mock-trial competition that he had attended. (Exh. F, p. 100). Then, at trial, after prosecutors showed Novak his ID card swipe records, he "corrected" the time of this conversation, and stated it likely occurred around 10:00 p.m. (Novak: 1637; 1641). This conversation, however, could not have occurred at 10:00 or 10:30 p.m., since -- as indicated above -- Christopher and Marshall Crumiller were moving their vehicles at this time, and it likewise could not have occurred earlier in the evening since Novak did not arrive back to campus from his trip until 8:45 p.m. and did not see Christopher for about an hour after his arrival (Novak: 1620). Rather, the only possible time the conversation between Novak and Christopher could have taken place was at approximately 11:00 p.m., *after* Christopher moved his Jeep and stopped back at his dorm to retrieve a backpack (Christopher Aff: ¶21 [Exh. E]). *See also* section (E)(2) of Point Four.

Further, while Novak initially gave a statement that at 1:45 p.m. on Monday, November 15, 2004, he witnessed Christopher go into Marshall Crumiller's room, tell him that "he couldn't get a hold of his parents," and state that he "heard that there was a homicide on his street at home" *see* (Exh. F, p. 100), by the time Novak testified at trial, the time of this interaction had changed

to 3:30 p.m., the discussion he overheard transformed into a group conversation, and what Novak previously characterized as a brief mention of Christopher's parents, became -- after prosecutorial prompting -- a laundry list of now familiar details:

> Q: So, you went into Marshall's room, it was yourself, Mr. Crumiller, and Mr. Porco?
>
> A: Yes.
>
> Q: And was there any conversation had between the three of you at that time?
>
> A: Yes, Chris was saying that he was worried about his parents because he couldn't get a hold of them. He was trying to call them.
>
> Q: Okay. Now, did he say how he tried to call his parents?
>
> A: He just mentioned to me that he tried to call both their cell phones and their home phone and he couldn't get through to them.
>
> Q: Did he tell you when he began to try and get a hold of his parents?
>
> A: I believe it was from the night before. He said that he couldn't get in touch with them From Sunday afternoon, Sunday evening.

(Novak: 1623-24). Thus, what was initially a statement attributed to Christopher about a homicide on his street and his concern that he could not reach his parents (Exh. F, p. 100), became -- after extensive interactions with police, prosecutors, and other students -- a detailed accounting of Christopher's specious concerns about not being able to contact his parents for the past day and a half, with no mention whatsoever of Novak's initial claim that Christopher stated that there had been a homicide on his street. Plus, in Crumiller's first statement to police, when he gave a clear account of the discussion he had with Christopher on the afternoon of November 15, 2004, he claimed that Christopher came into his room and said that someone had been killed on his street (Exh. F, p. 79; Crumiller: 1561). He made no mention of Christopher's parents, of any attempts Christopher made to contact them on various phone lines, or of any concern Christopher

expressed for them until after he spoke to Christopher *after* Christopher left the room and took a phone call. *Id.* *See also* 11/15 Statement of J. Wortham, discussed above.

In sum, Novak's account of his interactions with Christopher began as innocuous, but then changed to fit the prosecution's narrative that Christopher was feigning concern for his parents to cover his murderous plan. Accordingly, Novak's testimony about his alleged conversation with Christopher in Crumiller's dorm room likewise cannot be credited.[76]

5. Greg Whiteside

Greg Whiteside, another one of Christopher's fraternity brothers, was the fifth witness to testify about statements Christopher allegedly made concerning his supposed inability to contact his parents on Sunday or Monday. Whiteside was first interviewed by Detective Arduini on November 16, 2004, and during the interview, he gave an account of his interactions with Christopher on the morning of November 15, 2004. Specifically, he claimed that at about 10:00 a.m., he saw Christopher in the lounge, at which time they spoke, and Christopher told him that he had just returned from jogging, that he was tired from being out of shape, and that he had not slept comfortably on the couch in the lounge the night before (Exh. F, pp. 104-07). Less than two weeks later, however, on November 28, 2014, Arduini re-interviewed Whiteside (Exh. F, pp. 108-09), and by December 3, 2004, when Whiteside testified in the grand jury, he, too, like the other fraternity brothers, claimed that he recalled statements Christopher allegedly made about not being able to reach his parents (Whiteside GJ: 36-38). And then at trial, Whiteside repeated his

[76] Novak's initial statement, given to Bethlehem Police on November 17, 2004, helps shed light on the genesis of the false narrative presented at trial that Christopher was expressing concern for his parents *before* he learned of the crime. Indeed, as noted above, Novak's recollection clearly conflates the statement Christopher made to Marshall Crumiller about a homicide on his street, *before* he had received a phone call informing him that his parents had been attacked, with statements that Christopher did make about his parents minutes later, after he learned what had happened. This false recollection appears to have then spread in the highly charged days that followed, and it was formalized in interviews conducted by Detective Arduini on and before November 28, 2004 (*see* Exh. F, pp. 100; 63-113).

claim that Christopher had expressed concern over not being able to reach his parents on their cell phones or at their "residence" (Whiteside: at 1687-88).[77] Whiteside, however, like his four fraternity brothers, was never confronted with the fact that the statements attributed to Christopher (about not being able to reach his parents) materialized *after* his initial interview with police, and counsel, in turn, was never identified or advanced the argument to the jury that Whiteside's memory, like that of Crumiller, Novak, Ortiz, and Ambrosio, had been distorted by people and events experienced after November 15, 2004.

In short, an agenda-driven investigation combined with the fallibility and malleability of human memory to present an outwardly uniform, yet false, narrative, which contributed significantly to Christopher's wrongful conviction.

G. There is Clear and Convincing Evidence That the Attack on Christopher's Parents Was Perpetrated by an Unidentified Third Party.

1. There was an unidentified fingerprint at the crime scene that did not belong to Christopher.

During Christopher's interrogation -- after he voluntarily gave the police his DNA, his fingerprints, and his clothing -- Detective Bowdish informed him that the phone wires on the pole in the back of his house had been cut, that there were fingerprints on the phone box (Interrogation: 213), that the fingerprints on the box must belong to the attacker, and that if a comparative analysis proved that the fingerprints belonged to Christopher, the consequences would be grave (Interrogation: 220). Nevertheless, although there were indeed two fingerprints on the plastic phone company box attached to the telephone pole in the back of the Porcos' rear yard, just inches below where the telephone wires were cut, analysts determined that the one print that was suitable for comparison was not left by Christopher (Proceedings: 2675-77). Moreover, all of the police

[77] Whiteside also claimed to have last seen Christopher on Sunday night "in the vicinity of 10:00 p.m." (Whiteside: 1684), which, as explained herein, simply cannot be true.

officers who were at the crime scene, and all of the lawn care employees who had worked on the Porcos' lawn, and the relevant Verizon employees, including the worker who installed the phone box the previous August, were excluded as the one who left the fingerprint (Dean: 2697-98).

During his closing argument, the prosecutor dismissed the significance of the unidentified fingerprint, and claimed that it could have been left by anyone. This representation, however, was simply untrue. The phone box was mounted on a pole located inches below the telephone wires that were unquestionably cut by Joan and Peter's attacker, and the box would have been a natural place to rest a hand while handling the wires as they were cut. Furthermore, the pole itself was located in the back right corner of the Porco's backyard, amongst dense trees and shrubbery, and the yard was ringed on all sides by either woodland, hedges, or the backyards of other houses. The yard, in other words, was not accessible to the public, and in the more than twelve years that Joan Porco lived at 36 Brockley Drive, not once had she ever seen any unidentified or random person in the backyard who was not supposed to be there (Joan Porco Aff: ¶6 [Exh. D]). Clearly, the police believed that the perpetrator left the print during the course of committing the crime, however when they learned that the print did not belong to Christopher, investigators shelved this important piece of evidence since -- again -- it did not fit within the narrative of Christopher's guilt.

2. There was unidentified DNA at the crime scene that did not belong to Christopher or to either of his parents.

In addition to the unidentified fingerprint on the utility pole, investigators also recovered a Seiko watch from the nightstand in Joan and Peter's bedroom containing the DNA profiles of at least two unidentified people, on both the inside and outside of the watchband (Mukhtar: 2930-31). The district attorney argued that the DNA on the watch was not relevant to the case or to the identity of the perpetrator because it could have been left by someone changing the watch battery

or handling Peter's watch for some other unknown purpose (Summations: 4223). A more plausible explanation for the DNA on the watch, however, especially since there was unknown DNA on the *inside* of the watchband, is that one or more attackers handled the watch at or around the time of the crime.

3. There was no physical or forensic evidence connecting Christopher to the crime scene.

Not only was there evidence at the crime scene pointing to an unknown attacker or attackers, there was also -- despite the particularly bloody and violent nature of the attack -- a complete lack of any physical evidence connecting Christopher to the crime scene. Police conducted an exhaustive search for blood, and for any evidence at all, in Christopher's Jeep, in his dorm room, and even in dumpsters that could have been utilized to dispose of bloody clothing or other instrumentalities or evidence along the timeline route (App. 60), and yet, after literally dismantling the Jeep, removing dozens of items and clothing from his dorm, and checking every other conceivable place, the police ultimately found nothing. Accordingly, given this lack of evidence, prosecutors sought to dispel the suggestion that the attack on Peter and Joan would necessarily have caused blood evidence to transfer onto Christopher. During his closing argument, for example, the prosecutor marshaled the stricken blood spatter opinion testimony given by McDonald, who essentially testified as the People's non-expert prosecution witness; he made the repeated, baseless claim that the attacker would not have had much blood on him (Summations: 4204-08); and he told jurors that Christopher, in any event, was an expert in cleaning up "bloody messes" as a result of his time working at the veterinary hospital (Summations: 4208). These arguments, however, were neither reasonably inferable from the facts, nor were they made in good faith.

Subsequent to the jury's verdict, the defense retained the expert forensic services of Doctor Herbert Leon MacDonell, who after reviewing the crime scene evidence with his staff, determined that not only had there been no apparent attempt to clean up any blood at the scene with the veterinary chemical "parvasol," but that there was actually no evidence that anyone had made any effort at all to clean anything in the house during or after the crime (MacDonell Aff: 4-5 [Exh. B]). Furthermore, Dr. MacDonell also concluded that the "[b]loodstaining in the bedroom was so extensive, especially around the bed, that whoever struck the blows must certainly have become blood stained themselves" (MacDonell Aff: ¶7 [Exh. B]).[78] MacDonell acknowledged that "[a] person could commit such an act wearing protective clothing and then dispose of the garment or do it nude and then shower," but, in this case, "[t]here is no evidence that [Christopher] did either of these." Thus, in MacDonell's opinion, "if [Christopher] had any blood on him it should have been transferred to his Jeep and would have been detected." *Id.*

MacDonell's findings are clear, they are credible, and they support Christopher's contention that he is actually innocent of these crimes, for just as Christopher could not have driven 232 miles in his Jeep with only 14.2 gallons of gasoline, obtained at least 19 gallons of gas without leaving any trace, spoken to Jason Novak in his dorm while simultaneously collecting a toll ticket from John Fallon, or sent an instant message to Rachel Slater at 12:30 a.m. while driving on the Thruway, he could not have committed this violent crime without either transferring blood into his Jeep or leaving some sign in the house that he had taken a shower or even washed his hands. Indeed, MacDonell's review suggests that the true attacker (or attackers) was not

[78] In the grand jury, Dr. Hubbard likewise testified, when asked specifically by a juror about whether the perpetrator would have been covered in blood, "I think that the attacker and, I'm assuming there is only one attacker, must have had blood on the front of his body, including his clothing, assuming it's a man, in substantial amounts (Hubbard GJ: 2764-65). Later, at trial, Hubbard also reluctantly testified that he would expect the perpetrator to have blood on his hands or arms, but possibly not on his trunk or face (Hubbard: 2799).

concerned with cleaning the scene or themselves as they committed the crime and left the house. The uncomfortable truth, in other words, is that it is simply impossible to know what exactly happened to Joan and Peter inside 36 Brockley Drive. What is known, however, is that the police were convinced of Christopher's guilt from the start, they never wavered from this belief or seriously entertained any other possibility, and, as a result, other investigative leads were ignored, and evidence that was inconsistent with the prosecution's theory of the case or that tended to exculpate Christopher was deliberately obscured.[79]

H. Christopher Has Established His Factual Innocence by Clear and Convincing Evidence.

In order to vacate a conviction and win dismissal of the underlying indictment on actual innocence grounds, a defendant must prove, by clear and convincing evidence, that he is factually innocent, or that his innocence is "highly probable." *People v. Brownridge*, 2020 WL 3477707 at *5 (Sup. Ct. Queens Co. 2020), citing *People v. Velazquez*, 143 A.D.3d 126, 136 (1st Dept. 2016). Here, not only has Christopher cast serious and, in some respects, insurmountable doubt on material aspects of the prosecution's case, he has also put forth compelling affirmative facts -- previously unknown -- which lead to the undeniable conclusion that he did not attack, and could not have attacked, his parents, and that he is, in fact, actually innocent. He has established that the prosecution's timeline theory of the crime was physically impossible, and that there is no

[79] Indeed, the behavior of the police in the first hours, days, and weeks of the investigation -- and their singular focus on Christopher -- undoubtedly caused them to overlook other viable leads. Discovery materials make clear that not only did police and prosecutors make no discernable effort in the first days and weeks of the investigation to explore any scenarios in which Christopher was not responsible for the attack; they actually took affirmative steps to ignore or suppress evidence that did not implicate Christopher and his yellow Jeep. Numerous callers, for example, who telephoned the BPD dispatch on November 15, 2004 and attempted to relay information about unusual activity in the vicinity of 36 Brockley Drive, were informed that the police already had a "suspect in custody" (*see* Defense Exh. W; (Proceedings: 3877), and other concerned civilians who appeared at the BPD station to report what they believed to be relevant information were similarly dismissed (Meyer: 3707-26). By contrast, investigators spent countless hours chasing down dozens of yellow Jeep sightings around the Albany area in an effort to dispel the notion that anyone driving a yellow Jeep other than Christopher could have committed the attack.

other reasonably possible scenario in which he could have been present at the crime scene at the time of the attack; he has shown that the investigation conducted by law enforcement, despite its breadth and intensity, confirms that he simply could not have made the necessary fuel purchase anywhere within the constraints of the prosecution's timeline, and that there is not a shred of credible evidence that places him or his Jeep in Albany on November 14th or November 15th, or anywhere else along the theorized timeline route of travel; he has set forth evidence that he had two separate interactions with students at UR at the time prosecutors told jurors that he was driving on the Thruway to Albany -- Rachel Slater and Jason Novak -- and that he could not, therefore, have actually made the alleged trip; he has highlighted that there was no forensic evidence whatsoever that connected him to the crime scene and that, much to the contrary, the DNA and fingerprints belonging to a third-party -- the likely perpetrator -- were identified at key crime scene locations; and he has supplied the findings of an expert pathologist, which demonstrate that the attack on his parents occurred *no earlier than* 6:30 a.m. -- hours later than alleged by the prosecution -- when it would have been impossible for Christopher to be anywhere near the crime scene given that he was observed back at UR at 8:30 a.m.

These facts, and the evidence detailed herein -- much of which the jury never had the opportunity to consider -- discredit and dismantle the prosecution's circumstantial case and point overwhelmingly to one singular conclusion: Christopher is actually innocent.

* * * * *

In sum, other than the evidence of Mrs. Porco's head nod -- which was understandably a primary focus of the parties at trial, and ultimately ruled inadmissible by the Appellate Division -- the prosecution's case against Christopher was comprised entirely of circumstantial evidence, "which may have appeared overwhelming at the time," but in truth, "simply d[id] not reflect

reality." *Lisker v. Knowles*, 463 F.Supp.2d 1008, 2029 (D.C. Cal. 2006). In *Lisker*, a son was convicted of attacking and killing his mother over a purported financial dispute, but many years later, it was ultimately determined that nearly all of the evidence the prosecution relied on to secure the conviction was either misleading or false.[80] Essentially -- the *Lisker* court explained -- evidence that appeared to be overwhelming at trial was "effectively dismantled" during the evidentiary hearing held pursuant to the defendant's petition for a writ of habeas corpus, and this, together with the demonstrable evidence of police misconduct and possible third party culpability, lead to the conclusion that the defendant was actually innocent. *Lisker*, 463 F.Supp.2d at 1018.

So, too, in this case, the Appellate Division and the Court of Appeals, like the courts in *Lisker*, reviewed the evidence presented at trial and concluded that it overwhelmingly established Christopher's guilt. Due to the numerous errors committed by counsel, however -- which were exacerbated by pervasive police and prosecutorial misconduct -- the record reviewed by the appellate courts was based largely on conjecture rather than on actual fact. Neither the appellate courts nor the jury knew that the People's timeline theory was physically, factually, and mechanically impossible; neither knew that Steven Siko provided inaccurate testimony regarding the fuel economy of Christopher's jeep, or that the exhaustive efforts to find evidence that Christopher had made the necessary stop to refuel his Jeep, or that he had even been present at any point along the timeline, turned up nothing; neither knew that Detective Arduini, who was responsible for securing key statements from timeline and UR witnesses, harbored an intense bias against Christopher; neither knew that Rachel Slater told police that she received an instant message from Christopher at a time when he would had to have been -- according to the timeline theory -- driving down the Thruway toward Albany; neither knew that there was medical evidence

[80] Lisker was eventually exonerated (*See* Bruce Lisker, National Registry of Exonerations, www.umich.edu).

that supported an opinion contrary to that of Dr. Hubbard -- namely, that Peter Porco had actually only survived a short time after suffering his injuries, and had been attacked no earlier than 6:30 a.m., making it impossible for Christopher to have been the perpetrator; neither knew that the DNA evidence was misleading and deserving of little if any weight; neither appreciated that there was no reasonable explanation for the unidentified fingerprint on the box where the Christopher's phone wires were cut or for the unidentified DNA discovered on the watch on the nightstand; neither understood that the true perpetrator would have been covered in blood after the attack, and that there was no evidence whatsoever that any attempt had been made to clean any surfaces or clothing inside the house; and neither knew that Detective Bowdish committed perjury in connection with the warrant applications in an effort to conceal police and prosecutorial misconduct.

The police believed immediately that Christopher was guilty, they searched only for incriminating evidence to confirm their belief, and they ignored and obscured the evidence that pointed toward his innocence. As a result, the jury's verdict was based on a distorted and incomplete factual record comprised of evidence, which, due to critical errors made by defense counsel, was never subjected to meaningful adversarial testing. As a result, Christopher has been wrongfully held accountable for the crimes committed against his parents, and his conviction must, therefore, be vacated.

POINT SEVEN

THERE IS A REASONABLE PROBABILITY THAT HAD THE HAIR RECOVERED FROM THE ALARM KEYPAD IN THE PORCO HOME BEEN SUBJECT TO MITOCHONDRIAL DNA TESTING, AND THE RESULTS BEEN PRESENTED TO THE JURY, THE OUTCOME AT TRIAL WOULD HAVE BEEN MORE FAVORABLE TO CHRISTOPHER, AND THE COURT, THEREFORE, SHOULD DIRECT THAT THE EVIDENCE NOW BE TESTED.

Pursuant to CPL §440.30(1-a), the defense also moves for an Order directing that mitochondrial DNA testing be conducted on the human hair shaft that members of the New York State Police collected from the surface of the smashed alarm keypad inside of 36 Brockley Drive, which, given the absence of a root, was never subjected to a nuclear DNA analysis. Relief, in this regard, should be granted, because testing this evidence carries a reasonable potential for exculpation.

CPL §440.30(1-a) provides that:

> [w]here the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

CPL §440.30(1-a)(a)(1). *See also People v. Pitts*, 828 N.E.2d 67, 71 (2005). The standard is a liberal one and does not require the defendant to show that a favorable test result will wholly exonerate him or prove his actual innocence. Rather, he must establish only that the testing sought carries "a reasonable potential for exculpation." *People v. Tookes*, 167 Misc.2d 601, 603 (1996).

Here, the DNA testing sought by the defense easily satisfies this standard. Indeed, testing the hair has the ability to not only provide evidence that would have resulted in a more favorable verdict at trial for Christopher, it also has the potential to exculpate him.

At trial, Richard Brunt, a forensic scientist for the New York State Police, testified that he was never given a hair found on a faceplate of the burglar alarm control panel for analysis ((Brunt: 2828); Urfan Mukhtar confirmed that the hair was not subject to nuclear DNA analysis because it did not have a suitable root or skin on it (Mukhtar: 2934); defense expert William Shields testified that "hair without a root will not produce a DNA result, but a hair without a root can produce a mitochondrial DNA result" (Shields: 3601); and counsel pointed out on summation that notwithstanding Dr. Melton's testimony that her lab published a paper on the experience her analysts have had testing hundreds and hundreds of human hairs for mitochondrial DNA (Melton: 3266), the government chose not to send the hair found on the alarm pad for mitochondrial DNA testing (Summation: 4165). Indeed, although Detective Bowdish removed the alarm system from the Porco home, and on December 2, 2005, submitted the alarm keypad, along with a hair and some fibers, to the State Lab, he did so for the sole stated purpose of conducting an external examination of the keypad and comparing its damage to a flashlight that the police had also seized and submitted to the lab for testing (App. 332; *see also* Exhibit J)

And yet, had the hair recovered from the alarm keypad been subject to mitochondrial DNA testing, had Peter, Joan, Christopher, and any other lawful guests of the home been excluded as donors, and had this evidence been presented to the jury, there is a reasonable probability that jurors would have had a reasonable doubt as to Christopher's guilt. *People v. Flax*, 117 A.D.3d 1582 (4th Dept. 2014) (error to deny motion for DNA testing where other evidence of defendant's guilt was not overwhelming). Accordingly, pursuant to CPL §440.30(1-a), DNA testing should now be ordered.

CONCLUSION

For all of the foregoing reasons, we respectfully request that the court issue an Order vacating Christopher's judgment of conviction, or, in the alternative, directing that an evidentiary hearing be held to determine whether an Order for vacatur should follow.

Further, we move for an Order directing that mitochondrial DNA testing be conducted on the human hair shaft that members of the New York State Police collected from the surface of the smashed alarm pad inside of 36 Brockley Drive, together with any such other and further relief the Court may find to be just and reasonable under the circumstances.

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Respectfully submitted,

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