SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
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PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION IN SUPPORT OF DEFENDANT'S MOTION TO VACATE THE VERDICT

- against -

PAUL CORTEZ, Indictment No.: 6433/05

Defendant.

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TONI MARIE ANGELI, an attorney at law duly admitted to practice in the Courts of the State of New York, hereby affirms that the following statements are true under penalties of perjury:

1. I am the principal of the Law Offices of Toni Marie Angeli, located at 585 Stewart Avenue in Garden City, New York. I represent Paul Cortez, the defendant in the above captioned case, and as such, I am fully familiar with the facts and circumstances detailed herein. The facts detailed in support of Defendant's motion are based on information and belief. The source of that information is review of the trial transcripts,[1], review of the transcripts of relevant court appearances,[2] review of the appellate briefs, review of the 1st Department and Court of Appeals decisions, review of trial counsel's case file, review of the pre-trial discovery, communication with witnesses, communication with trial counsel, communication with the prosecutor's office, conversations with the defendant and independent case investigation.

[1]Numbers proceeded by "TT" refer to pages of the trial transcript, which will be provided upon request.
[2]Transcriptions of court appearances referenced herein will be provided upon request.

FACTUAL BACKGROUND

2. At some point prior to 6:25 p.m. on November 27, 2005, Catherine Woods, a young woman earning a living by stripping and performing lap dances at Manhattan strip clubs, was murdered inside her apartment near the corner of 1st Avenue and East 86th Street in Manhattan. Woods shared that apartment with David Haughn, an aspiring white rapper from her home town in Ohio. Haughn, an ex-boyfriend Woods had broken up with over the summer, was moving back to Ohio. The prosecution pinpointed the time of death in this case at 6:25 p.m.[3]

3. The issue throughout the trial was the identity of Catherine Woods' killer. As the prosecution argued in his summation, it was either her ex-boyfriend, David Haughn or Paul Cortez, the defendant. (TT 2024: 22-23; 2038:22-24). No one witnessed the crime. The murder weapon was never found. No surveillance camera placed Mr. Cortez at the scene of the crime. No one interviewed by the police saw Paul at the location, much less with blood dripping from his person. A clutch of hair, with the roots still attached, was found entwined in the decedent's bloody fingers; that hair was dissimilar to that of Paul Cortez. At least three of those hairs were light in color, like Haughn's; Haughn's hair was never scientifically tested. A bloody impression from the sole of a shoe found on Woods' bed was left by a size 10 ½ shoe – the size both men wore. Haughn, who claimed to have left the apartment 20 minutes prior to calling 911, placed himself squarely *inside* the apartment between 5:46 and 6:23, the time four civilian witnesses heard screams and cries as Catherine was being murdered.

4. Although Paul would ultimately be charged and convicted for Catherine's murder, from the inception Haughn, who immediately fingered Cortez, was the identified as the prime suspect. It was only when a latent print mistakenly believed to have been impressed in a

[3]While ear witnesses detail the sounds of the homicide occurring between 5:45 p.m. and 6:25 p.m., in its opening the prosecution pinpoints the latest possible period of time, stating: "[b]y 6:25 or so in a manner [sic] of such [sic]a minute or two, he had killed Catherine Woods and then just as stealthily as he entered the apartment, he was successfully able to flee it without being seen." (TT 39:5-9).

matrix of blood transfer at the scene did not match Haughn that the focus shifted to Mr. Cortez. (Exhibit Q, DD5 62).

5. Mr. Cortez was ultimately arrested and tried, based on circumstantial evidence consisting of the high volume calling patterns between himself and Woods, cell site records placing him on the upper east side near the time of the murder, and a witness's assertion that Cortez owned and was wearing shoes that were possibly consistent with the size and style of the impression of a shoe's outer sole left in blood near the decedent's body. The only physical evidence argued to be directly incriminating was the latent fingerprint matched to Mr. Cortez that had been lifted from Wood's bedroom wall.

Early Investigation Implicates David Haughn

6. In the early stages of the investigation, the police focused on Haughn as a suspect; in fact, he was referred to as "the perp" in law enforcement notes. (Exhibit R, Latent Print Form; Exhibit S, law enforcement's notes). This uncertainty existed throughout the pendency of the case, persisting up until the time of closing arguments, at which time the prosecution had acknowledged to the jury, repeatedly, that it was either David Haughn or Paul Cortez who had committed this crime. (TT 2024: 22-23; 2038:22-24). Due to a series of faulty interpretations of evidence made by police investigators, however, the prosecution's focus zeroed in on the Defendant, ultimately resulting in his unjust conviction. But law enforcement's initial instincts were correct and, as evidence discovered by current counsel shows, David Haughn is undoubtedly the true perpetrator.

7. Haughn, who admitted he had become financially dependent on Woods, told the police he and Woods had broken up over the summer, he now slept on the futon couch, and they were no longer boyfriend and girlfriend. (Exhibit T, Casolaro Affirmation at ¶ 5). Woods, who

had been dating a plethora of men outside her relationship with Haughn, told friends that he had given her chlamydia, that supporting him with the monies she was receiving from her parents and earning as a stripper had caused her to go into debt, and that she was glad that David, who was depressed and prone to screaming at her and kicking things, would be moving back to Ohio. (Exhibit U, DD5 41; Exhibit V, law enforcement's notes; Exhibit W, DD5 34; Exhibit X, DD5 132 and notes). Importantly, based on the timeline provided by Haughn and evidence revealed by current counsel, it is beyond dispute that the only persons inside Apartment 2D at the time the homicide occurred were Haughn and Catherine Woods.

8. Between 5:45 p.m. and 6:23 p.m., a time when the prosecution concedes Haughn was in the apartment, four disinterested civilian witnesses located in vantage points both above and beside Catherine Woods' apartment heard sounds indicating that something dreadfully awry was going on. During that specific time period, which law enforcement confirmed by cable boxes, phone records and repeated interviews of all four ear witnesses, a loud male voice, a female's terrified screams, dogs barking, sounds of a scuffle, whimpering cries, a loud thud, and the screeching sound of furniture being moved were heard. Not one of these civilian witnesses was spoken to by the defense, nor did the defense bother to call them at trial to detail the extended disturbance occurring inside 2D between 5:45 and 6:23 p.m. on November 27, 2005.

9. At trial, the verified and corroborated testimony of Andrew Gold, the tenant living directly above Catherine in apartment 3D, established that the homicide had occurred *no later than* 6:23 p.m. Gold told members of law enforcement that at 6:15 to 6:18 p.m. he was watching T.V. when he received a call from his fiancée, and – *at the most 5 minutes into that call* - Gold heard a young woman scream in terror, a dog barking, scuffling, another scream and then a loud thud. Donna Propp, his fiancée, similarly heard this terrifying commotion through the phone line. Based on Gold's verified and corroborated account, Catherine's murder had

occurred no later than 6:23 p.m. (Exhibit Y, DD5s 11, 12 and 13).

10. Although not spoken to by the defense or called at trial, tenants Jessie Danzig and Amy Vandeusen, who lived in the second floor apartment adjacent to Catherine's, both told law enforcement that between 5:45 and 6:00 p.m. they heard dogs barking, a loud male voice, and the sound of screams coming from Catherine's apartment; the sounds were so concerning that they muted their television to hear better. (Exhibit Z, DD5 4 and accompanying notes).

11. Arousing further suspicion was Haughn's deceptive behavior when he encountered a neighbor near the entrance door to the apartment just before Haughn entered the apartment and claimed to find Catherine had been assaulted. Brad Stewart, a fellow resident and dog owner living in the building, told law enforcement about a relevant conversation he had with Haughn in the hallway just outside Catherine's apartment. Stewart confronted Haughn because, at some point after 6:00 p.m., he saw Haughn's black Labrador, shivering and quaking with fear, in the building's vestibule. Stewart watched the dog flee the building as a delivery man was entering, and followed the dog after it ran out the front gate and down 1st Avenue. Sometime after 6:30 p.m., Stewart had finally caught and leashed Haughn's dog, brought him back to the building, and went to knock on the door to apartment 2D, which was slightly ajar. Stewart knocked repeatedly on the door, but there was no answer. It was then that Stewart saw Haughn approaching and confronted him with the fact that his dog had been running loose on 1st Avenue. At that point, a curiously rattled Haughn told Stewart that he had been gone for twenty minutes and his brother was inside the apartment watching the dog. (Exhibit AA, DD5 129 and accompanying note). This was a blatant lie; Catherine Woods was lying dead or dying on the floor of the apartment and his then-thirteen-year-old brother, as Haughn well knew, was in Ohio. The defense did not speak to Brad Stewart nor was he called to testify at trial about the patent falsehood Haughn relayed about who was present inside the apartment at the time Catherine was

murdered.

12. At 6:57 p.m., David Haughn placed a strikingly monotone 911 call. Haughn told the EMS dispatcher that there was blood all over the apartment, that he couldn't get his "girlfriend to wake up," that he "doesn't know if she is alive," and that he saw "boot tracks on the bed." When the 911 dispatcher asked Haughn if Catherine was breathing, he stated he couldn't know because she was lying "face down" and he was "scared to look at her." When the 911 dispatcher asked Haughn to check for Catherine's pulse, he stated that he was "too scared" to do so. When the dispatcher asked Haughn to try to administer CPR, he stated he "didn't know how." In the midst of this life or death situation, David made a point of mentioning the presence of bootprints, as opposed to *footprints*, on the bed.[4]

13. After the 911 call, Haughn did not remain at Catherine's side to await medical assistance, instead he left her lying on the floor and went to the apartment of another 2nd floor resident, Julia Jeon. Haughn told Jeon his girlfriend wasn't breathing and he asked her to accompany him to his apartment. Haughn never asked Jeon whether she knew how to perform CPR. When Jeon entered the apartment she saw blood in the living area and that a mattress from within the bedroom was blocking the entrance to that room. Jeon immediately turned and exited the apartment without seeing Ms. Woods' body. As she was leaving, Haughn asked Jeon whether she saw "bootprints on the bed." (Exhibit BB, DD5 10). The defense never spoke with Ms. Jeon, nor was she called to testify about Haughn's curious disregard for Catherine's well-being, as well as his uncanny knowledge that it was a boot, as opposed to a shoe or a sandal, that had left an impression on the bed.

14. Additionally, although Haughn specifically told law enforcement he went to get the car from the next block at 6:40 p.m, stayed for a "few minutes" - "five minutes at the most,"

[4] The 911 recording will provided upon request

and upon returning placed *three* calls to Catherine, letting the phone ring and ring - phone records show Haughn placed only a single call - a call that lasted only seconds and never connected with Catherine's cell phone.[5] (Exhibit CC, DD5 128 ¶ 1 and Haughn's attached statement; Exhibit DD, Haughn and Woods' phone records; Exhibit EE, DD5 48 and Haughn's attached statement; Exhibit K, Daniel Affidavit). The significance of these missing cell phone calls, which were not addressed by the defense at trial, will be addressed below.

15. Of further import, upon law enforcement arriving at the scene, Haughn was curiously prepared to identify the Defendant as the possible perpetrator, as he had a bag containing one of Paul's music CD's conveniently stowed just inside the apartment. (TT at 1245).

16. Although inconsistencies and outright inaccuracies in Haughn's story continued to mount, the faulty interpretation of several key pieces of evidence led law enforcement to ignore their initial instincts, and instead build a case based on an alternate theory which proposed the Defendant as the perpetrator.

In Catastrophic Failing the Surveillance Footage Placing Haughn at Scene is Ignored

17. In the immediate aftermath of the homicide, law enforcement obtained footage from several surveillance cameras that captured individuals in the immediate vicinity of Catherine's apartment. For a brief period of time, law enforcement erroneously believed that the Defendant's image was captured fleeing the location of the homicide. This faulty information was reported by news outlets[6] and communicated to numerous witnesses by the prosecutor. (Exhibit O, Killebrew Affidavit; Exhibit P, Apodaca Affidavit). By the time of trial, however,

[5]Catherine didn't answer Haughn's call for two reasons: 1. her phone didn't ring, and 2. she was dead.

[6]See, Murray Weiss and Dan Mangan, VID I.D. IN STRIPPER SLAY - EX SPOTTED OUTSIDE HER PAD AT DEATH HOUR: COPS, N.Y. Post, December 2, 2005, p. 4.

the prosecution had conceded that Mr. Cortez's image was *not* on any of the surveillance footage. That surveillance evidence, to the detriment of the defense, would play little role at trial.

18. One of the surveillance videos obtained by law enforcement was from a camera at 345 East 86th Street, the building adjacent to the entrance to Catherine's apartment. The surveillance footage captures persons traveling out of Catherine's apartment and proceeding west on the sidewalk in front of the surveillance camera and toward the garage Haughn said he cut through when he went to get his car at approximately 6:39 p.m. Current counsel has reviewed the relevant surveillance footage and has found that, while it is true that Paul Cortez's image is *not* depicted fleeing the scene of the homicide, *alternate suspect David Haughn is clearly depicted leaving the scene after Catherine was murdered.*[7] (Exhibit C, Brunetti Affidavit).

19. By the time of trial, Haughn was vague and imprecise about the time at which he left the apartment. However, in Haughn's pre-trial accounts - to a neighbor, in repeated interviews with law enforcement, and in the statement he hand wrote on November 27, 2005 - Haughn repeatedly stated that he left the apartment about twenty minutes prior to making the 911 call – a time frame that places him inside the apartment at the time of the homicide.[8] Of import, Haughn detailed his exact movements during these crucial moments in time: he stated he left the building about twenty minutes prior to the 911 call, took a right when exiting the building, traveled west on 86th directly under the camera located 345 East 86th Street, then cut through the walkway between the Quik Park garage located at 305 East 86th Street which leads out on to East 87th Street where, according to Haughn, he went directly into 309 East 87th Street, where he was

[7]Further removed from the jury's consideration was the fact that at 6:57 p.m., in the immediate aftermath of Catherine's homicide, a man can be seen running away from the location of the homicide in what appears to be blood-spattered clothing. (Exhibit FF). As the defense never spoke to any of Catherine's friends or co-workers, we know they did not confront them with stills that may have identified this, or other known persons, moving away from the location after the homicide.

[8]While the Court of Appeals, in its rendition of the facts elicited at trial, detailed Haughn returning to the apartment just before 7:00 p.m. after an absence of about an hour, there was no trial testimony, or documentary evidence, that in any way supported this perplexing finding.

employed as a doorman. (Exhibit EE, DD5 48 and Haughn's attached statement).

20. The surveillance footage reviewed by current counsel corroborates the inculpatory timeline Haughn repeatedly presented to the police and a neighbor, it corroborates him leaving the apartment at approximately 20 minutes prior to calling 911, it memorializes him walking west on 86th Street toward the garage at 6:37 p.m., and it places him squarely inside the apartment at the time of, and beyond the time of, Catherine Woods' murder.[9]

21. Of additional note, the surveillance footage shows that the individual identified by current counsel as alternate suspect David Haughn was wearing a distinctively marked baseball cap when he left the murder location at 6:37 p.m., that cap can clearly be seen sitting on a desk inside the apartment on the video NYPD's crime scene unit took after they secured the scene. (Exhibit C, Brunetti Affidavit).

22. Of equally critical importance, Haughn is *nowhere to be seen* on the video exiting the apartment subsequent to entering at about 5:00 p.m. and being shown exiting at 6:37 p.m. Because the route he claimed to have taken necessarily had him walking directly under the camera at 345 E. 86th St., this not only contradicts Haughn's trial testimony but it directly calls into question the prosecution's cloudy trial assertion that Haughn left the apartment *prior to* the homicide occurring.

23. David Haughn was not confronted with, and the jury did not see, the surveillance footage. This demonstrative evidence, consistent with Haughn's original timeline, shows that he left the apartment at 6:37 p.m., wearing a baseball cap later shown sitting on a credenza inside the apartment, nearly fifteen minutes *after* Catherine had been murdered.

[9] The manager of the coop building from which the surveillance footage was procured, prosecution witness Michael Reilly, testified about the security system that captured the surveillance footage. Reilly testified that the cameras are connected to a computer, which provides continually updates to the time and date legend via the internet. (TT 418:13-15; 425:3-14; 428:3-14).

In Catastrophic Failing Defense Fails to Correct Faulty Interpretations of Blood Evidence

24. In the early stages of the investigation, prior to law enforcement's misapprehension about Paul being on the video footage being corrected, that initial error was compounded by law enforcement's mistaken belief that a bloody handprint could be seen on the victim's bedroom wall and their misguided conclusion that a bloody fingerprint, matching the Defendant, was found within that blood smear. The prosecutor communicated this faulty information to potential trial witnesses and this erroneously interpreted evidence became the prosecution's central focus at trial. (Exhibit O, Killebrew Affidavit; Exhibit P, Apodaca Affidavit). In its closing, the prosecution calls the "bloody finger" print the "most important piece of evidence" in the case and conceded that the People lacked proof beyond a reasonable doubt without it. (TT 1947:8-10; 2020:11-15).

25. Although testimony from a forensic expert could have affirmatively established that the latent fingerprint lifted from the wall was *not left in blood,* trial counsel retained no expert to examine and evaluate the blood smears and took few steps to correct the prosecution's faulty position with respect to this critical piece of evidence. As will be discussed below, this question could have been definitively resolved by the simple expedient of subjecting a ridge of the fingerprint to DNA testing, which was done by neither the prosecution nor defense. Instead, the defense chose to adopt the prosecution's faulty proposition about there being a *patent print* and asserted an off-putting, unlikely and unnecessary defense: that Paul's "bloody fingerprint" had been placed on the wall during a sexual exchange when Catherine was menstruating.[10]

26. While the trial testimony regarding the fingerprint recovered was erratic and inconsistent, it is beyond contest that the fingerprint was a latent and the non-existent palm print

[10]Paul was in Catherine's apartment about ten times between August and November of 2005. (TT at 1637). The Wednesday before Thanksgiving, he picked her up there and he brought her to watch him perform at one of his band's performances. (TT at 1635-37, 1678-84).

impression was a figment of the imagination of an over-zealous crime scene technician. As will be discussed below, numerous experts for current counsel have opined that the erroneous interpretation of the blood evidence that formed the basis for prosecuting Mr. Cortez was dead-on wrong.

Cell Phone Data Falsely Interpreted In Manner That Implicated Paul Cortez

27. Numerous other very serious missteps plagued the prosecution and defense of this case. For instance, at trial, the prosecution's case rested circumstantially on their interpretation of cell phone records which showed, according to them, the high volume of unanswered calls Paul placed to Catherine's cell phone and Paul's supposed presence in the area on the day of the homicide. At trial, the prosecution asserted that the numerous unanswered calls fueled Paul's anger over Catherine's rejection and that Paul's cell phone pinging off a T-Mobile site numerous avenues and streets away from Catherine's apartment placed him at the scene of the murder. (TT 44-46; 1968-1978).

28. Although granted funds for a cell phone expert on September 20, 2006, the defense never consulted with one. Upon review of the cell phone records in consultation with a cell phone expert, current counsel has learned that the majority of the calls to Catherine which appear on Paul's phone records, but do not appear on Catherine's phone records, are non-completed calls, suggesting an inadvertent hit of the speed-dial or re-dial feature. Further, the cell phone expert indicated that had the defense obtained the official cell cite locations for T-Mobile in 2005, they could have ascertained, with certainty, Paul's possible range of location when his cell phone hit off a tower site located blocks south of the crime scene at or around the time of the homicide. Upon review, three out of four of the completed calls between them on November 27, 2005 were placed by Catherine, not Paul. Consultation with a qualified expert has

established that Paul's range of location does not place him at Catherine's buiding, and moreover, official cell site records may establish that his possible range of location *could not* place him at the location of the homicide.[11] (Exhibit K, Daniel's Affidavit).

29. At trial, the jury was never presented with testimony from an expert to accurately interpret the cell phone evidence, and as a result, this circumstantial evidence was presented to the jury in a manner that tended to inculpate, as opposed to exculpate, the Defendant. The failure to critically evaluate and effectively explain this exculpatory evidence was inexcusable.

Video Footage and Photographic Stills that Inculpate Haughn Are Ignored

30. Regrettably, neither the defense nor the prosecution linked the surveillance video and cell phone records together; those records establish that Catherine was placing a call to Paul in Haughn's presence, just as they were walking together towards her apartment door. The failure to subject the cell phone and video surveillance evidence to critical review, and thereby establish that not only was Catherine flaunting her communications with her lover at 4:59 p.m., but also that Haughn can be seen leaving the apartment building at 6:37 p.m., well after the homicide had occurred, was gross negligence. (Exhibit C, Brunetti Affidavit; Exhibit GG, Catherine's phone records).

31. Further, the defense failed to compare the surveillance footage of Haughn entering the apartment at 4:59 p.m. against the photographs law enforcement took of Haughn at the precinct later that night. Such comparison makes clear that Haughn's assertion to law enforcement that he was wearing the exact same clothes at the precinct as he had put on at 4:30 p.m., and the prosecution's assertion to the jury that Haughn had not changed his clothes that

[11] At trial, T-Mobile Agent Gabreal Dominguez testified for the People. Intriguingly, on cross-examination, apparently reading from such a document, he testified *that the 6:33 call went through a cell tower on 95th St*. "It says 18:33, First Avenue a/k/a 339 East 95th Street." (TT 611:23-24). Due to the failure of trial counsel to procure the cell site locations, current counsel can only wonder what Dominguez and the People were privy to that she is not.

day, were inaccurate. Had trial counsel critically examined these images, which depict Haughn wearing a white shirt when entering the apartment at 4:59 p.m. and a black shirt when photographed later at the precinct, they would have objected to this demonstrably false assertion. (Exhibit FF, DD5 48; Exhibit HH, street and precinct images).

32. Inculpating video footage, which places Haughn inside the apartment at the time of the murder, and pictures showing that Haughn changed his clothes after the murder, support a finding that he is the true perpetrator. This evidence should have been developed by the defense and presented at trial. Inexplicably, this did not happen.

Defense Fails to Contact or Call Civilian Witnesses That Disprove Prosecution's Theory

33. Although the prosecution adopted the theory that Paul's unrequited affections for Catherine, as opposed to David's frustrations with his lascivious ex-girlfriend, were the motivation for the crime, law enforcement had amassed a multitude of evidence that tended to disprove this position. While Catherine did not tell Paul that her ex-boyfriend was at her side when she phoned Paul at 4:59 p.m., the Defendant told law enforcement that he detected something off in her voice and he became somewhat concerned when she abruptly ended their conversation, because David had been violent with her in the past. (TT 1714-1716; 1570; 1785-1786). Further, prior to trial, law enforcement spoke with numerous disinterested civilian witnesses, some of whom detailed how Catherine and Haughn's relationship had "gone bad." (Exhibit W, DD5 34; Exhibit U, DD5 41; Exhibit V, law enforcement's notes; Exhibit X, DD5 132 and notes). In particular, these witnesses detailed Catherine's continuing rejection of Haughn, whom she repeatedly kicked out and wouldn't have sex with, Haughn's anger over Catherine's lifestyle, and Haughn's pattern of screaming, yelling, kicking and drugging. Further contradicting the prosecution's theory, several civilian witnesses reported seeing Paul and

Catherine together, in a romantic context, just days before the homicide. Civilian witnesses who saw Paul and Catherine together at *his place of work,* hugging and kissing, detailed an amorous exchange mere days before the homicide which became so heated that an uncomfortable gym member filed a complaint. (Exhibit II; DD5 108; Exhibit JJ, Equinox Comment Card). The defense never spoke with, let alone called to the stand, any witnesses to Catherine's passionate exchange with Paul. The defense's failure to investigate and present evidence showing that Haughn was aware of Catherine's relationship with Paul, that Haughn was angered by Catherine's lifestyle, and that the relationship between Catherine and Paul was most certainly ongoing - in that she was coming to his place of work, making the majority of the phone calls, and returning his romantic affections - was an unjustifiable failure.

34. In a case where even the prosecution recognized in its summation that "it's either David or the defendant," (TT 2038:22-23), the defense had an obligation to pursue evidence that established Haughn's motive for the crime and undercut the motive the prosecutor postulated for Paul. This did not happen.

Trial Counsel Failed to Pursue and Develop Investigation of Alternative Suspects

35. Although Catherine's friends would inform the police that she was involved with various men, and that some of those relationships were disturbingly volatile, from the inception the investigation focused on the theory of a love triangle involving Woods, a non-monogamous sex worker, Haughn, her depressed ex-boyfriend, and Paul Cortez, one of the many men she had been intimate with over the prior year. Trial counsel never spoke with Catherine's friends, tenants at the building, or co-workers from the strip club to identify any of the other men she was dating. Of further consternation, even though the defense was provided DD5s in which witnesses gave descriptions of other men Catherine had been seeing, and having problems with,

the defense failed to contact those witnesses or undertake any investigative measures to follow up on those leads. (Exhibit KK, DD5s 32, 33, 36, 42 and 144; Exhibit W, DD5 34; Exhibit U, DD5 41; Exhibit V, law enforcement's notes; Exhibit X, DD5 132 and notes).

Trial Counsel Failed to Obtain Other Relevant Surveillance Footage

36. Contrary to the surveillance footage which places David Haughn inside the apartment at the time of the homicide, it is conceded by the prosecution that there are no witnesses nor any surveillance footage which placed Paul Cortez at 355 East 86th Street on November 27, 2005. Of stunning import, in DD5 95, law enforcement details surveillance footage capturing images of Paul Cortez at a Duane Reade located at East 106th Street subsequent to the homicide. (Exhibit LL, DD5 95 and notes). The defense never obtained that surveillance footage, and as a result, the jury never saw footage depicting a presumably calm and *non-bloody* Paul Cortez, innocently shopping at a store located close to his home, and far from Catherine's, shortly after the homicide.

37. While it appears likely that the defense never reviewed the surveillance footage it received, it is certain the defense never subpoenaed any footage, nor did they obtained from the prosecution additional footage referenced in DD5s 18, 20, 21, 23 24, 25, 101 and 142. Clearly footage showing what occurred in the time period just prior to and just after the homicide would have been relevant to investigating the case and preparing a defense. In a case when even the prosecution recognizes that "it's either David or the defendant" (TT 2038:22-23), failing to seek out and put before the jury incontrovertible demonstrable evidence that inculpates Haughn by placing him in the apartment at the time of the murder and exculpates Mr Cortez by showing him at a location far from the homicide was gross negligence that, standing alone, constitutes ineffective assistance of counsel.

Law Enforcement's Processing of the Crime Scene

38. At 7:07 p.m. on November 27, 2005, paramedics and law enforcement arrived at the scene. At that time, Woods was still lying alone on the floor of her apartment and Haughn was stepping out to meet the first responders as they were about to ring the buzzer to the front gate. Haughn, who appeared calm to Officer Sheedy, told paramedic Warren Lau "I don't think she's breathing. I think she's dead." (TT at 178). David escorted them up to apartment 2D, opened the door and pointed them to the bedroom area. One of the paramedics climbed over the bed and, after determining that Catherine was dead, the crime scene was secured.

39. The scene of the homicide was documented by Crime Scene Unit Detective John Entenmann; he arrived at 8:50 p.m. and spent the next 9 ½ hours processing the crime scene. (TT at 285:1 and 358:2). Entenmann returned to the secured apartment two days later, on November 30, 2005, to conduct further tests and gather additional evidence. Entenmann testified to his findings at trial. (TT 282-322; 354-416).

40. Entenmann detailed the forensic evidence surrounding Woods' body as it lay prostrate in a pool of blood on the bedroom floor of her apartment in both photographs and video runs. Entenmann testified that it was absolutely clear there had been a struggle.[12] (TT at 411).

41. There was copious blood spatter on each of the bedroom walls, on and behind the bedroom furniture; the spatter extended all the way out of the bedroom and onto the north living

[12]Dr. Michael Greenberg performed the autopsy on Catherine Woods. She had suffered blunt force trauma injuries and incised lacerations to her neck, her hands, her arms, face, extremities on the rights side, and torso that he determined were consistent with defense wounds sustained in the struggle and lacerations inflicted by a weapon with a sharp edge. The cause of death was "incised wounds of the neck with transection of the larynx and jugular veins and partial transection of the carotid artery." (TT 1278-86; 1305; 1320:22-1321:14). In the prosecution's closing, he describes in detail the numerous defensive wounds that cut into Catherine's arm, face and straight into her mouth.

room wall. Nine blood samples, as well as nine corresponding control samples, were collected from various locations in the apartment, such as from the exterior molding on the doorknob area of the door jamb leading into and out of the bedroom, from the doorjamb and molding on the front door, from the victim's back, from the bathroom toilet, from the bookshelf and broken guitar in the bedroom, from the south living room wall, and from the east bedroom wall. (TT 287-315).

42. There was, according to Entenmann's faulty perception, a visible blood transfer leaving the impression of a hand on the wall. Also visible were blood transfers of footwear impressions leading in differing directions on the decedent's bedspread and both the top and fitted bed sheets, additionally present on the bedding were small and medium blood spatter. (TT 302-303). Additional footwear impressions were found on the floor in the bedroom, one on the living room floor just at, and directed into, the entrance to the bedroom, and one on the back of the decedent's shirt. (TT at 295). Various items, such as the broken guitar, the bed sheets and the victim's clothing, were taken into evidence.

43. In the course of processing the crime scene, various areas throughout the apartment, such as doorknobs, bottles, and everyday personal effects, were dusted and processed for fingerprints; none were recovered. A possible print was recovered from the base of the broken guitar, but, according to law enforcement, that print turned out to be of no value and tested negative for blood. The defense never obtained images of that print, nor subjected it to examination.

44. Along with the blood spatter across all the walls and on and behind the furniture, blood transfers were visible on the west wall, on the north wall, and on the shelf area of a bookshelf inside the bedroom. Possible blood transfer could also be seen on a doorjamb leading into the bedroom, on the interior molding of the front door to the apartment and under the toilet

seat.

5. When Entenmann returned to the apartment on November 30, 2005 he treated the entire kitchen, bathroom and hallway in front of the door to the apartment with leucocrystal violet, a chemical that reacts with the hemoglobin present in blood, in an attempt to ascertain indications of a clean up. The chemical reacted in several areas: under the toilet seat, in the tub, and at the front entrance door to the apartment. (TT 360-363). At that time, a portion of the sheet rock from north bedroom wall which contained what Entenmann had perceived to be a handprint, as well as an area of the bedroom flooring containing a footwear impression, were cut out and sent to the NYPD Forensic Lab to be further enhanced and processed. (TT 367-73; 377-381).

Mischaracterized Blood Evidence Left Unexamined, Unchallenged and Unclarified at Trial

46. As referenced above, when processing the crime scene, law enforcement's mistakenly believed that a bloody hand and fingerprint could be seen on the victim's bedroom wall. That erroneous and forensically unsupported position, left effectively unchallenged by the defense, was the lynch pin of the prosecution's case against Mr. Cortez.

47. Entenmann's convoluted and misleading trial testimony about seeing a patent handprint in blood transfer visible on Catherine's bedroom wall was central to the prosecution's theory that a bloody fingerprint from Paul Cortez was found within the blood matrix of that handprint.[13]

48. The prosecution's entire case was built around the supposed bloody fingerprint. In summation, the prosecution devotes 38 pages to contending that there is a bloody fingerprint

[13] See Exhibit MM, Felony Complaint: Detective Entenmann asserts he saw a "partial hand impression in blood on wall," Detective Gonzalez asserts there is a "partial hand impression in blood" in bedroom.

in existence, it was visible to the naked eye, and had been placed on the wall at the time of the homicide. According to the prosecution, "the defendant is the killer because he is there putting his fingerprint on the blood at the same time the blood is being thrown on the wall." (TT 1947-1985; 1963:16-18; 1967:15-16).

49. The prosecution's position that there was a "bloody" print, and the defense's decision to adopt the erroneous proposition and assert that it had been left in menstrual fluid, is utterly confounding given that any scientific basis for categorizing the print as "patent" was contradicted by the forensic witnesses for the prosecution. Alex Chacko, a forensic examiner from the NYPD, testified at trial about examining the piece of sheet rock thought to contain possible hand transfers. (TT 433-463). Upon examining the sheetrock in a laboratory setting, first with the naked eye and subsequently under a high definition light source, Chacko determined that there were no patent prints (prints deposited in the matrix of another substance). It was only when Chacko applied amido black, a chemical compound that reacts with various proteins, such as food or bodily fluids, that a latent print was discovered. Chacko testified to taking photographs of one latent print, enhancing the image, and copying the enhanced image onto a CD. Chacko did not characterize the transfers as a handprint.

50. Also absent from Chacko's testimony was any mention of the other prints or partial prints that were present on the sheet rock. The defense did not confront Chacko with, nor call an expert to identify, the other prints that were present on the sheet rock. Current counsel has consulted experts who, had they been called to testify at trial, would have explained to the jury that amido black reacts with numerous proteins, found in human body fluids such as semen, saliva, urine, as well as cow's milk, eggs or animal urine. Visualization with amido black informs only that the fingerprint was either deposited with proteins present or that proteins were layered on top of the fingerprint after its deposit. Amido black is not capable of providing

confirmation for a specific chemical; it *does not indicate*, and *cannot indicate*, the presence of human blood in the fingerprint. (Exhibit G, Harris Affidavit). Although granted funds, trial counsel failed to consult with or call such an expert at trial and, as a result, the prosecution felt free to postulate his own unsupported theory that the print was left in blood and confuse the jury. A forensic chemist could have, and should have, refuted the prosecutor's faulty prepositions with respect to the fingerprint being deposited in blood; the failure to put on evidence to correct this erroneous line of reasoning, standing alone, constitutes ineffective assistance of counsel at critical stages of the proceedings.

51. Anabelle Branigan, a fingerprint technician with the NYPD, testified about the comparison she conducted in relation to the enhanced image of the latent identified and photographed by Chacko. (TT 524-568). Branigan compared the enhanced image containing the singular latent print to known fingerprints from Paul Cortez and Haughn. Branigan did not testify to any of the other prints, or partial prints, being present on the sheetrock. Branigan conceded that latent prints, which require a chemical process to be become visible, cannot be dated. It was Branigan's conclusion that the latent she was provided matched the left index finger of Paul Cortez's right hand. Branigan did not document the basis for her conclusion at the time she conducted the examination. The defense did not confront Branigan with, nor call an expert to explain to the jury that, the standards required to make a fingerprint identification in 2005 had not been met in the case at bar.

52. Prior to the January 22, 2007 date set for trial, a forensic fingerprint examiner for the defense, Kenneth Eng, was asked to conduct a comparison of the enhanced image of the latent against the known fingerprint of Paul Cortez. The defense did not ask Eng to examine the sheetrock nor to opine on whether the print was latent and had been deposited prior to overlay by the blood transfer and spatter. Further, the defense did not obtain, let alone ask Eng to review,

the underlying notes of NYPD's forensic examiners Chacko and Branigan. Instead, Eng solely conducted a comparison between the enhanced image of the latent recovered from the sheet rock and the known fingerprints of Paul Cortez.

53. Mid-trial, on January 29, 2007, a week after the scheduled start of trial on January 22, 2007, Attorney Florio contacted forensic print examiner Kenneth Moses and asked him to review the enhanced images of the latent against known prints from Paul Cortez and provided photographs of the area of the bedroom wall that depicted the blood transfers for that purpose. Upon examination, Moses told Florio that an examination of the actual sheetrock was needed to investigate the presence of ridge detail from other prints and to determine whether the print identified by the prosecution had been placed on the sheetrock *before* the blood matrix. Moses never heard from her again. Attorney Florio never returned his calls, never responded to his invoice, and he was never compensated for his work. (Exhibit D, Moses Affidavit)

54. Current counsel has had several experts evaluate the supposed patent blood transfers from a hand as well as the fingerprint that are of paramount importance in this case. What experts for current counsel make categorically clear is that the blood transfer on the sheetrock was *not a handprint* and that print is latent*, not patent*. Moreover, experts for current counsel have determined the existence of additional ridges and print detail suggesting *other prints or partial prints* that are present in the overlay of blood that had been deposited *on top of the latent.*

55. Had trial counsel consulted with or called such experts, they would have been able to definitively refute the prosecution's theory of a hand impression on the wall, show that there was no evidence that Paul Cortez's fingerprint had been deposited in blood, and, moreover, show the existence of additional fingerprints, from an unknown source, which had been left in the overlay.

56. The failure to consult, follow up with, and call at trial, experts that could explain this critical piece of forensic evidence, and thereby correct misapprehensions of such magnitude, is shocking. Had the defense done so, they could have not only demonstrated the falsity of the prosecution's theory, but have fully discredited the only piece of forensic evidence alleged to link Paul to the crime scene. The failure to have done so is a degree of negligence that rises to malfeasance.

Hairs Clutched in the Decedent's Death Grip Were Not Subjected to DNA Analysis

57. Numerous hairs were found on Catherine Woods' body. Forty hairs were retrieved from her person and twelve were found, some with the roots still attached, entwined and clutched in her fingers. As testified to at trial, a hair and fiber examiner from the NYPD crime lab, Valerie Wade-Allison, compared the hair evidence recovered from Catherine to known hair samples from Catherine and Paul. (TT 1093-1124). None of the hairs were similar to Paul's. While a few of the hairs showed some similarities to Catherine's, Wade-Allison was unable to assert that they were a match. Wade-Allison was not provided, and did not conduct a comparison with, any hair samples from Haughn.

58. Although hair that contains the root can be identified through nuclear DNA testing, and hair without a root can identify anyone maternally related to the donor by mitochondrial DNA testing, the prosecution subjected none of the hairs recovered to DNA examination. Although trial counsel was granted 18B funds for a forensic pathologist and a DNA expert, no such expert was hired by the defense. Here, where the evidence had already established that none of the hairs were similar to Paul's, failing to take the minimalistic step of subjecting hairs ripped out by the roots, which were found in the bloody death grip of the victim, to DNA analysis is an omission without justification and, standing alone, is a wholesale failure to

provide effective assistance of counsel at a critical stage of the proceedings.

Irrelevance of Shoeprint Impression Not Made Clear by the Defense

59. At trial the prosecution attempted to link Paul to the crime through the bloody shoe impressions found in the decedent's apartment. The prosecutor called William Bodziak, a forensic examiner, to address the footwear impressions. (TT 722-774). Bodziak testified that the footwear impressions left on the bedding, clothing and floor in Ms. Woods' apartment were left by the outer sole used on a Sketcher shoe in a size 10 ½ - a common size worn by both Haughn and Cortez. Testimony elicited at trial established that, in the year 2005 alone, that particular outer sole was utilized on 26 different styles of Sketcher shoes, which were sold on line and in over 250 retail locations in New York City. In fact, one of the New York City EMS workers who responded to the scene on November 27, 2005 was wearing a Sketcher shoe with that very same outer sole.

60. Although the prosecution cleverly implied to the jury that the outsole print had been left by Mr. Cortez, in fact there was no forensic evidence establishing that Paul was wearing the particular shoes that left impressions in Catherine's apartment. Although the defense was granted funds for a footprint expert, they did not have any of the shoe evidence reviewed by, nor did they present testimony from, any expert to clarify for the jury the lack of relevance inherent in this specious piece of evidence.

Unprepared Counsel Try Case With Contempt Finding and Under Felony Indictment

61. Although trial was to begin on January 22, 2007, Miranda failed to appear until the fourth day the case was called for trial; Florio didn't show until the fifth day. The previous fall, on November 20th and 21st of 2006, suppression hearings were conducted in front of Judge

Berkman. Those hearings took place nearly a year after the November 27, 2005 murder. It was at the conclusion of those hearings that Judge Berkman set a firm trial date for January 22, 2007, two months thence. At that time, Attorney Miranda, who had been retained in March of 2006, protested that she would require additional time because she *had not yet contacted any experts in relation to the case*. Judge Berkman denied Miranda's request, with the caveat that trial counsel should come before the Court prior to the Christmas holidays should any outstanding discovery issues come up.

62. Miranda had no further communications with the court until Friday, January 19, 2007, the last business day before trial began. At that time, Attorney Miranda indicated she would not be ready to start trial because, according to her, the defense experts did not have their conclusions ready and she needed to discuss the fingerprint and DNA evidence with her client. The Court clearly expressed irritation, especially when the prosecutor indicated that the defense had received the fingerprint evidence over the summer and the DNA evidence no later than October of the prior year. Judge Berkman directed counsel appear on Monday, January 22, 2007 to begin trial.

63. On Monday, January 22, 2007, trial on the matter of People v Paul Cortez was on the calendar; Attorney Miranda and Attorney Florio failed to appear.

64. On Tuesday, January 23, 2007, again the matter of People v Paul Cortez was calendared for trial. Once again, neither Miranda nor Florio appeared. At that time, in an extended colloquy, Judge Berkman detailed the Court's frustrated attempt to serve on Order to Show Cause to compel Miranda's appearance upon her office (Miranda's officer manager would not accept service), detailed that receipt of the forensic discovery was documented far in advance of trial, and recounted Miranda's past history of not appearing in court on scheduled trial dates before Judge Berkman. Berkman held Miranda in contempt and imposed a fine of $1,000.

65. On Wednesday, January 24, 2007, again, neither Miranda nor Florio appeared for trial. The court indicated it had received a phone call from someone identifying herself as Laura Miranda who said there was an illness in her family.

66. On Thursday, January 25, 2007, although Florio still hadn't appeared, Miranda, herself represented by counsel, finally appeared in court. Attorney Feldman was there to represent Miranda on Berkman's contempt finding two days prior. Feldman informed the court that Miranda was not ready to proceed because she was facing sanctions from the court. He detailed that Florio was not present because she was attending a funeral, and that Defendant Paul Cortez did not want to proceed for two reasons: 1) because he was considering terminating Miranda due to negative publicity generated over her failure to appear on the first three days of trial, and 2) because he wanted his entire legal team, which included both Florio and Miranda, present at trial. In a fairly extensive colloquy, Berkman detailed the reasons for denying any continuance, the essential gravamen being that since all the scientific evidence had been made available to the defense since October of 2006, and a firm trial date was set two months prior, without a specific showing of the necessity to subject any evidence to further testing, there was no basis for finding that justice required anything other than an immediate trial. With respect to the assertion that the Defendant *may* want to terminate counsel, Berkman indicated that she would address the issue should it arise, but not delay the case for him to review the media reports while he was "just thinking about it." Most notably, it was in this proceeding that the trial judge first mentioned, but did not address with Paul Cortez, the "rather curious situation" created by Florio representing Paul given that she was under indictment, and facing prosecution in that very same county, for narcotics trafficking. Although Florio's pending indictment and Miranda's contempt finding presented actual conflicts, without further ado, the trial court ordered cousel to commence trial and called in a jury panel.

67. On September 15, 2005, two months prior to Catherine Woods' murder, Dawn Florio had been arrested in New York County for smuggling contraband in to a client incarcerated on Riker's Island.[14] [15] On March 24, 2006, on or about the time Florio and Miranda were retained, the New York County District Attorney's Office indicted Florio for, *inter alia*, felony sale of a controlled substance and felony introduction of dangerous contraband into a prison. People v Florio, No. 01711-2006. At the time of trial, Florio's felony charges were being prosecuted by the very same District Attorney's Office that was prosecuting Paul Cortez.

68. It wasn't until mid-trial, after Florio had given the defense's opening statement and crossed three of the five witnesses who had testified, that Berkman hurriedly conducted a cursory, insufficient and invalid Gomberg inquiry. See, People v. Cortez, 22 N.Y.3d 1061, 1067 (2014); TT 271:20-272:13).

69. At trial, the trial court committed further error by allowing the prosecution to admit inflammatory poems, songs, drawings and entries from Paul's diaries, some of which had been written six years before the murder. See, People v. Cortez, 22 N.Y.3d 1061, 1072 (2014). On February 15, 2007, Paul Cortez was convicted on one count of murder in the second degree in violation of P.L. 125.25. On March 23, 2007, he was sentenced to a term of imprisonment of 25 years to life.

70. The indictment against Attorney Florio was dismissed and sealed.

First Department and Court of Appeals Encourage Motion for New Trial

71. On direct appeal to the First Department, appellate counsel argued that Mr. Cortez

[14] See, www.nytimes.com/2005/9/17/nyregion, Andrew Jacobs, Visit to Jailed Client Ends in Lawyer's Arrest, N.Y. Times, Sept. 17, 2005.

[15] Florio is no stranger to imbroglios with criminals. In 2000, Florio, once a senior prosecutor, was reportedly fired from the Bronx DA's Office when it was discovered she provided a bogus alibi to help a felonious paramour charged with burglary. See, Inner City Press Bronx Reporter, Archive #2 2000: April- July 17, 2000.

had been deprived of his right to counsel as to both of his attorneys, that the trial court had made erroneous evidentiary rulings, and that the prosecution had made improper assertions in summation. As to the conflict of interest, Mr. Cortez asserted that Ms. Florio had represented him while laboring under a conflict rooted in her being contemporaneously investigated and prosecuted by the same office prosecuting him. Ms. Miranda had antagonized the court by failing to appear for the first three days of trial, resulting in her being found in contempt. Among else, Mr. Cortez had pointed to the failure to investigate as a prejudicial consequence of the conflicts. The First Department found that only Ms. Florio had a conflict, that Mr. Cortez had validly waived it, and that there was no evidence of prejudice. People v. Cortez, 85 A.D.3d 409, 409-10 (2011). Significantly, the court found that "the existing record is insufficient to show that the conduct of the defense was affected by either or both" conflicts, effectively inviting their exploration on a § 440.10 motion. (Id. at 410). As to the evidentiary questions, the court rejected the challenge to admission of entries from Paul's journals, in part because those objections were unpreserved. Id. at 411. Similarly, a challenge to the undue restriction of his cross-examination of an eyewitness who failed to identify him in court was rejected because his attorneys failed to make an offer of proof and acquiesced to the ruling, thus failing to preserve it. Id. Again, as to claims of impropriety in the prosecutor's summation, only one was found to have been "arguably" preserved. Id. The rest were forfeited by "failing to object, by making general objections or objections that did not articulate the grounds asserted on appeal, or by failing to request further relief after the court took curative actions." Id. Although the First Department stated largely conclusory alternative holdings, finding no merit in the claims, and, at the most, harmless error, it bears notice that the principal finding of the court as to most of the issues other than conflict was that Mr. Cortez's attorneys had failed to preserve his arguments.

72. Having been granted leave to appeal to the Court of Appeals, Mr. Cortez re-urged

the conflict issue, and the erroneous admission of the journal entries. Although the Court of Appeals denied relief in the end, both issues gave pause, and the court stated that they were "substantial and possess a fair measure of merit." People v. Cortez, 22 N.Y.3d 1061, 1063 (2014). Specifically, the court found that Mr. Cortez's waiver of the conflict was invalid, as the Gomberg "colloquy between defendant and the trial court simply does not provide the necessary assurance that [Ms. Florio's] conflict and its risks were understood and freely assumed by" Mr. Cortez. Id. at 1066. The court further agreed with Mr. Cortez that Ms. Miranda's relationship with the court was already so fragile that she "would not have been anxious to incur additional judicial displeasure" by explaining the conflict thoroughly to Mr. Cortez, nor to lose Ms. Florio's assistance mid-trial. Id. at 1067. "There is, in short, serious reason to doubt whether [Miranda's] advice...was the product of independent and disinterested professional judgment." Id. Importantly, the court's ultimate inability to find that the conflict "operated on the defense" was linked to the fact that the evidence *in the record* failed to demonstrate this, again, effectively inviting §440 review. Because "the record shed no light" on whether deficiencies were traceable to the conflict, the ineffective assistance claim, "*as it is now presented*," could not be granted. Id. at 1068-69 (emphasis added). On the Molineux question, the court found that it was error to admit the contested journal entries, and that "it would not be realistic to say that the introduction and exploitation of this inflammatory evidence was benign." Id at 1072. However, the court could not find that it was "outcome determinative" either, in light of the forensic evidence linking the defendant to the crime. Id. Importantly, the court recognized that this argument might fail if the forensics were properly brought into question, in a way not evident from the record, and now explicitly invited pursuit of the issue under §440. "It may be...that the probative value of the latent print...should not have been as great as it was made to seem at trial...If there is a claim that defense counsel were ineffective for failing to pursue an available and potentially

decisive line of defense more aggressively challenging [it], that would be appropriately raised" on a §440 motion. Id.

73. This statement of facts is incorporated by reference into each proceeding section of this affirmation.

GOVERNING FEDERAL AND STATE LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL AND ITS APPLICATION TO THIS CASE

74. A review of the relevant case law demonstrates that Mr. Cortez was not afforded constitutionally effective assistance of counsel under either New York State's Constitution or the United States Constitution. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 6 of the New York State Constitution guarantee a defendant's rights to due process, including effective assistance of counsel. Movant's conviction was obtained in violation of these constitutional rights. (Exhibit A, Ruhnke Affidavit; Exhibit B, Yaroshefsky Affidavit).

75. The Supreme Court of the United States has outlined the standards for determining ineffective assistance of counsel in two cases decided the same day, United States v. Cronic, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 668 (1984). **"**An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland at 685. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland at 686.

76. Ordinarily, a defendant must satisfy a two-pronged test for determining ineffective assistance: a showing (1) that counsel's representation fell below an objective standard of

reasonableness measured under prevailing professional norms, Strickland, 466 U.S. at 688, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, Id. at 694.

77. To make a showing for the first prong, where a single error is of sufficient magnitude, even "a single lapse by otherwise competent counsel" can "compel[] the conclusion that a defendant was deprived of his constitutional right to effective legal representation." People v. Turner, 5 N.Y.3d 476, 478 (N.Y., 2005). Likewise, even when no single error rises to Strickland's standard of faulty representation, the cumulative effect of numerous lesser failures may do so. Eze v. Senkowski, 321 F.3d 110, 135-36 (2d Cir. 2003). The second prong, under federal standards, is a prejudice requirement, and ordinarily requires a showing of reasonable probability of a different outcome under the particular facts and circumstances of the case, had the lawyer not made the errors involved. Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012).

78. However, in certain circumstances, prejudice is legally presumed under federal constitutional law, where it "is so likely that case-by-case inquiry into prejudice is not worth the cost." Strickland, at 692, quoting United States v. Cronic, at 658, 659, and n. 25. For instance, prejudice is presumed "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." Mickens v. Taylor, 535 U.S. 162, 167 (U.S. 2002). "In circumstances of that magnitude, ...we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." Id. (internal cites and quotes omitted)

79. Two such circumstances are relevant here. First is the circumstance when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Cronic at 659. "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.... [I]f the

process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." Cronic at 656-57. ….

80. Secondly, circumstances of that magnitude may also arise when the defendant's attorney actively represented conflicting interests." Mickens v. Taylor, 535 U.S. 162, 167 (U.S. 2002).

81. Under New York State constitutional law, defendants are afforded protection of their right to effective assistance of counsel that is "far more expansive than the Federal counterpart." People v. Bing 76 N.Y.2d 331, 339 (N.Y. 1990). Here, the totality of "the evidence, the law and the circumstances of a particular case" are examined to discover whether or not "the attorney provided meaningful representation." People v. Baldi, 54 N.Y.2d 137, 147 (N.Y. 1981). The New York test, like the federal test, has two prongs. The first is, like the federal test, an inquiry into whether the lawyer's performance fell below an objective standard of reasonableness. The second is a "prejudice component [which] focuses on the 'fairness of the process as a whole rather than its particular impact on the outcome of the case." People v. Graham, 11 N.Y.S.3d 242, 245 (N.Y. App. Div. 2d Dept. 2015)(internal citation and quotation omitted). Importantly, this prejudice component is "not necessarily the 'but for' prejudice required under federal law." Id. In fact, a showing of *any prejudice at all* is not an "indispensable element in assessing meaningful representation." Id., quoting, People v. Ennis, 11 N.Y.3d 403, 412 (N.Y. 2008).

Wholesale Failure to Subject the Prosecution's Case to Adversarial Testing Violates Defendant's Right to Counsel Under State and Federal Law

82. The Supreme Court makes clear that effective assistance of counsel includes the

duty to conduct reasonable pre-trial investigations: “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland v. Washington, 466 U.S. 668, 691 (U.S. 1984). A reasonable decision making an investigation unnecessary will ordinarily arise only when the attorney had reason to believe that pursuing certain investigations would be fruitless or even harmful.” Strickland, 466 U.S. at 691.

83. Kimmelman v. Morrison, 477 U.S. 365 (1986), applied Strickland in a rape case where an attorney had failed to file a timely suppression motion with regard to a piece of incriminating evidence, a bedsheet. The Court explained that the attorney's decision, having been based on ignorance of relevant facts and mistaken beliefs was:

> not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on “strategy,” but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense.
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> Kimmelman v. Morrison, at 385.

84. Explaining that the adversarial “testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies,” Kimmelman v. Morrison at 384, the Court upheld the finding of constitutionally inadequate representation, despite the fact that “the State's case turned far more on the credibility of witnesses than on the bedsheet and related testimony,” and that in other respects, counsel's performance was “generally creditable enough,” with “vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the

facts." Id. at 385. In Kimmelman v. Morrison, the nation's highest court "decline[d] to hold...that the guarantee of effective assistance of counsel...attaches only to matters affecting the determination of actual guilt." Id. at 380.

85. In Hinton v. Alabama, 134 S. Ct. 1081 (2014), the Supreme Court evaluated an attorney's decision to consult an expert known by the attorney to be inadequate, and have him testify, on the sole physical evidence linking the defendant to the crime. The decision was found constitutionally unreasonable because it was based on an "inexcusable mistake of law" which caused the lawyer to believe that the state would not give him sufficient funds to retain a qualified expert. Hinton at 1089. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Id. Necessarily, an attorney's ignorance of a point of fact that is fundamental to her case, combined with a failure to perform basic research within the discovery material on that point, is equally a quintessential example of unreasonable performance under Strickland. Cf. Williams v. Taylor, 529 U.S. 362 (2000) (petitioner was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial).

86. Federal courts interpret Strickland by typically stating that a "lawyer must engage in a reasonable amount of pretrial investigation and at a minimum…interview potential witnesses and…make an independent investigation of the facts and circumstances of the case. Jones v. Jones, 988 F. Supp. 1000, 1002 (E.D. La. 1997), *quoting*, Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985)(internal quotation marks omitted). "In nearly every case that concludes that counsel conducted a constitutionally deficient investigation, the courts point to readily available

evidence neglected by counsel." Greiner v. Wells, 417 F.3d 305, 322 (2d Cir. 2005), citing to numerous cases at n.21, including Eze v. Senkowski, 321 F.3d 110 (2d Cir. 2003)(faulting counsel for failing to consult available experts and medical literature).

87. The Second Circuit Court of Appeals reads Strickland to mean that counsel's trial strategies are to be judged by evaluating whether they are "the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb." Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. N.Y. 2001).

88. In New York courts, consistent with the State's view that a showing of prejudice is not absolutely essential, the Court of Appeals teaches that "counsel's failure to pursue the minimal investigation appropriate with respect to an issue central to the defense itself seriously compromises [the] defendant's right to a fair trial, regardless of whether the information would have altered the uninformed strategy counsel employed, or otherwise helped the defense." People v. Graham, 11 N.Y.S.3d at 245 (internal quotes omitted).

89. Graham was a case involving one investigatory omission by the defense, on an issue central to the People's case. Trial counsel failed to obtain a murder defendant's psychiatric records or to have him evaluated to determine if he had a psychiatric defense. The court reversed the conviction because:

> the People's case hinged almost entirely on their ability to prove the defendant's state of mind, and trial counsel undisputedly failed to take the minimal steps of obtaining the defendant's psychiatric records and having him evaluated by an expert, which were necessary to make an informed decision as to whether or not to present a psychiatric defense.
>
> Graham at 245.

90. The People had argued that counsel's failure to investigate did not deprive the defendant of effective assistance, because there was no reasonable chance that an insanity or EED defense would have succeeded, or affected the trial's outcome at all. The court rejected this argument, stating that it:

> misconstrues the central issue in this case. The issue is not whether trial counsel's choice to have certain documents excluded from the record constitutes a legitimate trial strategy, but whether the failure to secure and review crucial documents, that would have undeniably provided valuable information to assist counsel in developing a strategy during the pretrial investigation phase of a criminal case, constitutes meaningful representation as a matter of law.
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> Id at 246, citing to, People v. Oliveras, 21 N.Y.3d 339, 348 (N.Y. 2013).

91. In this case, under both the state or federal standard, trial counsel's failure to investigate, by neglecting to speak to relevant and exculpatory witnesses that establish the homicide occurred at a time Haughn was in the apartment; by failing to obtain and subject the prosecution's evidence, such as the sheetrock containing the blood transfers, hair, and T-Mobile cell tower sites, to critical review; and by failing to review, or simply by ignoring, the surveillance footage that clearly depicts the true perpetrator leaving the scene minutes after the homicide constitutes a wholesale failure in representation, from beginning to end, as a matter of law.

Defense Counsel Conducted Deficient Investigation In Failing To Obtain Appropriate Expert Review and Testimony as to Forensic Evidence

92. In the Second Circuit, numerous analogous cases have arisen, often in the context of habeas proceedings after convictions in New York State Courts. They demonstrate the

importance of appropriate defense use of experts as part of the necessary defense investigation and adversarial testing of the prosecution's case.

93. For instance, Gersten v. Senkowski, 426 F.3d 588 (2d Cir. 2005), involved a conviction of a defendant on charges of long-term sexual abuse of his own daughter. The court granted habeas relief, on defense counsel's failure to consult or call any medical experts, and failure to review or challenge critical evidence, the investigation of which would have revealed that a strong case could have been made that the crimes never occurred at all. The failure to conduct such an investigation, but instead to concede the prosecution's version of the sole critical physical evidence, was deemed objectively unreasonable. It could not be deemed to be a legitimate strategic choice: "a decision not to investigate will be reasonable only 'to the extent that reasonable professional judgments support the limitations on investigation.' Id at 607 (*quoting* Strickland). "[N]o facts known to defense counsel at the time that he adopted a trial strategy that involved conceding the medical evidence could justify that concession." Id. at 609.

94. Recently, the Third Department reversed the denial of a §440.10 motion in People v. Cassala, 15 N.Y.S.3d 479, 482 (N.Y. App. Div. 3d Dept. 2015). In Cassala, the defendant had been charged with multiple counts of sexually assaulting a teenage girl, who suffered from a bleeding disorder which, unlike other sexual abuse cases, rendered the absence of physical injury compelling evidence of innocence. Defense counsel at trial had, among else, failed to investigate this disorder, failed to consult with or call an expert on the subject, and failed to cross examine the state's medical expert on the subject.

95. Even where defense counsel does consult an expert, if the expert is inadequately or improperly informed of important information, ineffective assistance may be found. In People v. Henderson, 990 N.Y.S.2d 214 (N.Y. App. Div. 2d Dept. 2014) leave to appeal granted, 25

N.E.3d 348 (N.Y. 2014), a case with similarities to the one at bar, the court held that "defense counsel's limited disclosure of information to defense expert constituted ineffective assistance of counsel." Id. Henderson involved attempted murder and first degree assault charges in connection with a stabbing. The defense attorney consulted and even called to the stand an expert in the field, but neglected to provide him with important information, such as the victim's medical records, and the possible motivation for the attack. On cross examination, the prosecution was able "to demonstrate to the jury that the expert was ill-informed." Id. The People argued that this was not prejudicial, since if the expert *had* had all of the pertinent information, he could not have testified in a way that would have helped the defense. The court disagreed, and also observed that, even if this were true, trial counsel could have chosen not to call him as a witness at all, thus, impliedly, at least not making things worse. Id.

Trial Counsel Failed to Obtain Expert Review and Failed to Correct
Faulty Assertions About the Blood Evidence at Trial

96. In this case, the sole piece of physical evidence linking Mr. Cortez to the crime was supplied by the prosecution's creative interpretations of blood smears found on a piece of sheetrock that had been cut out of Ms. Woods' bedroom wall. At trial, the prosecution claimed that the smears of blood were in actuality a handprint, and that within this supposed handprint, was one bloody fingerprint, which they matched to Paul Cortez's left index finger. The prosecution put on no scientific evidence to support these bogus propositions, and in fact, the existence of a "bloody fingerprint" found no scientific support in the testimony of the prosecution's own forensic examiner witness. The defense, as the prosecution improperly pointed out in its closing, called no expert to refute this erroneous position. On the contrary, trial

counsel adopted the prosecution's theory that there was a "bloody fingerprint," and constructed the offensive and off-putting *she had sex while there was menstrual fluid present* defense, based upon these erroneous propositions.

97. The supposed existence of this bloody handprint, with one sole bloody fingerprint belonging to Paul Cortez smack dab in the middle of it, was admittedly the centerpiece of the prosecution's case. In its closing, the prosecution calls the "bloody fingerprint" the "most important piece of evidence" and concedes the People's lack proof beyond a reasonable doubt without it. (TT 1947:8-10; 2020:11-15). According to the prosecution, the entire case is decided by this one piece of evidence which shows "the defendant is the killer because he is there putting his fingerprint on the blood at the same time the blood is being thrown on the wall." (TT 1947-1985; 1963:16-18; 1967:15-16). The prosecution devoted a full 38 pages of his summation to establishing the existence of a bloody fingerprint. In a feat of verbal dexterity, the prosecutor avers that his own forensic expert's testimony that the print is latent and not visible to the naked eye is somehow consistent with it being a clearly visible blood print that had been placed on the wall at the time of the homicide. The defense was ineffective in its cross-examination of witnesses and put on no evidence to clarify, controvert, and contrast with this erroneous position.

98. At trial, a parade of prosecution witnesses testified in a manner that supported the bogus "bloody fingerprint" evidence. Detective John Entenmann testified to seeing a bloody handprint on the bedroom wall when he responded to Catherine's apartment. Then, in highly deceptive testimony, Entenmann went on to imply that a bloody fingerprint was likewise visible. While review of Entenmann's testimony makes clear that when he uses the term "patent," he is referring only to the "blood pattern transfer, which is a hand" (TT 367:25), the distinctions and nuances contained within the testimony of this seasoned crime scene investigator were not

discerned by Attorney Florio.[16] Florio's attempts at challenging Entenmann, who affirmatively declared *patent* whenever asked about the blood transfers in general, and provided equivocating answers when asked about the fingerprint in particular, failed to provide the jury with any degree of clarification. On the contrary, by the end of her cross examination of Entenmann, Attorney Florio had become so completely flummoxed, or was so thoroughly conflicted, that she adopted Entenmann's erroneous nomenclature and began herself referring to the fingerprint as *patent*.

99. The prosecution's theory, that there was one print, it was bloody, and it was placed there by Paul Cortez found little support in the testimony of Forensic Examiner Alex Chacko. Chacko was the only person who testified at trial to examining the actual sheetrock under laboratory conditions; the defense never had the sheetrock examined. According to Chacko, it was only when he applied amido black - a chemical which reacts with many proteins – that he was able to observe a fingerprint which he then photographed and enhanced. At no point in Chacko's testimony did he mention, nor did the defense question him about, the presence of any

[16]Entenmann testified that on the north wall of the apartment there was what he called, alternately, a "blood pattern transfer, which is a hand," (TT 367:25), a "hand blood pattern, a hand transfer," (TT 368:25-369:1), a "hand print," (TT 373:19), a "blood transfer patent print," (TT 393:8-9), a "hand transfer," (TT 394:2), "a blood pattern transfer which was a hand transfer" (TT 394:3-4), "an actual patent print...I referred to it as a hand transfer," (TT 394:9-11), "[t]he patent print," (TT 402:14; 413:23), "that print on the wall," (TT 402:18-19), "[t]he patent print ...[which] was cut out of the wall," (TT 408:4-5), "blood pattern transfer," (TT 408: 13), and "that print – I'm sorry – blood pattern transfer." (TT 414:1-2). He elided this testimony about the "patent" nature of what he wrongly believed to be a *hand*print, into an implication that the actual *finger*print developed by Chacko and analyzed by Branigan was also "patent," i.e., visible to the naked eye. This was accomplished, with the unwitting cooperation of the hapless Attorney Florio, by the repeated equivocal use of the word "print" to mean either or both, as it suited him. Every time Florio referred to the "print" – by which she meant "fingerprint" – as "latent," he would correct her to indicate that the "print" was "patent," (TT 393:6-394:11; 396:7-11), interspersing it with a lecture on three types of fingerprints, latent, patent and plastic, (TT 396:12-397:4), until Florio finally agreed with him, and began to voluntarily, and even proactively, adopt his implication that the *finger*print was patent. (TT 397:5-14; 397:22-24). He answered affirmatively when she asked him, regarding the "patent print," whether his "aim was that so it could be identified...[a]nd to see if it was the killer's print." (TT 411:19-22). However, when he spoke of the "print," he could only *truthfully* have been referring to what he mistakenly believed was a handprint, since at no time did he ever testify to any specific fingerprint on the wall at all, although he appears to have marked the location of the latent fingerprint on the Exhibits 41 and 32 when Florio asked him to indicate where the "patent print" was. (TT 397:5-10; 414:14-416:3). He was apparently unwilling to commit express perjury, when Florio later made one last try to make sense of the confusion, and pressed him explicitly, asking him, "Were you able to find, besides the latent prints on the guitar, any other prints in the apartment?" (TT. 402:8-10), Entenmann responded, "Except the – no. No." (TT 402:11).

other prints, ridge detail or partial prints on the sheetrock he examined.

100. Fingerprint Technician Anabelle Branigan testified to being provided with an enhanced image of a print. She testified to comparing that enhanced image to Paul Cortez's known fingerprint and finding that it was a match. Branigan, who never viewed the wall section at all and viewed only enhanced copied images of the fingerprint, testified, based on unknown, undocumented and unverifiable criteria. Branigan asserted that her conclusions were infallible and that the wall fingerprint was made by Paul Cortez.

101. Although the defense was authorized funds for experts in fingerprint and DNA analysis on September 20, 2006, no such expert examined the sheetrock containing the purported handprint nor was any testing conducted on the matrix of the single fingerprint alleged to have been found therein. In critical aspects, the defense catastrophically ignored opportunities to correct and expose erroneous assertions, and instead chose to unnecessarily adopt the prosecution's position and put forth a most repugnant and twisted version of the prosecution's faulty interpretation of the evidence.

Defense Counsel Failed to Correct the Prosecution's
Faulty Assertion That There Was a Bloody Handprint on the Decedent's Bedroom Wall

102. Forensic experts consulted by current counsel, the Drs. Lynn and Ralph Haber and Latent Print Specialist Michael Sinke, agree that *there is no handprint impression present on the sheetrock taken from the bedroom wall*. According to these forensic experts, what the prosecution referred to as a handprint was just a blood smear which bore a superficial resemblance to the partial *outline* of a hand. The Drs. Haber state: "Mr. Entenmann thought he saw a bloody handprint on the wall next to the bed...Mr. Entenmann's calling it a hand print was erroneous."

(Exhibit F, Haber Affidavit, p. 6). Latent Print Specialist Michael Sinke concurs: "...Entenmann describes the contact blood staining as a handprint...He refers to this as a patent print...[This] is in error and misleading. The contact staining has the appearance of being from a transfer from clothing and not a hand print... [T]here is no ridge structure visible. It is just a transfer of blood from a surface, such as clothing, on the wall." (Exhibit E, Sinke Affidavit, ¶ 22).

Defense Counsels' Acquiescence to the Prosecution's Theory Was a Wholesale Failure

103. Four forensic experts consulted by current counsel, Drs. Lynn and Ralph Haber, Latent Print Specialist Michael Sinke and Forensic Chemist Heather Harris, agree: *there is no "bloody fingerprint.*" The Drs. Haber opine that "there is no evidence of a friction ridge impression made in either wet or dry blood present in the latent partial print identified by the state examiner as belonging to Mr. Paul Cortez." (Exhibit F, Haber Affidavit, p. 3). "The fingerprint compared to Mr. Cortez has none of the features of a highly distorted print laid in blood, but is highly consistent with one made by sweat or body oils." (Exhibit F, Haber Affidavit, p. 3). Rather, the Drs. Haber continue, the print was made "BEFORE the blood spattered in that location," ([sic]; (Exhibit F, Haber Affidavit, p. 3), and was covered later by blood spatter. Latent Print Specialist Michael Sinke similarly concludes that: "[t]he blood above the latent print has the appearance of not being placed on the wall at the same time that the latent print was. The blood has the appearance of being dropped at the location after the latent print." (Exhibit E, Sinke Affidavit ¶ 24). Forensic Chemist Heather Harris makes clear that amido black, which reacts with a variety of human body fluids "such as blood, semen, saliva and urine" as well as proteins from other sources, "such as chicken eggs, cow's milk or dog urine ... does

not indicate, and it cannot indicate, that the visualization is due to the presence of human blood in the fingerprint residue." (Exhibit G, Harris Affidavit ¶¶ 5, 10, 12; see also, Exhibit E, Sinke Affidavit ¶ 21).

104. In this case, conceded by the People in its closing, the prosecution's case rested entirely on the print a) being made by Mr. Cortez, and b) being made in a blood matrix. However, there was no scientific basis from which to conclude the existence of a "bloody fingerprint." As the Drs. Haber, Latent Print Specialist Michael Sinke and Forensic Chemist Heather Harris make clear, all the evidence can possible establish is the existence of a fingerprint on a wall, which had been placed there at some unknown point in time *prior to* blood smears being transferred on the wall. (Exhibit F, Haber Affidavit, p. 3; Exhibit E, Sinke Affidavit, ¶ 25; Exhibit G, Harris Affidavit, ¶ 12). Here, where it was admitted by everyone that Mr. Cortez was in an intimate relationship with Ms. Woods and been inside the apartment in the past, the possible presence of his fingerprint on the wall *before* any blood was in no way inculpatory, let alone proof beyond a reasonable doubt that he committed a murder. Testimony to clarify the dramatically limited significance of this key piece of evidence could have, and should have, been proffered by the defense at trial.

105. Additionally, contrary to the prosecution's summation, the question of whether the latent fingerprint was made in blood, as opposed to some other substance, was left entirely unaddressed by trial counsel. The Drs. Haber opine that the fingerprint "has none of the features of a highly distorted print laid in blood, but is highly consistent with one made by sweat or body oils" (Exhibit F, Haber Affidavit, p. 7). Trial counsel could have presented conclusive evidence to settle the matter once and for all, simply by testing one or more of the ridges that formed the fingerprint. As the Drs. Haber note, "the defense should have had the matrix from which the

partial latent was formed tested to affirmatively determine the material of which it was constituted so those findings could...be presented to the jury." (Exhibit F, Haber Affidavit, p. 4). Likewise, Examiner Sinke believes that "[t]he lack of...DNA testing of the latent print itself is error, and the assertion by the prosecution that the latent print was made in the victim's blood is an unfair characterization...and any forensic expert could have provided testimony and/or advice to the contrary." (Exhibit E, Sinke Affidavit ¶ 24). As the attached affidavit from Dr. Noureddine makes clear, biological material contained in fingerprints deposited on a surface "can yield sufficient DNA for forensic testing and contributor identification." (Exhibit I, Noureddine Afidavit ¶ 3). Clearly, this testing could have been done by the police. Further, the defense could have not only highlighted these failings by calling an expert, but could have utilized one of the expert vouchers they were granted and simply demanded the testing be done.

The Defense Was Constitutionally Deficient in Failing to Expose to the Jury the Presence of Other Fingerprints on the Sheetrock

106. In its summation, the prosecution puts great emphasis on the fact that the sole fingerprint law enforcement recovered belonged to Paul Cortez. It turns out this position is untrue and could have been refuted, if trial counsel had been adequately informed, by retaining an expert to evaluate and examine the prosecution's evidence. This did not happen. No expert for trial counsel ever examined the sheetrock.

107. Forensic examiners retained by current counsel detail the presence of additional prints present on the sheetrock which were not identified by law enforcement or the defense prior to trial. In examining photographs of the sheetrock, the Drs. Haber note the presence of "at least two other partial fingerprint impressions" on the sheetrock. (Exhibit F, Haber Affidavit, p. 3).

Examiner Sinke similarly observed "a second separate partial latent print above the print identified as having been made by Paul Cortez..." (Exhibit E, Sinke Affidavit ¶ 23). Notably, neither the Drs. Haber nor Mr. Sinke had an opportunity to review the original sheetrock, but in examining the enhanced images of the print area, the human eye can discern additional prints present on the sheetrock. Indeed, as the Drs. Haber note, "any defense fingerprint expert would have seen the multiple prints right away, and illuminated this for the jury..." (Exhibit F, Haber Affidavit, p. 5).

108. It is troubling that no prosecution witness testified about these other prints, nor does it seem that anyone from law enforcement attempted to analyze them. The jury could, and should, have been apprised of the fact that the People's forensic examiners failed to notice additional prints in the immediate area of this supposed lynchpin piece of evidence. Here, this fruitful area of cross-examination was never put before the jury, and the jury was provided no basis for discrediting the inaccurate information provided by the People's expert witnesses. As the Drs. Habers observed, the "failure to notice the two (or more) additional fingerprints allowed the State's claim of a bloody print to remain in play." (Exhibit F, Haber Affidavit, p. 6).

109. Of further consternation, it came to the attention of current counsel that Attorney Florio was alerted to the possibility that there were additional fingerprints present in the blood transfers, but failed to investigate this vital line of defense. According to forensic print examiner Kenneth Moses, Attorney Florio contacted him on January 27, 2007 and asked him to conduct a comparison of the latent print found on the sheetrock against known prints from Paul Cortez. Florio provided Moses with photographs of that area of the bedroom wall that depicted the blood transfers for that purpose. Upon examination, Moses told Attorney Florio that the images suggest the presence of more than one fingerprint. Moses advised Florio to have the actual

sheetrock examined to definitively ascertain whether the fingerprints were deposited before or after the blood smears. Examiner Moses never heard from Florio again. (Exhibit D, Moses Affidavit).

110. Here, trial counsel was alerted to the possible existence of other prints that, had they been subjected to examination, had the potential of identifying the true perpetrator and/or excluding Paul Cortez. Alerting the jury to the existence of other prints, which the forensic examiners Chacko and Branigan failed to identify, would have severely undermined their credibility. That trial counsel chose not to further investigate the existence of additional prints, but instead turned a blind eye, a deaf ear and stood mute with respect to this fruitful area of cross-examination defies any good explanation.

The Defense Failed to Demonstrate There Was No Reliable Scientific Basis for the Erroneous Conclusion That the Latent Belonged to the Defendant

111. By the close of the trial, all parties had essentially conceded that the fingerprint recovered from the bedroom wall belonged to the Defendant. Expert review by the Drs. Lynn and Ralph Haber, Forensic Examiner Michael Sinke, and Dr. Simon Cole establishes that the testimony of prosecution witness Anabelle Branigan, which served to match the latent fingerprint to Paul Cortez, is deeply flawed, by standards at the time of trial, and still more so by current standards. The identification cannot, and should not have been, relied on.

112. Preliminarily, basic preparation for a homicide trial requires having the original fingerprint examined, *in situ*, on the sheetrock. As expert for current counsel Michael Sinke states, "[i]t is my understanding that the defense did not have the section of wall examined by a forensic expert so that the actual latent print could be examined instead of a second or third generation photograph of the latent print...This is an error on the part of the defense." (Sinke

Affidavit, ¶ 26).The Drs. Lynn and Ralph Haber note this failing as well, stating that: "qualified experts should have examined the actual sheetrock..." (Exhibit F Haber Affidavit, p. 4).

113. Trial counsel was grossly unprepared and ineffective in its cross-examination which failed to illustrate that the analysis done by prosecution witness Branigan was gravely deficient, in its presumptions, techniques and conclusions. As to Branigan's testimony that four, or five or six points of similarity among friction ridge details warrants a conclusion that two prints come from the same source, Dr. Cole states that as far back as 1973, it was known that there "was no valid basis" for such a conclusion. (Exhibit H, Cole Affidavit, p. 2). The Drs. Haber note the same fact: "the fingerprint profession thirty years ago rejected any numerical standard (such as eight) because no such standard guarantees that the identification is correct...the defense attorneys should have jumped all over [Branigan]." (Exhibit F, Haber Affidavit, p. 6). Mr. Sinke also finds fault with Anabelle Branigan's technique.

114. As to Branigan's preposterous testimony that her findings and conclusions are infallible, Dr. Simon Cole points out that, as has been known since at least the 1920's, "[o]f course, latent print examiners...do make errors, both in actual casework and in controlled studies designed to measure examiner accuracy." (Exhibit H, Cole Affidavit, p. 4).

115. Prior to Mr. Cortez's trial, the notorious fiasco of Brandon Mayfield's ordeal captured the world's attention, after *three* FBI fingerprint examiners wrongly matched a print linked to the 2004 Madrid terrorist attacks to, coincidentally, Mayfield's left index finger. The FBI, which also apparently believed it employed infallible analysts, declared to the district court that the evidence print constituted a "100% positive identification" of Mayfield.[17] As Dr. Cole notes, it was only because of "fortuitous circumstances" of the Spanish National Police having

[17]http://caselaw.findlaw.com/us-9th-circuit/1499231.html

doubted this infallibility that the error was caught. (Exhibit H, Cole Affidavit, p. 5). The Drs. Haber attest that Branigan's infallibility claim, left unchallenged by an expert, "dramatically misinformed the jury." (Haber Affidavit, p. 6). They note numerous experiments which have demonstrated that shocking numbers - *up to a devastating 80%* - of examiners being re-tested *on their own former conclusions*, come to different conclusions upon re-examination. (Exhibit F, Haber Affidavit, p. 4). Other studies show that fingerprint examiners overwhelmingly disagree with one another as to their conclusions. (Exhibit F, Haber Affidavit, p. 6). Branigan's arrogant infallibility claim, however commonly asserted among practitioners at the time of trial, was "a denial of all empirical science." (Exhibit F, Haber Affidavit, p. 6).

116. Another notorious case, not discussed by Dr. Cole or the Drs. Haber, still older than Mayfield's, was available for consideration by Attorneys Florio and Miranda, which should have caused them to consult and call a defense expert. In 1998, a young Scottish police officer, Shirley McKie, was almost driven to suicide after no fewer than *four* "infallible" experts from the Scottish Criminal Records Office insisted that a fingerprint in a murder victim's house was hers, while she categorically denied having ever entered the house, although she was an investigator on the case.[18] McKie was not suspected of the murder, but her insistence that the match was inaccurate cast doubt on the quality of the prosecution's evidence against the man arrested for the crime. When she stuck to her story in her testimony at the accused's trial, she was criminally charged with perjury by the prosecutors, who were infuriated by her supposed betrayal of the team. It was only through the good offices and courage of a senior forensic official at Scotland Yard, who was himself ostracized for doubting the doctrine of infallibility, that she was ultimately exonerated.

117. Third, Branigan's conclusion that the latent fingerprint matched Mr. Cortez's

[18]http://www.newyorker.com/magazine/2002/05/27/do-fingerprints-lie

rested on bases that were challengeable, but were not challenged by the defense. As the Dr. Habers put it, “she needed to admit that an unknown number of other persons could also have been matched to the crime scene print.” (Exhibit F, Haber Affidavit, p. 6). Failing that, she could and should have been challenged on cross examination “about the absence of any statistical basis about the confusability of fingerprints, the factors that make fingerprints confusable, and the judgmental processes used by examiners.” (Exhibit F, Haber Affidavit, p. 6). Dr. Cole discusses this and several other factors rendering the conclusion suspect, including Branigan's failure to document her analysis, and the failure to use blind verification. Although Dr. Cole discusses these infirmities largely in the context of new developments in the discipline, and are discussed as such at length below, it is the defense position that even at the time of trial, it should have gone without saying that these safeguards would be routinely employed in *any* forensic or scientific endeavor. The cross-examination conducted failed to elicit this relevant information.

118. As noted above, the defense attorneys did not properly challenge Entenmann about the “handprint,” either in the form of relevant cross examination or by presenting their own expert, instead essentially adopting the prosecution's position that the latent fingerprint was a “patent” print, i.e., impressed into blood that was already on the wall. The defense failed to challenge Chacko about the presence of other fingerprints present on the sheetrock, either on cross examination or through a defense expert. Finally, the defense failed to adequately challenge the shockingly unscientific methodology and conclusions of Branigan on cross-examination, and, once again, failed to offer testimony of their own expert to do so. The defense closing revealed Florio's and Miranda's complete, and confounding, capitulation to the People's erroneous interpretation of the fingerprint evidence. Aside from weakly pointing out that Entenmann had called it patent, while Chacko had called it latent, they were reduced to

advancing the highly repulsive theory that the print had been made in Catherine's menstrual blood when, at some hypothetical unknown time in the past, Paul had sex with her when she menstruated. The defense's failure to properly investigate and subject this fingerprint to critical examination doomed Paul Cortez to an unjust and unlawful conviction founded on faulty forensic interpretations.

Trial Counsel Failed to Obtain DNA Testing on Hair and Fingerprint Matrix

119. At the crime scene, numerous hairs, some with the roots still attached, were found entwined in the fingers of the decedent. Other hairs, 40 of them, were found on her person. While the prosecution subjected these hairs to comparisons against Paul Cortez – none were a match -- the prosecution subjected none of the hairs to DNA examination, neither did the defense.

120. As addressed above, contrary to the prosecution's summation, the question of whether the latent fingerprint was made in blood, as opposed to some other substance, was left entirely unaddressed by trial counsel. Experts for current counsel have opined that "the assertion by the prosecution that the latent print was made in the victim's blood is an unfair characterization..." (Exhibit E, Sinke Affidavit ¶ 24).

121. Although trial counsel was granted 18B funds for a forensic pathologist and a DNA expert on September 20, 2006, no such expert was hired by the defense to test the hair or blood evidence. Experts for current counsel have indicated that hair that contains the root can be identified through nuclear DNA testing, and mitochondrial DNA from hair without a root can identify anyone maternally related to the donor. (Exhibit I, Noureddine Affidavit ¶ 4). Further, experts for current counsel have indicated that trial counsel could have presented conclusive

evidence to contradict the assertion that the fingerprint was left in blood simply by testing one or more of the ridges that formed the fingerprint.

122. Here, where the Defendant is proclaiming his innocence, and evidence had already established that none of the hairs were similar to Paul's, trial counsel had no strategic basis for failing to subject the hairs, some of which were held clutched in the bloody death grip of the victim with the roots still attached, and the fingerprint, which the Defendant has insisted was not placed on the wall at the time of the homicide, to DNA testing.

Trial Counsel Failed to Obtain Expert Review of the Cell Phone Records to Accurately Interpret and Explain the Cell Phone Evidence to the Jury

123. A key circumstantial component to the prosecution's case was its interpretation of the cell phone records. The prosecution argued that the high volume of unanswered calls Paul placed to Catherine's cell phone on the day of the homicide demonstrates Catherine's rejection of Paul and that the cell tower site Paul's phone hit demonstrated Paul's presence in the area of the homicide. At trial, the prosecution introduced cell phone records and cell phone provider call details for both Catherine and Paul's phones. The phone records document almost daily phone calls between Paul and Catherine in the year preceding, and on the day of, the homicide. Although granted funds for a cell phone expert on September 20, 2006, trial counsel never retained or consulted with any such expert.

124. On the day of the homicide, the prosecution asserted, the phone records show a barrage of unanswered calls placed from Paul to Catherine. The prosecution's theory was that the numerous unanswered calls fueled Paul's anger over Catherine's supposed rejection. Current

counsel's review of Paul and Catherine's cell phone records, in conjunction with a cell phone expert, has established that although numerous calls from Paul to Catherine's appear on Paul's cell phone records for the day of the homicide, because those calls last only seconds in duration and are not on printouts of Catherine's phone records, they are non-completed calls. Such non-completed calls, current counsel has learned, end before ringing on the receiver's phone, and suggest an aborted call, such as after an inadvertent hit of the phone's redial or speed dial function.

125. What the jury could have learned, but was never shown, was that there were only 4 calls between Paul and Catherine on the day of the homicide – 1 placed by Paul and the other 3 placed by Catherine. Paul placed that one call to Catherine's phone when he woke up at 6:24 a.m.;[19] at that time Haughn was not in the apartment, and Catherine and Paul spoke for over half an hour. The other three calls between them were placed by Catherine. Catherine first called Paul at 10:44 a.m.; that call lasted a mere 31 seconds, so it likely went to voice mail prior to Paul picking up. The second call Catherine placed to Paul took place at 4:59 p.m.,[20] at a time when Catherine and Haughn were walking together into her apartment building. Catherine placed her third call to Paul at 5:11 p.m.,[21] after she sent Haughn out of the apartment and to the store.[22] This was the last time Catherine and Paul would speak; she told him she was getting ready to leave for her strip shift at Flashdancers.

126. Surveillance footage captures Catherine walking into her building with Haughn at 4:59 pm. Thus the 4:59 p.m. conversation between Catherine and Paul, the video surveillance establishes, occurred in Haughn's presence as he and Catherine were walking into the building

[19]This phone call lasted for 33 minutes and 38 seconds.
[20]This phone call lasted for 2 minutes and 56 seconds.
[21]This phone call lasted for 1 minute and 31 seconds.
[22] This was confirmed by Haughn's timeline and a Gristedes receipt.

and up the stairs to Catherine's apartment. At trial, Paul testified that he could tell from Catherine's voice that something was wrong. Trial counsel never brought the timing and circumstances of this conversation before the jury.

127. Further, the cell phone call details establish that during the time leading up to and following the murder, Paul's cell phone was pinging off the East 84th Street T-Mobile cell phone tower, consistent with Paul's stated location at a Starbuck's located between East 83rd and East 84th Streets. Without any support or basis, the prosecution argued in closing that Paul's cell phone hitting off the 84th Street site placed him at the scene of the homicide.[23] The defense failed to object to this unsupported position, and put on no evidence to establish the contrary.

128. Forensic Cell Phone Expert Larry Daniel has indicated that, had he been contacted prior to trial, he would have instructed defense counsel to obtain the verified records of the location of the T-Mobile cell phone tower records for November 27, 2005 to ascertain the range of Paul's possible location at the relevant periods of time. Further, had Mr. Daniel been called at trial, he would have explained to the jury that the calls from Paul's cell phone to Catherine's which were only seconds in duration and do not appear on her phone records represent calls that were terminated prior to connecting. Mr. Daniel would have testified that in fact there were only 4 calls between them on that date, the last 3 of which were made by Catherine. As trial counsel never consulted with or called a cell phone expert at trial, they were unable to refute the prosecution's hypothesis that Paul was becoming infuriated by Catherine rejecting his calls, nor to put exculpatory evidence establishing that Paul's range of location did not reach the scene of the homicide before the jury.

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[23] In fact, the prosecution's own witness, T-Mobile Agent Gabreal Dominguez, testifying from a document not provided to the defense stated that at 6:33 Paul's cell phone was hitting off a cell tower more than ten blocks away at 339 East 95th Street." (TT 611:23-24).

Defense Counsel Conducted Deficient Adversarial Testing in
Failing To Investigate Evidence Inculpating Alternate Suspect

129. A constitutionally sufficient defense investigation is not limited to consulting experts. Failing to pursue numerous other avenues of investigation may result in ineffective representation. Numerous federal decisions reversing state convictions, as well as New York State cases, reflect the critical importance held by defense investigation of witnesses and evidence.

130. Failure to interview important non-expert defense witnesses also constitutes ineffective assistance. In Williams v. Taylor, 529 U.S. 362, 396 (2000), the Supreme Court reversed a decision upholding a death sentence where the attorney, among else, had failed even to return the phone call of a certified public accountant who had offered to testify for the defense to present mitigating evidence.

131. In Ramonez v. Berghuis, 490 F.3d 482 (6th Cir. 2007), the court found it "objectively unreasonable" for the trial attorney not to interview three witnesses who possibly could provide beneficial testimony for his client. The court stressed that strategy must be developed *after* such thorough investigation: "Constitutionally effective counsel must develop trial strategy in the true sense-not what bears a false label of "strategy"- based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation." Ramonez v. Berghuis, at 489. See also, Lopez v. Miller, 915 F. Supp. 2d 373, 420-21 (E.D.N.Y. 2013)(reversing murder conviction where lawyer, among else, failed to interview alibi witnesses, and cataloguing cases).

132. Remaining in ignorance of basic, readily available facts that are helpful to her client, can also constitute an defense investigative failure. In People v. Delacruz, 16 N.Y.S.3d

793 (N.Y. Co. Ct. 2015), the defendant faced numerous charges in connection to a "drive by shooting" involving multiple participants. The court found ineffective assistance of counsel and granted his § 440.10 motion because his attorney, among else, failed to appear for a charge conference, Id at 2, proceeded upon a mistaken belief that "everyone knew" that his client had possessed the gun and fired the shots because "the witnesses said so," when in fact no witness had said so on direct examination, Id at 6, failed to interview or call to the stand the actual shooter, a co-defendant who had notified the defendant that he would waive his Fifth Amendment rights and testify in his defense, Id at 6-7, and conceded in summation that the People's witnesses told the truth on critical pieces of information that bolstered the People's case. Id at 8.

133. In this case, the defense failed to interview critical civilian witnesses who could provide evidence exculpating the Defendant and inculpating alternate suspects, and completely overlooked a videotape showing the alternate suspect leaving the scene after the murder.

Trial Counsel Never Showed the Jury
Evidence Strongly Inculpating Alternate Suspect David Haughn

134. In the immediate aftermath of the homicide, law enforcement took photographs of David Haughn, with and without clothing, and obtained footage from several surveillance cameras which captured individuals in the immediate vicinity of Catherine's apartment both prior to and subsequent to the homicide.

135. The prosecution, through corroborated testimony and verified records, pin-pointed the time of Catherine Woods' death at no later than 6:25 p.m. on November 27, 2005. In repeated interviews and a handwritten statement, David Haughn detailed his exact movements

during these crucial moments in time. Haughn told law enforcement that he came into the apartment with Catherine at approximately 5:00 p.m., that he never changed his clothes, and that he left the apartment at or around 6:40 p.m., about twenty minutes prior to the 911 call, took a right when exiting the building, traveled west on 86th directly under the camera located 345 East 86th Street, then cut through the walkway between the Quik Park garage located at 305 East 86th Street which leads out on to East 87th Street where, according to Haughn, he went directly into his job, 309 East 87th Street, where he picked up some items and then drove directly back to the apartment. (Exhibit CC, DD5 128 and notes; Exhibit FF, DD5 48 and notes). Haughn's initial accounts, to neighbors and law enforcement, place him inside the apartment with Catherine at the time of her murder. By the time of trial, Haughn's timeline had become unclear, allowing the prosecution to argue that he had left the apartment by about 6:25 p.m. (TT 39:5-9).

136. Law enforcement obtained, and provided to the defense, footage from a surveillance video taken from a camera at 345 East 86th Street, the building adjacent to the entrance to Catherine's apartment. The surveillance footage captures persons traveling west on the sidewalk in front of the surveillance camera and toward the garage Haughn said he walked to at approximately 6:40 p.m.

137. Upon reviewing the relevant portion of the surveillance footage, current counsel was stunned to find it clearly depicts Haughn traveling - just as he said - west along the 86th street sidewalk toward the garage at 6:37 p.m.[24] Of further note, the distinctively marked baseball cap Haughn was wearing as he left the murder location at 6:37 p.m., which was sitting on a desk located just outside the entrance to Catherine's bedroom when law enforcement arrived at the scene, is memorialized on video footage taken by NYPD's crime scene unit.

[24]Screen shots from the surveillance footage are memorialized in Exhibit C, the Brunetti Affidavit. The entirety of the surveillance footage provided to the defense will be provided upon request.

138. The surveillance footage corroborates the initial timeline Haughn presented to the police, it memorializes him walking west on 86th Street toward the garage at 6:37 p.m., it establishes he indeed left the apartment at approximately 6:40 p.m., it shows him wearing the baseball cap sitting on the credenza within the apartment, it places him squarely inside the apartment at the time of, and beyond the time of, Catherine Woods' 6:25 p.m. murder[25]. Had trial counsel reviewed the surveillance footage, they would have put this evidence inculpating Haughn in front of the jury.

139. Further, comparing the surveillance footage of Haughn entering the apartment at 4:59 p.m. against the photographs law enforcement took of Haughn at the precinct later that night makes clear that the prosecution's assertion in closing that Haughn had not changed his clothes was false. Had trial counsel reviewed these images, they would have objected to, and displayed the falsity of, that assertion.

140. Current counsel has consulted John Brunetti, a video enhancement expert, who has indicated his strong opinion that the individual leaving Catherine's building at 6:37 p.m. is likely the same person (David Haughn) who is depicted approaching the building with his dog at 4:59 p.m. Mr. Brunetti requested, but could not be provided with, footage from minutes earlier which would have showed Haughn leaving the building because the defense did not request, nor subpoena, this additional footage.

141. Whether or not trial counsel reviewed the relevant portions of the surveillance and crime scene videos prior to trial, what is known is that they failed to put this crucial evidence before the jury. As a result, trial counsel failed to confront Haughn with demonstrative evidence that shows, consistent with his original timeline, that he left the apartment at 6:37 p.m., about

[25]In sharp distinction to the surveillance footage which places David Haughn inside the apartment at the time of the homicide, it is conceded by the prosecution that there are no witnesses or surveillance footage which placed Paul Cortez at 355 East 86th Street at on the day of the homicide.

fifteen minutes *after* Catherine had been murdered.

142. Trial counsel's failure to review the photographs and surveillance footage it had been provided, nor making any efforts to obtain other relevant surveillance footage, kept it from putting key evidence before the jury that inculpated David Haughn as the true perpetrator. In this case, when even the prosecutor conceded that there were two suspects, and it was either David or Paul who committed the homicide, failing to review this evidence, and put evidence inculpating David before the jury, was nothing short of gross negligence.[26]

Trial Counsel Failed to Contact or Call at Trial Relevant Witnesses

143. As detailed above, between 5:45 p.m. and 6:25 p.m., a time when the prosecution concedes Haughn was in the apartment and Catherine Woods was murdered, four disinterested civilian witnesses located in vantage points both above and beside Catherine Woods' apartment heard a loud male voice, a female's terrified screams, dogs barking, sounds of a scuffle, whimpering cries, a loud thud, and the screeching sound of furniture being moved. (Exhibit Y, DD5s 11, 12 and 13; Exhibit Z, DD5 4 and accompanying notes). Law enforcement confirmed the information provided by cable boxes, phone records and repeated interviews of all 4 ear witnesses. Information from these civilian witnesses, all of whom heard sounds of a disturbance at a time when Haughn was in the apartment, was never pursued by trial counsel. Not one of these civilian witnesses was spoken to by the defense, nor did the defense bother to call them at trial to detail the extended disturbance occurring inside 2D between 5:45 and 6:25 p.m. on

[26]Further removed from the jury's consideration was the fact that at 6:57 p.m., in the immediate aftermath of Catherine's homicide, a man can be seen running away from the location of the homicide in what appears to be blood spattered clothing. (Exhibit EE).

November 27, 2005.[27]

144. Arousing further suspicion was Haughn's deceptive behavior when, subsequent to the time of Catherine's murder, he encountered Brad Stewart near the entrance door to the apartment. Haughn lied to Stewart and said his brother (who was 12 years old at the time and in Ohio), and not Catherine (who was lying prostate on the bedroom floor with her neck sliced), was inside the apartment with his dogs. Again, trial counsel never interviewed Brad Stewart, nor did they call him at trial to detail the fact that while standing outside the apartment door as Catherine lay inside bleeding to death, Haughn blatantly lied about who and what was inside.

145. Further, subsequent to alerting 911 to Catherine's condition, Haughn did not remain at Catherine's side, but instead went to the apartment of another 2nd floor resident, Julia Jeon. Haughn told Jeon his girlfriend wasn't breathing and he asked her to accompany him to his apartment. Although the 911 operator had asked Haughn to attempt CPR, which he declined to attempt, Haughn never asked Jeon whether she knew how to perform CPR. Instead, after Jeon entered the apartment, observed blood, and immediately turned and exited, Haughn asked Jeon whether she saw "bootprints on the bed." (Exhibit BB, DD5 10). The defense never spoke with Ms. Jeon, nor did they call her to testify about Haughn's curious disregard for Catherine's well-being, as well as his uncanny knowledge that it was a boot, as opposed to a shoe or a sandal, that had left impressions on the bed.

146. Although Catherine's friends informed the police that she was involved with various men, some of whom were disturbingly volatile, and witnesses at the scene of the crime provided information to law enforcement that contradicted Haughn's alibi, trial counsel failed to

[27]It wasn't until mid-trial, on February 6, 2007, that Miranda faxed investigation Richard Jordan a request to find 2 of the 4 ear witnesses. Whether Jordan received the fax or made any efforts to locate 2 of the 4 witnesses remains unknown. The 18B panel confirmed that no funds were paid to any investigator or expert hired by Miranda or Florio in relation to the defense of Paul Cortez. There are no indications that Miranda or Florio made even minimal attempts, at any time, to reach any of the other ear witnesses.

make any efforts to contact those witnesses or undertake any investigative measures to follow up on those leads.

147. In the case at bar, the failure to subject the prosecution's case to adversarial testing ineluctably led to a multitude of trial errors, including a deficient defense, ineffective cross examination and the failure to make cogent objections. (See Exhibit A, Ruhnke Affidavit; Exhibit B, Yaroshefsky Affidavit). As detailed above, evidence provided by prosecution witnesses with respect to the blood evidence, cell phone evidence, and the revised timeline provided by David Haughn could have easily been contradicted by both expert testimony, which refuted the prosecution's faulty interpretation of the evidence, and the surveillance footage which exculpated Mr. Cortez by establishing that Haughn was in the apartment at the time of Catherine Woods' murder.

COUNSEL LABORED UNDER ACTUAL AND/OR UNWAIVABLE CONFLICTS WHICH OPERATED ON THE DEFENSE

148. The right to the effective assistance of counsel also includes a correlative right to representation that is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261, 271 (1981). As the New York Court of Appeals has written:

> The State and Federal constitutional right to counsel, so fundamental to our form of justice, is the right to effective assistance of counsel, meaning the reasonably competent services of an attorney devoted to the client's best interest. The right to effective assistance of counsel encompasses the right to conflict-free counsel.
>
> People v. Ortiz, 76 N.Y.2d 652, 655-66 (1996)(emphasis added).

149. When an ineffective assistance claim is based on an asserted conflict of interest, the standard is like that of Cronic. Thus, when counsel was actually conflicted, prejudice is

presumed. The defendant need only establish "(1) an actual conflict of interest that (2) adversely affected his counsel's performance." United States v. Schwartz, 283 F.3d 76, 91 (2d Cir. 2002). In the words of the Supreme Court, "[a] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980).

150. The law in New York is the same. Once the defendant shows a conflict of interest, reversal is required if the "conduct of the [the] defense was in fact affected by the operation of the conflict of interest." Ortiz, 76 N.Y.2d at 657, quoting, People v. Alicea, 61 N.Y.2d 23, 31 (19). See also, People v. Berroa, 99 N.Y.2d 132 (2002)(reversing where defense counsel agreed to stipulation that contradicted defense witness's testimony to explain why no alibi notice had been filed).

151. "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993), cert. denied, 511 U.S. 1022 (1994), quoting Cuyler, 446 U.S. at 356 n.3. When a lawyer is being prosecuted by the *same* District Attorney's office that is prosecuting her client, *at the very same time*, it creates an actual conflict.

152. In United States v. Levy, 25 F.3d 146 (2d Cir. 1994), the Second Circuit held that prosecution of defense counsel by the same prosecutor's office, even on unrelated charges, creates an actual conflict of interest. As the Court reasoned, "Fisher [defense counsel] may have believed he had an interest in tempering his defense of Levy in order to curry favor with the prosecution, perhaps fearing that a spirited defense of Levy would prompt the Government to pursue the case against Fisher with greater vigor." Id at 156.

153. Similarly, in United States v. Armienti, 234 F.3d 820 (2d Cir. 2000), the Second

Circuit ordered an evidentiary hearing on a Section 2255 claim, reaffirming that when a lawyer is being criminally investigated or prosecuted by the same office that is prosecuting his client, their interests collide. According to the Court, the lawyer's own criminal problems pose a risk that the lawyer will devote less time to his client's case, or fail to investigate, or otherwise fail to vigorously attack the government's witnesses.[28]

154. Counsel's conflict has an adverse effect on his representation if the conflict creates an "actual lapse in representation." Cuyler, 446 U.S. at 336. The defendant must demonstrate that, "some 'plausible alternative defense strategy or tactic might have been pursued,' and that the 'alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" Levy, 35 F.3d at 157, quoting, Winkler, 7 F.3d at 309.

COUNSEL LABORED UNDER ACTUAL AND/OR UNWAIVABLE CONFLICTS

155. Ordinarily, most potential conflicts, and even many actual conflicts, may be waived by a defendant. See, e.g., U.S. v. Ward 85 Fed. Appx. 246, 2004 WL 57753, at 2 (C.A.2 2004)(waiver properly accepted where defense attorney's associate, who did little work on case, was in early stages of application for job with U.S. Attorney's office).

156. However, there are circumstances under which such a purported waiver is invalid, even if elicited after a thorough inquiry, and ardently desired by the defendant. Wheat v. United

[28]Other courts, too, have recognized that a lawyer who is the subject of an investigation or prosecution by the same prosecuting office as his client has an inherent conflict of interest. See, e.g., Thomkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992)(finding conflict where defense counsel had been given immunity by same prosecutor's office in exchange for cooperation, and noting "it may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer"); United States v. McLain, 823 F.2d 1457 (11th Cir. 1987)(finding actual conflict where defense counsel under investigation by same United States Attorney's office). See also, Briguglio v. United States, 675 F.2d 81 (3d Cir. 1982)(defendant entitled to evidentiary hearing to determine whether there was an actual conflict, when, after trial, defendant learned that counsel was under investigation by same office, and was later indicted and pled guilty).

States, 486 U.S. 153, 160 (U.S. 1988). When the threat or actual damage to a defendant's rights to a fair trial are compromised by the conflict to such an extent that the trial is rendered fundamentally unfair, no purported waiver can cure the constitutional infirmity of the conviction. Relatedly, when a conflict is so grave and pervasive that it renders the trial fundamentally unfair, institutional interests beyond the interests of the defendant apply: "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Id.

157. The most familiar class of unwaivable conflicts are those called conflicts "per se," and usually involve situations "where defendant's counsel was unlicensed, and when the attorney has engaged in the defendant's crimes." United States v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993). But these are not the only unwaivable conflicts. Others, which by so grossly disadvantaging a defendant, thereby attack the integrity of the judicial process, call for mandatory disqualification of a conflicted attorney over proffered waivers from defendants - or later reversal if a waiver was improvidently accepted. These conflicts are characterized as being so egregious that "no rational defendant would knowingly and intelligently desire that attorney's representation." United States v. Schwarz, 283 F.3d 76, 95 (2d Cir. N.Y. 2002). Importantly, this "no rational defendant" category is something which cuts across the categories of per se and actual conflicts, as well as actual and potential conflicts:

> If a district court finds that an attorney suffers from an actual or potential serious conflict that does not rise to the level of a *per se* conflict, it must then go on to determine whether a rational defendant would knowingly want to be represented by the conflicted lawyer. If not, the trial court is obliged to disqualify the attorney.
>
> United States v. Jones, 381 F.3d 114, 119-20 (2d Cir. 2004).

158. In the present case, although there was a purported waiver, the Court of Appeals has found that it was invalid. It is the defense position that the conflict – *even if, arguendo, it was not an actual conflict, but merely potential* – involving Ms. Florio was so severe and of such a nature that, even had an adequate Gomberg inquiry been conducted, any forthcoming waiver would have been invalid as a matter of law. This conflict involved Ms. Florio at a bare minimum appearing to "actively representing competing interests," Mickens v. Taylor, 535 U.S. 162, 167 (U.S. 2002), namely, Mr. Cortez's and her own, something which no rational defendant could desire. That the interests were competing ones is self-evident. In defending Mr. Cortez, Ms. Florio was battling the very District Attorney's Office which had just indicted her on felony charges. Ms. Florio had a lot to lose, personally, if Mr. Cortez was acquitted despite the best efforts of the District Attorney. As a criminal defendant in her own right, it was strongly in her interests not to antagonize that Office by any means, let alone by zealous and effective advocacy which could – and should – have resulted in a huge, humiliating loss for that Office in a highly publicized murder case. Even had Ms. Florio been able to put aside all such considerations (which she manifestly was not), the appearance of unfairness was insurmountable, thus an attack on the integrity of the judicial proceeding and the institutional interests of the court. As the Court of Appeals pointed out, in an understatement, "the nature of co-counsel's possible conflict should, from a lawyer's perspective, have been clear." People v. Cortez, 22 N.Y.3d 1061, 1066.

Conflict Operating on the Defense is Evinced by Persistent Failure to Pursue Fruitful Lines of Defense

159. As noted above, the Court of Appeals found that at least a potential conflict of interest was at play in this case, and that no valid Gomberg waiver was executed by Mr. Cortez.

As noted by Chief Judge Lippman, the trial judge's cursory, conclusory, largely one-side colloquy with Mr. Cortez, simply does not provide the necessary assurance that co-counsel's conflict and its risks were understood and freely assumed by defendant in the context of a choice essentially defined by the entitlement to conflict-free representation." People v. Cortez, 22 N.Y.3d 1061, 1066. As such, as discussed above, the Court of Appeals effectively invited this court, via a § 440.10 motion, to expand the record in order to allow a determination that there was an "actual conflict" that "operated on the defense."

160. In this case, the conflict presented by Miranda's contempt finding in front of the trial judge and Florio's felony indictment pending with the same prosecutor's office operated on the defense. Under the record now before the Court, it is clear that it had to have been a near-Herculean task to avoid developing and presenting exculpatory interpretations of evidence that were consistent with Mr. Cortez's protestations of innocence. It is evident that each and every angle of review presents with numerous fruitful areas from which to challenge to People's theory and the People's evidence, yet the instances in which the defense did so were nil. By necessary implication, the conflict operated on the defense, because the failings are so persistent and the areas of challenge un-pursued so plentiful that *not* subjecting the People's case to adversarial testing required the defense to affirmatively turn a blind eye, turn a deaf ear, and turn the VCR switch to Off.

161. Showing up and preparing for trial was not only expected, it was an obligation. Review of the case evidence was not only prudent, it was fundamental. Conducting an investigation was not only sensible, it was necessary. Consulting with experts to address scientific evidence was not only practical, it was essential. Developing fruitful areas of defense is not optional, it is a requirement. As detailed above, to the severe detriment of their client, trial counsel did none of these things.

162. Miranda, whom the trial judge held in contempt for not showing up until the fourth day of trial, clearly infuriated the court. The disdain, hostility and impatience Berkman directed at Miranda throughout the trial was palatable; it had to vicariously prejudice the Defendant. Florio, who had not bothered to show up in court until the fifth day the case was called for trial, was being prosecuted for drug trafficking by the same District Attorney's office that was prosecuting Paul Cortez. People v. Florio, No. 01711-2006.

163. What makes Paul's representation by these conflicted and unprepared attorneys particularly tragic is that, after three consecutive days of Paul's being transported to court, only to find that once again his counsel hadn't appeared, the Defendant told Judge Berkman that he wanted to consider hiring new counsel. Although Paul did not use the magic word "conflict," he clearly indicated that he was concerned with the nature of the representation he was receiving, as well as the tenor of the Court's frustrated interactions with counsel.

164. At that time, although alerted to Paul's concerns, Judge Berkman chose not to advise the defendant of the risks of proceeding with conflicted and admittedly unprepared counsel. Instead, she told the Defendant she would not delay the case while he was "just thinking about" his lawyers' repeated failures to appear and went on to tell him that the "rather curious situation" with Florio was not terribly serious. It wasn't until mid-trial - after a jury had been selected and sworn, after Florio had given an opening statement, and after Florio had crossed three of the five witnesses who had testified - that the Court finally saw fit to address, in a conclusory and negating fashion, the obvious conflict inherent in Florio's representation:

> THE COURT:
>
> So, I never quite know what to say about that. *There is an argument that in some fashion constitutes a conflict of interest, that she might, for some reasons, be more interested in her own*

> *matter than yours. I'm not quite sure I see it factually, frankly.* But it really isn't up to me to make that decision. Just as long as you understand that she has a matter that is pending here, in New York County. I don't know what the status of the case is at this point. But, it's particularly serious because if there were to be a conviction, she could lose her license to practice law. So, I just want to make it explicit that you understand that, and you understand that's going on, and that you wish to proceed with her, in any event.
>
> (TT 271:20-272:13).

165. Contrary to the court's limited perspective, far more was at stake than Florio's "license to practice law." Paul Cortez was facing homicide charges, his liberty was at stake and, unfortunately, his concerns were justified.

166. Paul was forced out to trial encumbered by attorneys who were not only unprepared, but laboring under actual conflicts. At the start of the trial, Miranda repeated what she had been saying for months: that neither she nor Florio were prepared to proceed to trial on the matter. Although they had an obligation, and the resources, to subject the prosecution's forensic evidence to adversarial testing, they chose not to.[29] Although counsel had a duty, nearly a full year, and over a hundred DD5s with which to conduct an investigation into the crime, no crime scene witnesses had been spoken to by the defense.[30]

167. First and foremost, as detailed above, defense counsel incompetently dealt with the forensic evidence. The decision to call experts to address the fingerprint evidence was a no-brainer, and the failure to do so was a wholesale failure without justification.

168. Law enforcement had concluded that a fingerprint matching the Defendant had been found at the crime scene. Defending against this evidence required 1) discrediting that expert witness, and/or 2) demonstrating that the *latent* fingerprint was deposited on the wall

[29]Trial counsel was in possession of the bulk of the forensic evidence in the summer of 2006 and the DNA in October of 2006.

[30]Trial counsel was aware of the location of the crime and identities of the relevant parties since March of 2006, well in advance of the January 21, 2007 trial date.

prior to the blood spatter. Inexplicably, although a fingerprint examiner contacted by Florio for comparison purposes requested examination of the actual sheetrock containing the blood transfers because his preliminary examination indicated: 1) the presence of additional prints that called into question the reliability of the prosecution's forensic testimony, and 2) a distinct possibility that the latent was deposited *prior to* the blood smear be deposited on top of it in overlay, Florio never pursued this line of defense.

169. But for the fact that Florio was alerted to this potentially favorable defense evidence, her self-imposed restrictions in addressing the fingerprint evidence could perhaps be excused as insufficient perception with catastrophic results. Given the information provided by Moses, however, Florio's unwillingness to develop information about *when* the latent fingerprint matched to Paul had been deposited, and her firm commitment to pursuing a defense based solely on *who* had deposited it is inherently suspect.

170. As detailed above, experts for current counsel have made clear the blood transfer on the sheetrock was *not a handprint* and the fingerprint is *not patent*. Moreover, experts for current counsel observed ridges and print details suggesting the presence of *other prints or partial prints* on the sheetrock. Lastly, experts for current counsel opine that the overlay was deposited *on top of the latent.*

171. Florio's decision to turn a deaf ear to information provided by Moses, and leave the specter of a bloody fingerprint in play, defies explanation. Subjecting the sheetrock to forensic examination would have posed no risk to the defense; calling an expert witness to refute the prosecution's science would serve only to discredit its witnesses; presenting definitive evidence that the *latent* was placed on the wall *before* the blood spatter could only eviscerate the significance of the prosecution's sole piece of physical evidence linking the Defendant to the crime scene.

172. Of further import, contrary to the prosecutor's argument in summation, amido black is not capable of providing confirmation for a specific chemical, it *does not indicate*, and *cannot indicate*, the presence of human blood in the fingerprint. (Exhibit G, Harris Affidavit). A forensic chemist could have, and should have, refuted the prosecutor's faulty statements with respect to the amido black. Expert testimony establishing the properties and function of amido black would have posed no risk to the defense, it would have served solely to undermine the significance, and highlight weaknesses, in the prosecution's evidence.

173. Trial counsels' grievous error in failing to challenge the fingerprint evidence became a fatal one when they adopted the prosecution's erroneous position that there was a *"patent"* fingerprint left in blood, and proposed a stomach-turning defense – that it had been left in menstrual fluid – to solidify that erroneous position. In a case where the prosecution's own forensic witness testified that the print was a latent, there is no sound legal strategy that supports this line of defense.

174. Another flagrant lapse in counsel's representation that points to the conflicts operating on the defense was the failure to conduct DNA analysis on hairs, some of which had the roots still attached, that were found clutched in Catherine's blood-soaked hands at the time of her death. As the prosecution's own evidence had established that those hairs did not belong to Paul, conducting DNA testing on the hair was entirely risk-free and potentially exonerating. There is no rational defense strategy that justifies this failure. The only possible harm inflicted by ascertaining the source of these exonerating hairs was to the prosecution's case.

175. Perhaps an equally catastrophic failing which points strongly to the conflict operating on the defense was counsel's absolute dereliction in declining to put before the jury the surveillance footage showing the Haughn leaving the apartment building after the murder had been committed. As detailed above, upon review, the footage shows alternate suspect David

Haughn leaving the scene at 6:37 p.m., long after Catherine was murdered. There is no strategy that justifies not putting this surveillance footage into evidence. The only parties that could possibly accrue a benefit from this failure would be the prosecution and Florio.

176. Also suspect was the defense choice not to display a comparison between the surveillance footage that showed Haughn walking up to the apartment in a white t-shirt at 4:59 p.m. and the photographs law enforcement took which show Haughn was in a black t-shirt after the homicide. Taking a second to display this comparison would have made clear that the prosecution's assertion in its closing that Haughn had not changed his clothes was inaccurate. The defense's failure to highlight this evidence to the jury, coupled with its failure to object to the prosecution's demonstrably false assertion, is beyond perplexing, it is grossly suspect.

177. In another dubious failing, trial counsel did not subpoena or request additional surveillance footage that was in the possession of the prosecution. Of stunning import, law enforcement details surveillance footage capturing images of Paul Cortez at a Duane Reade located at East 106th Street subsequent to the homicide. (Exhibit LL, DD5 95). As this footage was already in the hands of law enforcement, there was no downside to obtaining a copy. Surveillance footage depicting a presumably calm and *non-bloody* Paul Cortez, innocently shopping at a store located close to his home, and 30 blocks away from Catherine's, shortly after the homicide could only help the defense.

178. Another failing lacking a strategic basis was trial counsel's failure to obtain in discovery, and subject to testing, the fingerprint found on the broken guitar recovered near the decedent's body. While law enforcement found the print to be of no value, and it therefore could not be inculpatory, incompatibility with Mr. Cortez could only serve to exculpate the Defendant.

179. Further, the defense could have challenged the prosecution's interpretation of cell phone records which showed, according to its theory, the high volume of unanswered calls Paul

placed to Catherine's cell phone (which were alleged to have incited Paul's rage) and the cell site tower hits reflected on the phone records (which were alleged to have placed Paul at the scene of the homicide). Review of the cell phone records makes clear that of the four completed calls between Paul and Catherine on that day, three out of those four were placed by Catherine, not Paul. Additionally, while the prosecutor implied at trial that Paul Cortez's cell phone pinging off a tower two avenues south indicates he was at the location, this is certainly not true. The defense failed to call a cell phone expert to accurately interpret these records.

180. In a similar vein, although Haughn said he made three calls to Catherine's cell phone during the time he was waiting outside with the car, in actuality his cell phone records show only a single call, which lasted only a matter of seconds - a call that never connected or showed up on Catherine's cell phone records. Had the cell phone records been subjected to critical review, and had the defense wanted to, Haughn could have been confronted with a suspicious and suggestive piece of evidence that tended to inculpate him. Further, the defense could have avoided this circumstantial evidence being presented to the jury in a manner that tended to inculpate, as opposed to exculpate, the Defendant.

181. Evincing total disinterest in constructing a successful defense, trial counsel failed to speak with four disinterested civilian witnesses who heard screams and sounds of a struggle coming from Catherine's apartment between 5:45 p.m. and 6:23 p.m. Failing to speak with these material witnesses, who confirm the homicide occurred during a time when Haughn was concededly in the apartment, is without justification.

182. Likewise, no harm could be incurred by counsel interviewing civilian Brad Stewart about the bald-faced lie Haughn told as he was walking into the apartment after the attack on Catherine had occurred. At that time, Haughn said that his brother (who was 12 years old at the time and in Ohio) and not Catherine (who was dead or dying on the bedroom floor)

was inside the apartment with his dogs.

183. Similarly, the defense would have suffered no possible setback had counsel interviewed civilian witness Julia Jeon about Haughn's curious disregard for Catherine's well-being, as well as his uncanny knowledge that it was a boot, as opposed to a shoe or a sandal, that had left an impression on the bed prior to law enforcement arriving at the scene.

184. In their unwavering pattern of leaving every stone unturned, the defense did not follow up on the DD5s which detail civilian witnesses, some of whom recounted Haughn's anger over Catherine's lifestyle, several of whom who had seen Paul and Catherine together, in a romantic context, just days before the homicide, and others who knew of other men Catherine had been dating, as well as Catherine's rejection of Haughn.

185. The failings in conflicted counsels' representation continued to the bitter end; Miranda's summation was rambling and incoherent, indicative of counsel's pervasive lack of preparation.

186. In this case, the Defendant was charged with homicide, not a fare beat. The litigation strategy employed - showing up only when forced to do so, dealing with the evidence only as it was presented, and having dialogue with relevant witnesses only when and if they took the stand - was grossly inadequate. It is not even *theoretically* possible that failing to investigate the only piece of evidence that linked defendant to the scene of the crime was a "strategic" decision. And not putting surveillance footage which shows the alternate suspect leaving the scene *after the murder* - not even the most contorted reasoner can fashion a benign motive for that □

187. Trial counsel's litigation choices defy rationalization, they could only be advantageous if the primary goal was currying good will and avoiding acrimonious interactions with opposing counsel. Given the context of trial counsel's conflicts - and the grave nature of

trial counsel's persistent failings - it is clear that an actual conflict operated on the defense, or, at the very least, the potential conflict as to Florio was so extreme as to be unwaivable. As a result, Paul Cortez was denied "meaningful representation" under the New York State Constitution and "effective representation" under the Sixth Amendment.

NEW EVIDENCE

188. Under CPL § 440.10(1)(g), discovery of new evidence is a permissible ground for reversal of a conviction. New York's courts recognize that this section contemplates not only new evidence directly bearing on the guilt or innocence of the defendant, but also new advances in scientific technique or methodology, or assumptions and conclusions about a given subject, which may cast doubt on the reliability of a former technique, methodology, assumption or conclusion, even one of long standing.

189. For instance, in People v. Bailey, 999 N.Y.S.2d 713 (N.Y. Co. Ct. 2014), the court granted a new trial to a defendant convicted in the death of a toddler via "Shaken Baby Syndrome." The defendant demonstrated to the court's satisfaction that advances in the biomechanics of head injuries revealed that "the mainstream belief in 2001–2002, espoused by the Prosecution's expert witnesses at Trial, that children did not die from short falls, has been proven to be false." Bailey, at 724. Rejecting the prosecution's position that this research did not constitute newly discovered evidence, but rather merely contradicted expert opinion testimony at trial, the court found it critically important that "key medical propositions relied upon by the Prosecution at Trial were either demonstrably wrong, or are now subject to new debate." Id at 726. Because "recent medical and scientific opinion significantly, and substantially, undermines that 2001 [t]rial testimony," the court concluded that the defendant's proffered testimony about head injuries in children constituted "new evidence" under the meaning of CPL § 440.10(1)(g).

Id at 726 and 727.

190. The Bailey court's approach makes eminent sense. As the Court is undoubtedly aware, in the years since Mr. Cortez's conviction, there has been a sea change in the way the criminal justice system looks at the work of forensic laboratories all over the country. Extensive studies have revealed that there are pandemic problems in the nation's forensic laboratories.[31] Multiple massive scandals have come to light, covering a huge range of forensic science subjects, including improper techniques, methodologies predicated on unwarranted assumptions, lack of oversight, and flawed testimony. Some labs have been closed outright.[32] Others have undergone wholesale review and revision of their procedures.[33] This is very much a work in progress. For instance, the FBI laboratory, formerly deemed the "gold standard" in its field, has discovered a stunning 95% rate of flawed testimony by its technicians just in the area of hair analysis alone.[34] And there is no reason to believe that this is anything but the tip of the iceberg.

191. The NYPD lab which was responsible for processing the fingerprint evidence in this case was not exempt from discovery of shoddy and unreliable work, in the very area of fingerprint analysis, during the same time period as the investigation into the Catherine Woods murder. In June 2007, several months after Mr. Cortez's conviction, the New York State Commission of Investigation published a report entitled *Report on the New York City Police Department Crime Laboratory Latent Print Development Unit Incident*.[35] The report chronicled

[31]See, *Strengthening Forensic Science in the United States: A Path Forward*, available at, https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf

[32]See, e.g., *Rice, Mangano Announce Closure of Nassau County Crime Lab*, available at, https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf

[33]See, e.g., *State Police Crime Lab Undergoes A Major Overhaul*, available at, http://www.seacoastonline.com/article/20001001/News/310019974

[34]See, *FBI Admits Forensic Evidence Errors In Hundreds Of Cases*, available at, http://www.bbc.com/news/world-us-canada-32380051

[35]available at, http://ag.ca.gov/meetings/tf/pdf/NYPD_Inc_latent_print.pdf

a "failure by a latent print development analyst to find and report latent prints on evidence"[36] at the NYPD crime lab in Queens. The Commission was designated by New York State in July 2005, just before Ms. Woods' murder, to investigate "allegations of serious negligence or misconduct substantially affecting the integrity of forensic results committed by employees or contractors" of any forensic facility in the state.[37] In November of 2006, the Commission received a report from the state's Office of Forensic Science of a latent print examiner's failure to notice latent prints on a firearm. Investigation into an examiner's case work revealed that she had not only missed prints entirely, she had also failed to report prints that she had developed, and failed to report trace evidence.[38] Her work had been involved in 176 convictions.[39] The errors highlighted in the Commission's report are similar to those made by NYPD Criminalist Alex Chacko, when he missed the other prints on the sheetrock.

192. But what is most alarming in the Commission's report is the shockingly unreliable oversight protocol that was in place at the time of the Woods investigation. The protocol in place at the time involved the review of 6 cases per month per analyst, but the review was carried out by another latent print analyst. Worse, each analyst selected which of his or her completed cases were to be reviewed.[40] A less reliable supervisory protocol can hardly be imagined, and it was the one operative at the time Mr. Chacko and Ms. Branigan were analyzing the fingerprint evidence in this case.

193. The important point for this motion is that these are not mere isolated cases of misconduct, shoddy procedure, technique, assumptions or oversight, but that there is a deeply-entrenched system-wide failure which renders the conclusions reached by any given forensic

[36] Id. p. 1.
[37] Id. p. 1.
[38] Id. p. 3.
[39] Id. p. 4.
[40] Id. p.4

technician in a law enforcement laboratory presumptively *un*reliable.

194. Specifically, in this instance, the attached affidavits of Dr. Cole and the Drs. Haber detail the post-conviction advances in the science surrounding fingerprint analysis that elucidate infirmities in testimony presented by the prosecution's forensic fingerprint witnesses Alex Chacko (Chacko failed to detail additional prints present in the matrix) and Anabelle Branigan (Branigan definitively asserted the print belonged to Paul based on insufficient and unverified criteria). Post-conviction advances in the science surrounding fingerprint analysis constitute "new evidence" warranting a new trial. CPL § 440.10(1)(g).

195. As applied to the prosecution's forensic fingerprint testimony, the attached affidavit of Dr. Cole details five different areas of development in the discipline, in light of which Mr. Cortez should be granted a retrial. The Drs. Haber echo much of what he says. As noted above, there was already sufficient information at the time of the trial to have alerted the defense team that fingerprint analysis could be unreliable. Since the trial, however, through the explosion of the above-detailed scandals and their aftermath, so much more has come to light regarding flaws in the craft, as typically practiced at the time, as to mandate vacatur.

196. First, it is now glaringly obvious that, as Dr. Cole says, "while some comparisons showing four corresponding characteristics may well have significant probative value, the probability of observing such number of characteristics in agreement between fingerprints from unrelated individuals is not negligible." (Exhibit H, Cole Affidavit, pp. 2-3)

197. Second, Ms. Branigan's categorical assertion that the wall fingerprint was made by Mr. Cortez is now entirely unacceptable to the latent print community. It is now recognized that only DNA analysis can support a high degree of certainty as to a "match," that neither empirical evidence nor statistics support categorical assertions about "matches" in other disciplines, and that latent print examiners should never testify directly *or even imply*, that they

have made a match between a suspect's prints and an evidence print. (Exhibit H, Cole Affidavit, pp. 3-4). The Drs. Haber, pointing to the same alarming reports as Dr. Cole, observe that "[t]he theme throughout these reports is that there is no evidence to support that fingerprint conclusions are reliable...and accurate." (Exhibit F, Haber Affidavit, p. 4). Specifically, these reports stress that the "ACE-V" method employed in this case "has not been demonstrated to have a low error rate or to be reliable." (Exhibit F, Haber Affidavit, p. 4). Consequently, the International Association for Identification "acknowledges that there is lacking or insufficient evidence to support" assertions that a "crime scene print matches the defendant, and it could not have been made by anyone else." (Exhibit F, Haber Affidavit, p. 5).

198. Third, Branigan's testimony as to infallibility is even more obviously unreliable than it was at the time of the trial. As Dr. Cole notes, in 2009, the foundational National Research Council Report[41] stated that claims of infallibility "are not scientifically plausible." (Exhibit H, Cole Affidavit, p. 5). So too, the Drs. Haber point to the International Association for Identification's current rejection of examiners' testimony asserting certainty that they have not made erroneous identifications. (Exhibit F, Haber Affidavit, p. 5).

199. Fourth, Branigan's failure to document the number or nature of the "points of comparison" she relied on for her conclusions is now clearly unacceptable in the latent print discipline. Dr. Cole cites to five different authorities, including the 2009 National Research Council Report, the FBI-sponsored Scientific Working Group on Friction Ridge Analysis Study and Technology (SWGFAST), the Expert Working Group on Human Factors in Latent Print Analysis, the FBI's own current Laboratory Standard Operating Procedures, and the Justice Department Office of the Inspector General's report responding to the Mayfield misidentification. All of these authorities strongly stress that rigorous documentation is essential

[41] NRC, *Strengthening Forensic Science in the United States: A Path Forward,* 142 (Feb., 2009).

to avoiding misidentification errors. (Exhibit H, Cole affidavit, pp. 5-7). Again, the Drs. Haber concur; due to the findings of the aforementioned studies in the wake of the scandals, a "State's fingerprint experts must describe the method they used in detail, so that it can be evaluated for its reliability. This did not happen in this trial." (Exhibit F, Haber Affidavit, p. 5).

200. Fifth, Dr. Cole's affidavit explains that "it is now well established that forensic analysts, like all scientific observers, can be influenced by cognitive bias." (Exhibit H, Cole Affidavit, p. 8). As a result, it is now known that it is important for verifications of matches to be conducted "blind," such that the verifying examiner should not be aware of the conclusion reached by the first examiner when conducting verification. Blind verification was not conducted in this case. As Dr. Cole notes of Ms. Branigan's cavalier testimony that verification was only done at all as a pro forma compliance with a bureaucratic procedure, that testimony "undermines the whole ostensible purpose of the 'Verification' phase of the ACE-V process: to catch errors." (Exhibit H, Cole Affidavit, p. 8).

201. Therefore, even if the Court were to find – as it should not – that trial counsel was constitutionally effective, the new developments in fingerprint science are, standing alone, enough to mandate a new trial. The fingerprint attributed to Mr. Cortez is the sole piece of forensic evidence linking him to the offense. It is now well known among forensic scientists that many of the claims and conclusions asserted by the People's witnesses at trial are simply incorrect. A conviction resting on such a basis should not stand.

CONCLUSION

201. Some adversarial testing, a scant degree of investigation, a scintilla of input from an expert or two, would have gone a long way in this case. Abundant evidence could, and should, have been proffered which would have dramatically shown that the people's sole piece of

physical evidence - the "bloody fingerprint" - simply didn't exist. Conflicted trial counsel could, and should, have driven home that the People's own cell phone evidence undermined their theory that Paul's affections for Catherine were unrequited, and placed Mr. Cortez far from the scene of the crime, all the way up at 96th Street, prior to Haughn even placin his 911 call. It is a certainty that hairs clutched in Catherine's bloodied hands at the ti1me of her death did not belong to Paul Cortez; common sense informs that testing those hairs would identify the true perpetrator. In this case the jury did not hear from any of the ear witnesses, even though they heard Catherine's harrowing cries at a time when Haughn was concededly in the apartment. Had the jury been shown surveillance footage which depicts Haughn leaving the scene long after Catherine's cries had ended and after having changed his clothing, one can easily conclude a different verdict would have returned. (Exhibit A, Ruhnke Affidavit; Exhibit B, Yaroshefsky Affidavit).

202. Mr. Cortez was effectively deprived of counsel at each and every critical stage of the proceedings. The failure to investigate in this case was a "constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it." United States v. Cronic, 466 U.S. 648, 659 (1984)(internal quotes and cites omitted). Even were a showing of prejudice necessary, it was amply demonstrated by the calamitous effects of the conflicts of his lawyers, a constitutional violation of equal magnitude. As a result, the resultant conviction was procured in violation of Defendant's right to counsel; it is a travesty and must be undone.

203. Further, even if the Court were to determine that trial counsel was not ineffective, new developments in the science of fingerprint identification mandate a new trial, as these developments dramatically undermine the sole piece of physical evidence connecting Mr. Cortez to the crime.

The conviction must be reversed.

Dated March 21, 2016
Garden City, NY

Respectfully submitted,

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