SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY YARBOUGH,

Defendant.

NOTICE OF MOTION

Ind. No. 7325/92

TO: Kings County District Attorney's Office
350 Jay Street
Brooklyn, NY 11201

PLEASE TAKE NOTICE, that upon the annexed affirmation of Zachary Margulis-Ohnuma, an attorney duly admitted to practice law in the State of New York, the annexed exhibits and the prior proceedings herein, the undersigned will move this Court at the courthouse thereof at 320 Jay Street, Brooklyn, New York as soon as counsel can be heard for an Order:

1. VACATING the Judgment of Conviction pursuant to CPL §§ 440.10(1)(g) and (h); or, in the alternative,

2. APPOINTING (1) a private investigator and (2) a forensic pathologist pursuant to County Law 18-b, to assist in perfecting the instant motion; and

3. DIRECTING the People to cause forensic DNA testing pursuant to CPL § 440.30(1-a) of all evidence gathered at the crime scene; and

4. For such other relief as this Court may deem just and proper.

Dated: New York, New York
July 19, 2010

Respectfully submitted,

Law Office of Zachary Margulis-Ohnuma

By: _____
Zachary Margulis-Ohnuma
260 Madison Avenue, 17th Fl.
New York, NY 10016
(212) 685-0999
zach@zmolaw.com

Copy to: Clerk of Court
Kings County District Attorney's Office

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY YARBOUGH,

Defendant.

ATTORNEY AFFIRMATION

Ind. No. 7325/92

I, Zachary Margulis-Ohnuma, an attorney duly licensed to practice law in the State of New York, do hereby state and affirm under penalty of perjury as follows:

1. I represent the defendant Antonio Yarbough with respect to post-conviction proceedings. Mr. Yarbough has been in prison since the day that his mother, Annie Yarbough, his 12-year-old sister, Chavonn Barnes, and his sister's friend Latasha Knox were murdered in 1992. Mr. Yarbough – who was convicted based almost entirely on the testimony of a cooperating witness who has since recanted – was denied a fair trial and is factually innocent. Until last year, the People withheld crucial exculpatory evidence showing that the murders took place at a time when they conceded that Mr. Yarbough had an alibi. Moreover, among other failings, trial counsel neglected to do the most rudimentary research or obtain medical testimony establishing the true time of death based on available physical evidence. In addition, DNA testing will undoubtedly reveal the identity of a drug addict who threatened Annie Yarbough at knifepoint in her apartment in the hours before the murders, and therefore is likely to lead to the discovery of the true killers.

2. As described in further detail below, the case against Mr. Yarbough was scandalously weak. Tony was 17 at the time he was interrogated. He did sign a confession that had been written out by police, but only after 15 hours in custody and while still in shock after discovering – and reporting – the bodies of his mother and his beloved little sister. None of the abundant physical evidence linked Mr. Yarbough to the crime in any way. The People conceded he had an alibi for the whole evening before and therefore theorized with great precision that the three murders took place between 6:30 and 7 a.m. on June 18, 1992, despite powerful physical evidence that they took place hours earlier. Moreover, a document, suppressed by the People until last year, shows that Mr. Yarbough first reported the crime to his uncle at 6:45 a.m. that day. Mr. Yarbough's co-defendant Sharrif Wilson (who was the only eyewitness against him) maintained both boys' innocence and went to trial risking life in prison *despite an offer of three-to-nine years for the triple homicide*. Mr. Wilson turned only after being convicted at trial. The jury in the first trial against Mr. Yarbough deadlocked. The second jury convicted, but only after the videotaped confession of Sharrif Wilson was admitted to bolster his credibility.

3. Before, between, and after the two trials Sharrif Wilson exculpated Tony Yarbough: he denied the murders at his own trial, in a statement to a probation officer between the two trials, and in numerous statements since his sentencing. In 2005, he wrote a letter to Mr. Yarbough's aunt apologizing for lying. A true copy of this letter of apology is attached hereto as Exhibit A. Mr. Wilson reiterated the boys' factual innocence in statements to a lawyer I helped him find, Adam Perlmutter, Esq., this year.

We intend to submit an affidavit from him describing in detail how his false statements were a product of official misconduct.

4. New evidence has also arisen shedding light on a crucial trial issue: the time of the murders. The alibi witnesses called by the People in the second trial accounted for the boys' whereabouts until 6:30 in the morning. A document disclosed by the Kings County District Attorney's Office last August showed clearly that the medical examiner at the scene put the time of death, based on *rigor mortis* in the bodies, at eight to ten hours prior to about 10:25 a.m., i.e. right in the middle of the alibi period. A second document disclosed by the DA's office showed that Tony reported the murders to his uncle at 6:45 a.m. – just 15 minutes after he was seen on the street with Sharrif by his neighbor Dorothy Ferrer, who was a prosecution witness at trial. These documents should have been disclosed prior to trial. If they had been disclosed – and there is no evidence they were – they should have been used by the defense lawyer to show the People's theory was squarely contradicted by the physical evidence and eyewitness testimony. But the defense lawyer should have consulted with an expert and made this argument anyway, based on the testimony she had that *rigor mortis* was fixed by 10:25 a.m. in all three bodies. The failure to employ this evidence – whether caused by the People or by trial counsel – denied Tony Yarbough a fair trial, caused him to be wrongly convicted, cost him 18 years of unjustified incarceration, and prevented one or more vicious murderers from being prosecuted for killing an innocent woman and two little girls.

FACTS

5. The following facts are based on my review of the case, including (1) transcripts of the trial of Sharrif Wilson and the two trials of Anthony Yarbough obtained from Mr. Yarbough; (2) documents obtained from the file at Kings County Supreme Court; (3) documents obtained from the Kings County District Attorney's Office pursuant to a request under the Freedom of Information Law; (4) a letter from Sharrif Wilson to People's witness Sandra Vivas, obtained from Ms. Vivas, Ex. A;[1] (5) discussions with Mr. Wilson's post-conviction attorney, Adam Perlmutter, Esq.; (6) conversations with Mr. Yarbough's trial attorney Irene Elliot, Esq.; (7) conversations with my client; and (8) my own investigation.[2]

6. The facts are presented in chronological order, beginning with the facts elicited at the trials regarding the events of June 17 and June 18, 1992; the subsequent court proceedings; Mr. Wilson's letter to Mr. Yarbough's family in 2005; and the Kings County District Attorney's Office's disclosure of documents in 2009.

I. EVIDENCE FROM THE TRIALS DESCRIBING THE EVENTS OF JUNE 17 AND JUNE 18, 1992

7. This section summarizes the evidence presented at Mr. Yarbough's second trial in February 1994, which forms the basis of his conviction. A true copy of the transcript ("Tr.") of this trial that I received from my client is being served and filed as a separate volume. Where relevant, the trial evidence is supplemented with facts

[1] All exhibits to this Affirmation are being served and filed in a separate volume.
[2] I hereby gratefully acknowledge the volunteer assistance of recent law school graduates Martha Lineberger and Matthew Shroyer in conducting the investigation and preparing this Affirmation.

elicited at Mr. Yarbough's first trial, Ex. O, at the trial of Sharrif Wilson, Ex. N, or from other sources as indicated.

A. Background

8. Antonio Yarbough was 17 years old on June 18, 1992, the day of the murders. He was friends with a young man named Sharrif Wilson, whom he had met about four months earlier in Greenwich Village. Tr. 368.[3] Sharrif was just 15 at the time. Although both boys were openly gay, they were not romantically involved with each other. Tr. 404. About a week earlier, Tony had met Ron Carrington, who was a couple of years older and had a car. *See* Ex. N: Sharrif Wilson Trial Transcript at 152, 156 (hereinafter "SW").

9. Tony lived on the first floor of 2832 W. 23rd Street in Coney Island, Brooklyn with his mother, Annie Yarbough, who was 40 at the time of her death. Annie was a heroin addict, as confirmed by the presence of tracks on her arms and traces of cocaine, codeine and opiates in her blood after her death. Tr. 612, 684. She attended a methadone program at Coney Island Hospital three days a week. Tr. 887; *see also* Ex. B at 3 (notes of interview with Charnette Loyal indicating Annie Yarbough is in methadone program at "CIH"). She walked with a crutch and customarily slept in a chair in the front room of her apartment. Tr. 331. Since the lock on the door to the apartment was broken, she used the crutch to hold it shut. Tr. 332. She also apparently sold drugs out of her apartment. *See* Tr. 804-05; 280-81 (Tony and Annie's house was "not a great place to

[3] Unless otherwise stated, references to transcripts are to the second trial of Anthony Yarbough, which took place over six days in February 2004 and gave rise to the conviction for which he is presently incarcerated.

visit" because "a lot of drug addicts go there"). In addition to Tony, Annie lived with her twelve-year-old daughter, Tony's half-sister Chavonn Barnes.

B. Tony and Sharrif Go Out for the Evening While Annie Gets High and Sells Drugs at Home

10. It was never disputed that Tony and Sharrif Wilson spent the evening of June 17, 1992 – the night before the bodies were discovered – hanging out, first in Coney Island, then in Greenwich Village. At about 3:15 a.m., Ron Carrington drove them from Manhattan, where they had been hanging out with him on the piers in the West Village, to Brooklyn. SW at 159. He had been with them for the previous three hours. SW at 159. He dropped them off near the Prospect Park subway station at about 4 a.m. SW at 160; Tr. 879.

11. It was undisputed that Sharrif came to Tony's apartment on the evening of June 17, 1992. At the apartment, Tony's mother asked her son: "didn't I tell you not to bring him around here?" referring to Sharrif. Tony did not answer back and the boys left shortly thereafter. Tr. 334.

12. While Tony and Sharrif were out in the Village, Annie was home using and selling drugs. Tr. 803, 822-24; *see also* Tr. 336-38, 345. A friend of Annie's, Charnette Loyal, testified that she was in the apartment with Annie after Tony left, "doing what we always do" – using drugs. Tr. 803. Sometime after Tony left, two men came to the apartment. Tr. 804. The men were waiting for someone to bring drugs to them at the apartment. Tr. 805. Although the men were smoking with Annie and Charnette, the drugs they were waiting for did not arrive. *Id*. At some point, one of the men pulled out a knife and said to Annie: "I will kill you if you don't get my money or

my drugs." Tr. 805, 818. Charnette had seen one of the men, whose name was Vinnie, at Annie Yarbough's house on several prior occasions. Tr. 806. As a result of the threat, Charnette went out to "hussle" and returned with drugs for Vinnie, who was still there with Annie and the other man. Tr. 806. She finally left the apartment for the night at some point before daybreak. Tr. 843.

13. Loyal, whose testimony was somewhat vague, was vigorously cross-examined. *See* Tr. 822-41. However, it appears that she provided a more coherent account of that evening to the police on the morning the bodies were discovered. *See* Ex. B (Notes of Interview with Charnette Loyal). There is no mention of these notes or Ms. Loyal's prior statement at the second trial. In the statement to the police, Loyal said that after Tony and his friends left the apartment, Charnette, Annie and Vinnie got high. Charnette smoked crack while Annie and Vinnie shot dope. There was an argument between Vinnie and Annie about drugs. Annie gave Vinnie a water shot and he got mad. He pulled out a knife and said "give me my money or another hit." Charnette said, "I'll go get the money." Vinnie left and said he would be back at 10 p.m. Charnette left about two minutes later – this was at 9 p.m. Annie asked her to come back at 10 p.m. but Charnette never returned, according to the notes. She heard about the murder the next day when she was taking her son to school at 7:30 a.m. Charnette described Vinnie to the police as a white male with sandy blond hair, 6'1" or 6'2" tall, and wearing wire rim glasses. He was 40-45 years old and had blue eyes. His left eye was cocked. He was in the methadone program at Coney Island Hospital with Annie. Ex. B. The notes are silent about the other person in the apartment, but Ms. Loyal testified in the first trial that she told police about him at the time. Ex. O at 418-23.

14. Clara Knox, who is the grandmother of victim Latasha Knox, also testified about the apartment in the early morning hours of June 18, 1992. She said she stopped by the apartment at about 1 a.m. Tr. 335. Her granddaughter was asleep in one of the bedrooms and Annie was in the living room with a "Spanish man" whom Ms. Knox had never seen before. Tr. 336-38. Ms. Knox stayed for about 45 minutes. Tr. 339.

15. Tony and Sharrif's activities between 4 a.m. and about 6:30 a.m. were essentially undisputed, although the only witnesses for this time period were Sharrif Wilson and Tony himself. According to Wilson, after Carrington dropped them off, the boys hung out in the park until after daybreak and then took a subway to Coney Island. Tr. 376, 406 (Wilson testimony). According to Tony, the boys got out of Carrington's car at 4:09 a.m. – he noticed the time on the clock on the car's dashboard. Tr. 879. Wilson testified that they got off the subway at Stillwell Avenue near the corner of Mermaid Avenue at about 6 a.m. Tr. 377-78 (Wilson). According to Tony, they got out at 6:25 a.m. Tr. 880. They stopped at a pawnshop, where Tony sold a bracelet and bought hot chocolate and a bagel at a grocery store. They walked from there to 23rd Street. SW at 605-606 (Wilson); Tr. 379, 407 (Wilson), 880-881 (Yarbough).

16. Two witnesses testified at trial that they saw the boys that morning before the bodies were discovered. Tony's aunt, Sandra Vivas, testified that she saw him after 6:15 a.m. (when she left her house) but before 6:27 a.m. (when her train to work comes) at 15th Street and Mermaid Avenue. Tr. 678. She asked him what he was doing out and about at that time of day. Tr. 280. "He told me he was at the Village all night hanging out and he was on his way home," she testified, without objection. Tr. 280.

Dorothy Ferrer, a neighbor who lived at 2832 W. 23rd Street, testified that she saw Tony at 6:30 a.m. on a bench in front of the building with his friend, laughing and talking. Tr. 300.

C. Tony and Sharrif Separate

17. The first major fact in dispute was how Wilson and Yarbough parted company that morning. There is no question they were seen by others – laughing and happy – around 6:30 in the morning. According to Tony, after they spoke to Dorothy Ferrer in front of the apartment, Sharrif said he needed something to wear and that he was staying at the home of a friend who lived nearby, Shawn Jones. Tr. 881. Sharrif was going to go inside Tony's apartment to get something to wear, but he did not. Tr. 882. Instead, as far as Tony understood, Sharrif headed to Shawn's house. Tr. 882.

18. Sharrif told two different stories regarding what happened at that moment. At his own trial where he testified in his own defense and in a statement to a probation officer between the two trials, Sharrif said when they arrived at the corner of 23rd Street, he went toward Shawn Jones' apartment a block away, which was where he was staying. SW at 606. (Shawn lived at 2949 W. 23rd Street, *see* SW at 600). He arrived at Shawn's and knocked on the door. Nobody answered so he "sat there and waited for somebody to answer." A little boy answered and told him Shawn was not home. Sharrif then returned to Tony's house. When he got back to Tony's house, Tony was standing outside with the police. SW at 606.

19. At the Yarbough trials, of course, Sharrif Wilson claimed to have committed the murders with Tony. He testified that he and Tony entered the apartment

together, Tr. 378-79, and separated only when Sharrif silently left the apartment, leaving Tony alone with the garroted corpses of his family members three minutes and ten seconds later. Tr. 391-92, 426-27. His testimony at trial about the murders themselves was characterized by memory lapses and inconsistencies with his prior statements. *See generally* Tr. 402-31. However, he consistently stated that the victims were first stabbed to death by Tony. Sharrif claimed that the two boys then moved the dead bodies around in the apartment and *only then* tied them up with cords to "make it look like a real murder." Tr. 389; *see* Ex. C (Wilson Video Statement at 11). He never said they strangled the victims to death or hit Annie on the head. In the trial version, after the murders Sharrif went to Shawn's house and stayed there 15 to 30 minutes. Tr. 392-93. He then returned to the scene of the crime he claimed he committed a few minutes earlier. Seeing police at the crime scene, he voluntarily accompanied them to the station. Tr. 393-94.

D. Tony Discovers the Bodies and Reports them to His Uncle Major "Sonny" Yarbough

20. Tony Yarbough testified that after Sharrif went to Shawn's, he entered his apartment and noticed the crutch that normally held the door closed was missing and his mother was not in the chair where she usually slept. Tr. 882-83, 887. The apartment was poorly lit. Tr. 883. He looked for his mother in the kitchen and she was not there, so he figured she was at the next door neighbor's apartment. On the way out, he noticed a girl on the couch in the living room with no top on. He also noticed that the door to his bedroom was open. He went into the bedroom and saw his mother laying on the bed. He shook her and got no response. He went to look for his little sister in the

next bedroom. She was lying on the floor. He shook her and she did not respond either. At that point, Tony got scared and ran out of the house. Tr. 889-890.

21. He came out of the building and ran into his uncle, Major Yarbough. Tr. 891. (Major Yarbough is Annie's brother, Tr. 315). Tears streaming down his face, Tony told his uncle that everybody in the house was dead. Tr. 317, 323, 891. Major Yarbough was dropping off his son, who has cerebral palsy, at the bus stop and told Tony he had to wait for the bus. Tr. 316, 318, 893. Tony, still crying, was afraid to go back in the apartment himself. Tr. 893. After the bus came, Tony and Major went in and Tony called the police from a neighbor's telephone. Tr. 319-21, 893. Tony spoke to the police himself. Tr. 321.

22. Although Major Yarbough testified at trial that Tony approached him at 7 a.m., he previously stated in a statement to the police that Tony approached him at 6:45 a.m. *See* Ex. D (Major Yarbough DD-5). As discussed below, however, this statement was suppressed by the People and so defense counsel never asked about it and it was not placed before the jury.

23. Officer Ricky Bradford received a radio call to respond to the location at about 7:20 a.m. Tr. 202, 239. As soon as he arrived, Officer Bradford was approached by Antonio Yarbough and another man. Tr. 202-03, 239-240. Tony told the officer that he had called the police. Tr. 204. Tony led the police into his apartment. Tr. 204, 894. He observed Latasha Knox dead on the couch, topless, with a bra pulled up over her chest and panties on. She had puncture wounds in her chest. Tr. 204. There was a cloth tied around her neck and her hands were tied behind her back. Tr. 206. Upon seeing the body, Officer Bradford drew his gun and Tony ran out of the apartment in

horror. Tr. 205. Bradford continued to discover the body of Annie Yarbough in the first bedroom and Chavonn Barnes on the floor in the second bedroom. Tr. 206-07, 212. Annie was clothed. Tr. 208. Chavonn's pants were pulled down and her bra and shirt were pulled up. Tr. 208. Annie and Chavonn had stab wounds and cloths around their necks and restraining their arms. Tr. 206-07, 212.

24. When Bradford left, Tony was waiting outside, in front of the apartment. Tr. 247. Tony responded to Bradford's preliminary questions. Tr. 248.

25. The sequence of events can be summarized as follows:

Time Range	Apartment	Tony & Sharrif
8 – 8:30 pm	**Clara Knox** sees Tony and Sharrif at Annie and Tony's apartment. Tr. 333.	Tony & Sharrif are at the apartment. Tr. 333.
8:30 pm – 1 am	**Charnette Loyal** and Annie and two men are at the apartment using drugs. Tr. 803-05.	Tony and Sharrif go to Greenwich Village and hang out with Ron Carrington beginning about 12 midnight. SW at 159.
1 – 1:30 am	**Clara Knox** sees Annie and two men at the apartment. Tr. 336-39.	Tony and Sharrif meet up with Ron Carrington in the Village. SW at 158-60.
3:15 – 4:09 am		**Ron Carrington** drives Tony and Sharrif to Prospect Park. SW at 159; Tr. 879.
4:09 – 6:16 am		Tony and Sharrif hang around in Prospect park and take the subway back to Coney Island. Tr. 376-78, 880-81.
6:16 – 6:27 am		**Sandra Vivas** sees Tony and Sharrif near Coney Island subway station. Tr. 678.
6:30 am	In response to leading questions by **ADA Peter Gray** in video admitted in Yarbough trial, Wilson agrees that murders took place "about 6:30" in the morning. Ex. C at 3. Wilson testifies that the murders took three minutes and ten seconds. Tr. 391-92.	**Dorothy Ferrer** sees Tony and Sharrif laughing and talking on the bench in front of the apartment. Tr. 303, 309.
6:34 am – 7 am	Tony discovers the bodies in the apartment and reports them to **Major Yarbough**. Tr. 882-89. M. Yarbough testifies he saw Tony at 7 am, Tr. 316-17, but withheld DD-5 shows that Tony reported the crime at 6:45 am.	Sharrif claims after the murders he went to Shawn Jones' home, knocked on the door, stayed 15-30 minutes, then returned to the murder scene. Tr. 392-394.
7:20 am	Officer **Ricky Bradford** responds, confirms murders and speaks with Tony. Tr. 202, 239.	
10:25 a.m.	Medical Examiner **Jonathan Eckert** arrives, observes bodies in full *rigor mortis* and cool to the touch, concludes that deaths took place 8-10 hours earlier. Tr. 676; Ex. M.	

E. The Crime Scene Evidence Shows Three Murders, Little Struggle and No Murder Weapon

26. The only witness who described the crime scene was Officer Bradford. Bradford was present when Dr. Jonathan Eckert, a medical examiner, arrived to investigate the state of the bodies. Tr. 210. Bradford noticed that cords from electrical appliances had been cut throughout the apartment, which was generally messy. Tr. 210. Bradford did not observe much blood at the scene, but when the bodies were moved, he saw blood pour from the wounds. Tr. 213, 245-46. None of the items recovered from the crime scene were offered into evidence, except the two knives that were offered by the defense. Tr. 871. It was stipulated that one of the knives was found behind the living room couch and the other was found on the kitchen counter. Tr. 871. It was further stipulated that a serology test conducted by the medical examiner's office found no evidence of blood on either knife. *Id*. Officer Bradford authenticated numerous gruesome photographs of the victims, which were admitted over the objection of defense counsel. Tr. 216-232.

27. Acting First Deputy Chief Medical Examiner Dr. Jonathan Arden testified about the condition of the bodies based on autopsies he performed and reports from Dr. Eckert, who was at the crime scene. Tr. 675-76. Dr. Eckert was not called by either side. Dr. Arden's testimony included details of the autopsies and a number of conclusions. However, Dr. Arden danced around the issue of time of death. He noted that the bodies were cool to the touch when Dr. Eckert examined them at 10:25 a.m. and that *rigor mortis* was fully developed or "fixed" in Chavonn Barnes and Latasha Knox. Tr. 676. Dr. Arden asserted that rigor mortis had reached the extremities and the

mandible in Annie Yarbough. Tr. 676.[4] But he testified that "it is not possible to establish an actual time of death based on post-mortem changes … we never establish the time of death." Tr. 680. He claimed that he would expect to find "well developed *rigor mortis*" at 10:25 a.m. if the murders had taken place at 6:30 a.m. Defense counsel hardly challenged this point, which flies in the face of most estimates of *rigor mortis*, which hold that the process only *begins* two hours after death and does not become fixed until 8 to 12 hours after death. *See* Ex. F at 216-19 [excerpt from Gerberth, V., *Practical Homicide Investigation: Tactics, Procedures and Forensic Techniques*, 3rd Ed. 1996 (CRC Press)].[5]

28. Significantly, Dr. Arden concluded that each victim was strangled to death while still alive – a marked contrast to Wilson's testimony that the victims were only stabbed to death. *See, e.g.* Tr. 597. Each victim suffered multiple stab wounds and strangulation with "ligatures" – i.e. electrical cords that were cut from appliances found at the scene. Annie Yarbough had puncture wounds to her heart, lungs and liver. Tr. 561-63. However, she had no defensive wounds to her hands. Tr. 616. A large gash was

[4] Although trial counsel failed to point it out, this contradicted his testimony at the prior trial of Anthony Yarbough in which he testified that all three bodies were in full rigor mortis when they were examined by Dr. Eckert. *See* Ex. O at 345-46 (excerpts of Anthony Yarbough trial in January 1994).

[5] Dr. Arden also testified about the extent of *rigor mortis* the following day, when he conducted the autopsies. Tr. 689-90. There he testified that at the time of the autopsies, Latasha Knox and Chavon Barnes were in full *rigor mortis* while Annie Yarbough was only in "moderate" *rigor mortis*. *Id*. The autopsy of Annie Yarbough took place at 4 p.m. on June 19, 1992, the day after the incident. Tr. 689. The autopsy of Latasha Knox took place at 9 a.m. that day. Tr. 690. The autopsy of Chavonn Barnes took place at 1 p.m. that day. Tr. 690. According to *Practical Homicide Investigation*, the effects of *rigor mortis* start to recede 18-36 hours after death, suggesting that if Annie were murdered at the time the People believed, she might still have been in full rigor at the time of the autopsy but if she were murdered earlier, her state of *rigor mortis* would have begun to moderate, as Dr. Arden observed.

cut along under her chin along her throat. Tr. 564. This injury did not bleed, however, indicating that it was suffered after death. Tr. 596. There was also evidence of a blunt trauma to the back of her head. Tr. 596. This injury was not apparent until Dr. Arden examined the body internally and found the scalp had bled and bruised. Tr. 596. Based on the autopsy, Dr. Arden concluded that Annie Yarbough was first stabbed, then, before she died, was strangled with the cord and struck on the back of the head. Tr. 597. The strangulation occurred during life and contributed to her death. Tr. 609. The stab wounds ranged from two to five inches deep. Tr. 607-08. A toxicology report revealed the presence of cocaine, codeine and opiates in her system. Tr. 612. There were also needle tracks on her arms consistent with intravenous drug use. Tr. 684.

29. According to Dr. Arden, Chavonn Barnes suffered very similar wounds. She was stabbed multiple times, then strangled with a cord *while she was still alive*. Tr. 617-621. Dr. Arden estimated that she bled internally from the stab wounds for about a minute before her death was hastened by strangulation. Tr. 621. The stab wounds were also two to five inches deep. Tr. 624.

30. Latasha Knox was also killed the same way. She was first stabbed, causing wounds two to five inches deep, then strangled with an electrical cord *while she was still alive*. Tr. 659-683.

F. Tony and Sharrif Execute Custodial Confessions

31. It was undisputed Sharrif Wilson and Antonio Yarbough willingly accompanied police back to the stationhouse for questioning. SW at 253 (Officer Bradford testimony); *see also* Tr. 423 (Wilson), 807-08 (Loyal); 895 (Yarbough). The

only police officer who testified about their interrogation at trial was Det. Peter McMahon of the New York City Housing Police Department. When Det. McMahon arrived at the 60th Precinct at 1:10 p.m., Wilson and Yarbough were in separate rooms. Tr. 510. McMahon claimed that Tony told McMahon that he discovered the bodies and that he had driven back to Coney Island with Ron Carrington at 6:30 a.m. Tr. 511. However, McMahon testified that he interviewed Ron Carrington and Carrington told him that he dropped Tony off at 4 a.m. at Prospect Park. Tr. 514. Next, McMahon spoke to Wilson who, according to McMahon, confessed to the crime at 2:45 p.m. to McMahon, Det. Phil Grimaldi and Det. John DiCarlo. Tr. 516. McMahon testified that Det. DiCarlo wrote up Wilson's statement over a couple of hours and prepared a DD-5 report about it. Tr. 517-18. Testimony at the trials contained several versions of what happened at the stationhouse.

(1) The Police Account of the Statements Given at Trial

32. According to McMahon, in the "early evening," detectives advised Yarbough of his Miranda rights and began interrogating him again. Tr. 519-20. They confronted him, telling him his story was false, that Carrington did not back it up and that Wilson "told us what really happened in that apartment[.]" Tr. 523. They brought Wilson in to the room where they were interrogating Yarbough to say he "already told them what happened." Tr. 523. According to McMahon, Tony's story changed bit by bit until he eventually confessed to the crime. Tr. 523-24. McMahon wrote out a confession and had Tony sign it. Tr. 525-28. He signed at 10:25 p.m. Tr. 528.

33. On cross-examination, McMahon admitted that Tony was upset during the interrogation and put his head down on the desk because he had not slept in over 24 hours. Tr. 552. There were four or five detectives in the room with him. Tr. 553.

(2) Mr. Yarbough's Account of His Interrogation and Statement

34. Mr. Yarbough and Mr. Wilson also testified about their interrogations at the various trials. Yarbough said that he went voluntarily to the precinct with his aunt Carla and Charnette Loyal. Tr. 895. Sharrif Wilson had come back and also went with them. Tr. 896. Several hours after they arrived, police separated them into four separate rooms. Tr. 897, 900. Mr. Yarbough spoke with Detective Izzo. At trial, Mr. Yarbough denied telling Det. Izzo that Ron Carrington dropped the boys off at Coney Island at 6:30 a.m. Rather, he testified that he always told the police the same story he told at trial: that Ron Carrington dropped him and Sharrif off at Prospect Park at about 4 a.m. and they took the train home to Stillwell Avenue in Coney Island. Tr. 897-98. Tony provided the police with Carrington's beeper number so they could verify the story. Tr. 898.

35. After speaking to Det. Izzo, Tony was placed alone in another, smaller windowless room. He was left there for "a long, long time" – several hours. Tr. 901-02. He did not eat anything at the stationhouse and had not slept since 4 p.m. the day before. Tr. 906. After those hours alone, the aggressive interrogation began. Tony described it as follows at trial:

> Well, they had came and got me, one of the cops, detective [Williams], came and got me and he put me in this room with a whole bunch of, it was like three other, four other cops in there and that's when I started being accused of what happened…
>
> They said a lot of smart things to me. They took pictures and shoved them in my face. He said, he told me I was crazy. He smacked me upside my head. And told me my co-defendant gave up.
>
> He told me he called Ron and Ron denied, denied me being around there with them. He told me my family didn't want to speak to me, or nothing like that.
>
> And he also told me my family left.
>
> …
>
> I was crying.
>
> …
>
> They showed me a picture of my mother. He was talking about I said hold her down, hold her down, asked me to remember those words.
>
> ….
>
> I wouldn't sign no statement. I wouldn't make no statement, and they kept threatening me and so, he told me, one of them, the Detective Williams, he was harassing me and there was another detective who would come in there and try to talk to me real nice, he told me if he was to bring Sharrif in here and have Sharrif say it to my face that he gave up, would I be willing to make a statement, and I wouldn't respond nothing to him, and he brung Sharrif there.
>
> …
>
> [Sharrif] just say "Give up," and that was it, they took him right back out.
>
> Tr. 902 – 904.

36. Tony continued to resist the pressure from the police, even as it got more and more intense:

> I wouldn't make a statement and so he smacked me upside my head. He said I was a faggot, I was crazy, only a faggot

> would do something like this. He told me he'll blow my brains out if I didn't make the statement.
>
> Tr. 905.

37. After that, the police brought Sharrif in again and again Sharrif said "give up, give up." Tr. 906-07. Still, he resisted. Tr. 907. At last though, at 10:25 p.m., after 15 hours in the police station, he signed his name to a paper the officers wrote out. Tr. 908-9. He was forced to put his name there and he never intended it as a confession. Tr. 908-9.

38. At 11:09 p.m., about 45 minutes after the supposed confession, Mr. Yarbough was asked to make a videotaped statement about the crimes. However, he was advised at the beginning of the proposed statement – for the first time – that he had a right to remain silent and a right to an attorney. He invoked those rights and no statement was taken. *See* Ex. G (DD-5 of Video Statement by Det. McMahon).

(3) Sharrif Wilson's Accounts of His Statements

39. Sharrif Wilson gave two different versions as to his custodial statements. At Yarbough's trial, he simply testified that he initially maintained his innocence, but confessed at 2:45 p.m., after six or seven hours at the stationhouse. Tr. 394.

40. At his own trial, however, Wilson described in detail the pressure put on him to confess. *See* SW 609-614, 643, 646, 662-63. According to this testimony, some of which was elicited in Wilson's cross at Yarbough's trial, the police prevented Wilson from sleeping, told him falsely that Yarbough had confessed, and promised him he could go home if he said Yarbough committed the murders. SW at 609-611. Sharrif

was scared and wanted to sleep. He kept denying the murders and putting his head down. He testified:

> Everytime I would fall asleep, a detective would come and hit me on my head, or bang on the table. One officer would come in and say "you could tell us what happened," and then another, as soon as he leaves, another would come in. The other one would would tell me that Tony said, "[w]e did it," that "[w]e stabbed the three victims."
>
> Tr. 609.

41. For three or four hours, the detectives alternated between demanding that Sharrif confess and telling him what happened in the apartment:

> The detective told me, he said that we stabbed the victims, then we put cords around their necks, and then we moved the bodies.
>
> …
>
> SW at 610; *see also* SW at 612.

42. After that, they brought him to another room at about 2:45 p.m., an office on the second floor of the stationhouse. SW at 609-10. There they read him his rights, but told him he could leave if he made a statement – "if I make this statement saying me and Anthony did it, I could leave out the precinct." SW at 611. Finally, Sharrif said, he "made the statement saying that me and Tony Yarbough did it, because I was scared and they said if I made the statement, I could go." SW at 613. He then slept until about 8 or 9 p.m. SW at 613.

43. After Sharrif woke up, the detectives instructed him that he had to convince the assistant district attorney that he did the murders. SW at 614. Police suggested that he say that Tony told him to move the bodies around to "make it look like a real murder." SW at 613-14. A detective told him to go in to where Tony was and tell him "we did it, we did everything so we could go home." SW at 614. The detectives

stayed with Sharrif throughout, three of them present for the videotaped statement. SW at 615. As he was giving the statement, Sharrif said, he was scared. SW at 615. Just before giving the videotaped statement, Detective Grimaldi went over it with him. SW 652. The detectives provided details for Sharrif to tell the district attorney, including that he touched the two girls, that they moved the bodies from room to room, that they used steak knives, and that the boys should "make it look like a real murder." SW 662-63.

II. PROCEDURAL HISTORY

A. Preliminary Proceedings

44. Anthony Yarbough was arraigned on a complaint executed by Det. Grimaldi and dated June 19, 1992. Ex. E. He has been in custody ever since – a total of more 6,606 days. Both boys were indicted for three counts of murder in the second degree, P.L. 124.25(1), on or about June 24, 1992. *See* Ex. H (Indictment). The People filed a statement of readiness that day. *See* Ex. I (Statement of Readiness). They also filed a voluntary disclosure form and notices. *See* Ex. J (Voluntary Disclosure Form and Notices). The VDF specified the time of the offense was 6:30 – 7 a.m. on June 18, 1992. The notices include notice pursuant to CPL § 240.20(1)(A) to Mr. Yarbough of (1) the written statement he allegedly made at 9:40 p.m. to Detective Grimaldi and (2) the oral statement he allegedly made at 10:45 a.m. to Detective Izzo. There was no mention of any statement to Det. McMahon or any statement at 1:10 p.m. There is no indication on the VDF that any other discovery or *Brady* material was served.

45. On August 21, 1992, Mr. Yarbough moved for, *inter alia*, suppression of his statements as fruit of an unlawful arrest and involuntarily made under *Dunaway* and *Huntley*. See Ex. K (defense pre-trial motions). The motion also included

a demand for discovery including numerous materials discoverable under *Brady v. Maryland* and all reports or documents relating to the investigation made by officials. A hearing was held in December 1992 and continued in January 1992. A copy of all pages of the hearing transcript that I received from my client is attached hereto as Exhibit Q. There appears to have been no discussion of the statement to Det. McMahon at the hearing. The motions were apparently denied because all the statements were admitted at the three trials.

B. Sharrif Wilson's Rejects an Offer of Three-to-Nine, Loses at Trial and Begins Cooperating

46. It appears that Mr. Wilson engaged in some sort of plea discussions in the fall of 1992 aimed at securing his cooperation. The Kings County District Attorney's Office disclosed in 2009 a plea agreement signed by Wilson and his lawyer. See Ex. L (Wilson Plea Agreement dated November 6, 1992). The agreement provides for a three-to-nine year sentence for all three murders in exchange for Wilson's cooperation, presumably including his testimony against Antonio Yarbough. It is not clear when Wilson and his lawyer signed the agreement, which was not offered into evidence or received at trial.

47. Despite this incredibly generous plea offer, Mr. Wilson proceeded to trial, maintaining his innocence and taking the stand in his own defense to testify, as described above. At Wilson's trial, nothing tied him to the murders other than his own videotaped confession. A copy of a transcript of the video is attached hereto as Exhibit C. The physical evidence, in fact, tended to contradict the account on the video in significant respects: Dr. Arden testified that all three victims were alive when they were

strangled, while the statement maintains the victims were stabbed to death and then tied up to "make it look like a real murder"; the time of death indicated by the states of *rigor mortis* of the bodies was several hours before 6:30 a.m. which is the time of death which Sharrif repeatedly adopted in assent to the assistant district attorney's questions; there is no mention of the latent injuries – the slashing of Annie Yarbough's throat or the blow to her head; and there was no blood on the ground or other evidence that the bodies had been moved.[6] Witnesses at Wilson's trial included Ron Carrington, Major Yarbough, Clara Knox Officer Bradford, Dr. Arden, Detectives Grimaldi and Gallipani, Chavonn Barnes' aunt Elaine Smith, Sharrif's mother, a Board of Education official, and ADA Peter Gray, Esq. He was convicted on January 10, 1994. Tr. 397.

48. After Wilson was convicted, he apparently entered into a cooperation agreement with the People about which he testified.[7] According to Wilson, he believed his sentence without cooperation would be 27 years to life in prison. Tr. 397-98, 429. He accepted an offer that he believed would reduce the sentence to nine-years-to-life in return for his testimony against Tony. Tr. 397, 429.

[6] I do not have the closing arguments of Sharrif's trial and therefore do not know whether his attorney highlighted these points for the benefit of the jury. He certainly did not home in on them in cross-examination. I am in communication with Adam Perlmutter, Esq., who is representing Mr. Wilson in post-conviction proceedings and I anticipate that he will seek a new trial based on the ineffectiveness of Mr. Wilson's trial counsel in this and other regards.

[7] As far as I know this agreement was not disclosed.

C. Yarbough is Convicted Based on Wilson's Videotaped False Confession after His First Trial Ends in a Hung Jury and Wilson Recants to a Probation Officer

49. The first trial of Antonio Yarbough took place starting January 21, 1994, just 11 days after Mr. Wilson was convicted. At the first trial, the People were not permitted to offer the videotaped statement of Sharrif Wilson to bolster his testimony. In addition, the defense called Sandra Vivas and Dorothy Ferrer, the two witnesses who saw the boys between 6:15 and 6:30 a.m. Ron Carrington's testimony from Wilson's trial was offered into evidence by stipulation. Besides Wilson, Det. Grimaldi, Clara Knox, Det. Williams, Major Yarbough, and Dr. Arden testified for the People. The trial ended with a hung jury.

50. In between the two trials of Mr. Yarbough – i.e. after Mr. Wilson had agreed to cooperate and "tell the truth" – Mr. Wilson "emphatically" denied committing the crime to a probation officer named Alan Arfer. Tr. 354, 400. According to the trial judge, the Pre-Sentence Report, in the section on the offender's statement, read as follows:

> The defendant emphatically denies his guilt in the instant offense. He stated that in point of fact, he was with a female friend at the time of the crime named Shawn Jones, the address 2949 West 23rd Street, apartment 2-C. He stated he did not commit the crime, although he did state that when he went to the precinct he admitted that he had committed the crime along with the co-defendant.
>
> The defendant stated that in point of fact, that he and the co-defendant had come to his apartment in the morning and discovered the bodies of the co-defendant's mother, sister and next door neighbor.
>
> Tr. 353-54.

51. The defense did not revisit this point during the testimony. Although the prosecution elicited that Mr. Wilson had denied the crime a week earlier, defense counsel failed to object to leading questions by the prosecutor suggesting that Mr. Wilson did not know who the probation officer was. *Id*. She did not obtain the report, interview Mr. Arfer or even put before the jury the excerpt read by the judge.

52. The second Yarbough trial resulted in the judgment against which this motion is made. It began on February 8, 1994. At the second trial, the videotape of Sharrif Wilson was admitted in evidence not for its truth but as a prior consistent statement to rebut a charge of improper motive or recent fabrication. In addition, the People called the defense witnesses in the prior trial, Ferrer and Vivas, as witnesses in their case-in-chief. Bradford, Knox, Major Yarbough, Arden, Wilson, Detective McMahon, Police Captain Luongo, and Chavonn Barnes' aunt Elaine Smith also testified on behalf of the People. Luongo authenticated photographs of the boys in custody and testified that Tony did not appear injured during the interrogation. Smith testified that Anthony had a bad reputation in the community for being a violent person.

53. At the second trial, the prosecutor acted as an unsworn witness, making statements based on excluded testimony under the guise of examining witness Sandra Vivas about the basis for her knowledge that Tony "is known as a peaceable person to his friends and neighbors," Tr. 285. *See* Tr. 292-95 (prosecutor's challenge via leading questions on re-direct examination). The trial judge properly excluded evidence of second-hand rumors that Tony beat his mother, but nonetheless permitted – without objection by the defense – the prosecutor to repeatedly ask Ms. Vivas whether she had "learned" about specific prior bad acts. Tr. 292-95. This portion of the trial transcript

will grate on the ears of anyone involved in trials. To quote just one particularly glaring example of the impropriety, after asking *twice* whether Ms. Vivas "learned" that the defendant beat his mother "on a regular basis," and after eliciting two denials, the prosecutor continued as follows:

> Q Did you speak during your discussions about this defendant's reputation for peacefulness, did you learn through Elaine Smith Chavonn Barnes' aunt –
>
> A I don't know Elaine Smith.
>
> Q – let me finish, that this defendant had been beating up Annie Yarbough? Did you learn through her?
>
> A No, I did not.

54. Rather amazingly, these questions drew no objection from defense counsel. *See* Argument § II.E. *infra*.

D. On Appeal, Yarbough Argues the Video Should Not Have Been Admitted, that He was Wrongly Excluded from an *in camera* Conference and Three Sidebars, and that the Sentence was Excessive

55. Mr. Yarbough appealed his conviction and sentence on direct appeal. He raised three substantive attacks to the fairness of the trial. First, he argued that the video should have been excluded on the ground that trial counsel did not seek to show that Wilson's testimony was a "recent fabrication" because his motive to fabricate – i.e. to get leniency – existed from the moment he walked into the police station and was told he could go home if he made a statement inculpating Tony. Second, appellate counsel urged that the defendant's exclusion from an *in camera* conference about whether Elaine Smith could testify about his fights with his mother violated his constitutional right to be present at every material stage of the proceedings (the People's application was denied). Third, Mr. Yarbough's counsel urged reversal as a result of the

fact that the record does not show a waiver of his right to be present during sidebars with prospective jurors during *voir dire*. Finally, Mr. Yarbough argued on appeal that his sentence, 75 year to life, was excessive.

56. The appeal was denied in an opinion dated July 29, 1996. *See People v. Yarbough*, 229 A.D.2d 605, 646 N.Y.S.2d 353 (2d Dep't 1996). The Court of Appeals denied leave to appeal on December 6, 1996. *See People v. Yarbough*, 89 N.Y.2d 932, 654 N.Y.S.2d 734 (Table).

III. NEWLY DISCOVERED EVIDENCE

57. Since the trial, Mr. Yarbough has diligently sought legal assistance and new evidence as best he could while in prison. While Mr. Yarbough lacks the resources to investigate the case properly (and seeks those resources in this motion), two new sources of evidence have emerged since the trials: Sharrif Wilson has recanted his trial testimony and the district attorney's office has turned over documents showing that the murders occurred well before 4 a.m. and that Tony reported the crime to his uncle fifteen minutes earlier than what Major Yarbough testified to at trial.

A. Sharrif Wilson Apologizes to Antonio Yarbough's Family for Perjuring Himself

58. After admitting the crime under duress in police custody when he was 15, testifying twice at trials against Mr. Yarbough, and spending 18 years in jail, Sharrif Wilson still maintains his innocence. He first communicated his post-trial change of heart to Mr. Yarbough in a signed letter to Mr. Yarbough's aunt, People's witness Sandra Vivas, dated December 1, 2005. A copy of that letter – which tracks Mr. Wilson's original trial testimony – is attached hereto as Exhibit A.

59. I am in communication with Adam Perlmutter, Esq., who is an attorney who has agreed to represent Mr. Wilson with respect to post-conviction matters. Mr. Perlmutter advises me that Mr. Wilson maintains his innocence and is prepared to testify that his prior statements to the contrary were a product of official coercion. I am in the process of obtaining an affidavit from Mr. Wilson and will submit it to the Court when it becomes available.

B. The People Turn Over Records Showing Dr. Eckert Believed the Murders Occurred at Least an Hour Before 4 A.M., Tony Yarbough Reported the Crime 15 Minutes Earlier than Indicated at Trial, and Charnette Loyal Gave a Full Description of the Man Who Threatened Annie at Knifepoint the Night of the Murders

60. On August 10, 2009, the People mailed to me photocopies of records in response to a request previously submitted pursuant to the Freedom of Information Law.

61. The new records included at least three important documents that were not used by the defense at trial. As discussed below, two of these documents appear to have been withheld. First, the newly disclosed records contained handwritten notes taken at the scene of the crime by the investigator from the medical examiner's office, Dr. Jonathan Eckert. The records clearly state that each of the three bodies was in "full rigor" at the time the notes were taken. One of the pages states "8-10 hrs" above the words "full rigor." It is unmistakably clear that these notes, which were taken shortly after 10:20 a.m., put the time of death from between 12:20 a.m. and 2:20 a.m. or a few minutes later – i.e. the victims died when the defendants were in Manhattan with the

People's witness Ron Carrington. A true copy of the pages that were clearly written by Dr. Eckert is attached hereto as Exhibit M.

62. Second, the records disclosed in 2009 include a DD-5 of the police interview with People's witness Major Yarbough. In the DD-5, Major Yarbough is reported to have told the police on the day of the murders that Tony came running out of the building crying and calling out to him at 6:45 a.m. A true copy of the DD-5 is attached hereto as Exhibit D.

63. Third, the documents included notes from an interview with Charnette Loyal conducted the day the bodies were found. In the notes, Ms. Loyal – whose memory at the time of the trial two years later was quite poor – states very clearly that Annie gave Vinnie a "water shot," he got mad, and he pulled a knife on her. Ms. Loyal provided a detailed description of Vinnie and said he was in the methadone program at Coney Island Hospital with Annie. A true copy of these notes is attached hereto as Exhibit B and described in further detail above.

64. I have specifically discussed the notes relating to the times of the murders, Ex. M, with my client. He advises me that he never saw them before the People sent them to me in 2009 and I forwarded them to him.

65. I have also spoken to trial lawyer Irene Elliott about these notes and more generally about her recollection of the case. Ms. Elliott advised me that she destroyed her file in this case in approximately 2000. I sent her for her review a copy of the notes and the testimony of Dr. Arden at the two trials. After receiving the material, Ms. Elliot told me that she has no recollection of receiving the medical examiner's notes indicating the time of death 8-10 hours prior to 10:20 a.m. She also said she cannot recall

why she failed to argue in summation that the murders took place while Tony and Sharrif were with Ron Carrington. When I asked her more generally about the two trials, she told me that the main thing she could remember was that the judge was about to leave for a vacation and needed to end the trial quickly. In addition, she emphasized to me that, despite the trial transcripts, she clearly remembers that Dr. Arden testified only at the first trial and not at the second trial. She insisted that a different employee of the Office of the Chief Medical Examiner testified at the second trial. [8]

ARGUMENT

66. Mr. Yarbough is factually innocent and would have prevailed in any trial with a modicum of fairness. The trial itself failed to uncover the truth because of a breakdown in the adversarial process that resulted from a combination of the prosecutor's misconduct and the trial attorney's incompetence. Whether the omitted material was withheld by the prosecutor or overlooked by the defense lawyer, there is no doubt it was not used at trial and that it should have been – if trial counsel had performed at even a minimally adequate level, she would have shown conclusively that the murders took place while Tony and Sharrif were in Greenwich Village and minutes after Annie was threatened at knifepoint by a junkie she had just ripped off.

[8] After Ms. Elliott told me this, I re-reviewed the transcripts to see if it was possible that the court reporter's identification of Dr. Arden at the second trial was an error. I concluded that it could not have been an error because, in the narrative testimony, the details of Dr. Arden's job title, education and other background information were the same in both trials.

I. THE CONVICTION SHOULD BE VACATED BECAUSE THE PEOPLE WITHHELD MATERIALLY EXCULPATORY EVIDENCE THAT THE MURDERS WERE COMMITTED BY SOMEONE ELSE AT A TIME WHEN MR. YARBOUGH WAS IN GREENWICH VILLAGE

67. The People's failure to turn over the notes showing the murders occurred while the defendants were in Greenwich Village with Ron Carrington violated the Due Process Clauses of the federal and state Constitutions as well as New York Criminal Procedure Law § 240.20(1)(h). It is therefore a ground for a new trial under Criminal Procedure Law § 440.10(1)(h).

68. It is "well settled" that "the government's failure to disclose evidence that is materially favorable to the defense violates due process." *U.S. v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004); *see also People v. Vilardi*, 76 N.Y.2d 67 (1990). Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "the suppression by the prosecution of evidence favorable to an accused …violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." A *Brady* violation has three elements: (1) the evidence at issue must be "favorable to the accused"; (2) it must have been "suppressed" by the government, either willfully or inadvertently; and (3) "prejudice" must have ensued as a result of the government's conduct. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999); *U.S. v. Rivas*, 377 F.3d at 199.

69. As described below, in this case the materials withheld were both specifically requested in the defense's omnibus motion filed August 21, 1992 and were materially exculpatory. The exclusion of these materials prejudiced the defense.

Therefore, a new trial is required under the state and federal Constitutions and the New York Criminal Procedure Law.

A. The People Held Back the Medical Examiner's Notes from the Crime Scene in Violation of *Brady v. Maryland*

70. The most egregious *Brady* violation was the suppression of Dr. Eckert's notes from the crime scene showing the true time of death. Ex. M. The motion filed in August 1992 included a discovery demand requesting, *inter alia*, "any written report or document, or any portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the instant criminal action which was made by, or at the request or direction of a public servant engaged in law enforcement activity[.]" *See* Ex. K at Demand to Produce ¶ 3.

71. Since this document was requested by the defense, reversal is required upon "a showing of a 'reasonable possibility' that the failure to disclose the exculpatory report contributed to the verdict[.]" *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990). Even if, *arguendo*, the material had not been specifically requested, reversal would be required if "in the context of the entire trial, the omitted evidence creates a reasonable doubt that did not otherwise exist." *People v. Baxley*, 84 N.Y.2d 208, 214 (1994).

72. Either of these standards is easily met here: if the notes had been turned over, counsel would have shown that the deaths occurred between 12:30 a.m. and 2:30 a.m. when, according to the People's own witness, the boys were in Manhattan. Defense counsel would have used the notes to impeach Dr. Arden's statement that he would "expect" to find full rigor mortis in all three bodies if they had been killed just four

hours earlier. Defense counsel surely would have called Dr. Eckert to elaborate on his conclusion that the deaths occurred earlier than the People were urging. All this would not only have raised a reasonable possibility of a different outcome; it would have created a reasonable doubt.

B. The People Held Back a Police Report Showing that Mr. Yarbough Reported the Crime to a Civilian Witness Fifteen Minutes Earlier than What the Witness Testified to at Trial

73. Similarly, the defense specifically demanded "the written, recorded or oral statements of all witnesses" prior to trial. *See* Ex. K at 9, § VIII, ¶ 4. This was a specific request for the DD-5 memorializing Major Yarbough's statement. Ex. D.

74. The interview of Major Yarbough was materially exculpatory because, if credited, it indicated the boys had less than 15 minutes to commit the three crimes. At trial, Major Yarbough testified that Tony reported the crime to him at 7 a.m. Tr. 316. He was not impeached on this in any way. In the interview with police, however, he says that Tony came up to him at 6:45, while he was waiting for the bus with his disabled son. *See* Ex. D.

75. The newly disclosed evidence shows that at 12:50 p.m. on June 18, 1992, Major Yarbough specifically told the police that he waits for the bus with his son beginning at 6:30 a.m. every day. The bus comes at 7 to pick up the child. On that morning, while he was waiting – but 15 minutes before the bus came – Tony approached him and stated "I went home this morning and everyone was dead." In the interview, Major Yarbough twice states that the time was 6:45 a.m. – that's when Tony approached and they waited from then until the bus came at 7. Ex. D.

76. Proper disclosure of this document would have changed the outcome of the trial. Major Yarbough changed his story at trial for no apparent reason. While his new story fit perfectly into the prosecution theory – a theory that did not develop until Sharrif Wilson "confessed" at 2:45 p.m. that day – the old story did not. Rather, if the initial story given by Major Yarbough was true, then the boys only had 15 minutes from when they were seen laughing on the bench by Dorothy Ferrer. In other words, they would have had to finish their conversation, enter the building, enter the apartment, find the knife, stab each victim numerous times, cut at least six cords from the appliances with a steak knife, garrote each victim, bind each victim with clothing and cords, hit Annie Yarbough on the head, slash Annie Yarbough's throat after she was dead, molested the two girls, move the bodies around, clean up the blood from the apartment, clean up their clothing, clean the knives, and exit the apartment separately all within 15 minutes. This could not all have been done in 30 minutes (as the defense lawyer should have argued), let alone 15 minutes.

77. In summation, the prosecutor emphasized the significance of Major Yarbough's testimony about the timing, arguing that Tony could not account for his whereabouts for the half-hour between 6:30, when Dorothy Ferrer saw him and 7, when he reported the murders. Tr. 1030. The People knew this argument was false when they made it because they were in possession of the DD-5 that showed, in fact, Tony reported the murders 15 minutes after Ms. Ferrer saw him with Sharrif outside the apartment. If the People had complied with their *Brady* obligations, this argument would not have been available to them. As such, the Major Yarbough DD-5 was reasonably

likely to affect the outcome of the proceeding and would have created a reasonable doubt in the minds of the jurors.

II. THE CONVICTION SHOULD BE VACATED BECAUSE MR. YARBOUGH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

78. Whether or not there was a *Brady* violation, trial counsel failed Mr. Yarbough because she did not comprehend the essence of the defense: that the *physical evidence* – the state of the victims' bodies when they were discovered – conclusively showed that the murders could not have taken place at the time the People were forced to argue that they took place. She failed to request an alibi charge, and none was given. *See People v. Victor*, 62 N.Y.2d 374 (1984) (defense entitled to charge that People must disprove alibi beyond a reasonable doubt). She also unjustifiably failed to cross-examine or present evidence with respect to a recent prior inconsistent statement of the main prosecution witness, failed to object to the admission of a custodial statement for which no prior notice was given under Criminal Procedure Law § 710.30, failed to offer evidence of a prior consistent statement of a key defense witness that was admissible to rebut a charge of recent fabrication, and failed to provide a constitutionally adequate summation.

79. The Sixth Amendment of the United States Constitution and Article I, § 6 of the New York Constitution guarantee that a criminal defendant is entitled not just to have an attorney present, but also to be effectively represented by counsel at trial. Under New York law, a defendant bears the burden of demonstrating only that he was deprived of a fair trial because his he was denied "meaningful representation."

People v. Caban, 5 N.Y.3d 143, 155-56 (2005). The federal constitution has a more stringent test, requiring the defendant show that counsel's performance was deficient *and* that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In *Caban*, the court laid out the interaction of the two tests for purposes of assessing claims of ineffective assistance of counsel under New York law:

> Under the two-pronged test established in *Strickland v. Washington*, a defendant must, in order to prevail on a federal claim of ineffective assistance, demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" Our state standard of meaningful representation, by contrast, does not require a defendant to fully satisfy the prejudice test of *Strickland*, although we continue to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation, whose prejudice component focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case.
>
> *People v. Caban*, 5 N.Y.3d at 155-56.

80. Applying these general standards to the case at hand, there is no doubt that counsel's failings denied Mr. Yarbough meaningful representation at his trial: her decision not to investigate or consult an expert regarding the time of the victims' death, not to impeach Wilson about his "emphatic" declaration of innocence between the two trials, her decision not to challenge a custodial statement that she had not been notified about, and her decision not to argue that Wilson's account was at odds with the physical evidence are classic examples of deficient performance – performance far below what is called for by a trial lawyer defending a 17-year-old client where the prosecution

offers no physical evidence and no motive to prove he systematically slaughtered his own family.

A. Trial Counsel was Ineffective Because, for No Strategic Reason, She Failed to Argue that the Murders Occurred before 6:30 a.m.

81. In order to provide meaningful assistance of counsel, trial lawyers in criminal cases have an obligation to investigate their client's claims and develop theories of defense. *See People v. Van Wie*, 238 A.D.2d 876 (4th Dep't 1997) (reversing conviction where counsel failed to investigate facts); *People v. Donovan*, 184 A.D.2d 654 (2d Dep't 1992) (same). This obligation is especially strong in cases where an expert's assistance is needed to interpret complicated physical evidence: "The importance of consultation and pre-trial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation." *Eze v. Senkowski*, 321 F.3d 110, 128 (2d Cir. 2003) (reversing denial of a hearing on habeas review where counsel was ineffective for failing to question a prosecution medical expert about earlier medical records showing sex abuse pre-dated the alleged assault); *see also Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001) (reversing denial of habeas due to trial counsel's ineffectiveness, in part for failure to call a medical expert). "The failure to investigate is so fundamental to the deprivation of the effective assistance of trial counsel that it cannot be rationalized away with a *post hoc* construction of the trial theory of defense." *People v. Fogle*, 307 A.D.2d 299, 762 N.Y.S.2d 104 (2d Dep't 2003).

82. Even without the notes that were suppressed, counsel in this case could easily have demonstrated that the murders occurred several hours before 6:30 a.m. Based on the suppressed notes, it seems nearly certain that if the defense had called Dr.

Eckert as a witness, he would have testified that the deaths took place before 2:30 a.m. Ex. M. As described above, the bodies were in full *rigor mortis* when they were discovered. Even a cursory review of the literature on *rigor mortis* reveals that it usually *begins* only two to four hours after death. *See* Ex. F at 216 (Geberth, *Practical Homicide Investigation*). *Rigor mortis* does not become complete until eight to twelve hours after death. It then begins to recede about 18 to 36 hours after death. *Id.* Because many variables can affect *rigor mortis*, and the timing of the murders was the critical factor in defending the case, trial counsel here had an obligation to obtain professional assistance. *Id.* Funds are available for such assistance under County Law § 18-b. *See Thomas v. Kuhlman*, 255 F.Supp.2d 99 (E.D.N.Y. 2003) (failure to engage an investigator based on belief that funds were not available constituted ineffective assistance of counsel). There is no conceivable strategic reason that a competent trial lawyer would not, at the very least, consult an expert and make a detailed argument that the murders took place – as the ME at the scene wrote – at about 2 a.m., while Tony Yarbough was 16 miles away in Manhattan. *See, e.g., Gersten v. Senkowski*, 426 F.3d 588 (2d Cir. 2005) (affirming habeas corpus for ineffective assistance of counsel where attorney failed to call as a witness or even consult with a medical expert to assist in cross-examination or rebut People's medical expert).

B. Trial Counsel Was Ineffective Because She Failed to Point Out Inconsistent Statements by Co-Defendant Sharrif Wilson

83. Except at the Yarbough trials and when he was in police custody, every single time Sharrif Wilson opened his mouth he said Tony Yarbough was innocent of the crimes charged. While Mr. Yarbough's lawyer gingerly used Wilson's trial

testimony to impeach him, she apparently tuned out when the trial judge advised her that Wilson had "emphatically" denied the crime during his pre-sentence interview. Tr. 353-54. She never took any steps to obtain this prior inconsistent statement or interview the officer who recorded it. She did not impeach Mr. Wilson with it or even find out when he made it. It appears, though, that he made the statement between the two trials, making it far more powerful impeachment evidence than his arguably self-serving statements at his own trial. After Wilson had flipped and testified against Mr. Yarbough in the first trial, Wilson had a powerful incentive to "stick with his story" in order to obtain the benefit of his cooperation agreement. He also had an incentive to show some remorse for the grisly murders in order to obtain a more sympathetic Pre-Sentence Report. If his testimony had been true, he would never have denied it to the probation officer. But trial counsel wholly failed to demonstrate the power of this statement to the jury and it even appears that she somehow did not comprehend that the statement even existed. *See People v. Clarke*, 66 A.D.3d 694 (2 Dept. 2009) (ineffective assistance of counsel where defense attorney failed to impeach witness based on evidence of a prior inconsistent statement); *People v. Wallace*, 187 A.D.2d 998, 591 N.Y.S.2d 129 (4th Dep't 1992) (in re-trial, failure to use records from prior proceeding denied defendant meaningful representation).

84. Even beyond her failure to make this essential point on cross, defense counsel's examination of Mr. Wilson was generally incompetent. Although she came armed with two lengthy exculpatory prior statements, copious contrary physical evidence, and numerous inconsistencies in the various inculpatory statements, the cross examination lasted only 31 pages of trial transcript. Counsel began the examination

asking mostly open-ended questions permitting him to repeat, without challenge, his direct testimony. *See* Tr. 401-12. Finally, after showing the jury a grisly death-scene picture again, Tr. 408, and having him demonstrate on her how he allegedly held his victim down, Tr. 410-12, counsel inquired about his statements at his own trial. Tr. 412. But instead of asking about his denials, she asked about the interrogation. She did so incompetently, failing to lay a foundation for impeachment with an inconsistent statement. Tr. 413. She very quickly returned to the narrative, asking him to repeat his description of molesting and stabbing to death 12-year-old Latasha Knox and Chavonn Barnes. Tr. 415-419. At that point, defense counsel helpfully asked about the pre-trial offer of three-to-nine years in prison, pointed out that Mr. Wilson did not flee when the police arrived, and pointed out inconsistent statements from the first trial of Tony Yarbough and Wilson's custodial statement. Tr. 421-24d. All this was done jumping from topic to topic and without foundation or guidance that would make it easy for the witness or the jury to follow. She asked a few more questions about the killings, scoring easy points where Sharrif's memory failed him. Tr. 425-27. Next she returned to the interrogation, pointing out how tired Sharrif was at the time and finally asking: "you are here because you could get nine-to-life, right?" Tr. 428-30. She concluded asking about Tony's relationship with his mother, eliciting an admission that Annie never told Sharrif she did not like him. Tr. 430-31.

85. This examination did not make clear that Mr. Wilson steadfastly maintained his innocence at his own trial and since the first Yarbough trial. It did not make clear that the sequence of events he repeatedly gave – that the victims were stabbed to death and tied up with cords later – was at odds with the physical evidence that showed

they were strangled during life. Tr. 609. It did not home in on the numerous anomalies and omissions in Mr. Wilson's account: Where did the murder knife come from and what happened to it after? Why was there no blood on the boys? Who slashed Annie's throat after she was dead? Who beat her on the head? Why did Wilson see only three cords when police recovered six? Why did Wilson silently leave the apartment? Why did Wilson come back to the apartment? Why did he willingly go with the police to the stationhouse? How did all this activity take place in such a short time frame?

C. Trial Counsel was Ineffective Because She Failed to Object to the Admission of a Custodial Statement that was Not Noticed Pursuant to CPL 710.30

86. According to the People, Antonio Yarbough made at least three statements to the police on June 18, 1992. The People provided notice of two of these statements: one made to Det. Izzo at 10:45 a.m. and one made to Det. Grimaldi at 9:40 p.m. *See* Ex. J at 2 (Statement Notice). They did not provide notice of a third statement, made to Det. McMahon at 1:10 p.m. in which McMahon claims Tony lied about when he arrived in Coney Island.

87. Mr. Yarbough moved to suppress "all statements" obtained by police as a result of his arrest. *See* Ex. K at 5 (Omnibus Motion). A hearing was held and evidence was adduced relating solely to the 9:40 p.m. statement. The People offered no evidence relating to the un-noticed statement 1:10 p.m., which the defense still did not know about. Therefore, pursuant to CPL § 710.30(3), the People were precluded from offering this statement at trial. *See People v. O'Doherty*, 70 N.Y.2d 479 (1987) (holding

that CPL § 710.30 precluded admission of an un-noticed statement even if defendant is not prejudiced by it).

88. Competent criminal defense attorneys know both the peril they face when their clients give "false exculpatory" statements and the stringent rules imposed by the New York Criminal Procedure Law to ensure that such statements are taken by police in compliance with the Constitution. The lawyer here apparently knew neither. Thus her performance was deficient – i.e. it fell "outside the wide range of professionally competent assistance." *Lindstadt v. Keane*, 239 F.3d 191, 198 (2d Cir. 2001) (granting habeas corpus where counsel was ineffective).

89. Moreover, the failure to object was highly prejudicial to Mr. Yarbough and affected the outcome of the proceeding. Had counsel objected, the 1:10 p.m. statement would surely have been excluded – there would have been no evidence that Tony lied while in custody. At trial, Tony testified about the 10:40 a.m. statement he made to Det. Izzo. Tr. 897-98. Tony maintained at trial that he never told the police that he got a ride from Ron Carrington to Coney Island arriving at 6 a.m. In other words, Mr. Yarbough maintained that *he never made the alleged false exculpatory statement* – his story was always that he and Sharrif were dropped off by Ron Carrington at Prospect Park at 4 or 4:30 a.m. This is the version confirmed by Ron Carrington.

90. Izzo did not testify at the second trial. As a result, McMahon's testimony that Tony told the police a false story and that the false story turned their suspicion on Tony is devastating – it both painted Tony as a liar and explained why the police suspected him of murder. But if not for the improperly admitted testimony, there would have been no dispute that Tony told the same story all along.

91. Although the defense lawyer missed it, the prosecutor was well aware of the power of the earlier statement. She argued in closing (without evidentiary foundation, in our view) that Tony and Sharrif coordinated their stories – "the defendant says [to Sharrif Wilson] come with me to the precinct, I'm going – we're gonna say the same thing." Tr. 1014. The police, she argued, only began to suspect Tony and Sharrif when "the story they told that morning was not verified. The story they told that morning fell apart." Tr. 1014-15.

92. This whole line of argument would have been unavailable to the People if the defense lawyer had done her job: Sharrif never testified that the stories were coordinated or that he told detectives Ron Carrington brought the boys back to Coney Island at 6:30 a.m. There was no evidence at trial about the 10:40 a.m. statement – i.e. the one to Det. Izzo that was the subject of the suppression hearing because Izzo did not testify at the second Yarbough trial. So, assuming the prosecutor relied only on evidence in the record before the jury, she must have been referring to, and relying on as proof of guilt, the un-noticed custodial statement given at 1:10 p.m. to Det. McMahon. Therefore, there was no evidence of a false exculpatory and the People would have been entirely unable to explain why the police turned their suspicion on Antonio Yarbough.

D. Trial Counsel was Ineffective Because She Failed to Adequately Prepare Charnette Loyal and Introduce Her Prior Consistent Statement Implicating a Violent Junkie in the Homicides

93. The statements of Charnette Loyal were essential to the defense. Loyal testified that she observed a heroin addict threaten Annie Yarbough at knifepoint

the evening before the murders. *See* Facts § I.B, *supra*. This provided the defense with a theory for how the murders took place that exculpated Mr. Yarbough.

94. Nonetheless, by the time she came to testify, Ms. Loyal was virtually incoherent. She bore the hallmarks of an unprepared witness: she had to be prodded to speak about the knife, she could not remember any times, and she was defensive on the witness stand. She was vigorously cross-examined by a well-prepared prosecutor.

95. In their disclosure in 2009, the Kings County District Attorney's Office turned over notes of an interview with Ms. Loyal.[9] Unlike her testimony, the notes, which appear to have been created the day the bodies were discovered, are clear and coherent. *See* ¶ 13 *supra* (detailed description of Loyal testimony and notes of interview).

96. Defense counsel should have used these notes in two ways. First, the attorney should have used them to refresh Ms. Loyal's recollection and prepare her to testify. The notes set forth times that she came and went. They provide a detailed description of the man who threatened Annie Yarbough. They provide a clear reason as to why Annie was threatened. They indicate how Annie met the man. None of these questions were answered in Ms. Loyal's trial testimony. Second, the notes were evidence of a prior consistent statement admissible to rebut a charge of recent fabrication or improper purpose. On cross-examination the prosecutor suggested that Ms. Loyal

[9] It appears that these notes were turned over prior to the second trial because the prosecutor uses them to attempt to impeach Ms. Loyal at the first trial. If they were not turned over and therefore trial counsel cannot be faulted for not using them, that would be a *Brady* violation as the notes are materially exculpatory. We hereby challenge the judgment of conviction on this basis.

recently fabricated the story about the knife to protect her "brother-in-law," Tony Yarbough. Tr. 822-23 (knife recently fabricated); 840-41 (prosecutor portrays relationship as "brother-in-law" and charges that Loyal testifies "to try to help him as best you could"). The notes show that she told the same story about Annie being threatened by a junkie since the morning the bodies were found. It was error for the prosecutor not at least to offer the notes to reinforce Ms. Loyal's crucial testimony. *See*, *e.g.*, People v. Jenkins, 68 N.Y.2d 896 (1986) (failure to use crucial evidence due solely to counsel's erroneous assumption that it is inadmissible may be so prejudicial as to deny meaningful representation).

E. Trial Counsel was Ineffective Because She Failed to Object to Obviously Improper Questioning by the Prosecutor

97. As described above, though properly prevented from adducing testimony from an in-law of Annie Yarbough that Chavonn had claimed that Tony beat Annie on a regular basis, the People were able to make the point to the jury by asking grossly improper questions on their re-direct examination of Sandra Vivas.[10] From the

[10] Because it is necessary to understand the depth of counsel's failure, I set out the objectionable line of questioning in full:

> Q Did you learn, Ms. Vivas, in discussing this defendant's reputation for peacefulness that on January 27th of 1988 while this defendant was in junior high school he was in possession of a box cutter razor in class?
>
> A I didn't know of that.
>
> Q You didn't know of that?
>
> A No.
>
> Q You didn't learn that during your discussions about how peaceful this defendant was?

A No.

Q Did you learn during your discussions with people discussing this defendant's reputation for peacefulness that as a result of carrying a box cutter razor to a junior high school class he was suspended from school? Did you learn that during your discussions with people about his peacefulness?

A No I did not.

Q Ms. Vivas, did you learn or did you hear in discussing this defendant's reputation for peacefulness, did you learn that he had been beating up Annie Yarbough in her home on a regular basis prior to the night that she was murdered, the morning she was murdered? Did you hear that in discussing –

A No I did not.

Q Did you learn, Ms. Vivas in discussing this defendant's reputation for peacefulness that Chavonn Barnes, Mrs. Yarbough's daughter, had to make certain she was in the home to protect her mother and she was being beaten up by this defendant? Did you learn that?

A No, I did not and I don't believe that.

Q You didn't hear that in the community, did you?

A No, I did not and I don't believe it.

Q Did you speak during your discussions about this defendant's reputation for peacefulness, did you learn through Elaine Smith Chavonn Barnes' aunt –

A I don't know Elaine Smith.

Q – let me finish, that this defendant had been beating up Annie Yarbough? Did you learn through her?

A No, I did not.

Q Did you discuss the peacefulness of this defendant with Elaine Smith?

A I have not.

Q And you never learned that he, that this defendant had been beating Annie Yarbough up?

A I have not learned anything like that.

transcript, one would conclude that a defense lawyer is not even present: she remains silent as a witness is being repeatedly badgered about a prior bad act of the defendant that never happened and was excluded from evidence in any event. A moderately well-prepared defense lawyer would have predicted this issue would arise and would be familiar with the correct rule – that cross-examination is limited to what a witness heard and questions may not ask whether a witness *knows* a particular prior bad act took place. *People v. Lediard*, 80 A.D.237, 242-43, 438 N.Y.S.2d 540, 543-44 (1st Dep't 1981). But even without citation to the rule, any defense lawyer would understand that the prosecutor was manipulating the judge's decision by asking impeaching her own witness, asking compound questions, repeating questions, and effectively testifying herself rather than eliciting evidence or seeking truth. A simple objection would doubtless have ended the impropriety. Moreover, though, the defense lawyer should have asked the court to remind the jury that questions are not evidence and there is no evidence in the record for the prosecutor's allegations.

98. Defense counsel's failure in this regard had a discernable effect on the outcome of the trial. The People never offered any motive for the murders – their original theory that Antonio Yarbough murdered his mother because she found out he was gay fell apart under scrutiny. *See* SW at 153-155 (prosecutor states that witness will testify "yes, the murder happened because of the sexual preference of Anthony

---

> Q And Chavonn Barnes had to stay at home because of the beatings that this defendant was administering to Annie Yarbough?
>
> A I had heard nothing like that.
>
> Tr. 293-95.

Yarbough"). There was testimony that Tony had a good relationship with his mother, despite her drug problem, and that he was a respectful son. Tr. 284-85 (Vivas testimony); 339-41 (Knox). There is no evidence at all that he ever committed an act of violence against anyone. Thus, if grounded in the evidence, the People would have been reduced to arguing that these incredibly vicious murders were the result of a one-time episode of insanity – a motiveless outburst of violence that cannot be explained. The first jury obviously did not buy this, so, desperate for a conviction, the People communicated to the second jury the theory that the triple homicide came after beatings "on a regular basis." The judge wisely excluded second-hand evidence of this theory and the defense lawyer was in a position to protect her client from its admission through the prosecutor's improper questioning. Her failure to do so is not excusable under any standard, much less in a murder trial. It contributed materially to the verdict and thus Mr. Yarbough was denied effective assistance of counsel guaranteed by the state and federal constitutions.

F. Trial Counsel was Ineffective Because She Failed to Adequately Summarize the Evidence at Trial

99. Defendants are constitutionally entitled to an effective summation. *See People v. Etienne*, 220 A.D.2d 446, 631 N.Y.S.2d 898 (2d Dep't 1995). In this case, the closing argument of defense counsel fell far short of professional standards and prejudiced the defendant. Therefore, Mr. Yarbough was denied effective assistance of counsel and the motion should be granted.

100. As a general matter, the closing was rambling and hard to follow. It did not focus on the defendant's many trial rights such as proof beyond a reasonable

doubt and his right to remain silent. Specifically, it failed to make at least three essential points that were clearly available based on the trial testimony.

101. First and foremost, as discussed in detail above, trial counsel entirely missed the fact that Mr. Yarbough had a solid alibi defense. She scarcely mentions the time of death in her closing argument and does not mention *rigor mortis* at all. She does not carefully explain that the time of the murders was circumvented by eyewitnesses who saw the boys until 6:30 a.m. or that on the video confession, Sharrif Wilson is led through the fact that the murders happened at 6:30. *See* Ex. C at 3, 9 ("OK, you and Tony went up to the apartment about 6:30 in the morning?" and "This is all around 6:30 in the morning?"). This failure alone is stunning, and should be sufficient to grant the motion.

102. Second, the medical examiner stated very clearly that, based on the condition of the bodies, each of the three victims was strangled *while they were alive*. *See* Facts § I.E *supra*. Sharrif Wilson testified just as clearly that the victims were stabbed until they were dead. They were then tied up. He never said anything about strangling them. This hardly seems like something he could have forgotten or been mistaken about – strangling a live human being to death is very different from tying up a dead body. Wilson's testimony clearly contradicted the physical evidence. It was deficient performance for the defense lawyer not to point that out. This error very likely contributed to the verdict.

103. Finally, defense counsel offered no theory of the case. Rather than rely on the testimony Charette Loyal, a the witness she called, she told the jury "you can believe her or not" because she is a "crackhead." Tr. 989. This was not a valid strategic

decision: seen in the light of the entire case, the theory grounded in Ms. Loyal's testimony – that a drug addict named Vinnie who was ripped off by her and in the apartment for several hours murdered the family – is far more plausible than the People's version, in which there is no motive for the murder, committed by one of the few people who loved the victims. There was no reason not to simply say: the evidence shows that Mr. Yarbough could not have committed the murders but that a drug addict named Vinnie almost certainly did. The failure to offer a defense theory was deficient performance and if a defense theory had been skillfully explained, the outcome would have been different. *See*, *e.g.*, *People v. Linksman*, 183 A.D.2d 510 (1st Dep't 1992) (finding counsel's assistance ineffective in part due to incompetent closing argument).

III. THE CONVICTION SHOULD BE VACATED BECAUSE OF NEWLY DISCOVERED EVIDENCE THAT THE SOLE WITNESS IMPLICATING MR. YARBOUGH PERJURED HIMSELF AT TRIAL

104. Antonio Yarbough's conviction should be vacated because new evidence – viz. a letter written by Sharrif Wilson in 2005 in which he apologizes to Mr. Yarbough's family and details explicitly how he was, at fifteen years of age, shepherded into implicating himself and Yarbough in the crimes for which they were convicted – has been discovered which is of such character as to create a probability that had such a letter been received at trial, the verdict would have been more favorable to Yarbough. Ex. A; CPL § 440.10(1)(g).

105. The evidence against Mr. Yarbough was scant at best. No physical evidence tied him to the murders and another man was seen threatening Annie Yarbough with a knife in a drug-induced rage on the evening she was killed. Mr. Yarbough's

conviction was secured based on his signature on a statement written out by the police and the testimony of his co-defendant. As a result, this new evidence, together with Dr. Eckert's notes indicating that the murders could not have taken place at 6:30 a.m., eviscerates Wilson's testimony at trial. Mr. Yarbough's conviction should therefore be reversed and he is, at the very least. In the alternative, the Court should order a hearing on this issue. *See People v. Rodriguez*, 88 A.D.2d 890, 453 N.Y.S.2d 4 (1st Dep't 1982) (ordering hearing in interest of fundamental fairness based on recantation of key witness); *People v. Jackson*, 29 A.D.3d 328, 816 N.Y.S.2d 22 (1st Dep't 2006)(reversing conviction based on newly discovered impeachment evidence).

IV. THE CONVICTION SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE U.S. CONSTITUTION, THE NEW YORK CONSTITUTION, AND NEW YORK LAW BECAUSE MR. YARBOUGH IS ACTUALLY INNOCENT OF THE CRIME CHARGED

106. Under CPL § 440.10(1)(h), a conviction cannot be sustained where that conviction violates the New York and United States Constitutions because the defendant is actually innocent. *People v. Bermudez*, 25 Misc.3d 1226(A) (Sup Ct. N.Y. Co. 2009); *People v. Cole*, 1 Misc.3d 531 (Sup Ct. Kings Co. 2003). Mr. Yarbough contends that because he is actually innocent his continued detention is in violation of his Due Process rights under the New York and United States Constitutions. *See White v. Keane*, 51 F.Supp.2d 495 (S.D.N.Y. 1999); *Sacco v. Greene*, 2007 WL 432966, at *7 (S.D.N.Y. Jan.30, 2007).

107. A convicted defendant has the burden of demonstrating by clear and convincing evidence that he is actually innocent. *People v. Bermudez*, 25 Misc.3d at

22. In determining whether that burden has been met, this court may examine all credible evidence available. *Id*.

108. Mr. Yarbough's conviction rested entirely on two pieces of evidence: (1) his signature on a "confession" the police wrote out for him and (2) Sharrif Wilson's now recanted testimony. No physical evidence links Mr. Yarbough to the crime scene in any way. The "confession" was coerced by police and worthless.

109. Mr. Wilson's testimony has no evidentiary value at this point. Shortly after his confession was coerced, he denied any involvement in the crime, refusing to accept a sentence of three-to-nine years for the brutal triple homicide for which he was later convicted. Tr. 421. He denied any involvement in the murders at his own trial. SW. 597-607. Between testifying against Mr. Yarbough at Mr. Yarbough's two trials, he "vehemently" denied any involvement in the murders. Tr. 353.

110. He contradicted his testimony against Mr. Yarbough once again in 2005 in a letter to Sandra Vivas. Ex. A. He has maintained his innocence to his post-conviction attorney, Adam Perlmutter, Esq. Note that it is and was against his penal interest to claim his innocence both between the two trials and now. Between the trials, he was speaking to a probation officer for purposes of a pre-sentence report. Once he was convicted, Mr. Wilson would clearly have been better off for sentencing purposes if he had truthfully accepted responsibility for the crime. Similarly now, Mr. Wilson is eligible for parole review every two years. However, by failing to accept responsibility, he is diminishing dramatically his chances of being released on parole. Although Mr. Wilson obtained a post-conviction lawyer at my suggestion, he has not filed any motion for post-conviction relief.

111. Unlike the trial jury, the court considering a § 440.10 motion must examine *all* of the available evidence. *People v. Bermudez*, 25 Misc.3d at 22. Viewed in the light least favorable to Yarbough, Mr. Wilson's word is at best a neutral factor in determining whether Yarbough is actually innocent.

112. The court must also look at the physical evidence. In this case, the physical evidence adduced at trial and since squarely contradicts the People's theory of the case and Wilson's testimony. *Rigor mortis* was fixed in all three bodies at about 10:30 a.m. This means the deaths occurred prior to 2:30 a.m. *See* Facts § I.E. While the development of *rigor mortis* this quickly on one of the bodies could conceivably be explained away as abnormal or anomalous, the onset of *rigor mortis* in all three bodies in less than four hours is well nigh impossible. This is clear and convincing evidence that Tony Yarbough was with Ron Carrington in Manhattan at the time the murders were committed. An armed, violent junkie with a motive to kill was seen by witnesses with Annie Yarbough just hours earlier. Thus there is clear and convincing evidence that Antonio Yarbough is actually and factually innocent of killing his mother and his sister and his sister's friend on June 18, 1992. *See People v. Cole*, 1 Misc.3d at 541 ("[T]he conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the Due Process Clause of the State Constitution.").

V. IN THE EVENT THE CONVICTION IS NOT VACATED BASED ON THIS AFFIDAVIT, THE COURT SHOULD APPOINT A PRIVATE INVESTIGATOR AND A FORENSIC PATHOLOGIST TO ASSIST IN FURTHER DEVELOPING THE FACTS PRESENTED HEREIN PRIOR TO A HEARING

113. In the event this application is not granted on the papers, I respectfully request the appointment of both a private investigator and a forensic pathologist under County 18-b to assist in further investigating this case and preparing for the hearing.

114. Mr. Yarbough, incarcerated for the past 18 years, is indigent.

115. A forensic pathologist will be able to assist in determining the time of death based on the available evidence.

116. A private investigator will be able to assist in developing the defense theory that a man named Vinnie in the methadone program at Coney Island Hospital murdered Annie Yarbough and the two children as a result of a dispute over drugs.

117. These experts are essential to provide justice and due process to Mr. Yarbough, and, under the circumstances described herein, are required by the due process clauses of the New York State and United States Constitutions.

VI. IN THE EVENT THE CONVICTION IS NOT VACATED BASED ON THIS AFFIDAVIT, THE COURT SHOULD ORDER DNA TESTING OF ALL PHYSICAL EVIDENCE COLLECTED FROM THE CRIME SCENE

118. Under CPL § 440.30(1-a)(a), a court must grant a defendant's motion to perform a DNA test on evidence when it finds that, if a DNA test had been conducted on evidence, and if the results had been admitted at trial, there is a reasonable

probability that the verdict would have been more favorable to the defendant. In this case, there are numerous items which, if tested, would have identified the drug addict who threatened Annie Yarbough during the time-frame in which the murders took place. If this individual had been identified, Mr. Yarbough would have been acquitted as the actual murderer would have been found. Therefore, DNA testing of items from the crime scene would raise *at least* a reasonable probability that the verdict would have been more favorable to Mr. Yarbough.

119. Mr. Yarbough seeks to examine all items recovered from the crime scene and test any biological material found under § 440.30(1-a). The items recovered are listed on two property clerk's vouchers prepared by the New York City Police Department. Copies of those vouchers received from the Kings County District Attorney's Officer pursuant to a Freedom of Information Law request are attached hereto as Exhibit P. The items include two steak knives, which were the purported murder weapons under the People's theory, as well as two hair samples, the electrical cords used to bind and garrot the victims, and three cigarette butts.

120. With respect to the cords, biological material linking them to another person would conclusively exonerate Anthony Yarbough under these circumstances. The real killer is likely to have been the methadone patient identified by Charnette Loyal and thus his DNA is quite likely to be in the DNA database maintained by the state Division of Criminal Justice Services. That person's DNA on the cords would confirm that he was the murdered.

121. The hair samples and cigarette butts are likely to contain testable material that would reveal who else was in the apartment that night. Again, we believe

these are likely to lead back to the violent, unidentified drug addict who threatened Annie Yarbough at knifepoint within the timeframe when the deaths occurred. Therefore, it is reasonably likely that testing them would have changed the outcome of trial.

122. Testing of all of the other material listed in Exhibit P is reasonably likely to lead to an outcome more favorable to the defendant and therefore all the material should be tested.

WHEREFORE, I respectfully request that the relief specified herein and in the accompanying Notice of Motion be granted.

Dated: New York, New York
July 19, 2010

Respectfully Submitted,

Law Office of Zachary Margulis-Ohnuma

By: _____
Zachary Margulis-Ohnuma