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

THE PEOPLE OF THE STATE OF NEW YORK,

v.

GARY J. THIBODEAU,

Defendant.

INDICTMENT NO. 94-161

POST-EVIDENTIARY HEARING MEMORANDUM OF LAW IN SUPPORT OF GARY THIBODEAU'S MOTION TO VACATE JUDGMENT PURSUANT TO CPL § 440.10

LISA A. PEEBLES
FEDERAL PUBLIC DEFENDER
4 CLINTON SQUARE, 3RD FLOOR
SYRACUSE, NEW YORK 13202
(315) 701-0080

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY.....2

ARGUMENT.....11

POINT ONE.....11

THE PROSECUTTION'S FAILURE TO DISCLOSE MATERIAL EVIDENCE, INCLUDING THE FULL SCOPE OF INFORMATION CONCERNING ALLEN'S STATUS AS A CONFIDENTIAL INFORMANT AND THE FACT THAT HER FILE WAS PUBLICLY EXPOSED, VIOLATED BRADY AND REQUIRES A NEW TRIAL.

FACTUAL BACKGROUND.....11

I. Evidence Concerning the Non-Disclosure of Heidi Allen's Confidential Informant File and the Loss of the File by the Oswego County Sheriff's Department. 11

A. Failure to Disclose Brady Material Concerning Heidi Allen's CI File. ...12

1. The Creation of Allen's CI File by the Oswego County Sheriff's Department. 12

2. Attorney Fahey Specifically Requests the Oswego County District Attorney to Disclose Allen's CI File on December 8, 1994. 13

3. Attorney Fahey's Request for the CI File was Frustrated by the Oswego County Sheriff's Department and the Oswego County District Attorney's Office. 14

4. The Location of Allen's CI File Prior to Gary Thibodeau's Trial. 15

B. Failure To Disclose Brady Material Concerning Deputy Van Patten's Loss of Allen's CI File in the Parking Lot of the D&W Convenience Store Prior to Her Abduction. 16

1. Deputy Van Patten Drops Allen's CI File in the Parking Lot of the D&W Convenience Store. 16

2. Deputy Montgomery Retrieves Allen's CI File from Kristine Duell at the D&W Convenience Store. 17

3. Kristine Duell's File is Tampered with in a Restricted Area of the Sheriff's Department.....17

4. The December 9, 1994 Internal Memoranda of Deputies Van Patten, Montgomery, and Anderson Regarding the Loss and Recovery of Allen's CI File. 18

5. Oswego County Sheriff's Department Investigator Whipple's Maintenance of the Allen Investigative File. 20

6. Chief Assistant District Attorney Dodd's Document Procedure. .22

7. The People's Concealment of Allen's CI Status during Gary Thibodeau's Trial. 24

8. Dodd's Concealment of Allen's CI File after Gary Thibodeau's Trial. 25

9. Dodd's December 14, 1994 Claim of Disclosure of the Memoranda of Deputies Van Patten, Montgomery and Anderson to Attorneys Fahey and Walsh. 26

10. Neither the December 9, 1994 Memoranda nor Allen's CI File Were Disclosed to Fahey on March 21, 1995. 31

11. Dodd's May 17, 1995 Claim of Disclosing the Kleist Report and Allen's CI File. 32

12. Dodd's June 5, 1995 Second Claim of Disclosing the Kleist Report and Allen's CI File. 33

II. Evidence Developed during the April 7, 2015 Recess of How Allen Became a Confidential Informant for the Oswego County Sheriff's Department. 34

III. Failure to Disclose *Brady* Material Concerning Darlene Upcraft's Sighting of a White Rusty Van Parked in Front of the D&W the Morning of Heidi Allen's Abduction. 36

LEGAL BACKGROUND 37

DISCUSSION.....39

I. The Prosecution Actively Suppressed Material Evidence Concerning Heidi Allen's Status as a Confidential Informant and the Fact that Her Status Was Compromised by the Oswego County Sheriff's Department Prior to Her Abduction. 39

A. Gary Thibodeau's Trial Record Proves the CI Evidence Was Suppressed. 40

B. The People Have Failed to Establish the Disclosure of the CI Evidence. 43

1. The Kleist Report and Allen's CI File Were Never Turned Over to Fahey. 43

2. The December 9, 1994 Memoranda of Deputies Van Patten, Montgomery, and Anderson Were Never Turned Over to Fahey. 47

II. There is a Reasonable Possibility that Had the Evidence Been Disclosed to the Defense the Result of the Proceeding Would Have Been Different. 52

A. Trial Testimony of Robert Baldasaro. 52

B. Trial Testimony of James McDonald. 53

C. Dodd's Closing Statement to the Jury 54

POINT TWO.....59

THE INTRODUCTION OF NEWLY DISCOVERED EVIDENCE AT A NEW TRIAL WOULD LIKELY RESULT IN A DIFFERENT OUTCOME.

FACTUAL BACKGROUND.....59

I. Newly Discovered Evidence of Alternative Suspects Responsible for Allen's Disappearance. 59

A. Direct Observations of Alternative Suspects Responsible for Allen's Disappearance. 59

1. William Pierce 59

2. Jennifer Wescott 62

a. Priest and Wescott Communications 62
b. Oswego County Sheriff's Department Recorded Interview of Wescott 64
c. Text Messages between Murtaugh and Wescott Disappear after the Sheriff's Department Takes Custody of Wescott's Cell Phone.....66

d. Oswego County District Attorney Conceals Wescott's Admissions. 68
e. Additional Police Interviews of Wescott 68
f. Wescott's Post-Conviction Hearing Testimony....69
g. Third-Party Corroboration of Wescott's Admissions....70

i. Carl Robinson Confirms Wescott Lived on Rice Road 70
ii. Deborah Vecchio Confirms Wescott Lived on Rice Road 70
iii. Joe Storto Confirms Wescott Lied to Sheriff's Investigators. 71
iv. Amanda Braley Confirms Wescott and Breckenridge were Involved in Allen's abduction. 72

B. The Third-Party Admissions Implicating Alternative Suspects. 72

1. Michael Bohrer 72

a. Tyler Hayes 72
b. Danielle Babcock 73
c. Michael Bohrer 73

i. March 21, 2013 Recorded Police Interview 73
ii. Bohrer's Post-Conviction Hearing Testimony....75
iii. Bohrer's Literature, Defense Exhibit 56....77

2. James Steen....78

a. Ronald Clarke 78
b. Joseph Mannino 79
c. Amanda Braley 79
d. Tonya Priest 79
e. Megan Shaw....79
f. Jonathan Barkley....80
g. James Steen....80

3. Roger Breckenridge 82

a. Jessica Howard....82
b. Chris Combs....82
c. Brittany Johnson 82
d. Amanda Braley 83
e. Roger Breckenridge 83

C. The Additional Corroborative Evidence. 83

1. Suspects Were Involved in drug activity in 1994 83

2. Cadaver Canine 84

LEGAL BACKGROUND 85

DISCUSSION 86

I. The Evidence Was Discovered Since Trial and Could Not Have Been Uncovered Prior to Trial. 86

A. The New Evidence is Material, Non-cumulative, and Not Merely Impeaching or Contradictory to Former Evidence. 87

B. Considered Individually and Together, the Introduction of the Newly Discovered Evidence Would Change the Result of a New Trial. 88

1. William Pierce's Testimony Firmly Establishes Thibodeau's Innocence. 88

2. Jennifer Wescott's Unguarded Admissions Made during a Secretly Recorded and Police-Monitored Phone Call with Tonya Priest Exonerate Gary Thibodeau. 88

3. The Admissions of Steen, Breckenridge, and Bohrer are Admissible and Establish Each Declarant's Guilt. 90

4. The Newly Discovered Evidence Proves Thibodeau is Actually Innocent. 102

CONCLUSION 105

PRELIMINARY STATEMENT

Gary Thibodeau has spent the past 21 years in a maximum security prison for a crime he did not commit. Thibodeau was convicted of kidnapping Heidi Allen from a convenience store despite (1) the lack of any forensic evidence linking him to the her abduction,[1] (2) the absence of eyewitness testimony placing him at the store, (3) the police's inability to extract a confession; and (4) the prosecution's failure to provide a solid motive for his alleged involvement. What is more, Thibodeau's brother was acquitted by a separate jury, despite his acknowledged presence at the store prior to Allen's abduction. Aside from uneven and inconclusive circumstantial evidence, Thibodeau's conviction was the direct result of both testimony elicited from two jailhouse informants and defense counsel's understandable inability to raise doubt by pointing to alternative suspects.

During the past two years, Thibodeau has unearthed information that serves to undermine the evidence presented against him and to establish alternative suspects responsible for Allen's abduction. This same evidence also demonstrates how the prosecution unconstitutionally secured his conviction. As a result of this newly discovered evidence, this Court should vacate his conviction and order a new trial for the following two reasons.

First, newly discovered evidence shows the prosecution conducted a concerted effort to thwart its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Most significantly, the prosecution suppressed the fact that Heidi Allen had been acting as a confidential informant and the fact that her status had been publicly exposed. By doing so, the prosecution was able to (a) suggest (falsely) that Allen's abduction might be the result of her own drug use; (b) keep defense

[1] Indeed, police had access to and searched both the alleged vehicle used to abduct her (Richard Thibodeau's van) and the place Allen was allegedly brought following the abduction (Gary Thibodeau's house).

counsel from spoiling and undermining the jailhouse informants' testimony; and (c) prevent defense counsel from pointing to possible alternative suspects and to highlight the incompetence and inadequacy of the police investigation. Had defense counsel been presented with this information, there is a reasonable possibility (and probability) the verdict would have been different.

Second, newly discovered evidence firmly establishes for the first time the identity of and motives for alternative suspects responsible for Allen's abduction. More particularly, this new evidence consists of eyewitness accounts, admissions by third-parties, and other corroborative evidence linking three other suspects to Heidi Allen's abduction. Beyond merely impeaching or contradicting the evidence presented at trial, this newly discovered exonerates Gary Thibodeau and establishes his actual innocence. Because a jury's consideration of this evidence at a new trial would likely result in a favorable outcome, this Court should grant Thibodeau's 440 motion and order a new trial.

PROCEDURAL HISTORY

On July 30, 2014, the defense moved this Court for an Order, pursuant to New York State Criminal Procedure Law § 440.10(1)(b), (g), and (h), seeking to vacate the judgment of conviction of Gary Thibodeau, entered on the 7th day of August, 1995, convicting him of Kidnapping in the First Degree, in violation of New York State Penal Law § 135.25. This motion is based upon newly discovered evidence as well as the prosecution's failure to provide the defendant with exculpatory and impeachment material, as defined by *Brady v. Maryland*, 373 U.S. 83 (1963), in violation of Art. I, § 6 of the New York State Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The newly discovered evidence portion of Thibodeau's motion centered on admissions made by Jennifer Wescott that Allen was abducted on April 3, 1994, by three male suspects, not including Gary or Richard Thibodeau, admissions by the three new suspects, and additional corroborative evidence. In particular, Thibodeau relied on a recorded and monitored phone call between Wescott and Tonya Priest, during which Wescott admitted Allen was brought to her home in a van by James Steen, Roger Breckenridge and Michael Bohrer following her abduction.

The prosecution's failure to fulfill their continuing *Brady* obligations centered on the concealment of Allen's status as a confidential informant for the Oswego County Sheriff's Department and the Department's loss of her confidential informant file in the parking lot of the D&W where she was employed and ultimately abducted.

On August 26, 2014, Thibodeau supplemented this motion after additional witnesses came forward unveiling additional *Brady* violations committed by the prosecution. Specifically, the Oswego County Sheriff's Department withheld the entirety of an eyewitness identification of the van observed outside the D&W on the morning of Allen's abduction. The supplemental motion further alleged the prosecution withheld *Brady* material consisting of a statement of Roger Breckenridge's wife by the Sheriff's Department. Finally, new witnesses came forward corroborating the newly discovered evidence portion of Thibodeau's motion in regard to the crushing of the van used to abduct Allen.

The prosecution responded on October 10, 2014, opposing Thibodeau's motion in all respects and asking this Court to deny Thibodeau's motion without an evidentiary hearing. In terms of the newly discovered evidence claims, the prosecution argued the defense did not act with due diligence, the evidence consisted of inadmissible hearsay and speculation, and it did not create a probability of a more favorable verdict. With respect to Thibodeau's *Brady* claims, the

People first argued Allen's confidential informant status was very limited to information she had gained from the "rumor mill," she only provided non-specific background information, she never did any work as an informant, her confidential informant card was not proof of anything, and it was remote in time to her abduction. Second, the prosecution argued confidential informant material was turned over to Thibodeau prior to trial. Third, the prosecution claimed there was no reasonable probability of a different verdict.

Thibodeau replied to the People's response on October 28, 2014, arguing the *Brady* violation suppressing Allen's confidential status was intentional, was never disclosed to Thibodeau, and the evidence was favorable and material to the defense. Thibodeau argued due diligence was exercised with respect to the newly discovered evidence and the evidence was admissible and reliable.

Thibodeau's request for an evidentiary hearing was granted and scheduled for January 12, 2015.

During a November 21, 2014 telephone conference between the Court and the parties, the Oswego County District Attorney assured the Court it would timely submit additional discoverable material to the defense prior to the January 12, 2015 hearing date.

On Friday, January 9, 2015, after 5:00 PM, the defense received disclosure from the People consisting of 6.66 gigabytes of information, comprising 2,645 pages of documents, 816 photographs, approximately 13 hours and 23 minutes of audio recordings, and 8 hours and 43 minutes of video recordings. Evidence contained in this disclosure included additional *Brady* material dating from June of 2013 through January of 2015.

On January 12, 2015, Thibodeau moved the Court to grant his motion to vacate the conviction without a hearing on the basis of egregious prosecutorial misconduct in light of the

above actions of the Oswego County District Attorney's Office. The Court agreed with the defense that the prosecution's actions were improper. The prosecution agreed to withdraw their allegation that Thibodeau did not act with due diligence in bringing his current 440 motion. As a further remedy, the Court assured the defense that any additional time, or need to recall witnesses, based upon the most recent disclosures from the prosecution would be permitted.

The evidentiary hearing was held January 12-16, February 3, 5-6, March 24-27, and recessed at the close of testimony on April 7, 2015. The defense called 31 witnesses and the People called 21 witnesses.

On February 3, 2015, Thibodeau filed a motion asking the court to reconsider the admissibility of Defense Exhibit 53, consisting of Michael Bohrer's notes he created when conducting his own investigation into the disappearance of Allen. The People opposed.

On March 19, 2015, Thibodeau filed a letter motion seeking to recall Michael Bohrer to testify at the post-convicting hearing. The defense provided an offer of proof regarding Michael Bohrer's prior felony conviction for false imprisonment of a woman in Wisconsin in 1981. The defense requested to call the victim of the offense and John Bohrer, Michael Bohrer's brother, his accomplice in the attempted kidnapping. On March 26, 2015, the court denied the defense request in its entirety.[2]

On March 27, 2015, Thibodeau moved to have the Court reconsider Thibodeau's right to cross-examine Donald Dodd regarding whether the Oswego County Sheriff and/or the Oswego County District Attorney faxed confidential documents to Michael Bohrer on May 31, 1994.

[2] Thibodeau continues to object, and thereby preserves his objections, to this and every other adverse ruling made by this Court during the 440 hearing in response to Thibodeau's motions.

On April 6, 2015, Thibodeau moved to have the court reconsider the admissibility of Michael Bohrer's 1981 prior conviction for false imprisonment, including the testimony of the victim, and his co-defendant, John Bohrer.

On April 7, 2015, the Court filed a written decision denying Thibodeau's February 3, 2015 motion seeking to admit Defense Exhibit 53, Michael Bohrer's notes.

On April 7, 2015, after the testimony was concluded for the day, the Court addressed the defense's motions. First, a knife was found in August of 2014 at a home once occupied by Michael Bohrer. The prosecution agreed to submit the knife for DNA testing. The defense requested permission to call John Bohrer and set forth an offer of proof. The Court promised a written decision on this motion by Friday, April 10, 2015. (2408,2410). The Court declared an official recess of the hearing.

A decision was never issued by the Court on April 10, 2015 in response to the defense's request to call John Bohrer.

On June 5, 2015, Thibodeau filed a supplement to his April 6, 2015 motion for reconsideration of the admissibility of evidence concerning Michael Bohrer's 1981 conviction for false imprisonment. New evidence was uncovered since the filing of the April 6, 2015, motion pertaining to Bohrer's 1981 conviction. Additionally, the defense learned the details surrounding Bohrer's 1980 Disorderly Conduct conviction. Michael Bohrer followed a female in a vehicle and attempted to force her off the road. When the victim stopped at a stop sign, Bohrer exited his vehicle and tried to enter her car. She drove to the police station and Bohrer followed her. Moreover, in May of 1985, Michael Bohrer was a suspect in an attempted murder and sexual assault case involving a 23-year-old woman in Beacon, New York. Finally, the

defense spoke to Michael Bohrer's ex-wife, who described Bohrer's sexual, physical, and emotional abuse of her and their two daughters.

The People filed a response opposing Thibodeau's June 5, 2015 motion in its entirety.

On June 30, 2015, Thibodeau filed a letter advising the Court of a profile report created by FBI Supervisory Special Agents Clinton R. Van Zandt and David C. Gomez, dated April 9, 1994, describing characteristics similar to Michael Bohrer's actions in the Allen case. The defense offered Van Zandt's report as Defense Exhibit 171, or in the alternative sought a ruling allowing the defense to call Van Zandt as a witness. The defense also offered this report as support for admission of Defense Exhibit 53.

On July 10, 2015, the People opposed this request during a telephone conference with the Court.

On July 17, 2015, the defense supplemented the June 30, 2015 request with references to Bohrer's interviews with Oswego County Sheriff Investigators as well as his notes contained in Defense Exhibit 53.

On September 2, 2015, the defense filed a letter request seeking to call Melissa (Searles) Adams to testify at Thibodeau's post-conviction hearing in regard to a bracelet she gave Allen prior to Allen's abduction. This request was supplemented on September 21, 2015 with an affidavit from Adams indicating she read Michael Bohrer's notes on Syracuse.com, which referred to a bracelet Allen hid in a vehicle during her abduction. Prior to her abduction, Adams had given Allen a bracelet, engraved with Heidi's name and the words "Love Missy." The bracelet mysteriously ended up in Adams's mailbox years after Allen's abduction.

On September 28, 2015, the People sent a letter to the Court indicating they did not oppose the defense request to call Melissa Adams to testify about the bracelet she gave her cousin and the fact that she found it in her mailbox years after Allen was abducted.

On September 30, 2015, the defense filed a letter request seeking to call Rhonda Burr to testify at Thibodeau's post-conviction hearing. Burr's testimony would show Allen was actively working as a confidential informant for the Sheriff's Department at least three weeks prior to her abduction.

On September 30, 2015, the defense filed a letter motion seeking to call Martha Sturtz to testify at Thibodeau's post-conviction hearing. Sturtz's testimony would show how Allen became a confidential informant for the Sheriff's Department and would provide evidence that Deputies Van Patten and Anderson may have committed perjury during their post-conviction hearing testimony.

On October 7, 2015, the defense sought a Judicial Subpoena to obtain the PINS petition pertaining to Allen and referenced by Martha Sturtz.

On October 20. 2015, the defense submitted an additional affidavit from John Bohrer in support of the defense motion to call him as a witness at Thibodeau's post-conviction hearing.

On October 28, 2015, the defense supplemented the request for a Judicial Subpoena to obtain the PINS petition.

On November 2, 2015, the Court issued a Decision and Order denying all of the defense requests. Upon careful review, the Court's November 2, 2015 decision misapprehends several facts as well as the nature and purpose of several defense proffers. For clarification purposes, and to preserve Thibodeau's objections, the defense corrects the following errors:

First, the Court's decision states Thibodeau asked to recall William Pierce, Tyler Hayes, and Danielle Babcock to testify at the post-conviction hearing. Thibodeau never made these requests. Instead, Thibodeau's submission of June 5, 2015 stated only that "it is important to *recall*" that the defense's proffer of certain evidence was being made in combination with evidence developed through the testimony of Bohrer, Pierce, Hayes and Babcock.

Second, William Pierce never identified the woman being abducted as Heidi Allen. Pierce also never testified that the second man involved in the woman's abduction was Michael Bohrer. Nor did the defense proffer that testimony in any of the above submissions.

Third, Defense Exhibit 53 is not the "box of documents" created by Michael Bohrer. Instead, it is Bohrer's handwritten notes identified by him during his post-conviction hearing testimony.

Fourth, in all of the above-mentioned submissions, the defense never requested to call Tonya Priest as a witness about her conversation with James Steen. Priest's sworn statement was admitted into evidence during the post-conviction hearing as Defense Exhibit 35.

Fifth, the defense sought to call "Jane Doe #1" to testify at the post-conviction hearing about her encounter with Michael Bohrer when he entered her apartment prior to her assault. The defense did not ask to admit the 1983 assault investigation. Also, "Jane Doe #1" was found nude in her bed, not on the floor of her apartment.

Sixth, John Bohrer's third sworn statement was not a brief discussion of going to the D&W with his brother to look for "some broad," but instead indicated Michael Bohrer drove John Bohrer to the D&W and directed him to go inside to determine whether "the broad" was working. John Bohrer did as directed and reported to his brother that she was not inside so they left.

Seventh, the police recorded conversation with Martha Sturtz revealed a PINS petition was filed against Allen as a quid-pro-quo rather than charging her with a crime as long as Allen provided the Oswego County Sheriff's Department with information. This is not a "fishing expedition" since it directly relates to how Allen became a confidential informant and provides evidence that Deputies Van Patten and Anderson may have committed perjury during their post-conviction hearing testimony.

Eighth, Melissa Adams did not state the bracelet found in her mailbox was "similar" to the one she gave Allen, she identified it as *the bracelet* she gave to Allen. She did not receive the bracelet in 2013, she stated she received it more than 10 years following Allen's abduction, and after 2008.

Ninth, in all of the above submissions, the defense never requested to call Brett Law as a witness.

Tenth, Michael and John Bohrer did not try to "put" Catherine Schmitt in their car. Instead, it was a violent attack consisting of Bohrer grabbing her around the neck and choking her. When she struggled to break free, he punched her repeatedly in the face and dragged her to his car.

Eleventh, the defense did not seek to call Clinton Van Zandt to testify that Allen's perpetrator was a sexual predator who acted on his desire to kidnap Allen. The defense offered Van Zandt's testimony to explain Bohrer's conduct and behavior following Allen's abduction. More specifically, the evidence was proffered to debunk the claim that Bohrer was simply a "gentleman with a concern."

Finally, the defense does not accept the ViCAP report created by the FBI as an independent investigation by the FBI and/or the New York State Attorney General's Office into

the criminal activities of Michael and John Bohrer. Notably, the ViCAP report incorrectly states Thibodeau was convicted of kidnapping Allen with intent to collect ransom. The FBI did not interview John Bohrer or any witnesses, including Michael Bohrer's relatives or family members. In any event, based upon the Court's November 2, 2015 decision any information gleaned from the FBI ViCAP report regarding prior kidnappings or murders regardless of whether they could be connected to Michael or John Bohrer would be irrelevant to Allen's abduction.

Following the Court's decision, a deadline of November 16, 2015 was set for filing written submissions setting forth the respective arguments of the parties.

ARGUMENT

POINT ONE

THE PROSECUTION'S FAILIURE TO DISCLOSE MATERIAL EVIDENCE, INCLUDING THE FULL SCOPE OF INFORMATION CONCERNING HEIDI ALLEN'S STATUS AS A CONFIDENTIAL INFORMANT AND THE FACT THAT HER FILE WAS PUBLICLY EXPOSED, VIOLATED *BRADY* AND REQUIRES A NEW TRIAL.

FACTUAL BACKGROUND

I. Evidence Concerning the Non-Disclosure of Heidi Allen's Confidential Informant File and the Loss of the File by the Oswego County Sheriff's Department.

Joseph Fahey, then a seasoned attorney with nearly twenty years of criminal defense experience, was retained by Gary Thibodeau in July of 1994 to defend him against charges alleging he had kidnapped Heidi Allen on April 3, 1994. (120).[3] Following Gary Thibodeau's jury trial conviction, Fahey recruited Randi J. Bianco to assist with Gary Thibodeau's sentencing and N.Y. CPL § 330.30 post-conviction motion. (23). Bianco continued to represent Gary

[3] References to the 440 hearing are to the page numbers therein.

Thibodeau *pro bono* for twenty years in connection with further post-conviction motions and appeals. (24).

The *Brady* violations that are the subject of Gary Thibodeau's current N.Y. CPL § 440.10 post-conviction motion were discovered by Bianco in connection with the newly discovered evidence portion of this motion upon reviewing Richard Thibodeau's trial file. (30). Bianco discovered three December 9, 1994, memoranda in Richard Thibodeau's file, written by Oswego County Sheriff Department Deputies Van Patten, Anderson, and Montgomery, that revealed Heidi Allen had been a confidential informant for the Oswego County Sheriff's Department and this information had been exposed to the public. (31-33). Bianco also discovered a report from Oswego County Sheriff Department Investigator Kleist that referenced finding Allen's CI file on May 16, 1995, in bulk storage. (Id.). Richard Thibodeau's trial file did not contain Allen's actual CI file or her 1993 planner referenced in Investigator Kleist's report. (41-42). Neither Fahey nor Bianco had ever before seen these documents. (29-42,139). Robert Calver, the licensed private investigator hired by Fahey to assist in the defense of Gary Thibodeau, had also never seen these documents. (175-176).

A. Failure to Disclose *Brady* Material Concerning Heidi Allen's CI File.

1. The Creation of Allen's CI File by the Oswego County Sheriff's Department.

On December 11, 1991, Heidi Allen, a 16-year-old high school student, became a confidential informant ("CI") for the Oswego County Sheriff's Department. (1927,1928). Oswego County Sheriff Deputy Christopher Van Patten and Oswego County Sheriff Sergeant Roy Lortie met with Allen at her home. (1927,1928,1929). At the time of this meeting, Deputy Van Patten had been working for the Sheriff's Department for two years as a road patrol officer

and he had no prior training or experience working with confidential informants. (1924,1925,1927,1931,1943).

Allen's CI file was created by Deputy Van Patten on this date. (1930). The CI file consisted of a 3" x 5" confidential informant index card, which included Allen's true name and code name (Julia Roberts), her address, telephone number, date of birth, social security number, height, weight, eye color, hair color, left and right thumbprint, the date it was created, and the Oswego County Sheriff Deputy she was working with. (Defense Exhibit 11A, 1930). In addition to the CI card, the file included a photograph of Allen and Deputy Van Patten's field notes with the names and numbers of potential drug targets he obtained from Allen. (Defense Exhibit 11A; 1929,1930). Deputy Van Patten placed all of this information into a soft bound leather-type case that he kept with him in his road patrol vehicle. (1929,1934). Deputy Van Patten agreed that the information on the CI card appears official on its face, contains highly sensitive information, and would be *incriminating* for Allen if it fell into the wrong hands. (1950,1951). Deputy Anderson, who had separately met with Allen to obtain confidential information about drug activity in Oswego County, reiterated that exposure of Allen's CI information to the public would expose her to danger. (1931,1985,1986).

Brian Mensch, a resident of Oswego County since 1981, and a friend of Deputy Van Patten, had a conversation with Van Patten at Champs Corners Tavern sometime between the winter of 1991 and 1993, about a confidential informant. (1284,1286-78). Deputy Van Patten told Brian Mensch, "I have a female CI in New Haven." (2413).

2. Attorney Fahey Specifically Requests the Oswego County District Attorney to Disclose Allen's CI File on December 8, 1994.

Just prior to Gary Thibodeau's pretrial motion hearing on December 8, 1994, Attorney Fahey was alerted to Allen's possible status as a CI through Oswego County Sheriff Sergeant

Roy Lortie's April 27, 1994 police report. (December 8, 1994, Pretrial Hearing Transcript, pp.30-31). Sgt. Lortie's report indicates that on April 3, 1994, the morning of Allen's abduction from the D&W convenience store, he recalled that he had worked with Allen as a CI. (Defense Exhibit 5). This recollection caused him to have Allen's CI file located and brought to him at the crime scene to investigate "names of dealers that ALLEN would have been involved with." (Id.). After leaving the crime scene, Sgt. Lortie and all members working the crime scene went to the command center at the New Haven Fire Station. (Id.). Heidi Allen's CI file was brought to the command center. (Id., Defense Exhibit 9).

At the pretrial motion hearing, Fahey made the following specific request in relation to the Lortie Report:

> The report that Mr. Walsh shared with me indicated that there was a file in existence that was brought to the scene of the D&W, but Mr. Walsh has not been given that particular file. That's what I would ask to be disclosed.

(December 8, 1994, Pretrial Motion Hearing Transcript., p. 31).

3. Attorney Fahey's Request for the CI File Was Frustrated by the Oswego County Sheriff's Department and the Oswego County District Attorney's Office.

In response to Attorney Fahey's specific request for Allen's CI file, Chief Assistant Oswego County District Attorney Donald Dodd denied knowledge of Allen's CI status during the December 8, 1994, pretrial motion hearing. (December 8, 1994, Pretrial Hearing Transcript, p.32). Dodd indicated to the court that he had "some information" and stated, "[i]t appears often times the first time I hear something is when I read it in the paper." (Id.). Dodd told the court that he would speak with Attorney Fahey about this matter. (Id., at p. 33).

The Oswego County Sheriff's Department made efforts to obfuscate Allen's actual CI status through official statements in a Post-Standard Newspaper dated December 7, 1994.

Oswego County Sheriff Investigator Goodsell and Undersheriff Todd stated that "*there is no formal file,* because Allen was not really an informant." (Defense Exhibit 4) (emphasis added). They attempted to minimize the CI issue by stating, "Allen had talked to investigators in 1992 about possibly informing on a drug deal involving a friend, but the case never went anywhere." (Id.,129-130). Undersheriff Todd claimed Sgt. Lortie was confused, had a faulty memory and "he was thinking of a file he hadn't seen, so he wouldn't have known if there was one or 100 cases involving Allen." (Defense Exhibit 4). Neither Sgt. Lortie's report nor any comments made by Dodd or members of the Sheriff's Department contains any description of Allen's CI file, much less that it includes a 3"x 5" index card with Allen's identifying information, her code name, "Julia Roberts," and a photograph of Allen. (Defense Exhibit 5).

4. The Location of Allen's CI File Prior to Gary Thibodeau's Trial.

The command center headquarters for the Oswego County Sheriff's Department investigation into Heidi Allen's abduction began at the New Haven Fire Station. (1474,1524,1709, Defense Exhibit 5). Two weeks following Allen's abduction, the entire operation and investigative file was moved to the Oswego County Sheriff's Office. (1474-1475,1524-1525). The evidence pertaining to the Heidi Allen abduction was kept in three places once it was moved. (2255). The first area was the situation room located across from criminal investigations in the Sheriff's Department. (2256). The second area was the bulk storage area in the garage of the Sheriff's Department. (2255-2256). The third area was the evidence room in the Sheriff's Department. (2256).

On May 16, 1995, six days prior to the start of Gary Thibodeau's trial, Allen's CI file was found by Oswego County Sheriff Investigators Kleist and Yerdon in the midst of a large amount of uncatalogued evidence in the bulk storage area in the garage. (Defense Exhibits 11, 11A,

2243-2249, 2257-2258). Allen's CI file had been stored in this location for one year after it had been moved from the New Haven Fire Department. (2249). It had never been made a part of the Sheriff's Investigative file. (Defense Exhibit 11, 2258-2259).

After Investigator Kleist found Allen's CI file, he brought it to the Oswego County District Attorney's Office where it was stamped: "Received, Oswego County District Attorney's Office, May 16, 1995." (Defense Exhibit 11, 2244). Investigator Kleist created a report on May 16, 1995, to detail his actions with respect to this evidence. (Defense Exhibit 11). He and Investigator Yerdon were tasked with cataloguing evidence prior to Gary Thibodeau's trial. (Id.). Investigator Kleist found paperwork referring to Allen as a confidential informant, a photograph of her, names and numbers, a Sheriff's Department card, paperwork with drug information, notes from the day of her abduction and a 1993 personal planner. (Id.). After it was turned over to the District Attorney's Office, it was returned to the Sheriff's Department on May 23, 1995, where it received a date stamp, and stored on shelf B-20 of the evidence room. (Defense Exhibits 11, 11A). Gary Thibodeau's trial had commenced the day before. (39).

B. Failure To Disclose Brady Material Concerning Deputy Van Patten's Loss of Allen's CI File in the Parking Lot of the D&W Convenience Store Prior to her Abduction.

1. Deputy Van Patten Drops Allen's CI File in the Parking Lot of the D&W Convenience Store.

Just over a month after creating Allen's CI file, Deputy Van Patten unknowingly dropped the file in the parking lot of the D&W convenience store. (1976,1977). Oswego County Sheriff Deputy Montgomery is the officer that retrieved the file from the D&W and then contacted Deputy Van Patten at his home. (1934,1966). Deputy Van Patten instructed Deputy Montgomery to place the compromised file in his mailbox at the Sheriff's Department. (1935). No investigation was ever conducted concerning the compromised file. (1939,1950,1954,2002).

Neither Allen nor her family were ever informed that her identity as a CI had been exposed to the public. (1950). Allen unwittingly took a job at the D&W convenience store months after this highly sensitive information had been exposed to the public in the parking lot of her new employment. (1877, TT[4]., p. 1474).

2. Deputy Montgomery Retrieves Allen's CI File from Kristine Duell at the D&W Convenience Store.

Kristine Duell, the owner of the D&W convenience store, was the person that found Allen's CI file in the parking lot of the D&W. (1877-78). Kristine Duell could not recall when she found Allen's CI card, but recalled keeping it on her person and telling her mother, Roberta Wills, about it. (1877-8-98). Duell "ended up" calling the Oswego County Sheriff's Department on January 23, 1992, to report finding Allen's CI card. (1878-79,1915).

In January of 2015, Duell was interviewed by Oswego County Sheriff's Investigators and told them she had found Allen's CI card at least by the summer of 1993 and that it was "freaking nice out." (1894-99).

3. Kristine Duell's File Is Tampered with in a Restricted Area of the Sheriff's Department.

During the Heidi Allen abduction investigation, a security breach had occurred in the "situation room" where evidence was stored. (1525). On August 12, 1994, Investigator Whipple, the person in charge of the Allen abduction investigative file, found that someone had removed the master file on Kristine Duell. (Defense Exhibit 156). It was found lying on top of the files in an open position. (Defense Exhibit 156). Investigator Whipple did not know if anything was missing or who had been looking through it. (Defense Exhibit 156,1525,1527-28,1562, 1712). This area was restricted to Sheriff Department personnel only. (1525). As a

[4] "TT" refers to Gary Thibodeau's trial transcript.

result of this security breach, Investigator Whipple instituted protocols prohibiting any original files, pictures or paperwork being removed from the situation room without his permission. (1528). No follow-up investigation was conducted in regard to the breach. (1570, Defense Exhibit 156).

Michael Bohrer, one of three new suspects, testified at the post-conviction hearing that he knew Allen's CI card was dropped in the parking lot of the D&W and that it had been found by Kristine Duell. (594-595). Bohrer proclaimed that Duell's recovery of Allen's CI card was on the 12:00 P.M. news in 1991 on the day it was recovered. (596).

Following Bohrer's testimony, the complaint card documenting Duell's telephone call to the Sheriff's Department and the retrieval of Allen's CI card from the D&W on January 23, 1992, was discovered by Investigator Moskal during a recess of Thibodeau's current post-conviction hearing. (1093,1120, Defense Exhibit 144). Defense Exhibit 144, received into evidence, is a copy of the complaint card and contains notes made by Investigator Moskal indicating "Original Removed/ R.A. Moskal 01/23/2015 @ 1602/ To Heidi Allen Master File." (Defense Exhibit 144,1095). The actual complaint card makes no mention of the property retrieved from Kristine Duell and it does not have a lead number assigned to it. (1531,1572, Defense Exhibit 144). This document was only discovered following Bohrer's testimony surrounding his personal knowledge that Allen's CI status had been breached.

4. The December 9, 1994 Internal Memoranda of Deputies Van Patten, Montgomery, and Anderson Regarding the Loss and Recovery of Allen's CI File.

On December 9, 1994, nearly two years after Deputy Van Patten had lost Allen's CI file in the parking lot of the D&W convenience store, three internal memoranda were created by Deputies Van Patten, Montgomery, and Anderson in connection with the compromise of Allen's

CI file by the Oswego County Sheriff's Department. (Defense Exhibits 8,9,10). These memos were created one day following Attorney Fahey's request at the pretrial motion hearing for Allen's CI file. (1662). Fahey could not have known about Allen's CI file being compromised since Sgt. Lortie's report makes no reference to this incident. (Defense Exhibit 5).

Deputy Van Patten's memorandum recites his interaction with Allen in 1991 and the creation of her CI information. (Defense Exhibit 9). Deputy Van Patten admits losing Allen's sensitive information in the parking lot of the D&W and learning of this through Deputy Montgomery's retrieval of the documents from an employee at the D&W store. (Id.). Deputy Van Patten had instructed Deputy Montgomery to place the documents into his mailbox. (Id.). He claims he next saw the documents two years later at the "Heidi Center." (Id.).

Deputy Anderson wrote a brief memorandum reciting his interaction with Allen in 1991 as a CI. (Defense Exhibit 10). Deputy Anderson downplayed Allen's CI status but reflected he had no knowledge that Deputy Van Patten had already signed Allen up as a CI. (Id.). His memorandum indicates that Allen did not use drugs. (Id.). Dodd's closing argument at Gary Thibodeau's trial indicated Allen used drugs and that her family did not know her well. (1833-34, TT., p. 3377). Dodd told the jury that Bob Baldasaro and James McDonald offered Gary Thibodeau's motive to kidnap Heidi Allen through Gary Thibodeau, by stating:

> They told you that this particular defendant had described that he and his brother had gone to the D&W Convenience store and that this defendant went there because that girl was upset about something that may have had to do with drugs. Now, I agree with Mr. Fahey. The testimony you have heard from Brett Law, Sue Allen, Ken Allen tend to support that Heidi Allen would have nothing to do with drugs. But you know something, ladies and gentlemen? We don't know. Sometimes moms and dads and boyfriends don't know everything. Sometimes they don't know that a person may have some knowledge about something, someone that's a friend or a relative that may have some connection to this defendant. The reason for why can only be stated to you through the witnesses that have testified and Bob Baldasaro and James McDonald told you reasons why.

(TT., pp. 3377-78).

Deputy Montgomery's memorandum, unlike the others, is dated December 8, 1994, at 1500 hours, showing it was created the afternoon following the pretrial motion hearing. (Defense Exhibit 8). It was created at the request of Lt. Goodsell. (Id.). Deputy Montgomery's recollection of the recovery of Allen's CI documents from Kristine Duell contradicts the complaint card created at the time of the events and Duell's statements and testimony about this incident. (Id.). According to Deputy Montgomery, he just happened to be at the D&W sometime in late 1991 or early 1992, and was asked about an index card and photo that had been found in the parking lot of the store. (Id.). His memorandum does not even mention a call to the Sheriff's Department, thereby allowing him to eliminate Kristine Duell's name in his memorandum. (Id.).

Former Chief Assistant Oswego County District Attorney Donald Dodd testified that he had received these documents at his office on December 9, 1994, and he agreed that these memoranda constituted *Brady* material. (1662-1663,1670,1712,2069).

5. Oswego County Sheriff's Department Investigator Whipple's Maintenance of the Allen Investigative File.

Oswego County Sheriff Department Investigator Terry Whipple became the custodian of all records in the Allen investigation after the investigation and file were moved from the command center at the New Haven Fire Department to the Oswego County Sheriff's Department two weeks following Allen's abduction. (1476,1511-12,1516,1523,1712). During the first two weeks of the investigation, there was no system to keep track of records held at the command center. (1516). Investigator Whipple described the command center as chaotic and without security to protect documents. (1525).

Once the file was moved out of the command center, Investigator Whipple was given a room in the new Public Safety Center that was vacant at the time, called the "situation room." (1477,1525). The "situation room" was restricted to authorized personnel only. (1525).

The Heidi Allen investigation was one of the largest cases of his career. (1511). The amount of paperwork was "staggering." (1480,1514). Investigator Whipple had to create a system to handle the voluminous material that was coming in on the case. (1478). Any paperwork that came in was directly given to Investigator Whipple and he would date stamp it received by the Oswego County Sheriff's Department. (1478). If he was not there, the paperwork was placed in his inbox for him to address upon his return. (1511-12,1523). Investigator Whipple assigned lead numbers chronologically to documents and logged them on a master lead sheet that contained all lead numbers. (1479,1512,1520,1530-1531,1712, Defense Exhibit 163).

After Gary and Richard Thibodeau were indicted, Investigator Whipple assisted Chief Assistant District Attorney Donald Dodd in handling discovery matters. (1481). The entire Sheriff's investigative file was moved to the District Attorney's Office and Investigator Whipple remained in charge of the file. (1562-1563,1568,1864). Investigator Whipple became the liaison between the defense attorneys and the District Attorney's Office and the Sheriff's Department. (1489).

The first time Investigator Whipple saw Allen's CI file was after Investigators Kleist and Yerdon had found it on May 16, 1995. (1522-1523). They had been directed by Dodd to find this documentation because there had been questions about where these documents were. (1504,1523). The date stamp of May 23, 1995, indicates the first time that Investigator Whipple

received Allen's CI file. (1523). Investigator Whipple never assigned a lead number to Allen's CI file. (1524).

Investigator Kleist's report and Allen's CI file were not in the Sheriff Department's file in August of 1994 when it was given to the District Attorney. (1534-35). Investigator Whipple believed all leads were important in a case of this magnitude. (1517). There were in excess of 1500 leads in this case, but there were no lead numbers assigned to the December 9, 1994, memoranda of Deputies Van Patten, Montgomery, and Anderson. (1523-24,1565-69,1634). Investigator Whipple had no recollection of where those documents were filed in the District Attorney's file that was maintained by Whipple. (1565-69).

Investigator Whipple stated that Allen's CI status was not discussed at Sheriff Department meetings until after May 16, 1995. (1532). Prior to that, he had some knowledge of Allen's CI status but was "told the matter had been taken care of on the first day of the investigation and there was nothing to it." (1533). Investigator Whipple would have found this information significant if he had it and it would have been made into a lead. (1533). For example, in another instance, Investigator Whipple had created a lead on June 23, 1995, that stated "Heidi Allen is a snitch" written on the wall of a bathroom at the Junius Pond rest area on the New York State Thruway. (1545, 1548,Defense Exhibit 140). Gary Thibodeau's trial had ended when this lead came in and Investigator Whipple had no idea as to whether that document had been provided to the defense. (1547,1549).

6. Chief Assistant District Attorney Dodd's Document Procedure.

After Gary and Richard Thibodeau were indicted, the sheriff's investigative file was moved to the Oswego County Grand Jury room, which was next door to the Oswego County District Attorney's Office in the Oswego County Public Safety Building. (1481-82,1534-35).

Dodd testified that the Heidi Allen abduction investigation contained the largest volume of materials of any other case he encountered during his twenty-six years with the Oswego County District Attorney's Office. (1706). Dodd believed he created a structure that was "systematic, organized and verifiable" for all documents received by the Oswego County District Attorney's Office in connection with the Allen investigation. (1637,1663,1706-07). Dodd testified that in December of 1994, he alone "created the system and the structure that was utilized at all stages as it relates to statutory discovery being identified and turned over and also any and all Brady material." (1635,1638).

There was only one Heidi Allen investigative file, consisting of 5 boxes in excess of 1500 leads, maintained by the Oswego County Sheriff's Department. (1634-35, 1714). Investigator Whipple was responsible for the lead number designations. (1712). Dodd instructed anyone who had photocopied an original document to mark the original document with green ink on the face sheet. (1639). The green mark only verified that the original document had been photocopied, not that it was turned over to the defense. (1553-54, 1537). Three reproductions of the investigative file were created for Fahey, Walsh, and the Oswego County Court. (1638,1640). The reproduction of the 5 boxes occurred prior to December 14, 1994. (1640-1641).

Documents received after the investigative file was reproduced involved a two-step procedure. Dodd testified that all materials were shared between the Office of the Oswego County District Attorney and the Oswego County Sheriff's Department. (1715-17). First, when a document was received by the Oswego County District Attorney's Office, it was date stamped "received" by the District Attorney's Office and made the "original document" for the file. (1663,1678-79, 1715-17,2025). Second, the document was then hand delivered to Investigator

Whipple at the Oswego County Sheriff's Department to receive a date stamp from that office. (1663,1678-79, 1715-17,2025). Dodd insisted, with "100% certainty" that all documents in the Heidi Allen investigation were handled in this manner. (1717).

Dodd testified that if documents came to his office from the Sheriff's Department, they would be date stamped by his office. (1717-18). On December 9, 1994, Dodd received the memoranda of Deputies Van Patten, Montgomery and Anderson at his office regarding the loss and recovery of Allen's CI file, but he did not date stamp it pursuant to his procedure. (1567,1662-63, Defense Exhibits 8,9,10). During his post-conviction hearing testimony, Dodd claimed the December 9, 1994, date stamp on Deputy Van Patten's memorandum was from the Office of the District Attorney; however, the document itself shows only one date stamp as received by the Oswego County Sheriff's Department on December 9, 1994. (1725, Defense Exhibits 8,9,10).

Dodd had his own copy of these memoranda that he wrote "my copy" on the top in red ink and "H-A," meaning Heidi Allen. (1666). He also wrote "Brady," "C-C, carbon copy," and "T-O-T, turned over to," at the top of the page. (1666-69, People's Exhibit QQQ). Dodd's copy did not inform who the documents were turned over to or contain dates as to when these documents were turned over. (People's Exhibit QQQ).

7. The People's Concealment of Allen's CI Status during Gary Thibodeau's Trial.

Kristine Duell, the owner of the D&W Convenience Store, was a witness for the prosecution at Gary Thibodeau's trial. (1902). Kristine Duell had known Heidi Allen for approximately 10 years prior to her abduction. (TT., p. 1474). Heidi Allen worked for Duell at the D&W from April of 1992 until the date of her abduction, April 3, 1994. (TT., p. 1474).

Chief Assistant Oswego County District Attorney Donald Dodd never asked her any questions regarding finding Allen's CI papers in the parking lot of the D&W. (1902, TT., pp. 1471-1519).

Oswego County Sheriff Investigators Yerdon and Kleist, the investigators who had found Allen's CI file just days before, were prosecution witnesses at Gary Thibodeau's trial. Allen's CI index card contained her right and left thumbprint. (Defense Exhibit 11A). During questioning conducted by Dodd, Investigator Kleist was specifically asked how he had obtained Allen's fingerprints for comparison with fingerprints left at the crime scene[5]. (TT, p. 2073-2074). Instead of referring to Allen's CI card which contained her thumbprints, Investigator Kleist testified at trial that he had to obtain her fingerprints from her notebooks that were found in her vehicle at the D&W. (TT, p. 2076). Investigator Kleist had even itemized these details about Allen's thumbprints in his report. (Defense Exhibit 11). Likewise, Investigator Yerdon avoided any reference to the existence of Allen's thumbprints on her CI card during cross-examination by Fahey. (TT., 2063). Fahey asked, "Do you have fingerprints of Heidi Allen's?" and Investigator Yerdon answered, "I didn't take them. I believe there's a thumb print." (TT., 2063). Fahey continued fingerprint questioning asking if Investigator Yerdon had a full set of Allen's fingerprints and Yerdon answered, "Not to my knowledge. I have never saw one." (TT., p. 2063). Investigator Yerdon was even asked if he had checked Sheriff Department records to see if there were any Heidi Allen fingerprints on file and he said he did not and he did not know if that had ever been done. (TT., p. 2063).

8. Dodd's Concealment of Allen's CI File after Gary Thibodeau's Trial.

Between the time of the jury verdict and Gary Thibodeau's sentencing, Fahey received an anonymous tip that the prosecution had possession of Allen's diaries. (25,144). Fahey and

[5] During the post-conviction hearing testimony of Donald Dodd, an offer of proof was made by the defense on the issue of Allen's thumbprints and trial testimony elicited by Dodd of Investigators Kleist and Yerdon. The court agreed to review the trial record on these claims. (1841-45).

Bianco confronted Dodd about withholding Allen's diaries and Dodd admitted possession of the material but claimed they did not constitute *Brady* or *Rosario* material and, therefore, they were not discoverable. (25-27,144). The defense filed a motion in the trial court pursuant to N.Y. CPL § 330.30, seeking production of Allen's diaries. (28). The defense argued they were material to the defense, but still had no knowledge of Allen's CI status. (28-29). Had the defense been aware of Allen's CI status, they would have also argued the diaries were material because of a possible connection between people mentioned in her diaries and her CI status. (28-30,144). During the 330.30 motion, Fahey specifically asked Dodd if anything else had been logged into evidence along with Allen's diary, and Dodd responded, "not that I am aware of." (29,145-46).

9. Dodd's December 14, 1994 Claim of Disclosure of the Memoranda of Deputies Van Patten, Montgomery and Anderson to Attorneys Fahey and Walsh.

Dodd's first and only claim of disclosure of the December 9, 1994, memoranda of Deputies Van Patten, Montgomery, and Anderson, centers around Fahey's visit to the District Attorney's Office to review evidence on December 14, 1994, six days following the pretrial motion hearing.[6] (1659,1670,1731). This meeting was documented by Dodd in a letter to Fahey, dated December 21, 1994. (Defense Exhibit 13.). Dodd's letter referenced five cardboard file boxes that contained the Oswego County Sheriff's Department investigation report that were turned over to Fahey on December 14, 1994. (Id., 1640-1647). Dodd gave Fahey other options than taking a reproduction of the entire file, but Fahey stated he wanted everything. (1640-47). Dodd's letter referred to the December 8, 1994, pretrial motion hearing in which Dodd claimed he had previously provided all discoverable material and would continue

[6] Dodd claimed in paragraph 16 of his October 6, 2014, Affidavit offered in the People's responsive papers that he provided Fahey with the December 9, 1994, memoranda, Allen's CI file, and the Kleist report on December 14, 1994 and March 14, 1995.

to provide the defense with discovery through the December 16, 1994, deadline. (Id.). The letter makes no mention of Fahey's December 8, 1994, specific request for Allen's CI file. (Id.). Dodd pointed out possible *Brady* material contained within the five boxes by directing the reader to:

> Heidi Allen sightings, anonymous telephone call, anonymous letters, building checks, DCJS reports, D&W bulletin board notes, Heidi Allen doctor records, drive by motorists, evidence, FBI reports, FBI surveillance, Halt VICAP, hang up phone class, Heidi Allen Center, hospitals, lead sheets, motel checks, neighborhood canvasses, Niagara Mohawk, NYSPIN dates, Onondaga Community College, orders of protection, emergency management, parole lists, questionnaire, interview sheets, PEN register, people in store, police reports, psychics, road block information, search team maps, search team sign up sheets, search warrant, Heidi Allen sightings, Sythe Energy, stolen car reports, store checks, subsurface imaging, suspicious persons (lead 1 through approximately 1,400), suspicious vehicles (lead 1 through approximately 1,500), tax map information, teletypes, time calculations, television stations, D&W store, warrants, telephone calls Oswego County Jail, telephone traps, Heid Allen file, specific files involving the following individuals: Darlene Austin, Robert Baldasaro, John Barlow, Mark Barlow, Jodi Benway, Christopher Bivens, Jean Budd, Dayne Corey, John Corey, Leonna Corey, Susan Cowen, William Cowen, Ricky Crawford, Teresa Crawford, Deptuy Curtis, Sgt. Burdick, Ronald Dawley, Jennifer Delong, Arleta Dix, Kristine Duell, Matt Duell, Leo Fabian, Nancy Fabian, Christina Frasier, Steven Frasier, Jamie Gardnier, John Glensister, Patricia Granger, Hills Heating and Air Conditioning, George Ingersoll, David Hinman, William Kane, Daryl Kellar, Keith Lafond, Scott Laisey, Brett Law, Rod and Mary Law, Gina Lombardo, Crystal Magrisi, James McDonald, David Maynes, Richard Mitton, David Maloney, Leland Neadle, David Maynes, Karen Souva, Donald Neville, Sr., Donald Neville, Jr., Richard Mitton, David and Angela Nelson, Alexander Nye, Maryann O'Reilly, Ann Perau, Harold Perau, Laurie Petrie, Nathalia Silva, James Spears, Linda Sperling, Kimberly Stevens, David Stinson, Mary Stinson, Dean Stone, John Swenskowski, Julie Sweich, Richard Thibodeau, Gary Thibodeau, Ken Allen, Kristine Duell, David Vrooman, Harold Wiltsie, William Woolson, Francis Zeller, Lisa Allen, Sue Allen, Jerry Harrington, Brett Law, Rod Law, Wendy Law, Jim Price, James Searles, Missy Searles, Nancy Searls, Terry Searles, Tom Searles, Martha Sturtz, Russell Sturtz, Chip Wills, George Wills, Roberta Wills, Adams Police Department, Agawan Police Department (Massachusetts), Amateur Electronic Mail, America's Most Wanted, Athens Police Department, Atlanta, Georgia, Police Department, Auburn Police Department, Broome County Sheriff's Department, Buffalo Police Department, Carlisle (Pennsylvania) Police Department, Cayuga County Sheriff's Department, Chickasaw (Iowa) County Sheriff's Department, Clay Police Department, Clinton (New Jersey) Township Police Department, Columbia

County Sheriff's Department, Commerce City (Colorado) Police Department, Crawford (Illinois) County Sheriff's Department, Community Alert Network Information, Danville Police Department, Dexter Police Department, Dutchess County Sheriff's Department, East Greenwhich Police Department, Elmira Police Department, Fitchburg (Massachusetts) Police Department, Fort Myers (Florida) Police Department, Fulton County Sheriff's Department, Geddes Police Department, Genesee Township (Tennessee) Police Department, Geneva Police Department, Gilmere (Texas) Police Department, Headland (Alabama) Police Department, Heidi Search Center (Texas), Henrietta (Oklahoma) Police Department, Hillsborough (Florida) County Sheriff's Department, Ithaca Police Department, Jefferson County Sheriff's Department, Johnstown Police Department, Kennebec (Maine) County Sheriff's Department, Leominster (Massachusetts) Police Department, Lewis County Sheriff's Department, Livingston County Sheriff's Department, Los Angeles (California) County Sheriff's Department, Loves Child Protection Services, Madison County Sheriff's Department, Manlius Police Department, Maryland State Police, Massachusetts State Police, Missing Children Foundation, Missing Children Health Center (Florida), Montgomery County Sheriff's Department, National Center for Missing and Exploited Children, Niagara County Sheriff's Department, NYS Police (Albany, Auburn, Cortland, Fulton, Ithaca, Julias Pond, Watertown, North Syracuse, Pulaski, Oneida, Painted Post, Wilton, Wolcott, Thruway), Lewis County Sheriff's Department, Ogden Police Department, Ohio State Police (Ohio), Onondaga County Sheriff's Department, Oneida County Sheriff's Department, Ontario County Sheriff's Department, Ontario Provincial Police (Canada), Orange County Sheriff's Department (Florida), Oswego County Jail, Oswego Police Department, Pinellas County Sheriff's Department (Florida), Pennsylvania State Police (Pennsylvania), Phoenix City (Alabama), Police Department, Phoenix Police Department (New York), Prince George County (Maryland) Police Department, Pueblo County Sheriff's Department (Colorado), Saratoga County Sheriff's Department, Seneca County Sheriff's Department, Shenandoah County Sheriff's Department (Virginia), Syracuse Police Department, St. Lawrence Sheriff's Department, Taylor County Sheriff's Department (Florida), Toledo, Ohio, Police Department, Unsolved Mysteries Show, Utica Police Department, Vermont State Police (Vermont), Warren County Sheriff's Department, Waterford Police Department, Watertown Police Department, Wayne County Sheriff's Department, Webster Police Department, Ervin Adams, Patrick Allen, Adam Beshures, Daniel Brady, Raymond Bies, Thomas Borrelli, Paul Burns, David Duell, David Duell, Jr., Dennis Duell, Rory Formen, Charles Gawrecki, Albert Fellows, Carl Green, Mandell Hart, Robert Jones, Heath James, Martin Kabot, Daryl Keller, Robert Kohutanich, Steven Kuznia, Richard Leone, Dani Lister, Paul Marturano, Stephen McKearin, Ian Mucky, Shane Moore, Michael Santimaw, Roger Singleton, Kazimer Skoczdopli, Leon Slobe, Tracey Dale, Tom Watson, Nelson Weed, Oswego County Sheriff's Department Officers William Cromie, Jeff Bzdick, Dean Goodsell, Sumner Hall, Nick Kleist, Fred Ling, Robert Lighthall, Ralph Scruton, Ruell Todd, Rodney Watson, Robert Wheeler, Terry Whipple, Dale Yager, Herb Yerdon, Ralph

> Scruton, evidence sheets (leads 0 through 1,3999), drawn measurements D&W Store, PEN Register, and Thibodeau van carpet measurements.

(Defense Exhibit 13).

Missing from the list of thirteen Oswego County Sheriff Department personnel are Deputies Van Patten, Montgomery, and Anderson. (1723-1725,20176,Defense Exhibit 13). Dodd was specifically asked to show reference to Deputies Van Patten, Montgomery, and Anderson in the above letter and he responded with his general reference to *Brady* material in his letter. (1723-1726, Defense Exhibit 13). Dodd claimed the portion of his letter stating, "In the motion presently filed in County Court, you demanded all, 'Brady material.' You presently are in possession of, Oswego County Sheriff's Department criminal investigation report relative to the facts and circumstances involving the kidnapping of Heidi Allen. To the extent that there is any potential evidence or information property that may in fact or may tend to be exculpatory, it is included" meant the December 9, 1994, memoranda were included. (1724-1726,Defense Exhibit 13). This portion of Dodd's letter appears before the 200 specific *Brady* items quoted above. (Defense Exhibit 13). This is Dodd's only purported disclosure of the December 9, 1994, memoranda of Deputies Van Patten, Montgomery, and Anderson. (1731).

Dodd agreed that Allen's actual CI file could not have been included in the investigative file because it had not been located until May 16, 1995, five months after Fahey's December 14, 1994, visit to the District Attorney's Office. (1533-1535,1809,2243-2248, 2257-2258, Defense Exhibit 11).

Prior to December 14, 1994, Dodd created handwritten notes to account for all material contained within the five boxes of discovery "for the purpose of being systematic and organized in an effort to verify the contents of the boxes and what was being reproduced for the defense attorneys." (2039,2046,2051, People's Exhibit ZZZ). Dodd's twenty-two pages of notes were

meticulous, referencing start to finish on each box. (People's Exhibit ZZZ). There were 38 specific *Brady* references throughout the notes. (2042-43). Although Dodd testified that the December 9, 1994, memoranda were *Brady* material, his notes make no reference to these memoranda. (Id. 1670,2069). Dodd claimed they were included on page 4 of his notes under the "police reports" notation. (2053-2054,2058). The top of that page is dated, "12/5/94," which predates the creation of those memoranda. (2039-40, People's Exhibit ZZZ, Defense Exhibits 8,9,10). Additionally, there is no *Brady* notation next to "police reports." (People's Exhibit ZZZ). Investigator Whipple, the custodian of the investigative file, had no recollection of those documents ever being made a part of the master file and they did not contain lead numbers or two date stamps pursuant to Dodd's document procedure. (1565-69).

Dodd claimed he was "particularly careful" about discovery matters "to insure that we had a systematic, organized, verifiable way to demonstrate in the event this day came" to be able to "point back in time to twenty years ago…with a measure of reliability to this judge the procedure that was in place for the purposes of demonstrating that the documents in fact were photocopied, reproduced in their entirety and turned over to attorneys Fahey and Walsh." (1786).

Dodd testified that both Fahey and Walsh received an exact reproduction of the sheriff's investigative file on December 14, 1994, that contained 1500 leads in chronological order. (1638, 1640-41, 1512, 1805, Defense Exhibit 163). Dodd's verifiable procedure was called into question by Attorney Walsh's pretrial motion that sought production of the following lead sheets which were not provided to counsel on December 14, 1994. (1787-1799, Defense Exhibit 142). The leads Walsh sought were "3, 82, 85, 87, 96, 110, 112, 147, 154, 156, 160, 174, 210, 228, 234, 240, 246, 253, 255, 256, 261, 266, 269, 270, 277, 280, 281, 288, 289, 292, 295, 298, 302,

306, 309, 322, 325, 440, 445, 455, 467, 468, 479, 490, 503, 512, 519, 559, 594, 630, 635, 646, 650-669, 703, 705, 710, 727, 747, 750, 786, 808, 817, 823, 854, 855, 867, 884, 892, 897, 909, 946, 973, 974, 989, 990, 993, 1023, 1028, 1052, 1095, 1098, 1125, 1134, 1150, 1221, 1225, 1254, 1265, 1304, 1346, 1359, 1362, 1366, and1367." (Defense Exhibit 142). In this same motion, Walsh moved for sanctions based upon Dodd's disclosure violations under *Rosario* and NY C.P.L. § 240.44, with respect to both defendants. (Defense Exhibit 142). Walsh noted that Dodd had represented to the court that "everything, would be provided to the defense," when in fact Dodd had not done so as of January 13, 1995. (Defense Exhibit 142). Dodd's answer to Walsh's motion claimed 62 out of Walsh's 113 lead sheet requests had already been provided. (2027, 2062, People's Exhibit WWW).

10. Neither the December 9, 1994 Memoranda nor Allen's CI File Were Disclosed to Fahey on March 21, 1995.

Fahey returned to the Oswego County District Attorney's Office on March 21, 1995, to view additional discovery. (1673). Prior to this meeting, Dodd sent a memorandum to Investigator Whipple to assist Fahey during his March 21 visit. (People's Exhibit KKK). Dodd's memo indicates that Fahey would be there "to listen to the Baldasaro tape." (Id.). Investigator Whipple kept notes of that meeting and listed all people that were present, what evidence had been listened to, and what evidence had been copied for the defense. (Id.).

Dodd testified that he only provided the December 9, 1994 internal memoranda one time to Fahey and Walsh, on December 14, 1994. (1731). Investigator Whipple's notes make no reference to the December 9, 1994, internal memoranda. (Id.). There could be no reference to

Allen's CI file or Investigator Kleist's report because the CI file had not yet been found by Investigator Kleist.[7] (1533-1535,1809,2243-2248, 2257-2258, Defense Exhibit 11).

11. Dodd's May 17, 1995 Claim of Disclosing the Kleist Report and Allen's CI File.

Dodd's first claim of disclosure of the Kleist Report and Allen's CI File centers on his May 17, 1995 cover letter addressed to attorneys Fahey and Walsh, sent with unnamed attachments. (1674). This letter was mailed to both Fahey and Walsh on the same date. (1866). Dodd's letter states, "Pursuant to the People's on going duty to disclose, CPL § 240.60, I am providing with this letter copies of additional discoverable property obtained since my last disclosure to you by letter dated April 25, 1995." (People's Exhibit JJJ). Dodd now claims the unnamed attachments were Investigator Kleist's report along with a copy of Allen's CI file. (1674). Gary Thibodeau's trial commenced on May 22, 1995, and the record is absent of any response from Fahey regarding the five-month delay for obtaining exculpatory material on the eve of trial.

The Kleist report that was found in Richard Thibodeau's trial file, that inspired this current *Brady* violation argument, did not contain a copy of Allen's CI file. (41-42,1626). Additionally, the Kleist report found in Richard Thibodeau's file is markedly differently from the copy of the Kleist report contained in People's Exhibit JJJ. Richard Thibodeau's Kleist report contained two date stamps. (Defense Exhibit 11). The first is "Received, May 16, 1995, District Attorney's Office," and the second is, "Received, May 23, 1995, Oswego County Sheriff's Department." (Defense Exhibit 11). The People's copy of the Kleist report contains only the May 16, 1995, date stamp. (People's Exhibit JJJ). Richard Thibodeau's Kleist report with the

[7] Dodd claimed in paragraph 16 of his October 6, 2014 Affidavit, offered in the People's responsive papers, that he provided Fahey with the December 9, 1994 memoranda, Allen's CI file and the Kleist report on December 14, 1994 and March 14, 1995.

May 23, 1995, date stamp could not have been mailed to him on May 17, 1995. (1735,1809). The evidence log shows Allen's CI file being logged into evidence by Investigator Kleist on May 23, 1995, and being placed on shelf B-20 of the evidence room. (Defense Exhibit 11).

12. Dodd's June 5, 1995 Second Claim of Disclosure of the Kleist Report and Allen's CI File.

Although Dodd testified that he never duplicated discovery, he offered a second disclosure of the Kleist Report and Allen's CI file, occurring on June 5, 1995, one day prior to the People resting their case. (1681,1731,1748-49). Dodd's purported evidence is a June 5, 1995 cover letter he drafted to Fahey on a yellow piece of paper without official letterhead. (1681, 1684-85, 1691, People's Exhibit SS). This letter was hand delivered to Fahey in the midst of Gary Thibodeau's trial at the courthouse with unnamed attachments that Dodd says contained the Kleist report and Allen's CI file. (1689,1866-67). Dodd wrote this letter on a yellow piece of paper to "save an expense." (1684-85, 1691). This claim brought forth a third version of the Kleist report, again, not found in Richard Thibodeau's trial file. (Defense Exhibit 11, People's Exhibit SS, People's Exhibit B). This Kleist report contained only one date stamp, marked "Received, May 23, 1995, Oswego County Sheriff's Department. (2101,People's Exhibit B, People's Exhibit SS). The May 23, 1995, stamp is in a different location on this Kleist report than the May 23, 1995, stamp on Richard Thibodeau's copy. (2101,Defense Exhibit 11, People's Exhibit B, People's Exhibit SS).

Dodd never had Allen's CI file with him during Gary Thibodeau's trial. (2110). Gary Thibodeau's trial record makes no mention of Fahey receiving a copy of Allen's CI file that he requested on December 8, 1994, just prior to, during, or near the close of the prosecution's case-in-chief. Fahey testified that if he had been provided with these documents at any of these times,

he would have "raised holy hell about it. There would have been sanctions" and he would have moved for a mistrial. (962).

The trial record does show Fahey objecting to late disclosure of a different report from Investigator Kleist that was created by him at the request of Dodd on June 6, 1995. (TT., pp. 3093-94). Dodd was trying to admit this report into evidence when Fahey objected, stating:

> Judge, the record should reflect that in the course of this witness' testimony, Mr. Dodd has elicited from him that following, apparently the testimony of the Bartletts, who were called on the defense case, he directed Investigator Kleist to go to the location of the - - of where the Bartletts had formerly lived to make certain measurements with respect to the driveway, as I understand the testimony, and the distance between the various driveways or two driveways or some portion of the driveway that is apparently set forth on those premises.
>
> It is my contention that under 240.20(1)(c), which requires disclosure of "any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial." It is my contention that when he sends Investigator Kleist out there to specifically make those measurements, particularly midcourse during this trial, that that, in fact, constitutes material which I believe is required to be disclosed under 240.20(1)(c) and which falls, I believe, within the relatively broad language of "scientific test or experiment" in that section. I think the failure to disclose that and to elicit it for the first time on cross-examination with respect to Investigator Kleist, particularly where there was no testimony offered about the distances between the Bartlett residence and the Thibodeau residence during the course of this witness' testimony, I think that that - - it violates both the letter and the spirit of Section 240.20 and I would request the Court to preclude any further testimony on it.

(TT., pp. 3093-94).

II. Evidence developed during the April 7, 2015 Recess about How Allen Became a Confidential Informant for the Oswego County Sheriff's Department.

During the April 7, 2015 court's recess of Thibodeau's post-conviction hearing, the

defense learned Allen's cousin, Melissa (Searles) Adams had possession of a bracelet she gave to Allen prior to her abduction. This bracelet was engraved "Heidi" on the front and "Love Missy" on the back. Adams brought this to the attention of the defense after reading Michael Bohrer's notes that were posted in a Post-Standard newspaper article. Bohrer's notes referred to Allen hiding a bracelet in the vehicle she was abducted in.

Following Allen's abduction, Adams had talked about the "Heidi" bracelet she had given to her and wondered if she had it on when she was abducted. Adams said Bohrer was present when she discussed the bracelet. Years following Allen's abduction, the bracelet was mysteriously found by Adams in her mailbox in a plain white envelope. The defense brought this to the Court's attention on September 2 and 21, 2015, through letters and affidavits from defense counsel and Adams.

In response to this claim, the People had Sheriff's investigators speak to Adams's family members to determine whether she was credible. One such family member was Allen's aunt, Martha Sturtz. Martha Sturtz is the wife of Russell Sturtz, the Town Judge of New Haven, who Deputy Van Patten testified is the person who introduced Allen to the Sheriff's Department to provide information about drug related activity in Oswego County. (1927).

Martha Sturtz's interview with investigators occurred on September 8, 2015 at her home and was recorded. The recording was previously provided to the Court on October 7, 2015. The interview provides additional *Brady* material that was withheld from the defense. Additionally, if the information is true, it provides evidence of Deputies Van Patten and Anderson committing perjury during their recent post-conviction hearing testimony.

According to Martha Sturtz, Allen was confronted by the police when she was 15 years old for being at a "booze party" and leaving a child in her care unattended in a car. In an effort

to avoid criminal charges for Allen, Judge Sturtz reached out to the Sheriff's Department on her behalf to see if she could provide them with information about criminal activities in exchange for a PINS Petition. The Sheriff's Department agreed. The PINS Petition allowed Allen to stay at home with her parents, but because this was not working out as planned, Allen was allowed to live with her aunt and grandmother, which is where she was living at the time of her abduction. Martha Sturtz elaborated that Allen became an informant and the negotiated deal between Judge Sturtz and the Sheriff's Department was all "connected to drug stuff Allen became involved in and she got into all this trouble."

During his post-conviction hearing testimony, Deputy Van Patten testified that Allen was introduced to him by Russell Sturtz because he was a personal friend and "his niece wanted to share some information and I followed up on it." (1927). There was no testimony that Allen was in legal trouble. Further, he testified that had Allen been "involved in using, buying or selling controlled substances," he would not have used her as an informant. (1946). This was a reiteration of his prior sworn statement submitted to the Court in the People's response to Thibodeau's 440 motion. (Id.).

Deputy Anderson testified he met with Allen and her boyfriend, Brett Law, at the Sheriff's Department because one of her friends was getting into drugs. Allen became an informant because she was concerned about a friend who was in trouble. (1976, Defense Exhibits 9,10).

On September 30, 2015, the defense learned Allen was working as a confidential informant up until the time of her abduction. Rhonda Burr, Allen's co-worker at the D&W, stated Allen would often talk about working with the Sheriff's Department and fearing for her

safety. Deputies Van Patten and Anderson testified Allen was not an active informant at the time of her abduction.

III. Failure to Disclose *Brady* Material Concerning Darlene Upcraft's Sighting of a White Rusty Van Parked in Front of the D&W the Morning of Heidi Allen's Abduction.

On the morning of Heidi Allen's abduction, Darlene Upcraft drove past the D&W convenience store on her way to church at approximately 6:30 A.M. (187-189). It was Easter Sunday and she was surprised the D&W was open. (189). She observed a white rusty van parked perpendicular to the front of the D&W. (189). Upcraft reported these observations to the Oswego County Sheriff's investigators within four days of Allen's abduction. (190-191, Defense Exhibit 19). After her initial disclosure, Upcraft was contacted at least two more times by Sheriff Investigators to follow-up with her regarding what she had observed. (191). First, a Sheriff Investigator came to her home and asked her about the van she observed at which time she told them she saw a white rusty van. (191). After that visit, a Sheriff Investigator returned to her home while she was walking to her mailbox and he asked if he could talk to her about the van she had observed. (191). Upcraft was asked if the van she saw was black and white and she repeated that the van was a white rusty van. (192). Upcraft had seen Richard Thibodeau's van on the television news and that was not the van she saw in front of the D&W on the morning of Allen's disappearance. (192). The lead sheet created by the Oswego County Sheriff's Department in connection with Upcraft's observation incorrectly states that she did not see anything when she drove past the D&W that morning. (193, Defense Exhibit 19).

LEGAL BACKGROUND

In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either

to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose *Brady* material is applicable even if there has been no formal request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). *Brady* material includes impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 682. This rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id*. at 438. Therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf . . .including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Under New York law, "where a defendant makes a specific request for a document, the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings." *People v. Garrett*, 23 N.Y.3d 878, 891 (2014)(quoting *People v. Fuentes*, 12 N.Y.3d 259,265 (2009)). Failure to disclose specifically requested *Brady* material is more serious in "its potential to undermine the fairness of the trial, and ought to be given more weight…by a reviewing court." *People v. Vilardi*, 76 N.Y.2d 67,77 (1990). "Where the defense itself has provided specific notice of its interest in particular material, heightened rather than lessened prosecutorial care is appropriate." *Id.* The "reasonable possibility" standard is equivalent to the "seldom if ever excusable" rule. *Id.*

On December 8, 1994, Attorney Fahey, specifically requested the Oswego County District Attorney to disclose Allen's CI file, stating:

> The report that Mr. Walsh shared with me indicated that there was a file in existence that was brought to the scene of the D&W, but Mr. Walsh has not been given that particular file. That's what I would ask to be disclosed.

(December 8, 1994, Pretrial Motion Hearing Transcript., p. 31).

In light of this specific request, the "reasonable possibility" standard applies to the facts of this case.

During the December 8, 1994, Pretrial Motion Hearing, Dodd indicated he had no knowledge of Allen being a CI and learned it for the first time by reading an article in the Post-Standard Newspaper. (December 8, 1994, Pretrial Motion Hearing, P. 32). The Sheriff's Department denied Allen was a CI, stating Sgt. Lortie was confused and thinking of a different case. (Defense Exhibit 4).

Fahey, Calver, and Bianco never saw Allen's CI file until Thibodeau's current post-conviction hearing and neither of them had ever seen the December 9, 1994, memoranda of Deputies Van Patten, Montgomery, and Anderson until Bianco found them in Richard Thibodeau's trial file in July of 2014. (29-42, 139, 175-76).

DISCUSSION

I. The Prosecution Actively Suppressed Material Evidence Concerning Heidi Allen's Status as a Confidential Informant and the Fact that Her Status Was Compromised by the Oswego County Sheriff's Department Prior to Her Abduction.

At the time Fahey read Sgt. Lortie's report, he was only alerted to the fact that Allen was a possible confidential informant for the Sheriff's Department. (Defense Exhibit 5, December 8, 1994, Pretrial Motion Hearing Transcript, pp. 30-33). The active concealment of Allen's CI status by both the Oswego County Sheriff's Department and the Oswego County District Attorney's Office blocked Fahey from ever learning, until now, that the Sheriff's Department placed her life in danger when Deputy Van Patten lost her CI file in the parking lot of the D&W Convenience Store, which contained, *inter alia*, her name, home address, and photograph. (Defense Exhibit 11A,People's Exhibit B). The danger was amplified by the Sheriff's

Department's failure to do anything to mitigate the harm already caused by them, and, most importantly, to alert Heidi Allen of their wrongs.

The suppression of this evidence can be traced back to the discovery of Deputy Van Patten's gross negligence by his superiors on the date of Heidi Allen's abduction. Sgt. Lortie, who was present with Deputy Van Patten when Allen became a CI on December 11, 1991, immediately recalled this fact when he responded to the D&W on the date of Allen's disappearance. (1927-29, Defense Exhibit 5). Sgt. Lortie's first investigative instinct was to retrieve Allen's CI file to obtain the "names of dealers that ALLEN would have been involved with." (Defense Exhibit 5). He soon learned that her file was not where it was supposed to be; locked in Investigator Scruton's drug file. (Defense Exhibit 5). Instead, Allen's file had been sitting in Deputy Van Patten's mailbox. (Defense Exhibits 5,8,9,10).

From the date of Allen's abduction on April 3, 1994, and Sgt. Lortie's recollection of her CI status, there is not a single Oswego County Sheriff's report mentioning Allen's CI status until Fahey requested the file on December 8, 1994. (Defense Exhibits 5,8,9,10). Inexplicably, Sgt. Lortie's desired line of investigation came to a dead stop on April 3, 1994.

Fahey's request merely caused the Sheriff's Department to generate internal memoranda, not official police reports, to account for how Allen's CI file appeared in Deputy Van Patten's mailbox and not in Investigator Scruton's locked drug file. (Defense Exhibits 8,9,10). The memoranda of Deputies Van Patten, Montgomery, and Anderson reveal for the first time that Deputy Van Patten lost the CI file in the very parking lot where Allen was employed and abducted. (Defense Exhibits 8,9,10).

A. Gary Thibodeau's Trial Record Proves the CI Evidence Was Suppressed.

Having the knowledge that we now have of Allen's CI status and the danger she was placed in by the Sheriff's Department, the active concealment of this evidence during Gary Thibodeau's trial is glaring. For example, Chief Assistant District Attorney Donald Dodd called Kristine Duell as a prosecution witness and never questioned her about finding Allen's CI card in the parking lot of the D&W. (TT., pp. 1471-1519). Since Kristine Duell was a witness for the People, it was effortless for Dodd to tailor her testimony to exclude this evidence.

Both Investigators Yerdon and Kleist testified for the People on June 5, 1995. (TT., pp. 1989,2072). This was 20 days following their discovery of Allen's CI file in the midst of uncatalogued evidence in the bulk storage area of the garage of the Sheriff's Department. (Defense Exhibit 11). This evidence was never brought out at Gary Thibodeau's trial even though Kleist logged Allen's CI file into evidence on May 23, 1995, thirteen days prior to his testimony. (Defense Exhibit 11). June 5, 1995, is also the date Dodd claims he disclosed Kleist's report and a copy of Allen's CI file for a second time to Fahey. (1681,1684-85,1689,1691,1731,1748-49, 1866-67,People's Exhibit SS). Although Dodd claims this disclosure, he admitted he never brought Allen's CI file to Gary Thibodeau's trial. (2110). This was confirmed by Kleist who placed the file on shelf B-20 of the Sheriff's Department evidence room. (Defense Exhibits 11, 11A). It was never logged back out. (Id.).

Both Investigators Kleist and Yerdon saw Allen's original CI file created by Deputy Van Patten on December 11, 1991, which contains Allen's right and left thumbprint. (1926,People's Exhibit B). During Gary Thibodeau's trial they both sidestepped around questions posed to them by both Dodd and Fahey regarding Allen's fingerprints. Investigator Kleist, an evidence technician for the Sheriff's Department at the time of Allen's disappearance, was called to the D&W to process the scene. (TT., pp. 2072-73). Investigator Kleist "raised some prints" at the

D&W. (TT., p. 2073). Dodd asked him if he was able to obtain any fingerprints from Heidi Allen for comparison and his response to this question avoided the thumbprints on Allen's CI card already in existence. (TT., p. 2075-76). Investigator Kleist testified he obtained Allen's fingerprints from her notebooks that were found in her vehicle, suggesting that the Sheriff's Department did not have her fingerprints on file. (TT., p. 2076). Investigator Yerdon mentioned the Sheriff's Department may have a possible thumbprint of Allen, despite having first-hand knowledge that there were two thumbprints on the CI card. (TT., p. 2063). His most troubling testimony surrounds his claim that he was not aware of Allen's fingerprints being on file with the Sheriff's Department. (TT., p. 2063).

Dodd did not call Sgt. Lortie, Deputy Van Patten, Deputy Montgomery, or Deputy Anderson to testify at Gary Thibodeau's trial. Sgt. Lortie, Deputy Van Patten, and Deputy Anderson had direct contact with Heidi Allen; they knew her. She was not just a stranger in the community that went missing, she was a person they had met with on behalf of her uncle, Russell Sturtz, the Town Justice for New Haven. (1927). Heidi Allen agreed to put herself on the line for the Sheriff's Department by providing incriminating information about people in her small community. Presumably, Deputy Anderson was not called to testify because he claimed that Allen was not a drug user, which completely contradicted Dodd's theory of prosecution. (TT., pp. 3377-78).

Deputy Van Patten was called by the defense. Fahey, unaware of Allen's CI status and the fact that Deputy Van Patten lost her file in a public place, asked Deputy Van Patten about the morning of Allen's disappearance. (TT., p. 2445). Deputy Van Patten testified that he received a phone call to proceed to the D&W store in New Haven. (TT., p. 2445). Fahey asked him what he did there, and Deputy Van Patten replied that the ***first thing*** he did was interview Sally

Brooks, one of the employees there. (2446). This testimony directly contradicts Sgt. Lortie's report and Deputy Van Patten's December 9, 1994, memorandum. Sgt. Lortie called Deputy Van Patten in an effort to locate Allen's CI file. (Defense Exhibit 5). Deputy Van Patten confirmed this in his memorandum when he stated:

> In 1994 when Heidi came up missing, this reporter received a phone call at my residence from SGT Lortie. Lortie advised this reporter that Heidi was a confidential informant for me in 1991. This reporter advised Lortie that I had no recall about the case involving Heidi[8]. This reporter was then advised that Heidi was the relative of Judge Sturtz, and inquired where the case packet was located as it was not in the drug locked file. Patrol advised Lortie that the paperwork was located in this reporters mailbox. While this reporter was working at the Heidi Center, this reporter saw the paperwork which was retrieved from this reporters mailbox. (Defense Exhibit 9).

Deputy Van Patten's own memorandum shows the ***first thing*** he was asked to do in the Heidi Allen investigation was to locate her CI file. He artfully left these uncontested facts out of his trial testimony.

Investigator Kleist was called to testify three times during Gary Thibodeau's trial. First, during the People's case-in-chief, second during the defense's case-in-chief, and third during the People's rebuttal case. (TT., pp. 2072,3024,3252). He and Dodd had three opportunities to reveal the recovery of Allen's CI file, but failed to do so. (TT., pp. 2072-2104, 3024-3115, 3252-3267).

B. The People Have Failed to Establish the Disclosure of the CI Evidence.

The evidence proves the non-disclosure of Allen's CI file and the December 9, 1994, memoranda of Deputies Van Patten, Montgomery and Anderson.

1. The Kleist Report and Allen's CI File Were Never Turned Over to Fahey.

[8] Van Patten testified at the post-conviction hearing that Russell Sturtz was a personal friend. (1927).

It is undisputed that Allen's actual CI file was never made a part of the Sheriff's investigative file. (Defense Exhibits 11, 11A, 1522-23, 1533-35,1809, 2243-49, 2257-59). Once Investigator Kleist found the CI file, he logged it into evidence on May 23, 1995, and placed it on shelf B-20 of the evidence room where it remained until Gary Thibodeau's current N.Y. CPL §440.10 motion and hearing. (Defense Exhibit 11, 11A).

Dodd admitted that he could not have turned over Investigator Kleist's report or Allen's CI file prior to May 16, 1995, because Kleist had not found the CI file or written his report prior to that date. (1809, Defense Exhibits 11, 11A). Therefore, the People's attempt to prove Dodd provided these documents to Fahey on December 14, 1994, or March 21, 1994, is wholly without merit.

The People also failed to prove that Dodd produced these documents on May 17 or June 5, 1995. First, the CI file never made it out of the evidence room after May 23, 1995, and a copy of it was never found in Richard Thibodeau's trial file. (Defense Exhibits 11, 11A, 41-42). By Dodd's own admission, he never brought Allen's CI file to Gary Thibodeau's trial. (2110).

The documentary evidence entirely refutes Dodd's claim that the Kleist report and Allen's CI file were sent to Fahey and Walsh with a May 17, 1995, generic cover letter. (People's Exhibit JJJ). Walsh's copy of the Kleist report contained two date stamps: "Received, May 16, 1995, District Attorney's Office," and "Received, May 23, 1995, Oswego County Sheriff's Department." (Defense Exhibit 11). ***This*** copy of the Kleist report is what activated the current *Brady* argument being presented to this Court.

Walsh could not have received the Kleist report containing a May 23, 1995, date stamp if it was mailed to him on May 17, 1995. The People tried to combat this truth by presenting a different copy of the Kleist report that contained only one date stamp: "Received, May 16, 1995,

District Attorney's Office." (People's Exhibit JJJ). However, this after-the-fact production of a different Kleist report cannot undo the actual evidence Bianco found in Richard Thibodeau's trial file.

The People also tried to combat this truth by suggesting that Fahey was so messy and incredibly disorganized that he did not know Dodd had given him Allen's CI file. (965-67,1603-04). This argument fails in light of Dodd's testimony that he provided Allen's CI file to Fahey right before Gary Thibodeau's trial commenced and again during trial by hand delivering it to him in the courtroom. Despite the fact that Fahey may have organized his file in an unorthodox way, Walsh admitted that Fahey had a "terrific memory" and "knew not only what was on every single piece of paper, he knew where it was and how to locate it." (1604). Fahey testified that he would have remembered seeing Allen's CI file because her code name, "Julia Roberts," was unforgettable. (139).

The People's attempt to avoid this reality prompted a claimed second disclosure of the Kleist report and Allen's CI file despite Dodd's testimony that he never duplicated discovery and did not bring Allen's CI file to Gary Thibodeau's trial. (1681,1731,1748-49,2110). One day before the People rested their case against Gary Thibodeau, Dodd asserted he hand-delivered a letter to Fahey, written on a yellow piece of paper, that had attached to it the Kleist report and Allen's CI file. This Kleist report is now the People's second version of Richard Thibodeau's Kleist report. It has only one date stamp: "Received, May 23, 1995, Oswego County Sheriff's Department," and the date stamp is in a different location on the page than Richard Thibodeau's copy of the Kleist report. (2101, Defense Exhibit 11, People's Exhibit B, People's Exhibit SS). The People's offering of these documents is a failed effort to support their specious argument.

Dodd's May 17 and June 5, 1995 claims of disclosure are not supported by the trial record. First, Fahey asked for Allen's CI file on December 8, 1994, and the trial record is completely void of any reaction from Fahey in receiving this specific evidence five months after he asked for it. The People's suggestion that he received this *Brady* material, which entirely contradicts Dodd's theory of prosecution, less than a week before Gary Thibodeau's trial and then again one day prior to the People resting their case without an on-the-record objection is preposterous.

The trial record shows Fahey heatedly objecting to other untimely evidence offered by the People on ***June 6, 1995***, through ***Investigator Kleist***. This is one day after Dodd purportedly dropped the Kleist report and Allen's CI file on Fahey's table during trial. Dodd was attempting to offer a report created by Investigator Kleist in regard to measurements, and Fahey objected stating to the court:

> Judge, the record should reflect that in the course of this witness' testimony, Mr. Dodd has elicited from him that following, apparently the testimony of the Bartletts, who were called on the defense case, he directed Investigator Kleist to go to the location of the - - of where the Bartletts had formerly lived to make certain measurements with respect to the driveway, as I understand the testimony, and the distance between the various driveways or two driveways or some portion of the driveway that is apparently set forth on those premises.
>
> It is my contention that under 240.20(1)(c), which requires disclosure of "any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial." It is my contention that when he sends Investigator Kleist out there to specifically make those measurements, particularly midcourse during this trial, that that, in fact, constitutes material which I believe is required to be disclosed under 240.20(1)(c) and which falls, I believe, within the relatively broad language of "scientific test or experiment" in that section. I think the failure to disclose that and to elicit it for the first time on cross-examination with respect to Investigator Kleist, particularly where there was no testimony offered

> about the distances between the Bartlett residence and the Thibodeau residence during the course of this witness' testimony, I think that that - - it violates both the letter and the spirit of Section 240.20 and I would request the Court to preclude any further testimony on it.

(TT., pp. 3093-94).

To suggest that Fahey, a seasoned attorney with over twenty years of experience, would object to this and not evidence constituting *Brady* material that he specifically requested five months prior, which undermines the case against his client, is implausible. Fahey himself testified that he would have "raised holy hell about it. There would have been sanctions" and he would have moved for a mistrial. (962).

2. The December 9, 1994 Memoranda of Deputies Van Patten, Montgomery, and Anderson Were Never Turned Over to Fahey.

The People's evidence offered to prove that Fahey received the December 9, 1994, memoranda of Deputies Van Patten, Montgomery, and Anderson, on December 14, 1994, only acts to solidify Gary Thibodeau's *Brady* material suppression argument. First, Fahey asked for Allen's CI file on December 8, 1994. At this time, he had no knowledge of Allen's CI file being compromised by the Sheriff's Department since Sgt. Lortie's report makes no mention of these facts. Second, the December 9, 1994, memoranda prove Allen was a CI, and Dodd claims he turned Allen's CI file over for the first time by mailing it to Fahey on May 17, 1995, days before Gary Thibodeau's trial began. The trial record has no evidence of Fahey asking for the production of Allen's CI file after reading the December 9, 1994, memoranda, or notifying the court of Dodd's failure to comply with *Brady*. It is illogical to suggest Fahey would ask for the CI file, be told the file does not exist, six days later read memoranda indicating the file does exist, never ask for the file, receive the file days before Thibodeau's trial began, receive the file

again one day before the People rested their case, and remain silent on the People's *Brady* violation.

Dodd claims one disclosure of these memoranda, December 14, 1994, when Fahey came to the District Attorney's Office and received a reproduction of the Sheriff's Investigative file consisting of five boxes. (1659,1670,1731). This was six days following the pretrial motion hearing when Fahey asked for Allen's CI file and Dodd alluded to Fahey and the court that he had no knowledge of Allen being a CI. Specifically, Dodd stated:

> Judge, I have some information. I most certainly, again, will speak with Mr. Fahey. It appears often times the first time I hear something is when I read it in the paper and in that regard, Judge, that will create an issue I wish to address when we are through with this particular motion, your honor.

(December 8, 1994, Pretrial Motion Hearing Transcript, p. 32).

Dodd intimated to Fahey and the Court that he was going to find out the truth of this matter and would then share the result with Fahey. (December 8, 1994, Pretrial Motion Hearing Transcript, p. 33). He never did.

The following day, Dodd was provided with *Brady* material from the Oswego County Sheriff's Department consisting of the memoranda of Deputies Van Patten, Montgomery, and Anderson ***confirming*** that Allen was a CI, and further revealing Deputy Van Patten exposed her to danger by dropping her CI card in the parking lot of the D&W. (1662-63, 1670, 1712, 2069). This put Dodd on notice that the Sheriff's Department lied about Allen's CI status in their statements to the press. (Defense Exhibit 4).

Dodd now had the ideal opportunity to correct this cover up by the Oswego County Sheriff's Department by creating a record demonstrating the existence and compromise of Allen's CI file. In light of the known deception surrounding this evidence, it seems Dodd would have wanted to have a clear record of this material evidence being provided to the defense. In

fact, Dodd testified at the post-conviction hearing that he was "particularly careful" about discovery matters "to insure that we had a systematic, organized, verifiable way to demonstrate ***in the event this day came***" to be able to "point back in time to twenty years ago…with a ***measure of reliability to this judge*** the procedure that was in place for the purposes of demonstrating that the documents in fact were photocopied, reproduced in their entirety and turned over to attorneys Fahey and Walsh." (1786) (emphasis added).

At the post-conviction hearing, Dodd was repeatedly asked to "point back in time" to demonstrate that these memoranda had been provided to Fahey and he could not do so. Dodd's "systematic, organized, and verifiable" procedure only proved to show that the documents were not turned over. There is no record of the memoranda in the Sheriff's Investigative file; Dodd's notes of the sheriff's investigative file; Dodd's December 21, 1994, letter to Fahey documenting what had been provided to Fahey on December 14, 1994; and the master lead sheet created by Investigator Whipple, the custodian of all records in the Heidi Allen investigation.

At some point after Gary and Richard Thibodeau were indicted, and prior to the December 14, 1994, meeting, the sheriff's investigative file was moved from the Sheriff's Department to the grand jury room next to the District Attorney's Office. (1481-82,1534-35). Before Dodd turned over the file to Fahey and Walsh on December 14, 1994, he created notes to document all of the items that were contained within the five boxes constituting the sheriff's investigative file. His notes were meticulous and detailed for each box, including the dates he was reviewing the material. He specifically wrote *"Brady"* next to the items he considered *Brady* material. His notes make no mention of ***any*** CI evidence ***anywhere*** in the file. Although he specifically makes 38 *Brady* references and numerous police officers throughout his twenty-two pages of notes, there is not a reference to Deputy Van Patten, Deputy Montgomery, or

Deputy Anderson. Dodd claimed the December 9, 1994, memoranda were included on page 4 of his notes, dated "12/5" under "police reports," but the memoranda had not yet been written. Most importantly, there was no "*Brady*" reference next to "police reports."

The reason these memoranda are not in Dodd's notes is because they were not in the sheriff's investigative file when Dodd was reviewing it prior to turning it over on December 14, 1994. (1565-69). Investigator Whipple, the custodian of all records concerning the Heidi Allen investigation never assigned lead numbers to these reports and never included them within the sheriff's investigative file. (1523-24, 1565-69, 1634, Defense Exhibits 8,9,10).

Despite this, Dodd persisted in his claim of disclosure by relying upon his December 21, 1994, letter documenting the discovery that was provided to Fahey on December 14, 1994. Although this was less than a week following the pretrial motion hearing, which he actually refers to in this letter, he makes no mention of Allen's CI file that Fahey demanded production of at the hearing. Dodd, who used an organized, systematic, and verifiable procedure suggests that proof of disclosure of the memoranda can be found in his generic *Brady* reference portion of the letter that states, "In the motion presently filed in County Court, you demanded all, 'Brady material.' You presently are in possession of, Oswego County Sheriff's Department criminal investigation report relative to the facts and circumstances involving the kidnapping of Heidi Allen. To the extent there is any potential evidence or information that may in fact or may tend to be exculpatory, it is included." (1724-26, Defense Exhibit 13). Following this portion of the letter, Dodd points to over 200 items of possible *Brady* material. (*See, Statement of Facts, pp. 27-29).* Included within the 200 items are numerous law enforcement personnel and law enforcement agencies. There is no mention of Allen's CI status, or Deputies Van Patten, Montgomery, or Anderson.

The December 9, 1994 memoranda also fail Dodd's document procedure test. (1663,1678-79,1715-18,2025). Dodd's organized, systematic, and verifiable procedure required all documents to receive two date stamps, one from the Oswego County District Attorney's Office and one from the Oswego County Sheriff's Department, before being made a part of the Sheriff's investigative file. (Id.). The December 9, 1994, memoranda contain only one date stamp as, "Received, December 9, 1994, Oswego County Sheriff's Department." (Defense Exhibits 8,9,10). Although Dodd claims he received them, read them, and marked them *Brady*, they have no "received" date stamp from the District Attorney's Office which contradicts his testimony that he was 100% certain that all documents in the Heidi Allen investigation received two date stamps. (1717).

Dodd's testimony regarding his alleged disclosure is entirely inconsistent with his prior recorded written statements. A party may show that an opposing witness has made prior statements that are inconsistent with some part of his trial testimony. *See People v. Bishop*, 206 A.D. 2d 884 (4th Dept. 1994) *citing* (Richardson, Evidence Section 501 at 486 [Prince 10th ed]). In *Bishop,* the Court quoted the following evidence treaties which stated, "[t]he absence from a former statement of a material fact or circumstance testimonially presented * * *may be proved" (Fisch, New York Evidence Section 474 at 310 [2d ed]) "[i]f the former statement fails to mention a material circumstance presently testified to which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent." *Id*. (quoting McCormick, Evidence Section 34, at 114-115 [Strong 4th ed]). The *Bishop* Court recognized that "it is an elementary rule of evidence, and of common sense, in our State and in almost every other jurisdiction, that, when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of

impeachment." *Id*. (citing *People v. Savage*, 50 N.Y.2d 673, 679 (1980)). In *Bishop*, an Officer testified that numbers in sneaker imprints were clearly visible even though the characters were not visible in photographs and the Officer made no mention of the numbers in his report. The Court held it was reversible error for the lower Court to preclude impeachment by omission evidence where a police officer's report left out critical facts. *Id.* In this case, Dodd's own writings demonstrate his meticulous detailed methodology in documenting the items he disclosed and the critical items requested by defense counsel are mysteriously missing.

Dodd's testimony, along with his notes and December 21, 1994 letter, are examples of his organized, systematic and verifiable procedure. He is correct, he was meticulous and organized, and because of that, he can point back in time to show this court with a measure of reliability that he did not provide Fahey with the December 9, 1994, memoranda of Deputies Van Patten, Montgomery and Anderson.

II. There is a Reasonable Possibility that Had the Evidence Been Disclosed to the Defense the Result of the Proceeding Would Have Been Different.

The CI evidence was material and favorable to the defense because it undermined the People's theory of the case against Gary Thibodeau. The lack of forensic and eyewitness evidence to support the charge against the Thibodeaus caused the People to base their case upon the testimony of two jailhouse informants who were detained at the Worcester House of Corrections in Massachusetts with Gary Thibodeau while Thibodeau was being held on a misdemeanor drug charge. They claimed Gary Thibodeau had confided in them and suggested Allen's abduction was a result of drug activity between Allen and Thibodeau that went badly, thereby creating a motive for the prosecution to present to the jury. Dodd knew this was not true given his review of the CI material he withheld from the defense.

A. Trial Testimony of Robert Baldasaro

At trial, Baldasaro claimed Gary Thibodeau confided in him about Allen's disappearance and told him that he and his brother, Richard Thibodeau, went to the convenience store to talk to her "because she was upset and they wanted to try and straighten things out, that she thought…Gary was going to try to screw her about something and she was really upset so they went down - - wanted to have a conversation with her." (TT., pp. 1544,1630-31). Baldasaro's signed statement to investigators stated, "Gary said that girl and another guy and he was involved in some kind of drug deal. Gary said she screwed him and was trying to get him into some kind of trouble."[9] (TT., pp. 1636-39).

Baldasaro claimed Richard and Gary Thibodeau picked Allen up from the store in his brother's van, drove her to the woods by his house and talked to her. (TT., pp. 1544-45). Richard Thibodeau then dropped Gary off at his house and drove Allen back to the store, dropped her off and later returned because he had forgot to purchase cigarettes. (Id.). Upon Richard Thibodeau's return, no one was at the store. (Id.). Baldasaro alleged Gary Thibodeau told him "five to several times" that the girl was dead, "her head had been bashed in with a shovel and she was mutilated" and they would not find her. (TT., pp. 1549-1550). Baldasaro never testified that Gary Thibodeau knew Allen was a CI.

B. Trial Testimony of James McDonald

McDonald[10] was also housed at Worcester House of Corrections in Massachusetts with Baldasaro and Gary Thibodeau. (TT., pp. 1661-62). McDonald testified at Gary Thibodeau's trial that Gary and his brother went to the store to buy cigarettes in his brother's van. (TT., pp. 1662-63). McDonald claimed Gary Thibodeau said Allen's head was bashed in with a "fold up Army type shovel" and her body would never be found. (TT., p. 1665-70, 1690). According to

[9] Investigator Yerdon was one of the officers that spoke to Baldasaro about these allegations. (TT., p. 1554-55).
[10] McDonald and Baldasaro were represented by the same attorney, Michael Taylor. (TT., p. 1689).

McDonald, upon leaving prison, Gary told McDonald and Baldasaro not to say anything to anybody about what he told them. (TT., p. 1670). When McDonald was interviewed by investigators he told them Gary's involvement with Allen had to do with drugs. (TT., p. 1685,1688). McDonald claimed Gary told him Allen was into cocaine and would use cocaine with Thibodeau. (TT., p. 1688-89). James McDonald never testified that Gary Thibodeau knew Allen was a CI.

C. Dodd's Closing Statement to the Jury

Expanding upon Baldasaro's and McDonald's testimony, Dodd told the jury that Allen's family and friends probably did not truly know her, stating:

> They told you that this particular defendant had described that he and his brother had gone to the D&W Convenience store and that this defendant went there because that girl was upset about something that may have had to do with drugs. Now, I agree with Mr. Fahey. The testimony you have heard from Brett Law, Sue Allen, Ken Allen tend to support that Heidi Allen would have nothing to do with drugs. But you know something, ladies and gentlemen? We don't know. Sometimes moms and dads and boyfriends don't know everything. Sometimes they don't know that a person may have some knowledge about something, someone that's a friend or a relative that may have some connection to this defendant. The reason for why can only be stated to you through the witnesses that have testified and Bob Baldasaro and James McDonald told you reasons why. (TT., pp. 3377-78).

Dodd, who had seen the CI evidence, most importantly, Deputy Anderson's December 9, 1994, memorandum, knew Allen did not use drugs. Dodd perpetrated a lie and Fahey had no way of knowing this until now.

Allen's CI status was both favorable to Thibodeau and material to his innocence, and the People's failure to disclose this information to the defense violated his constitutional right to due process. *People v. Wright*, 86 NY2d 591, 598 (1995). In *Wright*, the Court of Appeals overturned a defendant's conviction in a case factually similar to this case. The prosecution withheld *Brady* material concerning an assault victim's status as a police informant. *Id.*, at 595.

During a post-conviction 440.10 motion, the defense asked for the withheld material and the prosecutor claimed the victim was not an informant "in this case," and had no personal knowledge of prior instances in which the victim had provided information to the police. *Id.* At trial, the defense argued that she believed the victim was going to rape her causing her to assault the victim in self-defense. *Id.*, at 594. The Court found that even under the "reasonable probability" standard, reversal was required because the withheld evidence went directly to the credibility of the victim's version of events and the police investigation that followed. *Id.*, at 596-97. During summation, the prosecution led the jury to believe that the victim was afraid to go to the hospital after the defendant lacerated his penis since the police would be alerted and due to his criminal past, he did not expect the police to help him. *Id.*, at 597. The prosecution went so far as to claim the victim did not believe the cops were his friends. *Id.* Evidence that the victim worked with the police on prior occasions would have "effectively refuted the prosecutor's proffered justification" for the victim's behavior in failing to seek medical assistance. *Id.* The Court reasoned that if the jury had learned that the victim had a working relationship with the police, "his efforts to circumvent police discovery might have appeared even more suspicious." *Id.* at 598.

The outcome of this case turned on whether the jury believed Baldasaro's and McDonalds' testimony that Gary Thibodeau caused harm to Allen because of drug activity they were involved in together. Allen's status as a CI provided motives for other people to want to harm her. She gave names of people involved in drug activity to Deputy Van Patten, and he carelessly lost this highly sensitive information in the parking lot of the D&W less than a month after he created it. Approximately two months after he lost this file, Allen began employment at the D&W and this is the very place she was abducted two years later. There is no proof positive

evidence of how long Kristine Duell had the CI card before she called it into the Sheriff's Department on January 23, 1992 and Michael Bohrer recently testified that he knew Duell found the card prior to the discovery of the punch card.

The suppressed evidence also undercuts the thoroughness and good faith of the police investigation. "When . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." *Kyles v. Whitley*, 514 U.S. 419, 446 n.15 (1995). The Supreme Court has therefore held that information's tendency to undercut the thoroughness and good faith of a police investigation is a factor to be considered in determining whether withheld information is exculpatory. *Id*. at 445-49. S*ee also Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 830 (10th Cir. 1995) ("while the knowledge the police were investigating [alternative suspect] would arguably carry significant weight with the jury in and of itself, that fact would also have been useful in 'discrediting the caliber of the investigation or the decision to charge the defendant,' factors we may consider in assessing whether a *Brady* violation occurred"); *Stano v. Dugger*, 901 F.2d 898, 903 & n.28 (11th Cir. 1990); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir.) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation."), *cert. denied*, 479 U.S. 962, 107 S. Ct. 458, 93 L. Ed. 2d 404 (1986); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding new trial because withheld *Brady* evidence "carried within it the potential . . . [for] the discrediting, in some degree, of the police methods employed in assembling the case against" defendant); *United States v. Glover*, 1998 WL 575125 at *4 (D. Kan. Sept. 1, 1998) ("communication of facts which tend to discredit the investigation, within

the meaning of *Kyles*" is "included within the scope of *Brady* material"); *Orena v. United States*, 956 F. Supp. 1071, 1100 (E.D.N.Y. 1997) (Weinstein, D.J.) ("As the O.J. Simpson case and many others demonstrate, destroying the bona fides of the police is a tactic that has never lost its place in the criminal defense reasonable doubt armamentarium.").

If this evidence had been disclosed, Fahey would have been able to show the jury that the Sheriff's Department closed down Sgt. Lortie's desired line of investigation into people Allen had provided information about upon learning of the compromise of Allen's CI file. The investigation was directed away from them and toward the Thibodeaus in an effort to conceal their own wrong doing. Moreover, the second in command at the Oswego County Sheriff's Department, Undersheriff Todd, testified that the Allen case was the biggest case in Oswego County history, and he had no knowledge that Allen was a CI. (1087,1091). Todd relied on his underlings to provide him with information about the investigation. (1091). Todd confirmed there were no protocols in place for handling confidential informants or direct supervision over Deputies utilizing informants. (1087,1092). Todd was not even aware Allen's CI file was dropped in the parking lot of the D&W. (1092). It was his belief that Deputy Van Patten dropped his business card in the parking lot. (1092). During his testimony, Todd attempted to deny knowledge of Sgt. Lortie's report, despite the fact that he is quoted in the Post-Standard on December 7, 1994, referencing Sgt. Lortie's report. (1098).

The concealment of material evidence during the Allen investigation lends credibility to Upcraft's testimony that the Sheriff's Department failed to include observations of the van she observed in front of the D&W on the morning of Allen's abduction. On the morning of Heidi Allen's abduction, Darlene Upcraft drove past the D&W convenience store on her way to church at approximately 6:30 A.M. (187-189). It was Easter Sunday and she was surprised the D&W

was open. (189). She observed a white rusty van parked perpendicular in front of the D&W. (189). Upcraft reported these observations to the Oswego County Sheriff's investigators within four days of Allen's abduction. (190-191, Defense Exhibit 19). After her initial disclosure, Upcraft was contacted at least two more times by Sheriff Investigators to follow-up with her regarding what she had observed. (191). First, a Sheriff Investigator came to her home and asked her about the van she observed at which time she told them she saw a white rusty van. (191). After that visit, a Sheriff investigator returned to her home while she was walking to her mailbox and he asked if he could talk to her about the van she had observed. (191). Upcraft was asked if the van she saw was black and white and she repeated that the van was a white rusty van. (192). Upcraft had seen Richard Thibodeau's van on the television news and that was not the van she saw in front of the D&W on the morning of Allen's disappearance. (192). The lead sheet that was created by the Oswego County Sheriff's Department in connection with Upcraft's observation incorrectly states that she did not see anything when she drove past the D&W that morning. (193, Defense Exhibit 19).

For all of these reasons, this Court should find the State obtained Thibodeau's conviction through fraud and misrepresentations and by failing to disclose critical *Brady* material and should vacate Thibodeau's judgment pursuant to CPL 440.10(1)(b) and (h).

POINT TWO

THE INTRODUCTION OF NEWLY DISCOVERED EVIDENCE AT A NEW TRIAL WOULD LIKELY RESULT IN A DIFFERENT OUTCOME.

FACTUAL BACKGROUND

I. Newly Discovered Evidence of Alternative Suspects Responsible for Allen's Disappearance.

A. Direct Observations of Alternative Suspects Responsible for Allen's Disappearance.

1. William Pierce

At approximately 6:00 p.m., Friday, January 9, 2015, two and a half days prior to the start of Gary Thibodeau's post-conviction hearing, the defense received discovery from the Oswego County District Attorney's Office consisting of 2,645 pages of documents, 816 photographs, 13 hours and 23 minutes of audio recordings, and 8 hours and 43 minutes of video recordings. The court admonished the People for the late disclosure and noted it would allow the defense to have additional time whenever requested and recall any witness based upon what the defense learned "from the most recent disclosures from the District Attorney's Office." (19).

Contained within this voluminous material was a sworn statement provided by 79-year-old Oswego County resident William Pierce, who provided an eyewitness account of Allen's abduction. Pierce shared this vital information with Oswego County Sheriff Investigator James Pietroski in July of 2014, which was withheld from the defense until January 9, 2015. The defense was able to locate Pierce, and he was called to testify at Thibodeau's post-conviction hearing on February 3, 2015. (972).

During his testimony, Pierce revealed on the morning of April 3, 1994, he drove past the D&W convenience store on his way to check on his trailer located at Brennan's Beach. (974). He was at the intersection of Routes 104 and 104B when he observed a "white van with a lot of

rust on the side of it," outside of the D&W. (975). This van was not Richard Thibodeau's van.[11] (977,1042, Defense Exhibit 132). There was "a man located in the driver's seat and a woman standing next to the driver on the outside of the van." (Id.). The woman was wearing a black or navy blue "puffy jacket"[12] and the man had a beard, dark hair, and was husky. (986-88,1043). Pierce believed they were arguing because the woman walked away from the driver toward the front of the van and toward the gas pumps. (Id.). The driver exited the van, walked to the front of the van, came up behind the girl and hit her behind the right ear on the base of her neck with his fist. (Id.). The girl folded like a "rag doll." (Id.). The man caught her before she hit the ground. (Id.). A person in the passenger seat opened the door on the passenger side of the van. (Id.). At this point, traffic started to move and Pierce drove away.[13] (976).

Pierce's eyewitness account of Allen's abduction is consistent with the trial evidence that there was no struggle with Allen inside of the D&W. (TT., 1423,1458,2052). In addition, the road conditions as described by Pierce on that Easter morning 20 years ago is consistent with the trial testimony of Donald Neville, Sr., William Cowen, Brittany Link, Donald Neville, Jr., and Christopher Bivens. (TT. 1810, 1786, 1869, 1846, 1962 and 1289). The manner in which Pierce described the abduction is similar to the eyewitness account of Christopher Bivens. They both described two men and a woman outside of the D&W. (TT. 1293, 1295, 1296, 1325, 1334, 1336). Neither Pierce nor Bivens could describe the woman's face. (TT. 1328). Like Pierce,

[11] Initially, Bivens did not believe Richard Thibodeau's van was the van he observed outside of the D&W until Sheriff's Investigators convinced him otherwise. (TT. 1324, 1343-45).

[12] The defense does not dispute Allen was wearing an SU sweatshirt while inside of the D&W on the morning she was abducted, but the fact she may have also worn a jacket to work on that cold snowy morning should not come as a surprise.

[13] Pierce didn't pull into the gas station because of the snowy road conditions and his vehicle started to slide sideways toward oncoming traffic. (996, 1000). Pierce drove through the intersection and was going to turn around but decided that it was a domestic dispute and didn't want to get involved. (1000,1013, 1024-1025).

Bivens drove by without stopping to help because he did not want to get involved in what he believed was a domestic dispute. (TT. 1311).

Pierce provided this information to the Oswego County Sheriff's Department in July of 2014, after reading a newspaper article that indicated a member of the Sheriff's Department continued to be bothered by Allen's disappearance. (Id.). Back in 1994 or 1995, Pierce believed Thibodeau was the abductor after drawing a beard on his picture and believing "he looked close enough." (Id. at 1005). Pierce had faith in the Sheriff's investigation and "figured" they knew more than he did. (Id.). When he read that the law enforcement officer was still concerned, Pierce wanted to put his mind at ease. (Id.). He attempted to do this on July 25, 2014, when he provided a sworn statement to Investigator Pietroski. He was not shown a photo array of any suspects during this initial interview.

After his interview with Investigator Pietroski, Pierce observed James Steen's photograph in the Post Standard newspaper and realized he had made a "terrible mistake" regarding Allen's true abductor. (1032-34). James Steen was the man he saw hit Allen outside of the D&W, not Gary Thibodeau. (977-78,1034). He wanted to "rectify" his mistake "as soon as [he] possibly could" and he called the Sherriff's Department on July 30, 2014. (977,1032-34,2219).

Investigator Pietroski responded to Pierce's urgent message three months later on October 28, 2014. (2219). It took him three months because he was supposedly trying to find a photograph of James Steen from 1994. (Id.). He did not contact Steen's family members to obtain such a photograph. (2223-24). The photo array Investigator Pietroski took three months to create included a 1988 photograph of a youthful, baby face image of Steen without facial hair. (2219, 2222-23). Pierce did not recognize this image as Steen. (978,2219). Despite Pierce's

description of the van he observed outside the D&W that morning, Investigator Pietroski failed to show Pierce a photograph of Richard Thibodeau's van. (1041-42).

2. Jennifer Wescott

a. Priest and Wescott Communications

On February 25, 2013, Tonya Priest informed Oswego County District Attorney Oakes about James Steen's admitted involvement in Allen's abduction. (Defense Exhibit 35, February 25, 2013, Priest-Oakes audio recording). Priest met with Oakes and Investigator Pietroski on February 28, 2013, and executed an affidavit stating Steen had told her seven years prior that he, Roger Breckenridge, and Michael Bohrer brought Allen to Breckenridge's home on Rice Road in the Town of Mexico after they abducted her. (Defense Exhibit 35). Jennifer Wescott was present. (Id.). Steen had indicated they dragged Allen to a cabin in the woods off of Rice Road where they disposed of her body. (Id.).

Priest grew up with Wescott but they had not spoken in two years. (Id. at 1328-30). Given this familiarity, Priest was able to regain a connection with Wescott through Facebook. (1335). Priest provided Wescott with her cell phone number and they began exchanging text messages. (1335-37). Priest gained Wescott's trust through a ruse pertaining to her incarcerated ex-husband. (Id.). During the text message exchange, Wescott admitted her only involvement in Allen's abduction was the scrapping of the van Allen was abducted in. Priest had no prior knowledge of this detail. (Defense Exhibit 35).

Their communication moved from text messaging to phone conversations. The first conversation was brief and unrecorded. After their initial communication, Wescott even went on line to confirm whether Priest's ex-husband was coming up for parole. (1337). The second phone call was monitored and recorded by the Oswego County Sheriff Investigator Carmen Rojek on

March 2, 2013. Priest was coached and guided by Investigator Rojek in her questions to Wescott. (1263). The following exchange occurred:

Priest: But he [Steen] just told me that him, [Steen],Michael Bohrer and uh Roger had taken uh Mike's van to the store and that they grabbed her from the store and they brought her to your house and um he said that you did flip out when you guys got there and uh you know I stuck up for you and I don't blame you for flipping out uh and basically that's what he had said had happened.
Wescott : Um uh.
Priest: That it's not your fault you know so I knew a long time ago - I just didn't want you to think that I thought . . .
Wescott: Right.
Priest: Think less of you.
Wescott: No, I um, I really in my own head dropped that shit.
Priest: Right.
Wescott: I don't know . . probably about ten years ago.
Priest: Yeah.
Wescott: But it took me a while to get it gone.
Priest: How the hell, why did they even involve you, or even do this?
Wescott: I don't know.
Priest: I mean, you were young.
Wescott: All I know is yeah that and the cocaine.
Priest: It was for cocaine - yeah sounds like the area. I don't know kiddo - I love you and I'm sorry that happened to you.
Wescott: Yeah.
Priest: Roger put you through a lot and there is no reason for it Jennifer. You are a good girl.
Wescott: Well, maybe that is why he is sitting in Elmira where he needs to be right now.
Priest: I agree with you 100 percent - what the heck happened with you and Bruce - I thought things were great with you two?
Wescott: Uh no, things were never really good for us.
Priest: Oh really.
Wescott: Yeah, he was arrested multiple times for beating on my kids.
Priest: Oh, I didn't know that.
Wescott: He never beat on me, he beat on the kids, Jacob and Christian. I just had it - I hadn't wanted him for like three years.
Priest: Right. Did you even know that ....this was Heidi that they brought there and that this is what they were going to do?
Wescott: Nah, uh
Priest: Had no clue, they just showed up with her?
Wescott: Yeah.
Priest: What a bad position for you - probably scared the shit out of you?

Wescott: Well it's not even - they didn't even bring her in the house, they made her sit in the van.

Defense Exhibit 35.

This recording confirmed new evidence that three men, not including Gary or Richard Thibodeau, abducted Allen. Wescott also confirmed her prior admission that her involvement in Allen's abduction was limited to scrapping the van used to abduct Allen. (Id. at 6:50). Wescott told Priest she erased these events from her mind a decade earlier and she did not want to have to think about it again. (Id. at 2:09-2:19, 13:22-13:40). Wescott wanted to make certain Priest understood that Bohrer, Breckenridge, and Steen never brought Allen into her home but instead made Allen stay in the van. (Id. at 3:24-3:37). Allen was not murdered in front of her, and she denied knowledge of how Allen was murdered, stating only that she would never disclose this information to the police because she feared for her own life. (Id. at 8:10-8:20, 8:36-8:43, 1344). Specifically, Wescott was afraid of Dan Barney, Bob Zakala, and Dave Maynes. (Id. at 6:53-7:07). Wescott insisted she would never tell the police and when Priest pressed her with the identity of Allen's murderer, Wescott ended the call stating she did not want that "stuff" back in her head. (Id. at 6:-8:00, 13:37). When the Sheriff's Department contacted Wescott seeking an in-person interview following this recorded phone call, Wescott sent a text message to Priest asking if she was a cop. (Defense Exhibit 35, 8:20, 30:30-30:34).

b. Oswego County Sheriff's Department Recorded Interview of Wescott

During Investigator Rojek's videotaped interview of Wescott she tried to discount her admissions. However, he believed there was substance to her statements, which established a common thread between Bohrer, Steen and Breckenridge. (1276-77). In his view, Wescott

appeared to be confiding in a friend about her troubles and he just could not move past the admissions made during the phone call. (Id.).

When Wescott was interviewed by the Sheriff's Department, she was not initially told that her phone call with Priest had been recorded. (Defense Exhibit 35, 14:50-16:00). She denied any admissions made to Priest and attempted to provide an alibi for Breckenridge, claiming she was with him when Allen was abducted. (Defense Exhibit 35, :50). Wescott said she did not know anything about the Allen case and she was at her mother's house having Easter dinner when the news of Allen's abduction was televised. (Id. at 3:26-3:38). During this time period she lived between her parents' home and Breckenridge's mother's house. (Id. at 5:24). According to Wescott, she had no personal knowledge pertaining to Allen's abduction, but learned details from Priest over the telephone.

Wescott told Investigator Pietroski that she exclaimed, "Tonya, what the hell are you talking about? …I'm like you're fucking crazy" when Priest told her about Steen's admissions. (Id. at 6:48-6:55, 28:20-28:26). Wescott went further stating she told Priest in that phone call that Bohrer, Breckenridge, and Steen could not have abducted Allen "because I lived with my mother and I'm sure I would know if they came there with a woman they were getting ready to kill." (Id. at 29:00-29:13). Wescott denied ever telling Priest that Allen was brought to her house and made to sit in the van. (Id. at 31:19-31:25, 40:40-40:47, 41:50-41:53).

With respect to her relationships with Breckenridge, Steen, and Bohrer, she met Thumper (Steen) at Fulton Speedway at the age of 15. (Id. at 14:50-16:00). Thumper introduced her to Breckenridge. (Id.). She was impressed with Thumper as a young girl because he rode on the back of a tow truck when he worked at the speedway. (Id. at 13:37-14:00). She was aware of Steen murdering his wife, Vicky West. (Id.). Although she acknowledges Bohrer's involvement

in her recorded phone call, Wescott claimed meeting Bohrer for the first time in 2007 when she purchased a computer from him. (Id. at 19:15-20:03). She also denied ever living on Rice Road. (Id.). In an effort to discredit Priest, Wescott labelled her a "story teller," without being able to provide past examples of "story telling." (Id. at 16:20-17:18).

Still not knowing her phone call with Priest was recorded, Wescott offered to show investigators text messages she sent to Priest after being contacted by the Sheriff's Department for this interview. (Id. at 8:00-8:16, 9:00-9:42). Wescott's side of the conversation feigns ignorance of Allen's abduction and suggests Priest should go to the police if she has information about Allen's abduction. (Id.). Wescott also asks Priest if she is a cop. (Id.). She claimed she had to delete some messages at Priest's direction and because her inbox was full. (Id. 1:12:31). In light of this offering, Investigators ask for Wescott's consent to examine her cell phone. This caused Wescott to disclose text messages she sent to Richard Murtaugh, the owner of a junkyard in Fulton, New York, where Breckenridge worked. (Id. at 43:38-44:24). Wescott often drove Breckenridge to work. (1342,1350). Although the recorded phone conversation between Wescott and Priest never mention the van involved in Allen's abduction being junked at Murtaugh's junkyard, Wescott tried to convince Investigator Pietroski that she gained this information through Priest. (Id. at 44:08-44:24; Defense Exhibit 85 8:30-8:40). When Murtaugh received Wescott's text, he did not know who she was so she did not feel the need to speak to him.[14] (Id.). Wescott indicated Investigator Pietroski would see this for himself upon examination of her cell phone. (Id.).

c. Text Messages between Murtaugh and Wescott Disappear after the Sheriff's Department Takes Custody of Wescott's Cell Phone

[14] This contradicts her testimony during the post-conviction hearing where she stated Murtaugh had been a family friend her whole life and she has known him for 38 years. (1342,1395).

Investigators took possession of Wescott's phone and took "screen shots" of all of Wescott's text messages. (11-14). The People's discovery of this evidence included screen shots of texts messages from Wescott's cell phone except the text messages between Wescott and Murtaugh. (Id.). This evidence is crucial because it follows Wescott's admission to Priest that she was involved with junking the van used in Allen's abduction. Once Wescott learned the Sheriff's Department wanted to speak to her about Allen's abduction, she began communicating with Murtaugh. The court found it odd that "pictures had been taken of those text messages, and for some reason all text messages that were before and apparently text messages after exist, but the photos of those actual text messages do not exist." (12-14). District Attorney Oakes asked "Investigator Pietroski if we have screen shots of everything else, why not that." (12). That question has not been answered despite Oakes's promise to continue to investigate the disappearance of these text messages. (14).

After Wescott stated the above, she learned her phone call with Priest had been recorded and monitored. In response, Wescott became enraged using profanities in connection with Priest. (Defense Exhibit 35, 40:58, 42:43-42:49). She even accused Priest of chopping the recording before learning the call was monitored by the Sheriff's Department. (1353). In response to her own recorded admission that Steen brought Allen to her house in a white van, Wescott shouted, "that's the craziest fuckin' shit I ever heard in my life!" (Id. at 40:40-40:49). When Investigator Pietroski continued to quote Wescott's admissions, she gave up and said, "I don't know, I don't know. I have nothing else to say. I have nothing else to say." (Id. at 42:35-42:45). Conceding defeat, Wescott asked if she is going to be in trouble and Investigator Pietroski assured her she will not be in any trouble. (Id., at 58:17). Despite her recorded admissions, her deceit about these admissions before learning she had been recorded, her text

messages to Murtaugh before speaking to law enforcement, her reaction when confronted with the recorded phone call, Investigator Pietroski allowed her to sign a statement denying any knowledge about Allen's kidnapping. (Id. at 1:19:19-1:22:37). Even Wescott did not believe this would be enough to release her from criminal liability. (Id. at 1:22:52-1:24:10). Yet it was and she signed a statement generally denying the content of her phone conversation with Priest. Investigator Pietroski did not believe the statement he wrote for Wescott to sign was the truth. (794).

d. Oswego County District Attorney Conceals Wescott's Admissions

Prior to the filing of Thibodeau's 440 motion, District Attorney Oakes through a letter to the defense dated June 6, 2013, concealed Wescott's admissions, stating:

> Given the nature of Priest's allegations, we arranged to have her make contact with Jennifer Wescott. Initially, the contact took place through Facebook and via text messages. Ultimately, we made arrangements to have Priest make a monitored telephone call to Wescott. Investigators from the Sheriff's Department subsequently interviewed Wescott and obtained a written statement from her. She denied any knowledge about Heidi Allen's disappearance or death. She denied the allegations by Priest.

(Defense Exhibit 35).

e. Additional Police Interviews of Wescott.

Days after Thibodeau's 440 motion was filed, Wescott was interviewed a second time at her attorney's office by Oswego County District Attorney Oakes and his staff investigator, Kathy MacPherson. (1320). She was interviewed a third time on August 4, 2014, by District Attorney Oakes and Sheriff Investigator Rojek. As above, District Attorney Oakes withheld this recorded interview from the defense until January 9, 2015. During this interview, Wescott told them Priest gave them a hell of a start into the investigation of Allen's abduction. (1354).

The number of interviews brought along a number of stories of how she met Steen and Breckenridge. (1312, 1322). Additionally, Breckenridge had sent a message to Wescott through his sister for her to "keep her fucking mouth shut," after her first interview and before her third interview. (1314). By the time of the third interview, Wescott was no longer Breckenridge's alibi, but instead met him for the first time following Allen's abduction. (Defense Exhibit 35, 1:00:08-1:00:25; 1321, 1400). No longer was Steen the memorable boy riding on the back of a tow truck at the Fulton Speedway, but was a person she met through Breckenridge just prior to turning 18. (1420).

This attempt to distance herself from Allen's abduction was discredited by the post-conviction hearing testimony of Earl Russell. (1454). Russell lived in Oswego County between 1991 through 1993. (1454-55). He was employed by Tom Martin between 1988-1993, as was Roger Breckenridge. (Id.). Russell also knows James Steen because he is his wife's cousin and he met Michael Bohrer through Tom Martin. (1456,1458). Russell first met Wescott in 1991 or 1992, through Breckenridge. (1457). Prior to 1993, Russell was at a party at Tom Martin's and he witnessed Breckenridge being asked to take Wescott off the property because they were concerned Breckenridge may have served her alcohol when she was underage. (1457-58).

f. Wescott's Post-Conviction Hearing Testimony.

Wescott's post-conviction hearing testimony revealed further knowledge pertaining to Allen's abduction gleaned through Breckenridge. For example, after the Sheriff's Department showed up at his mother's house in Parish and interrogated him, Breckenridge told her Allen was burned in a woodstove and taken care of in a van. (1383-84,1418-19). She kept quiet about Breckenridge's admission for 20 years because she "didn't want family drama" for her children. (1384).

g. Third-Party Corroboration of Wescott's Admissions.

i. Carl Robinson Confirms Wescott Lived on Rice Road.

In June of 2014, Wescott communicated with Carl Robinson through Facebook and discussed the disappearance of Allen. (1365). Wescott's recorded conversation with Priest had been published in the Post Standard newspaper and she wrote to Robinson that she "would not be the next one dead in a box in the woods for running her mouth off." (Defense Exhibit 85, 18:11). A month later, Wescott wrote Robinson again and directed him not to tell anyone she ever lived on Rice Road or fled to Florida after Allen was abducted. (Id. at 20:19). Wescott confirmed communicating with Robinson on Facebook but denied sending her responses, claiming others had access to her Facebook user name and password. (1365-68).

ii. Deborah Vecchio Confirms Wescott Lived on Rice Road.

Deborah Vecchio confirmed Wescott lived on Rice Road in 1993 or 1994. (1197,1201). Vecchio has lived on Rice Road for forty years. (1192). Her father has owned the property next to her on Rice Road since 1990 or 1991. (1193). During the winter months, her father lived in Florida and rented a trailer on the property to tenants. (1193). Vecchio assisted her father with the rentals while he was away. (Id.). In 1993 or 1994, Wescott's mother rented the trailer on her father's property. (1203). Wescott had been staying in the trailer and Vecchio confronted her due to the number of cars in the driveway at different times of the day and night. (1203). Wescott was told the trailer had been rented to Wescott's mother, not her, and she had to vacate the premises. (Id.). Breckenridge was present during this confrontation and Vecchio was afraid of him. (1203-04).

The people called Darcy Purdy to testify that she and her boyfriend, Thomas Rathburn resided in the trailer for 4 consecutive years. (2140-2151). Purdy did sign a five month lease

dated December 1992 through May 1, 1993.[15] (Defense Exhibit 84, 2158). Purdy claimed that the elder Walter Rice and his girlfriend moved in with her and Rathburn when they returned from Florida. (2158). Purdy acknowledged that she did not know Rice or his girlfriend but suggested they lived with her in the confines of this trailer while she continued to pay rent. (2162). Purdy's claim contradicts the testimony of Darron Vecchio who testified that his grandfather, Walter Rice, would never have moved in with a tenant. (2382). Moreover, Deborah Vecchio testified that her father returned from Florida in April or May 1993 and he wanted Purdy out of the trailer because they caused a lot of damage. (1197). Brian Mensch also testified that in late 1993 into early 1994 he rented the apartment on Rice Road from Vecchio located on the same property as the trailer and when he was living in the Rice Road apartment the trailer was vacant. (1285) The people's introduction of dated catalogs and a marriage registry does nothing to show actual residency for a 4 year continuous period. The People did not call Rathburn or any of Wescott's family members.

iii. Joe Storto Confirms Wescott Lied to Sheriff's Investigators.

In September of 2014, Wescott admitted to another third party, Joe Storto, through a message that she had given a false statement to the police. (1356-57, Defense Exhibit 39). She began the conversation with Storto indicating Gary was going to get a new trial but she would have to plead the Fifth in order to stay out of prison. (Defense Exhibit 39). She told Storto she did sign a false statement but District Attorney Oakes was trying to protect her. (1358, Defense Exhibit 39). However, Wescott acknowledged "what the judge says goes" and "they can't

[15] Purdy claimed she signed more than one lease because they added a pet at one time. (2160). However in the people's response Purdy provided an affidavit which stated, "sometime around 1992 I was living in the City of Syracuse with my then boyfriend, Thomas Rathburn Jr, and we were looking to move to a more country setting. We were specifically looking for a place that was pet friendly because we had a Golden Retriever. We found a place at 66 Rice Road in Parish, NY through an ad." (People's Response Exhibit 4)

charge her with anything until a decision is made." (Defense Exhibit 39). During her post-conviction hearing testimony, Wescott tried to suggest these statements referred to a 2008 conviction for a false statement pertaining to a stolen washer and dryer. (1357).

iv. Amanda Braley Confirms Wescott and Breckenridge were Involved in Allen's abduction.

In 2002, during the time Amanda Braley was living at Jennifer Wescott's parents' home, she was watching television with Wescott and Breckenridge. (674). A report came across the television about Allen and Breckenridge laughed. (Id.). In response, Wescott looked at Breckenridge and said, "Don't look at me Rog, I didn't have anything to do with it. I only took the van to Murtaugh's." (Id.). Braley was too afraid to tell anyone. (Id.).

B. The Third-Party Admissions Implicating Alternative Suspects.

1. Michael Bohrer

a. Tyler Hayes

On November 29, 2000, Tyler Hayes called the Oswego County Sheriff's Department to report statements made by Bohrer regarding Allen's abduction. (Defense Exhibit 21, 201). Hayes was at the Liberty Bell Tavern with Bohrer on November 29, 2000, celebrating Hayes's father-in-law's birthday when he became involved in a confrontation with Bohrer. (200). Bohrer was at the bar bothering Hayes's wife and family saying he had information about the Allen case. (200). Hayes confronted him and Bohrer admitted he knew who killed Allen and the location of her remains. (Defense Exhibit 21, 201, 209). Bohrer said the Thibodeau's were not involved. (Id.). Hayes had a further conversation with Bohrer in the men's room of the tavern where Bohrer was sobbing stating he had been dealing with Allen's disappearance for too long. (201). Hayes immediately reported this to the Oswego County Sheriff's Department and he

never received a response back from them. (202). Bohrer agreed with Hayes's testimony, but denied crying. (582-585).

b. Danielle Babcock

Danielle Babcock worked at Medspars and East Coast Resorts in Oswego as a telemarketer in 2001. (631-32). Bohrer was her supervisor. (632). She terminated her employment after only 6 or 7 months because Bohrer constantly threatened to do to her what he did to Heidi. (633-36). Bohrer confirmed Babcock's employment. (447-48).

c. Michael Bohrer

i. March 21, 2013 Recorded Police Interview

Michael Bohrer was interviewed by Oswego County Sheriff Investigators Pietroski and Johnson on March 21, 2013, because of Wescott's recorded admissions. (Defense Exhibit 35, Bohrer Recording). At the time of the interview, they did not know about Bohrer's 1981 False Imprisonment conviction, the 1980 Disorderly Conduct conviction where he tried to run a young female off of the road and attempted to enter her vehicle, or that he was a suspect in a 1985 assault and attempted murder of a 23-year-old female in Beacon, New York. Even Dodd acknowledged during his testimony that if there was reliable information that an individual had previously participated in imprisonment or abduction of an individual it would be something that should have been considered in relation to the investigation of Allen's abduction. (1830) According to Dodd, on May 25, 1995 Investigator Whipple ran a criminal record check for Michael Bohrer and it did not reflect Bohrer's Wisconsin convictions. (1847,1848).[16]

The interview began with Bohrer stating his knowledge about the Allen case was different than everyone else and he had "been waiting for this call. Cause I knew one day I'm

[16] The Beacon Police Department successfully ran a national record check 10 years prior when Bohrer was a suspect in the attempted murder of Jane Doe #1 which reflected his prior Wisconsin convictions.

gonna pop in the picture somewhere, because I made it publicly known that this is what I believe…." (Defense Exhibit 35, Bohrer Recording, :16, 10:37). Bohrer was obsessed with the case and he took a "personal note" because his daughter was the same age as Allen and it "freaked" him out that a kid could be taken like that. (Id. at 4:28-4:46; 28:56-29:13). He admitted closely following the case and wanted to check his notes to find out where he observed a suspicious red truck in the days leading up to Allen's abduction. Bohrer found it "weird" that Bivens changed his eyewitness account after every visit with Deputy Wheeler. (Id. at 30:20). According to Bohrer, Bivens's first statement to the police was the closest to the truth.[17] (Id. at 30:35-30:38).

Bohrer offered several theories to investigators as to who kidnapped Allen and why, stating "it was before Friday. Because I seen the red truck again on Friday and Bonnie reported this suspicious character in a red truck. So I was thinking I'm not too far off. I sense this is strange. I have like a sixth sense." When asked if it was before Allen disappeared, Bohrer said, "before because that Sunday she was gonna disappear, ok but now it's Friday." (Id. at 9:38-9:50). He knew Allen was going to disappear because "we're in the future now." (Id. at 9:40-9:50). He claimed he can sense evil and identify a murderer by looking at their eyes. (Id. at 10:13-10:22).

Bohrer offered Mark Hall and Matt Duell up as suspects because Hall claimed Allen overheard something about him and maybe threatened to turn him in for murder. According to Bohrer, Duell was always taunting or trying to rape Allen. (Id. at 11:13-11:50). Bohrer claimed he was "not capable" of doing anything like abducting Allen. (Id. at 27:47). Bohrer assured

[17] Bivens's first statement was made on April 8, 1994, when he contacted the police and reported driving past the D&W between 8:00 and 8:30 AM and observing two men and a woman arguing on the porch area of the store. (TT., 3120). Bivens witnessed one vehicle near the gas pump. (TT., 3121).

investigators he was not a violent man and it was not in him to do something like that. (Id. at 27:53-27:57).

Bohrer claimed he did not know Steen or Breckenridge but earlier stated they were both capable of abducting Allen. (Id. at 17:04; 28:30-28:43). Bohrer said "they made her disappear." (Id. at 17:41). Bohrer volunteered that Allen could have ended up at Crosby Hill salvage yard owned by Murtaugh. (Id. at 17:56). When investigators probed as to how he knew this, he quickly changed the subject and claimed Murtaugh may have murdered his first wife. (Id. at 18:40). Bohrer junked vehicles at Murtaugh's junkyard at the time of Allen's disappearance "until things got too hot." (Id. at 19:10-19:13). Bohrer had no mental health problems prior to Allen's disappearance, but required antidepressants following her abduction. (Id. at 46:50-46:54).

ii. Bohrer's Post-Conviction Hearing Testimony

In April of 1994, Bohrer lived at Spinners, located at the corner of County Routes 6 and 104B, less than half a mile from the D&W convenience store. (440, 415-16). Bohrer knew Allen and she made him sandwiches at the D&W. (416). He went to the D&W every day. (417).

Following Allen's abduction, he collected documents pertaining to Allen and kept them in a box for more than 20 years on the front seat of his camper that he lived in. (423-24,492). This box contained all three statements Christopher Bivens gave to the Sheriff's Department.

Bohrer was so emotionally attached to the case that it bothered him every time he had to drive by the "Where's Heidi?" sign. (483). During this testimony about the sign, he became emotional and was about to breakdown when the Court asked if he needed a break. (483-84). There is no evidence to suggest Bohrer was involved in the search efforts to find Allen.

Bohrer had also called in various false leads early on during the investigation, but during his post-conviction hearing he stated he did not recall phoning in tips. (612). The following exchange took place during Assistant District Attorney Moody's questioning of Bohrer:

> Q: Now you mentioned that you-that you had-you had also-well, besides speaking with the FBI, excuse me, did you also phone in some tips to the –Sheriff's Department?
> A: I don't remember phoning in tips
> Q: Do you remember in –April thirteenth of ninety-four phoning in something about seeing a guy in military fatigues and a gray pickup truck near 104 and 104B?
> A: It slips my mind.

(612).

Bohrer also misled the Court when he testified that he was driving a green Ford Galaxy in 1994. (430). Lead 977 labeled New Haven Post Office is in evidence and states Bohrer was driving a black pick-up truck and he left around Easter and had returned two weeks later. (Exhibit 17). Breckenridge testified at the post-conviction hearing that Tom Martin referred him to Michael Bohrer to help him junk vehicles because he had a black pick-up truck with a trailer. (327) Breckenridge claimed his interaction with Bohrer occurred in 1999. However, according to lead 977, Bohrer was driving the black pick-up in 1994. (Exhibit 17).

Bohrer also testified that he was conducting his own investigation, taking notes and interviewing witnesses. (509). His notes, however, served no investigatory purpose whatsoever and simply highlighted his obsession with Allen's abduction. He methodically summarized witness statements and provided a detailed timeline, but he never mentioned anything about the various leads he called in throughout the days following Allen's abduction, nor did he write about information he acquired as a result of his "own" investigation. (Exhibit 56). Bohrer never even attempted to interview, nor did he refer to, the two jailhouse snitches who testified at Gary's trial.

iii. Bohrer's Literature, Defense Exhibit 56

Over the past 20 years Bohrer created writings and collected newspaper articles and other items pertaining to Heidi Allen. His writings were both handwritten and typewritten notes and stories about Allen's abduction and the investigation. He gave all of his Heidi Allen collection to investigators after his March 21, 2013 recorded interview. (419). The Court ordered the District Attorney to allow the defense to review this material on November 21, 2014. Bohrer identified this material during his post-conviction hearing testimony, and called it his "literature." (484-89,499). Included within these materials was *"The Heidi Allen Triangle,"* authored by Bohrer on August 19, 1996, a year following Gary Thibodeau's conviction. (479,482, Defense Exhibit 56). This writing was dedicated to the "DEAD and MISSING CHILDREN of today and THE CHILDREN OF YESTERDAY." (Id.). "These are the children whom have found themselves victims of the deadly EMPIRE GAMES of the DEVEILS TRIANGLE." (Defense Exhibit 56). In this writing, Bohrer referred to himself as "Investigator A," and Jim Beningfield, the Allen family private investigator, as "Investigator B." (Defense Exhibit 56, 482).

Bohrer also wrote, *"The Heidi Allen Triangle (Part I),"* where he repeated much of what he wrote in *"The Heidi Allen Triangle."* (Defense Exhibit 130). This writing claims he never knew Allen's name prior to her kidnapping, but he notices she always had a smile. (Id.). He described Allen, stating "[t]here is always a cheerful and pleasant manner about her. She was sweet, pretty, courteous, and pleasantly nice. She made great sandwiches for me often. For I was a regular customer there." (Id.). During his post-conviction hearing testimony when asked if he knew Allen, he replied, "not really." (416).

Bohrer's literature shows his personal knowledge about the D&W work schedule for Easter Sunday. Bohrer wrote, "how did David know Heidi was the clerk? She was not on the schedule located behind the counter on the wall. The store originally was scheduled to be closed Easter Sunday." (Defense Exhibit 130). Bohrer denied knowledge of the employee work schedules at the D&W during his post-conviction hearing testimony. (418).

During the hearing, Bohrer was asked if he had a history of violence against women between 1981 and 1996. Bohrer responded, "I don't consider it violence…I didn't hit any woman." (Id.). He also claimed that his interest in the case was sparked because he had two beautiful daughters of his own and he realized Allen was the same age as his daughter. Defense requests were made on March 19, April 6, April 7, June 5, and July 17, 2015, to introduce evidence through victims, a co-defendant, and police reports involving three known instances of Bohrer's prior acts of violence against women and physical, sexual and emotional abuse of his ex-wife and daughters. All requests were denied by the Court.

2. James Steen

Six witnesses directly heard James "Thumper" Steen admit to either killing Allen or helping to dispose of her body after she was killed. As set forth above, newly discovered witness William Pierce identified Steen as the man he saw outside the D&W on the morning of Allen's abduction hitting a woman outside of a van near the gas pump.

a. Ronald Clarke

Ronald Clarke was a friend of Steen's family and provided occasional work for Steen. Clarke testified at the post-conviction hearing that Steen was at his house a few years following Gary Thibodeau's conviction and heard Steen say, "she's long gone now…she's gone to Canada and I know more about the Heidi Allen case than the Oswego County Sheriff's, they got the

wrong guys." (1051). The admissions by Steen to Ron Clarke were disclosed in the materials provided by the prosecution in the document dump.

b. Joseph Mannino

Joseph Mannino testified he has known Steen for the past 10 years. (640). Their first meeting involved cocaine. (Id.). Mannino was jailed with Steen in the Oswego County Jail in 2011 when Steen told him the Thibodeaus had nothing to do with Allen's abduction and Steen destroyed the van used in her kidnapping by hauling it to Canada and having it scrapped. (641). Steen also referred to Allen as a "rat" during this conversation. (642).

c. Amanda Braley

Amanda Braley overheard Steen admitting to being involved in Allen's kidnapping when he said, "I'm not afraid to go to prison, I'll go for anybody…I can, however, tell you I will never see a day in prison for what we did to Heidi." (673).

d. Tonya Priest

Steen admitted to Tonya Priest that he, Roger Breckenridge, and Michael Bohrer adducted Allen. (Defense Exhibit 35). In spring of 2006, Priest worked with Steen's wife, Vicki West, who he later murdered, a crime for which he is now serving a life sentence. After work, she and Vicki were in their home and Steen was watching television when he started talking about Allen's disappearance. (Id.). Steen admitted to kidnapping Allen and dismembering her body. (Id.).

e. Megan Shaw

In 2010, while Steen was visiting Shaw at her home in Parish, New York, he told Shaw he was going to kill his wife, Vicki. When Shaw said she did not believe him, Steen told her he

helped dispose of Allen's body with others by putting her remains under the floorboards of a cabin in the woods. (759,761).

f. Jonathan Barkley

On September 12, 2010, after Steen murdered his wife he received a text message to his cell phone from Jonathan Barkely's cell phone that asked, "Heidi? Ciao." (279, Defense Exhibit 45). Steen was at a party with Jonathan Barkely the night before he killed his wife. (275,1179). Barkley had given Steen permission to drive Barkley's truck home that night. (181). Steen drove Barkley's truck to his West's apartment on the morning he murdered her. (284). Barkley woke up the next morning and saw his truck on the news as Steen's misdeeds were being televised. (1181). Barkley called Steen's cell phone at 12:11 p.m., but Steen did not answer. (1182). One minute later a text message was sent from Barkley's cell phone to Steen's cell phone with the above text. (279, 1184, Defense Exhibit 45). Barkley admitted making the phone call, but denied sending the text message that came from his phone a minute later. (1182-83). Barkley was the only person in the house when these events took place. (1181). Neither Steen nor Barkley offered an explanation regarding the coded language but rather they both denied sending or acknowledging receipt of the message. The identity of Barkley was learned after reviewing the material provided by the prosecution in the document dump on the eve of the evidentiary hearing.

g. James Steen

Steen acknowledged being an acquaintance with Roger Breckenridge in 1994 and admitted they smoked "weed" together. (224-25). Steen smoked weed with and sold weed to "a lot of people." (225,249).

At the post-conviction hearing, when asked about killing and disposing Allen's body, Steen testified as follows:

> Q: And you deny making statements to anyone about abducting or killing Heidi Allen.
> A: I have never said to anyone that I abducted or killed Heidi Allen.
> Q: Did you ever say to anyone at any time that you helped destroy the van that she was abducted in?
> A: Never. The only thing - -I'll wait till you ask the question then.
> Q: The only thing - -
> A. The only thing I've ever said to anybody is what Roger told me. That's all I ever known, and then like I told you earlier in this deal is I went to Rich Murtaugh and asked him. That's all I ever known about this case or any part that I've had in it, if I had any part in it, is from what Roger said. Plain and simple. Knowingly, I had nothing to do with any of this Heidi Allen Stuff.
> Q: You said knowingly.
> A: Knowingly. Until Roger told me that I had a stolen van on my truck or that what was in that van, I knowingly didn't know that I – that it was there.
> ---
> Q: But are you saying you don't know whether you were involved in the destruction of Heidi Allen's body and the van?
> A: Knowingly I wasn't, but if I drove that truck up there, then I guess I was the one that hauled it, but I had nothing to do with getting to doing it. I didn't know it was on my load is what I'm saying. I did not expect my –inspect my load. I picked up a load of crushed cars, took them to Canada. I was driving a step deck trailer. I backed up in front of the shredder. That's where I had to back up in front of. If I would have had a high flat on, they would have taken the cars off and stacked them in the yard because the yard was full of cars, but since I had a step deck trailer and all the cars were uneven, they can't pull them off in neat stacks, the crane unloaded it."

(284-285).

During questioning by District Attorney Oakes, Steen said he did not know he disposed of Allen's remains until after it was done. (290). Roger Breckenridge told him that Heidi Allen was in the van on that load. (286).

When Steen spoke to Sheriff Investigators on March 15, 2013, and June 14, 2014, he never told them Breckenridge had him haul Allen's remains to Canada. (248, 252, Defense Exhibits 44, 94). Steen explained this omission with, "I'm doing life without parole in prison, lady. I am not a snitch, plain and simple, and that's what I told them." (253). Steen would not

under any circumstances provide anyone with information about Allen's disappearance because he was serving life without parole. (254).

3. Roger Breckenridge

a. Jessica Howard

Jessica Howard has been married to Andrew Howard, Breckenridge's nephew, for 12 years. (1142). Howard contacted the Oswego County Sheriff's Department on August 8, 2011, to tell them she heard Breckenridge say Allen was a "rat" and she would never be found. (1149-50, Defense Exhibit 131). During her 12-year marriage, she heard Breckenridge make similar statements about Allen being a "rat." (1151). Howard testified that Allen was going to "break" Breckenridge or have him arrested for selling drugs. (1154). Howard called the Sheriff's Department again in 2014, but they never responded to her call. (1157). Howard provided this information to the Sheriff's Department over a year prior to Priest contacting them.

b. Chris Combs

Chris Combs worked with Breckenridge at Heath Paving Shop in the early 2000s. (1129-30). Breckenridge said to Combs about Allen, "[w]e chopped her up, we put her in a wood stove and put her in a vehicle and sent her to Canada."[18] (1131). Combs had reached out to the Oswego County Sheriff's Department in July, 2014 and disclosed this information. This information was included in the document dump by the prosecution on the eve of the evidentiary hearing.

c. Brittany Johnson

Brittany Johnson socialized with Breckenridge between 2009 and 2011. (1465). She heard Breckenridge say about Allen in 2011, "that bitch is long gone" as he pointed his beer up

[18] The People were aware of this *Brady* material and withheld it from the defense until January 9, 2015.

to the sky. (1465). Johnson was too afraid to come forward. (1466). The identity of Brittany Johnson was learned through information provided by the prosecution in the document dump.

d. Amanda Braley

In 2003, while Amanda Braley was on the back deck of Jennifer Wescott's parents' house, she heard Breckenridge say in the presence of Wescott and others about Allen, "he took that bitch to the scrap yard in the van, they had it crushed, and that she was shipped to Canada." (670-71). Wescott "chuckled." (671). Breckenridge "swung his arm up behind him and pointed to the northern direction of the sky and he said, "See you, bye," as he left. (Id.). Wescott slapped Roger and said, "You shouldn't be talking about that shit, Rog." (Id.). Breckenridge responded, "What, Jen, it's done and over with, and besides, nobody's ever going to find her." (Id.).

e. Roger Breckenridge

Breckenridge denied knowing Steen, Wescott and Bohrer prior to the day of Allen's abduction. This testimony contradicted the testimony set forth above of Steen, Bohrer, Wescott, Amanda Braley, Earl Russell, and Deborah Vecchio.

During his post-conviction hearing testimony he admitted reading stories in the Post Standard about Thibodeau's current post-conviction motion. (396). As a result, he sent a message to Jennifer Wescott through his sister Emmie West to tell Wescott "to shut the fuck up about Heidi Allen." (397). When asked why he sent that message, he stated, "I plead the Fifth Amendment on that." (399). Breckenridge denied Wescott's claim that they spoke on the phone in March of 2014. (395,1316-17).

C. The Additional Corroborative Evidence.

1. Suspects Were Involved in Drug Activity in 1994

Brian Mensch, who has lived in Oswego County since 1981, testified that he has known James Steen on and off for twenty years. (1290). In 1992 or 1993, he purchased marijuana from James Steen. (Id.). Mensch has known Roger Breckenridge for the same amount of time and also purchased marijuana from him. (1291). Mensch knew Michael Bohrer as the "local computer guy" and he would bring his computers to him for repair. (Id.). Bohrer sold Mensch marijuana at Medspars, the company owned by Bohrer in Parish. (Id.).

As set forth above, Steen admitted to "smoking weed" with Breckenridge and selling marijuana to "a lot" of people in the 1990s. (224,225,240).

2. Cadaver Canine

Priest's sworn statement informs that Steen said Allen's remains were buried under a floor board of a cabin in the woods off of Rice Road. A collapsed cabin was located off of Rice Road and three cadaver dogs indicated the presence of human decomposition. (Defense Exhibit 68, 528, 531-39, 558, 2185-86).

After a New York State Police Cadaver dog hit on a location at the site, a forensic dig was conducted on July 29, 2014. (2185-86,2192). Neither the Oswego County Sheriff's Department nor the forensic examiner conducting the dig had any training in this area. (2200-02). They did not find human remains in their two and a half day investigation and they failed to test the soil for chemical traces of human remains. (2204).

The defense obtained assistance from the Massasauga Search and Rescue Team to conduct an independent canine (K-9) cadaver search of the area. On October 23, 2014, Kathryn Bamford and Dana Malabar brought their trained cadaver dogs to the collapsed cabin off of Rice Road. (528). K-9 Hawk, trained in the detection of charred human remains detected human decomposition twice at the site. (533-34, Defense Exhibit 68). K-9 Libby, who was kept away

during K-9 Hawk's search, indicated at the same location as K-9 Hawk. (539). These dogs are trained to detect the chemical profile of a decomposing body because the chemicals bind up in the soil. (532). When a body decomposes in the ground, tissues break down into chemical components referred to as volatile organic compounds (VOC). (536). As the tissue breaks down, VOC are created and the decomposition fluid leaches into the soil. (537). The VOC create the odor profile that the cadaver dogs are trained to detect. (537). Trained cadaver dogs can detect these chemical profiles decades after the body decomposes. (552).

LEGAL BACKGROUND

In relevant part, New York Criminal Procedure Law § 440.10 provides the following:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such a judgment upon the ground that:
>
> ****
>
> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence….

As explained by the Fourth Department, the new evidence brought in a motion under CPL 440.10(1)(g) must satisfy the following six criteria: (1) it must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before trial by the exercise of due diligence; (4) it must be material to the issue: (5) it must not be cumulative; and (6) it must not be merely impeaching or contradictory to the former evidence. *See People v. Smith*, 968 N.Y.S.2d 786, 788 (4th Dept. 2013 (citing *People v. Madison*, 964 N.Y.S.2d 820 (4th Dept. 2013)).

Discussion

I. The Evidence was Discovered since Trial and Could Not Have Been Uncovered Prior to Trial.

The newly discovered evidence underlying Thibodeau's motion was first discovered by the defendant almost 20 years following the jury's verdict on June 19, 1995. Steen did not admit his involvement in the Heidi Allen abduction and disposal of her remains to Tonya Priest until 2006. (Defense Exhibit 35, Priest Sworn Statements). Steen's admissions revealed Michael Bohrer, Roger Breckenridge, and Jennifer Wescott were also involved. (Id.).

On March 2, 2013, Priest called Jennifer Wescott to verify Steen's admissions. The phone call was monitored and recorded by Oswego County Sheriff's Deputy Rojek. During this call, Wescott agreed Allen was brought to her home in a van by Bohrer, Breckenridge, and Steen on the day she was abducted. Wescott further admitted she was involved in junking the van Allen was kidnapped in.

As set forth above, further evidence has been discovered since Steen's admissions that corroborates this newly discovered evidence. Megan Shaw, who also heard Steen make admissions in 2010, did not reveal that fact until 2013. Jennifer Wescott made her involvement known in 2013, and confirmed the reasons for her lack of candor concerning her involvement in July of 2014. Danielle Babcock disclosed Michael Bohrer's threats to "do her like [he] did Heidi" on July 25, 2014. Joseph Maninno revealed to defense counsel that he overheard Steen confess his involvement in destroying the van used to abduct Allen on July 25, 2014. In July of 2014, defense counsel learned of the cabin located across the street from Wescott's former residence on Rice Road, that the condition of the cabin had been disturbed, and that a cadaver dog had strongly alerted to a particular area of the cabin. Because defense counsel was unaware of the existence of any of these individuals prior to trial and because all of this evidence flows

directly from Steen's admissions, no amount of diligence could have led defense counsel to this evidence prior to trial.

A. The New Evidence is Material, Non-Cumulative, and Not Merely Impeaching or Contradictory to Former Evidence.

On April 3, 1994, Heidi Allen was working the morning shift as a clerk at the D&W convenience store when she was abducted and never heard from again. Within minutes of her disappearance, deputies from the Oswego County Sheriff's Office responded to the store and immediately began interviewing customers and potential witnesses. No physical evidence was ever discovered and Allen's whereabouts remain a mystery.

Each item of newly discovered evidence is material to the issue of Thibodeau's guilt. The newly discovered evidence establishes an alternative theory to explain Heidi Allen's abduction—one that exonerates Thibodeau and squarely implicates at least three other individuals in the abduction of Allen. It would be difficult to see how evidence could be more material. The State was unable to place Gary Thibodeau at the D&W the morning of Allen's abduction through any physical evidence, direct admissions, or eyewitness accounts. Nor did the State's similar evidence put Thibodeau and Allen together at any time after she went missing. Although Thibodeau's trial counsel raised considerable doubt as to his involvement, it could not answer one very important question: if *not* Gary and Richard Thibodeau, then *who* abducted Heidi Allen?[19] The newly discovered evidence squarely answers that question.

The newly discovered evidence is not cumulative. As already noted, in the absence of an alternative theory to explain Allen's abduction, defense counsel at trial was left to highlight reasonable doubt in the State's case. If the newly discovered evidence were introduced at a new

[19] This is not to suggest that defense counsel had such a burden. Providing the jury with a probable alternative, however, would have gone far to securing Gary Thibodeau's acquittal.

trial, counsel for Thibodeau would be able to present an alternative theory of the case for the first time.

The new evidence does not merely impeach or contradict the evidence offered at trial. As previously noted, the recently discovered evidence presents a wholly new theory of the case that exonerates Thibodeau and places responsibility on at least three individuals who were never mentioned at the original trial.

B. Considered Individually and Together, the Introduction of the Newly Discovered Evidence Would Change the Result of a New Trial.

1. William Pierce's Testimony Firmly Establishes Thibodeau's Innocence.

William Pierce identified James Steen as the man outside the D&W convenience store on the morning of Allen's abduction that he witnessed in a "white van with a lot of rust on the side of it." (975). Pierce was clear that this van was not Richard Thibodeau's van . (977,1042, Defense Exhibit 132). It was Steen, not Gary or Richard Thibodeau, that he saw exit the white van, walk to the front of the van, come up behind a girl and hit her behind the right ear on the base of her neck with his fist. (977-78,1034). Pierce's eyewitness account of Allen's abduction is consistent with evidence that there was no struggle with Allen inside of the D&W. (TT., 1423,1458,2052).

The Court's November 2, 2015, order claims Pierce's testimony is speculative, and "his prior identification testimony has proven to be unreliable." (Decision and Order, p. 16). Pierce has seen images of both men, Steen and Thibodeau, in newspaper articles and he is able to say with certainty that Steen is the man he saw that morning. Pierce did not provide prior identification testimony. Back in 1994, Pierce thought the assailant might be Gary Thibodeau after he drew a beard on a photo of Thibodeau that was in the newspaper. Upon seeing James

Steen's photograph in the newspaper in 2014, he instantly knew Steen was the man he observed that morning. The photo array Investigator Pietroski provided to Pierce included a 1988 photograph of a youthful, baby face image of Steen without facial hair . (2219, 2222-23). Obviously, Pierce did not recognize this image as Steen. (978,2219).

2. Jennifer Wescott's Unguarded Admissions Made during a Secretly Recorded and Police-Monitored Phone Call with Tonya Priest Exonerate Gary Thibodeau.

On March 2, 2013, with the assistance of the Oswego County Sheriff's Department, Tonya Priest called Jennifer Wescott to verify James Steen's 2006 admissions. Wescott was not aware the phone call was recorded. During this call, Wescott confirmed Steen, Breckenridge, and Bohrer brought Allen to her home in a van after they abducted her from the D&W on April 3, 1994. She admitted knowledge that Allen was in the van and she confirmed she was involved in the disposal of Allen's remains. Wescott told Priest numerous times that she pushed these events out of her mind ten years ago.

When Wescott learned Sheriff's Investigators wanted to speak to her about the Allen investigation, she contacted Murtaugh, the owner of the junkyard where the van that was used to abduct Allen was taken for destruction. Unfortunately, we do not know what she and Murtaugh discussed because the Sheriff's Department made the messages disappear. They turned over all text messages they obtained from her phone that were sent before and after she communicated with Murtaugh. The People have no explanation as to why these specific messages have gone missing.

During her videotaped interview with investigators on March 7, 2013, Wescott presented several stories about her conversation with Priest that contradict what she and Priest actually discussed. When confronted with the fact that the call was recorded, she reacted with rage and

then ultimately conceded defeat, stating, "I don't know, I don't know, I have nothing else to say, I have nothing else to say." Wescott worried she was in trouble, and Sheriff's investigators assure her she was not. They allow her to sign a false statement and they released her.

Thereafter, Wescott's guilt was solidified when she communicated with Carl Robinson on Facebook about the Allen case and said, "I am not going to tell anyone about it. Im not going to be the next one dead for running my mouth off!" When Robinson told her she should tell the truth, she replied, "I will not be the next one dead in a box in the woods." She also begged Robinson not to tell anyone she lived on Rice Road.

Wescott's admissions, along with her after-the-fact behavior, confirm Gary Thibodeau is innocent.

3. The Admissions of Steen, Breckenridge, and Bohrer Are Admissible and Establish Each Declarant's Guilt.

Throughout the post-conviction hearing the Court recognized a standing objection by the prosecution that the admissions by Steen, Breckenridge and Bohrer were hearsay if they were available to testify and denied making the admissions. This objection is without merit based upon recognized case law pertaining to a defendant's claim of third-party culpability and actual innocence.

Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted. 2 McCormick on Evidence § 244 (Kenneth S. Broun ed., 6th ed. 2006); *DiSalvo v. Bortle,* 58 A.D.2d 997, 998 (4th Dept. 1977). As a general rule, hearsay evidence is inadmissible. "The underpinning for the rule excluding hearsay is that the purported utterer of the quoted statement cannot be subjected to cross-examination for purposes of casting full light on the information contained therein." *Vincent v. Thompson,* 50 A.D.2d 211, 224 (2d Dept. 1975).

The rule against the admission of hearsay statements, however, is not absolute. As relevant in the instant case, New York has adopted two rules concerning the admissibility of out-of-court statements. First, statements of a party opponent, including those made by a criminal defendant, are admissible at trial. *See*, *e.g.*, *People v. Solomon*, 73 A.D.3d 1440 (4th Dept. 2010) (citing *People v. Chico*, 90 N.Y.2d 585, 589 (1997); *People v. Webb*, 60 A.D.3d 1291, 1292 (4th Dept. 2009)). Several reasons have been offered to support this exception. Morgan contends a party's admissions are admissible under the adversary theory of litigation; "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." Morgan, Basic Problems of Evidence 265–66 (1963). Wigmore takes a similar view, adding that an admission discredits the party's statements inconsistent with the present claim asserted in pleadings and testimony. Further, Wigmore remarked that a party "has the full opportunity to put himself on the stand and explain his former assertion." 4 Wigmore, Evidence § 1048, at 5 (Chadbourn rev. 1972).

Second, a statement made against penal interest by any witness is admissible. *People v. Shabazz*, 22 N.Y.3d 896, 898 (2013). This exception has four components: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability. *Id*. This exception is premised on a conviction that individuals do not knowingly make statements jeopardizing their liberty unless the statements are true. *See Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two

countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . .").

During the 440 hearing, Thibodeau introduced the respective admissions of James Steen, Roger Breckenridge, and Michael Bohrer through several witnesses. As set forth in the above statement of facts, these admissions have been corroborated by several independent sources of evidence including, but not limited to, Pierce, Wescott, Deborah Vecchio, Jonathon Barkley, Darlene Upcraft, and tests conducted by cadaver canines.

Despite the demonstrated reliability of these admissions, the prosecution has sought to bar their consideration. The prosecution's arguments should be rejected for the following reasons. First, it is too early to determine whether any of the witnesses will be unavailable (either through absence of invocation of the Fifth Amendment privilege) at the time of a new trial. Although each testified at the 440 hearing, each did so prior to the introduction of William Pierce's testimony, and prior to his identification being made public. Further in this regard, each witness offered testimony that was inconsistent, thus increasing suspicion that they are culpable.

Even if the admissions of Steen, Breckenridge, and Bohrer fail to satisfy the technical requirements of a hearsay exception, this Court should still find them admissible pursuant to Thibodeau's right to present a defense. As the Supreme Court has acknowledged, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). However, that latitude has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment,

the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Indeed, the Supreme Court has on several occasions found certain rules of evidence "infring[e] upon a weighty interest of the accused" or are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting *Rock v. Arkansas*, 483 U.S. 44, 58, 56 (1987)).

Of particular relevance to the instant case is the Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973). In *Chambers*, a defendant on trial for murder called an individual who had previously confessed to the crime and had made three additional self-incriminating statements to three other persons. The state trial court precluded the defendant from cross-examining the suspect as an adverse witness and prohibited him from introducing his three separate self-incriminating statements as inadmissible hearsay. The *Chambers* Court concluded the defendant had been denied "a trial in accord with the traditional and fundamental standards of due process." *Id.* at 302. As for the hearsay statements, the Court held the testimony of the three witnesses was offered "under circumstances that provided considerable assurance of their reliability":

> First, each of [the other suspect's] confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other [independent] evidence in the case . . . . The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. [The other suspect] stood to benefit nothing by disclosing his role in the shooting to any of his three friends, and he must have been aware of the possibility that disclosure would lead to criminal prosecution. . . . Finally, if there was any question about the truthfulness of the extrajudicial statements, [the other suspect] was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury.

Id. at 300-01 (citations and footnotes omitted).

Because the hearsay statements were vital to the accused's defense, the Court concluded that the Due Process Clause required their admission:

> Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact, is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness, and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to [the defendant's] defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302 (emphasis added).

More recently, the Supreme Court has approvingly cited *Chambers* when addressing a state evidentiary rule that barred evidence of third-party culpability. In *Holmes v. South Carolina*, 547 U.S. 319, 325-26 (2006), the Court unanimously concluded that the trial court erred in preventing a defendant from introducing hearsay testimony that another person had admitted to committing the crime.

Courts in New York have jealously guarded the right to present a defense. To that end, New York Courts have held that where, as here, the declarations exculpate the defendant, they "are subject to a more lenient standard, and will be found 'sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement might be true'" *People v. Deacon*, 96 A.D.3d 965 (2d Dept. 2012) (quoting *People v. Settles*, 46 N.Y.2d 154, 169–170 (1978)).

In the context of statements against penal interest, this leniency appears to have been most frequently applied to the fourth prong of the exception, which requires sufficient proof independent of the utterance to assure the statement's reliability. For example, in *People v. McFarland*, 108 A.D.3d 1121, 1122 (4th Dept. 2013), the defendant sought to introduce

evidence in the form of an affidavit from an individual to whom a third-party confessed to killing the victim. Relying on the leniency provided to the admissibility of hearsay statements offered in the service of a defendant's right to present a defense, the Fourth Department remanded the denial of his 440 motion for a hearing on whether sufficiently competent evidence assured the statement's trustworthiness and reliability. *Id.* at 1123. See also *People v. Deacon*, 96 A.D.3d at 968 (finding third-party admissions exculpating defendant admissible under more lenient hearsay standard); *People v. Abdul*, 76 A.D.3d 563, 565 (2d Dept. 2010) (same).

Even more importantly, in circumstances surprisingly similar to those present here, courts in both New York and other jurisdictions have also held that the unavailability requirement of the statements against penal interest exception must give way to a defendant's due process right to present a defense. For example, in *People v. Oxley*, 4 A.D.3d 1078 (3d Dept. 2009), the Third Department held that the trial court erred in precluding the defendant from introducing hearsay evidence that a third-party had admitted committing the alleged crime. The defendant in *Oxley* was charged and convicted of murder in the second degree. *Id*. at 1079. Evidence at trial tended to show that the victim was beaten in the head, causing death by blunt force trauma. *Id*. Within hours of the victim's death, the police found a baseball bat in the defendant's basement. *Id*. The bat had both the victim's hair and blood and the defendant's DNA. *Id.* at 1079-80. To make matters worse for the defendant, a neighbor testified that he saw the defendant walking toward the victim on the night of the victim's death. *Id*. at 1080. Still other witnesses told the jury that the defendant had been struggling with a drug addiction and believed the victim had cheated him out on a recent drug transaction. *Id.* Further still, the prosecution introduced testimony from another witness that the defendant made a jailhouse admission to the crime. *Id*.

Despite the evidence suggesting the defendant's guilt, he proffered the following evidence indicating that another individual was solely responsible for the murder:

> One witness would testify that she saw a man called Chase at the scene of the crime and threatening the victim only a few hours before the murder. Less than 48 hours prior to the murder, Chase had threatened that he would kill the victim. Six months after the murder, she heard Chase admit that he committed the murder, stating that he made good on his previous threat to beat the victim's brains in with a bat. An inmate incarcerated with Chase was prepared to testify that Chase told him that he, and not defendant, committed the murder. Another inmate who overheard that conversation was also willing to testify. A woman who was apparently living with Chase would testify that a few nights prior to the murder she went to the victim's house to get away from Chase. When Chase appeared at the victim's house, the victim refused to let Chase in and threatened Chase with a baseball bat, prompting Chase's response that the victim would be sorry he got involved and that he was going to get hurt. This occurrence was corroborated by an independent witness, a local cab driver, who testified that he picked up a man fitting Chase's description at the home where Chase was apparently living, drove him to the victim's house and waited outside, where the cab driver heard yelling between his fare and an occupant of the house. The fare yelled that the victim needed to pay the money he owed or he was going to "get beat."

Id. at 1082.

When Chase testified outside of the presence of the jury, he, "predictably, denied committing the murder or making the inculpatory statements attributed to him." *Id*. The trial court refused to permit the defendant to introduce the evidence of third-party guilt because "Chase attended a meeting with his parole officer in Brooklyn at 3:00 p.m. on the day prior to the murder, Chase's statements were allegedly inadmissible hearsay and Chase's DNA was not on the bat." *Id*.

On appeal, the Third Department held that the trial court erred in excluding the proffered evidence, "which was not merely speculative, but specific and adequately connected Chase to the victim and scene so that it 'tend[ed] clearly to point out someone besides [defendant] as the guilty party.'" *Id*. at 1083 (citing *People v. Schulz*, 4 N.Y.3d 521, 529 (2005), in turn quoting *Greenfield v. People*, 85 N.Y. 75, 89 (1881)); *see also People v. Primo*, 96 N.Y.2d 351, 356–357 (2001)). As explained by the Third Department, "[b]y evaluating and relying upon the strength

of the People's potential rebuttal evidence and Chase's denial, the court usurped the jury's role of assessing credibility and the relative strength of conflicting evidence, depriving defendant of his right to present a complete defense." *Id*. (citing *Holmes*, 547 U.S. at 330-331).

Of particular relevance here, the Third Department also independently evaluated the admissibility of the third-party's inculpating statements. After acknowledging that the statements failed to meet the requirements for declarations against penal interest because Chase, the third-party, was available and denied making incriminating statements, the Third Department turned to whether the hearsay rule, as applied, is "'"arbitrary" or "disproportionate to the purposes [it is] designed to serve"' such that its application 'infringed upon a weighty interest of the accused.'" *Id*. (quoting *Scheffer*, 523 U.S. at 308, in turn quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). Before addressing that particular question, the *Oxley* Court observed a perverse consequence of the unavailability requirement:

> As applied here, New York's common-law exception to the hearsay rule for declarations against penal interest would permit the admission of Chase's statements only if he asserted his Fifth Amendment right and refused to testify—making him unavailable—but those statements are deemed inadmissible under this particular exception if he testifies that he never made the statements. Yet the ability to challenge those statements through cross-examination when the witness testifies provides a better opportunity to test or assure their credibility.

Id. at 1083-84.

With that observation in mind, the Court found that when supported by the relevant non-hearsay evidence, the hearsay third-party admissions "bore persuasive assurances of trustworthiness" and were critical to Oxley's defense. *Id*. at 1093 (citing *Chambers*, 410 U.S. at 302). "Given the importance of Chase's statements to the defense, the other evidence supporting those statements, and Chase's availability to testify and test the credibility of those statements, exclusion of those statements infringed on defendant's weighty interest in presenting exculpatory

evidence, thus depriving him of a fair trial." *Id.* (citing *Chambers*, 410 U.S. at 302-303; *People v. Darrisaw*, 206 A.D.2d 661, 665 (3d Dept. 1994); *Hawkins v. Costello*, 460 F.3d 236, 245 (2d Cir. 2006)). Finding that the hearsay rules must bend to a defendant's right to present a defense was made easier by the Third Department's decision in *Darrisaw*, in which the Court held that when a "'statement is exculpatory as to [a] defendant, a less exacting standard applies' in determining whether statements against penal interest are admissible, and 'where the statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission.'" *Id*. (quoting *Darrisaw*, 206 A.D.2d at 664).

Equally persuasive treatment of the unavailability requirement was provided by the Supreme Court of Oregon in *State v. Cazares-Mendez*, 350 Or. 491 (2011). In *Cazares-Mendez*, two defendants were convicted of aggravated murder. During their separate trials, each defendant attempted to present hearsay evidence from four different witnesses that another person had admitted her sole involvement in the murder. The trial court rebuffed each respective attempt. On appeal, the Supreme Court of Oregon, relying on *Chambers* and *Holmes*, concluded that, as relevant here, exclusion of the hearsay evidence on the basis of a failure to satisfy the unavailability requirement of the hearsay exception deprived the defendant of his due process right because it infringed on his weighty right to present a defense and was arbitrary and disproportionate to the purpose the rule was designed to serve. *Id.* at 519.

According to the *Cazares-Mendez* Court, the unavailability requirement was rooted in reliability concerns and reflected a preference for live testimony when a declarant is available. *Id.* However, the Court concluded that the "unavailability of a declarant who has allegedly confessed to the crime would not make her hearsay testimony more reliable—it would make it less reliable." *Id*. What is more, "[i]f the hearsay declarant is available, as here, the declarant

can take the stand and clarify or refute the confession that he or she allegedly made. If the declarant is unavailable, however, no such opportunity exists." *Id.* Finally, the Court observed that "the unavailability of the declarant actually would help witnesses concoct falsified 'confessions' by absent third parties, because they would know that the missing declarant will not be around to deny their claims." *Id*.

As held by the Third Department in *Oxley* and the Oregon Supreme Court in *Cazares-Mendez*, application of the unavailability requirement in this case would infringe on Thibodeau's weighty constitutional right to present a defense. At his original trial, Thibodeau raised considerable doubt as to the prosecution's evidence against him. Through effective cross-examination, he established that no evidence (testimonial or physical) directly placed him at the D&W on the morning of Heidi Allen's disappearance and no evidence directly placed him with Allen at any point thereafter. Cross-examination also called into question the accuracy and reliability of Christopher Bivens, who claimed to have seen Allen in a bear hug as she was being abducted near a van in front of the D&W. Additional doubt was raised concerning the statements attributed to Thibodeau by the jailhouse informants. Despite the considerable doubt raised through skilled questioning of the prosecution's witnesses, defense counsel was at a loss to establish an alternative theory to explain Allen's abduction. This was partly owing to the suppression of material evidence, including the fact of Allen's role as an informant together with the fact that her status was disclosed to some members of the public. Equally important, however, was the unavailability of since newly discovered evidence exonerating Thibodeau and establishing an alternative explanation for Allen's disappearance. Part of this newly discovered evidence comes from individuals with first-hand knowledge concerning Allen's disappearance, including William Pierce and Jennifer Wescott. Still other new evidence comes in the form of

circumstantial evidence, including testimony from Darlene Upcraft and Katheryn Bamford. Tying this evidence together are the admissions of Steen, Breckenridge, and Bohrer. Denying Thibodeau the opportunity to introduce this newly discovered evidence would place an undue burden on his right to present a meaningful defense.

Furthermore, permitting a defendant to introduce a third-party admission of guilt when that third-party is either absent or invokes his Fifth Amendment right to silence, but denying the introduction of the same evidence when the person is present and denies the statement is arbitrary and disproportionate to the purpose of the exception for several reasons. First, as the Oregon Supreme Court noted in *Cazares-Mendez*, the unavailability of a third-party confessor would not make the admission more reliable, it would make it less reliable. Second, the unavailability requirement actually has the perverse effect of incentivizing fabricated third-party admissions. Third, because an available witness can hardly be expected to admit guilt, his denial will have the effect of making him unavailable. Fourth, to the extent that the third-party confessor denying the admission can be deemed available, the trustworthiness of the hearsay testimony can be tested and better evaluated by the jury when he testifies in open court.

Yet another reason shines a light on the arbitrary nature of the unavailability rule. Consider the following case – similar to the instant one, but simplified for sake of discussion. Victim is abducted and never seen or heard from again. During its investigation, the police learn that Witness A claims that Suspect 1 admitted to him that he was solely responsible for abducting the victim. Meanwhile, the police learn that Witness B claims that Suspect 2 admitted to him that he was solely responsible for the abduction. Pursuant to the traditional hearsay rules, the prosecution will be permitted to use the hearsay statements of whichever suspect it prosecutes. And if the non-prosecuted suspect is not unavailable, either through absence or

invocation of the Fifth Amendment, technical application of the hearsay rules will bar the defense from informing the jury that a different individual made a separate claim of sole responsibility for the victim's abduction. In this way, mere mechanical application of the unavailability requirement unfairly privileges the prosecution by empowering it to choose, in a case such as this, which hearsay statement will be admitted.

Finally, the unavailability requirement is disproportionate to the purposes it is designed to fulfill because it does nothing to mitigate the broader concerns of admitting hearsay evidence. Recall that hearsay is generally disfavored because it precludes the declarant from being subjected to cross-examination. See *Vincent*, 50 A.D.2d at 224. Obviously, an unavailable declarant will always escape cross-examination. So, what purpose, then, is served by the unavailability requirement? Early decisions of the New York Court of Appeals do not offer one. Instead, the unavailability requirement seems to have been simply adopted wholesale from the previously adopted exception for statements against pecuniary interest. *See*, *e.g.*, *People v. Brown*, 26 N.Y.2d 88 (1970) (first adopting declaration against penal interest exception). Other early penal interest exception cases from the Court of Appeals were concerned with "circumvent[ing] fabrication and insur[ing] the reliability of these statements . . . ." *Settles*, 46 N.Y.2d at 168. To achieve that end, these earlier decisions placed understandable weight on the need to establish "some evidence, independent of the declaration itself, which fairly tend to support the facts asserted therein." *Id.* (citing *Donnelly v. United States*, 228 U.S. 243, 277 (Holmes, J., dissenting). The Settles Court offered the following explanation for the rule:

> Only when there is other evidence tending to show that the declarant or someone he implicates as his accomplice actually committed a crime, may a declaration against penal interest be said to display the degree of reliability sufficient to overcome the dangers of admitting hearsay evidence. By imposing such a requirement a balance is struck between the interest of defendant to introduce

> evidence on his own behalf and the compelling interest of the State to preserve the integrity of the fact-finding process in this aspect of criminal prosecutions.

Id. at 169.

Importantly, early cases from the Court of Appeals make no attempt to connect the unavailability requirement to these reliability concerns, and, indeed, no connection can be made.

Even beyond these landmark decisions from the Court of Appeals, a rational justification for the unavailability requirement cannot be found. For example, McCormick acknowledges that hearsay exceptions seek to admit evidence "where 'circumstantial guarantees of trustworthiness' justify departure from the general rule excluding hearsay." 2 McCormick on Evid. § 253 (7th ed.) (citing 5 Wigmore, Evidence § 1422 (Chadbourn rev. 1974). McCormick then identifies two groups of exceptions: those where availability is not a factor, and those where it is. *Id.* As explained by McCormick, the reliability of statements in the first group is assured irrespective of the unavailability of the declarant. *Id*. However, "[t]he theory of the second group is that, while live testimony would be preferable, the out-of-court statement will be accepted if the declarant is unavailable." *Id*. Nothing about this theory is based on reliability, and it certainly fails to explain why statements from unavailable declarants are more reliable than statements from available ones. While it may be the case that a preference for live testimony requires the proponent to call an available witness to the stand, there is no basis for extending that preference to require unavailability of the declarant. In the end, there is simply no rational basis for the unavailability requirement in the context of this case, and, even if one can be imagined, the rule is disproportionate to any purpose it may serve. Therefore, this Court should find that Thibodeau's right to present a defense requires the admissibility of the third-party admissions.

4. The Newly Discovered Evidence Proves Thibodeau is Actually Innocent.

A "freestanding" claim of actual innocence is cognizable in New York under CPL § 440.10(1)(h). *See People v. Hamilton*, 115 A.D. 3d 12, 15 (2d Dept. 2014). "Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction of incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution." *Id*. at 26 (citations omitted). A constitutional violation occurs if there is clear and convincing evidence that the defendant is innocent. *Id.* at 27.

A prima facie showing of actual innocence is made out when there is "'a sufficient showing of possible merit to warrant a fuller exploration'" by the court. *Id*. (quoting *Goldblum v. Klem*, 510 F.3d 204, 219, *cert. denied* 555 U.S. 850).

A hearing on this ground should allow all reliable evidence, including evidence not admissible at trial, should be admitted. *Id*. Gary Thibodeau also moved under section of CPL § 440.10, in his original moving papers, and at all times made it known he was actually innocent of this crime and that Bohrer, Steen, and Breckenridge are the actual kidnappers. All evidence developed and presented during the course of this motion has been offered toward Gary Thibodeau's actual innocence. If a defendant establishes his actual innocence by clear and convincing evidence, the indictment should be dismissed pursuant to CPL 440.10(4), which authorizes this disposition where appropriate. *Id.* Empaneling another jury is not necessary where the trial court has determined, after a hearing, "that no juror, acting reasonably, would find the defendant guilty beyond a reasonable doubt." *Id.*

The People's failure to turn over *Brady* material that reveals Allen was an active confidential informant for the Oswego County Sheriff's Department, who exposed this

information to the public and placed her in danger, is inextricably intertwined with the newly discovered evidence that proves three other suspects were responsible for the abduction of Heidi Allen on April 3, 1994. These suspects were all living in the area where she was abducted, they were engaged in drug use and sales, and they believed she was a "rat." They have admitted to others that they were involved in her abduction and the disposal of her remains. Wescott's recorded telephone call with Priest confirms all of these events. There is no escaping her agreeing that Allen was at her home in a van and she was brought there by Steen, Bohrer and Breckenridge. Pierce identified Steen as the driver of the van outside of the D&W on April 3, 1994.

CONCLUSION

For all of these reasons, this Court should find the State obtained Thibodeau's conviction through fraud and misrepresentations and by failing to disclose critical *Brady* material and that the newly discovered evidence proves Thibodeau is actually innocent requiring this court to vacate Thibodeau's judgment and dismiss the Indictment pursuant to CPL 440.10(1)(b) and (h).

Lisa A. Peebles, Esq.
Federal Public Defender
4 Clinton Square, 3rd Floor
Syracuse, New York 13201
(315) 701-0080