To Be Argued By:
ALEXANDRA A.E. SHAPIRO
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Indictment No. 2014-635-1
Onondaga County Index No. 2014-0737

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

—against—

M. ROBERT NEULANDER,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

ALEXANDRA A.E. SHAPIRO
JACOB S. WOLF
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
Telephone: (212) 257-4880
Facsimile: (212) 202-6417

Attorneys for Defendant-Respondent

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Defendant-Respondent M. Robert Neulander respectfully submits this brief in response to the People's appeal, by permission of Justice Nancy E. Smith, from the June 29, 2018, Order of the Appellate Division, Fourth Department, vacating his convictions for murder in the second degree and tampering with physical evidence following a jury trial in County Court, Onondaga County. The Appellate Division granted a new trial based on juror misconduct. For the reasons set forth below, this Court should affirm that decision.

INTRODUCTION

On September 17, 2012, Leslie Neulander died due to a significant head injury. After examining her body at the scene and performing an autopsy, the Medical Examiner concluded that Leslie, who had a history of vertigo, had died as a result of an accidental fall in the shower. Nevertheless, two years later the District Attorney charged Leslie's husband of 30 years, a prominent and well-respected Syracuse obstetrician, with murdering her. The question presented is whether, as the Appellate Division concluded, Neulander's trial was fundamentally unfair because one of the jurors repeatedly disobeyed the trial court's instructions, participated in improper communications about the case, lied under oath about her misconduct, and attempted to cover it up by deleting data from her cellphone.

The trial was highly publicized and took place in a flurry of extensive and unrelenting newspaper, television, and internet coverage. The trial court

repeatedly admonished the jurors not to communicate with others about the case, to avoid media coverage about the trial, and to promptly report any such communications or media exposure to the court. After the verdict, an evidentiary hearing revealed that one of the jurors had blatantly and repeatedly violated these instructions by communicating numerous times with her family and friends about the case via text messages. In those communications, her father encouraged her to "make sure [Neulander's] guilty!", a friend repeatedly called Neulander "scary," and another friend—who claimed to know "every possible detail" about the case—opined that a key defense witness was lying. Instead of shutting down these improper exchanges and reporting them to the court, the juror compounded her misconduct by providing a false affidavit and selectively erasing her text messages and deleting all internet browsing history from her phone. Although the trial court concluded that the juror's misconduct evinced consciousness of wrongdoing, it refused to grant Neulander relief.

The Appellate Division, by contrast, recognized that this egregious misconduct poisoned Neulander's trial from start to finish and prejudiced his constitutional right to an impartial jury—a right that is "fundamental to the American scheme of justice and essential to a fair trial." *People v. Rivera*, 15 N.Y.3d 207, 211 (2010). That decision broke no new ground: The Appellate Division merely recognized that jurors must follow the court's instructions and

cannot submit false affidavits and then conceal their misconduct. It simply applied that settled law in concluding that the juror's conduct here fell far short of those basic expectations.

Because Neulander is entitled to an untainted jury, this Court should affirm the decision below.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a defendant is entitled to a new trial based on juror misconduct, where a juror repeatedly and knowingly violates the trial court's instructions by communicating with friends and family members about the defendant and defense witnesses during trial, lies to the court under oath about these communications, and conceals and attempts to destroy evidence of this misconduct.

2. Whether, in the alternative, this Court should affirm because Neulander received ineffective assistance of counsel, or at least remand the case with instructions to the Appellate Division to consider that question (along with a related prosecutorial-misconduct claim) in the first instance.

STATEMENT OF THE CASE

A. The Trial

On September 17, 2012, Leslie Neulander died at her home from a fatal injury to her skull. The sole trial issue was whether her injury was caused by an accidental fall in the shower or a fatal attack by her husband, Robert Neulander.

Neulander did not testify. However, during two interviews with law enforcement, he explained that on the day of Leslie's death, he woke up between 6:00 and 6:30 and, as he often did, went for a run. (R-3872-73, 4042). He returned home between 7:00 and 7:30. (R-3877, 4042). At around 8:00 or earlier, he brought a cup of coffee to the master suite for Leslie. (R-3877-78, 4043). Hearing the shower running, he left the coffee on Leslie's nightstand. (R-3878, 4045). Around 8:15 or 8:20, Neulander woke his adult daughter Jenna, who was joining her parents at 9:00 Rosh Hashanah services. (R-3881, 4047). He returned to the master suite between approximately 8:20 and 8:30. (R-3882, 4048). The shower was still running, so Neulander entered the bathroom, where he discovered Leslie lying unconscious on the floor of the shower. (R-3886, 4049, 4054).

Neulander attempted to resuscitate Leslie and tried calling 911 from a cordless phone next to the shower. (R-3770, 3893, 4057). That phone did not work, so he ran toward Jenna's room and yelled instructions to call 911. (R-3893, 4057). He then ran back to Leslie and, with Jenna's assistance, began to carry her from the bathroom, which had a hard marble floor, to the carpeted bedroom, where he continued to try and resuscitate her. (R-3994, 4058).

At approximately 8:31, emergency medical personnel and police officers arrived at the home. Emergency responders attended to Leslie, but ultimately pronounced her dead at 8:42. (R-1268, 1279-80). At around 9:09, Officer Michael

Kurgan began photographing the scene; more than 21 people moved through the space before and while he was taking pictures. (R-1443, 4205).

Kurgan's photographs depicted various bloodstains in the master suite: on the floor of the bathroom and the bathroom entryway; on the bathroom entryway walls and doorframe; on the floor of the bedroom where Neulander had attempted to resuscitate Leslie; and around the bed, near where paramedics had attended to Leslie.[1] (R-3735-39, 3743-47, 3754-60, 3784, 3800).

The People's case was entirely circumstantial. The People relied primarily on expert testimony intended to disprove Neulander's account of the relevant events and on speculation that he must have disposed of non-existent evidence of homicide. Their case, however, was substantially undercut by evidence consistent with the defense theory and problems with the methodology of their experts.

The People called four medical experts. Only one expert had visited the scene on the day of Leslie's death, and he ruled the death an accident (R-1571, 4168, 4712). Tellingly, he was unable to explain why he reversed course two years later. (R-1589, 4182). The other experts relied only on photographs from the poorly-processed and "incompletely investigated" scene. (R-4316; *see also* R-1515-16, 1518, 1532-36, 2339-40).

[1] Although the People claimed that Neulander carried certain bloodied items downstairs and out of the house, there was no blood found anywhere outside of the master suite. (R-1489).

Additionally, after consulting with two blood-spatter analysts who could not corroborate their theory, the People resorted to calling a quack who performed a series of bizarre experiments in her home that she admitted she designed solely to "confirm" the People's theory of the case. (R-2147). These included placing a large rock on a mattress, covering it with a "rubber layer," "some wig hair," and blood (R-2150-51), and repeatedly striking it with an ax handle (R-2148-49) and going "into the shower" with wet, bloody hair and then turning her "head back and forth left, right, left," "to recreate" stains found at the scene. (R-2071-72).

The People never recovered a weapon or any other physical evidence. However, they invited the jury to speculate that Neulander must have disposed of some sort of weapon and blood-stained bedding. (R-2861-62). The People also failed to establish any realistic motive. Although the Neulanders were considering a trial separation (R-3870, 3917), the People offered no evidence that Neulander was angry with Leslie. Witnesses who attended dinner with them the night before Leslie's death testified that the couple seemed to have a "harmonious, enjoyable" time. (R-2294, 2616).

In response, the defense called a medical expert and a blood-spatter analyst, as well as Leslie's two adult children, her sister, two friends with whom the Neulanders had spent the evening before Leslie's death, and her personal trainer. (R-2266-2657). Among other things, these witnesses testified that Leslie had

vertigo, a condition which—according to one of the People's medical experts—causes "severe dizziness, disorientation and so forth" and can "certainly" cause a person to fall. (R-1759).

B. Juror Misconduct

The trial took place amidst a media frenzy, with constant reporting on television and a well-trafficked local website. *See* Syracuse.com, http://search.syracuse.com/robert+neulander/ (listing more than 300 news stories about Neulander's prosecution). Because of the extensive media coverage, the trial court took extra precautions to ensure that the jury was not influenced by outside sources. The court admonished the jurors not to discuss the case with anyone, "further instructed the jurors that they must report any attempt by anyone to speak with them about the case," and "repeatedly advised the jurors that they were to refrain from reading or watching any news accounts of the case." (R-13). The court "repeated these admonitions several times throughout the proceedings." (R-13; *see* R-1044-48, 1093, 1156, 1245, 1295, 1360, 1414-15, 1490, 1509, 1544, 1617, 1693, 1748-49, 1799, 1809, 1817-19, 1834, 1850, 1884, 1891, 1931, 1987, 2030-31, 2102-03, 2158, 2225-26, 2242-43, 2296, 2308, 2359-60, 2396-97, 2457, 2520, 2586-87, 2630, 2656, 2691, 2719, 2736-38, 2855, 2887, 2923, 2934-35, 2999-3003, 3032-35).

During jury deliberations, defense counsel observed two jurors speaking to

one another after one had been discharged. (R-3318-19). At counsel's request, the trial court questioned one of the deliberating jurors ("Juror-12") in chambers about whether she had had "any discussions" about the case with the discharged alternate juror ("Alternate-Juror-4"). At that time, Juror-12 denied discussing the trial with Alternate-Juror-4 (R-3061) and (falsely, as it turned out) claimed not to have talked about the case with anyone except the other deliberating jurors (R-3062).

After the verdict, Alternate-Juror-4 advised defense counsel that Juror-12 had engaged in prohibited communications during trial. Based on this information, Neulander filed a motion to set aside the verdict pursuant to CPL 330.30. (R-3080). The trial court scheduled an evidentiary hearing on the motion and ordered a forensic examination of Juror-12's phone. (R-3356-57).

The evidence recovered from the phone and presented at the hearing showed the following:

1. Juror-12's improper communications.

The most pertinent text conversations included the following:

As soon as Juror-12 was selected to serve on the jury, she told her father about her selection. He replied: "Oh lucky you!" and "*Make sure he's guilty*!" (R-3386 (emphasis added)).

That same day, Juror-12 told her friend Tiff Sampere that she had been selected as a juror. In the ensuing text exchange, Sampere twice referred to

Neulander as "scary," asking "Is he scaryyyy" and "Did you see the scary person yet." (R-3366). Juror-12 responded that she had "seen him since day 1." (R-3366; *see also* R-3489 (admitting she understood reference was to defendant)). Juror-12 exchanged messages with Sampere throughout the trial. (R-3366-67, 3376-77).

The day Jenna Neulander testified as a defense witness, Juror-12 exchanged dozens of messages with her friend Lindsay Flanagan about the trial. Flanagan's messages started during a break in Jenna's testimony, while Juror-12 was in the jury room. Flanagan asked whether the court "check[ed Juror-12's] texts." (R-3417). Juror-12 responded no. Flanagan then said she was following the trial "live on Twitter" and was "obsessed." (R-3417). Flanagan said she thought Jenna was not credible. Flanagan said that she had "read so[] much" about the case that she knew "every possible detail that the public is allowed to know," and that she was "so anxious to hear someone testify against Jenna." (R-3418). In a message that Juror-12 later deleted, Juror-12 responded that "[n]o one will testify against her!" and explained that the only opportunity for the prosecution to question Jenna would come on cross-examination. (R-3418).

Following Jenna's cross-examination, Flanagan wrote to Juror-12 that her "mind [was] blown that the daughter [was not] a suspect." (R-3422). In a playful back-and-forth, Juror-12 sent Flanagan a "see no evil, hear no evil, speak no evil"

emoji (🙈🙉🙊) and Flanagan asked, "[or] is she?" with an accompanying emoji. (R-3422). Flanagan continued to express her suspicions about Jenna, advising that she had "so many questions [she] would ask if [she] was one of the prosecutors or stuff [she] would look into if [she] was an investigator." (R-3422).

At the evidentiary hearing, Juror-12 conceded that she "knew [these exchanges] violated the Judge's rules." (R-3522).

2. Juror-12 deleted text messages, which were recovered during the forensic examination of her phone.

Juror-12 deleted some of her text exchanges, including those with her father and Sampere, in their entirety. At the hearing, she was unable to explain why. (R-3484 ("I don't have an answer for you")). She first said that she had deleted the exchanges with Sampere because Sampere had moved, but moments later claimed not to remember why she had deleted the messages. (R-3484).

Juror-12 also selectively deleted some of her exchanges with Flanagan, including: (1) Flanagan's message asking whether the court reviewed Juror-12's texts; (2) Flanagan's message explaining that she had read so much about the case that she knew "every possible detail that the public is allowed to know"; and (3) Juror-12's response to Flanagan's message expressing a desire to hear someone testify against Jenna. (R-3417-18). Juror-12 had to delete these messages one-by-one and, once again, was unable to explain at the hearing why she did so. (R-3510-12).

3. Juror-12 erased her internet browsing history.

The forensic analysis of Juror-12's phone revealed that during trial she had visited Syracuse.com, a news site that extensively covered the trial, and had subsequently deleted her browsing history. (R-3381). Because of this misconduct, the court could not determine which news stories she had read. In testimony that strains credulity, Juror-12 testified that she had "probably" read an article about cheerleading (R-3486), but the trial court accepted defense counsel's representation that "Syracuse.com did not post any articles about cheerleading on its website on the day in question" (R-24). Juror-12 was again "unable to explain" her conduct. (R-23).

4. Juror-12 knowingly made numerous false and misleading statements to the prosecutor and to the court.

During the in-chambers inquiry before the verdict, Juror-12 falsely told the court that she had not discussed the trial with Alternate-Juror-4 or anyone else. (R-3061-62). She also failed to disclose any of her improper text conversations when she met with the District Attorney after Neulander filed his 330 motion, "although this clearly was an opportunity to do so." (R-2D). And she lied in an affidavit submitted to the court when she said that "[a]t all times throughout the trial and deliberative process" she "followed [the court's] instructions." (R-3321). As the Appellate Division pointed out, "[t]his statement was patently untruthful." (R-2D). Indeed, she later admitted that she "knew" that she had repeatedly "violated the

Judge's rules." (R-3522).

Other false statements permeated Juror-12's affidavit. For instance, she claimed that "the substance" of her exchanges with Flanagan related to Flanagan's concern about her well-being. (R-3323). She then concocted false evidence to support that claim by giving the prosecutor heavily-doctored screenshots of her phone that omitted the crucial exchanges with Flanagan. (*Compare* R-3328, 3330, *with* R-3417-8; *see also* R-2D (Juror-12 not only failed to provide the "improper text messages," but also "specifically provided some innocuous text messages" to conceal her misconduct)). Finally, Juror-12 misleadingly claimed that she never received a media alert on her phone. (R-18-19, 3322).

5. The Trial Court's Decision

The People pretend that the trial court "found that none of the incidents constituted misconduct" (Br.16) and attempt to paper over Juror-12's misdeeds (Br.11-13), but the court expressly found that Juror-12 committed misconduct in several different ways. For instance, the court found that Juror-12 "contravene[ed] … the Court's admonitions"—which were repeated 45 times—by "engag[ing] in imprudent text conversations with other individuals" and "failing to report her missteps in a timely manner, despite the fact that she had ample opportunity to do so." (R-35). The court further concluded that Juror-12 fully "understood the prohibition on speaking about this case with third parties" and "the fact that [Juror-

12] deleted pertinent messages clearly displayed a consciousness that she had engaged in misconduct, in violation of the Court's admonitions." (R-24). And the court found that Juror-12's affidavit did not "completely address the extent of her communications" with third parties. (R-24). Notably, Juror-12's sworn assertion that she had "followed [the court's] instructions" at all times (R-3321) came *after* she had "displayed a consciousness" of her "misconduct" by deleting her phone data. (R-24).

Yet despite its express findings that Juror-12 engaged in various forms of serious misconduct, the trial court denied the 330 motion. The court concluded that "there was no showing that [Juror-12] received external information pertinent to the case from an external source." (R-31). In doing so, the court chose to credit her self-serving claims "that when the jurors conducted an initial vote, she was initially 'undecided,'" and "that she based her ultimate verdict strictly on the evidence that she heard in the courtroom and the law as charged by the Court." (R-25).

6. The Appellate Division Decision

The Appellate Division concluded that Juror-12's misconduct deprived Neulander of a fair trial.[2] It held "that every defendant has a right to be tried by

[2] The Appellate Division rejected Neulander's challenges to the sufficiency and weight of the evidence. (R-2B-2C).

jurors who follow the court's instructions, do not lie in sworn affidavits about their misconduct during the trial, and do not make substantial efforts to conceal and erase their misconduct when the court conducts an inquiry with respect thereto." (R-2E). The ruling was highly fact-specific: "[I]n this case, a new trial is required because juror number 12 received a message during the trial from her father imploring her to 'Make sure [defendant's] guilty!,' and there were numerous other *improper* communications between juror number 12 and her friends directly concerning specific issues in the trial, which juror number 12 failed to report and then actively concealed and lied about under oath during the court's inquiry into the misconduct." (R-2F).

The Appellate Division further "observe[d] that, had [Juror-12's] misconduct been discovered during voir dire or during the trial … the weight of authority under CPL 270.35 would have compelled her discharge on the ground that she was grossly unqualified and/or had engaged in misconduct of a substantial nature." (R-2D). Thus, "through no fault of his own," Neulander "was denied the opportunity to seek her discharge during trial" because of Juror-12's "flagrant failure to follow the court's instructions and her concealment of that substantial misconduct." (R-2D-2E).

The court also explained that Juror-12's "intentions" were "not relevant to the analysis" because even "'well-intentioned jury conduct' may create a

substantial risk of prejudice to the rights of the defendant." (R-2E (citing *People v. Brown*, 48 N.Y.2d 388, 393 (1979))).

The dissent agreed with the trial court's findings of misconduct (R-2F) but would have declined to "disturb the court's credibility determinations," and found no "likelihood of prejudice." (R-2G). The dissent also believed that Juror-12's cover up "cannot support the conclusion that defendant was somehow deprived of an opportunity to move to discharge [Juror-12] pursuant to" CPL 270.35. (R-2G).

The majority responded that "the dissent's approach" would reward Juror-12 for "deliberately concealing and withholding the misconduct from the court." (R-2E). Thus, in addition to Juror-12's violating Neulander's right to a fair trial, her successful cover-up *also* deprived Neulander of his more specific "right … to pursue a remedy [during the trial] under CPL 270.35 based on the juror misconduct that is patent on this record." (R-2E).

Because it ordered a new trial based on Juror-12's misconduct, the Appellate Division majority declined to reach Neulander's ineffective-assistance-of-counsel and prosecutorial-misconduct claims.

ARGUMENT

I. THE APPELLATE DIVISION'S RULING SHOULD BE AFFIRMED

The Sixth Amendment to the United States Constitution expressly guarantees the accused a trial "by an impartial jury." There is nothing "more basic to the criminal process than [this] right." *People v. Branch*, 46 N.Y.2d 645, 652 (1979). "At the heart of this right is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors." *Rivera*, 15 N.Y.3d at 211. Simply put, defendants are entitled to a jury "capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

The Criminal Procedure Law "safeguard[s] [this] constitutional right to participate in jury selection and have an impartial jury." *People v. Rodriguez*, 100 N.Y.2d 30, 34 (2003). For instance, Section 270.35, which "governs the procedure for discharge of a sworn juror," *People v. Kuzdzal*, 31 N.Y.3d 478, 483 (2018), requires courts to dismiss jurors during trial if they are "grossly unqualified to serve" or have "engaged in misconduct of a substantial nature." And a new trial is required if a juror's misconduct "*may* have affected a substantial right of the defendant and [] was not known to the defendant prior to the rendition of the verdict." CPL 330.30(2) (emphasis added). Although "not every misstep by a juror rises to the inherently prejudicial level at which reversal is required

automatically," certainty of harm is not required. *Brown*, 48 N.Y.2d at 394. As the Appellate Division explained, "the plain language of CPL 330.30(2) does not require a defendant to establish actual prejudice." (R-2C). Accordingly, defendant need only demonstrate a "significant risk that a substantial right … was prejudiced." *People v. Giarletta*, 72 A.D.3d 838, 839 (2d Dep't 2010). And in assessing the "likelihood that prejudice was engendered," a court must examine "[e]ach case … on its unique facts."[3] *People v. Clark*, 81 N.Y.2d 913, 914 (1993).

The Appellate Division faithfully applied this framework here. It explained that "every defendant has a right to be tried by jurors who follow the court's instructions, do not lie in sworn affidavits about their misconduct during the trial, and do not make substantial efforts to conceal and erase their misconduct when the court conducts an inquiry with respect thereto." (R-2E). Remarkably, the People insist that this was an overly "high standard for juror conduct." (Br.39). Yet it is difficult to fathom an easier standard for jurors to satisfy. In any event, we suspect this Court has rarely seen such egregious juror misconduct, which far exceeds *any* standard that might apply.

[3] The People criticize the Appellate Division for invoking CPL 330's "may" language, claiming that this improperly "lessened the burden on defendant." (Br.38). But they ignore the statute's text and this Court's pronouncements in *Brown* and *Clark* focusing on "the likelihood" (not certainty) of prejudice. Notably, the case the People rely on, *People v. Irizarry*, 83 N.Y.2d 557, 561 (1994), quotes *Brown* and reaffirms that "likelihood" suffices.

The People's attempts to attack the Appellate Division's ruling miss the mark. They paint Juror-12's conduct as innocuous, but the trial court's own findings contradict that picture. They cite cases in which new trials were denied, but none involved the egregious misconduct that occurred here. They fail to grapple with how the cumulative effect of all the misconduct necessarily prejudiced Neulander. And they fail to appreciate the broader ramifications of affirming a conviction tainted by such extensive misconduct.

A. Juror-12's Misconduct Created A Substantial Risk Of Prejudice To Neulander's Right To An Impartial Jury

The Appellate Division correctly determined, on the "totality of the circumstances," that Juror-12 "engaged in substantial misconduct that 'created a significant risk that a substantial right of … the defendant was prejudiced.'" (R-2E (quoting *Giarletta*, 72 A.D.3d at 839)).

1. The Appellate Division correctly concluded that Juror-12's knowing and repeated "failure to follow the court's instructions" and "failure to report her own misconduct and the improper communications" created a significant risk of prejudice on the "unique facts" of this case. (R-2E). A bedrock principle of our legal system is the presumption that jurors follow a court's instructions. *See, e.g.*, *People v. Cotterell*, 7 A.D.3d 807, 808 (2d Dep't 2004) (failure to admonish jurors to avoid discussing case and to refrain from reading or listening to accounts of case requires reversal); *People v. Donovan*, 53 A.D.2d 27, 31 (3d Dep't 1976); *United*

States v. Rosario, 111 F.3d 293, 300 (2d Cir. 1997). This presumption is destroyed where, as here, a juror knowingly and repeatedly violates the court's admonitions and then lies to the court about her malfeasance.

As the trial court found, Juror-12 "understood the prohibition on speaking about this case with third parties," and her deliberate deletion of improper communications from her phone "clearly displayed a consciousness that she had engaged in misconduct, in violation of the Court's admonitions." (R-24). Even worse, Juror-12 committed perjury when she told the court that at "all times throughout the trial and deliberative process, [she] followed [the court's] instructions." (R-3321).

2. The content of the improper communications and their obvious anti-defendant bias underscored the risk of prejudice. The trial court and the People erroneously focus on whether the text messages relayed specific outside information about the case. (*See* R-31; Br.23-24, 27-31, 57). But that misses the point: outside opinions—particularly those of family members or close friends—may color a juror's view even where the third party communicates no specific extra-record facts, and thus require a new trial. *See People v. Davis*, 86 A.D.3d 59, 65 (2d Dep't 2011) ("Improper influences have been found to include, for example, statements to jurors of opinion … as to the defendant's guilt . . . ." (citing *Parker v. Gladden*, 385 U.S. 363, 363 (1966))); *People v. Harris*, 84 A.D.2d 63,

104 (2d Dep't 1981) ("[V]erdict may be found to be tainted where … a nonjuror expresses an opinion to the jury regarding the defendant's guilt . . . ."). As the Supreme Court has observed, "apparently innocuous comments" about a case "can taint a juror." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1893-95 (2016).

The risk of such improper influence was plain here. For instance, as soon as Juror-12 was selected, her father "implor[ed]" her to "[m]ake sure [Neulander] is guilty!" (R-2F). For the People to characterize that statement as merely "an advisement to ensure defendant's guilt beyond a reasonable doubt before convicting him" (Br.27-28) blinks reality. Even Juror-12 never testified that she interpreted the text message in this contorted way. Also, why would Juror-12's father need to remind her to "ensure [Neulander's] guilt beyond a reasonable doubt" before finding him guilty, unless he thought she was biased and would presume guilt?

Flanagan's comments likewise created a substantial risk that Juror-12 would not decide the case based solely on the evidence. Flanagan purported to know "every possible detail that the public is allowed to know" (R-3418) and stated she was following the trial "live on Twitter" (R-3417). While Jenna Neulander was on the stand, Flanagan repeatedly suggested that Jenna should not be believed. Flanagan even said that Jenna herself should have been a suspect in her mother's murder—a theory not argued at trial and with no record support. Flanagan did not

share the basis for her opinions, but as the trial court found, she made it "abundantly clear that [she] believed that she had read a great deal about this case." (R-33). The prejudice was heightened because Jenna was a critical defense witness who corroborated Neulander's account. *See People v. Stanley*, 87 N.Y.2d 1000, 1002 (1996) (ordering new trial based on jurors' extra-record experiment to test witness credibility).

The text conversations in which Juror-12 admitted that she understood that Sampere was calling Neulander "the scary person" (R-3366, 3489) created even further risk that she would convict regardless of what the evidence might show.

3. The Appellate Division also correctly recognized that Juror-12's lies and efforts to hide her improper actions themselves established a substantial risk of prejudice. Juror-12's "concealment of [her] substantial misconduct" deprived defendant, "through no fault of his own," of the "opportunity to seek her discharge during trial" pursuant to CPL 270.35, which mandates dismissing jurors who are "grossly unqualified" or commit "substantial misconduct." (R-2E; *see also id*. (Juror-12's "concealment of [her] misconduct and the improper communications … denied defendant the *opportunity* to pursue a remedy under CPL 270.35" during trial) (emphasis in original)). By failing to report these messages to the court before the verdict, as the court had instructed, Juror-12 prevented the court from taking steps to "counteract or 'sterilize' any possible *subconscious* effect" that the

messages might have had. *See People v. Crimmins*, 26 N.Y.2d 319, 324 (1970). Likewise, by deleting her internet browsing history, Juror-12 ensured that no one would discover whether and the extent to which she improperly exposed herself to media coverage of the case.

The Appellate Division correctly concluded that had Juror-12's "misconduct been discovered during voir dire or during the trial, rather than after the verdict, the weight of authority under CPL 270.35 would have compelled her discharge." (R-2D (citing *People v. Havner*, 19 A.D.3d 508 (2d Dep't 2005); *People v. Pineda*, 269 A.D.2d 610, 611 (2d Dep't 2000); *People v. Robertson*, 217 A.D.2d 989, 990 (4th Dep't 1995); *People v. Fox*, 172 A.D.2d 218, 219-20 (1st Dep't 1991)); *cf. People v. Spencer*, 29 N.Y.3d 302, 311 (2017) ("[N]either the constitutional right to a trial by an impartial jury, nor the controlling statute, nor [this Court's] case law requires a statement of actual bias for a sworn juror to be grossly unqualified.")).

Juror-12's perjury and deceit also establish implied bias and thus a violation of the Sixth Amendment right to an impartial jury. A juror whose "answers to the [court's] questions are willfully evasive or knowingly untrue … is a juror in name only." *Clark v. United States*, 289 U.S. 1, 11 (1933). Federal courts have thus consistently found that the presence of a "juror … who lies materially and repeatedly" to the court is presumed to be biased. *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998) (en banc) (holding that bias must be presumed where juror

deliberately lied during voir dire). *See also United States v. Parse*, 789 F.3d 83, 111 (2d Cir. 2015) (where juror "has lied" to keep her "seat on the jury—a mission apparently so powerful as to cause the juror to commit a serious crime—it reflects an impermissible partiality on the juror's part") (citation omitted); *Sampson v. United States*, 724 F.3d 150, 167 (1st Cir. 2013) ("juror dishonesty … can be a powerful indicator of bias"); *Williams v. Bagley*, 380 F.3d 932, 950 (6th Cir. 2004) (court may "presume bias if a juror deliberately conceals material information"); *United States v. Boney*, 977 F.2d 624, 634 (D.C. Cir. 1992) ("[L]ying or failing to disclose relevant information during *voir dire* itself raises substantial questions about the juror's possible bias."); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (juror's dishonesty was, "of itself, … evidence of bias"); *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (juror's failure to reveal that her brother-in-law was government attorney would "reflect[] an impermissible partiality on the juror's part").

These cases reflect two critical impartiality concerns that juror dishonesty implicates. First, a juror whose lies help ensure her participation (or continuation) on the jury "exhibit[s] a personal interest" that suggests "a view on the merits and/or knowledge of evidentiary facts," *Colombo*, 869 F.2d at 151, or a "personal bias against the defendant," *Dyer*, 151 F.3d at 983. Second, a juror who "herself does not comply with the duty to tell the truth" may be unable to "stand in

judgment of other people's veracity" and "can be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn." *Id.*

Those concerns are clearly in play here. By lying to the trial court during the in-chambers examination, Juror-12 ensured that she would remain on the jury through the verdict. And by lying to the court in her affidavit, Juror-12 aided the People's effort to keep that verdict in place. If anything, her conduct was even more egregious than in the cases cited above. Here, Juror-12 took the additional steps of deleting the improper messages from her phone, erasing her internet browsing history, and disregarding the court's explicit admonition that jurors must report their communications with third parties. Her dishonesty and destruction of evidence of her misconduct, at a minimum, created a grave risk that the verdict was tainted.

4. Juror-12's misconduct was so egregious that her self-serving testimony that she voted to convict based on the evidence alone is entitled to no weight. Moreover, as the Appellate Division recognized, even if "juror number 12's intentions were pure," her "intentions are not relevant to the analysis" because even a well-intentioned juror "may create a substantial risk of prejudice to the rights of the defendant." (R-2E).

People v. Cocco, 305 N.Y. 282 (1953), is instructive. There, a discharged

alternate juror told a deliberating juror that he heard that the defendant "runs a sporting house." *Id.* at 286. The trial court refused to set aside the verdict because it accepted the deliberating juror's testimony that she did not "believe [the comment]" and "had put [it] out of her mind." *Id.* at 286-87. This Court disagreed and granted a new trial. This Court explained that it could not agree that "the furtive hearsay statement concededly made … to a member of the jury, while that body was considering issues of fact submitted for its determination—including the defendant's character—did not prejudice defendant's substantial rights." *Id.* at 287. Similarly, in *Crimmins*, this Court ordered a new trial due to juror misconduct even though the trial court had credited the jurors' self-serving testimony that they decided the case impartially. 26 N.Y.2d at 324. As in *Cocco* and *Crimmins*, no reasonable fact-finder could have accepted Juror-12's self-serving assurances that her decision was based solely on the trial evidence.

Further, whether Juror-12 honestly believed the messages did not affect her impartiality is beside the point. *See, e.g., Arkwright v. Steinbugler*, 283 A.D. 397, 399 (2d Dep't 1954) ("No matter how conscientious they may be, jurors are but individuals, and may be subject to influences of which they themselves may often be unaware."); *People v. Santana*, 58 Misc. 3d 581, 589 (Sup. Ct. Bronx Cty. 2017) (external influences may "have a subtle or unconscious impact on the jurors"). And, as explained, Juror-12's cover-up prevented the trial court from

taking steps to "counteract or 'sterilize' any possible *subconscious* effect" that the messages had. *Crimmins*, 26 N.Y.2d at 324 (emphasis in original).

Federal courts similarly put no stock in a juror's self-serving statements. The Supreme Court has held that in "a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227 (1954); *see also United States v. Lawson*, 677 F.3d 629, 643 (4th Cir. 2012) (collecting cases from the First, Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits presuming prejudice "in cases involving external influences on jurors"). And once facts emerge that suggest a juror may be biased, a "juror's statements as to his or her ability to be impartial become irrelevant." *Parse*, 789 F.3d at 100-01 (citation omitted); *see also United States v. Mitchell*, 690 F.3d 137, 143 (3d Cir. 2012) (a juror's "assessment of her own ability to remain impartial is irrelevant" and "doubts regarding bias must be resolved against the juror") (citation omitted); *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000) (a juror's self-serving statements "without more, are insufficient").

B. The People's Arguments Are Unavailing

1. The People's attempt to salvage the verdict by trying to minimize the significance of each individual instance of misconduct repeats the trial court's error

of "address[ing] separately" "each of the allegations of juror misconduct." (R-26, 31-34). The issue is not whether particular acts of misconduct or improper communications individually are sufficient to require a new trial. Potential prejudice must be evaluated based on the "totality of the circumstances." *See, e.g.*, *People v. Maragh*, 94 N.Y.2d 569, 572 (2000) (reversing conviction due to misconduct of multiple jurors); *Brown*, 48 N.Y.2d at 394 (all of "the facts must be examined to determine … the likelihood [of] prejudice"); *People v. Romano*, 8 A.D.3d 503, 504 (2d Dep't 2004) (affirming grant of 330 motion based on "cumulative effect of the [jurors'] misconduct"); *People v. Forde*, 8 Misc. 3d 1005(A), at *22 (Sup. Ct. N.Y. Cty. 2005) (granting new trial because "one must look at the cumulative effect of [improper] behavior on the jurors' deliberations and verdict"), *aff'd sub nom. People v. Devereaux*, 32 A.D.3d 763 (1st Dep't 2006). The Appellate Division correctly analyzed the *cumulative* impact of Juror-12's misconduct in finding that Neulander was deprived of a fair trial. (R-2E).

2. The People cite various lower court cases refusing to set aside a verdict despite complaints about a juror's misconduct, but all of them are inapposite. None involved a juror who repeatedly violated the court's instructions, committed perjury, or tried to conceal her wrongdoing—much less all three of these improper acts. Several involved jurors who were not exposed to any external influences. *See United States v. Ganias*, 755 F.3d 125 (2d Cir. 2014) (cited Br.25) (juror

posted about trial and "friended" another juror on Facebook, but there was no evidence of premature deliberations), *abrogated on other grounds by* 824 F.3d 199 (2d Cir. 2016) (en banc); *People v. Cilberg*, 255 A.D.2d 698, 700 (3d Dep't 1998) (cited Br.26) (after defense rested, juror overheard another juror say "let's find this guy guilty and let's go home," but no other juror heard the statement and the supposed speaker denied saying it); *People v. Leonard*, 252 A.D.2d 740, 741 (3d Dep't 1998) (cited Br.30) (juror questioned why the defendant should be allowed to learn the jurors' names during voir dire); *People v. Rhodes*, 92 A.D.2d 744, 745 (4th Dep't 1983) (cited Br.43) (one juror supposedly commented to another about defendant's guilt prior to deliberations); *People v. Cabrera*, 305 A.D.2d 263 (1st Dep't 2003) (cited Br.43), *habeas denied sub nom. Cabrera v. Burge*, No. 04-Civ-6158(LAK)(FM) (S.D.N.Y. 2007), Dkt.14 (explaining that state trial judge had found "there was not one iota of evidence" that the juror spoke to anyone about the case).

And the other cases merely raise questions about whether a verdict was tainted because of jurors being exposed to external information about the case or social media posts. *See Santana*, 58 Misc. 3d at 588 (cited Br.19) (jurors viewed prejudicial video about a *co-defendant* who had already pleaded guilty); *People v. Hartle*, 159 A.D.3d 1149, 1154-55 (3d Dep't 2018) (cited Br.21) (jurors briefly discussed defendant's prior rape prosecution for which he was acquitted); *People*

v. Wilson, 93 A.D.3d 483, 485 (1st Dep't 2012) (cited Br.24-25) (third parties made unsolicited comments on a juror's Facebook post that "merely advised her friends that she was on a jury" but did not specify the case, and the juror did not respond to the comments); *People v. Martin*, 177 A.D.2d 715, 716 (2d Dep't 1991) (cited Br.26) (juror told other jurors that the defendant was "crazy" to make them feel better *after the verdict was rendered*);[4] *People v. Rios*, 26 Misc. 3d 1225(A) (Sup. Ct. Bronx Cty. 2010) (cited Br.26-27), *aff'd* 87 A.D.3d 916 (1st Dep't 2011) (juror sent Facebook "friend request" to witness who did not respond to the request); *People v. Jamison*, 24 Misc. 3d 1238(A) (Sup. Ct. Kings Cty. 2009) (cited Br.31), *aff'd* 95 A.D.3d 1236 (2d Dep't 2012) (juror discussed case at dinner but never stated name of case or defendant, and dining companions did not respond to the comments); *People v. Loliscio*, 187 A.D.2d 172, 179 (2d Dep't 1993) (cited Br.35) (jurors heard unsubstantiated rumor about defendant's prior acts); *People v. Williams*, 50 A.D.3d 472, 473-74 (1st Dep't 2008) (cited Br.35) (juror briefly

[4] The People repeatedly mischaracterize *Martin*. For example, they claim that the court denied the CPL 330 motion even though "a juror's friend told him that defendant was 'crazy' and had 'been in a whole lot of trouble before." (Br.30). What the juror actually said was that he "called his friend because he felt it would be impossible for him to deliberate in good conscience if his friend knew the defendant," but that "his friend advised him" that he did *not* know the defendant and the juror "did not learn anything about the defendant from his friend." 177 A.D.2d at 716. After the verdict, the juror told the other jurors that he "learned that the defendant was no good" in order to "relieve their pain [and] their anguish" from rendering a guilty verdict. *Id.*

discussed the trial with her friend, who she then learned was defendant's niece).

Unlike here, most of the People's cases did not even involve information about the defendant on trial, and the cases that did are distinguishable. For example, in *Williams*, the First Department found no prejudice because the improper communication "was, if anything, beneficial to [the] defendant." 50 A.D.3d at 474. In *Loliscio*, unlike here, the jurors did not conceal any misconduct: they immediately sent a note to the trial court reporting the rumor, providing the court an opportunity to hold a hearing and cure any potential bias prior to the rendering of the verdict. *Loliscio v. Goord*, 263 F.3d 178, 182 (2d Cir. 2001). In *Hartle*, the defendant's allegation of impropriety consisted of unsworn interviews with jurors suggesting that they "may have … briefly mentioned" defendant's prior prosecution and acquittal "in the jury room," but also revealing that the jurors "dismissed" "the prior matter" because they "knew that it could not be used in their deliberations." 159 A.D.3d at 1154-55.

3. Like Chicken Little, the People cry that the sky will fall if the decision below is affirmed. We recognize that a court should not lightly reverse a conviction because of juror misconduct. But doing so here would hardly "create troubling precedence [sic]" that would make it too easy to overturn verdicts in run-of-the-mill situations where jurors have "inevitable" but innocuous contact with the outside world. (Br.19-20, 38-39). The Appellate Division's ruling is entirely

consistent with the extensive body of law addressing a juror's innocuous exposure to social media or inadvertent improper communication, and its decision was narrow and tailored to the extraordinary facts of this case. The greater risk to the system would be to sanction the egregious misconduct here, by signaling that no adverse consequences will flow from such blatant contempt for the judicial system and the integrity of jury trials.

Other arguments are downright silly. For instance, the People say that "the majority's analysis" requires "all cellphone owners" to "purchase unlimited data storage to ensure that they are able to save every text message they ever send or receive." (Br.40). But the Appellate Division never suggested that jurors have to preserve all their text messages; it merely held that Juror-12's deliberate and selective deletion of improper messages was part of a pattern of concealment that undermined the integrity of the verdict. The only implications of that ruling are that jurors should refrain from sending text messages about the case and, if they receive such messages, tell the court instead of hiding them. That is not an onerous standard.

II. HARMLESS-ERROR ANALYSIS DOES NOT APPLY

The People's argument that any error should be disregarded because of supposedly "overwhelming proof of defendant's guilt" (Br.44) fails for three separate reasons. First, it is unpreserved. Second, it is well-settled that juror misconduct claims are *not* subject to harmless-error analysis. Third, the paper-thin "proof" at trial was hardly "overwhelming" in any event.

A. The People Failed To Preserve The Argument

The People never argued in either the trial court or the Appellate Division that evidence of Neulander's guilt was relevant to analysis of the juror misconduct claim. Rather, the People focused below on arguments that Juror-12's messages were "innocuous" and did not "rise to a level of prejudice warranting reversal." (People's 4th Dep't Br.56; R-3562-82). And the dissenting justices did not apply a harmless-error analysis. Accordingly, because the "argument was not raised before the trial court" and "not part of the [People's] … petition or reply papers before the Appellate Division" the "argument is unpreserved … preclud[ing] any merits discussion or disposition" in this Court. *Attorney General of State of N.Y. v. Firetog*, 94 N.Y.2d 477, 484 (2000); *accord People v. Erts*, 73 N.Y.2d 872, 874 (1988) (the "People having failed to raise that issue" to the lower courts, "it was not preserved for [Court of Appeals'] review"); *People ex rel. Murray v. N.Y. State Bd. of Parole*, 50 N.Y.2d 943, 944 (1980) (where an "issue was not raised in the

Supreme Court or at the Appellate Division, it may not be raised in [the] [C]ourt [of Appeals]").

B. The Application Of Harmless-Error Analysis Is Foreclosed By Binding Precedent

Even if this Court were to reach the issue, the People's argument is foreclosed by precedent. The Supreme Court has held that among the "basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876 (1989) (citation omitted). "[B]ecause the impartiality of the adjudicator goes to the very integrity of the legal system … harmless-error analysis cannot apply." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). In fact, an impartial jury is a prerequisite to treating *other* constitutional errors as harmless. *See*, *e.g.*, *Rose v. Clark*, 478 U.S. 570, 579 (1986) (harmless error applies "*if* the defendant had counsel *and was tried by an impartial adjudicator*") (emphasis added).

This Court agrees. "The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right." *People v. Crimmins*, 36 N.Y.2d 230, 238 (1975). The right to a fair trial, of course, "includes the right to an impartial jury" and this Court has not hesitated to grant a new trial without regard to the strength of the evidence of guilt where a juror was "grossly unqualified to serve." *Spencer*, 29 N.Y.3d at 309 (alteration omitted). Simply put, where "the defendant's right to a jury trial" is violated, "[h]armless

error analysis is inapplicable." *People v. King*, 27 N.Y.3d 147, 165-66 (2016) (Rivera, J. dissenting) (citing *People v. Anderson*, 70 N.Y.2d 729, 730-31 (1987); *Hildreth v. City of Troy*, 101 N.Y. 234, 239 (1886)).

Indeed, this Court has explained that "the other protections afforded the accused at trial" including "[t]he presumption of innocence [and] the prosecutor's heavy burden of proving guilt beyond a reasonable doubt" are "of little value unless those who are called to decide the defendant's guilt or innocence are free of bias." *Branch*, 46 N.Y.2d at 652. And this Court has previously "decline[d] the People's invitation to apply a harmless error analysis based on the proof of defendant's guilt" where the defendant has been "depriv[ed] of the constitutional right to a jury trial" because under those circumstances, "harmless error analysis is … unavailable." *Anderson*, 70 N.Y.2d at 730-31; *see also People v. Arnold*, 96 N.Y.2d 358, 368 (2001) (reversing conviction due to possibly biased juror without analyzing evidence of guilt).

Moreover, both the Supreme Court and this Court have repeatedly confirmed that defects related to the composition of the jury are structural and mandate reversal. For example, in *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986), the Supreme Court held that the unlawful exclusion of jurors based on race requires reversal "because it denies [the defendant] the protection that a trial by jury is intended to secure" and "undermine[s] public confidence in the fairness of our

system of justice." Similarly, this Court has held "that the replacement of a deliberating juror" absent a written waiver by the defendant "amount[s] to a violation … of the constitutional right to a jury trial" and requires reversal. *People v. Ortiz*, 92 N.Y.2d 955, 957 (1998); *accord People v. Ryan*, 19 N.Y.2d 100, 103 (1966).[5]

Given the abundance of binding precedent foreclosing their argument, the People's attempt to invoke the harmless-error doctrine is frivolous.

C. The Evidence Of Guilt Was Underwhelming

In any event, the evidence was hardly "overwhelming." (Br.44). The People concede that their case was purely circumstantial, but contend that circumstantial evidence "paint[s] a far stronger picture of guilt than direct evidence." (Br.45). This defies common sense and basic evidentiary principles. *Compare* EVIDENCE, Black's Law Dictionary (10th ed. 2014) ("direct evidence … proves a fact without inference or presumption") *with id.* ("circumstantial

[5] The People cite no appellate decision reviewing a CPL 330.30 claim that considers the strength of the evidence at trial in assessing prejudice, and we are aware of none. The *only* case the People cite (Br.45) is a Bronx County Supreme Court decision that does not actually support their position. In evaluating a CPL 330.30(2) motion, that court said it would consider, *inter alia*, "whether the overall evidence of guilt was otherwise substantial." *Santana*, 58 Misc. 3d at 589. But the court cited no authority for this statement and never actually did analyze the "overall evidence of guilt" in that case. Instead, the *Santana* court based its ruling on the fact that the "jurors … *consciously* … structured their deliberations to avoid" considering external information. 58 Misc.3d at 590.

evidence," is "based on inference and not on personal knowledge or observation"). The absence of *any* direct evidence from the People's case was a major weakness, not a strength.

And the evidence here was extremely weak. For example, Medical Examiner Stoppacher was the only expert who examined Leslie's body or the scene the day she died. Following his extensive examination and Leslie's autopsy, Stoppacher determined that Leslie died from a fall in the shower (R-1571; *see also* R-4168, 4172). He only changed his story nearly two years later—even though he admitted that no new factual evidence had been brought to his attention. (R-1589, 1610).

Further, after consulting with two blood-spatter analysts who could not corroborate their theory, the People subsequently called Karen Green as a blood spatter "expert." Green's testimony was based on bizarre experiments conducted in her home. In one experiment, Green placed a large rock on a mattress, covered it with a "rubber layer," "some wig hair," and blood (R-2150-51), and repeatedly struck it with an ax handle (R-2148-49). In another, Green "went into the shower and got [her] hair wet" and "put blood in [her] own hair." (R-2071-72). She then "pretty much turned [her] head back and forth left, right, left, … to recreate th[e] linear stains" seen on the bathroom doorjamb, suggesting to her that blood spatter was "consistent with cast-off" from Leslie's hair. (R-2072). Not only were

Green's astoundingly unreliable pseudo-scientific experiments deeply flawed and designed to "confirm" the People's theories, but she conceded that she did not even test innocent explanations for the bloodstains. (R-2147); *see, e.g.*, *Guzman ex rel. Jones v. 4030 Bronx Blvd. Associates L.L.C.*, 54 A.D.3d 42, 50 (1st Dep't 2008) (plaintiff's expert testimony was inadmissible because it failed to "even rule out" alternative explanations).

The People also make numerous misrepresentations, exaggerations, and extra-record assertions to bolster their meager proof. There are far too many to catalog here, but we provide a few examples below:

- The People claim that "Dr. Mary Jumbelic, the former Chief Medical Examiner for Onondaga County," "opined that Leslie's manner of death was a homicide," even though they concede that this "opinion was not presented to the jury." (Br.4).

- The People make the blanket assertion that "[t]he experts … concluded that Leslie suffered multiple blows or impacts," (Br.46), but three prosecution witnesses acknowledged that the injury could have been caused by a single impact to the head (R-1606, 1785, 2235), and that the wound could have been caused by the marble shower edge (R-1596-97, 1785, 2235).

- The People claim that "Dr. Baden thoroughly informed the jury on how a pathologist calculates time of death" and "placed Leslie's time of death between 4:15 a.m. and 5:15 a.m." (Br.48). But Baden's testimony relied on Leslie's body temperature, which the People's experts agreed was a "crude" tool to establish time of death. (R-1603, 1667). In fact, Medical Examiner Stoppacher acknowledged that Leslie could have died as late as 7:15. (R-1604).

- The People assert that Leestma's red-neuron testimony "puts the time of impact between 2:15 a.m. and 5:15 a.m." (Br.49). But *no* witness,

including Leestma, testified to that time period. Moreover, Leestma conceded that his conclusion was "something that pathologists can argue about," (R-1746), and his testimony was inconsistent with his own report, textbook, and testimony in a different trial. (R-4417-18, 4468, 4789, 4805).

- The People argue that Neulander's statements to law enforcement about "steam" in the shower were "lies" because "the steam shower had a maximum operating time of 20 minutes."[6] (Br.53-54). But Neulander never told investigators the steam function had been activated; he merely stated that the shower was steamy. (R-3886, 3892-93, 3897, 4029-30, 4034, 4059). This was unremarkable and consistent with the People's own evidence. (R-1454).

- The People misleadingly state that Neulander and Leslie "were in the process of separating." (Br.51). However, the evidence suggested only that Neulander and Leslie were "talking about a trial separation," (R-3870, 3917), and there was no evidence that Neulander was angry at Leslie. On the contrary, witnesses testified that the couple appeared to be having a "harmonious, enjoyable" time at a dinner the night before. (R-2294; *see also* R-2616).

Meanwhile, Neulander offered significant evidence that Leslie's death was caused by a fall in the shower. For example, Leslie's sister testified that Leslie suffered from Meniere's disease, an inner-ear disorder that causes vertigo. (R-2272-73). This was corroborated by Leslie's personal trainer of eight years, who testified that he had to adjust Leslie's workouts due to her vertigo. (R-2582-83). Vertigo causes "quite severe dizziness" and could "certainly" cause a person to fall. (R-1759). Leslie's vertigo had worsened in the years before her death. (R-

[6] The shower had a "steam" function that could create additional steam beyond what the hot water naturally produces. (R-2555-56).

1651, 2273, 2286, 2291, 2582-83).

In sum, the People lacked (1) physical evidence; (2) motive; (3) an eyewitness; and (4) reliable, consistent experts. Their case was far from overwhelming.

III. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

The Appellate Division did not reach Neulander's ineffective-assistance-of-counsel claim, but if this Court reverses the juror-misconduct ruling, it can affirm on this ground. This Court has broad authority to consider "[a]ny other question of law involving alleged or possible error or defect in the criminal court proceedings … which may have adversely affected" Neulander.[7] CPL 470.35(2)(b).

An ineffective assistance claim turns on whether the defendant received "meaningful representation," and requires the "absence of strategic or other legitimate explanations for counsel's alleged shortcomings." *People v. Wright*, 25 N.Y.3d 769, 779 (2015) (quotation marks and citations omitted). Whereas the federal standard derived from *Strickland v. Washington*, 466 U.S. 668 (1984), requires that "the deficient performance prejudice[] the defense," *id.* at 687, a "defendant need not fully satisfy the prejudice test of *Strickland*" to be entitled to

[7] The trial court's principal reason for denying Neulander's 440 motion was its erroneous assumption that the ineffective assistance claim was "based upon facts in the record which would permit review upon direct appeal" and therefore "almost entirely procedurally barred." (R-4407). The Appellate Division's consolidation of Neulander's direct appeal with the 440 appeal mooted that issue.

relief under state law; prejudice is a "significant but not indispensable element in assessing meaningful representation." *People v. Stultz*, 2 N.Y.3d 277, 284 (2004).

Because the main issue before this Court is Juror-12's misconduct, we lack the space to chronicle all of Neulander's trial counsel's deficiencies, but the details are in Neulander's briefs to the Appellate Division. (*See* Neulander's 4th Dep't Br. at 46-66; Neulander's 4th Dep't Reply Br. at 25-34). In short, Neulander's trial counsel failed to (1) object to any of the prosecutor's extensive misconduct in summation; (2) seek preclusion of Green's bizarre blood spatter testimony; (3) call two non-testifying prosecution experts who would have undermined the People's theory, based on counsel's misunderstanding of the law; and (4) effectively cross-examine Leestma, whose critical "red neuron" testimony directly conflicted with his prior statements. These errors, individually and cumulatively, deprived Neulander of his constitutional right to effective assistance of counsel.

1. Neulander's trial counsel failed to object to any of the prosecutor's extensive misconduct in his closing argument.[8]

The prosecutor engaged in four types of misconduct:

- He improperly expressed his own beliefs and opinions during

[8] Neulander also argued that the Appellate Division should vacate the conviction in the interests of justice based on the prosecutorial misconduct. CPL 470.15(6)(a). The Appellate Division did not reach this issue, and this Court lacks jurisdiction to review this claim. *See, e.g., Hecker v. State*, 20 N.Y.3d 1087, 1087 (2013). If this Court reverses the juror misconduct ruling, it should remand to the Appellate Division for consideration of the prosecutorial-misconduct claim.

summation. Among other things, the prosecutor baselessly claimed that he "kn[ew] Jenna thought her dad killed her mother" (R-2882) and that evidence about Leslie's vertigo was "silly nonsense" (R-2861). This was wholly improper. *See People v. Paperno*, 54 N.Y.2d 294, 301 (1981).

- The prosecutor improperly purported to reenact the steps Jenna testified she had taken while the 911 operator was on hold in an attempt to prove her testimony was false. (R-4637-38). This demonstration wrongfully created new evidence (by a biased, unsworn witness) about the plausibility of Jenna's testimony. *See, e.g., Stanley*, 87 N.Y.2d at 1001.

- The prosecutor repeatedly misrepresented important facts about the case. *See Wright*, 25 N.Y.3d at 780 ("statements that misrepresent evidence central to the determination of guilt" are out-of-bounds). Representative examples include: (1) the false characterization of a defense expert's time of death testimony (R-2869, 2880); (2) the unproven claim that there was no blood on an untested coffee cup (R-2870-71, 2874, 2880); (3) the unproven assertion that there was blood "under the pajama bottoms that Leslie Neulander supposedly laid" on the bathroom floor before taking her shower (R-2873); (4) the unproven claim that the bloodstains on the bedroom wall were "non diluted" (R-2874); and (5) the false claim that Neulander "lock[ed] [the bathroom] door" while he disposed of the evidence (R-2861-62) even though the door had no apparent locking mechanism (R-3737, 3747) and the evidence showed the door was closed, not locked (R-3878).

- The prosecutor improperly appealed to the jurors' sympathy: "Please, please, just try to hear [Leslie]. She's telling you who did this with her blood, her struggle and her wounds. Please listen." (R-2886-87). *See People v. Fisher*, 18 N.Y.3d 964, 967 (2012).

It is well-established that a defense attorney cannot sit idly by "when faced with a pattern of prosecutorial misstatements far afield from acceptable argument, such as statements that misrepresent evidence central to the determination of

guilt." *Wright*, 25 N.Y.3d at 780; *see also Fisher*, 18 N.Y.3d at 967 (new trial where counsel "fail[ed] to object to any, let alone all, of the prosecutor's egregiously improper departures during summation").

The trial court did not address any of the improper remarks other than the prosecutor's misleading reenactment of Jenna's testimony. Although the court acknowledged that this conduct was improper, it found that "counsel's failure to object to the re-enactment did not render counsel's performance ineffective in light of the totality of the representation provided to the defendant." (R-4406). Given that the trial court failed to even consider any of the other instances of prosecutorial misconduct, its determination should be accorded no weight.

2. Trial counsel failed to seek preclusion of Karen Green's testimony. There was no conceivable strategic reason for this inaction because, as noted above, Green's opinions were based on unreliable pseudoscience.

An expert's testimony must be based on reliable methods to ensure that the jury is not asked to consider junk science in which "there is simply too great an analytical gap between the data and the opinion proffered." *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 781 (2014) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Testimony about the result of an "experiment or test is admissible only if the conditions under which it is conducted are sufficiently similar to those existing at the time of the event to which they relate."

CAN Ins. Co. v. Carl R. Cacioppo Elec. Contractors, Inc., 206 A.D.2d 399, 401 (2d Dep't 1994); *accord People v. Cohen*, 50 N.Y.2d 908, 910 (1980) (reversing where People's expert failed to show a "substantial similarity between the skin and tissue of the test subject and that of a human victim"). And an expert "cannot reach [her] conclusion by assuming material facts not supported by evidence." *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646 (1959).

Green's testimony was based in part on an experiment in which she struck a "large rock" as a stand-in for a human head. (R-2150). But Green herself conceded that it is "very hard to replicate a human head" (R-2150), and that the rock she used was "likely too hard" (R-4584). In another experiment, Green relied on wetting her own hair with blood. (R-2071). But Green failed to account for the differences between her own hair and Leslie's hair. (R-2141). Green also assumed various facts not in evidence. For instance, she struck the large rock with an object similar to an ax handle (R-2149), even though no weapon was recovered and there was no evidence suggesting that a weapon similar to an ax handle was even available to Neulander. Indeed, Green conceded she was "*not* trying to re-create what happened" or to rule out alternative explanations (R-2150 (emphasis added)), but was instead attempting to "confirm" a theory favorable to the prosecution. (R-2147). In other words, her own testimony demonstrated that her opinions were not based on any reliable scientific method.

Trial counsel must be particularly vigilant with respect to expert testimony given "the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006). Accordingly, courts have repeatedly found that counsel's failure to object to this type of unreliable testimony constitutes ineffective assistance. *See, e.g.*, *People v. Barret*, 145 A.D.2d 842, 844 (3d Dep't 1988) (expert witness "simply explained that he performed 'tests' on the material sold to identify it as cocaine," and defense counsel made "no attempt … to explore whether these tests involved known standards requiring a foundational basis"); *People v. Rodriguez*, 94 A.D.2d 805, 806 (2d Dep't 1983) (failure to object to expert testimony based on unreliable tests).

Here, the trial court found that even if counsel had objected, Green's testimony would not have been precluded because "blood spatter interpretation is generally considered reliable." (R-4404). But the reliability of an expert's specific procedures constitutes a "separate and distinct" requirement than whether a field is "general[ly] accept[able]." *Parker*, 7 N.Y.3d at 446-47. Neulander's ineffective-assistance motion was based on trial counsel's "fail[ure] to argue that the *specific* defects in Green's methodology made her testimony inadmissible." (R-4667-68 (emphasis added)). No reasonable counsel would allow a prosecution expert to

testify that such bizarre and unscientific experiments proved guilt without voicing an objection.

3. Trial counsel was also ineffective for failing to call two experts whom the People had consulted but did not call as witnesses. Both experts had written reports that were critical of the investigation (R-4621, 4635), were inconsistent with the prosecution's theory (R-2881, 4622), and contained observations and conclusions favorable to the defense (R-2881, 4622, 4633-35).

Although the reports were exculpatory, trial counsel erroneously believed that he was legally unable to subpoena the experts to testify. (R-2758). In fact, trial counsel could have compelled them to testify about their opinions and conclusions expressed in their reports. *See People v. Greene*, 153 A.D.2d 439, 448 (2d Dep't 1990) (collecting cases). A defendant has a right to counsel who is "able to employ at trial basic principles of criminal law and procedure." *People v. Droz*, 39 N.Y.2d 457, 462 (1976). It is ineffective to make an important trial decision based on a flawed understanding of the law. *See People v. Nesbitt*, 20 N.Y.3d 1080, 1082 (2013); *see also People v. Jenkins*, 68 N.Y.2d 896, 897-98 (1986) (if counsel failed to use evidence based on mistaken belief that it was inadmissible, representation would be ineffective).

The trial court instead erroneously assumed that trial counsel "did not want to" call the experts. (R-4405). The court also suggested that trial counsel's

decision was tactical because he may have wanted to seek a missing witness charge. (R-4405). If so, this was not a reasonable strategy, because such a request to charge was doomed to (and did) fail precisely because counsel "could have called [them] as witnesses." (R-2777).

4. Trial counsel also failed to adequately cross-examine Dr. Jan Leestma, who testified that the appearance of red neurons in Leslie's brain showed she was injured "at least a couple of hours" before she died. (R-1746; Br.48-49). This testimony was crucial to the People's theory that Neulander "had hours after he inflicted the debilitating head injury to stage the slip-and-fall and discard the evidence that he could not cover-up by moving Leslie's body." (Br.49). The prosecutor highlighted this testimony in his summation (R-2881), and it apparently resonated: the jury requested a read-back of Leestma's "testimony under direct examination regarding red neurons" (R-3017).

Effective representation requires counsel to meaningfully cross-examine key witnesses. *See People v. Caldavado*, 26 N.Y.3d 1034, 1036 (2015). This includes using prior inconsistent statements to impeach prosecution witnesses. *See People v. Cantave*, 83 A.D.3d 857, 858-59 (2d Dep't 2011) (new trial where counsel "made no attempt to impeach" with "inconsistent statements"); *see also People v. Arnold*, 85 A.D.3d 1330, 1333 (3d Dep't 2011); *People v. Raosto*, 50 A.D.3d 508, 509 (1st Dep't 2008).

Trial counsel failed to impeach Leestma's red-neuron testimony using Leestma's own report and textbook, which both stated that red neurons could appear within an hour, a significantly shorter period of time than, as he testified at trial, "at least a couple of hours." (R-4417; *see also* R-4418, 4468). The report was provided to trial counsel almost a year before the trial began, and trial counsel had Leestma's textbook with him at trial. (R-1761).

Moreover, a defendant's right to effective representation entitles him "to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial." *People v. Bennett*, 29 N.Y.2d 462, 466 (1972); *accord Droz*, 39 N.Y.2d at 462. Even minimal investigation here would have yielded additional cross-examination material. For instance, during his testimony at the highly-publicized murder trial of Michael Peterson, Leestma agreed that "red neurons can begin to develop in as little as thirty minutes" and that the development of red neurons in that time frame was "supported by the literature." (R-4789, 4805; *see also* R-4792-93, 4796-97, 4803-04). Counsel could easily have learned about this testimony, which was discussed in a brief available online. (R-4440).

The trial court missed the point entirely. It concluded that counsel was not required to "investigate comprehensively every lead or possible defense" (R-4400),

even though counsel already possessed Leestma's report and textbook. The court also misread the Peterson trial transcript and mistakenly concluded that Leestma's testimony in that trial was "relatively consistent with his testimony in the instant case" (R-4401), even though it was diametrically opposed.

5. Finally, even if counsel's errors do not individually warrant a new trial, their cumulative effect rendered his representation ineffective under both state and federal standards. A defendant has the "right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense and who is familiar with, and able to employ at trial basic principles of criminal law and procedure. Whether counsel has adequately performed these functions is necessarily a question of degree, in which cumulative errors particularly on basic points essential to the defense, are often found to be determinative." *Droz*, 39 N.Y.2d at 462 (internal quotation marks and citations omitted); *accord People v. Oathout*, 21 N.Y.3d 127, 132 (2013); *Strickland*, 466 U.S. at 695.

This was a murder case in which Neulander's freedom hung in the balance. He was entitled to a lawyer who did not make such basic mistakes.

CONCLUSION

For the reasons set forth above, the Appellate Division's decision should be affirmed.

Dated: New York, New York
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Alexandra A.E. Shapiro
Jacob S. Wolf
Shapiro Arato LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110
(212) 257-4880

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Defendant-Appellee M. Robert Neulander certifies pursuant to 22 NYCRR § 500 that the foregoing brief contains 11,393 words, excluding the parts of the brief exempted by 22 NYCRR § 500 according to the Word Count feature of Microsoft Word 2016.

Dated: January 14, 2019

Alexandra A.E. Shapiro