To Be Argued By:
ALEXANDRA A.E. SHAPIRO
Time Requested: 15 Minutes

Onondaga County Indictment No. 14-635-1
Onondaga County Clerk's Index No. 14-0737

New York Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

DOCKET NOS.
KA16-02210
KA16-01293

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

M. ROBERT NEULANDER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from a jury's conviction of Dr. Robert Neulander, a prominent and well-respected obstetrician in Syracuse, who was charged with second-degree murder of his wife of 30 years, Leslie Neulander. On September 17, 2012, Leslie died at the couple's home as a result of a significant head injury. After examining her body at the scene and performing an autopsy, the Medical Examiner concluded that she had died as a result of an accidental fall in the shower. There was ample evidence supporting this conclusion, as well as Neulander's account of discovering Leslie lying on the shower floor and moving her to the bedroom, where he attempted unsuccessfully to resuscitate her. Among other things, Leslie had a history of vertigo, a condition that can cause people to lose their balance and fall.

The People's case was paper-thin at best, and entirely circumstantial. The conviction should be reversed for insufficiency or, at the very least, because it was against the weight of the evidence. There was no eyewitness, no murder weapon, no realistic motive, and no history of violence between the Neulanders. The People's case was premised on expert testimony intended to disprove Neulander's account. Yet four of their expert witnesses never examined Leslie's body and relied on photographs of an incompletely processed scene. Their other expert was the Medical Examiner, who testified that he now believed a homicide occurred, even though he admitted that no new facts had come to light and he could not explain why he had changed his mind nearly two years after the incident.

Notably, the People did not call two of their experts (Lawrence Knapp and Peter Pizzola), who had analyzed blood at the scene and found the evidence inconclusive and improperly preserved. Instead, they called a third "blood spatter" analyst (Karen Green) who performed a series of odd experiments in her home, using her own blood and various props that bore little resemblance to the actual evidence; Green never tested whether she could rule out the defendant's account, but nonetheless declared she was certain that Leslie had died from a violent attack. Although expert testimony based on such a flawed methodology is inadmissible, Neulander's attorney never sought to preclude Green's testimony.

At a minimum, Neulander is entitled to a new trial for three independent reasons:

First, he was deprived of his right to an impartial jury by egregious juror misconduct. This trial

was the subject of constant local media coverage that portrayed Neulander in a negative light. As a result, the court repeatedly admonished the jurors not to communicate about the case with others, to avoid the media coverage, and to report any communications or media exposure to the court. Following a post-trial hearing, however, the court found that a juror had repeatedly disregarded these instructions. This juror had engaged in extensive text messaging about the case, in which, *inter alia*, her father advised her to "make sure [Neulander's] guilty," one friend told her multiple times that the defendant was "scary," and another who had "read so much" about the case suggested that a defense witness was lying. The juror had attempted to conceal her misconduct by providing a false affidavit and deleting many messages from her mobile phone. Her misconduct was so extensive, particularly in light of her dishonesty and destruction of evidence, that it plainly prejudiced Neulander's right to an impartial jury. The trial court's conclusion that there was no risk of prejudice, even though it found she had engaged in and attempted to conceal misconduct and had disregarded instructions, should be reversed.

Second, the prosecutor engaged in extensive misconduct in his closing argument. He made numerous improper, inflammatory and prejudicial remarks, including: expressing his personal opinions about defense witnesses and evidence; acting as an unsworn witness; misrepresenting the evidence; urging the jury to consider impeachment material as substantive evidence; and appealing to the jury's sympathy. The Court of Appeals and Appellate Division have reversed convictions where a prosecutor engaged in just one of these types of misconduct, even where, as here, the defense attorney failed to object. Since the misconduct was extensive and permeated the entire summation, the conviction should be reversed in the interest of justice.

Third, Neulander was deprived of his constitutional right to the effective assistance of counsel under the New York State and United States Constitutions. His trial counsel's performance fell far short of the "meaningful representation" to which Neulander was entitled, in several significant ways:

- Counsel failed to object to *any* of the prosecutor's misconduct in the closing, even though many of the improper remarks were plainly sufficient by themselves to require a new trial under controlling caselaw.

- Counsel never sought to preclude Green's blood spatter testimony even though her experiments

ignored relevant variables, made unfounded assumptions, and failed to test alternative explanations—all problems that rendered her opinion inadmissible under controlling authorities.

- Counsel failed to call the two prosecution experts (Knapp and Pizzola) who had concluded that they could not rule out innocent explanations for the blood evidence and that deficiencies in the investigation made a definitive conclusion impossible. He admitted that he did not call them because of a legal error. By definition, this is legally deficient performance and cannot reflect any reasonable strategy.

- Counsel failed to cross-examine one expert (Jan Leestma) on critical testimony related to what time Leslie had died, even though his testimony was materially inconsistent with prior statements in his report, his textbook, his testimony at another trial, and other work in the same field.

Individually and collectively, these mistakes amounted to ineffective ssistance that tarnished the fairness of the entire trial.

QUESTIONS PRESENTED

1. Whether the verdict as to the murder count was supported by insufficient evidence or otherwise against the weight of the evidence, because the proof was entirely circumstantial and a reasonable juror could not exclude the possibility of an accident?

The trial court answered no as to sufficiency, and did not address weight.

2. Whether the verdict as to the evidence-tampering count was supported by insufficient evidence or otherwise against the weight of the evidence, because the People's theory that physical evidence was altered or destroyed was based on unverified speculation?

The trial court answered no as to sufficiency, and did not address weight.

3. Whether a new trial is required based on juror misconduct, because during trial a juror communicated with friends and family members about the defendant and defense witnesses, lied to the court about her communications, and deleted evidence of her misconduct?

The trial court answered no.

4. Whether the verdict should be reversed in the interest of justice because in his closing argument the prosecutor improperly expressed personal opinions, acted as an unsworn witness, misrepresented the record, urged substantive use of impeachment material, and appealed to the sympathy of the jury?

The trial court did not answer this question.

5. Whether trial counsel provided ineffective assistance by failing to: object to more than a dozen instances of prosecutorial misconduct during closing argument; object to the admission of methodologically flawed expert testimony; call witnesses with exculpatory testimony based on a misunderstanding of law; and impeach a key prosecution witness with prior inconsistent statements?

The trial court answered no.

STATEMENT OF THE CASE

A. Procedural History

On or about June 20, 2014, Dr. Robert Neulander was indicted on two counts in County Court, Onondaga County, New York. Count One charged murder in the second degree in violation of P.L. §125.25(1); Count Two charged tampering with physical evidence in violation of P.L. §215.40(2). (Record on Appeal at 37 ("R-37")).

Trial before the Honorable Thomas J. Miller, County Court Judge, commenced on March 16, 2015. The trial took place amidst a media frenzy, with constant coverage on television and a well-trafficked local website. *See* Syracuse.com, http://search.syracuse.com/robert+neulander/ (listing more than 250 news stories published on site about Neulander's prosecution).

Neulander was represented by Edward Menkin, Esq. at trial. Trial counsel moved to dismiss both counts on the basis of insufficient evidence at the close of the People's case, and renewed his motion at the end of the defense presentation. (R-2257-60, 2264, 2738-40). The court denied these motions. (R-2265, 2740). On April 2, 2015, the jury returned a verdict of guilty on both counts. (R-3075).

On May 11, 2015, proceeding with new counsel, Gerald Shargel, Esq., Neulander moved for a new trial pursuant to C.P.L. §330.30 based on juror misconduct that the defense learned about after the verdict. (R-3080). On July 27, 2015, after an evidentiary hearing, the Court denied the motion. (R-13).

On July 30, 2015, the trial court sentenced Neulander principally to concurrent terms of 20 years' to life imprisonment on Count One and one-and-one third to four years' imprisonment on Count Two. (R-12). At sentencing, Leslie Neulander's siblings and children expressed their belief in Neulander's

innocence and asked the court to impose the lowest possible sentence. (R-3662-66; Sentencing Documents at 73-92 (Victim Impact Statement)).

Neulander timely filed a notice of appeal. (R-3).

On January 20, 2016, before perfecting his direct appeal, Neulander moved the trial court for an order pursuant to C.P.L. §440.10 vacating the conviction and granting him a new trial based on ineffective assistance of counsel. (R-4409). On June 27, 2016, the court denied the motion. (R-4395).

On July 25, 2016, Neulander sought leave to appeal the denial of his 440 motion; the People opposed. On November 2, 2016, the Honorable Nancy E. Smith, Associate Justice of the Appellate Division, Fourth Department, determined that the case presented "questions of law or fact that ought to be reviewed by this Court" and granted Neulander's application. (R-4389).

On November 9, 2016, Neulander filed a notice of appeal of the 440 motion. (R-4391).

On December 12, 2016, this Court granted Neulander's motion to consolidate the direct appeal and the appeal of the 440 motion. (R-4855).

B. Factual Background

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

The People's case was entirely circumstantial, and the evidence was equivocal at best. 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 and a blood spatter witness. Only one expert visited the scene on the day of Leslie's death; the others relied heavily on scene photographs. Other prosecution witnesses included emergency personnel and officers who responded to the scene; a scientist responsible for confirming that certain bloodstains matched Leslie's DNA; and a friend who had recently observed

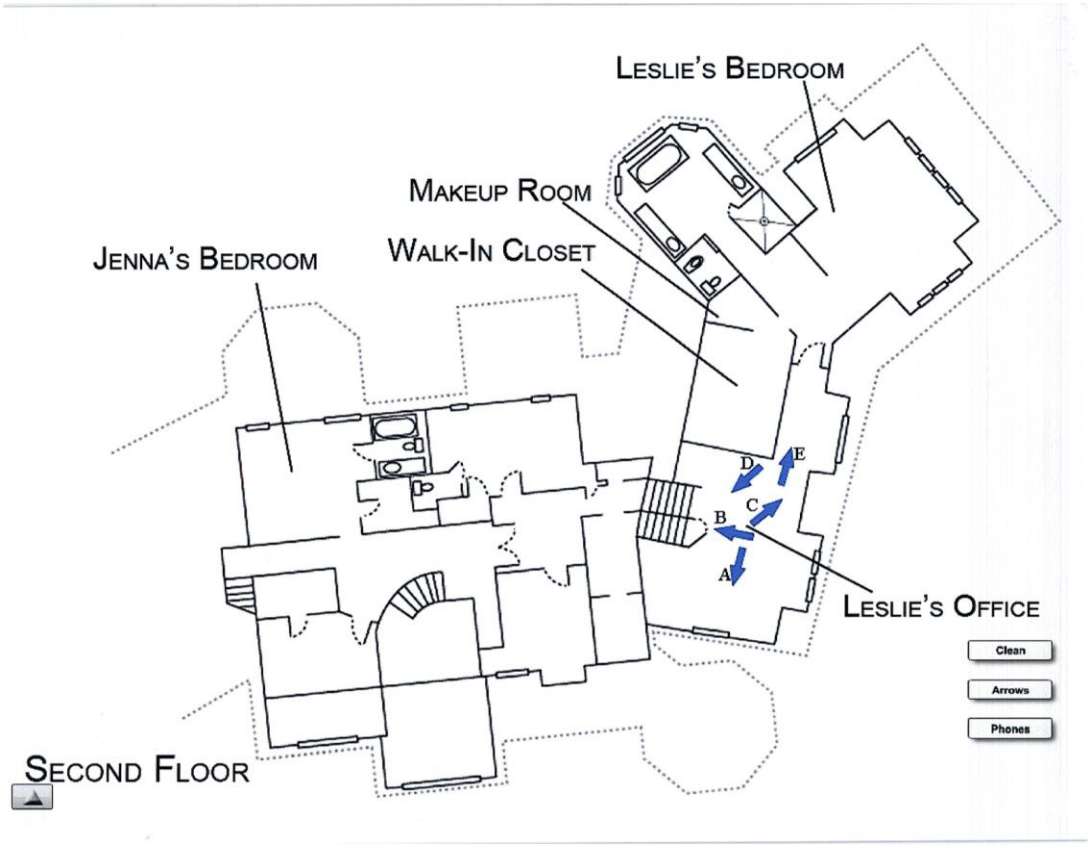
Leslie fall at a wedding. The People also introduced statements that Neulander had made to investigators.

The defense called a medical expert and a blood spatter analyst as well as various individuals close to Leslie, including her two adult children, her sister, two friends with whom the Neulanders had spent the evening before Leslie's death, and her personal trainer.

1. Scene

The evidence at trial focused on what had happened in the master suite on the second floor of the Neulanders' home at the time of Leslie's death. To understand the trial evidence, familiarity with the layout of the rooms on that floor is necessary. The master suite includes (1) a large bathroom containing an enclosed water closet; (2) the bathroom entryway, a short, hallway-like space; (3) a walk-in closet just outside the bathroom; and (4) the bedroom itself. The bed was on the east side of the bedroom, opposite the walk-in closet and a large armoire.

There was an office outside the master bedroom. The Neulanders' daughter Jenna's bedroom was in the house's other wing. The floor plan below (R-3705) shows the layout:



2. Neulander's Account

Neulander did not testify at trial. However, the People introduced his statements to law enforcement personnel during two interview sessions. He explained that he, Leslie, and their two adult children had dinner at the home of family friends the night before Leslie's death. (R-3970-71). When the couple and their daughter Jenna, who lived with them, arrived home, Neulander retired to a guest bedroom. (R-3871).

The next morning, Neulander woke up between 6:00 and 6:30 and, as he often did, made a 15-minute drive to Green Lakes and went for a run. (R-3872-73, 4042). He returned home between 7:00 and 7:30. (R-3877, 4042). He brewed coffee and at around 8:00 or earlier, brought a cup 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 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 floor of the shower. (R-3886, 4049, 4054).

Neulander attempted to resuscitate Leslie in the bathroom 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 ran back to Leslie and began to carry her from the bathroom, which had a hard marble floor, to the bedroom, which was carpeted. (R-3994, 4058). When Neulander attempted to resuscitate Leslie in the area between the armoire and walk-in closet, he realized that she was bleeding from a wound on her head. (R-3895-96, 4059). He eventually moved Leslie near the bed, where a large bay window provided greater light, and remained there until emergency personnel arrived minutes later. (R-3896, 4060).

3. 911 Calls And Jenna's Testimony

Recordings of 911 calls show that at approximately 8:25 Jenna called 911 and reported that her father had found her mother lying on the floor of the shower. (People's Exhibit 1 (electronic exhibit)). As instructed by the 911 operator, Jenna put the call on hold and went to the next room. (*Id.*). She

subsequently reconnected to the operator and screamed, "Oh my God, there is blood everywhere," and, a few seconds later, "Oh my god, oh my god, my mother! My mommy! Dad, put her down. Her neck might be broken." (*Id.*). For the next minute and fifteen seconds, the recording was unintelligible except for interspersed cries from Jenna and Neulander. (*Id.*). Almost three minutes into the call, Jenna told Neulander not to move Leslie. (*Id.*). Jenna made a second 911 call at approximately 8:28 from a different phone. (*Id.*).

Jenna testified that she made the first 911 call from a phone in the office adjoining the master suite. (R-2629). After putting the 911 operator on hold, Jenna ran to the water closet and picked up another phone. (R-2631-32). She left the water closet, holding its phone, to assist her father, who was already carrying Leslie through the bathroom entryway. (R-2634). Jenna testified that she attempted to reconnect to the call, but that "no one was answering." (R-2662). As she was helping move Leslie, Jenna dropped the water closet phone, and as her father placed Leslie on the floor near the armoire, she retrieved the cordless phone from the walk-in closet behind her. (R-2635-37, 2661-62). Jenna helped her father try to resuscitate Leslie and then left the bedroom to call her uncle, Ovid. (R-2639, 2641). She returned to the bedroom as her father was moving Leslie toward the bed and, as reflected on the 911 recording, pleaded with her father to stop moving her. (R-2642; People's Exhibit 1). Jenna placed the second 911 call downstairs. (R-2644).

4. Arrival Of Emergency Personnel

At approximately 8:31, emergency medical personnel and police officers arrived at the home. Five emergency responders attended to Leslie in the area between the bed and the south bedroom wall. (R-1279-80). They moved her once so that they would have more space to work. (R-1264). Leslie was pronounced dead at 8:42. (R-1268). Afterward, at least three emergency responders began to search the master suite, including the bathroom, for medications that Leslie might have taken. (R-1249, 1289, 1308). At least three members of the Dewitt Police Department did a walk-through of the master suite before Officer Michael Kurgan began to photograph the scene sometime after 9:09. (R-1348, 1443, 1494). In total, more than 21 people moved through the scene that morning before and while Kurgan was

taking pictures. (R-4205).

Kurgan's photographs depicted various bloodstains in the master suite. These bloodstains were 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. Although the prosecutor maintained that Neulander carried certain bloodied items downstairs and out of the house, there was no blood found anywhere outside of the master suite.

5. Leslie's Vertigo

Leslie's sister, Joanne London, testified that for many years Leslie had suffered from Meniere's disease, an inner ear disorder that causes vertigo. (R-2272-73). This condition causes people to lose their balance. As one of the People's medical experts explained, vertigo involves "essentially turning, feeling like you're turning topsy-turvy, often experiencing quite severe dizziness, disorientation and so forth" and could "certainly" cause a person to fall. (R-1759). Leslie had experienced several episodes of vertigo in the year and a half leading up to her death. (R-2273). Philip Miller, a longtime friend of the Neulanders, testified that during a trip their families took to Israel earlier in 2012, Leslie fell on a boardwalk and injured her arm. (R-2286, 2291; *see also* R-1651 (London)). Leslie's personal trainer of eight years, Terry Wilson, testified that he adjusted Leslie's workouts because of her vertigo, which had worsened in the year before her death. (R-2582-83).

6. Lack Of Motive

The prosecution was unable to establish any realistic motive. The People introduced evidence that Neulander received a payout of $500,000 on Leslie's life insurance policy, which had been taken out ten years before Leslie's death. (R-2263). But that sum was insubstantial compared to Neulander's income from his medical practice, as well as his net worth, which was approximately $4 to $6 million in 2012. (R-2735). Although the Neulanders were in the process of a trial separation and had been sleeping in different bedrooms (R-3871, 3917-19), there was no evidence that Neulander was angry at Leslie. On the contrary, witnesses who attended the Rosh Hashanah dinner the night before Leslie died testified that

the couple appeared to be having a "harmonious, enjoyable" time. (R-2294 (Miller); *see also* R-2616 (Jenna)).

7. The People's Expert Testimony

The People called five expert witnesses: Robert Stoppacher, the Medical Examiner who performed the autopsy; Karen Green, a "blood spatter" analyst from Pullyap, Washington; two forensic pathologists, Michael Baden and Tracy Corey; and Jan Leestma, a neuropathologist. This testimony suffered from serious flaws, as explained below.

a. *The Medical Examiner's unexplained about-face.*

After visiting the scene and performing an autopsy, Medical Examiner Stoppacher opined that Leslie died from an accidental fall. He changed his mind nearly two years after Leslie's death—after the prosecutor decided to indict Neulander—even though no new facts had come to light.

Stoppacher was the only expert who examined Leslie's body or the scene the day she died. He arrived at approximately 10:09 a.m., spent about an hour on the premises, and performed an autopsy later that day. (R-1519, 1558, 1561). At the scene, he observed a five-inch laceration on the right side of Leslie's head with a fracturing of the skull underneath. (R-1562). He also observed a related pooling of blood behind Leslie's left eye—a "contrecoup" injury, which looked like a black eye, but actually reflected bleeding from a skull fracture located 180 degrees from Leslie's principal head wound (the "coup" injury). (R-1562, 1564-67). Stoppacher also identified slight bruises on Leslie's left hand, face, and right upper arm and shoulder, as well as petechial contusions (*i.e.*, patchy areas of bruising) on Leslie's left and, to a lesser extent, right cheeks. (R-1562-63). During the autopsy, Stoppacher observed fracturing of the left lateral element of Leslie's fourth cervical vertebra, which was not visible in an x-ray. (R-1567, 1595).

Stoppacher issued a final autopsy report on December 13, 2012. (R-1579). He concluded "to a reasonable degree of medical certainty" that Leslie had died from "blunt force head injuries as the result of a fall from standing height" in the shower. (R-1571; *see also* R-4172). This was consistent with his conclusion in the death certificate he issued on September 17, 2012, stating that Leslie died from an

"accident," *i.e.*, "Fall from standing height," "Unwitnessed fall in shower." (R-4168). Stoppacher could have listed Leslie's manner of death as "undetermined circumstances" or "pending investigation" had he had "any doubt or reservation" about his conclusion, but he chose not to do so. (R-1585).

At trial, however, Stoppacher testified that Leslie died from "an injury or blow to the head" because, he claimed, "additional information was brought to light as far as the potential that some impact or injury occurred outside the shower." (R-1572). However, he never explained what that "additional information" was, and on cross-examination he admitted that no new *factual* evidence had been brought to his attention. (R-1589).

Stoppacher apparently changed his testimony to conform his opinion to the views of other prosecution experts retained to testify that Leslie's death was a homicide. In March 2013, the prosecutor, along with an ADA, four police officers, and two other prosecution consultants (Baden and Mary Jumbelic, who never testified), visited Stoppacher at his office. (R-1610). Stoppacher testified that these individuals "provided information and had some concerns about the death of Leslie Neulander" and suggested that "it may not have been the result of a fall in the shower." (R-1610). Subsequently, on June 20, 2014—the same day the indictment was returned—Stoppacher changed the conclusion in his autopsy report from "accident" to "homicide." (R-4182; *see also* R-4170 (amended death certificate)). His amended report said that the findings were changed "in light of additional investigative information and new forensic evidence" but, again, did not identify what evidence had supposedly caused him to change his medical opinion. (R-4183).

Stoppacher's unexplained change is particularly troubling because this prosecutor apparently has previously lobbied other medical examiners to change their opinions to better fit his theories. He appears to have persuaded the medical examiner in one case to change his opinion about the time of death to get around the defendant's alibi. *Rivas v. Fischer*, 780 F.3d 529, 536-37 (2d Cir. 2015) (reversing and remanding with instructions to grant habeas relief). The medical examiner's sudden about-face in *Rivas* occurred soon after the prosecutor's election and almost six years after the case had gone cold. *Id.* at 536. A different medical examiner alleged that he was fired after he refused to conform his medical opinion to

this prosecutor's theory of guilt in multiple cases, two of them involving homicides. *See* John O'Brien & Jim O'Hara, "Fired Medical Examiner Files Suit Against Some Top County Officials," *Syracuse Herald-Journal* (Jan. 31, 1998), *available at* https://newspaperarchive.com/syracuse-post-standard-jan-31-1998-p-1/; *Menchel v. Fitzpatrick*, No. 5:98-cv-00149 (N.D.N.Y).

b. *Green's testimony was based on flawed unscientific experiments about hypothetical scenarios unrelated to the actual evidence.*

It was difficult for any "blood spatter" analyst to reach a definitive conclusion about what might have happened because evidence recovered from the scene of the incident was not collected or processed in a reliable way. Michael Kurgan, the evidence technician, admitted that he failed to measure relevant bloodstains and instead estimated stain sizes more than 24 hours later based on his memory of the scene. (R-1515-16, 1518). He testified that he would have needed 20 additional hours to complete the measurements relevant to the blood spatter analysis and that his processing was cut short because Leslie's death was declared an accident. (R-1538-39). Kurgan also admitted that the police failed to collect many relevant items, including Leslie's robe, the bedding and pillows, and a coffee cup found on Leslie's nightstand. (R-1532-36).

The police also failed to ensure that the evidence was not contaminated by medical personnel attempting to resuscitate Leslie and police officers walking around the area. (R-2339 (Kish)). Consequently, there was no way to know whether particular bloodstains had been deposited in the places in which they appeared in photographs before or after the emergency personnel arrived at the scene. (R-2339-40 (Kish)).

For this reason, neither of the two blood spatter experts the prosecutor initially consulted but never called at trial, Peter Pizzola and Lawrence Knapp, could reach a definitive conclusion or rule out an accident. Pizzola opined that analysis of the blood evidence was "hindered since the scene was incompletely investigated." (R-4316). He acknowledged that Neulander's movements could explain the blood spatter around the bed. (R-4317). Knapp opined that the blood spatter went from the bathroom to the bedroom, which was consistent with Neulander's account. (R-4332). Knapp also concluded that the

bedside spatter patterns were inconclusive and did not appear to have been made by an instrument. (R-4333-34).

After Pizzola and Knapp provided their inconclusive reports, the People retained and subsequently called Green as a blood spatter witness. She testified based upon "experiments" performed in her home, which supposedly gave her opinion "scientific[]" value. (R-1565).

The primary focus of Green's testimony was the cause of the bloodstains in the area around the bed. Green testified that she was "100 percent sure in her opinion [that] the best explanation for th[is] spatter" was that Neulander struck an already-open wound on Leslie's head with a heavy object while Leslie was on or near the bed. (R-2099; *see* R-2153). The basis for her opinion was a bizarre experiment designed to "confirm" the plausibility of Green's hypothesized attack. (R-2147). 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 from different positions (R-2148-49). Green testified that she was able to reproduce bloodstains "similar" to those found at the scene. (R-2148). Yet, as Green herself admitted, it is "very hard to replicate a human head" (R-2150), and no weapon resembling an ax handle was ever recovered (or identified as missing) from the scene. The experiment had little relation to the known facts, and Green did not testify to the quantity of spatter that her experiment produced or whether her staging left bloodstains in areas that were blood-free in the scene photographs.

Green also failed to test alternative explanations for the bedside bloodstains. For example, Green did not consider whether the stains could have been caused by Neulander's moving Leslie into that area (as Knapp's report suggested), by Neulander's removal of a bloody garment after he left Leslie's side (as suggested by Neulander's statements and Pizzola's report); or by the actions of the emergency responders who attended to Leslie (as suggested by Kurgan's testimony). Because Green did not test these scenarios, she had no basis on which to testify, with "100 percent" certainty, that her explanation was the "best." (R-2099).

Green also testified that the bloodstains in the bathroom entryway could not be explained by a "scenario in which Leslie Neulander fell in the shower and then was simply carried or moved from the

bathroom to the site of the bedroom." (R-2102). Green claimed that the bloodstains were caused by Leslie's "stumbling around and contact[ing] the wall" (R-2074), and purported to test this hypothesis through additional experimentation. Green first "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). While in the shower, she also applied blood to her arm and testified that she was able to approximate two transfer stains on the entryway wall by placing her hair and upper arm again the wall. (R-2074-75). But Green did not consider particular characteristics of Leslie's body or the scene in setting up her experiment, and used blood mixed with water even though she said she was trying to determine what might have happened *before* Leslie was in the shower. Green also failed to test whether Neulander's moving Leslie through the narrow bathroom entryway could have caused the bloodstains. Without testing this alternative explanation, Green had no basis to reject it at trial.

c. *Other weaknesses in the prosecution's expert testimony*.

The other experts were inconsistent with one another and the defense expert on critical points like the number of impacts that could have caused the fatal injury and the time of death.

Injuries. Baden, Leestma, and Corey testified that Leslie's head injury did not result from a fall in the shower. Baden and Corey testified that the injury was more severe than they would expect from such a fall (R-1626 (Baden); R-2224 (Corey)), and Baden said that irregularities in the skull injury suggested "at least two, probably three blows" (R-1625; *see also* R-1739 (Leestma) (suggesting multiple impacts)). But three prosecution witnesses acknowledged that the injury could have been caused by a single impact to the head (R-1606 (Stoppacher); R-1785 (Leestma); R-2235 (Corey)), and that the wound could have been caused by the marble shower edge (R-1596-97 (Stoppacher); R-1785 (Leestma); R-2235 (Corey)). The witnesses all agreed that there was only one blood-letting injury. (R-1605 (Stoppacher); R-2231 (Corey); R-2527-28 (Spitz)). Thus, if there were multiple impacts, Neulander would have had to strike Leslie multiple times in exact same location (R-1607 (Stoppacher)), which was highly unlikely.

And prosecution witnesses agreed that a contrecoup injury is consistent with a fall. (R-1565-66 (Stoppacher); R-1778-79 (Leestma); *see also* R-2228 (Corey)).

Daniel Spitz's testimony for the defense further undermined the People's experts. Spitz, a forensic pathologist, is the Chief Medical Examiner for Macomb and St. Clair Counties in Michigan, and the co-author of the leading book on the subject. He opined that Leslie died as a result of blunt force head injuries sustained during an accidental fall. (R-2490). He explained that there was superior undermining on the head injury, most indicative of force coming from below and moving up—suggesting that Leslie was injured by the hard edge of the shower bench—and that she had a contrecoup injury, which occurs in falls. (R-2529-30, 2532). When a contrecoup results from a "blow, as opposed to a moving head striking a non-moving object" as in a fall, the contrecoup is much smaller than what Leslie exhibited. (R-2579).

The testimony about the significance of Leslie's other injuries was similarly equivocal. As Spitz explained, the other injuries were very minor, and could well have been present before September 17. (R-2522, 2527). Baden had testified for the People that the cheek injury could have been caused by the imprint of a pattern on bedding material if her cheek had been forced into the bedding by a blow to the head. (R-1628-29; *see also* R-1734 (Leestma) (speculating that cheek injury could have come from the imprint of a weapon or some kind of surface)). Spitz explained, however, that it could well have come from her face hitting the shower drain, especially due to her skin condition at the time. (R-2506-10). Leslie had very sensitive skin following a "skin peel" plastic surgery procedure that she had undergone just a few weeks earlier and thus was more susceptible to injury than normal. (R-2515, 4194-97, 4228). The prosecution experts ignored this fact. (R-1628-30 (Baden); R-1786 (Leestma, expressly disavowing knowledge of "condition of Leslie Neulander's facial skin prior to her death")). Spitz further explained that her right cheek injury did not reflect any pattern and could have resulted simply from being rubbed against coarse surface such as the carpet. (R-2518).

Baden claimed the minor injury to Leslie's fingers was likely caused by a blow to the back of her hand during a struggle (R-1632), but no other person's DNA was under her fingernails, as one would expect if she had been struggling to defend herself (R-2023). In any event, the injuries to Leslie's hand

could have resulted from a fall in the shower. (R-2522 (Spitz)). Finally, the fracture to her vertebrae was so minor that it did not show up on an x-ray. (R-1595 (Stoppacher)). Although Stoppacher thought it occurred when Leslie died or shortly thereafter (R-1570), he was aware of this injury when he initially determined that the death was an accident (R-4173). And Spitz pointed out that she could have had the injury without realizing it, or it could have resulted from a fall. (R-2525, 2562-63).

Time of death. The People argued that time of death occurred "much, much earlier than 7:00 a.m." (R-2880). This was critical to their case for two reasons. First, the evidence showed that Leslie would normally have arisen around 7:00. (R-2699). Second, the prosecution's theory assumed that Neulander killed Leslie; remade her bed; travelled 15 minutes to Green Lakes; disposed of a full set of sheets, a pillow, and an unidentified murder weapon so effectively that none of these items were ever recovered; travelled 15 minutes back home; showered; made coffee; and talked to his daughter for ten minutes, all before 8:25. He would not have had time to do all of that unless the alleged homicide had occurred well before 7:00.

The proof concerning time of death, however, was inconclusive at best. For instance, there was some evidence of rigor mortis when emergency responders arrived (R-1265), but both sides' experts agreed that it can first become apparent in as little as 30 minutes after death (R-1600-01 (Stoppacher); R-1674 (Baden); R-2495 (Spitz)). Indeed, Stoppacher acknowledged that Leslie could have died as late as 7:15 (R-1604), which was consistent with Spitz's estimate of 7:00 to 7:30 (R-2504). Although Leestma testified that he believed Leslie died "a couple of hours" after sustaining her head wound, he conceded that this was "something that pathologists can argue about." (R-1746).

8. Speculation About Non-Existent Evidence Of Murder

The lack of any murder weapon or blood on the sheets severely undermined the People's theory that Neulander attacked his wife on the bed with a blunt instrument that cut open her skull. The People therefore speculated that he must have disposed of the hypothetical weapon and bloody sheets when he said he was on his morning run, and then remade the bed to cover up the destruction of this evidence. Bozana Smith, the family housekeeper, testified that the sheets on the bed on September 17 were not the

ones that had been on the bed the previous week (R-1860-61), that the bed in the scene photograph was made differently from how she made it (R-1862), and that a pillow was "missing" (R-1863). But when interviewed closer to the time of the events, Smith had told the police that she could not recall whether the sheets were the same. (R-1871). She was unable to explain how her memory could have improved two and a half years later. Moreover, Smith did not work on weekends (R-1853, 1855), and Leslie died on a Monday, so someone else had made the bed. Both Joanna and Jenna testified that they had helped Leslie make the bed on numerous occasions. (R-2271-72, 2615). Jenna also testified that she had seen her father take one of the pillows to the guest bedroom on September 16 and had observed it there again after her mother had died. (R-2654-55).

ARGUMENT

I. THE CONVICTION WAS NOT SUPPORTED BY SUFFICIENT PROOF AND WAS OTHERWISE AGAINST THE WEIGHT OF THE EVIDENCE

The evidence as to both murder and evidence tampering was insufficient to support the verdict. C.P.L. §470.15(4)(b). Alternatively, the verdict was against the weight of the evidence. C.P.L. §470.15(5).

A. The Evidence Was Legally Insufficient

A conviction must be reversed unless "the evidence, viewed in the light most favorable to the People, could lead a rational trier of fact to conclude that the elements of the crime had been proven beyond a reasonable doubt." *People v. Hitchcock*, 98 N.Y.2d 586, 591 (2002) (internal quotation marks omitted). In this entirely circumstantial case, the appellate court "must decide whether a jury could rationally have excluded innocent explanations of the evidence." *People v. Reed*, 22 N.Y.3d 530, 535 (2014).

1. The People Failed To Prove Murder

Murder in the second degree requires proof that the defendant "[w]ith intent to cause the death of another person, . . . cause[d] the death of such person." P.L. §125.25(1). The People were thus required to establish two elements: that Neulander (1) "caused the death of Leslie L. Neulander by causing b[lunt]

force injuries to her head," and (2) did so "with the intent to cause [her] death." (R-2912 (jury instructions)). The evidence was insufficient to establish either element.

The medical testimony did not conclusively establish that Leslie was killed by another person. It was undisputed that Leslie suffered from a single blood-letting injury—her head wound. (R-1605, 2231). The only prosecution expert to examine that wound, Stoppacher, wrote in his autopsy report that the injury was "the result of a fall from standing height." (R-4173). He amended his report a year and a half later, but not based on any new factual evidence; he admitted changing his mind solely because investigators suspected that Leslie's death was not an accident. (R-1588-89). Given his initial conclusion and the lack of valid basis for changing it, his testimony provides no reasonable basis to rule out the possibility that Leslie died following an accidental fall. (*See also* R-1596-97). Also, Corey and Leestma both acknowledged that the injury could have been caused by Leslie's head hitting the marble shower edge a single time (R-1785, 2235)—just as Stoppacher had determined after the autopsy.

The only medical expert who unequivocally opined that the death was a homicide was Baden, who believed that Leslie suffered "at least two, probably three blows." (R-1625). But if his hypothesis were correct, the perpetrator would have had to strike Leslie multiple times in exact same location (R-1607 (Stoppacher))—a wholly implausible scenario. That scenario would have been inconsistent with the People's theory that the blood spatter reflected a struggle that began on the bed that continued into the bathroom.

The time of death-related testimony did not prove homicide. The People's theory required them to prove that Leslie had died before 7:00, because otherwise there would not have been enough time for the alleged cover-up. Stoppacher acknowledged that Leslie could have died as late as 7:15 (R-1604), consistent with Spitz's estimate of 7:00 or later (R-2504). Baden's estimate was the earliest, but he relied on the detection of rigor in the arm and leg joints at 10:15, and admitted ignoring that paramedics could move Leslie's arm as late as 8:30 and had then noticed stiffness only in her jaw (R-1639, 1670-73 (Baden); *see also* R-716 (Flemming); R-2495-96 (Spitz)). He also conceded that rigor could become apparent in as little as 30 minutes after death (R-1674), which would support a time of death as late as

8:00.

Baden also relied on Leslie's internal body temperature—92.1 degrees at 10:15. (R-1637). But Stoppacher had relied in part on body temperature and, as noted, conceded Leslie could have died as late as 7:15. And although experts can use formulas to estimate time of death based on the deceased's body temperature, the People's experts agreed that they are a "crude" tool. (R-1603 (Stoppacher); R-1667 (Baden)). In any case, Baden used the most prosecution-friendly body temperature formula and made a baseless assumption that Leslie was under hot shower water for so long that her body temperature had increased so much that it would have taken hours to cool to 92.1 degrees. (R-1636, 1638).

Leestma testified that Leslie did not die instantly, but instead died "at least a couple of hours" after she sustained her head wound. (R-1746). He based this conclusion primarily on the appearance of "red neuron" cells in Leslie's brain tissue, which develop while a person is "dying or being morbid after an injury has occurred to the brain." (R-1746). But even if the jury could reasonably accept this testimony (which could readily have been undermined but for counsel's ineffectiveness, *see infra*, Point IV.D), it was not sufficient to establish homicide beyond a reasonable doubt, because Leestma conceded that "the time scale is something that pathologists can argue about." (R-1746).

Green's blood spatter testimony provided no reasonable basis to reject innocent explanations for the bloodstains in the bathroom and bedroom. It was undisputed that most of the blood was deposited when Neulander moved Leslie from the bathroom to the bedroom: There was blood on the bathroom floor where Neulander tried to resuscitate Leslie; inside the bedroom where Neulander and Jenna first set Leslie down; and in the area around the bed where Neulander ultimately carried Leslie.

Green testified that other bloodstains on the bathroom entryway walls and on the walls and furniture where paramedics attended to Leslie were the result of a violent altercation. But Green's experiments were scientifically unreliable and lacked any factual basis. *See generally infra*, Point IV.B. For instance, Green's rock-on-the-bed experiment simply sought to "confirm" that an attack was a plausible explanation for the bedside bloodstains (R-2147), and her bathroom entryway experiments only tested whether a scenario in which Leslie "stumbl[ed] around and contacted the wall" might be

"consistent" with blood spatter depicted in photographs (R-2074). Green did not test whether the bedside bloodstains could have been created when Neulander and numerous emergency personnel tried to resuscitate Leslie, or whether the bloodstains in the bathroom entryway were caused by carrying Leslie's body through that area. Since she failed to test obvious alternative explanations, Green had no basis to reject them, and neither did the jury. *See People v. Jones*, 73 N.Y.2d 427, 431 (1989) (finding evidence insufficient because expert's conclusion that tested material was controlled substance lacked "evidentiary base"); *Reed*, 22 N.Y.3d at 535 (in circumstantial case, court must determine whether jury "could rationally have excluded innocent explanations of the evidence").

Jenna's testimony did not support the homicide theory. Jenna corroborated her father's account of finding Leslie in the shower and moving her to the bedroom. She had an extremely close relationship with her mother, cooperated fully with the investigation of Leslie's death, and had no discernible motive to lie. (R-2608-09). The People nonetheless claimed that Jenna initially told investigators that she spoke to the 911 operator using the water closet phone, but lied at trial when she testified that this phone was not working. This argument is baseless, and it was immaterial which phone she used anyway.

First, no reasonable juror could conclude that Jenna deliberately changed her testimony. In her first statement to investigators, Jenna wrote that she "believed" she used the water closet phone and that she "tried to talk to the operator." (R-2683). In a later interview, Jenna stated that after placing the operator on hold, she "went into the bathroom . . . picked [the phone] up and at that point . . . ." (Unmarked Court Exhibit (electronic exhibit)). At that moment, Jenna was interrupted by the interviewing officer and did not have the opportunity to say what happened next. (*Id.*). Jenna's trial testimony was consistent. She testified that she tried to reconnect with the 911 operator using the water closet phone, but "no one was answering." (R-2662). Jenna never denied that she tried to take the 911 operator off hold using the water closet phone, and never claimed that she successfully did so.

Second, any minor inconsistencies between her trial testimony and prior statements to the police were immaterial, and perfectly understandable in light of the traumatic experience she had undergone. Jenna awoke to the sudden shock of seeing her mother unconscious and bleeding, frantically attempted to

call 911, and helped her father try to resuscitate her mother. One would not expect a person in this situation to focus on, much less precisely remember, minutiae such as which telephone she used to reconnect to the 911 operator.

In any event, the notion that she reconnected using the water closet phone, rather than the walk-in closet phone, would hardly be evidence of a cover-up; which phone she used was irrelevant. The People insisted that: (1) when Jenna said "Oh my God, there is blood everywhere" during the 911 call, she had just picked up the water closet phone and was seeing blood in the bathroom, and (2) when she cried "Oh my god, my mother" a few seconds later, she was seeing her mother for the first time—suggesting that there was blood in areas where Neulander had not yet moved Leslie. (R-2885). But there was no rational basis for this assertion. Jenna consistently told investigators and testified at trial that she saw her father moving her mother *before* she entered the water closet and picked up the phone to reconnect with the 911 operator. (R-2632). Moreover, Jenna would have been able to see the spot on the bathroom floor where Leslie's body was initially placed as soon as she entered the bathroom. (R-2068, 3713). Jenna's account contains, at most, an immaterial inconsistency.

2. There Was Insufficient Evidence To Prove Evidence Tampering

Count Two required proof that "[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use," Neulander "suppresse[d] it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person." P.L. §215.40(2). The People had to prove: (1) that he "changed the sheets on the master bed and moved [Leslie's] body . . . after her death to alter and conceal the physical evidence and blood stain patterns at the scene to make it appear she had died from an accidental death in the shower," and did so (2) "believing that such physical evidence was about to be produced or used in an official proceeding or a prospective official proceeding" and (3) "intending to prevent such production or use." (R-2915 (jury instructions)).

Because the evidence was insufficient to prove the homicide, there was no physical evidence to alter or destroy. Moreover, Bozana Smith's testimony about the bedsheets was not evidence that

Neulander got rid of the sheets that were on the bed the day Leslie died. Smith worked only on weekdays, and Leslie died on a Monday morning. Smith did not know who made the bed over the weekend, or what sheets that person used.

* * *

Because no "rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt," Neulander's federal constitutional right to due process of law was also violated by the convictions. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). At worst here, the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, [such that] a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015) (citation omitted).

B. At A Minimum, The Verdict Was Against The Weight Of The Evidence

Even if the Court were to conclude that the evidence was legally sufficient, it should reverse because the verdict was against the weight of the evidence. This analysis is "governed by a legal standard that is far broader than the one employed in a sufficiency analysis." *People v. Delamota*, 18 N.Y.3d 107, 115 (2011); *see, e.g.*, *People v. Fortunato*, 70 A.D.3d 851, 852 (2d Dep't 2010) (murder conviction based on "inconsistent and confusing" testimony, where inference of guilt was unsupported by any "persuasive evidence," was against weight of evidence even though defendant had made false statements to police); *People v. Chase*, 60 A.D.3d 1077, 1078-79 (2d Dep't 2009) (although identification evidence was legally sufficient to sustain verdict, it was not overwhelming and verdict was thus against weight of evidence).

In determining whether a verdict is against the weight of the evidence, a court "sits as a thirteenth juror and decides which facts were proven at trial." *People v. Danielson*, 9 N.Y.3d 342, 348 (2007). Once the court has determined that an acquittal would not be unreasonable, the court "weigh[es] conflicting testimony, review[s] any rational inferences that may be drawn from the evidence and evaluate[s] the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt." *Id.* The court "must resolve conflicting evidence," *People v. Romero*, 7 N.Y.3d 633, 644 n.2 (2006), and

"may draw inferences contrary to those implicitly drawn by the jury" at trial, *People v. Acosta*, 80 N.Y.2d 665, 672 (1993).

The deficiencies in the People's proof are magnified when its weight is considered. For example, Stoppacher's revised claim that Leslie's injuries *could* have resulted from a homicide was extremely suspect given the curious circumstances under which he amended his report. In fact, Corey testified that he could not recall ever changing an autopsy conclusion from "accidental" to "homicide" during his 23 years as a medical examiner in Kentucky. (R-2200, 2239). Likewise, Green's bizarre experiments bore little relation to what she was supposed to be testing. *See People v. Johnson*, 56 A.D.3d 1191, 1192 (4th Dep't 2008) (verdict is against weight of evidence when it rests on speculative expert testimony); *People v. Grice*, 84 A.D.3d 1419, 1420 (3d Dep't 2011) (same). Green's methodology was so unreliable that her testimony should have been excluded in its entirety. *See infra*, Point IV.B.2.

On the other side of the ledger is the testimony of Spitz, the author of a leading forensic pathology textbook, who testified that Leslie died between 7:00 and 7:30 and identified superior undermining on Leslie's head injury, indicative of being struck by a force moving in an upward direction, as in a fall. (R-2504, 2529). Paul Kish, the defense blood spatter expert, testified that the bloodstains were consistent with Neulander's account of moving Leslie from the bathroom to the bedroom. (R-2353-54, 2367-71). Unlike Green, he tempered his conclusions due to the incomplete investigation and possible contamination of the scene, and his testimony suffered from none of the methodological flaws that Green's did. (R-2338-41, 2367-71).

In sum, the verdict on both counts was against the weight of the evidence. At worst, the circumstantial evidence here "supported equally strong inferences" of guilty and innocence, but the jury "assigned more weight to the inference that" the defendant was guilty. *People v. Lamar*, 83 A.D.3d 1546, 1547 (4th Dep't 2011). Accordingly, the verdict was necessarily against the weight of the evidence, *id.*, and the conviction should be reversed.

II. A NEW TRIAL IS REQUIRED BECAUSE OF JUROR MISCONDUCT THAT IMPAIRED NEULANDER'S RIGHT TO AN IMPARTIAL JURY

There is nothing "more basic to the criminal process than the right of an accused to a trial by an impartial jury." *People v. Branch*, 46 N.Y.2d 645, 652 (1979). Juror Johnna Lorraine engaged in serious misconduct during Neulander's trial. She disregarded the trial court's instructions—repeated 45 times—not to discuss the case with others and to report any such communications to the court. During the trial, she exchanged numerous text messages with a family member and friends who expressed negative views about Neulander and defense witnesses. She did not report these communications to the court. Instead, she deleted evidence from her phone to conceal the misconduct and made false statements under oath to the court about her activities. In other words, Lorraine repeatedly violated the court's clear instructions and engaged in a fraud on the parties and the court to cover up her actions.

Following an evidentiary hearing, the trial court expressly found that Lorraine had engaged in this misconduct, but nevertheless denied any relief. The court's findings clearly establish that Lorraine was unfit to serve, and that her presence on the jury tainted Neulander's conviction and impaired his right to an impartial jury. A court must set aside a guilty verdict if there was "improper conduct by a juror, or improper conduct by another person in relation to juror, which may have affected a substantial right of the defendant." C.P.L. §330.30(2). The trial court's failure to do so here should be reversed.

A. Factual Background

1. The Initial Inquiry

There was extensive, unremitting media coverage of the prosecution and trial. The trial court therefore 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).

At the end of the second day of jury deliberations, defense counsel observed Lorraine speaking with Elisabetta DiTota, a previously discharged alternate juror. He requested that the court question Lorraine about her encounter with DiTota before deliberations resumed.

The next morning, the court called Lorraine into chambers. The court told Lorraine that someone had observed her speaking with DiTota and asked whether she had had "any discussions at all about this particular case." (R-3061). Lorraine stated that she had not discussed the trial with DiTota (R-3061), and assured the court that she had not had any discussions about the case with anyone except the other jurors (R-3062). The jury resumed deliberations and returned a verdict of guilty that same day.

After the verdict was announced, DiTota contacted the defense with her own concerns regarding Lorraine's conduct. Neulander, represented by new counsel, then filed a motion to set aside the verdict pursuant to C.P.L. §330.30. (R-3080). DiTota alleged that: (1) At the start of trial, Lorraine attempted to show her a media alert about jury selection that Lorraine had received on her phone. DiTota reminded Lorraine that reading press coverage about the case was not permitted. (2) During a break in Jenna Neulander's testimony, Lorraine announced in the jury room that her friend had sent her a text message regarding a Twitter report that the court had taken a break because one of the jurors was too upset to continue. (3) Finally, when Lorraine and DiTota spoke after the second day of jury deliberations, Lorraine told her that deliberations were stressful and that the jury was evenly divided. (R-3085-86.).

After the motion was filed, Lorraine met with the prosecutor and provided an affidavit that the People used to oppose the 330 motion. In her affidavit, Lorraine swore that "[a]t all times throughout the trial and deliberative process, [she] followed [the court's] instructions." (R-3321). She also stated that she had never received any media alerts about the trial and therefore could not have shown DiTota a media alert on her phone; that she had instead showed DiTota a text message she had sent to inform her co-worker that she had been selected for the jury; and that she had received a text message from a friend, Lindsay Flanagan, during a break in Jenna's testimony, but recalled sharing the message only with

DiTota. (R-3322-23). She claimed that "the substance" of her exchanges with Flanagan related to Flanagan's concern about her well-being. (R-3323). Lorraine also admitted speaking with DiTota during deliberations, but denied having discussed the deliberations. (R-3323).

To bolster these assertions, Lorraine volunteered screenshots of her text messages to the prosecutor, which he also submitted in support of the People's opposition to the 330 motion. (R-3325-31). The parties and the court subsequently discovered that statements in the affidavit—most prominently the claim that Lorraine had always followed the court's instructions—were false, and that the screenshots that Lorraine had provided were inaccurate and incomplete because she had deleted relevant text messages and other information from her phone before disclosing them.

2. Lorraine Deleted Phone Data Reflecting Her Extensive Misconduct

After the trial court scheduled a hearing on the 330 motion, the defense obtained a subpoena for a forensic examination of Lorraine's phone. The examination revealed that Lorraine (1) had engaged in a series of text conversations with family and friends about the case; (2) had deleted almost all the pertinent text messages from her phone; (3) had erased her phone's internet browsing history during the relevant time, but had left evidence that she had visited a local news website; and (4) had made false and misleading statements to the court.

Lorraine exchanged improper text messages. Even though the court told the jurors 45 times not to engage in third-party communications, Lorraine exchanged messages with friends and family about the case throughout the trial. The relevant text messages include the following:

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

That same day, Lorraine also told her friend Tiff Sampere that she had been selected as a juror. In the text exchange that followed, Sampere twice referred to Neulander as "scary," asking "Is he scaryyyy" and "Did you see the scary person yet." (R-3366). Lorraine responded that she had "seen him since day 1." (R-3366; *see also* R-3489 (admitting she understood reference was to defendant). Lorraine exchanged messages with Sampere throughout trial. At one point, Sampere asked, "Is he guilty?!" (R-

3420). Lorraine responded by stating that she "[couldn't] tell." (R-3420).

The day Jenna testified, Lorraine exchanged dozens of messages with another friend, Lindsay Flanagan. Flanagan asked whether the court "check[ed Lorraine's] texts." (R-3417). Lorraine indicated no. Flanagan then said she was following the trial "live on Twitter" and was "obsessed." (R-3417).

In this conversation, Flanagan said she thought Jenna was not credible. Flanagan's messages started during a break in Jenna's testimony, while Lorraine was in the jury room. 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 she later deleted, Lorraine responded that "[n]o one will testify against her!" and explained that the only opportunity for the prosecution to question her would come on cross-examination. (R-3418). Lorraine later acknowledged that she understood what it meant to testify "against" someone. (R-3515).

Later that day, after the prosecutor had had the opportunity to cross-examine Jenna, Flanagan wrote to Lorraine that her "mind [was] blown that the daughter [was not] a suspect." (R-3422). A playful back-and-forth ensued in which Lorraine 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's involvement in the alleged murder, 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).

When confronted with the text messages at the evidentiary hearing, Lorraine admitted that she "knew [the exchanges] violated the Judge's rules." (R-3522).

Lorraine deleted text messages. Lorraine 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. She first said that she had deleted the exchanges with Sampere because Sampere had moved, but moments later claimed not to remember why she deleted the messages. (R-3485).

Lorraine made selective deletions of her exchanges with Flanagan, including: (1) Flanagan's

message asking whether the court reviewed Lorraine'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) Lorraine's response to Flanagan's message expressing a desire to hear someone testify against Jenna. (R-3417-18). Lorraine had to delete these messages one-by-one and was unable to explain why she did so at the hearing. (R-3510-12). Importantly, Lorraine erased the messages from her conversation with Flanagan *before* she met with the prosecutor and provided him a screenshot of that (heavily edited) conversation. (*Compare* R-3328, 3330, *with* R-3417-8).

Lorraine erased her internet browsing history. The forensic analysis of Lorraine's phone also revealed that during trial Lorraine had visited Syracuse.com, a news site that provided extensive coverage of the trial, and had subsequently erased her browsing history. (R-3381). Lorraine was once again "unable to explain" why she had done so. (R-23). But her conduct prevented the court from learning which news stories she had read. Lorraine testified that she had "probably" read an article about cheerleading (R-3486), but the trial court "accepted the contention in the defendant's post-hearing memorandum that Syracuse.com did not post any articles about cheerleading on its website on the day in question" (R-24).

Lorraine made numerous false and misleading statements to the court. Lorraine lied two times about not having discussed the case with third parties. During the in-chambers inquiry, Lorraine told the court that she had not discussed the trial with DiTota or anyone else. (R-3061-62). Later, in her affidavit, she swore that "[a]t all times throughout the trial and deliberative process, [she] followed [the court's] instructions." (R-3321). The recovered phone data revealed that these statements were false, as Lorraine herself later admitted.

Lorraine also made other misleading statements in her affidavit. She claimed that she never received a media alert on her phone, and had merely showed DiTota a text message informing a friend that she had been selected for the jury. The forensic examination, however, revealed that someone else had sent Lorraine a screenshot of a media alert on the day in question, and the trial court found that DiTota had viewed this media alert. (R-18-19). Lorraine concealed this exchange from the prosecutor

and the court.

3. The Trial Court's Decision

The trial court expressly found that Lorraine had committed misconduct. It found that Lorraine had "engaged in imprudent text conversations with other individuals, in contravention of the Court's admonitions" (R-35), and understood that the rules prohibited these third-party conversations (R-24). The court also found that Lorraine had violated its admonitions "by 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 determined that Lorraine's destruction of evidence showed that she was aware of her wrongdoing: "the fact that [Lorraine] deleted pertinent messages clearly displayed a consciousness that she had engaged in misconduct, in violation of the Court's admonitions" and that her actions revealed that she "understood the prohibition on speaking about this case with third parties." (R-24). The trial court also found that Lorraine's affidavit, prepared before the forensic examination revealed she had deleted text messages, did not "completely address the extent of her communications" with third parties. (R-24). Notably, Lorraine's sworn assertion that she had "followed [the court's] instructions" at all times (R-3321) came *after* Lorraine had deleted her phone data and thus Lorraine was already "conscious[]" that she violated the court's admonitions (R-24).

Even though the trial court found that Lorraine engaged in various forms of serious misconduct, it denied the 330 motion. The court concluded that "there was no showing that [Lorraine] received external information pertinent to the case from an external source." (R-31). Even though Loraine had repeatedly misled and concealed the true facts about her conduct from the court, the court chose to credit her self-serving claim "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).

B. Lorraine's Misconduct Created A Substantial Risk Of Prejudice To Neulander's Right To An Impartial Jury

The trial court must set aside a conviction if misconduct by a juror "may have affected a

substantial right of the defendant and [] was not known to the defendant prior to the rendition of the verdict." C.P.L. §330.30(2). Although "not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically," *People v. Brown*, 48 N.Y.2d 388, 394 (1979), certainty of harm is not required, and a 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). In assessing the "likelihood that prejudice was engendered," a court must examine "each case . . . on its unique facts." *People v. Clark*, 81 N.Y.2d 913, 914 (1993). A trial court's denial of a motion pursuant to §330.30(2) is reviewed for abuse of discretion. *People v. Maragh*, 94 N.Y.2d 569, 574 (2000).

The trial court erred in finding that Lorraine's extensive, egregious misconduct somehow did not create a substantial risk of prejudice to Neulander's right to an impartial jury.

1. Lorraine's repeated exposure to the biased opinions of her family and friends plainly risked influencing her own views regarding Neulander's guilt or innocence. For instance, as soon as the jury was selected Lorraine's father encouraged her to "[m]ake sure he is guilty!" and Sampere called Neulander "the scary person." (R-3366, 3386).

Lorraine's extensive discussions with Flanagan about the case also created a risk of bias. Jenna's corroboration of her father's account was critical to the defense. Yet while Jenna was on the stand, Flanagan repeatedly undermined Jenna's credibility to Lorraine. Flanagan even suggested that Jenna herself should have been a suspect in her mother's murder—a theory not argued at trial with no record support. Flanagan did not share the basis for her opinions, but she made clear to Lorraine that she had read all the information she could find on Neulander's prosecution. Coming from a friend and possibly based on facts to which Lorraine did not have access, Flanagan's opinions certainly risked coloring Lorraine's own opinions. Because the messages concerned Jenna's alleged lack of credibility, an issue "critical to the prosecution's case," the risk of prejudice is even starker. *People v. Stanley*, 87 N.Y.2d 1000, 1002 (1996) (finding clear risk of prejudice where jurors simulated prosecution witness's conduct to determine key issue of whether she could have observed defendant).

These messages exhibited clear bias against Neulander. By failing to report them to the court before the verdict, as the court had instructed, Lorraine prevented the court from taking steps to "counteract or 'sterilize' any possible *subconscious* effect" that the messages might have had. *People v. Crimmins*, 26 N.Y.2d 319, 324 (1970) (finding higher risk of prejudice where disclosure of misconduct was made after verdict, when it was no longer possible to admonish jurors who, "although not *consciously* affected by the[ir] visit" to the crime scene, might have been subconsciously affected by it).

The trial court, however, improperly limited its review to whether the text messages contained *specific* facts that were not before the jury, and declared the risk of prejudice minimal solely because "there was no showing that [Lorraine] received external information pertinent to the case from an external source." (R-31). But a juror's exposure to extra-record facts is not the only way her misconduct can affect a defendant's substantial rights. A juror's exposure to a third-party opinion about the defendant or his defense, as occurred here, may also prejudice a defendant's right to an impartial jury, even where the third party communicates no specific extra-record facts. *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 by court personnel 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 . . . ."); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1893-95 (2016) ("various external influences . . . can taint a juror" and even "apparently innocuous comments" about case could prejudicially affect juror's views; juror's texting about case *to* her spouse, which would not even involve any receipt of specific information, could prejudice defendant).

As a result of this error, the trial court ignored the risks posed by Lorraine's exposure to her father and friends' opinions. For example, the court found Lorraine's messages harmless because a "fair review of the complete exchanges with Flanagan . . . indicates that [Lorraine] was not exposed to any external information regarding this case that could have possibly prejudiced a substantial right of the defendant." (R-34; *see also* R-33 (emphasizing that Flanagan did not "impart any external information to [Lorraine]")). But the court failed to consider how Flanagan's opinion might have affected Lorraine's

own view of the case, or how Flanagan's influence might have been enhanced because she had made "abundantly clear that [she] believed that she had read a great deal about this case." (R-33). When Flanagan expressed doubts about Jenna's credibility, Lorraine had no way of knowing whether Flanagan's messages were based on extra-record facts, and there certainly was a risk that Lorraine might think so. Similarly, the court found Sampere's message calling Neulander "scary" to be innocuous because it did not "affirmatively communicat[e] to [Lorraine] any knowledge that the defendant was scary." (R-32). But that could only have led Lorraine to speculate the worst.

2. Lorraine's lies and efforts to hide her improper actions in themselves established a substantial risk of prejudice. For instance, federal courts have repeatedly found that such behavior establishes implied bias and thus a violation of the Sixth Amendment right to an impartial jury. *See, e.g., Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998) (en banc) (holding that bias must be presumed where juror deliberately lied during voir dire where truthful answers may have jeopardized her chances of being on the jury); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (juror's dishonesty was, "of itself, . . . evidence of bias"); *see also 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 on *voir dire*"); *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"); *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.").

These cases reflect two critical concerns that juror dishonesty raises about impartiality. 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, Lorraine ensured that she would remain on the jury through the verdict. And by lying to the court in her affidavit, Lorraine aided the People's effort to keep that verdict in place. Her conduct was even more egregious than in the cases cited above. Unlike in those cases, Lorraine took the additional steps of deleting the improper messages from her phone 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.

Atlought the trial court found Lorraine's cover-up efforts to be clear evidence of her consciousness of wrongdoing (R-24), it utterly failed to consider the *legal* significance of these efforts in assessing prejudice (R-25-34). None of the cases the court cited involved a juror who committed perjury and tried to conceal her wrongdoing; instead, the court focused solely on whether the content of third-party communications prejudiced the defendant. (R-29-34 (discussing *People v. Wilson*, 93 A.D.3d 483 (1st Dep't 2012); *People v. Giarletta*, 72 A.D.3d 838 (2d Dep't 2010); *People v. Smith*, 290 A.D.2d 391 (1st Dep't 2002); *People v. Martin*, 177 A.D.2d 715 (2d Dep't 1991); *People v. Rios*, 26 Misc. 3d 1225(A) (Sup. Ct., Bronx Cnty. 2010); *People v. Jamison*, 24 Misc. 3d 1238(A) (Sup. Ct., Kings Cnty. 2009))).

By analogizing this case to others that did not involve deceit and turned entirely on the content of the third-party communications, the trial court failed to evaluate this case on its "unique facts." *Clark*, 81 N.Y.2d at 914. Lorraine's concealment of her misconduct is perhaps the most significant evidence of the risk of bias, and the court ignored this evidence entirely. *Cf. People v. Edgerton*, 115 A.D.2d 257, 258-59 (4th Dep't 1985) (vacating conviction where court failed to consider facts that would require setting aside verdict).

3. Lorraine's knowing and repeated violations of the judge's many admonitions further heighten the risk of prejudice. One of the principal means of ensuring a fair trial is proper instructions to the jury. *See People v. Nelson*, 125 A.D.3d 58, 61-62 (2d Dep't 2014); *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). A bedrock principle of our legal system is the presumption that jurors follow a court's instructions. *See, e.g.*, *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). If following instructions gives rise to a presumption of impartiality, 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, Lorraine's 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," and she "understood the prohibition on speaking about this case with third parties." (R-24). Even worse, Lorraine apparently assumed that no one would recover the deleted data and she would not be caught, and lied under oath when she told the court that at "all times throughout the trial and deliberative process, [she] followed [the court's] instructions." (R-3321).

4. When Lorraine's misconduct is consider cumulatively, the risk of prejudice is even starker. Yet at no point did the trial court consider the cumulative effect of the improper exchanges, let alone consider them together with Lorraine's lies about and concealment of the messages. It stated that "each of the allegations of juror misconduct will be addressed separately" (R-26), and assessed each text message in isolation (R-31-34). This was clear legal error. *People v. Romano*, 8 A.D.3d 503, 504 (2d Dep't 2004) (upholding 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. Cnty. 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).

5. Lorraine's misconduct was so egregious that her self-serving testimony that she voted to convict based on the trial evidence alone is entitled to no weight. An appellate court may reverse even where the trial court accepts a juror's disclaimer of improper influence. In *People v. Cocco*, for instance, a discharged alternate juror commented to a deliberating juror that he had heard the defendant "runs a sporting house." 305 N.Y. 282, 286 (1953). The trial court refused to set aside the verdict because it

accepted the sitting juror's testimony that she "[didn't] believe it," "had put [it] out of her mind," and "had not mentioned [his comment] to the jury." *Id.* at 286-87. The Court of Appeals, however, granted a new trial. It could not find that "the furtive hearsay statement concededly made by [the alternate juror] 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.* In *Crimmins*, the Court of Appeals also reversed despite the trial court's credibility determination. There, jurors visited the area in which a witness had identified the defendant and later discussed the "lighting in the area . . . in 'small talk'" during deliberations. *Crimmins*, 26 N.Y.2d at 323. Based on their post-verdict testimony, the trial court found no improper influence on the verdict. 33 A.D.2d 793, 794 (2d Dep't 1969) (Beldock, P.J., dissenting). The Court of Appeals disagreed and granted a new trial. It determined that the visit had exposed the jury to extraneous information and that, because the visit was not disclosed until after the verdict, the court could not have taken any action to "counteract or 'sterilize' any possible *subconscious* effect" that the visit might have had. *Crimmins*, 26 N.Y.2d at 324.

Here, the trial court was not required to choose between competing testimony. Notably, the court declined to make a credibility determination as to the single instance in which Lorraine and DiTota gave different accounts (about their conflicting versions of their April 1 conversation). (R-20). Its "credibility" determination thus merely accepted Lorraine's self-serving assurances that her decision was based solely on the trial evidence—exactly the sort of testimony that the Court of Appeals disregarded in granting new trials in *Cocco* and *Crimmins*. Given the court's own acknowledgment that Lorraine may have been "less than completely forthright at the hearing" (R-35 (internal quotation marks omitted)), its conclusion warrants little deference. In any event, the court did not consider the potential subconscious bias infecting Lorraine's decision on the verdict, *Crimmins*, 26 N.Y.2d at 324, and her misconduct in communicating with third parties and in concealing those communications created a substantial risk of prejudice.

In sum, if this Court permits Neulander's conviction to stand in spite of Lorraine's egregious misconduct, it will set a dangerous precedent. The clear message will be that jurors may disregard the

court's instructions and are free to lie and cover up their wrongdoing. That message would undermine the integrity of the criminal justice system, and the rule of law.

III. A PATTERN OF PROSECUTORIAL MISCONDUCT IN THE CLOSING ARGUMENT DEPRIVED NEULANDER OF A FAIR TRIAL

In his closing, the prosecutor expressed his personal opinions about defense witnesses and evidence; acted as an unsworn witness by performing a misleading reenactment of Jenna's testimony; misrepresented the evidence; urged the jury to consider prior inconsistent statements as substantive evidence when they were admitted solely for impeachment purposes; and appealed to the jury's sympathy. Courts have reversed convictions where a prosecutor engaged in just one of these types of misconduct; here, the misconduct was extensive and permeated the summation. Singly or collectively, the improper remarks deprived Neulander of a fair trial.

Although trial counsel failed to object to any of this misconduct (and thereby provided ineffective assistance, *see infra*, Point IV.A), this Court should exercise its discretion to vacate the conviction in the interest of justice. C.P.L. §470.15(6)(a). This Court regularly reviews unpreserved instances of prosecutorial misconduct in the interest of justice, "mindful of [its] 'overriding responsibility' to ensure that 'the cardinal right of a defendant to a fair trial' is respected in every instance," *People v. Ballerstein*, 52 A.D.3d 1192, 1193 (4th Dep't 2008), and vacates convictions involving far less egregious misconduct. It should do so here as well.

A. The Prosecutor Improperly And Repeatedly Expressed His Personal Opinion On The Evidence And The Credibility Of Defense Witnesses

During summation, prosecutors may not express personal opinions, because of the "danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the [prosecutor's] beliefs and opinions." *People v. Paperno*, 54 N.Y.2d 294, 301 (1981). A prosecutor may not "present[] his own belief as to the lack of merit of the defense testimony," *People v. Lee*, 79 A.D.2d 641, 642 (2d Dep't 1980); "speculate[] as to the significance" of particular evidence, *People v. Marcus*, 101 A.D.3d 1046, 1048 (2d Dep't 2012); "denigrate[] the defense by . . . characterizing it as 'ridiculous' and 'absurd,'" *People v. Gordon*, 50 A.D.3d 821, 822 (2d Dep't 2008); or "express his personal belief . . .

that defendant was guilty of the crimes charged," *People v. Jones*, 47 A.D.2d 761, 762 (2d Dep't 1975).

Here, the prosecutor improperly and repeatedly communicated his personal opinions to the jury during his closing argument.

The prosecutor claimed that he "kn[ew] Jenna thought her dad killed her mother." (R-2882). There was no evidence supporting this inflammatory remark, and only what Jenna witnessed was relevant. It was improper to share his personal views about Jenna's state of mind by suggesting that he knew something the jurors didn't, especially since the People argued that Neulander had not only killed his wife, but also manipulated his daughter into becoming his alibi witness. *See People v. Tatum*, 54 A.D.2d 950, 950 (2d Dep't 1976) (reversing in interest of justice where prosecutor told jury that "the attorneys for the defendants . . . didn't believe the defendants' story, and yet expected the jury to believe it").

Likewise, the prosecutor expressed personal doubts about the seriousness of Leslie's vertigo, which might explain why she would have fallen in the shower: "There's a difference between vertigo and actually falling" (R-2861), and "I have no clue whether" Leslie's fall in Israel "ha[d] anything to do whatsoever with vertigo" (R-2861). Even worse, he speculated that "she tripped on boardwalk . . . and bruised herself." (R-2861). He also denigrated testimony about a recent fall at a wedding as "silly nonsense about a vertigo attack" (R-2861)—precisely the type of misconduct that requires a retrial. *See People v. Hansen*, 141 A.D.2d 417, 420 (1st Dep't 1988) (prosecutor "denigrated the defendant's witnesses" by claiming all criminal defendants could produce positive character evidence and describing such evidence as "completely irrelevant"); *Lee*, 79 A.D.2d at 642 (prosecutor characterized defense as a "cock and bull story"); *see also People v. Walters*, 251 A.D.2d 433, 434-35 (2d Dep't 1998) (prosecutor expressed "his own opinion regarding the truth and falsity of witnesses' testimony").

Lastly, the prosecutor belittled the defense by claiming arguments that Leslie had fallen in the shower were "[a]bsurdities" and asking the jury: "Is there anything about this picture [of the shower] that suggests someone is actually taking a shower? Is there soap? Shampoo? That squiggly thing on the right which someone tells me is a kamise [sic]. Is there anything about that that says she's taking a shower,

other than the fact that it is a shower?" (R-2866). These remarks were disingenuous because the photographs of the shower depict various bottles of soap, shampoo, or conditioner. (R-3770-74). It was improper for the prosecutor to mislead the jury about the evidence and express his personal view about the defense's theory that Leslie had been showering prior to her death.

B. The Prosecutor Performed An Improper, Misleading Reenactment Of Jenna's Testimony

The prosecutor also improperly purported to reenact the steps that Jenna testified she had taken while the 911 operator was on hold. He argued that Jenna could not have done everything that she said she had done in that thirteen-second period, and attempted to prove that her testimony was false by performing a timed reenactment of her account.

After playing a portion of the 911 call, the prosecutor removed his cellphone, started its timer, and placed the phone on the edge of the jury box. He acted out the movements Jenna had described and narrated as follows:

> One minute and eleven seconds into that call Jenna is frustrated that she can't answer the questions of the operator, so she places the operator on hold to get closer to see what's going on. This is her testimony. She takes a second, puts the phone down. Hurries down the hallway. It's at least 80 to 90 feet. You can do the math. Rushing, rushing down the hallway, I got to see what's happening. I get in—I finally get there, I turn left. I go into the water closet. I pick up the phone. I answer. I try to talk to the person a couple of times, nothing is happening. I drop the phone. I come out of the water closet. There's my father, he's crouched down, he's carrying my mother. This is the first time I've seen my mother. I then began to assist him carrying her out of the bathroom. Place her on the ground, and we try to revive her, and I then back up three steps. I did that pretty quick.

(R-3882-83). Next, he picked up his cellphone, displayed it to the jury, and said that Jenna's actions that morning "[d]idn't happen" as she had testified. (R-2883, 4637-38). He then played the recording of that 911 call and displayed a table listing the times of particular moments in the call, including the 13-second period when the operator was on hold. (R-4639-41).

This demonstration wrongfully created new evidence (by a biased, unsworn witness) about the plausibility of Jenna's testimony. The Court of Appeals reversed a conviction based on a similar reenactment in *People v. Stanley*, 87 N.Y.2d 1000 (1996). There, two jurors timed themselves running a specified distance at the crime scene as part of a reenactment "pointedly aimed at authenticating the

eyewitness's version of the crime as testified to at trial." *Id.* at 1001. Even though "both counsel [had] assented to a request by one juror to walk to a specified corner and run back," the Court of Appeals held that "[b]y simulating the witness's purported conduct . . . the two jurors became unsworn witnesses, incapable of being confronted by defendant, and their experiment created nonrecord evidence, which defendant could not test by cross-examination." *Id.* The Appellate Division has overturned convictions in similar circumstances where the prosecutor performed the reenactment. *See People v. Melendez*, 140 A.D.3d 421, 425 (1st Dep't 2016) (prosecutor used rolled up paper to illustrate police officer's testimony regarding gun flashes when witness "did not make such a demonstration"); *People v. Williams*, 90 A.D.2d 193, 196 (4th Dep't 1982) (prosecutor "revealed to the jury that he had the weapon in question concealed on his person during his entire opening statement" to illustrate concealability).

The prosecutor's conduct here is even worse because his new "evidence" was quite misleading. He assumed a distance between Leslie's office and the bathroom entryway (80 to 90 feet) with no basis in the trial record. (R-2882). He himself had claimed in opening that Jenna's bedroom—which appeared on a floor plan to be more than twice the distance between the bathroom and Leslie's office (R-3709)—was 100 feet from the master bathroom (R-1070). There was no evidence of that either, but if it was true, the bathroom was only 50 feet from Leslie's office, and the reenactment presented an entirely false narrative.

C. The Prosecutor Misrepresented Critical Facts

In summation, prosecutors may not "refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence." *People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976) (internal citations omitted). "[S]tatements that misrepresent evidence central to the determination of guilt" are out-of-bounds. *People v. Wright*, 25 N.Y.3d 769, 780 (2015) (misrepresentation of testimony was improper, and counsel's failure to object warranted reversal on ineffective assistance grounds); *see also People v. Redd*, 141 A.D.3d 546, 549 (2d Dep't 2016) (granting new trial where prosecutor, *inter alia*, misstated time-of-death testimony).

The prosecutor repeatedly violated these principles. He misrepresented important facts about the defense medical expert, the blood evidence, and Neulander's statements to investigators, and encouraged

the jury to draw improper inferences regarding them, including:

The medical testimony. The prosecutor misrepresented the defense medical expert's testimony on the critical time of death issue. Defense expert Spitz unequivocally testified that Leslie had died between 7 and 7:30. (R-2504). However, the prosecutor falsely asserted that Spitz had testified that the time of death "occurred much, much earlier than 7:00 a.m." (R-2880; *see also* R-2869 ("If Leslie Neulander has fallen to the ground, hit her head, split her skull open, as even the defense expert says has to have happened before 7:00 a.m. . . .")).

The blood evidence. The prosecutor repeatedly claimed that there was no blood on the coffee cup that Neulander left on Leslie's nightstand, although the record was silent on that point. He said that this proved that Neulander put the cup there after the blood was deposited in the bedroom, and therefore there had to have been an attack, because the other possible explanations for the bedside blood spatter (such as the actions of emergency personnel) occurred after the cup was already there. The prosecutor told the jury:

> There is blood on those bottles. There is blood on that lamp shade. There's blood on that headboard. There's blood on that light switch. And there's blood on the wall to the right. Do you know what there isn't a single solitary drop of blood on, the white coffee cup. Why not? Because it wasn't there when the assault took place. And if it had been there when all this contamination was going on, which is made up, you'd see blood spots all over that cup of coffee.

(R-2870-71; *see also* R-2874 (casting doubt on notion that blood "missed the coffee cup"); R-2880 ("'[W]hat about the coffee cup? How come there is no blood on the coffee cup?' Because he put it there later.")).

These remarks were improper. *See, e.g.*, *People v. Hemingway*, 240 A.D.2d 328, 328 (1st Dep't 1997) (finding prosecutor's remark that items in defendant's bag were stolen improper because evidence provided no basis for this claim). Not one of the eight prosecution witnesses who were at the scene testified that the cup had no blood on it, and it was never collected or tested. The scene photographs are also inconclusive. (R-3792-95, 3800-23, 3828-29, 3992-95). One showed some unexplained discoloration on the front of the cup (R-3994), and no pictures were taken of the back or left side. At least one other object on the nightstand had blood on its backside, so there could have been blood on a

part of the cup that was not photographed. Finally, at least one emergency responder handled the cup before it was photographed. (R-1286-87, 1443). He could have inadventently wiped off blood on the front of the cup, or altered the orientation of the cup such that the blood it contained no longer appeared on the side facing the photographer.

Similarly, the prosecutor told the jury that there was blood "under the pajama bottoms that Leslie Neulander supposedly laid" on the bathroom floor before taking her shower, suggesting that Neulander placed the pajama bottoms there after a blood-producing assault. (R-2873). Again, there was no evidence supporting this assertion. The pajama bottoms were not collected for testing, and no police officer or emergency responder even lifted the pajama bottoms at the scene. None of the scene photographs depict what was under the pajamas either. (R-3758-61, 3776-77, 3978-87, 4191). Instead, the photographs show a pool of blood that ends before reaching the pajama bottoms, and the pajama bottoms themselves may have had additional blood spatter on top of them. (R-3968, 4191).

The prosecutor made another baseless assertion that there was blood in the water closet. (R-2873). Not a single picture of the water closet depicts any blood (R-3749-53), and not a single witness observed blood in that area. On the contrary, an emergency responder testified that she did not observe any blood in the water closet (R-1309), and another prosecution witness testified that the water closet phone and the interior of the water closet door tested negative for blood (R-2028).

The prosecutor also misrepresented that the bloodstains on the south bedroom wall were "all non diluted." (R-2874). He argued: "How could [the blood] not be diluted if [Leslie was] coming out of the shower," and that the bloodstains had to have been "the result of the initial assault on the bed." (R-2874). But there was *no* evidence that the blood was undiluted by water. A layperson cannot tell from photographs whether blood has been diluted, and there was no expert testimony supporting the prosecutor's assertion. *See Redd*, 141 A.D.3d at 549 (improper for prosecutor to hypothesize as to cause of cuts on defendant's hand without evidentiary basis).

Neulander's statements. The prosecutor also misrepresented Neulander's statements. *See People v. Mehmood*, 112 A.D.3d 850, 853 (2d Dep't 2013) (reversing in interest of justice where prosecutor,

inter alia, misrepresented defendant's testimony).

In closing, the prosecutor repeatedly asserted that Neulander changed his account between his December 2013 and February 2014 interviews to conform it to new facts that he had supposedly learned about the investigation. A paramedic had testified that the coffee cup was still warm when he arrived at the Neulanders' home (R-1287), and the prosecutor seized on this. Mimicking Neulander, he told the jury: "You come up with new facts, I'll come up with a new story. The coffee's hot. Oh, I didn't leave it there at 7:15. I left it there at 8:20." (R-2859). He drew the jury's attention to this alleged "new story" two more times before he finished his summation, emphasizing that Neulander's sequence of events implicated "[c]rucial, important facts." (R-2871 ("And how about the defendant's sequence. Again, not trivial facts. Crucial, important facts about the day your wife died. Did you get up and jog, then shower, then shave, then bring the coffee, then made the discovery? Or did you jog, bring the coffee, shower, shave in the shower, and then discover her, ..."); *see also* R-2870 ("And yet by the defendant's narrative, that cup of coffee is sitting there maybe at 7:15 like he first said, maybe at 8:20 like he second said, but in any event, it's still sitting there.")).

This was highly misleading. Neulander never said he put the coffee cup on the nightstand at 8:20, and the differences between his accounts in the two interviews were trivial. In his December 2013 interview, Neulander stated that after returning from his run between 7:15 and 7:30 a.m., he prepared coffee, delivered a cup to master bedroom, and showered, finishing around 8:00. (R-3877-78, 3880). When he returned to the bedroom between 8:20 and 8:30, Neulander found Leslie in the shower. (R-3882). In his February 2014 interview, Neulander's account was essentially identical except that he stated that upon returning from his run, he started brewing the coffee, but only brought it upstairs at 8:00 after he finished showering. (R-4042-45). As before, Neulander told the interviewer that he did not discover Leslie until he returned to the bedroom around 8:30. (R-4048-49).

Importantly, there was no evidence that Neulander learned of the "new fact"—that the coffee cup was supposedly warm when the paramedics arrived—between his two interviews. The only discovery on this was turned over to the defense more than six months *after* the second interview was conducted.

Neulander plainly had not changed his account to conform to evidence he had not yet seen. *See People v. Negron*, 161 A.D.2d 537, 538-39 (1st Dep't 1990) (vacating conviction where prosecutor suggested that defendant conformed testimony where defendant made statements before alleged impetus for fabrication occurred).

The prosecutor similarly misrepresented Neulander's prior statements when describing the "only thing that . . . really . . . concern[ed]" him about this case: "why would [Neulander] leave to dispose of evidence on the chance that his daughter . . . might find her mother in the bathroom where he placed her." (R-2861-62). He said:

> I reread the transcript of the interview that [Neulander] gave in the DA's office . . . [n]ow he says . . . I heard the shower running, and the door was locked. Really! How could you possibly know it was locked. I mean it was closed. I think he did lock that door. And I think that's the answer to Mr. Menkin's question [regarding why Neulander would leave to dispose of evidence risking that Jenna would find her mother].

(R-2862). But Neulander never claimed that the door was locked; he merely said it was closed. (R-3878). And photographs of the bathroom door handles show that they have no apparent locking mechanism, let alone one that would have enabled Neulander to lock the door from the outside and later reopen it with a key. (R-3737, 3747). No witness testified to observing any such lock. Moreover, if the blood in the bedroom was deposited because of an altercation, locking the *bathroom* door would not have hidden the evidence from Jenna. The prosecutor's argument that Neulander locked the bathroom door as part of a cover-up effort was baseless and misleading.

Finally, the prosecutor misrepresented the photographic evidence when he questioned Neulander's statement that he had tried calling 911 from the bathroom phone. He encouraged the jury that if they looked "very, very closely" at a picture of the bathroom phone, they could "clearly see [it was] working." (R-2865). But nothing in the photographic evidence sheds light on whether the phone worked or not. (R-3770).

D. The Prosecutor Improperly Encouraged The Jury To Consider Impeachment Material As Substantive Evidence

The prosecutor improperly urged the jury to use Jenna's prior statements as affirmative evidence

of guilt even though the court had limited their permissible use to impeachment.

At trial, Jenna testified that she was unable to reconnect the call to the 911 operator from the water closet phone. The prosecutor attempted to impeach her with prior statements to the police in which, according to the prosecutor, she recalled speaking to the operator using the water closet phone. Because these statements could be used solely for impeachment purposes, the court did not admit them as substantive evidence. (R-2779-80). But that is precisely how the prosecutor used them in closing. After playing the 911 recording, he described Jenna's trial testimony and claimed that it "[d]idn't happen that way." (R-2883). He then offered an alternative account, based on his interpretation of Jenna's prior statements, in which Jenna successfully used the water closet phone. (R-2884, 2886). This was misconduct. *People v. Romandette*, 111 A.D.2d 1040, 1041 (3d Dep't 1985) (improper for prosecutor to cite impeachment evidence as direct evidence during summation); *see also People v. Summers*, 49 A.D.2d 611, 612 (2d Dep't 1975) (vacating conviction where court conveyed impression that jury could use inconsistent grand jury testimony for its truth).

E. The Prosecutor Improperly Appealed To The Jurors' Sympathy By Urging Them To "Listen" To Leslie Tell Them Who Had Killed Her

The prosecutor closed by encouraging the jury to bring justice to Leslie: "I told you that Leslie Neulander would be the most important witness in this case. Please, please, just try to hear her. She's telling you who did this with her blood, her struggle and her wounds. Please listen." (R-2886-87). This echoed similar statements in his opening that Neulander "was a guy that beat his wife to death. He is trying to fool you now and get away with it. Will you listen to Leslie? Do you hear her? I ask you not to let him get away with it." (R-1092-93).

A prosecutor may not appeal to the sympathy of the jury in this manner and encourage a guilty verdict to ensure justice for a victim. *See People v. Fisher*, 18 N.Y.3d 964, 967 (2012) (improper for prosecutor "to admonish the jury that their acceptance of the testimony of the child witnesses was essential to the administration of justice"); *Ballerstein*, 52 A.D.3d at 1194 (improper for prosecutor to tell jury that "[p]rosecutors seek justice and juries deliver it in cases such as these"); *People v. Benedetto*, 294

A.D.2d 958, 959 (4th Dep't 2002) (improper for prosecutor to characterize case "as a 'search for the truth' and 'for justice'"); *People v. Andre*, 185 A.D.2d 276, 278 (2d Dep't 1992) (improper for prosecutor to refer to People's witness as "brave young girl" and "ask[] the jury not 'to let her down'"). The prosecutor's plea to "listen to Leslie" was similarly improper and unfairly prejudicial to Neulander, and warrants a new trial.

F. The Court Should Reverse In The Interest Of Justice

Despite trial counsel's inexplicable—and constitutionally deficient—failure to object to a single instance of the prosecutor's misconduct, this Court should reverse Neulander's conviction in the interest of justice. *See* C.P.L. §470.15(6)(a).

This Court has regularly reversed convictions in the interest of justice in similar circumstances. *See, e.g.*, *People v. Porter*, 136 A.D.3d 1344, 1346 (4th Dep't 2016) (prosecutor injected his personal opinion regarding the truthfulness of testimony, mischaracterized burden of proof, and referred to defense contentions as "[a]ll this nonsense"); *People v. Jones*, 134 A.D.3d 1588, 1589 (4th Dep't 2015) (prosecutor denigrated the defense, repeated a "safe streets" argument, and overstated the probative value of the DNA evidence presented by the prosecution expert); *People v. McClary*, 85 A.D.3d 1622, 1624 (4th Dep't 2011) (prosecutor elicited testimony that vouched for credibility of informant, highlighted defendant's post-arrest silence, and forced defendant to characterize prosecution witnesses as "liars"); *see also People v. Griffin*, 125 A.D.3d 1509, 1510-11 (4th Dep't 2015) (prosecutor characterized the People's case as "the truth," vouched for veracity of complainant, implied that defendant had to prove that complainant had a motive to lie, and appealed to sympathy of jury by "extolling the complainant's 'bravery'"); *Ballerstein*, 52 A.D.3d at 1193 (4th Dep't 2008) (reviewing unpreserved instances of prosecutorial misconduct and reversing).

In this case, the People's evidence was hardly overwhelming, and the prosecutor's misconduct was egregious: He expressed his personal opinions on pivotal issues, acted as an unsworn witness, encouraged improper use of impeachment evidence, and misrepresented the record to suggest that the defense's medical expert had rejected Neulander's version of events, that certain bloodstains were

incompatible with an accidental death, and that Neulander had lied to conform his story to the testimony that the jury would hear at trial. He also improperly appealed to the sympathy of the jury. This Court should not uphold a guilty verdict tainted by such an extensive pattern of misconduct.

IV. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

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." *Wright*, 25 N.Y.3d at 778 (internal quotation marks and citations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (discussing federal standard for establishing ineffective assistance). Whereas *Strickland* requires that "the deficient performance prejudiced the defense," 466 U.S. at 687, a "defendant need not fully satisfy the prejudice test of *Strickland*" to be entitled to 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).

Trial counsel's deficient performance tarnished the fairness of the entire trial. He failed to (1) object to any of the prosecutor's extensive misconduct in summation; (2) seek preclusion of Green's blood spatter testimony, despite its methodological flaws; (3) based on a misunderstanding of the law, call two prosecution blood spatter experts who would have undermined the People's theory; and (4) effectively cross-examine Leestma, whose "red neuron" testimony directly conflicted with his prior statements. These errors, individually and cumulatively, deprived Neulander of his rights under the New York State and United States Constitutions to effective assistance of counsel.

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). Although this ruling overlooked significant extra-record materials attached to the motion, the consolidation of Neulander's two appeals has mooted the issue. *See People v. Evans*, 16 N.Y.3d 571, 574-75 (2011) (where proper vehicle for bringing "mixed claim" of ineffective assistance is disputed, court should consider claim on consolidated appeal). Even when the court purported to address the merits, it ignored

Neulander's most important arguments, mischaracterized aspects of his claim, and failed to address binding authorities warranting vacatur of Neulander's conviction.

A review of the complete record of this consolidated appeal shows that trial counsel was ineffective in multiple, significant respects. A new trial should be granted.

A. Trial Counsel's Failure To Object To The Prosecutor's Misconduct Was Ineffective Assistance

As explained in Point III, the prosecutor engaged in extensive misconduct in his closing argument. Trial counsel failed to object to a single instance of this misconduct.

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 Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001); *Washington v. Hofbauer*, 228 F.3d 689, 703 (6th Cir. 2000). In *Wright*, for example, the Court of Appeals found trial counsel ineffective where he "failed to object when the prosecutor misrepresented the scientific import of the DNA evidence, suggested that the evidence directly linked defendant to the murder although it did not, and made statements that contradicted the expert testimony about the limitations of [a particular type of] DNA analysis." 25 N.Y.3d at 780. Although two prosecution witnesses had seen the defendant with the murder victim before her death and in her car after her death, and DNA analysis could not rule him out as her killer, the Court of Appeals held that counsel's "inexplicable" silence in the face of the prosecutor's misconduct warranted a new trial. *Id.*

The Court of Appeals similarly reversed in *People v. Fisher*, where the defendant had been convicted of various sex offenses based on the testimony of the two minor complainants and a jailhouse informant. 18 N.Y.3d at 965. The prosecutor there made references to prior consistent statements of the complainants that were not in evidence; a "literally true" statement that nonetheless was "less than frank [in its] minimization of the consideration [the informant] was to receive" for his testimony; and a peroration that suggested that acceptance of the complainant's testimony was "essential to the administration of justice." *Id.* at 966-67. The prosecutor's summation "directed the jury's attention"

away from the properly admitted evidence, "a circumstance that competent counsel should have sought to prevent." *Id.* at 966. Because he "fail[ed] to object to any, let alone all, of the prosecutor's egregiously improper departures during summation," counsel rendered ineffective assistance. *Id.* at 967.

Extensive misconduct is not even necessary to support a claim that counsel was ineffective for failing to object to improper remarks. In *People v. Ramsey*, for example, the prosecutor twice referred to an alleged statement by the defendant that had been stricken from the record. 134 A.D.3d 1170, 1171 (3d Dep't 2015). Because the evidence of guilt was not overwhelming, "no reasonable defense lawyer could have thought that such an objection would not have been worth making." *Id.* at 1172. The Appellate Division found counsel's performance constitutionally deficient based solely on counsel's failure to object to these two remarks. *Id.*; *see also People v. Rozier*, 143 A.D.3d 1258, 1260 (4th Dep't 2016) (failure to object to prosecutor's distortion of DNA evidence by itself constituted ineffective assistance).

The same conclusion should be reached here, as the prosecutor's misconduct was far more extensive. His remarks plainly were not harmless, and trial counsel's failure to object to any and, indeed, all of his improprieties, could not possibly have reflected any strategy. *Cf. Wright*, 25 N.Y.3d at 784 (counsel may be "reluctant to interrupt and bring undue attention to one slightly off comment by the prosecution . . . where the summation had little or no impact on the defense"). Trial counsel's failure to object to *any* of the misconduct was ineffective assistance.

The trial court did not address any of the improper remarks except for the prosecutor's misleading reenactment of Jenna's testimony. The court tactically acknowledged that this conduct was improper, but 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 all of the prosecutor's other instances of prosecutorial misconduct, and the trial court's refusal to consider them in assessing the ineffective assistance claim, its determination should be accorded no weight.

B. Trial Counsel's Failure To Seek Preclusion Of Karen Green's Methodologically Flawed Expert Testimony Was Ineffective

The testimony of blood spatter analyst Karen Green was particularly critical to the People's case.

But her opinions were based on patently unreliable junk science and should never have been presented to the jury. Green ignored relevant variables, made unfounded assumptions, and contradicted basic principles of the scientific method by failing to test alternative explanations. Despite these fatal flaws in Green's methodology, trial counsel inexplicably failed to seek preclusion of her testimony. There was no conceivable strategic reason for this inaction.

1. Green's Experiments And Trial Testimony

The source of bloodstains found in the Neulanders' master suite was a critical trial issue. Green said she was "100 percent sure" that "the best explanation for the spatter . . . see[n] in the areas around the bed is an impact event with probable resulting cast-off" (R-2099), and that "a scenario in which Leslie Neulander fell in the shower and then was simply carried or moved from the bathroom to the site of the bedroom by Robert Neulander cannot account for these dynamic and extensive bloodstains . . . around the bathroom and the bedroom" (R-2102).

Her testimony was based on a series of experiments that she performed at her home. To "confirm" that an assault took place on the bed, she repeatedly struck a blood-covered rock with an ax handle from different positions until she produced some blood spatter similar to that depicted in scene photographs. (R-2147-48). To test whether the bathroom entryway stains were caused by Leslie "stumbling around and contact[ing] the wall" (R-2074), Green covered her own hair and body with blood and water. By shaking her head "back and forth left, right, left" (R-2072) and laying "[her]self up against the wall" (R-2074), Green was able to approximate some of the stains photographed in that area.

2. Green's Testimony Was Inadmissible Because It Rested On Methodologically Flawed Experiments

Even if expert opinion testimony satisfies the general reliability concerns of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), it is inadmissible if it is not founded upon a reliable methodology. This threshold inquiry into foundation is "separate and distinct" from the *Frye* analysis, *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006), and concerns "the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence

at trial," *People v. Wesley*, 83 N.Y.2d 417, 429 (1994). To satisfy the foundation requirement, the proponent must establish that "accepted methods were appropriately employed in a particular case." *Parker*, 7 N.Y.3d at 447; *see, e.g.*, *People v. Middleton*, 54 N.Y.2d 42, 50 (1981) (recognizing that even though bite mark evidence is generally reliable under *Frye*, such testimony is admissible only if the experts employed "accepted techniques" to reach their conclusions). A specific 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)). Green's opinions were based on experiments that suffered from several serious methodological flaws and should have been excluded for lack of foundation.

a. *Green's experiments failed to account for key variables.*

Testimony regarding 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 so that the result achieved by the experiment or test is relevant to the issue to be proven." *CNA 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); *McCarthy v. Handel*, 297 A.D.2d 444, 448-49 (3d Dep't 2002) (expert testimony inadmissible because there was no evidence that testing was done on item similar to actual item).

Green's attempts to account for the conditions at the scene fell far short of the "substantial similarity" required to admit expert opinions based on a staged reenactment. *Styles v. General Motors Corp.*, 20 A.D.3d 338, 339 (1st Dep't 2005). Green testified that she was "100 percent sure" that the best explanation for the bedside bloodstains was that Leslie was struck in the head with a heavy object (R-2099), based on an experiment that assumed facts with no basis in the evidence. As a stand-in for a human head, Green used "a large rock as a hard, firm surface . . . cover[ing] it with a rubber layer . . . [and] some wig hair." (R-2150-51). There was no basis, scientific or otherwise, for assuming that striking a rock would create blood spatter similar to the spatter that striking a living person would

produce. 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). Moreover, she acknowledged that she was "*not* trying to re-create what happened." (R-2150 (emphasis added)). Rather, by using a rock in her experiment, she "just tr[ied] to get a blood source on something that wouldn't squish into the bed." (R-2150).

The Court of Appeals has reversed a conviction involving similarly flawed expert testimony. In *People v. Cohen*, the issue was whether the victim had committed suicide or whether his wife had killed him with the gun recovered at the scene. 50 N.Y.2d at 908. Multiple witnesses testified to the results of experiments in which the gun was fired at "various objects at prescribed distances." *Id.* at 910. The "objects" included "a living rabbit which had been shaved and [had] human hair placed over [its] skin to simulate the conditions on the victim's head." *Id.* But there was no evidence that the rabbit or other objects "possess[ed] characteristics substantially similar to human skin or that they reflected powder burns in the same manner as human skins." *Id.* The Court reversed, instructing that before "the People offer to show the effects of a gun shot from this [particular] weapon on animal tissue" at a new trial, "they must first establish that there is a substantial similarity between the skin and tissue of the test subject and that of a human victim." *Id.* Since the People's own witness here conceded that the rock was not substantially similar to Leslie's head, her testimony was inadmissible under *Cohen*.

In other instances, Green simply ignored relevant variables. Green testified about the bloodstains Leslie's hair would have created in the bathroom based on experiments in which she wetted her own hair with blood. (R-2071). But Green's hair is relatively thin and straight (R-4618), whereas Leslie's was thick and curly (R-3846). Green admitted she was unaware of differences between her hair and Leslie's and that she failed to account for the length, body, and curliness of Leslie's hair. (R-2141). There was no basis to presume, as Green apparently did, that all hair interacts with blood the same way.

Green's conclusion that blood from Leslie's upper arm and head created two transfer stains in the bathroom entryway was similarly problematic. Photographs depict the two bloodstains at a low distance from the floor, below the handle of the water closet door. (R-3782, 3988). Green tested whether Leslie could have created the two stains while "stumbling around" (R-2074), but her experiments failed to

account for the position a person of Leslie's height would have needed to be in to generate the stains (R-2170) and provided no basis on which to conclude that her claimed scenario was even physically possible.

Finally, Green testified that certain bloodstains could have resulted from a heavy blow to Leslie on the bed, based on experiments that assumed that Leslie's head was already bleeding at the time of the blow. (R-2153). But the mattress on which the supposed attack occurred had no bloodstains. Although Green maintained that considering the condition of the mattress in her experiments would have required her to "assume no post-incident tampering" and that there was not a "water-resistant pad" (R-2177), there was no evidence to support either assumption. Green's decision to ignore relevant physical evidence and instead engage in conjecture shows that her experiments were patently unreliable.

b. *Green's experiments rested on assumptions lacking any evidentiary basis.*

It has long been "settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness" and that an expert "cannot reach his conclusion by assuming material facts not supported by evidence." *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646 (1959). Even if an injury could have been caused by a particular event, an expert cannot opine that that event actually caused the injury without a factual predicate.

For instance, in *Samuel v. Aroneau*, an expert testified that most paint used for building exteriors at the time in question was lead-based and that "sandblasting [performed on the building] created lead-contaminated dust which contributed to [the plaintiff's] lead poisoning." 270 A.D.2d 474, 475 (2d Dep't 2000). The court held that, because there was no evidence that the actual paint on the building was lead-based, the expert's conclusion was "without foundation and wholly speculative," and could not be considered on summary judgment. *Id.*

Similarly, Green's "best explanation" for the bedside bloodstains was based on an experiment that assumed facts inconsistent with the evidence—namely, that (1) Neulander stood atop the bed (R-2149), and (2) struck an already open wound on Leslie's head (R-2153), (3) with an object that was similar to an ax handle (R-2149), (4) while Leslie was lying near the south edge of the bed (R-2148-49,

4216-17). But no weapon was recovered, and there was no evidence suggesting that a weapon resembling an ax handle was even available. Nor is there any evidentiary basis for Green's assumption that Leslie first suffered a significant head wound and then was positioned on the bed, presumably unconscious, in a manner that would have enabled Neulander to restrike the same wound to create the bedside bloodstains. Leslie suffered only one blood-letting injury, and the prosecution's theory was that she was hit two or three times in the exact same location on her skull. Green's assumption that Neulander struck Leslie elsewhere in the master suite before delivering a massive blow to her skull on the bed contradicted the prosecution's own theory—that the first strike to Leslie's head occurred in the bedroom, and was followed by a "struggle by the water closet," after which Neulander placed Leslie in the shower, and "smash[ed] her head [against the bench]." (R-2881). Moreover, Green was able to produce only sixteen droplets of blood on the south bedroom wall in her experiment (R-4584)—a far cry from the more than 100 spatter stains she observed in the scene photographs (R-2089). Under the conditions that Green tested, Neulander would have needed to strike Leslie more than six times to produce the bloodstains on the south bedroom wall. No evidence supported such a theory.

c. *Green improperly designed experiments to try to prove the People's theory.*

Instead of attempting to rule out alternative explanations for the bloodstains, Green improperly designed her experiments to "confirm" a theory favorable to the prosecution. (R-2147). This is yet another ground for exclusion.

Expert testimony based on methodology that does not seek to rule out alternative explanations is inadmissible. *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 "failed to identify any evidence and accepted methodology that would permit their expert to state . . . that [plaintiff's neurological] deficits [were] the result of one traumatic incident as opposed to another, or even to rule out nontraumatic causes or the cumulative effect of [plaintiff's] series of head traumas").

Eliminating alternatives is at the heart of the scientific method. Scientists are supposed to

"[s]tart[] with a theory" and "construct experiments in an attempt to disprove the theory." Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Pol'y Rev. 381, 392 (2004). Blood spatter analysis is no different. For example, a leading manual provides guidelines to "prevent the reconstruction effort from becoming too subjective." Tom Bevel & Ross M. Gardner, *Bloodstain Pattern Analysis with an Introduction to Crime Scene Reconstruction* 367 (3d ed. 2008); *see also* Scientific Working Group on Bloodstain Pattern Analysis, *Bibliography Project: Bloodstain Pattern Analysis* (Sept. 16, 2013), *available at* http://www.swgstain.org/resources/bibliography (identifying Bevel & Ross manual as key resource for crime scene reconstruction). One of the manual's principal guidelines is to "[c]oncentrate on elimination: The analyst should concentrate his effort on eliminating possibilities that are 'not consistent.' Do not put emphasis on 'identifying' the event. It is not the case that the analyst can associate a set of circumstances to a specific event and always absolutely exclude all other possibilities. Scientific method works on the idea of falsification." Bevel & Ross, *Bloodstain Pattern Analysi*s 367 (emphasis omitted).

Green's experiments flouted these basic principles by failing to test the plausibility of Neulander's account of events. For example, Green testified that she considered whether bloodstains in the bathroom entryway could have been caused by Leslie's "stumbling around" (R-2074), and purported to confirm the validity of this theory through experiments in which she covered her own head and arm in blood. But there was other activity in that same area that she failed to consider: Neulander, with the assistance of Jenna, moved Leslie from the shower to the bedroom. Even though Green was aware of this fact, she made no attempt to test whether moving a person with significant head laceration through the bathroom entryway could have caused the bloodstains that she attributed to a violent altercation.

Additionally, Green testified that her experiment for the area adjacent to the bed was designed to "confirm" that a blow to Leslie's head could have caused the visible blood spatter. (R-2147). Her choice of words is revealing, and demonstrates that she saw her task as confirming the prosecution's theory without examining alternative scenarios. For example, the blood spatter on the south bedroom wall might have come from Neulander's removal of a bloody garment or from the actions of emergency personnel.

(R-4622 (Pizzola, considering the possibility that Neulander's removal of clothing caused spatter stains and stating that it could "not be ruled out"); R-1523 (medical examiner opined at scene that blood spatter on bedroom wall was consistent with cast-off from paramedics' gloves)). Blood spatter on items on the nightstand might have been caused by Leslie's placement on the floor next to the bed. (R-4634-35 (Knapp, declaring bloodstains near bed "inconclusive with no distinguishing pattern," but positing that the "question is how was the victim placed down on the floor after she was moved from the bathroom" and suggesting that rolling Leslie over might "caus[e] blood to cast off of the blood and water mixed hair")). Green reviewed the Knapp and Pizzola reports before formulating her own opinion. (R-2114).

Because Green failed to test whether the bloodstains could have come from the movements of Neulander and Jenna or the flurry of activity of emergency personnel attending to Leslie, her experiments were unreliable and provided no scientifically valid basis for her conclusions. The jury should not have been permitted to consider Green's fatally flawed testimony that the "best explanation" for the bedside spatter was an impact event on the bed (R-2099), and that Neulander's moving Leslie from the bathroom to the bedroom "cannot account for" the bloodstains seen in those areas (R-2102).

3. Counsel Was Ineffective For Failing To Seek To Exclude Green

Where harmful evidence is inadmissible, counsel's failure to object to its admission often constitutes ineffective assistance. *See, e.g.*, *People v. Case*, 114 A.D.3d 1308, 1310 (4th Dep't 2014) (counsel was ineffective for failing to review and object to inadmissible summary exhibits); *People v. Brown*, 61 A.D.3d 1427, 1428 (4th Dep't 2009) (counsel was ineffective for failing to object to admission of victim's medical records, which contained information about prior allegations of sexual abuse against defendant); *People v. Barret*, 145 A.D.2d 842, 844 (3d Dep't 1988) (counsel was ineffective for, *inter alia*, failing to object to testimony identifying defendant's voice on monitoring device where no foundation for testimony was established).

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*, 7 N.Y.3d at 447. Accordingly, courts have

repeatedly found that counsel's failure to object to this type of unreliable testimony constitutes ineffective assistance. *See, e.g.*, *Barret*, 145 A.D.2d at 844 (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); *United States v. Hebshie*, 754 F. Supp. 2d 89, 118 (D. Mass. 2010) (failure to move for *Daubert* hearing about canine identification of fire accelerant location).

A court need not determine that a challenge to an expert's testimony would have been successful to find counsel's performance ineffective. The "standard . . . is whether trial counsel failed to file a 'colorable' motion and, if so, whether counsel had a strategic or legitimate reason for failing to do so." *People v. Carver*, 124 A.D.3d 1276, 1279 (4th Dep't 2015) (citing *People v. Garcia*, 75 N.Y.2d 973, 974 (1990), and *People v. Rivera*, 71 N.Y.2d 705, 709 (1988)). Although "colorable" requires something more than little or no chance of success, "'certitude'" is not required. *Id.*; *accord People v. Carnevale*, 101 A.D.3d 1375, 1381-82 (3d Dep't 2012) (ineffective assistance for failure to file colorable motion to suppress); *People v. Vauss*, 149 A.D.2d 924, 924 (4th Dep't 1989) (same).

Given the numerous methodological flaws of Green's experiments, there is *at least* a colorable claim that Green's testimony lacked foundation, and there was no strategic reason for trial counsel's failure to object to its admission. Moreover, although prejudice is not strictly required under state law, Neulander was obviously prejudiced by Green's unfounded testimony. Only one expert other than Green testified that Leslie's head injury could not be attributed solely to a fall in the shower. The People's other experts conceded that Leslie's head injury could have resulted from hitting the shower bench a single time, and the defense presented its own blood spatter expert who opined that the spatter was not inconsistent with Neulander's account. Thus, but for trial counsel's error, there is a reasonable probability that the verdict would have been different. *See Strickland*, 466 U.S. at 694.

4. The Trial Court's Errors

The trial court did not grapple with the methodological defects in Green's testimony or the

pertinent caselaw. Instead, the court found that a motion to preclude Green's testimony "would not have been successful, as blood spatter interpretation is generally considered reliable," citing two cases finding blood spatter testimony generally reliable under *Frye*. (R-4404). But Neulander's motion made clear that he was "not arguing that trial counsel's performance was deficient because counsel neglected to seek a *Frye* hearing, but rather because he failed to argue that the specific defects in Green's methodology made her testimony inadmissible." (R-4667-68; *see also* R-4844-45). The requirement that the *specific* procedures an expert used be reliable is "separate and distinct" from *Frye*, which, in contrast, simply looks to whether general principals have "gained general accepted in [its] particular field" and "emphasizes counting scientists' votes, rather than on verifying the soundness of a scientific conclusion." *Parker*, 7 N.Y.3d at 446-47 (internal quotation marks and citations omitted). Even where a type of expert testimony is generally reliable under *Frye*, it is necessary to determine "whether the accepted techniques were employed by the experts" in the particular case. *Middleton*, 54 N.Y.2d at 50; *accord Wesley*, 83 N.Y.2d at 429. The trial court's holding that *Frye* case law would have precluded the challenge to Green's methodology was thus legally erroneous.

The trial court also found that, because a *Frye* challenge would have failed, there was a tactical reason to allow "the jury to hear from *both* Green and [defense expert] Kish" and "to argue that Kish was a more credible witness." (R-4404). But again, the basis for precluding Green was not *Frye*, but rather Green's specific methodological errors, none of which infected Kish's testimony. The trial court ignored "the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury." *Parker*, 7 N.Y.3d at 447. Reasonable counsel would not allow a prosecution expert to testify that such bizarre and unscientific experiments definitively proved guilt when that testimony could have been precluded. Trial counsel's failure to challenge its admissibility was ineffective assistance.

C. Trial Counsel Was Ineffective For Failing To Call Rejected Prosecution Experts As Witnesses Due To A Misunderstanding Of The Law

Trial counsel was also ineffective for failing to call Pizzola and Knapp, whom the People had consulted but did not call as witnesses. Both experts had written reports that were critical of the

investigation, were inconsistent with the prosecution's theory, and contained observations and conclusions favorable to the defense. Although their testimony could have significantly undermined the People's case, trial counsel did not call either expert as a trial witness, because he erroneously believed he was not permitted to do so. This mistake of law rendered trial counsel's representation ineffective.

1. Pizzola and Knapp's Reports

The prosecution's theory was based on experts' interpretations of physical evidence at the incident scene, and Pizzola's opinion could have undermined the basis for the People's case. Pizzola's report was highly critical of the collection, analysis, and interpretation of this evidence. He concluded that "[t]he analysis and interpretation of the physical evidence gathered from this incident scene is hindered *since the scene was incompletely investigated*." (R-4621 (emphasis added)). Pizzola observed that "[p]otentially significant items of evidence were not collected," including the bedding from the Neulanders' bed, and "it is likely that much of the physical evidence in the form of blood, tissue or hair was washed away" in the shower. (R-4621).

Pizzola also said he could not "rule[] out that the stains . . . originated from the removal of a bloody garment in the area between the bed and ceiling/wall" (R-4622), as Neulander had said he did before emergency responders had arrived (4064-65). Although Pizzola raised some doubts about this possible explanation (R-4622), his opinion stood in sharp contrast to Green's testimony, which completely rejected such an explanation.

Knapp also suggested in his report that there were serious flaws and inadequacies in the incident scene investigation that would have caused any expert difficulty in drawing ultimate conclusions. For example, he observed that "[t]here were very little close up photographs of any of the blood stains and no photographs with scales in them. There are no photographs of the patterns on the bathroom wall and door frames from straight on (90 degree) or of the patterns on the bedroom carpet from directly above (90 degree)." (R-4635). The directionality of blood spatter and the size of the stains are important considerations in blood spatter analysis.

Knapp also provided opinions consistent with the defense theory that Leslie's injury occurred in

the bathroom—and inconsistent with the People's theory that an assault occurred in the bedroom, continued in the bathroom entryway, and ended when Neulander struck Leslie's head against the shower bench. (R-2881). His report stated that "the photographs indicated that the blood spatter starts in the bathroom" and that the bloodstains in and around the bathroom entryway appeared to be blood mixed with water—meaning they were created after Leslie was carried from the shower, not during the alleged attack. (R-4633-34).

Knapp's opinion about the bedside bloodstains was particularly helpful to the defense. He opined that these bloodstains were "inconclusive," and expressly stated that "[t]he blood spatter pattern(s) on the wall and ceiling, do not appear to have been made by an instrument, as a cast-off pattern from an instrument almost always consists of spatter in parallel lines." (R-4634-35). Knapp's conclusion directly contradicted Green's opinion that the spatter resulted from Leslie's being struck by an object on or near the bed. Knapp's report also raised the possibility that blood spatter in the bedroom was "cast off of the blood and water mixed hair," which suggests that the bloodstains were created *after* Leslie was removed from the shower. (R-4635).

Despite the various ways these reports were helpful to the defense, trial counsel did not call Pizzola or Knapp at trial, because he erroneously believed that he was legally unable to subpoena them to testify. He stated this view on the record:

> I can't subpoena an expert and compel them to give an answer. I can't subpoena their expert and expect that he's going to answer my questions about his opinion. He's entitled, number one, to be paid. Number two . . . he can quash the subpoena.

(R-2758).

In response, the People argued (correctly) that trial counsel could have subpoenaed these experts (R-2758), and the Court (correctly) agreed (R-2777). As the caselaw makes clear, there was no legal reason why trial counsel could not compel Pizzola and Knapp 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) ("[A] witness is not the property of either party to a suit and simply because one party may have conferred with a witness and even paid him for his expert advice does not render him incompetent to testify for the other

party." (internal quotation marks and citation omitted)) (collecting cases).

2. Trial Counsel's Flawed Understanding Of Evidentiary Rules Deprived Neulander Of Effective Assistance

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 assistance to make an important trial decision based on a flawed understanding of the law.

For example, in *People v. Nesbitt*, counsel did not defend certain assault charges because of his belief, stated on the record, that no defense was available given the text of the statute. 20 N.Y.3d 1080, 1082 (2013). The Court of Appeals, however, found that the "record afford[ed] a good-faith basis for an argument that the injuries the victim received did not result in serious and protracted, or serious and permanent, disfigurement," and that at the time of the defendant's trial, "the meaning of these statutory terms was an open issue." *Id.* Therefore, counsel's "belief that his client was without a defense . . . was mistaken," and his "error in overlooking that issue render[ed] his assistance to defendant ineffective." *Id.* In *People v. Jenkins*, a central issue was whether the key prosecution witness could accurately identify the defendant as the perpetrator. 68 N.Y.2d 896, 897-98 (1986). Yet defense counsel failed to cross-examine the witness with police reports establishing that he had misidentified two other suspects as the defendant's accomplices. *Id.* at 898. The Court of Appeals held that the police reports were admissible and that if counsel had failed to use the reports because he mistakenly believed them to be inadmissible, this error deprived the defendant of effective assistance. *Id.*; *see also People v. Yagudayev*, 91 A.D.3d 888, 892 (2d Dep't 2012) (ineffective assistance where "had defense counsel properly researched his theory of the case, he would have ascertained that it was legally unsound"); *People v. Brown*, 300 A.D.2d 314, 315 (2d Dep't 2002) (ineffective assistance based on, *inter alia*, defense counsel's "unfamiliarity with the law" on admissibility).

Here, trial counsel acknowledged that he did not call Pizzola and Knapp due to his flawed understanding of the law. This mistake was inexcusable, particularly because the testimony of these two expert witnesses could have undermined the prosecution's case in several ways.

First, both Pizzola and Knapp would have testified that the incident scene investigation was deeply flawed. Since the prosecution's case hinged on analysis of the scene, Pizzola and Knapp would have undercut the People's experts who drew conclusions based on their review of scene photographs.

Second, their testimony would have directly contradicted key prosecution witnesses, particularly Green, because they both conceded that there were innocent explanations for the bloodstains in the bedroom and bathroom entryway that cast doubt upon the prosecution theory. And Knapp's observation that the blood trail went from the bathroom to the bedroom was inconsistent with the prosecutor's argument that the blood trail was "indicative of someone coming out of the bedroom with a bleeding head." (R-2864).

Finally, Pizzola and Knapp's testimony would have carried significant weight with the jury because they had been retained by the prosecution, and Knapp worked for the Onondoga County Sheriff's Office. Their testimony would have demonstrated that even the prosecution's experts could not agree on what happened at the scene and what conclusions could be drawn from the evidence, and that the People were concealing unfavorable testimony from the jury.

3. The Trial Court's Errors

The trial court ignored Neulander's argument that he was deprived of the right to an attorney who understood "basic principles of criminal law and procedure." *Droz*, 39 N.Y.2d at 462. The court instead rejected his claim on the erroneous assumption that during an "on-the-record discussion," trial counsel "stated that he could call [Pizzola and Knapp] but did not want to do so." (R-4405). In fact, counsel told the court the exact opposite—"I can't subpoena their expert . . . . I mean, he can quash the subpoena" (R-2758)—and the trial court pointed out counsel's legal error (R-2777). The court also suggested that counsel made a tactical decision to not call the witnesses and instead seek a missing witness charge. (R-4405). If so, this was not a reasonable strategy, because that request to charge was doomed to fail, and did fail, because of the same legal principle that trial counsel had misunderstood—that "the defense could have called Knapp and/or Pizzola as witnesses" (R-2777). *See People v. Stefanovich*, 136 A.D.3d 1375, 1377 (4th Dep't 2016) ("[A]n attorney should not be deemed effective simply because he or she followed

a strategy"; the strategy must be "reasonable and legitimate." (internal quotation marks and emphasis omitted)).

Finally, the court's hypothesis that "counsel may not have wanted to call Pizzola and Knapp as witnesses because many of their findings would have been potentially damaging to the defendant's case" (R-4405) overstates the significance of other parts of their reports and, more importantly, misses the point: There was no need for Pizzola and Knapp to unequivocally exculpate Neulander. Pizzola and Knapp would have substantially undermined its case, since their testimony that the blood evidence was inconclusive by definition establishes reasonable doubt. Calling them also would have underscored that the case was so weak that the People had to consult several witnesses before they could find one (Green) who supported their theory.

D. Trial Counsel's Cross-Examination of Leestma Was Constitutionally Deficient

Trial counsel failed to challenge Leestma's red neurons testimony with prior inconsistent statements in Leestma's own report, his textbook, and other material that simple internet searches would have unearthed. His failure to deploy any of this material severely prejudiced the defense given the importance of the testimony, and demonstrates ineffective assistance.

1. <u>"Red Neurons" and Time of Injury</u>

The People relied heavily on Leestma's testimony 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).

The prosecutor highlighted this testimony in his closing argument:

> And being a simple guy, I like simple facts, so when I asked Dr. Leestma, help me out here, help this jury out with time of death. Red neurons, they take hours to develop. Hours. A fact.

(R-2881). This argument apparently resonated: the jury requested Leestma's "testimony under direct examination regarding red neurons" during deliberations. (R-3017).

Trial counsel did not challenge this aspect of Leestma's testimony. He asked *no* questions about how long it takes for red neurons to develop after a mortal injury. (R-1795-96). The only question he asked about red neurons was whether they continue to develop after death, a proposition for which he

apparently had no evidentiary support. (R-1795-96).

2. Trial Counsel Was Ineffective For Failing To Cross-Examine Leestma With Materially Inconsistent Prior Statements

A defendant's right to effective representation entitles him to counsel who prepares and executes meaningful cross-examination of key witnesses. *See People v. Caldavado*, 26 N.Y.3d 1034, 1036 (2015). Counsel must use prior inconsistent statements to impeach prosecution witnesses. In *People v. Cantave*, for example, the complainant's testimony that the defendant raped her was inconsistent with prior statements she made at the hospital. 83 A.D.3d 857, 858 (2d Dep't 2011). Although the hospital records were "received into evidence and readily available to trial counsel . . . counsel made no attempt to impeach the complainant at trial with her inconsistent statements" or otherwise highlight the discrepancies in her account. *Id.* The Appellate Division found "no strategic or legitimate tactical explanation" for counsel's inaction and, based on that error alone, granted a new trial. *Id.* at 859; *see also People v. Arnold*, 85 A.D.3d 1330, 1333 (3d Dep't 2011) (ineffective assistance where, *inter alia*, counsel failed to impeach complainant with prior inconsistent statements); *People v. Clarke*, 66 A.D.3d 694, 697 (2d Dep't 2009) (same); *People v. Raosto*, 50 A.D.3d 508, 509 (1st Dep't 2008) (ineffective assistance where, *inter alia*, counsel "mishandled an important opportunity to impeach the arresting officer").

Trial counsel's cross-examination of Leestma was constitutionally deficient because he failed to impeach Leestma's red neurons testimony using Leestma's own report. The report twice 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":

> Probably an hour or more is required for this change to start appearing, which becomes more evident in succeeding hours before death. . . . The meaning of this observation is that this is one more observation that supports an interval of *an hour or more* with some measure of vital signs occurred between injury and death in Mrs. Neulander.

(R-4417 (emphasis added); *see also* R-4418 ("This histological change [of red neurons]. . . takes most probably an hour or more after injury in the presence of some vital functions to occur.")). The report was provided to trial counsel almost a year before the trial began. Leestma's trial testimony also contradicted his own textbook, where Leestma stated that red neurons can develop in an hour: "In some circumstances,

it appears that red neurons can evolve *in as little as an hour or two and possibly slightly less*." (R-4468 (emphasis added)). Trial counsel had Leestma's textbook with him at trial. (R-1761). There was no reasonable strategic explanation for counsel's failure to use the prior inconsistent statements in his possession to cross-examine Leestma.

That error alone would establish ineffective assistance, but there is more. He could easily have obtained additional materials to bolster the attack on Leestma's red neurons testimony. 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.

The Appellate Division recently granted a new trial based on counsel's failure to prepare to cross-examine an expert in *People v. Cassala*, 130 A.D.3d 1252 (3d Dep't 2015). The issue was whether the defendant had sexually assaulted the complainant. *Id.* at 1254. Counsel's strategy focused on the lack of physical injuries, but the nurse examiner testifying for the People stated that it is "common" for sexual assault victims to exhibit no visible injuries. *Id.* at 1255. The appellate court found that if trial counsel had investigated, he "likely would have become aware of medical experts" who would have testified that the victim had a disorder that "would have made the presence of bruising or bleeding during forceful, non-consensual anal intercourse more likely." *Id.* (internal quotation marks omitted). The court concluded that counsel's "failure to investigate the victim's bleeding disorder meant that he was unprepared to effectively cross-examine [the nurse examiner]," and as a result, that witness's opinion "went completely unchallenged during the trial, and it effectively neutralized" otherwise persuasive evidence for the defense. *Id.* at 1254-55. Based on this and other shortcomings, the court found trial counsel ineffective and vacated the conviction. *Id.* at 1256.

Even minimal investigation here would have yielded additional cross-examination material. For instance, 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 id.* at 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).

Basic internet searches would have also revealed other experts who disagreed with Leestma's trial testimony. Leestma himself acknowledged in his report that although "[m]any reference works state that several hours are required to produce" red neurons, "there is a body of literature that suggests that shorter periods of elapsed time . . . may produce these changes." (R-4576). Trial counsel could easily have obtained this body of literature. For example, *Greenfield's Neuropathology*, a prominent neuropathology treatise, states that "[n]euronal red cell change may be seen in patients surviving *less than 1 hour*." (R-4474 (emphasis added)). This treatise is free online. *See* https://books.google.com/books?id=nrEWkAc7W7IC&printsec=frontcover&dq=greenfield%27s+neuropathology&hl=en&sa=X&ved=0ahUKEwjtr77qbvJAhVGcz4KHUARD0UQ6AEIKzAA#v=onepage&q=greenfield's%20neuropathology&f=false.

These materials all contradicted Leestma's testimony that Leslie's injury must have occurred "at least a couple of hours" before she died (R-1746), and would have substantially undermined his credibility. The contrast between the Peterson testimony and the testimony here also suggests that Leestma shades his testimony to suit particular clients, and that his conclusions are scientifically unreliable. The materials counsel did not use also supported the defense theory of the case that Leslie was injured in the shower at around 7:00. There was no conceivable strategic reason for failing to obtain and use this information.

3. The Trial Court's Errors

To the extent that the trial court considered the merits, it missed the point entirely. The court concluded that defense counsel need not "investigate comprehensively every lead or possible defense" (R-4400 (internal quotation marks omitted)), and that counsel's failure to "impeach Leestma with his [Peterson] trial testimony . . . is nothing more than an attempt to employ the clarity of hindsight' to show how counsel's cross-examination 'might have been more effective'" (R-4401). But the court ignored that counsel already had the report and textbook containing the prior inconsistent statements. No further

investigation was needed.

The trial court also simply misread the Peterson trial transcript. The court thought that Leestma's testimony in that trial was "relatively consistent with his testimony in the instant case" (R-4401), but it wasn't. Here, Leestma testified that red neurons take "at least a couple of hours" to develop; in the Peterson case, he repeatedly opined that they could develop in as little as 30 minutes. These two positions cannot be reconciled, and the shorter timeframe would have severely undermined the People's homicide theory and jibed with Neulander's version of events.

E. Trial Counsel's Cumulative Errors On Essential Points Rendered His Representation Ineffective

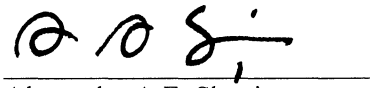
Even if counsel's errors do not individually warrant a new trial, their cumulative effect rendered his representation ineffective under both state and federal standards. A defendant has the "right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant 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.

As detailed above, trial counsel failed to (1) object to more than a dozen instances of prosecutial misconduct during summation; (2) seek preclusion of expert testimony based on plainly flawed methodology; (3) call witnesses with valuable testimony because he misapprehended the law; and (4) effectively cross-examine a key expert witness despite the availability of significant cross-examination material. But for these shortcomings, the evidence would have been much more favorable to the defense, and the jury would not have entered deliberations with the prosecutor's baseless summation commentary fresh in their minds. Each of trial counsel's errors, standing alone, constitutes ineffective assistance, but at a minimum their cumulative effect is more than sufficient to warrant a new trial.

CONCLUSION

For the reasons stated above, the conviction should be reversed. Alternatively, the judgment should be vacated and the case remanded for a new trial.

Dated: New York, New York
April 18, 2017



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