

COUNTY OF SUFFOLK
OFFICE OF DISTRICT ATTORNEY



CONVICTION INTEGRITY BUREAU
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**A Review of the Disclosure Practices of
Former Assistant District Attorney Glenn Kurtzrock**

Suffolk County District Attorney's Office

Conviction Integrity Bureau¹

¹ The Conviction Integrity Bureau is grateful to the New York Law School Post-Conviction Innocence Clinic for its assistance in the preparation of this Report.

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INTRODUCTION

Background

On December 30, 2020, the Supreme Court of the State of New York, Appellate Division for the Second Department, issued an opinion captioned *In the Matter of Glenn Kurtzrock*, 192 A.D.3d 197 (2d Dept. 2020) (“*Matter of Kurtzrock*”). The opinion confirmed the findings of a Special Referee appointed by the Grievance Committee for the Tenth Judicial District and imposed discipline on former Suffolk County District Attorney’s Office (“SCDAO”) Assistant District Attorney Glenn Kurtzrock (“Kurtzrock”) for violating several New York State Rules of Professional Conduct.

The violations arose out of Kurtzrock’s conceded failure to comply with the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires material exculpatory information to be provided to the defense; *Giglio v. United States*, 405 U.S. 150 (1972), which requires material impeachment information concerning prosecution witnesses to be provided to the defense; and *People v. Rosario*, 9 N.Y.2d 286 (1961), which requires production to the defense, before hearing or trial, of all written or recorded statements made by prosecution witnesses which relate to the subject matter of the witnesses’ testimony. These conceded failures occurred in connection with a criminal trial in which Kurtzrock was the assigned Assistant District Attorney (“ADA”).

Specifically, the Appellate Division found that while serving as trial prosecutor in the matter of *People v. Messiah Booker*, Ind. No. 2325A-2015, during a 2017 trial, Kurtzrock failed to produce *Brady/Giglio* and *Rosario* information that was required by law to be disclosed. Following revelation of these nondisclosures, Kurtzrock resigned from the SCDAO. Among other things, the Appellate Division affirmed the following factual findings by a Special Referee:

- Kurtzrock failed to turn over memo book entries, written reports, and interview notes that identified an alternative suspect as a potential perpetrator of the crime. *Matter of Kurtzrock*, 192 A.D.3d at 210-11.
- Kurtzrock failed to turn over notes of an interview of a key prosecution witness reflecting that the witness was under the influence of powerful prescription medication that could have impaired her powers to perceive, retain, and communicate information at the time of the crime, and interview notes of a third party who stated that this witness “keeps changing her story.” *Id.* at 211-12.
- Kurtzrock failed to turn over records of out-of-state police activity concerning Booker’s former girlfriend, who was a testifying accomplice witness. *Id.* at 212.

According to the Appellate Division, this constituted serious and inexcusable violations of the Rules of Professional Conduct.

The Appellate Division, however, found the following in mitigation of these violations: “While the respondent committed extensive misconduct in one case, there was no showing that he engaged in any similar conduct in any other cases notwithstanding the respondent’s assertion to the effect that he customarily delegated responsibility for compliance with *Brady* to the police.” *Id.* at 220.

The Review of Kurtzrock’s Conduct

Suffolk County District Attorney Timothy D. Sini, who took office in 2018 following the conclusion of the Booker case and Kurtzrock’s resignation from the SCDAO, tasked the SCDAO’s Conviction Integrity Bureau (“CIB”) with addressing two questions arising out of the Appellate Division’s decision. First, were any other defendants’ fair trial rights affected by misconduct of the type identified by the Appellate Division? Second, in the event that any similar misconduct was identified, did the Grievance Committee or Appellate Division require additional information that may affect the Appellate Division’s conclusion that there was “no showing that he engaged in any similar conduct in any other cases”?

DA Sini also directed the CIB to prepare a Report that described the CIB’s review of the cases ADA Kurtzrock handled. This Report identifies case-specific issues and the remedial measures imposed as a result of the CIB’s review. This Report also informs the public of actions the SCDAO has taken and is taking to address appropriately the serious misconduct set forth in the Appellate Division’s decision and prevent its future recurrence.

The CIB’s work built on efforts first initiated by the SCDAO in 2017 and 2018 following the identification of *Brady/Giglio* and *Rosario* violations in the *Booker* case. During this initial review, experienced SCDAO prosecutors with no prior involvement in the cases examined case files in several other homicides in which Kurtzrock served as the lead trial ADA. As described below, several of these reviews resulted in identification of documents that, in the view of the reviewing prosecutors, should have been turned over by Kurtzrock but were not. Where documents were identified that had not been produced and that, in the view of the reviewing attorneys, constituted potential *Brady/Giglio* or *Rosario* material, they were produced to defense attorneys at the conclusion of the review.

The CIB reexamined each of these cases and determined whether any additional disclosures were warranted based on the issues identified by the Appellate Division and our own reviews. In certain cases, where the factual record or significance of particular documents was unclear or where the review had not examined whether issues identified by the Appellate Division had occurred in the case, the CIB conducted additional examinations of case materials and spoke with SCDAO personnel and defense counsel to ensure that all potential *Brady/Giglio* and *Rosario* material that had not been produced by Kurtzrock was produced to defendants.

In one of those cases, *People v. Shawn Lawrence*, Ind. No. 1095-12B, described in greater detail herein, the SCDAO’s file review resulted in identification of dozens of pieces of potential

Brady/Giglio or *Rosario* material that had not been produced. These materials were provided to defense counsel in late 2017. These disclosures, as well as subsequent investigation by the SCDAO and defense counsel that identified other serious issues with the case, led the SCDAO under DA Sini to move jointly with defense counsel for dismissal of the indictment against Lawrence in 2018.

As part of its review, the CIB attempted to identify and examine for *Brady/Giglio* and *Rosario* compliance all cases Kurtzrock tried while serving as an ADA with the SCDAO,² both as a homicide prosecutor and while serving in a bureau that prosecutes non-fatal violent crimes and other felony offenses. The CIB also examined additional cases, described below, that Kurtzrock did not try himself but in which Kurtzrock's actions prior to trial were identified as raising *Brady/Giglio* and/or *Rosario* compliance concerns.

The Role of the New York Law School Post-Conviction Innocence Clinic

The CIB provided a copy of the draft Report and proposed disclosures made pursuant to case reviews to the New York Law School Post-Conviction Innocence Clinic ("PCIC"). The CIB and PCIC have formed an innovative partnership that is partly supported by the United States Department of Justice's Bureau of Justice Assistance Upholding the Rule of Law and Preventing Wrongful Convictions Program to review certain applications for relief submitted to the CIB and investigate systemic issues identified by the CIB or PCIC. The CIB and PCIC determined that Kurtzrock's misconduct in connection with the *Booker* and *Lawrence* trials, and the resulting examination of Kurtzrock's disclosure practices in other cases, raised a potential systemic issue warranting additional future review.

Pursuant to the partnership, the PCIC reviewed a draft of this Report, which described the facts of the cases reviewed and the CIB's proposed disclosures. The PCIC also examined and discussed with the CIB material identified by the CIB over the course of its review as raising potential *Rosario*, *Brady*, and/or *Giglio* concerns. The PCIC did not conduct an additional review of the case files, which in many instances had already been reviewed twice. The PCIC agreed that the CIB should disclose all the materials identified by the CIB as raising potential *Rosario*, *Brady*, and/or *Giglio* concerns. The PCIC suggested that in the future the SCDAO might consider conducting a broader review of SCDAO practices to identify those which might have allowed Kurtzrock's actions. Moreover, the PCIC and CIB will be working pursuant to the partnership on ongoing reviews of certain cases identified in this Report.

In addition, the SCDAO and PCIC hope that this Report, which is believed to constitute the first publicly-reported review and audit, by a District Attorney's Office, of an individual prosecutor's compliance with statutory and constitutional pretrial disclosure obligations, will inform the public of the issues identified as a result of this review and the SCDAO's efforts to address them. The SCDAO and PCIC also hope that this Report will serve as a teaching tool

² Prior to joining the SCDAO in 2004, Kurtzrock had spent several years as a prosecutor for the Nassau County District Attorney's Office.

for current participants in the criminal justice system inside and outside of Suffolk County and for law students and others who hope to participate as advocates in the criminal justice system in the future.

DA Sini and the CIB appreciate the assistance of the PCIC in the preparation of this Report and thank the PCIC for its ongoing partnership.

Findings

In several prosecutions handled by Kurtzrock, this review identified practices similar to those criticized by the Appellate Division in the *Booker* case. In particular, in several *Rosario* productions, Kurtzrock redacted written statements by a witness in a manner that did not make clear the existence or extent of the redactions. Moreover, in some instances, Kurtzrock's *Rosario* redaction practices were incompatible with both the general practice in the SCDAO at the time and with what the CIB understands to be the requirements of *Rosario*.

For example, while the CIB's review reflects that the general practice of prosecutors in the SCDAO at the time of Kurtzrock's employment was to produce all notes taken by a testifying lead detective concerning steps taken by the detective in furtherance of the investigation,³ Kurtzrock in many cases redacted or withheld the lead detective's notes (a) in a manner that did not make clear the existence and scope of the redactions or withheld material to the recipient of the *Rosario* production, and (b) in a manner that appears to have been designed to limit disclosures only to statements responsive to specific factual questions that Kurtzrock intended to ask the lead detective on his direct examination. In so doing, in the view of the CIB, Kurtzrock failed to give proper consideration to the fact that a testifying lead detective's testimony is likely to relate to the conduct of the investigation more generally, and thus the lead detective's notes about the investigation as a whole relates to the subject matter of the detective's testimony.⁴ Moreover, in some instances those practices led Kurtzrock to redact or otherwise fail to disclose *Rosario* material in detectives' notes related to testifying lay witnesses whose statements were captured in those notes. In these cases, Kurtzrock's redaction and withholding practices did not consider whether potential *Giglio* or *Brady* material was contained in the notes that he was redacting. Kurtzrock's decision to disregard his obligations concerning *Giglio* and *Brady* resulted in late or nonexistent production of potential *Giglio* and *Brady* material in certain cases described in this Report.

These practices had a devastating effect on the fairness of the proceedings in the *Lawrence* matter. In that case, the SCDAO's 2017-18 case review concluded, with the assistance of able advocacy by Lawrence's counsel, that Kurtzrock had committed serious disclosure violations

³ The SCDAO under DA Sini produces all detectives' notes concerning the case without redactions pursuant to its Voluntary Disclosure Policy and the recently-enacted CPL § 245.20 unless a judicially-authorized protective order or statute limits the scope of disclosure.

⁴ *People v. Rosario*, 9 N.Y.2d 286 (1961), requires production to the defense before hearing or trial of all written or recorded statements made by prosecution witnesses which "relates to the subject matter of the witness' testimony," *id.* at 289.

resulting in a miscarriage of justice in that case. A court agreed with that assessment and dismissed charges that had been filed against Lawrence. An examination of the case by the CIB following *Matter of Kurtzrock* determined that Kurtzrock's practices in *Lawrence* bore striking and disturbing similarities to those identified in *Matter of Kurtzrock*.⁵

Despite our confidence in the verdicts of conviction and negotiated dispositions of ADA Kurtzrock's cases, with exceptions noted below, the 2017-18 SCDAO reviewers and the CIB (following consultation with the PCIC) made available to defendants all non-produced potential *Rosario*, *Brady*, and/or *Giglio* material so that they could make their own, independent assessments concerning the effects, if any, of the nondisclosures identified as a result of these reviews. The CIB, either at the request of defense counsel or in an abundance of caution, also included in its supplemental disclosures certain additional material that might not constitute potential *Rosario*, *Brady*, and/or *Giglio* material in order to ensure that defendants have a full and fair opportunity to evaluate their own cases in light of the issues identified with Kurtzrock's disclosure practices.

Certain supplemental disclosures have already resulted in the filing of an application for relief under CPL § 440.10 in one case. In addition, some defendants whose cases were the subject of supplemental reviews have applied to the CIB for relief from their convictions. Those cases will be reviewed under standards applicable to CIB applications.

Actions Taken by the SCDAO

The SCDAO's first priority is to remedy any potential harm caused by Kurtzrock's disclosure practices and provide defendants with all information relevant to an evaluation of their cases. This approach resulted in provision of supplemental disclosures in 100 percent of Kurtzrock's homicide cases reviewed and in 76 percent of all cases reviewed. In some cases, the supplemental disclosures constituted a single piece of information or witness statement, while in others the disclosures contained dozens of pages of information. The nature of the supplemental disclosures, and any ongoing investigations or applications made in connection with those disclosures, are described in the case summaries below.

In addition, the SCDAO has taken several broader measures following Kurtzrock's resignation from the SCDAO to remedy past misconduct and prevent its future recurrence. These measures include the following:

- DA Sini created the CIB as the first-ever Bureau within the SCDAO whose sole aim is to achieve and ensure justice by investigating claims of innocence, remedying identified wrongful convictions, and providing proactive support and recommendations to the

⁵ The disturbing similarities previously were identified in a January 20, 2021 letter from Paul Schechtman of Bracewell LLP and Nina Morrison of the Innocence Project to the Appellate Division. The CIB thanks Nina Morrison and the Innocence Project for calling the letter to its attention.

Office to prevent wrongful convictions. The production of this Report is in furtherance of this mission.

- Upon assuming office in 2018, DA Sini adopted a new Voluntary Disclosure Policy designed to ensure compliance with legal and ethical obligations, remove gamesmanship from the criminal justice system, and further the Office's mission of seeking the truth through a fair and just process. Under the Voluntary Disclosure Policy, *Rosario* material is to be disclosed with initial discovery (instead of on the eve of trial, as the *Rosario* rule requires) unless witness safety or other compelling reasons support later disclosure, and timely compliance with *Brady* and *Giglio* requirements is mandated.
- The Voluntary Disclosure Policy anticipated discovery law reforms which took effect in January 2020. As of January 2020, *Rosario* material, *Brady* information, and *Giglio* information concerning testifying witnesses was required by statute to be disclosed at the time of initial discovery. The SCDAO has committed to compliance with these discovery reforms and has invested substantial resources in implementing new technology and new partnerships with criminal justice agencies to make *Rosario* material and potential *Brady/Giglio* information available for prompt disclosure. The SCDAO has created a new Intake Bureau and a new Disclosure Team, and it has hired new staff to ensure it is well positioned to comply with the new discovery law.
- The SCDAO has conducted regular training on dictates of the new discovery laws and the requirements of *Rosario*, *Brady*, and *Giglio*, both for newly-hired ADAs and for experienced prosecutors. Since 2018, the SCDAO has conducted 12 separate trainings on discovery obligations for prosecutors in the office and has also hosted a multi-day training for new hires covering prosecutorial ethics and discovery obligations. Additionally, the Office regularly issues bulletins on judicial decisions and updates to the law to ensure that prosecutors are kept abreast of the latest developments as they relate to discovery obligations.

Conclusions

The CIB review concludes that Kurtzrock engaged in other misconduct that is similar to that identified by the Appellate Division in *Matter of Kurtzrock*. As a result, the CIB will provide a copy of this Report to the Appellate Division and the Grievance Committee so that they may determine what, if any, additional action is appropriate. The SCDAO is prepared to assist the Appellate Division and Grievance Committee in providing any further information or material that may be sought by either body in response to this Report. A copy of this Report will also be shared with all employees of the SCDAO.

Through measures including creation of the CIB, publication of this Report, and implementation of new training and disclosure policies, the SCDAO under DA Sini has sought to transform the culture of this Office so that no prosecutor will endeavor to engage in gamesmanship or fail to adhere faithfully to the dictates of *Brady*, *Giglio*, and *Rosario*. The Office also commits to ensuring that any past injustices will be brought to light and remedied. In connection with this commitment, the CIB, in partnership with the PCIC, will examine future cases submitted to the CIB for similar misconduct as described in *Matter of Kurtzrock* and herein, to ensure that such practices did not infect the fairness of those convictions under review. Moreover, if any systemic injustices are identified as a result of the CIB's and PCIC's ongoing work, they will be brought to the attention of the appropriate authorities and the public.

CASE REVIEW SUMMARIES

This section of the report summarizes the CIB's review of cases handled by Kurtzrock. It describes any potential *Brady/Giglio* or *Rosario* issues identified during the course of the review and in any legal proceedings related to the case. The case reviews also note where there will be further review because of a wrongful conviction application or because either the CIB or the PCIC have recommended a more in-depth study of the matter.

The case reviews summarize facts and legal proceedings related to the case only to the extent these matters were relevant to the CIB's review.

A. The *Lawrence* Case and a Related Prosecution⁶

The CIB based its review of the *Lawrence* prosecution and a related matter on the existing record in view of the disposition of the cases.

People v. Shawn Lawrence, Ind. # 1095B-12

Evidence elicited at the trial of Shawn Lawrence reflected that on January 12, 2010, David Hodges had an altercation with Allan McGhee at a party held by his sister at her home in Andpress Plaza, a housing complex in North Amityville. Later that night, a van driven by James Terry and occupied by Ralph Council and David Hodges was set upon by four men. Multiple gunshots were fired into the van, killing Terry and seriously injuring Hodges. Council was wounded but was able to flee on foot. McGhee and Shawn Lawrence were charged with participating in these crimes in 2012.

McGhee pleaded guilty to Manslaughter in the First Degree and two counts of Assault in the First Degree in June 2014. Lawrence, however, maintained his innocence, rejected all plea offers, and insisted on a trial. Kurtzrock served as the SCDAO's counsel for Lawrence's trial, which occurred in 2015 and which resulted in guilty verdicts against Lawrence and imposition of an aggregate sentence of 75 years to life.⁷

After Kurtzrock's resignation from the SCDAO, a comprehensive review was conducted of the Lawrence file that revealed over 40 items or categories of documentation and information that appeared to fall within the category of potential *Brady*, *Giglio*, and/or *Rosario* material and that had not been disclosed prior to Lawrence's trial.

The nondisclosed materials included items that bore striking similarities to documents and information that the Special Master and Appellate Division concluded Kurtzrock was obligated to disclose but did not in the *Booker* case:

⁶ CIB Bureau Chief Craig McElwee took no part in the review of these cases. Further detail concerning these cases is available on the public docket under the listed indictment numbers.

⁷ Other SCDAO prosecutors were assigned to this case prior to Kurtzrock's designation as trial counsel. Kurtzrock tried the *Lawrence* case alone and handled all pretrial *Rosario* disclosures on behalf of the SCDAO.

- Kurtzrock redacted significant sections of the notebook of the lead detective, who testified at trial, in a manner that did not make clear the extent and nature of the redactions. Redacted portions of the lead detective's notebook contained significant potential *Brady* information that was not disclosed through another source. Among other things, the excised portions of the lead detective's notebook included notes reflecting that 17 days after the shooting, victim Hodges indicated to a nurse at the hospital where he was recuperating that he believed another patient at the hospital (who was there because he had been shot in the back two blocks from Andpress Plaza) and his visitor were participants in the shooting. This section of the notebook indicated that another detective visited the hospital, confirmed that Hodges had identified the patient and his visitor as perpetrators, and obtained security footage that may have shown the two individuals.⁸ Additionally, nondisclosed portions of the lead detective's notebook reflected that shell casings recovered from the crime scene were linked to other cases and individuals other than Lawrence. *Compare Matter of Kurtzrock*, 192 A.D.3d at 201-08 (notebook of lead detective in *Booker* case was redacted by Kurtzrock to remove two years of investigative notes in a manner that did not make clear the nature and extent of the redactions; Kurtzrock did not conduct *Brady* analysis when reviewing notes and redacted all information that was not to be disclosed in Kurtzrock's direct examination of the witness).
- Statements and information concerning a potential alternative suspect who admitted to firing shots in Andpress Plaza on the night of the murder were not turned over prior to trial. The alternative suspect claimed in an April 2010 statement, which was undisclosed prior to trial, that he observed three young males who were six feet tall or shorter⁹ participate in the shooting (not four, as other witnesses indicated). This witness further claimed that he had fired shots from his own gun in an attempt to scare away the three who had shot up the van, and that he had later destroyed the gun. Detective notes related to that alternative suspect also were not turned over. *Compare id.* at 210-11 (Kurtzrock found to have not disclosed information concerning an alternative suspect in *Booker* case).
- Hours after the homicide, Council described the perpetrators as four “young” black males. Kurtzrock did not disclose this prior statement by Council, who testified at trial that Lawrence, a 38-year-old male, was one of the perpetrators of the crime. *Compare id.* at 211-12 (information calling into question a key trial witness's credibility was not disclosed in *Booker* case).

⁸ The security camera footage, the existence of which was not made known to the defense prior to trial, was lost prior to trial and was thus not available for post-trial review.

⁹ Lawrence was 38 years old and was 6 foot 4 inches tall at the time of the shooting.

- It appears, based on a recording made by Kurtzrock of a post-trial conversation with trial witness James Jones that was found in the Lawrence file, that Kurtzrock had arranged for Jones, a drug addict with mental health issues, to receive an extended stay in a hotel room and money for food prior to trial. Receipts obtained over the course of the review reflect that witness expenses also were covered for Council. After trial, Kurtzrock arranged for Jones to receive \$4,000 for alleged relocation expenses and may have facilitated Jones's access to noncustodial drug treatment and other benefits; it is unclear whether these benefits were the product of an agreement with Jones that existed prior to trial. No witness benefits or agreements were disclosed by Kurtzrock to the defense prior to or during trial. *Compare id.* (information that could have been used in cross-examination of key prosecution witness was not disclosed by Kurtzrock in *Booker* case).

After the SCDAO's 2017 review resulted in discovery of voluminous nondisclosed potential *Brady*, *Giglio*, and *Rosario* material, including the material described above, that material was provided to Lawrence's appellate counsel, Laura Solinger, Esq. Following discussions with Lawrence's counsel which commenced in the fall of 2017 and concluded early in DA Sini's tenure, in January 2018, both the SCDAO and defense counsel moved to dismiss Lawrence's indictment in furtherance of justice pursuant to CPL § 210.40, which authorizes dismissal of an indictment based on "the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice."¹⁰ Both the SCDAO's motion and the defense motion made specific reference to subsections (c) and (e) of CPL § 210.40, which authorize consideration of "evidence of guilt" and "any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant," respectively, in connection with an interests-of-justice dismissal motion.

Acting Supreme Court Justice William J. Condon considered the applications at a proceeding in open court on February 15, 2018, during which he described the withholding of evidence and information prior to trial in the case as "absolutely stunning" and granted the defense application to dismiss based on CPL § 210.40(e), the provision related to "exceptionally serious misconduct of law enforcement." Justice Condon followed his oral order with a written Order on that same date in which he stated that the withholding of exculpatory and impeachment evidence from Lawrence constituted "more than 'exceptionally serious misconduct'" that deprived him of a fair trial and warranted dismissal in the interests of justice.

¹⁰ Lawrence's conviction already had been vacated and a new trial ordered by the Appellate Division based on appellate counsel's argument, which was not contested by the SCDAO on appeal, that Lawrence's trial counsel should have been disqualified and new counsel substituted so that trial counsel could have testified about a pretrial recantation by Council that only he had heard. *People v. Lawrence*, 156 A.D.3d 652 (2d Dept. 2017).

People v. Allan McGhee, Ind. # 1095A-12

The SCDAO also provided post-trial disclosures to Lawrence's co-defendant, Allan McGhee, after discovering the disclosure issues set forth above in the course of its review of Lawrence's conviction. The CIB examined these disclosures, as well as transcripts of judicial proceedings and public filings in McGhee's case. While McGhee pleaded guilty prior to trial, the CIB elected to review these materials in light of the serious misconduct identified in connection with the trial of his co-defendant Lawrence.

The CIB determined that, despite ample evidence of McGhee's guilt independent of the flawed evidence used to convict Lawrence, McGhee's prosecution also was adversely affected by the misconduct identified in the Lawrence prosecution. McGhee pleaded guilty to Manslaughter in the First Degree and two counts of Assault in the First Degree on June 12, 2014. The SCDAO agreed to a sentence of 12 years of incarceration followed by five years of post-release supervision, to run concurrently on each of the counts of conviction. During the plea allocution, McGhee stated that he and Lawrence both participated in the shooting.

McGhee later testified at Lawrence's trial as a defense witness, however, that while he was one of the shooters, Lawrence was innocent and he (McGhee) had been coerced into naming Lawrence as a perpetrator in his plea allocution in order to obtain a favorable plea. (Lawrence 5/18/15 Trial Tr. 17-18, 61-62.)

This testimony led to further punishment for McGhee. Following trial, McGhee was charged with Perjury in the First Degree under Indictment 1296-15 based on his mutually incompatible sworn statements at his plea allocution and trial concerning Lawrence's role in the offense. On February 17, 2016, McGhee pleaded guilty to the perjury charge and was sentenced to 1 to 3 years of incarceration under Indictment 1296-15, to run consecutive to the 12-year sentence under Indictment 1095A-12.

The misconduct identified in connection with the review of Lawrence's file led the SCDAO under DA Sini to conduct a review of McGhee's prosecution in 2018. On May 22, 2018, McGhee's counsel was invited into the SCDAO's offices and provided with access to all of the previously-undisclosed potential *Brady*, *Giglio*, and *Rosario* material that had been identified during the review of the Lawrence trial and related files. Soon thereafter, McGhee's counsel was provided with all of the material in electronic format.

While McGhee had admitted to his participation in the crime and there was significant other untainted evidence of McGhee's guilt, in view of the magnitude of the misconduct identified as a result of the review of the Lawrence trial, the SCDAO agreed with McGhee and his current counsel that to resolve McGhee's potential claims his sentence would be reduced to 10 years' imprisonment, and his sentence for perjury would run concurrent to the 10-year term.

Thus, the misconduct identified in connection with the Lawrence trial adversely affected McGhee's case as well. Furthermore, the CIB concludes that the misconduct in the case

hampered potential future efforts to hold accountable the other participants in the murder and shootings that occurred at Andpress Plaza on January 12, 2010.

B. Other Homicide Prosecutions

Kurtzrock served as an ADA in the Homicide Bureau from October 2010 until his resignation from the SCDAO in 2017. Cases that were reviewed are summarized in chronological order of the date of indictment.

People v. James McArthur, Ind. # 1809-08¹¹

James McArthur shot Jermaine Fafana at a party in Huntington Station in the early morning of July 15, 2007.¹² After leaving the party, McArthur was walking on the street with a woman named Ikima Bollar when McArthur and Bollar encountered three intoxicated Hispanic males who were walking home from a bar. According to Bollar, McArthur told her, “Watch how I rob this Spanish dude,” and he proceeded to attempt to rob one of the men, brandishing a gun in connection with the attempted robbery. When one of the men, later identified as Sebastian Bonilla, began to move towards McArthur, McArthur shot him in the stomach at close range, killing him. A victim of the attempted robbery, police officers who responded to the scene, an onlooker who saw McArthur and Bollar leaving the scene together looking agitated, and forensic scientists testified at trial. At the conclusion of the trial, McArthur was convicted of Murder in the Second Degree and Criminal Possession of a Weapon in the Third Degree. McArthur was sentenced principally to a term of 35 years to life imprisonment.

Based upon a determination that Kurtzrock improperly commented, in summation, on McArthur’s post-arrest silence and that defense counsel was ineffective for, among other things, failing to object to Kurtzrock’s comments in summation and opening the door to introduction of evidence of McArthur’s earlier shooting of Fafana, McArthur’s convictions after trial were reversed on appeal and a new trial was ordered. *See People v. McArthur*, 101 A.D.3d 752 (2d Dept. 2012). Concerning Kurtzrock, the appellate court found that his improper comments included an assertion that the defendant looked “[d]isappointed” upon his arrest, which Kurtzrock alleged was “not how an innocent person is going to react being told he’s being charged with murder.” *See id.*

Following issuance of the appellate ruling, the case was returned to County Court and scheduled for a retrial, but McArthur was offered and chose instead to plead guilty to a reduced charge of Manslaughter in the First Degree and a sentence principally of 15 years imprisonment, with 5 years of post-release supervision.

Although the trial conviction had been reversed and McArthur pleaded guilty to the killing, the CIB undertook a review of the trial transcript and case file to confirm that no potential *Rosario*

¹¹ Prior to joining the Homicide Bureau Kurtzrock served as trial counsel in the prosecution of James McArthur.

¹² McArthur pleaded guilty to shooting Fafana prior to trial. A pretrial judicial ruling excluded evidence of the Fafana shooting from McArthur’s murder trial but McArthur’s defense counsel’s questioning of witnesses about the Fafana shooting led the judge to admit evidence of it at the trial.

or *Brady/Giglio* information had been withheld by Kurtzrock. That review revealed no exculpatory evidence or impeachment information concerning testifying witnesses that had been withheld. The review identified statements of two homeless witnesses who did not testify at trial that did not appear to have been turned over, but the review also indicated that information provided in these statements was consistent with the prosecution's theory of the case and with information provided during investigation and trial by other witnesses. In addition, Kurtzrock's pretrial *Rosario* production to the defense includes a Supplemental Report that includes both a reference to and a summary of the non-testifying witnesses' statements. The file review also reflected that phone records were obtained but do not appear to have been disclosed. The phone records and witness statements detailed above do not seem to have resulted in any evidence material to the prosecution or defense of this matter. Nonetheless, after further consideration and consultation with its partners in the PCIC and in an abundance of caution, the CIB is disclosing the items to defense and appellate counsel at this time.

People v. Ralph Guerrier, Ind. # 0323B-10

The prosecution proved to the satisfaction of the jury at trial that Ralph Guerrier and two others, all armed with handguns, confronted 37 year old Geremias Caceras and his 17 year old son, Denis Caceras as they walked to their home in Huntington Station on January 24, 2010. This confrontation occurred right next to the Caceras' home.

Trial testimony from a number of witnesses, including Denis Caceras and the two other participants in the crime, both of whom testified against Guerrier at trial, reflected that upon approaching the men, Guerrier ordered the two men to the ground and demanded their money. All three assailants were wearing bandanas over their faces and had hoods pulled over their heads, and two of the three firearms were loaded. When Geremias failed to comply with Guerrier's direction to get on the ground, Guerrier and Brown began to shoot at Geremias, each firing at least 5 times according to the evidence recovered at the scene. Geremias was struck and killed.

Guerrier was taken into custody approximately one hour after the incident after the assailants tried to flee the scene and burn their sweatshirts and do rags,¹³ and a bullet found in Guerrier's pocket was forensically linked to the gun used to kill Geremias, as reflected by a bullet recovered from Geremias's chest. The defendant's two accomplices, Gni Brown and Lavell Leftenant, later cooperated with the prosecution and testified against the defendant at trial pursuant to cooperation agreements that were disclosed. Guerrier also made post-arrest statements that were used against him at trial. Cooperating witnesses stated that all three firearms had been provided by Guerrier and that the two loaded weapons were those possessed by Guerrier and accomplice Gni Brown.

¹³ These items were recovered from an outdoor firepit in the vicinity of the crime. Forensic testing reflected that Guerrier's DNA was found on the sweatshirts and that he was determined to be a possible contributor to DNA found on the do rags.

Guerrier was convicted after trial of Murder in the Second Degree and Robbery in the First Degree and sentenced principally to a term of 25 years to life imprisonment. His conviction was affirmed on appeal.

The SCDAO conducted a review of the case file in 2017, following Kurtzrock's resignation. The review determined that *Rosario* material including certain notes and statements of investigating detectives had not been turned over prior to trial. Furthermore, no disclosure had been made of a statement made by one of the defendant's accomplices. These materials were provided to Guerrier's counsel accompanied by a cover letter, dated November 9, 2017.

The CIB has received an application from Guerrier alleging that he is actually innocent and had no role in the charged offenses. The matter is now under review under the standards applicable to such applications.

People v. Jairon Gonzalez-Martinez, Ind. # 1625A-2011

Evidence adduced at the trial of Jairon Gonzalez-Martinez reflected that Gonzalez-Martinez and two associates brutally beat two victims with bats and pipes outside of a pool hall after a dispute arising out of the assailants' membership in MS-13.¹⁴ One of the victims died, while the other was seriously injured. A police officer who was summoned to the scene by an onlooker observed Gonzalez-Martinez fleeing and gave chase. The officer eventually was able to tackle Gonzalez-Martinez and place him under arrest. The officer observed blood on Gonzalez-Martinez's clothing, and DNA analysis reflected that both victims' blood was found on Gonzalez-Martinez's clothing and shoes. Surveillance video from the vicinity of the crime showed Gonzalez-Martinez and his associates running with bats and pipes towards the scene of the crime prior to the assault and murder and running away from it when the police officer arrived. Other forensic evidence appeared to contradict Gonzalez-Martinez's "mere bystander" defense, and phone analysis reflected numerous telephonic communications among Gonzalez-Martinez and other assailants.

The SCDAO conducted a review of the case file and trial transcript following Kurtzrock's resignation from the office. The review revealed several items that were not turned over by Kurtzrock. These included portions of the notebooks of testifying detectives, which were redacted in a manner that appears to have been consistent with Kurtzrock's pre-disclosure redaction practices described herein. Certain other supplemental reports and notes of testifying and non-testifying detectives also were not disclosed. Nor were statements and interview notes of certain non-testifying witnesses. In total, 167 pages of undisclosed material was identified as a result of this review.

Gonzalez-Martinez's trial counsel was notified of the existence of these additional materials and was provided copies of them at the conclusion of the SCDAO's review, at a meeting with the

¹⁴ Additional investigation by the CIB has revealed at least one additional assailant who was later indicted under Ind 0750-13 and is discussed in detail herein.

reviewing ADA in December of 2017. Copies of the supplemental disclosures also were provided to appellate counsel and to Gonzalez-Martinez himself in December 2017.

On or about July 16, 2021, Michael J. Brown Esq., filed a Motion to Vacate Gonzalez-Martinez's Judgment of Conviction, pursuant to CPL Sections 440.10(1)(b), (f), (g) and (h). Mr. Brown attached the 167 pages of the December 2017 Supplemental Disclosure mentioned above and, in addition to alleging violations of Kurtzrock's duty to have disclosed much of the information, specifically noted certain items within its pages that defense counsel contends adversely affected his client's rights and ability to mount a proper defense.

As a part of its continuing investigation, the CIB conferred with attorney Brown and conducted further review of the District Attorney's files and the SCPD files related to the investigation of this 2011 case. Specifically, the CIB conducted an intensive search for "videotaped interviews" of two individuals, Alcides Gomez (aka "Gavilan") and Jose Misael Diaz Hernandez (aka "Maliente"), who were alleged to have participated in or witnessed the murder and assault with which Gonzalez-Martinez was charged. These videos are referenced in police notes turned over as a part of the supplemental disclosure of December 2017, but the tapes do not appear to have been turned over to defense counsel prior to trial. A search of the SCDAO file for Indictment # 1625A-2011 (Gonzalez-Martinez's indictment number) confirmed that the videotaped interviews of Hernandez and Gomez were not present in the files directly related to this defendant and case.

The CIB then retrieved other files with which these individuals might be involved in an effort to identify and turn over the videotaped statements of Gomez and Hernandez referenced in the notes. In its continued efforts, the CIB researched the criminal history of both Gomez and Hernandez and requested case files for other cases that potentially could have contained the videotaped statements referenced in the notes. It was based upon this search that the CIB received and reviewed the case file associated with Indictment # 0750-13, *People v. Alcides Gomez*.

These files reflect that Gomez was taken into custody on September 2, 2012, and admitted to being directly involved with Jairon Gonzalez-Martinez and others in the murder and assault at the Fiesta Pool Hall. Alcides Gomez also appears to have provided information in his interview related to his presence during a second gang-related assault and murder, which occurred in Brentwood at Migelino's Bar on August 18, 2012, that also was indicted by Kurtzrock.¹⁵ A video recording of the interview of Alcides Gomez was located in this file and turned over to Gonzalez-Martinez's defense counsel, Michael Brown, along with most of the contents of the SCDAO file related to Indictment 0750-13.

The CIB also reviewed prior files related to Hernandez and determined that Hernandez was taken into custody in August of 2012 and gave a statement to the police about the August 18, 2012, gang-related assault and murder at Migeulino's Bar in Brentwood. Hernandez admitted

¹⁵ See *People v. Elvir Portillo-Aguilar*, Ind. # 2215A-12, discussed below.

to being present at the scene of the 2012 murder and further admitted to certain acts constituting an Assault in the 2nd degree, for which he was indicted.¹⁶ A search of the SCDAO file under that indictment revealed a videotaped interview which seems to be the same one referenced in the prior supplemental disclosure. A copy of this video was turned over to defense counsel, Michael Brown.

People v. Robert Waters, Ind. # 1640-11

As reflected by evidence adduced at the trial of Robert Waters, which occurred before Acting Supreme Court Justice Fernando Camacho without a jury, police responded to a 911 call indicating that an individual later identified as Waters suffered an epileptic seizure and was acting violently, and that an elderly person was in the home. Responding police officers found the defendant sitting in the front lawn acting distraught and found Water's girlfriend's 90 year old grandmother, Florence Troiani, beaten to death in her bedroom. The police brought Waters to a hospital, where they observed blood on his hands and where they questioned him about what had happened. Waters claimed that he had a seizure and did not recall what had happened, but testimony also reflected that he made statements accepting responsibility for Trioiani's death and blaming consumption of Xanax rather than a seizure for his conduct. Waters was indicted for Murder in the Second Degree and proceeded to trial.

There was no dispute at trial that Waters had killed Troiani. Instead, Waters pursued a defense, supported by expert testimony, that he was not criminally responsible by reason of extreme emotional disturbance. Waters blamed an epileptic seizure that he claimed to have suffered at the time of the killing for his conduct. The defense expert conceded on cross-examination that certain elevated hormone levels observed in the defendant's blood on the night of the killing could have been consistent with stress rather than a seizure and admitted that he did not factor a reported history of aggressive behavior by Waters into his opinion. A rebuttal expert witness called by the prosecution testified that the prolonged repetitive directed violence of the type inflicted by Waters on Troiani was inconsistent with the behavior of someone suffering from a seizure or post-seizure confusion. Justice Camacho rejected the affirmative defense and convicted Waters, and the conviction was affirmed on appeal.

While an initial review of the case file was conducted by the SCDAO in 2017 without results, the CIB conducted a supplemental review of the trial transcript and the case file to confirm that conduct identified in the 2020 *Matter of Kurtzrock* decision did not occur in this case. The CIB did not uncover any *Rosario* material that had not been disclosed prior to trial. However, at the time of the murder, Waters' mother and girlfriend each provided statements to investigating officers consistent with Waters' defense. These statements were not disclosed to defense counsel, by Kurtzrock, at the time of trial. Although defense counsel had access to the witnesses and these witnesses were interviewed by the psychiatric expert hired by defense counsel, the statements should have been disclosed by Kurtzrock prior to trial, since the prosecution's responsibility to disclose potential *Brady* information does not depend on whether

¹⁶ Diaz was indicted along with Elvis Sazo and Elvir Portillo-Aguilar under Indictment # 2215-12 discussed further in the portion of this memo dedicated to the matter of *People v. Portillo-Aguilar*.

the defense knew or should have known about the existence of the statements or the information contained therein. Therefore, in an abundance of caution, the materials have been supplied to the original trial counsel and appellate counsel.

People v. Guillermo Alvarado-Ajcuc, Ind. # 1373-12

Evidence adduced at the trial of Guillermo Alvarado-Ajcuc reflected that Alvarado-Ajcuc spent the evening of May 5, 2012 drinking at a bar adjacent to the Department of Motor Vehicles (“DMV”) office in Riverhead, Suffolk County. A woman (described herein as “MG”) also was at the bar drinking that evening. Video surveillance in the vicinity of the bar reflected that Alvarado-Ajcuc walked away from the bar with MG. The following morning, May 6, 2012, Alvarado-Ajcuc went to a deli on Main Street in Riverhead and told a friend named Rigoerto Coslaya who also was at the deli that he thought he had hurt a girl the night before. He further told Coslaya that he had left the girl in the woods and did not know whether she was dead or alive. Surveillance footage obtained from the deli corroborated Coslaya’s recollection of this conversation.

On May 7, 2012, MG failed to appear at her place of employment and was reported missing by her family. MG’s body subsequently was discovered in the woods behind the DMV office, in close vicinity to the bar where MG had been seen with Alvarado-Ajcuc. MG’s body was naked from the waist down and her cause of death later was determined to be neck compression, as reflected by a nearly horizontal line that ran from the right side of her neck, across the midline, to the left side, and petechial hemorrhages around her eyes and cheeks and constricted blood vessels consistent with strangulation. Alvarado-Ajcuc’s DNA was found under MG’s fingernails.

On May 16, 2012, Alvarado-Ajcuc was located outside of his home and identified himself to investigating officers as the person who was in a still photo taken from the May 6, 2012 deli surveillance video in which he was observed speaking with Coslaya. He waived his *Miranda* rights in Spanish and made a recorded statement in Spanish, with a Spanish-speaking detective interpreting, in which he admitted to penetrating MG in an attempt to have sex with her. He claimed he had not tried to kill MG but acknowledged that he had choked her with his belt when she tried to resist him. He was charged with two counts of Murder in the Second Degree under intentional and felony murder theories.

The case proceeded to trial in May 2014, with Kurtzrock serving as trial counsel. The lead detective, Detective Tilio Serrata, was the only detective to testify at trial about the police investigation of the defendant.¹⁷ During trial, defense counsel elicited on cross-examination that Detective Serrata had taken investigative steps, and had created notes and reports, that were not reflected in the *Rosario* production concerning Det. Serrata. The Court ordered production of certain reports but not the entire investigative file. In response to a further challenge from defense counsel, Kurtzrock stated the following:

¹⁷ Other law enforcement witnesses testified about the discovery of MG’s body and the crime scene. Experts from the Medical Examiner’s Office testified about MG’s autopsy and DNA analysis.

Judge, my understanding with respect to material that I'm required to turn over has to be discoverable or covered under *Rosario* or has to be *Brady* material. With respect to any portion of Detective Serrata's notes that were not turned over, I would submit as an officer of the Court, they do not fall under any of those three areas. I did not ask him, for example, the portion that he reviewed with respect to people that he interviewed, I never asked him, other than Rigoberto Coslava, who he interviewed, whether he interviewed anyone else I did not cover anything he did at the scene. I did not go into anything other than what is covered in the materials that relate to his direct testimony. That's what *Rosario* says. I submit that I turned that over, Judge. I have fulfilled my obligation. (Trial Tr. 543-44.)

Alvarado-Ajcuc was convicted on both counts and was sentenced to a term of 25 years to life imprisonment. His conviction was affirmed on appeal, 142 A.D.3d 1094 (2d Dept. 2016), and a petition for a writ of habeas corpus filed with the United States District Court for the Eastern District of New York was denied, *Alvarado-Ajcuc v. New York*, No. 18-CV-00183, 2019 WL 3409515 (E.D.N.Y. July 29, 2019).

Alvarado-Ajcuc's case was among those reviewed by the SCDAO following Kurtzrock's resignation from the office in 2017. That review determined that the evidence against Alvarado-Ajcuc was overwhelming but it identified several items that, in the view of the reviewing ADA, should have been turned over, including certain notes and reports generated by Det. Serrata and supplemental reports and notes documenting witness statements that were not turned over but were the duplicative equivalents of statements that were disclosed. The reviewing ADA also identified an additional inculpatory witness who was not identified to the defense and whose statements were not disclosed. In February 2018, as a result of the review, the SCDAO provided a supplemental disclosure to Alvarado-Ajcuc's appellate counsel of all investigating detectives' notebooks, all previously-unproduced supplementary reports and notes related to the case, and an anonymous Crimestoppers tip submitted by Coslava that had not previously been disclosed.

The CIB reviewed the entire case file, including the *Rosario* productions, the SCDAO's 2018 supplemental production, and the trial transcript. The CIB sought to identify whether Coslava had received a reward from Crimestoppers as a result of his tip and if so, the amount of the reward. The CIB determined that Coslava had in fact received a \$2,000 Crimestoppers reward prior to trial which had not been disclosed. The CIB provided this information to Alvarado-Ajcuc's appellate counsel.

People v. Quinton Rubin, Ind. # 2822-12

Quinton Rubin was convicted of killing Sean Berry, the boyfriend of his estranged wife Melissa Oyola, by shooting him at approximately 4:30 a.m. on November 13, 2012. Rubin and Oyola had a history of domestic violence and Rubin had recently moved out of the family home at the time of the shooting.

Evidence adduced at trial supported the following factual conclusions. The crime occurred after Rubin's 11-year-old son woke up in the middle of the night not feeling well and began looking for his mother. When he found her cellphone but could not locate her, at approximately 3:15 a.m. he called Rubin asking if he knew where Oyola was. Rubin's son also told Rubin that he thought Oyola was with Berry. Rubin's cellphone records reflected a conversation with his son and tracked Rubin from where he was staying to the vicinity of the family home shortly before the crime. Oyola testified that she was in a trailer located outside the home with Berry when someone began knocking on the window to the trailer. Thinking that it was one of the children knocking on the window, she asked Berry to open the door to the trailer. When Berry did so, Oyola said she saw a person she recognized as Rubin shout "You're f---ing my wife!" and shoot Berry in the face. Rubin then shot Berry four more times, killing him, and fled. A mask was recovered from the driveway that Rubin's son testified was the same as a mask Rubin had worn when he had gone quad riding with his son. A later search of Rubin's home recovered, among other things, a cartridge from a .357 Winchester and other shell casings that a forensic scientist from the Suffolk County Crime Laboratory determined were consistent with the five bullets that were recovered from Berry's body.

This matter was among those reviewed by the SCDAO following Kurtzrock's resignation from the office. The review identified a number of items that the reviewing ADA concluded should have been disclosed as discovery or *Rosario* material. Among the undisclosed materials was a photo of a message that Rubin's son sent to Berry on the night of the shooting asking if he was with Oyola; Rubin's son testified about sending the message but the message itself was not turned over in discovery or *Rosario* material. Nor were certain cellphone records or certain memo pages of testifying detectives, which appear to have been redacted in a manner consistent with Kurtzrock's redaction practices described herein. Several reports of testifying detectives also were not turned over, and notes and reports of non-testifying detectives also had not been produced.

In addition, certain material related to Oyola and allegations of domestic violence by her and against her was found in the SCDAO file but did not appear to have been produced by Kurtzrock prior to trial. Undisclosed materials included several police reports indicating that Oyola had made claims of threats or violence against Rubin, including occasions on which she alleged Rubin possessed a shotgun, and several other allegations that Rubin had made against Oyola. The reviewing ADA noted that Kurtzrock disclosed on the record at trial that Oyola had been charged with stabbing Rubin during a domestic dispute, and that defense counsel acknowledged being aware of the stabbing and cross-examined Oyola about it on the record. The substance of the domestic violence allegations by Rubin against Oyola and by Oyola against Rubin also would have been known by Rubin but, in the view of the reviewing ADA, documents concerning those allegations should have been disclosed as potential *Rosario* and/or *Giglio* material concerning Oyola. Certain records related to Child Protective Services also were not disclosed but, in the view of the reviewing ADA, should have been. At the conclusion

of the review, in November 2017 the SCDAO provided a supplemental production of the undisclosed materials to Rubin's counsel.

The CIB has reviewed the trial transcript, the *Rosario* production, and the supplemental production made by the reviewing ADA. It has obtained and produced additional documents located in the file in response to requests from Rubin's current counsel. The CIB has not identified any additional unproduced *Brady/Giglio* or *Rosario* material but it anticipates additional communications with counsel concerning the file.

People v. Elvir Portillo-Aguilar, Ind. # 2215A-12¹⁸

Evidence elicited at Elvir Portillo-Aguilar's trial reflected that Portillo-Aguilar and two other individuals, Elvis Geovany Enriquez Sazo and Jose Misael Diaz Hernandez (referenced above in connection with the prosecution of Jairon Gonzalez-Martinez in Indictment # 1625A-11), were outside of a bar in Brentwood in the early morning hours of August 18, 2012, when they encountered two intoxicated men who became belligerent. While Sazo and Hernandez struck the two men with a belt and a tree branch, Portillo-Aguilar got a gun and shot one of the men in the head while the man was lying on the ground. According to the trial testimony, Sazo and Hernandez then ran away and got picked up by a friend who drove away with them and Portillo-Aguilar.

Portillo-Aguilar was arrested after a Crimestoppers tip identified MS-13 member Alicides Gomez (also referenced above in connection with the Gonzalez-Martinez prosecution) and an individual named "Desconrido" as participants in the killing. Gomez was apprehended and contributed to the identification of Portillo-Aguilar as "Desconrido" and Portillo-Aguilar's whereabouts. On September 3, 2012, detectives approached Portillo-Aguilar and he admitted to being "Desconrido" and made a full confession to the crime that was captured on video. A bullet that was similar to the one that had been used to kill the victim and MS-13-related materials were found during a consensual search of Portillo-Aguilar's residence, and an eyewitness's description of the shooter and the crime was consistent with Portillo-Aguilar's appearance and his confession.

Kurtzrock indicted the case for the SCDAO in an instrument that charged Portillo-Aguilar with Murder in the Second Degree and Sazo and Hernandez with Assault in the Second Degree. Gomez was not charged in connection with the crime. Kurtzrock provided discovery to defense counsel and handled pretrial proceedings in the case until shortly before trial in 2016, when he was replaced by another ADA.

Before trial commenced, defense counsel's review of *Rosario* material revealed references to the existence of statements by Sazo and Hernandez that had not previously been produced. Defense counsel informed the ADA, who produced the requested statements. Review of the statements by Sazo and Hernandez reflected that both Sazo and Hernandez first lied about

¹⁸ CIB Bureau Chief Craig McElwee, who served as Portillo-Aguilar's attorney from soon after his arrest through trial, took no part in the review of Portillo-Aguilar's case file or the preparation of this summary.

their roles in the crimes, and then provided names of the shooter that were different from the “Desconrido” nickname known to be used by Portillo-Aguilar. The new ADA also produced to Portillo-Aguilar associated detective notes, as well as numerous other records that had not previously been disclosed by Kurtzrock. However, by the time of trial and disclosure of this information in 2016, both Sazo and Hernandez had pleaded guilty to felony assault charges and had been deported, and thus they could not readily be located or made available to testify for the defense.

During trial, Portillo-Aguilar’s counsel alleged that the failure to provide co-defendants’ statements earlier constituted both a violation of the discovery rule that at the time of trial required the prosecution to disclose on demand “(a) Any written, recorded or oral statement of the defendant, and of a co-defendant to be tried jointly, made...to a public servant engaged in law enforcement activity,” CPL § 240.20(1)(a). Defense counsel also alleged that the nondisclosure had violated the dictates of *Brady*. Based on these alleged violations, Portillo-Aguilar sought a mistrial or other relief. The new ADA, without conceding that any violations had occurred, allowed Portillo-Aguilar to question detectives about the co-defendants’ statements; the detectives’ interactions with the co-defendants; the co-defendants’ identification of someone with a nickname other than the one associated with Portillo-Aguilar as the shooter; and any investigative steps taken to identify or investigate the potential alternative suspect. While Portillo-Aguilar was able to use material related to the co-defendants in his defense at trial, he was nonetheless convicted and was sentenced to a term of 25 years to life imprisonment.

Portillo-Aguilar’s arguments for a new trial based on alleged *Brady* violations were denied by the trial court and on appeal to the Appellate Division, which found no *Brady* violation because “there was no reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different.” *See People v. Portillo-Aguilar*, 164 A.D.3d 1376 (2d Dept. 2018). Portillo-Aguilar later filed a federal habeas corpus petition that was denied based on a federal District Court’s finding that the Appellate Division’s *Brady* determination was not unreasonable and that in any event, Portillo-Aguilar was afforded an adequate remedy for any violation by being given the opportunity to cross-examine the police detective and elicit the allegedly exculpatory portions of the Hernandez and Sazo statements. *See Portillo-Aguilar v. McCarthy*, 19-CV-6006 (WFK) (E.D.N.Y. Decision & Order filed Aug. 21, 2020).

In view of the discovery and *Brady* violations that were alleged to have been committed by Kurtzrock in the case, the CIB undertook an independent review of the Portillo-Aguilar case file and trial transcript, and it spoke with the new ADA who took over for Kurtzrock shortly before trial in 2016. The CIB sought, among other things, to determine how the Hernandez and Sazo statements had not been disclosed by Kurtzrock at the time of initial discovery pursuant to the dictates of CPL § 240.20(1)(a) and/or *Brady*. According to the new ADA, she was similarly perplexed and questioned Kurtzrock about the nondisclosure; he replied, in substance, that he did not disclose the statements because he did not consider them statements of “co-defendant[s] to be tried jointly,” as he was in plea negotiations with Hernandez and

Sazo at the time discovery was provided to Portillo-Aguilar and did not intend to try them jointly with him. Kurtzrock apparently did not conduct a *Brady* analysis concerning the statements.

The CIB found discovery and plea-related materials in the case file reflecting that Kurtzrock provided discovery to Portillo-Aguilar in response to a discovery demand on December 21, 2012, prior to the time that Sazo and Hernandez had pleaded guilty to any charges in the indictment that had been filed against them jointly with Portillo-Aguilar. The Portillo-Aguilar discovery production did not include the Hernandez and Sazo statements. Case records further indicate that Hernandez did not plead guilty until January 23, 2013, and Sazo did not plead guilty until February 20, 2013, after the date that discovery was produced. Thus, regardless of Kurtzrock's expectations of an eventual plea, Portillo-Aguilar's co-defendants remained under indictment at the time Kurtzrock provided discovery to Portillo-Aguilar that lacked the co-defendants' statements.

In addition, as stated above, on or about July 16, 2021, Michael J. Brown Esq., filed a motion pursuant to CPL Sections 440.10(1)(b), (f), (g), and (h) concerning the prosecution of Gonzalez-Martinez referenced above. As a result of the review of that matter, the CIB noted that there were witnesses and participants in the 2011 murder and assault with which Gonzalez-Martinez was charged who also were witnesses to or involved in the crime with which Portillo-Aguilar was charged. These included Portillo-Aguilar's co-defendant Hernandez and Gomez, who, after initially being identified as a suspect in this murder investigation, provided information to the police about Portillo-Aguilar but was never charged in connection with the assault or murder.

As discussed in detail above, the CIB identified videotaped interviews of both Hernandez and Gomez and provided them to Gonzalez-Martinez's counsel. The CIB also found a videotaped interview of Elvis Sazo, the second co-defendant of Portillo-Aguilar, as a result of this review. While the written statements of all three individuals were produced to Portillo-Aguilar along with certain additional documentation related to the statements, it does not appear that the newly-discovered videos had been disclosed. Accordingly, the CIB provided these videos to Portillo-Aguilar's appellate counsel so that counsel could view the videos and evaluate whether any previously-undisclosed information of relevance was contained in them. The CIB also provided Portillo-Aguilar's appellate counsel with additional paperwork related to the previously-provided statements to aid in this evaluation.

People v. Ashton Barth, Ind. # 3218-12

Ashton Barth was charged with Murder in the Second Degree after Barth's brother called police on December 24, 2012 to report seeing a dead body in Barth's bedroom closet. The police then reported to Barth's home, where he was found covered in blood. A search of Barth's bedroom closet revealed a torso belonging to an associate of Barth's that was wrapped in plastic. Barth made a video recorded statement upon his arrest. Barth pleaded guilty during

jury selection, receiving a sentence of 15 years to life imprisonment. He did not pursue an appeal.

This matter was among those reviewed by the SCDAO following Kurtzrock's resignation from the office. The review examined the completeness of Kurtzrock's *Rosario* productions prior to a pretrial hearing and trial¹⁹ by comparing them against the police and SCDAO files related to the case. The review also examined the transcript of the pretrial hearing. The review determined that the completeness of Kurtzrock's pre-hearing *Rosario* production was challenged by defense counsel, and he was compelled to turn over additional material by the Court. The review determined that five additional pages of material should have been turned over as hearing *Rosario* material but were not; these materials were turned over in trial *Rosario* production, however, prior to Barth's guilty plea. In December 2017, the SCDAO produced the additional materials to Barth's pretrial hearing counsel.

While Barth pleaded guilty during jury selection, the reviewing ADA noted that a number of items were absent from the trial *Rosario* packet that she observed, including a portion of the lead detective's supplemental notes, multiple pages from detectives' memo books, and other supplemental reports. The review did not reveal any undisclosed *Brady* material in the case.

The CIB's review of this matter was limited by the defendant's pretrial guilty plea, which prevents a comparison of the pretrial *Rosario* production with the statements of witnesses who might have testified at trial. It identified no unproduced *Brady* or *Giglio* material as a result of its review but, in an abundance of caution, the CIB has disclosed the case-related notes and reports that were absent from the trial *Rosario* packet to both Barth's trial counsel and his appellate counsel.

People v. Brandon T. Davis, Ind. # 0567-14

Brandon Davis was charged with acting in concert with Cesar Figueroa, Tasheem Carter, and Sabrina Urbancik to rob an auto repair shop whose owner sold marijuana from the shop in the early morning of Christmas Day, 2013. According to the testimony of Carter and Urbancik, who testified as cooperating witnesses at trial, and the testimony of Margaret Stewart, who participated in discussions with the participants in the robbery, Davis, Figueroa, and Carter entered the shop to commit the robbery, while Urbancik cased the shop before the robbery by entering it to buy marijuana, and she served as the getaway driver. During the course of the robbery, Davis shot Taleik Bristol in the head, causing his death, and three other victims were shot, one suffering serious physical injury and the other two requiring medical attention. Urbancik's car was captured on video surveillance footage at the site of the robbery, and her relationship with Figueroa led them to arrest Figueroa and Urbancik. They both identified Davis, whose street name was "EE," and Carter as participants in the robbery.

Davis proceeded to trial, denying all involvement in the crime and pursuing a defense blaming Stewart's boyfriend, who lived with Stewart, Figueroa, and Urbancik at the time of the robbery,

¹⁹ Barth pleaded guilty after receiving a production of trial *Rosario* material.

as the fourth participant in the robbery. Kurtzrock represented the SCDAO at trial and handled all discovery and *Rosario* productions. The jury rejected the defense, convicting Davis of Murder in the First Degree as well as several other murder and assault charges. Davis was sentenced to a term of life imprisonment without the possibility of parole. Davis's direct appeal to the Appellate Division for the Second Department was denied, *People v. Davis*, 161 A.D.3d 1000 (2d Dept. 2018), although in response to a later petition for a writ of *coram nobis*, the Appellate Division vacated his convictions for Murder in the Second Degree but left the remaining counts of conviction undisturbed, *People v. Davis*, 197 A.D.3d 659 (2d Dept. 2021).

This case was among those selected for review in 2017 following Kurtzrock's resignation from the office. The reviewing ADA obtained files from the SCPD and identified Crimestoppers tips in the SCPD's files that appeared to have not been turned over to the defense. These tips were not in the SCDAO file, however, so it is unclear whether Kurtzrock was aware of the tips or made the decision not to disclose them. There were three tips at issue: the first, received on the day of the charged offenses, provided information that four men unrelated to those on trial were "robbing homes in the Patchogue/Medford area" and could have been involved in the robbery. Later that same date, the same tipster called again to advise of an additional male and an additional female who the tipster believed could have been involved in the crimes, providing a name and address for each.²⁰ On December 28, 2013, Crimestoppers received a tip that "E.E." (Davis's street name) and "Cesar" (the first name of Davis's co-defendant Cesar Figueroa) were participants in the killing. A third Crimestoppers tip was received on December 30, 2013, advising of a male unrelated to Davis and the other charged participants in the crime who had been talking about a recent shooting and whom the tipster believed might have been referring to the killing of Bristol.

The reviewing ADA also obtained a set of investigating detectives' notes. The reviewing ADA identified no *Brady* material in the file but determined that the Crimestoppers tips that were in the SCPD's possession should have been disclosed. Records reviewed in the file reflect that Davis's appellate attorneys, the Legal Aid Society of Suffolk County ("LAS"), who at the time were representing Davis in the appeal of his conviction to the Appellate Division, were provided access to certain detective notes in the fall of 2017²¹ and were sent a complete set of all paperwork related to the Crimestoppers tips, including notes reflecting attempts to follow up on the tips, by letter dated November 24, 2017.

The CIB undertook a review of the file, including the *Rosario* production and available SCPD paperwork, in view of the prior disclosures to determine whether any *Rosario* or potential *Brady* material had been withheld prior to trial. The review reflected that the lead detective's

²⁰ This tip identified the robbery crew as using a vehicle on the day of the robbery that is different in make, model, and color than that seen on surveillance footage at the crime scene, and that the tip did not purport to have firsthand knowledge of the crew's participation in the robbery.

²¹ Notes found in the file indicate that a LAS attorney was given access to detective notes and was asked to inform the SCDAO if any notes were missing from earlier productions, but it is not clear from the notes whether all detective notes, including those later obtained by Davis's current attorney via FOIL, were provided and whether any missing notes were identified as a result of this earlier review.

notebook was produced in *Rosario* material with redactions. Some of the redactions were merely of phone numbers and addresses, while others involved redactions of references to conversations with non-testifying witnesses and a confidential informant. Davis's current counsel obtained these redacted pages as a result of a FOIL request prior to the commencement of this review. The CIB has received additional requests for records from Davis's counsel and is in the process of responding to those requests.

People v. Marcus Lewis, Ind. # 0263-15

As reflected by evidence adduced at the trial of Marcus Lewis, as of September 2010, Lewis was a pimp who prostituted an exotic dancer (described herein as "DVD"). On September 25, 2010, Lewis drove DVD to a strip club in his grey Ford Escort, where they were let in by a bouncer who knew them well. DVD testified at trial that she observed Lewis engage in conversation with a person later identified as Michael Anderson and step out of the club with Anderson for a brief moment. After their return, Lewis summoned DVD to leave the club with him. They got back into Lewis's car and observed Anderson and an associate walking back from a nearby gas station towards the club. Lewis summoned Anderson over to the car and asked him to come to the driver's side window. When Anderson arrived, Lewis pulled out a gun and shot Anderson at point blank range in the head, killing him. Lewis immediately fled the scene with DVD. Surveillance video from the gas station showed Lewis in the vicinity of the strip club and Anderson getting shot from the driver's side of a grey Ford Escort that matched the description of Lewis's car. When DVD asked why Lewis had killed Anderson, Lewis responded, in substance, that he did so because people needed to respect him.

DVD testified at trial that following the murder, they fled to New Jersey and later, North Carolina. She further testified that Lewis was violent with her, pistol whipping her on one occasion with the gun he had used to kill Anderson, which made her frightened to come forward. Other witnesses corroborated that even though Lewis and DVD had frequented the strip club prior to the murder, after the murder they were never seen there again. Lewis later filed a claim with the Department of Motor Vehicles that the license plates to the Ford Escort were stolen, receiving replacement plates.

In January 2015, after DVD was located by the SCPD and provided information about Lewis's commission of the murder, Lewis was arrested. He waived his *Miranda* rights and made videotaped false exculpatory statements to police after his arrest, denying ever owning a Ford Escort, going to the particular strip club, or knowing anyone with the same name as DVD.

This matter was among those reviewed by the SCDAO in late 2017 following Kurtzrock's resignation from the office, but the review was limited by the absence of a completed trial transcript at the time of the review. The review found no exculpatory information in the file. It found one item that, in the view of the reviewing ADA, should have been turned over in discovery but was not: a positive identification of Lewis in a photo array by a bouncer who did not testify at trial. That identification, which was inculpatory, was provided to the defense in a supplemental disclosure in late 2017.

The CIB undertook a review of the trial transcript, which was available by the time of the writing of this Report, as well as the file, to assess the adequacy of *Rosario* disclosures made in the case and to confirm the reviewing ADA's earlier *Brady/Giglio* analysis based on the evidence introduced at trial. The review concluded that there were no *Rosario* violations in the case. The supplemental review did conclude that an item of potential *Giglio* information was not disclosed and arguably should have been in view of other challenges to "DVD"s testimony that were pursued at trial: a disciplinary letter from a college that "DVD" attended several years before the murder in which she was reprimanded for destroying property belonging to two students. This information was disclosed to Lewis's counsel in an abundance of caution.

People v. Charles Okonkwo, Jr., Ind. # 1487-15

As reflected by evidence adduced at the trial of Charles Okonkwo, Jr. (the "defendant"), at some time prior to July 19, 2014, the defendant began manifesting mental health issues and engaging in aggressive behavior, including choking his father Charles Okonkwo Sr. on one occasion. On July 19, 2014, the defendant's father requested a discharge from Huntington Hospital, where he had been admitted after feeling ill, because he was unable to reach anyone at his home other than the defendant, who hung up on him. The defendant's father returned home to find his wife badly beaten and his younger son, Bradley, who was 15 at the time, choked to death in his bedroom. The defendant, who was 18 years old at the time of the killing, was missing. Police responded to the home and went looking for the defendant. They located him in a Stop and Shop supermarket parking lot and placed him under arrest. The defendant was indicted for Murder in the Second Degree for killing his brother and Assault in the First Degree for severely injuring his mother.

The case proceeded to trial on August 1, 2016. It was not disputed at trial that the defendant had injured his mother and killed his brother. The defendant chose to argue self-defense at trial, testifying in his own defense. During the defendant's testimony, he claimed that he had inadvertently choked his brother in self-defense when his brother had first tried to choke him. He further claimed that he woke his mother, who was a physician, so she could help his brother, but that when she discovered what the defendant had done to his brother she began assaulting him, which again prompted him to strike her in self-defense. On cross-examination, the defendant admitted that he had not called anyone to obtain medical attention for his brother and mother and made other inculpatory statements. The defendant was acquitted of Murder in the Second Degree but convicted of the lesser included offense of Manslaughter in the Second Degree. He also was convicted of the assault count. The defendant was sentenced principally to 5-15 years imprisonment on the manslaughter count and 25 years' imprisonment on the assault count.

This matter was among those reviewed by the SCDAO following Kurtzrock's resignation from the office. The SCDAO's review found no *Brady* information in the file. The reviewing ADA found, however, that notebooks of two testifying detectives had been redacted prior to production in *Rosario* material in a manner that appears to have been consistent with Kurtzrock's practices described herein and that, in the view of the reviewing ADA, resulted in

nondisclosure of information that should have been turned over in the *Rosario* production. The reviewing ADA also determined that the defendant's father's cellphone, which had been downloaded but had not been disclosed to the defense in discovery or *Rosario* material, contained text messages that related to the subject matter of his testimony and certain information that might have been usable for impeachment purposes. The reviewing ADA also determined that notes of non-testifying detectives and certain supplementary reports related to the investigation had not been turned over. In late 2017, the SCDAO provided defense counsel with a supplemental production of all of the nondisclosed material that had been identified over the course of the review, including a full download of Okonkwo's cellphone and a complete set of notes and reports of investigating detectives, whether or not they had testified at trial.

The defendant has submitted an application to the CIB to have his case reviewed. The matter is now under review under the standards applicable to such applications.

C. Additional Matters Tried by Kurtzrock

Kurtzrock served as an ADA in the Major Crime Bureau, where he tried serious felonies other than intentional homicides, from his arrival in the SCDAO in October 2004 until his transfer to the Homicide Bureau in 2010. As with the summaries of homicide trials, cases that were reviewed are summarized in chronological order of the date of indictment.

People v. Porfirio Ocampo, Ind. # 1805-02

The victim in this case (“JCO”), a young adult male, claimed that this defendant had orally and anally violated him on Fire Island in July 2002. In October 2003, prior to Kurtzrock’s hiring by the SCDAO, Porfirio Ocampo was found guilty of 2 counts of Criminal Sexual Act in the First Degree [NYPL 130.50(1)], Aggravated Sexual Abuse in the Second Degree [130.67 (1)(A)] and Unlawful Imprisonment in the 1st Degree [135.10], after a jury trial in which another ADA represented the SCDAO and the defendant was sentenced to an aggregate 40 year term of imprisonment.

The conviction was overturned on appeal when an appellate court determined that the Court had erred in barring defense counsel from pursuing a defense theory on cross-examination of the complainant or on direct examination of the defendant. *People v. Ocampo*, 28 A.D.3d 684 (2nd Dept. 2003).

When the matter was returned for re-trial in 2006, it was assigned to Kurtzrock. The 2006 jury trial, which concluded with a verdict on October 13, 2006, similarly resulted in a conviction on all counts and a sentence that was eventually reduced, upon review, from 40 years to 10 years in prison. The records of the 2003 jury trial, the 2006 re-trial by Kurtzrock, and a subsequent 2010 review of the file for the purpose of a Sex Offender Registration Hearing meant that the discovery materials had been reviewed by several prosecutors, thereby lending a degree of confidence to the propriety of the 2006 prosecution by Kurtzrock but, in an abundance of caution, all records were fully reviewed once more by the CIB. The review identified correspondence from October 2006 (during the period of time Kurtzrock was responsible for the prosecution) regarding the District Attorney’s Office assisting the victim of these crimes, an undocumented immigrant, in his application for a “U Visa.” The CIB has found no indication in the file that the prosecution disclosed to the defense that it had assisted the victim in immigration matters, although it is possible that a disclosure was made at some point over the course of the prosecution. In an abundance of caution, a copy of the October 2006 correspondence regarding the complainant’s “U Visa” was disclosed by the CIB to defense counsel. The CIB’s review did not identify any other issues with *Brady*, *Giglio* or *Rosario* compliance in this case.

People v. John Prowse, Ind. # 2097-05

Evidence adduced at this trial reflects that multiple eyewitnesses saw a taxicab traveling southbound on Larkfield Road at an excessive rate of speed at approximately 8:15 p.m. on July 14, 2005. As that taxicab entered the intersection of Larkfield Road and Jericho Turnpike, it

collided with another vehicle, a white car, with great force. That white car had proceeded eastbound through a green light. The taxicab entered the intersection after passing multiple vehicles stopped at a red light in the southbound lanes of traffic by crossing into the northbound lanes. The force of the collision pushed the white car into a green SUV, damaging that vehicle as well.

John Prowse was identified as the driver of the taxicab. Patricia Crespo was the driver of the SUV (a green Ford Expedition) and the driver and passenger of the white car (a Cadillac) were identified as Wayne Starr and his wife, Fern Starr. The occupants of the white Cadillac were seriously injured and neither was responsive when police arrived to the scene. John Prowse was conscious but groggy. Prescription pills and a crack pipe were recovered from his vehicle. Testing confirmed that Mr. Prowse had both cocaine and the metabolite of cocaine present in his blood at the time of the crash. On July 15, 2005, Wayne Starr died as a result of the injuries sustained at the time of the crash.

Kurtzrock tried the case on behalf of the SCDAO in 2007. At the conclusion of trial, a jury convicted Prowse of charges of Manslaughter in the Second Degree and Vehicular Manslaughter in the Second Degree, as well as other related offenses. Prowse was sentenced on February 27, 2007, principally to a term of 5-15 years imprisonment with other concurrent sentences, after a motion to set aside the verdict was denied. The defendant's pre-sentence motion to set aside the verdict makes no allegation of any violation related to the CIB's current review.

The Appellate Division's decision in *People v Prowse*, 60 A.D.3d 703 (2nd Dept. 2009) indicates that the matters in issue on appeal were: the admissibility of opinion testimony, elicited by the People on direct, of the forensic toxicologist and certain testimony from the same witness upon redirect examination after defendant "opened the door" to such testimony; the admission of an autopsy photograph; and an allegedly factually incorrect statement made by Kurtzrock during summation, as well as other challenged remarks during summation. Defendant's appeal was denied.

The CIB has reviewed the SCDAO files and police files to determine whether there were any *Rosario*, *Giglio*, or *Brady* violations in the case. In reviewing the materials, the CIB identified a *Rosario* packet consisting of 698 pages of material and an additional 5 pages of materials turned over during the course of the trial. The *Rosario* packet appears to contain unredacted and unedited copies of the items identified.

Within the SCDAO file, in addition to witnesses included on the People's "witness list" provided at the time of trial, there is reference to certain additional witnesses: Ava Satnick, Michelle Furrey, Mark Fredrickson and Karen Hoch. It appears that, while either present at the scene or remotely related to the incident in question, they seem to have not actually witnessed anything of use, or even been able to offer any information to move the investigation in favor of the prosecution or defense. There are two matters, concerning financial compensation for witnesses, that should have been disclosed to the defense. One such matter

was disclosed on the record at trial: William Houston, of C.A.R.S. Inc, who performed the Accident Reconstruction, was compensated in the amount of \$2,613.60 for services, as shown by an invoice from October 6, 2005. Review of the trial transcript reflects the revelation of the expert's compensation by the prosecution (Trial Transcript ("TT") pg 427, lines 17-25) and further detail being explored by defense counsel on cross examination (TT pg 557, line 23 thru pg 560, line 12). In addition to the expert compensation detailed herein, the file contains a receipt for \$20.00 from the District Attorney "Confidential Funds" for the purchase of lunch for a witness on January 4, 2007, that does not appear to have been disclosed.

In addition, correspondence from ADA Kurtzrock dated August 18, 2005 regarding a conversation that the prosecutor had with a civil attorney representing the estate of the deceased, Wayne Starr, and the injured victim, Fern Starr, confirmed a pending Personal Injury and Wrongful Death lawsuit. Although there is no indication that this information was shared with the defense, it is reasonable to conclude that Prowse was aware of litigation against him by those he had harmed.

In an abundance of caution, the CIB has disclosed to the defense the existence of the \$20.00 witness lunch receipt and the note from ADA Kurtzrock confirming his knowledge of the existence of a civil suit.

People v. Eric Rubinstein, Ind. # 0220-06

Evidence adduced at the trial of Eric Rubinstein reflects that in November 2005, Rubenstein had a violent altercation with Ricardo Santos, the property manager at his apartment. That altercation was the result of the following dispute: in early November 2005, Rubinstein was at home with his girlfriend, Stasia Demetriades, when his cable "went out." When he left his apartment to check the connection outside, he saw that it had been physically disconnected. Ricardo Santos admitted that he had disconnected it for non-payment and an argument ensued. Rubenstein claimed to have been struck first by Santos, in the face with a heavy flashlight. There was no dispute that at some point in the altercation, Rubenstein took out a box cutter and began slashing Santos. Santos sustained numerous, large, gaping wounds to his torso, back, arms and face. Rubenstein sustained an injury to the area above his left eye. The questions presented at trial included whether this was a matter of mutual combat, self-defense/justification, or a criminal assault. There was no doubt that the injury inflicted upon Santos was severe and met the criteria for an offense of Assault in the First Degree.

On September 1, 2006, after the conclusion of the trial and during deliberations, Rubinstein pled to a reduced charge of Assault in the Second Degree and was sentenced principally to 6 months jail and 5 years' probation.

The CIB reviewed this file in part to determine what led to the disposition of the case during jury deliberations and to confirm that it was unrelated to disclosure issues of the type identified by the Appellate Division in *Matter of Kurtzrock*. A review of the file reflects that, after three days of jury deliberation, the jury sent a note advising that they were "hopelessly deadlocked."

It appears that, prior to an *Allen* charge²² being given, several conferences were held among the parties and the victim. As a result of these conferences, an offer to a reduced charge and a “split sentence” was made and accepted by Rubenstein.

Despite what appears to be a reasonable explanation for the plea and disposition of the case that is unrelated to the issues described in this Report, the CIB reviewed the available paperwork in this case. Based upon this preliminary inspection, it appears that the defendant’s position of “justification/self-defense” was supported, to an extent, by the eyewitness account of his girlfriend and, to a lesser extent, by the eyewitness account of the victim’s teenage son. Issues of who “started” the altercation and who escalated the verbal interaction to a physical stage, and who inflicted the initial injury by use of a weapon or dangerous instrument were in issue. Thus, the facts of the case appeared to support the possibility of a jury deadlock and a negotiated disposition to a lesser charge and lower sentence than that charged originally.

The entirety of the SCDAO file was reviewed, with particular concentration on the discovery packet, police reports and handwritten notes, witness statements and grand jury testimony, medical records, ADA case and trial prep notes, and pretrial and trial *Rosario* packets. The CIB determined that all discoverable statements appear to have been disclosed.

People v. Richard Cary, Ind. # 2089-06

The case involved the theft of \$186.00 worth of merchandise from a Wal-Mart. When Richard Cary was confronted by security, he wielded a box-cutter and threatened the store employee to effectuate his escape. He also resisted arrest when police arrived.

Cary proceeded to trial in March 2007, with Kurtzrock representing the SCDAO. Cary was found guilty of charges of Robbery in the First Degree and Resisting Arrest, while he was acquitted of the charge of Assault in the Second Degree in connection with injuries allegedly sustained by the arresting officer. On April 16, 2007, Carey was sentenced principally to 6 years imprisonment.

In connection with its review, the CIB reviewed the case file, including discovery and *Rosario* productions. The CIB also reviewed supplemental *Rosario* productions made during the course of trial (on March 19 and 20, 2007), as well as notes in the file related to file review, trial preparation, and *voir dire*. This review revealed no evidence of any suppression of discoverable information or misdeeds by the prosecution. The CIB did not determine that any additional disclosures were warranted in the case.

People v. Russell Argendorf, Ind. # 2904-06B

Russell Argendorf and his co-defendant/girlfriend were charged with Burglary in the Second Degree, for entering into a home in the early morning hours of April 29, 2006, and stealing a pocketbook, taking the cash inside and using the victim’s credit card to purchase gasoline before discarding the pocketbook in a body of water. Argendorf and his girlfriend both gave

²² An *Allen* charge is a charge that may be given in certain circumstances to a jury that has indicated it is deadlocked in an effort to resolve the deadlock.

written statements implicating themselves and each other. Argendorf's girlfriend pleaded guilty prior to trial. Argendorf went to trial on the original Burglary charge and subsequent charges of Witness Intimidation, Grand Larceny and Assault. The additional charges were based upon allegations by a witness, Andrea Pennise, that Argendorf had approached her on May 3, 2006, and stated "if you don't stop this shit with the police and blaming Val, I'm going to kill you." It was then further alleged that Argendorf hit the witness in the face with a closed fist, bit her and took her pocketbook before dropping it and leaving the scene.

Russell Argendorf was found guilty, after jury trial, of the Burglary in the 2nd Degree (NYPL 140.25(2) and acquitted on charges of Grand Larceny in the 4th Degree (NYPL 150.30), Witness Intimidation in the 3rd Degree (NYPL 215.15(1)), and Assault in the 3rd Degree (NYPL 120.00(1)) and was subsequently sentenced on July 30, 2008 to serve a determinate sentence of 5 years in prison with 5 years of post-release supervision on the burglary conviction.

The CIB reviewed the SCDAO file in this case. The review of this file began with the initial Discovery, the Preliminary Hearings *Rosario* packet, consisting of 73 pages of paperwork and 2 CDs with 911 and car to car transmissions, and the *Rosario* packet provided prior to the start of trial consisting of 118 additional pages of paperwork. Kurtzrock's notes also were inspected for any indication of potential issues related to disclosure.

The CIB's review determined that the paperwork turned over to defense was unredacted and seemed to include all discoverable information in the case. This review provided no indication of any suppression of discoverable information or improper actions by the prosecution.

People v. Bernard Brothers and Lindell Buggsward, Ind. # 2680A-07 and Ind. # 2680B-07

Evidence adduced at the trial of Lindell Buggsward supported jury findings that Buggsward and his co-defendant Bernard Brothers entered into a home on Woodycrest Drive in Holtsville and, while in possession of loaded firearms, woke and forcibly robbed the occupants of the home, who were asleep in bed together. A fellow occupant of the home had heard the commotion and called the police and, upon the police's arrival to the scene, Brothers and Buggsward exited the home through a second story window and were apprehended a short distance from the scene where they attempted to conceal themselves.

Buggsward proceeded to trial, and was convicted on March 20, 2009 of 4 counts of Robbery in the First Degree, 2 counts of Burglary in the First Degree, Criminal Possession of a Weapon in the 2nd Degree and Resisting Arrest. On August 11, 2009, Buggsward was sentenced to serve 25 years to Life in prison as a Persistent Felony Offender concurrent on the Burglary and Robbery charges and concurrent with the other offenses' sentences.

Co-defendant Brothers was initially tried, along with Buggsward, and found guilty after a jury trial of 4 counts of Robbery in the First Degree, 2 counts of Burglary in the First Degree, and Criminal Possession of a Weapon in the 2nd Degree. Brothers was sentenced on August 11,

2009 to 22 years to Life in prison as a Persistent Felony Offender. The convictions of both defendants were reversed on appeal and the case was returned to the County Court for a new trial.

On January 29, 2013 Brothers pleaded guilty to all charges under the Indictment, one day prior to his scheduled re-trial date and was sentenced as a second felony offender to 14 years imprisonment, with 5 years post-release supervision. His allocution included the involvement and identification of Lindell Buggsward as a participant in the robbery. Buggsward eventually accepted a plea on October 10, 2013 and on March 6, 2014 he was sentenced to 14 years prison with 5 years post-release supervision on each of the seven felony charges and to a concurrent term of 1 year incarceration on the Resisting Arrest misdemeanor.²³

The CIB reviewed the case file to determine whether issues identified in *Matter of Kurtzrock* were present in the case. A review of the file indicates that in the lead-up to trial the nondisclosure of a statement of a victim of the home invasion robbery named Yves Lindor was the subject of litigation. The defense moved to compel production, as the statement was never provided in discovery, nor was it turned over as *Brady* material. Defense counsel alleged that the statement was required to be turned over under *Brady* or, at least, *Rosario*. However, the Court reviewed the statement in chambers and gave an oral decision on the issue prior to the start of trial, stating that “It’s not an exculpatory statement under *Brady*. And it’s not Discovery. It’s not *Rosario* because he’s not going to be testifying. So, I don’t think Mr. Kurtzrock is going to need to turn that over.” This is the earliest instance identified by the CIB in which a matter handled by Kurtzrock wherein the issue of the adequacy of Kurtzrock’s compliance with *Brady* and *Rosario* was litigated on the record.

A review of the Lindor statement and of Lindor’s circumstances at the time of trial was conducted by the CIB. That review reflects that Yves Lindor, who had a prior criminal history, was in federal custody at the time of trial (March 6 – 20, 2009), awaiting deportation, and was subsequently deported on or about May 13, 2009, shortly after the conclusion of the trial. Hence, Lindor would not have been readily available to testify for the prosecution, and even had he been produced from federal custody, he would have been subject to cross examination in view of his criminal history.²⁴

After consultation with the PCIC, the CIB turned over the Lindor statement and his criminal history to counsel for Buggsward and Brothers. In an abundance of caution, the information

²³ In *People v. Buggsward*, 104 A.D.3d 865 (2d Dept. 2013) and *People v. Brothers*, 95 A.D.3d 1227 (2d Dept. 2012) the Appellate Division reversed the convictions and ordered new trials based upon the trial court’s improper denial of two “for cause” challenges to prospective jurors. It further warned that the trial court had “erred in failing to set forth specific reasons supporting its determination to sentence the defendant as a persistent felony offender.” *Buggsward* at 866, *Brothers* at 1229. Both defendants were allowed to plead guilty as above, in the absence of a new trial.

²⁴ Lindor had 13 prior charged offenses, including 9 misdemeanors and 1 violent felony offense. He had been convicted of 6 misdemeanors (most related to drug and alcohol use) and 1 violent felony (Robbery in the Second Degree), and had 27 prior bench warrants for failures to appear.

was also provided to the individuals themselves in view of Kurtzrock's earlier refusal to disclose the statement and the issues identified in this Report.²⁵

People v. Vance Jackson and Benjamin Thompson, Ind. # 2035A-09 and Ind. # 2035B-09

Defendants Vance Jackson and Benjamin Thompson were indicted along with co-defendants Theodore Briggs and Natalie Desir for committing a violent, daytime, home invasion robbery in 2009, in which they entered into a dwelling in Huntington while Jackson and Thompson were armed with loaded handguns. Jackson and Thompson shot two of the home's occupants, inflicting serious physical injury upon them, and stole cash. Evidence adduced at trial reflected that the perpetrators gained access to the home by employing a false sales ploy, and then committed these acts of violence in close proximity to the residents' two-year-old child and two other minor children who hid in a closet after hearing the gunshots. Upon fleeing the scene, the perpetrators led police on a car chase and, after abandoning the vehicle, continued to flee on foot. Clothing, weapons and other items of evidence were left along their path. Jackson and Thompson were eventually found trying to conceal themselves in a gravel yard.

Thompson pleaded guilty on the eve of trial to a single count of Robbery in the First Degree and received a sentence of 16 years to life imprisonment. Jackson was convicted after trial of all charges under the Indictment, which included four counts of Burglary in the First Degree, three counts of Robbery in the First Degree, four counts of Assault in the First Degree and Criminal Possession of a Weapon in the Second Degree (loaded firearm), and one count of Endangering the Welfare of a Child. He was sentenced principally to a term of 25 years to life imprisonment for these offenses.

The CIB elected to review not only the trial conviction of Jackson but also the plea by co-defendant Thompson, which was contemporaneous with the trial. Thompson's plea was accepted after numerous hearing dates resulted in adjournments. However, inspection of the file indicates that, upon review of the discoverable materials supplied by the prosecution and associated *Rosario* material, a guilty plea would have been reasonable in the circumstances, given the overwhelming amount of evidence contained in the file and the subsequent trial conviction of Jackson. The evidence contained within the file includes but is not limited to: eyewitness statements; photo array identification; fingerprint collection, analysis and matching; neighborhood canvassing with positive results; gunshot residue labs with positive results; dog tracking; DNA; ballistics; recovery of proceeds from the crime from the defendants; and incriminating statements from co-defendants. All relevant/discoverable materials seem to have been properly provided to the defendant and no *Rosario*, *Brady*, or *Giglio* violations were identified as a result of the review of this matter.

²⁵ Prior to the current review, Buggsward had submitted an application, claiming actual innocence, to the CIB for review of this conviction and an earlier 2001 conviction. These files have been referred to the PCIC for further review and ultimately will be reviewed by the CIB under standards applicable to such applications.