

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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THE PEOPLE OF THE STATE OF NEW YORK, :

- against - :

GREGORY THAYER, :

Defendant. :

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NOTICE OF MOTION

Indictment No. 70188-21

PLEASE TAKE NOTICE that, upon the annexed affirmation of Joel B. Rudin, Esq.; the annexed affirmation of Professor Bruce Green, an ethics expert and professor at Fordham Law School; the annexed affirmations of Robert C. Gottlieb and Andrew Kossover; the annexed affidavit of Gregory Thayer; the accompanying exhibits and Memorandum of Law; and all prior proceedings had herein, the undersigned will move this Court, at the Courthouse, at 285 Wall Street, Kingston, New York, on July 20, 2023, at 9:30 a.m., or as soon thereafter as the undersigned can be heard, for an order:

1. Disqualifying the Honorable Bryan Rounds from deciding the claims raised in this motion because the claims concern the conduct of Judge Rounds and his law clerk, William Ghee, and both are potential witnesses at a hearing pursuant to this motion, and therefore he must disqualify himself as a matter of state and federal constitutional due process and judicial discretion;
2. Setting aside the verdict under CPL § 330.30(2), because Judge Rounds and Mr. Ghee engaged in “improper conduct” by (a) failing to inform Gregory Thayer that the judge and Mr. Ghee already, before trial, had negatively prejudged Gregory’s planned affirmative defense of lack of responsibility due to mental disease or defect; (b) failing to inform Mr. Thayer that the judge wished for him to reconsider his decision to waive a jury; (c) causing or allowing Mr. Ghee to speak *ex parte* with Mr. Thayer’s lawyer Andrew Kossover to inform him of the above information, evidently so that Mr. Kossover would try to get Mr. Thayer to opt for a jury trial, even while Mr. Ghee asked Mr. Kossover to conceal the *ex parte* conversation from Mr. Thayer and from co-counsel, in violation of Mr. Kossover’s duty of loyalty to his client; and (d) failing to inform Mr. Thayer, before he waived his right to a jury trial and proceeded to a bench trial before Judge Rounds, that, during the first eight months of Mr. Thayer’s

prosecution, Mr. Ghee had been employed by the D.A.'s Office, where he worked with Mr. Thayer's trial prosecutor;

3. Setting aside the verdict under CPL § 330.30(2), the Due Process and Jury Trial Provisions of the State and Federal Constitutions, CPL § 320.10, and the inherent authority of the court, because Mr. Thayer's jury-trial waiver was not knowing or informed, was therefore invalid, and must be voided;
4. In the alternative, under CPL § 440.10, immediately vacating any judgment that is entered because, due to the above improper conduct by the trial judge and Mr. Ghee, the judgment will have been procured by "misrepresentation[s]" by the judge and Mr. Ghee, *id.* § 440.10(1)(b); by "[i]mproper and prejudicial conduct not appearing in the record" by the judge and Mr. Ghee, which, "if it had appeared in the record, would have required a reversal of the judgment upon an appeal," *id.* § 440.10(1)(f); and by causing Mr. Thayer to waive his constitutional right to a jury trial in a manner that was not knowing, intelligent, or voluntary and depriving Mr. Thayer of his constitutional right to a fair and impartial tribunal and factfinder, in violation of his rights under the New York and United States Constitutions, *id.* § 440.10(1)(h);
5. Pursuant to CPL § 440.10(1)(h), vacating any judgment that is entered because Mr. Kossover deprived Mr. Thayer of the effective assistance of counsel, in violation of Mr. Thayer's state and federal constitutional rights, by concealing from Mr. Thayer and co-counsel the circumstances and contents of his *ex parte* conversation with Mr. Ghee;
6. Adjourning the scheduled sentencing proceeding so that the present CPL § 330.30 motion can be decided before sentence is imposed; and
7. Granting such other and further relief as would be just and proper or in the interest of justice, including holding an evidentiary hearing on any disputed facts that are material to deciding this motion.

Yours, etc.,



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Attorneys for Defendant Gregory Thayer

Dated: New York, New York
July 11, 2023

To: Clerk of Court
Ulster County Courthouse
285 Wall Street
Kingston, New York 12401

Emmanuel C. Nneji
Ulster County District Attorney's Office
275 Wall Street
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK,	:	AFFIRMATION OF
	:	JOEL B. RUDIN
- against -	:	
	:	Indictment No. 70188-21
GREGORY THAYER,	:	
	:	
Defendant.	:	

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JOEL B. RUDIN, an attorney duly admitted to practice in the courts of the State of New York, hereby states, under penalty of perjury, upon information and belief, that the following is true:

INTRODUCTION

1. I am of counsel to Robert Gottlieb, Esq., attorney of record for the defendant, Gregory Thayer, am fully familiar with the facts and circumstances of this case, and make this affirmation in support of Mr. Thayer's motion to vacate his conviction and for a new trial. Mr. Gottlieb has enlisted my law firm to prepare this motion because he and his colleagues are potential fact witnesses regarding the issues raised in this motion, as I explain below.

2. Unless otherwise indicated, all allegations of fact are based upon inspection of the record and the exhibits presented herein and are made on information and belief.

3. This prosecution arose from an incident in the early hours of September 29, 2021, in which Gregory Thayer shot and killed his longtime close friend, Bruce Swierc. Gregory was charged with murder.¹ The defense theory—which was set forth at Gregory's earliest court proceedings and would eventually be presented at a bench trial through the testimony of several

¹ Several people discussed below share last names. For clarity, I refer to such people by their first names.

lay and expert witnesses—was that Gregory had spent several hours with Swierc drinking alcohol, that Gregory then snorted Xanax, and that the toxic combination of alcohol and Xanax caused a temporary episode of substance-induced psychosis during which Gregory mistakenly perceived Swierc to be a home intruder and shot him. If not disproven beyond a reasonable doubt, evidence of such mental defect or insanity would provide a complete defense to the murder count.

4. Gregory retained Mr. Gottlieb’s Manhattan-based law firm as lead counsel, and Gottlieb enlisted New Paltz–based attorney Andrew Kossover as local co-counsel. Mr. Gottlieb retained Dr. Eric Goldsmith, a highly qualified forensic psychiatrist, to examine Gregory. In August 2022, Dr. Goldsmith issued a report in which he concluded that Gregory had shot Swierc during an episode of psychosis caused by the combination of alcohol and Xanax. The defense promptly provided copies to the prosecution and the court.

5. In January 2023, Mr. Gottlieb informed the assigned judge, the Honorable Bryan Rounds, that Gregory intended to waive his fundamental constitutional right to a jury and request a bench trial before Judge Rounds. The trial was then delayed until April 2023.

6. In February 2023, the judge’s law clerk, William Ghee, summoned Mr. Kossover to a meeting and told Mr. Kossover, in words or in substance, that he and the judge had reviewed Dr. Goldsmith’s report and were concerned that it lacked support for an extreme emotional disturbance or “EED” defense. This implied that the judge was not persuaded by the report’s contention that Gregory lacked any criminal responsibility.² Mr. Ghee also told Mr. Kossover

² The defense of “lack of criminal responsibility . . . as a result of mental disease or defect” can be established by proof that the accused “lacked substantial capacity to know or appreciate either . . . 1. The nature and consequences of [his] conduct; or 2. That such conduct was wrong.” Penal Law § 40.15. It is a “complete defense” to murder, which “relieve[s] the defendant of responsibility for his otherwise criminal conduct.” *People v. Lancaster*, 69 N.Y.2d 20, 28 (1986). The defense of “extreme emotional disturbance” is “a mental infirmity not

that the defense may want to reconsider the decision to waive a jury. This implied that the judge did not want to act as factfinder at a bench trial, whether because he knew he had prejudged the temporary mental-defect issue or for some other, or additional, reason. Mr. Ghee asked Mr. Kossover to keep the meeting secret despite Mr. Kossover's duty of loyalty to his client.

7. Although all the above information obviously was highly relevant to Gregory's decision whether to waive a jury and let the judge sit as factfinder, and to Mr. Gottlieb's advice to Gregory on this issue, and although Mr. Kossover's duty of loyalty to his client required him to reveal this information to Gregory, *see* Affirmation of Bruce Green ("Green Aff.") ¶¶ 29-36, Mr. Kossover failed to disclose the information to Mr. Gottlieb or Gregory before the judge returned a verdict finding Gregory guilty of manslaughter.

8. Additionally, neither Mr. Gottlieb nor Gregory learned before the verdict that Mr. Ghee—and, by extension, the judge whom it was Ghee's job to advise—had an apparent conflict of interest. Upon information and belief, from Gregory's arrest in September 2021 until May 2022, Mr. Ghee was a prosecutor in the Ulster County D.A.'s Office, which decided to prosecute and then prosecuted Gregory. That office was and is a relatively small one, employing fewer than 20 prosecutors during Gregory's prosecution. Upon information and belief, during Mr. Ghee's employment at the D.A.'s Office during the first eight months of Gregory's prosecution, Mr. Ghee worked directly with Emmanuel Nneji, who was the prosecutor assigned to Gregory's case from day one. During those eight months, as recounted in the affirmation of Mr. Gottlieb, the parties litigated numerous hotly contested issues, including bail applications, discovery disputes, and a motion to dismiss, and the case was extensively covered in the local media. In

rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control." *People v. Israel*, 26 N.Y.3d 236, 239 n.* (2015) (internal quotation marks omitted) (citing Penal Law § 125.25(1)(a)). "A defendant who proves an affirmative defense of extreme emotional disturbance by a preponderance of the evidence may be convicted of manslaughter in the first degree." *Id.*

light of all the above, it is likely that, while Mr. Ghee was a prosecutor, he knew about Gregory's high-profile murder case, and he may have been directly involved in the case and/or been privy to nonpublic knowledge about the case. Certainly, that is the appearance.

9. Ignorant of the above information, Mr. Gottlieb advised Gregory to waive his fundamental constitutional right to a jury trial and proceed to a bench trial, and Gregory agreed.

10. True to the warning that Mr. Ghee had conveyed to Mr. Kossover, the judge ultimately rejected Gregory's mental-defect defense. He found Gregory not guilty of murder while, without any explanation, finding that he suffered from EED, thereby convicting Gregory of the lesser offense of manslaughter in the first-degree. He also found Gregory guilty of criminal possession of a weapon in the second degree.

11. Only after the verdict did Mr. Kossover finally reveal to Mr. Gottlieb—who then revealed to Gregory—the pretrial conversation Mr. Kossover had had with Mr. Ghee, and only then did Mr. Gottlieb and Gregory learn about Mr. Ghee's former role as a prosecutor at the Ulster County D.A.'s Office during the time that office was prosecuting Gregory.

12. As detailed below and in the accompanying memorandum of law, and as supported by the affirmation of Professor Bruce Green, an ethics expert and professor at Fordham School of Law, the court's verdict must be vacated and a new trial held on charges for which Gregory has not been acquitted. First, because Gregory waived his constitutional right to a jury trial without knowing that the judge had negatively prejudged Gregory's affirmative defense of temporary mental defect, had acted in a manner that suggested he had doubts about his own impartiality, had hired and was advised by a law clerk who had worked with Gregory's trial prosecutor, and had engaged through that law clerk in an impermissible *ex parte* conversation with Gregory's local counsel while equally improperly directing the attorney not to disclose the

conversation to his own co-counsel and to his client, Gregory's waiver was not knowing, intelligent, or voluntary and is invalid. Second, due to the above actual or apparent biases, conflicts of interest, and improper conduct of the judge and his law clerk, Gregory was deprived of his constitutional right to an impartial tribunal and factfinder or, at the very least, the appearance of such impartiality. Third, Mr. Kossover provided ineffective assistance of counsel by concealing the above information.

RELEVANT FACTUAL BACKGROUND

After shooting and killing his close childhood friend Bruce Swierc, Gregory Thayer immediately tells multiple witnesses that he shot an unknown intruder who threatened to kill him

13. In September 2021, Gregory Thayer was living part-time at the Kingston, New York home of his mother, Patricia Thayer, a longtime psychiatric nurse. Tr. 326.³ The rest of the time, Gregory stayed at the Brooklyn home of his sister, Stephanie Thayer. Tr. 82, 1273-74.

14. That month, Bruce Swierc, who lived in California, visited Kingston to see his mother. Tr. 42, 45-46, 64. Swierc was Gregory's close friend since childhood. Tr. 1209. Gregory and Swierc made plans to hang out on September 28. Tr. 48. Swierc planned to visit Gregory at Patricia's house in Kingston and sleep there "because they d[id]n't want to drink and drive." Tr. 49. On the night of September 28, Swierc left his mother's house for Patricia's house between 7:00 and 7:30 p.m. Tr. 50.

15. Shortly after midnight on September 29, Gregory called his sister Stephanie and told her he had shot and killed an intruder in Patricia's home. Tr. 743-44, 853, 1216. Stephanie

³ Citations prefixed "Tr." refer to the trial transcript. The page numbers inserted in that transcript by the court reporter restart at page 1 each day of trial. For convenience, we have applied consecutive page numbers to the entire transcript, which we use here when citing the transcript. A copy of the consecutively paginated transcript is included on a USB thumb drive accompanying these motion papers. Citations of other transcripts are identified by date. Counsel will make all transcripts, including hardcopies, available to the Court upon request.

called Patricia's next-door neighbor, Brian Lowe, a Kingston police officer. Tr. 85-86, 130.

Brian called his wife, Victoria Lowe, who walked to Patricia's house and found Gregory standing in the kitchen, where a man's body was slumped on the table. Tr. 86, 271-74.

16. Victoria and multiple responding police officers observed on the kitchen table a vodka bottle, multiple lines of white powder, and a rolled-up dollar bill. Tr. 287, 315, 711, 723. The powder was later determined to be alprazolam, which is commonly known by its trade name, Xanax. Tr. 375, 986. Victoria and other witnesses heard Gregory repeatedly say that he had shot an intruder who threatened to kill him, and that he did not know who the intruder was. Tr. 95-96, 132, 278, 283-84, 314, 316, 756. Gregory was taken to the police station, where he eventually was informed that the person he had shot was his best friend, Bruce Swierc.

17. On or about September 30, 2021, a grand jury indicted Gregory on one count of murder in the second degree and one count of criminal possession of a weapon in the second degree. *See* Exhibit A.

**Dr. Eric Goldsmith examines Gregory before trial and concludes that
Gregory shot Swierc during an episode of substance-induced psychosis,
without knowing what he was doing**

18. On October 5, 2021, Gregory retained Mr. Gottlieb's Manhattan-based law firm to represent him. Affirmation of Robert C. Gottlieb ("Gottlieb Aff.") ¶ 2. The same month, Mr. Gottlieb enlisted New Paltz-based attorney Andrew Kossover as local counsel. *Id.*

19. Mr. Gottlieb promptly arranged for Dr. Eric Goldsmith to examine Gregory to determine whether the evidence showed that Gregory was not responsible for the homicide by reason of mental defect. On November 9, 2021, the defense served and filed notice, under CPL § 250.10, of its intention to present psychiatric evidence in support of this affirmative defense. *See* Exhibit B.

20. On August 18, 2022, after Dr. Goldsmith had evaluated Gregory, the defense filed an amended notice under CPL § 250.10, to which it appended a copy of Dr. Goldsmith's report, dated August 2, 2022. *See* Exhibit C. Dr. Goldsmith wrote in his report that he had reviewed the case materials and Gregory's medical records, examined Gregory, and interviewed people who knew Gregory. *Id.* at 1-2. He noted that Gregory's father and brother had been alcoholics. *Id.* at 3. Gregory, Stephanie, Gregory's former romantic partners, and a doctor whom Gregory had seen in August 2020 all reported that Gregory, too, suffered from alcohol abuse. *Id.* at 3, 5, 6, 7. Gregory and Stephanie reported that Gregory had developed a "fear of being victimized in a home invasion," which stemmed from incidents in which his mother's psychiatric patients had broken into her Kingston home. *Id.* at 4. Stephanie reported that, when Gregory stayed with her in Brooklyn, he slept with a hatchet by his bed for protection. *Id.* at 5.

21. Gregory reported to Dr. Goldsmith that, the night of the shooting, he and his childhood friend Bruce Swierc had made plans to get together around 7:00 p.m. *Id.* at 8. Gregory drank three to four beers before Swierc arrived. *Id.* He and Swierc then drank beer and vodka. *Id.* He had no memory of snorting any drugs that night. *Id.* His memories of the moments surrounding the shooting were "fragmented." *Id.* at 9. Stephanie told Dr. Goldsmith that, when Gregory called her that night, he told her he had shot an intruder that wanted to kill him, and, when Stephanie asked Gregory to put Bruce on the phone, he told her Bruce had gone home. *Id.* Dr. Goldsmith noted that Victoria Lowe, in a statement to police officers, had said that Gregory told her the same thing. *Id.* Gregory told Dr. Goldsmith he was in "disbelief" and "horrificed" to learn he had killed Swierc. *Id.* at 11.

22. Dr. Goldsmith wrote that Gregory "likely ingested alprazolam" after being intoxicated by alcohol and that a "mixture of alprazolam and alcohol creates synergistic toxic

effects on the brain,” causing “toxic neuropsychiatric adverse effects.” *Id.* at 12. His opinion, “to a reasonable degree of psychiatric certainty,” was that Gregory shot Swierc while “in an acute substance-induced psychotic state of mind believing that he was a victim of a home invasion . . . [,] that his life was in danger[,] and [that] he needed to take action against the intruder. . . . Because of his mental defect, Gregory Thayer lacked substantial capacity to know or appreciate that what he had done was wrong.” *Id.* at 13.

23. The prosecution retained Dr. Lawrence A. Siegel to examine Gregory. In a report dated January 24, 2023, Dr. Siegel wrote that he had tested Gregory for malingering and concluded that Gregory “was not attempting to feign memory problems” and “[t]here is no indication that [Gregory] was attempting to magnify or minimize mental health problems.” Exhibit D at 25. As to whether Gregory “lacked substantial capacity to know or appreciate the wrongfulness of his specific conduct,” Dr. Siegel was “unable to give an opinion on this last issue within a reasonable degree of psychiatric certainty.” *Id.* at 29.

Unaware that the trial judge is skeptical of Gregory’s affirmative defense and doubts his own impartiality as factfinder, and that the judge’s law clerk has a conflict of interest, Gregory makes an unknowing, uninformed waiver of his constitutional right to a jury trial

24. By letter of January 20, 2023, and again in court on January 24, Mr. Gottlieb informed Judge Rounds that he expected Gregory to waive his fundamental constitutional right to a jury and request a bench trial. *See* Exhibit E; Gottlieb Aff. ¶ 6; January 24, 2023 Transcript at 4, 76.

25. On February 28, 2023, Mr. Kossover emailed Mr. Gottlieb, “I’ve been reflecting on our defense in the Thayer case and wish to share some thoughts and concerns.” Exhibit F at 1. Mr. Kossover wrote that Dr. Goldsmith’s report “seems to be primarily addressing Gregory’s lack of capacity to know right from wrong . . . RATHER than setting forth Extreme Emotional

Disturbance. . . . Goldsmith never mentions ‘extreme emotional disturbance.’” *Id.* Mr. Kossover noted that the prosecution expert was “unable to give[] an opinion” on the mental-defect defense. *Id.* at 2. He wrote that he was “concerned” that, “if [they] continue[d] to waive a jury,” Judge Rounds might still convict Gregory of “Man 1.” *Id.* He asked, “should we revisit our decision to go non-jury?” *Id.*

26. While Mr. Kossover presented his “thoughts and concerns” as if they were his own, the truth was that, at some point before he sent this email, Judge Rounds’s law clerk, William Ghee, had asked to meet with Mr. Kossover to discuss Gregory’s case *ex parte*. Affirmation of Andrew Kossover (“Kossover Aff.”) ¶¶ 6-10. As Mr. Kossover would eventually reveal—but only after the judge already had found Gregory guilty of manslaughter—the circumstances and contents of that meeting were as follows.

27. Mr. Ghee had initiated the conversation with Mr. Kossover by contacting him. *Id.* ¶ 6.

28. Mr. Ghee told Mr. Kossover that “we”—implying Ghee and Judge Rounds—had reviewed Dr. Goldsmith’s report and were concerned that it did not address extreme emotional disturbance. *Id.* ¶ 7. The suggestion to present evidence of EED implied that the court had prejudged the mental-defect or lack-of-criminal-responsibility defense, under which EED would not have to be addressed.

29. Mr. Ghee also told Mr. Kossover that the defense “may want to reconsider” waiving a jury. *Id.* ¶ 8. This implied that the judge was not comfortable sitting as factfinder at a bench trial, whether because he knew he had prejudged the temporary mental-defect issue or for some other, or additional, reason.

30. Mr. Ghee told Mr. Kossover their conversation was “off the record” and in confidence.

31. After receiving Mr. Kossover’s February 28 email, Mr. Gottlieb initiated a telephone conference with his colleagues, Paul Townsend and Kaylee Kreitenberg, and with Mr. Kossover, to discuss the issues Kossover had raised. Gottlieb Aff. ¶ 9; Kossover Aff. ¶ 12. Mr. Kossover did not reveal that he had learned, in an *ex parte* conversation with Mr. Ghee, that the trial judge expected to sit as factfinder had expressed doubts about the mental-defect defense and about his own impartiality. Gottlieb Aff. ¶ 10; Kossover Aff. ¶ 12.

32. Mr. Gottlieb learned at some point before trial that the judge had hired a new law clerk named William Ghee. Gottlieb Aff. ¶ 12. Mr. Gottlieb was vaguely aware that Mr. Ghee previously had been a prosecutor, but neither he nor his colleagues knew that Mr. Ghee had worked at the Ulster County D.A.’s Office during approximately the first eight months of Gregory’s prosecution or that he had worked directly with Gregory’s prosecutor, Mr. Nneji. *Id.* Gregory too knew nothing about Mr. Ghee’s former employment by the D.A.’s Office. Affidavit of Gregory Thayer (“Gregory Thayer Aff.”) ¶ 7.

33. As a result of being unaware of Mr. Ghee’s statements to Mr. Kossover, as well as Mr. Ghee’s history with the Ulster County D.A.’s Office, Mr. Gottlieb and Gregory stuck to their plan to proceed to a bench trial before Judge Rounds.

34. On April 14, 2023, in open court, Gregory waived his fundamental constitutional right to be tried before a jury. *See* Exhibit G; Exhibit H. At no point before or during this proceeding did Judge Rounds inform Gregory of the circumstances or contents of the *ex parte* conversation his law clerk had secretly held with Mr. Kossover or of his law clerk’s previous employment with the D.A.’s Office.

The trial

Brian and Victoria Lowe

35. Gregory's trial was held before Judge Rounds in April and May of 2023. Brian and Victoria Lowe testified that they lived next door to Gregory's mother, Patricia, and were "very close" with the Thayer family. Tr. 75; *see* Tr. 74-78, 258, 261. They had known Gregory for more than 15 years. Tr. 75, 88, 288. Brian, a Kingston police officer, was on duty the night of the shooting. Tr. 83, 103.

36. In the early hours of September 29, 2021, Gregory's sister Stephanie called Brian and told him Gregory had shot an intruder at Patricia's house. Tr. 85-86, 130. At 12:11 a.m., Brian called Victoria. Tr. 86, 271. Victoria went next door to the Thayer home, walked into the kitchen, and "saw somebody slumped on the table." Tr. 273. She also observed "three rows of white powder lined up and a rolled up piece of currency next to it." Tr. 287. The powder was "cut into lines like cocaine." Tr. 315. Gregory was standing at the kitchen sink. Tr. 274. Victoria perceived him to be "in a state of shock," "look[ing] blankly." Tr. 312. Gregory told Victoria, "I just shot and killed a person." Tr. 314; *see* Tr. 278.

37. Victoria guided Gregory to the back patio, Tr. 278-79, where Gregory "made repeated comments that there was an intruder in his home, that he came home and found some dude in the house," Tr. 283. He told Victoria the person was making "fucked up comments and talking a lot of trash" and he had "shot and killed him." Tr. 283-84. Victoria overheard Gregory tell Stephanie on the phone, "I'm just going to have to do my time. I just killed a guy." Tr. 285. Gregory then "[m]ade more statements about the intruder, and then had stated that the person in his home had threatened to kill him and that's why he shot him." Tr. 285, 317. Gregory told Victoria "many times while [they] were outside there [on the patio] that he didn't know who this

person was who he shot.” Tr. 316. At some point while they were on the patio, Gregory told Victoria that “his friend Bruce had been at the house earlier.” Tr. 316.

38. Victoria testified that she asked Gregory “if he thought the person who was shot in the kitchen was one of his mother’s psychiatric patients,” because Patricia, “through the years, . . . had shared different stories about different patients that would show up at her front door.” Tr. 323, 325.

39. Brian soon arrived and heard Gregory say that he had shot a man and “I don’t even know who the fuck that dude is.” Tr. 95. Brian also heard Gregory an “intruder” had “broke in the house.” Tr. 96, 132.

40. Brian and Victoria both testified about Gregory’s good character and reputation. *See* Tr. 126-27 (Gregory was “a very nice guy,” “soft-spoken,” “gentle,” and someone about whom Brian “never had any questions about his character, his good character”); Tr. 296 (Gregory was “very kind,” “compassionate,” and “caring,” and Victoria “would never in a million years have thought Greg to be capable of murder”).

Stephanie Thayer

41. Gregory’s sister Stephanie testified that she was a graduate of Smith College and a longtime manager at the New York City Department of Parks & Recreation. Tr. 1184-86. Her and Gregory’s father and brother had been alcoholics. Tr. 1186-88. After their brother died in 2020, “Gregory’s drinking just escalated” and he became “fearful and hypervigilant.” Tr. 1188-89. He often stayed with her at her home in Brooklyn, where he kept a hatchet next to his bed for protection. Tr. 1206. Stephanie testified that Gregory was a “functional alcoholic,” Tr. 1202; *see* Tr. 1080, 1201, and had “never been violent” when drinking, Tr. 1249. Eventually, Patricia had

convinced Gregory to see a doctor in Kingston who specialized in substance abuse. Tr. 1197. Medical records from this treatment were introduced in evidence. Tr. 1071.

42. On September 28, 2021, Gregory had texted Stephanie at 7:27 p.m. that Bruce Swierc was “coming for a sleepover.” Tr. 1214. Bruce was Gregory’s “best friend for life.” Tr. 1207. Stephanie’s understanding was that Gregory and Swierc were going to “[h]ang out” and “drink beer” at Patricia’s house in Kingston. Tr. 1215.

43. Telephone records were introduced showing that Swierc sent a text to a friend at 11:49 p.m. in which he wrote that he was “[j]ust talking shit with Greg” and telling “[d]runk stories”; he sent his last text to this friend at 11:51 p.m. Tr. 739-40, 852-53.

44. Stephanie testified that she got a call from Gregory at 12:04 a.m. on September 29, 2021, which telephone records corroborated. Tr. 743-44, 853, 1216. Gregory told her, “I shot a man inside the house, he was going to kill me.” Tr. 1216. She asked Gregory who he had shot, and Gregory said, “I don’t know, a stranger.” Tr. 1216. She thought he was joking and asked him to put Swierc on; Gregory responded, “He’s not here. He went home.” Tr. 1217-18. Stephanie then called Brian Lowe. Tr. 1219-20. Moments later, Stephanie phoned Gregory again, and he told her, “I’ll just do my time, it’s fine.” Tr. 1223.

Other fact witnesses

45. Multiple police officers arrived at the Thayer home shortly after the shooting. A police investigator testified that he recovered a 1.75-liter vodka bottle from the kitchen table where Swierc’s body was found, Tr. 711, 723; it was “approximately half consumed,” Tr. 727. Investigators also recovered 11 empty beer bottles and an empty alcoholic iced tea can “throughout the [crime] scene.” Tr. 727-28.

46. Photographs of the kitchen table showed Swierc's body slumped in a chair, and next to it the half-consumed vodka bottle and lines of white powder. Exhibit I (Defendant's Trial Exhibits A20-A22). The photographs show two faint lines of powder and one more pronounced line, suggesting that two of the lines had been snorted. Police witnesses agreed that one of the lines was more pronounced than the others. Tr. 450, 833.

47. A police witness testified that lab testing revealed the white powder to be alprazolam, Tr. 375, commonly known as Xanax, Tr. 986. Evidence was introduced that Swierc had a prescription for Xanax at the time of the shooting, Tr. 60, 64, 749, and that Gregory had never before used Xanax, Tr. 1251-53.

48. A police officer testified that he heard Gregory say, "I just shot someone in the kitchen. I don't know who it is. Can I see the scene? He repeatedly asked to see the scene. Then I asked him if he knew the guy in the kitchen and he stated he did not know the guy in the kitchen." Tr. 756. The officer testified that Gregory appeared to be impaired by alcohol, Tr. 766, and he smelled a "strong odor of alcohol" coming from Gregory, Tr. 768.

49. Representatives from the medical examiner's office testified that the cause of Swierc's death was a gunshot to the head, Tr. 198, which must have been fired from at least two feet away, Tr. 243; that Swierc's body showed no defensive wounds or injuries to his face, torso, legs, feet, or hands, meaning there was "no evidence of an altercation," Tr. 245-46; and that no alprazolam was found in Swierc's blood after his death, Tr. 207.

50. Police witnesses testified that they took Gregory to the police department and put him in an interrogation room, where he remained for 13 hours. Tr. 367. Video footage of these 13 hours was admitted into evidence as Defendant's Trial Exhibit E11, see Tr. 864-83, and is

appended hereto as Exhibit J.⁴ The video shows Gregory repeatedly expressing confusion about what happened and who he shot. *See, e.g.*, Exhibit J, Video “ch01_20210929022136.mp4,” at 02:56:15 (“I just wanna know who the hell was in my house, and what happened.”); *id.* at 02:58:30 (“I just I’m clueless, like I’m I’m like I want some answers.”). Toward the end of the 13-hour video, an officer tells Gregory that he is being charged with murder and that the shooting victim was “your best friend, Bruce”; Gregory asks for a cup of water and, after he has drunk it, asks for a garbage can, saying he “might be sick.” The video shows him retching into the can. Exhibit J, Video “ch01_20210929150216.mp4,” at 15:35:55-15:45:00.

51. A police investigator thoroughly examined and photographed Gregory’s body after the shooting and saw “absolutely no indication at all of any injuries” and “no sign of any fight or violence.” Tr. 428.

52. Police witnesses testified that, although they obtained a search warrant that authorized them to collect Gregory’s blood, they never collected it. Tr. 485-86, 491-92. As a result, there was no biological evidence available at trial regarding the presence of alcohol or alprazolam in Gregory’s blood at the time of the shooting.

With the court’s urging, the defense gives notice of a potential EED defense

53. After the close of the prosecution’s direct case on May 1, 2023, the court held an off-the-record pre-charge conference. Gottlieb Aff. ¶ 13; *see* Tr. 937-38 (referencing this conference). The judge explained that he and his law clerk had found case law holding that a judge must charge EED, even if not requested by the defense, whenever there is any evidence of extreme emotional disturbance. Gottlieb Aff. ¶ 13.

⁴ The video is broken up into several files, which are provided on a USB thumb drive. Also provided on the thumb drive is a transcript the defense prepared, and provided to the court at trial, *see* Tr. 872, of statements made during the video.

54. Before that point, the defense had not opened on EED or presented evidence for the purpose of establishing it; to the contrary, the entire defense had been focused on Gregory's lack of responsibility due to mental disease or defect. However, in response to the court's urging, the defense served and filed a second amended notice under CPL § 250.10, which included notice of a potential EED defense. Tr. 940; *see* Exhibit K. The judge noted that he had previously conducted research on EED because he "could see it coming a mile away." Tr. 944. Mr. Gottlieb and Gregory still did not know about William Ghee's pretrial statements to Mr. Kossover suggesting that the defense should present evidence about the lesser, partial defense of EED.

Dr. Jimmie Valentine and Dr. Eric Goldsmith give expert testimony that supports Gregory's mental-defect defense, which the prosecution does not rebut

55. Dr. Jimmie Valentine, a board-certified physician, testified as a defense expert in clinical pharmacology and forensic toxicology. Tr. 970, 978. He had no knowledge about the facts of the case. Tr. 977, 979, 1002. He testified that, when a person ingests Xanax in pill form, "it takes about one hour for the maximum blood level to be achieved," whereas "[i]f you crush that pill and then snort it . . . , you get the maximum blood level in about one to two minutes," Tr. 988, because the drug "go[es] directly to the brain," Tr. 990. Drinking alcohol and snorting Xanax at the same time can cause "frank psychoses, hallucinations, distorted—you would have a distortion of reality of what's going on." Tr. 991. Such combining of drugs also would be "more likely to affect the memory" and cause amnesia during the period of intoxication. Tr. 996. A person who hasn't used Xanax before would be especially prone to such effects. Tr. 992. Dr. Valentine opined that drinking alcohol and snorting Xanax could cause a "psychotic break from reality," such that a person "may not be able to understand the nature and character of their actions" and "not understand that certain actions that they take are wrong." Tr. 997.

56. Dr. Eric Goldsmith, a board-certified psychiatrist and forensic psychiatrist, testified as a defense expert in those fields. Tr. 1015, 1017, 1042. He had conducted “close to a thousand, if not more, forensic evaluations” in his career, Tr. 1022, which started in 1992, Tr. 1016-17. Of all the times he had examined criminal defendants to determine whether they “met the criteria for the insanity defense,” he found they did not “probably 60 to 75 percent of the time.” Tr. 1031.

57. Dr. Goldsmith, like Dr. Valentine, testified that Xanax, if snorted, “will enter the bloodstream extremely quickly,” and the effects of combining Xanax and alcohol “are synergistic,” causing “extreme toxic effects on the brain.” Tr. 1035-37. Such effects can occur “[w]ithin a minute, seconds to a minute” of snorting Xanax. Tr. 1037. Combining the substances can cause “extreme confusion, delirium, memory deficits and psychosis.” Tr. 1037. The memories lost during such an episode typically are never recovered. Tr. 1038.

58. Dr. Goldsmith testified that he had examined Gregory and also reviewed police investigative materials, consulted Gregory’s medical records, and interviewed Stephanie, Patricia, Victoria, and Gregory’s former romantic partners. Tr. 1053-57, 1067.

59. Dr. Goldsmith opined, to a reasonable degree of psychiatric certainty, that Gregory “was suffering from an alcohol and alprazolam induced psychotic disorder when he killed Bruce Swierc.” Tr. 1103. This diagnosis was based on the criteria for finding a “substance induced psychotic disorder” in the “DSM,” Tr. 1103, or Diagnostic and Statistical Manual, which is “the definitive guide” for diagnosing mental conditions, Tr. 1042-43. He further concluded, to a reasonable degree of psychiatric certainty, that this psychotic episode caused Gregory to be “under the delusional belief that an intruder was in the home and placing his life in danger, and in his paranoid delusional state of mind, he shot Bruce Swierc who he was deluded

to believe was an intruder, and he, because of his psychosis, he lacked capacity, substantial capacity to appreciate, to know or appreciate that what he had done was wrong.” Tr. 1106-07.

60. Dr. Goldsmith also concluded, to a reasonable degree of psychiatric certainty, that Gregory was not “malingering,” which is “the false presentation or exaggerated presentation of symptoms to convince a court that you were not responsible.” Tr. 1025. Dr. Goldsmith testified that he had previously “evaluated, treated individuals who [he] concluded were malingering.” Tr. 1108. Here, Dr. Goldsmith concluded that Gregory “honestly believed that there was an intruder in the house and that [Gregory] was in a deluded state of mind,” Tr. 1108, and it was his “opinion to a reasonable degree of psychiatric certainty that from a review of all of the sources of information, the consistency of the reporting, and the consistency among the sources, that everything is consistent, there is no evidence of inconsistency, and that there is no evidence that Gregory Thayer was malingering this delusional belief,” Tr. 1109.

61. The prosecution did not call any expert witnesses to rebut Dr. Valentine or Dr. Goldsmith. Specifically, the People did not call Dr. Lawrence Siegel as a witness even though he had evaluated Gregory after the People received Dr. Goldsmith’s report. As noted above, Dr. Siegel had declared himself “unable to give an opinion” on whether Gregory “lacked substantial capacity to know or appreciate the wrongfulness of his specific conduct,” while also concluding that Gregory was not malingering. *See* ¶ 23, *supra*.

Charge conference, summations, deliberations, and verdict

62. At a charge conference, the court ruled that it would self-instruct that it could draw adverse inferences regarding (a) “the People’s failure to obtain the defendant’s blood,” which resulted in a lack of forensic evidence about the presence of alcohol and Xanax in

Gregory's blood at the time of the shooting, and (b) the prosecution's failure to call an expert to rebut the defense's expert psychiatric testimony. Tr. 1520.

63. The court also ruled that it would self-instruct that it should consider (a) as lesser-included offenses to the murder charge, manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide, Tr. 1507; (b) the defense of "not responsible by reason of mental disease or defect with regard to both counts of the indictment and any lesser included offense," Tr. 1508; (c) "the issue of the defense of extreme emotional disturbance" with respect to the murder count, Tr. 1508; and (d) the defense of justification with regard to both the murder count and the weapons count, as well as any lesser-included offenses, Tr. 1515.

64. In summation, Mr. Gottlieb highlighted the expert testimony indicating that, due to the effects of alcohol and Xanax, Gregory had suffered a psychotic break that caused him to shoot Swierc while under the delusional belief that he was shooting an unknown intruder who had threatened his life. Tr. 1531-34. Mr. Gottlieb argued that "strong compelling circumstantial evidence" showed that Gregory had snorted Xanax just before shooting Swierc. Tr. 1550. First, the photographs indicated that two lines of Xanax were snorted, but no Xanax was found in Swierc's blood; therefore, Gregory must have been the one who snorted it. Tr. 1550-52. Second, Gregory's out-of-character actions and fragmented mental state—which, according to Dr. Goldsmith's un rebutted testimony, was genuine and not falsified or embellished—were consistent with psychosis induced by snorting Xanax while drinking alcohol. Tr. 1555-56. Third, the court could and should draw the adverse inference that, if police had not failed to draw Gregory's blood, the evidence would have been favorable to Gregory's defense. Tr. 1564.

65. Mr. Gottlieb argued that the court should render a verdict of not responsible due to mental disease or defect based on all the evidence and because of the un rebutted evidence that

Gregory “did not have the substantial capacity to know or appreciate that his conduct was wrong at the time he shot Bruce,” Tr. 1576, and the facts did not support convictions on the lesser-included counts, either, Tr. 1576-78. In the alternative, he argued that the court should acquit Gregory based on a defense of justification. Tr. 1578-79.

66. Mr. Gottlieb did not ask the court to find EED.

67. The prosecutor argued that the evidence was insufficient to show that Gregory had snorted Xanax, Tr. 1588, and that Gregory knew what he was doing when he shot Swierc, Tr. 1586, 1590-93, 1597-98. The prosecutor also argued against any claim of extreme emotional disturbance. Significantly, the prosecutor did not address or even mention that Dr. Siegel was not called as a witness and, as a result, an adverse inference could be found against the People.

68. The afternoon of his second day of deliberations, May 10, 2023, Judge Rounds returned his verdict, finding Gregory not guilty of murder in the second degree based on a finding of EED, but finding him guilty of the lesser-included offense of manslaughter in the first degree, and guilty of criminal possession of a weapon in the second degree. Tr. 1648-49. The court did not provide any explanation for its verdict, including how it could reject the defense showing that Gregory had suffered a psychotic break from reality but then find, without any evidence of any non-delusional fight or argument, that Gregory’s shooting of his own lifelong friend was due to an extreme emotional disturbance.

Mr. Gottlieb learns about Mr. Kossover’s *ex parte* conversation with the judge’s law clerk, as well as the clerk’s conflict of interest, and retains my law firm

69. On May 12, 2023, two days after the verdict, Mr. Gottlieb and Mr. Kossover spoke on the phone. Mr. Kossover told Mr. Gottlieb, for the first time, that before Gregory’s trial, he had had an *ex parte* conversation with the trial judge’s law clerk, William Ghee, about the case. *See* Gottlieb Aff. ¶¶ 17-18. Later the same day, Mr. Kossover joined a conference call

with Mr. Gottlieb and two of Gottlieb's colleagues, during which Mr. Kossover repeated the details of the meeting with Mr. Ghee that he had disclosed to Mr. Gottlieb. *Id.* ¶ 18; *see* ¶¶ 26-30, *supra*.

70. In a sworn affirmation submitted in support of this motion, Mr. Kossover acknowledges his *ex parte* conversation with Mr. Ghee and that he should immediately have revealed it to Mr. Gottlieb and Gregory. Kossover Aff. ¶¶ 6-10, 13.

71. After Mr. Kossover's revelations, Mr. Gottlieb recognized that he and his colleagues were fact witnesses to potential legal claims concerning those revelations, and he recommended that Gregory retain my firm to handle any such post-conviction motion. Gregory retained my firm. Gottlieb Aff. ¶ 24.

72. While preparing this motion, my office researched the background of the participants in this trial and read in a local news story that Mr. Ghee had been a prosecutor at the Ulster County's D.A.'s Office until May 2022—or during approximately the first eight months of Gregory's prosecution. *See* Exhibit L. We also learned that, in this relatively small office, Mr. Ghee had worked directly with Gregory's trial prosecutor, Mr. Nneji, and that the first eight months of Gregory's case involved several hotly contested disputes, numerous lengthy court appearances, and extensive media coverage. This all suggested that Mr. Ghee likely had been aware of Gregory's high-profile prosecution and possibly had played a role in making decisions about the prosecution, obtained nonpublic information about the case, or formed judgments about it. Mr. Gottlieb indicated that neither he nor any of his law firm colleagues had known any of this information before. Gottlieb Aff. ¶ 25. I then spoke with Mr. Kossover, who did not recall telling Mr. Gottlieb, anyone in Mr. Gottlieb's office, or Gregory that Mr. Ghee had previously worked at the Ulster County D.A.'s Office. Kossover Aff. ¶ 4.

73. Mr. Gottlieb explains in his affirmation that, had Mr. Kossover revealed the contents and circumstances of his *ex parte* conversation with Mr. Ghee before trial, and had Mr. Gottlieb known of Mr. Ghee's position with the D.A.'s Office during the first eight months of Gregory's prosecution, Mr. Gottlieb almost certainly would have advised Gregory not to proceed to a bench trial before Judge Rounds, and he very likely would have sought to have the judge disqualified from the case. Gottlieb Aff. ¶ 28. Similarly, Gregory explains in his appended affirmation that, had he learned about this information, he would not have proceeded to a bench trial before Judge Rounds unless Mr. Gottlieb advised him to do so despite the court's apparent bias and he would have followed Gottlieb's advice about whether the defense should move to disqualify the judge. Gregory Thayer Aff. ¶ 8.

MOTION FOR A NEW TRIAL

74. As detailed in the accompanying memorandum of law, adopted here by reference, and supported by the affirmation of professional-ethics expert Professor Bruce Green, Gregory's conviction should be vacated and a new trial should be ordered.

75. First, Gregory's waiver of his constitutional right to a jury trial was not informed, knowing, intelligent, or voluntary, because he made the waiver without knowing (a) that the trial judge had negatively prejudged his affirmative defense, (b) that the judge had expressed apparent concerns about his own ability to be an impartial factfinder at Gregory's trial, (c) that the judge's law clerk, William Ghee, had been employed by the prosecutor's office during a substantial part of the prosecution and that the circumstances of that employment indicated he was operating under a conflict of interest, and (d) that the judge and Mr. Ghee apparently had used an improper, secret, *ex parte* conversation with Mr. Kossover to try to cause him to influence Gregory and Mr. Gottlieb into opting for a jury trial.

76. Second, in view of the judge's actual or apparent biases against Gregory, as well as Mr. Ghee's conflict of interest, Gregory was deprived of his fundamental constitutional right to be tried before an impartial tribunal and factfinder, and of his right to move to recuse the judge based on what amounted, at least, to an appearance of judicial bias and impropriety.

77. Third, Mr. Kossover deprived Gregory of his constitutional right to the effective assistance of counsel because he violated his ethical duty to disclose to Gregory and Mr. Gottlieb the information about, and improper conduct by, the judge and Mr. Ghee that is detailed above.

78. This Court should consider these claims under CPL § 330.30(2), which authorizes the Court to order a new trial where, as here, there was "improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict." In this case, the "juror" was the judge in his role as factfinder and the "[o]ther person in relation to a juror" was the law clerk, Mr. Ghee.

79. In the alternative, should the Court determine that any of these claims cannot be raised under CPL § 330.30(2), it should consider them under CPL § 440.10(1)(b), (f), and (h), and immediately grant the motion for a new trial "after the entry of a judgment" against Gregory.

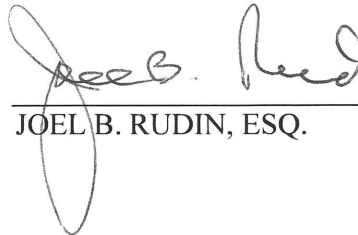
MOTION TO DISQUALIFY JUDGE ROUNDS FROM DECIDING THIS MOTION

80. As discussed in Professor Green's affirmation and in the accompanying memorandum of law, this motion creates an obvious conflict of interest for Judge Rounds: if he were to decide the motion, he would have to pass judgment on allegations of error amounting to misconduct by him and his law clerk. Also, the motion raises factual issues about which the judge and Mr. Ghee are potential witnesses. Finally, Mr. Ghee's original conflict of interest as a

member of the D.A.'s Office that prosecuted Gregory still requires the judge's recusal from this case. *See Green Aff.* ¶¶ 40-47.

80. Because the judge thus harbors actual bias regarding the outcome of this case, or his deciding the motion would at least create a facial appearance of impropriety which conflicts impermissibly with the notion of fundamental fairness, or, at the very least, his impartiality in deciding this motion might reasonably be questioned, he should disqualify himself from deciding this motion as a matter of state and federal due process and as a matter of judicial discretion.

WHEREFORE, for the reasons set forth above and in the accompanying memorandum of law, Judge Rounds should disqualify himself from deciding this motion; the currently scheduled sentencing proceeding should be adjourned so that the § 330.30 motion can be decided before sentence is imposed; the Court should grant Gregory Thayer's motion to vacate the conviction under either CPL § 330.30(2) or CPL § 440.10(1)(b), (f), or (h); and this Court should grant such other and further relief as would be just and proper or in the interest of justice, including ordering an evidentiary hearing to resolve any issues of fact relating to this motion.



JOEL B. RUDIN, ESQ.

Affirmed: July 11, 2023
New York, New York

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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THE PEOPLE OF THE STATE OF NEW YORK, :

- against - : Indictment No. 70188-21

GREGORY THAYER, :

Defendant. :

-----X

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION
TO VACATE HIS CONVICTION AND FOR A NEW TRIAL**

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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THE PEOPLE OF THE STATE OF NEW YORK, :

- against - : Indictment No. 70188-21

GREGORY THAYER, :

Defendant. :

-----X

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION
TO VACATE HIS CONVICTION AND FOR A NEW TRIAL**

INTRODUCTION

Gregory Thayer, facing some of the most serious charges in the Penal Law, waived his fundamental constitutional right to a jury in favor of a bench trial. He did so without knowing that the trial judge, through his law clerk, had previously expressed doubts about the merits of Gregory’s planned affirmative defense, that the judge had raised apparent concerns about his own ability to impartially judge the case at a bench trial, and that the judge’s law clerk had confided this information to one of Gregory’s lawyers but then asked that lawyer to keep their meeting secret, evidently hoping the lawyer would convince Gregory to opt for a jury trial without revealing the court’s actions. Gregory also did not know when he waived his right to a jury that, during the first eight months of his prosecution, the law clerk who had the *ex parte* conversation with Gregory’s local lawyer had been employed by the very D.A.’s Office that was prosecuting Gregory, and that the circumstances of that employment suggested that he likely had learned inside information about the case and prejudged it. Ignorant of the above information, Gregory proceeded to a bench trial, and the judge convicted him.

A verdict founded upon such a violation of the fundamental principles governing criminal trials and legal representation cannot stand. As we show below, Gregory is entitled to a new trial under either CPL § 330.30(2) or CPL § 440.10(1)(b), (f), and (h), because (1) his waiver of his fundamental constitutional right to a jury trial was not informed, knowing, intelligent, or voluntary; (2) the trial judge and factfinder was actually biased or, at the very least, operated under an appearance of bias that violated due process and state common-law rules regarding judicial disqualification; and (3) counsel provided ineffective assistance by withholding from Gregory the information, discussed above, that would have prevented him from agreeing to a bench trial before this judge.

The relevant facts are set forth in the affirmation of Joel Rudin—who is of counsel to Gregory’s counsel of record, Robert Gottlieb—which is incorporated herein by reference, as well as the appended affirmations, affidavit, and exhibits. Gregory’s arguments related to the conduct of the trial judge, the law clerk, and defense counsel Kossover are supported by the affirmation of renowned ethics expert and Fordham School of Law Professor Bruce Green, which is submitted herewith.

ARGUMENT

POINT I

Judge Rounds should recuse himself from deciding this motion, because there would be an inherent conflict of interest for him to judge allegations of his and his law clerk’s misconduct, the motion raises factual issues about which he and his law clerk are witnesses, and the original conflict of interest caused by his law clerk’s employment as a prosecutor still remains

A. Law governing recusal and disqualification

“Under the Rules Governing Judicial Conduct, recusal is appropriate when a judge’s ‘impartiality might reasonably be questioned.’” *In re LaBombard*, 11 N.Y.3d 294, 298 (2008)

(quoting 22 NYCRR § 100.3(E)(1)). This includes any situation where “the judge has personal knowledge of disputed evidentiary facts concerning the proceeding,” 22 NYCRR § 100.3(E)(1)(a)(ii); “the judge knows that he . . . has any . . . interest that could be substantially affected by the proceeding,” *id.* § 100.3(E)(1)(c); or “[t]he judge knows that the judge . . . is likely to be a material witness in the proceeding,” *id.* § 100.3(E)(1)(e); *see* Affirmation of Bruce Green (“Green Aff.”) ¶¶ 25, 40-41.

While, generally, the “trial judge is the sole arbiter of recusal and his or her decision in that regard will not be overturned absent an abuse of discretion,” *People v. Bibeau*, 21 A.D.3d 1225, 1226 (3d Dep’t 2005) (quoting *People v. Saunders*, 301 A.D.2d 869, 871 (3d Dep’t 2003)), appeals courts have found such abuse of discretion where the circumstances required “a special effort to maintain the appearance of impartiality,” *People v. Suazo*, 120 A.D.3d 1270, 1272 (2d Dep’t 2014) (quoting *People v. Moreno*, 70 N.Y.2d 403, 406 (1987)). Included are instances where a judge refused to recuse himself despite being a potential witness or where there were allegations of his misconduct. *See People v. McDaniel*, 168 A.D.2d 926, 927 (4th Dep’t 1990) (where defendant argued in 440 motion that jury-trial waiver was invalid because not signed in open court, remanding for evidentiary hearing “before a Justice other than the trial Justice because it is possible that he may be called as a witness”); *People v. Pendergrass*, 43 A.D.2d 592, 592-93 (2d Dep’t 1973) (where defendant alleged in post-conviction motion that justice coerced his guilty plea, ordering evidentiary hearing “before another Justice,” “since defendant alleged an impropriety on the part of the Trial Justice” and the justice was “a potential witness”); *see also People v. Alomar*, 93 N.Y.2d 239, 247-48 (1999) (discussing other cases where recusal was required because “the propriety of the judge’s prior conduct was at issue”).

Appeals courts have also found abuse of discretion in other circumstances where the appearance of impropriety was too great to overlook. *See, e.g., People v. Hymes*, 193 A.D.3d 975, 976-77 (2d Dep’t 2021) (judge’s law clerk was former prosecutor who was involved in early stages of defendant’s case); *Suazo*, 120 A.D.3d at 1272 (judge presided over suppression hearing involving police witness who was married to judge’s law clerk); *People v. Browne*, 220 A.D.2d 313, 314 (1st Dep’t 1995) (judge presided over defendant’s civil and criminal cases and heard defendant make “damaging admissions” in civil case); *People v. Corelli*, 41 A.D.2d 939, 939 (2d Dep’t 1973) (judge had previously, as a prosecutor, presented different case against the defendant to a grand jury).

Additionally, “[t]he Due Process Clause may sometimes demand recusal.” *Rippo v. Baker*, 580 U.S. 285, 287 (2017). The determinative question is “whether a serious risk of actual bias, based on objective perceptions and considering all the circumstances alleged, rises to an unconstitutional level,” or there is a “facial appearance of impropriety which conflict[s] impermissibly with the notion of fundamental fairness.” *People v. Towns*, 33 N.Y.3d 326, 332 (2019) (quoting *People v. Novak*, 30 N.Y.3d 222, 225-26 (2017)); *see also Alomar*, 93 N.Y.2d at 246 (“Recusal, as a matter of due process, is required . . . where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion . . .”). Of course, demonstrated “actual bias, if disclosed, no doubt would be grounds for appropriate relief” as well. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009).

B. Judge Rounds should recuse himself from deciding the issues raised in the rest of this motion, both as a matter of due process and as a matter of discretion

This motion alleges that the Honorable Bryan Rounds and his law clerk, William Ghee, harbored apparent or actual biases against the defense; that Mr. Ghee, acting on behalf of the judge, conducted an improper *ex parte* meeting with Gregory’s local counsel in which Mr. Ghee

induced counsel to withhold information from his own client and thereby violate his duty of loyalty to the client; and that Mr. Ghee and the judge operated under a conflict of interest based on Mr. Ghee's former employment by the D.A.'s Office while it was prosecuting Gregory.

The judge's conflict of interest in passing judgment on such allegations of his own impropriety and that of his law clerk is obvious, as Professor Green's affirmation shows. *See Green Aff.* ¶¶ 40-42. Further, the judge and his law clerk are potential witnesses at a hearing on whether their apparent misconduct entitles Gregory to a new trial, which also requires the judge's recusal. The judge should not decide this motion because the allegations against him and his interest in avoiding a hearing at which he and Mr. Ghee would have to testify provide him a strong incentive to deny the motion. He suffers from an inherent and obvious conflict and cannot be impartial. At the very least, there is an appearance of bias that is disqualifying. Additionally, Mr. Ghee's former employment by the D.A.'s Office, which was a ground for the judge's disqualification before trial, *see Point III, infra*, is *still* is such a ground, *see Green Aff.* ¶¶ 43-47. State and federal due process, canons of judicial ethics, and the case law cited above all require Judge Rounds to recuse himself and permit this motion to be decided by a judge who has played no part in the proceedings that this motion questions.

POINT II

Mr. Thayer's waiver of his constitutional right to a jury trial was not knowing or intelligent because he never was informed that the judge had negatively prejudged his affirmative defense, had apparent concerns about his own impartiality, and had hired a law clerk who worked at the D.A.'s Office during the first eight months of Mr. Thayer's prosecution

A. Law requiring waiver of the fundamental constitutional right to a jury trial to be knowing, intelligent, and voluntary

The New York State Constitution guarantees the accused the "inviolable" right to a "[t]rial by jury," while also providing that "[a] jury trial may be waived by the defendant . . . by a

written instrument signed by the defendant in person in open court before and with the approval of a judge or justice.” N.Y. Const. art. I, § 2; *see also* CPL § 320.10(2) (codifying these constitutional provisions).

Any purported waiver of this constitutional right must be “knowing, intelligent and voluntary.” *People v. Smith*, 6 N.Y.3d 827, 828 (2006); *People v. Page*, 88 N.Y.2d 1, 6 (1996); *see* CPL § 320.10(2) (“The court must approve the execution and submission of [a jury-trial] waiver *unless it determines . . . that the defendant is not fully aware of the consequences of the choice he is making.*” (emphasis added)); *People v. Canales*, 121 A.D.3d 14, 17 (2d Dep’t 2014) (“The defendant must be ‘fully aware of the consequences of the choice he [or she] is making.’” (quoting *People v. Duchin*, 12 N.Y.2d 351, 353 (1963))). Thus, “due process require[s] the trial court to disclose to the defendant all of the pertinent, material facts” before he may make a valid waiver. *Canales*, 121 A.D.3d at 18.

Courts must be “‘scrupulous in enforcing compliance with the waiver provisions’ of art I, § 2.” *Page*, 88 N.Y.2d at 10 (quoting *People ex rel. Rohrlach v. Follette*, 20 N.Y.2d 297, 300 (1967)). “[T]he People bear the burden of establishing a proper waiver.” *People v. Davidson*, 136 A.D.2d 66, 70 (2d Dep’t 1988).

The rule under the U.S. Constitution is similar. The Sixth and Fourteenth Amendments guarantee a jury trial in state criminal matters. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). A trial court “must evaluate a defendant’s waiver of his right to a jury trial under all the circumstances of the case to ensure that it is knowing, voluntary, and intelligent.” *United States v. Carmenate*, 544 F.3d 105, 107-08 (2d Cir. 2008); *see Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993) (“The right to a jury trial must be jealously preserved, and before this right can be waived, the trial court must satisfy itself that the defendant has intelligently consented.”).

Courts have repeatedly ordered new trials where the accused waived his right to a jury or other constitutional rights while “deprived of material information that led him down a path he might not have otherwise taken were full disclosure made.” *Canales*, 121 A.D.3d at 18. In *Canales*, the trial court replaced a sick juror with an alternate during deliberations, while the defendant was absent, and the jury quickly reached a verdict. 121 A.D.3d at 15-16. When the defendant arrived, the judge let him choose between a mistrial or consenting to the substitution, while withholding that the jury had reached a verdict. *Id.* at 16. The defendant consented and was found guilty. *Id.* The Appellate Division, noting that the rules for substituting deliberating jurors are “coextensive with the constitutional requirements for valid waiver of a jury trial,” *id.* at 17 (quoting *Page*, 88 N.Y.2d at 10), held that this waiver was invalid, and “due process” violated, because the court had withheld material information from the accused, *id.* at 18; *see also, e.g., People v. Finkle*, 262 A.D.2d 971, 973 (4th Dep’t 1999) (ordering new trial because judge obtained jury-trial waiver only at the end of trial, without “advis[ing] defendant of his absolute right to a mistrial and a retrial before a jury”); *cf. Randall v. Rothwax*, 78 N.Y.2d 494, 496 (1991) (ordering new trial where judge induced guilty plea by erroneously telling defendant that jury was leaning 10-2 to convict, when it really was leaning 10-2 to acquit).

Especially relevant to the present case is *People v. Mineccia*, in which a “prosecutor who appeared for over six months on the People’s behalf . . . was subsequently appointed to serve as the trial court’s confidential law clerk.” 185 A.D.3d 1408, 1409 (4th Dep’t 2020). Before the defendant waived a jury, the court “failed to inform defendant that its law clerk had previously prosecuted defendant.” *Id.* Although the court had “screened the law clerk off from any participation in th[e] case,” a new trial was required, because the defendant’s waiver, made when he was “ignorant of the fact that his former prosecutor had become the trial judge’s legal advisor,

was not tendered ‘knowingly and understandingly’ and was not ‘based on an intelligent, informed judgment.’” *Id.* at 1409-10 (quoting *People v. Davis*, 49 N.Y.2d 114, 119 (1979)). Importantly, defense counsel’s knowledge of the conflict of interest did not cure the error; the court noted that counsel “was aware of the law clerk’s prior role” but “failed to inform defendant.” *Id.*

The conflict of interest in *Mineccia* was especially salient because “[a] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge’s own.” *Suazo*, 120 A.D.3d at 1272 (quoting *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988)). Indeed, the Appellate Division has ordered new trials based not only on a judge’s failure to *inform* the accused of a law clerk’s conflict of interest, but also based on the judge’s failure to *disqualify* himself from a bench trial under such circumstances. *See id.* at 1271-72 (ordering new suppression hearing where judge’s law clerk was married to a police witness); *Hymes*, 193 A.D.3d at 976-77 (ordering new sentencing where judge’s law clerk was involved in early stages of defendant’s case as a prosecutor).

The Appellate Division has similarly ordered new trials where judges failed to disqualify themselves on the basis of other types of possible bias. In *People v. Zappacosta*, the judge acting as factfinder convicted the defendant after having taken a guilty plea from a codefendant who made incriminating statements about the defendant. 77 A.D.2d 928, 928-29 (2d Dep’t 1980). The Appellate Division ordered a new trial, holding that it was necessary to “avoid any situation which allows even a suspicion of partiality.” *Id.* at 930. The court further noted that the defendant had moved to disqualify the judge based on a “perception of bias [that] was made in good faith and based upon identifiable factors,” so “it was improper to circumscribe the exercise

of his constitutional right to waive a jury trial by compelling him to accept trial by the challenged Judge.” *Id.* at 929-30.

In *People v. Browne*, the defendant sued a drug-treatment facility while his drug-related criminal charges were pending and, during the civil proceedings, made “damaging admissions.” 220 A.D.2d at 314. On counsel’s advice, he then opted for a bench trial on the criminal charges before the same judge from the civil case. *Id.* The Appellate Division held that the judge should have recused himself, for even if he was able “to remove from consideration the damaging information developed during the civil proceeding,” his decision to act as factfinder “result[ed] in what, at a minimum, must be described as an appearance of impropriety.” *Id.* at 314-15. Indeed, the judge’s obligation to recuse himself was so clear cut that it required reversal even though defense knew about it (the court also finding, as an additional ground for reversal, that counsel was ineffective).

In *People v. Corelli*, the judge who convicted the defendant at a bench trial was aware of the defendant’s “background” from having, as a prosecutor, presented a different case against him to a grand jury. 41 A.D.2d at 939. The Appellate Division ordered a new trial, because “[a] juror who knew what this Trial Judge knew about defendant and his ‘background’ would have been subject to exclusion for cause,” and therefore “[t]he Judge, as the sole trier of the facts, suffered from a like disqualification.” *Id.*

If, in these cases, information indicating possible bias *required disqualification* of a judge from a bench trial, then certainly such information at least must be *disclosed* to the accused before his waiver of his right to a jury trial can be deemed informed and intelligent.

B. Gregory's waiver of his constitutional right to a jury trial was not knowing, intelligent, or voluntary

The material information that Gregory was deprived of before waiving his right to a jury was substantially more extensive and significant than in the cases discussed above. Like the law clerk in *Mineccia*, this judge's law clerk was previously employed by the same district attorney's office prosecuting the case his judge was handling and likely was involved in some manner in the prosecution, had inside knowledge about it, and/or had prejudged it. Here the impropriety was worse, however: unlike in *Mineccia*, this defendant's principal attorney did not know about the law clerk's conflict of interest and, equally significantly, the law clerk was not "walled off" from advising the judge on the case. To the contrary, he participated at every stage of the case (including the *ex parte* discussion with Mr. Kossover). This matter presents an even stronger case for vacatur than *Mineccia* did.

In addition, Gregory never was informed that the judge already had considered and expressed doubt about the central pillar of Gregory's defense and apparently was predisposed to convict Gregory at least of manslaughter on an EED theory, apparently had doubts about his own impartiality as a factfinder, and appeared to have arranged, or at least allowed, the highly improper *ex parte* meeting between Mr. Ghee and Mr. Kossover, at which Mr. Ghee induced Gregory's lawyer to betray his duty of loyalty to Gregory. It is obvious that any defendant knowing the above information would have had grave doubts about agreeing to a bench trial before this judge, as would any reasonable defense lawyer. Indeed, Gregory and Mr. Gottlieb have attested that, had they known such information, they likely never would have agreed to a bench trial before this judge. *See Rudin Aff.* ¶ 73. As *Mineccia* instructs, Mr. Kossover's knowledge of the above information cannot be imputed to Gregory or Mr. Gottlieb. Indeed, Mr.

Kossover’s failure to disclose this information rendered him ineffective, providing an independent ground for a new trial, as discussed in Point IV, below.

Under these circumstances, Gregory did not come close to tendering his jury-trial waiver “knowingly and understandingly” or “based on an intelligent, informed judgment.” *Mineccia*, 185 A.D.3d at 1409-10 (quoting *Davis*, 49 N.Y.2d at 119). Accordingly, a new trial is required.

POINT III

The judge and his law clerk’s prejudgment of Gregory’s affirmative defense, doubts about the court’s impartiality, conflicts of interest, and improper actions evince actual bias against Gregory, or at least demonstrate an intolerable appearance of bias that requires a new trial as a matter of due process and judicial discretion

A. The constitutional and common-law requirements that judges appear, and be, impartial in their judicial and factfinding roles

“A fair trial in a fair tribunal is a basic requirement of due process.” *Towns*, 33 N.Y.3d at 330 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955), and citing U.S. Const., Amend XIV, § 1; N.Y. Const., art. I, § 6). The right to “a fair and impartial trial before an unbiased court and an unprejudiced jury is a fundamental principle of criminal jurisprudence.” *Id.* (quoting *People v. De Jesus*, 42 N.Y.2d 519, 523 (1977)). “Not only must judges actually be neutral, they must appear so as well.” *Id.* (quoting *People v. Novak*, 30 N.Y.3d 222, 226 (2017)). “The pertinent inquiry . . . is ‘not whether the judge is actually, subjectively biased, but whether the average judge in [the same] position is likely to be neutral,’” *id.* (quoting *Novak*, 30 N.Y.3d at 226, and citing *Caperton*, 556 U.S. at 881)—although “actual bias, if disclosed, no doubt would be grounds for appropriate relief,” *Caperton*, 556 U.S. at 883. As noted above, “[i]n the . . . context of recusal . . . ‘courts [must] evaluate whether a serious risk of actual bias, based on objective perceptions and considering all of the circumstances alleged, rises to an unconstitutional level,’ or whether there is a “facial appearance of impropriety which conflict[s] impermissibly with the

notion of fundamental fairness.” *Towns*, 33 N.Y.3d at 332 (quoting *Novak*, 30 N.Y.3d at 226). If such an appearance exists, due process is violated and a new trial is required. *Id.* at 332-33.

As discussed above in Point I, even where there is no due process violation, a judge abuses his discretion by refusing to recuse himself where circumstances require “a special effort to maintain the appearance of impartiality.” *Suazo*, 120 A.D.3d at 1272 (quoting *Moreno*, 70 N.Y.2d at 406).

The requirement that trial judges appear, and be, impartial is particularly important in the context of a bench trial. The fundamental “protections afforded the accused at trial[] are of little value unless those who are called to decide the defendant’s guilt or innocence are free of bias.” *People v. Southall*, 156 A.D.3d 111, 118 (1st Dep’t 2017) (quoting *People v. Branch*, 46 N.Y.2d 645, 652 (1979)). Thus, the Appellate Division has vacated convictions where it appeared that judges sitting as factfinders might be biased yet refused to disqualify themselves, as in *Zappacosta*, *Browne*, and *Corelli*, discussed above in Point II.A.

Notably, “[a]ctual bias may be demonstrated” when a factfinder “conceal[s] material information” or “manifest[s] a predisposition in favor of the prosecution.” *Southall*, 156 A.D.3d at 121 (vacating conviction where juror withheld that she had applied for a job with the prosecutor’s office, which was not revealed until after trial).

B. The circumstances of this case establish the judge’s actual bias, or at least an intolerable appearance of bias and impropriety, and thus a new trial is required

This is a rare case where there is not just a circumstantial appearance of bias, but also evidence of actual bias. First, Mr. Ghee told Mr. Kossover that he and the trial judge were concerned that Dr. Goldsmith’s report didn’t address EED. This implied that the court had prejudged, and was biased against, the mental-defect defense—since if it accepted that defense, it would need not consider EED—and was inclined to convict Gregory at least of manslaughter.

That the judge later urged the defense to ask for an EED instruction, and then rejected the mental-defect defense without explanation and found EED—despite the prosecution’s failure to present any evidence rebutting the defense’s psychiatric experts, and the defense’s lack of argument for EED—supports that the judge harbored such a bias all along. *See Rudin Aff.* ¶¶ 53-54, 61, 67-68.

Second, Mr. Ghee told Mr. Kossover that the defense “may want to reconsider” waiving a jury, which implies the judge worried he could not fairly and impartially judge the case, due to his preconceptions about Gregory’s psychiatric defense or for some separate, or additional, reason. This is not just apparent bias, but actual bias. Indeed, the judge’s bias against Gregory’s complete psychiatric defense is revealed by the confounding verdict. The court never explained its basis. It never explained how it could find that Gregory acted under an extreme emotional disturbance in shooting to death his lifelong friend who had been with him all evening, when the only evidence of Gregory’s excited mental state was that he delusionally misperceived Bruce Swierc as an intruder who had threatened his life. In other words, the only logical way to find that Gregory was emotionally disturbed would be to conclude that Gregory’s perceptions were distorted by the very psychotic break, and temporary mental defect, that the defense correctly argued was a complete defense to *any* criminal responsibility.

Third, the judge demonstrated his actual bias by apparently arranging—or at least allowing—a secret, *ex parte* meeting at which Mr. Ghee encouraged Mr. Kossover to influence Gregory into abandoning his plan for a bench trial without disclosing to Gregory the reason why. If the judge indeed went to such lengths to avoid a bench trial, this speaks to the gravity of his doubts about his impartiality and further establishes his actual bias.

Even if, for the sake of argument, these facts do not establish actual bias, they create an objective appearance of bias and impropriety that violated due process. That is especially so when these facts are considered together with Mr. Ghee's previous employment by the small D.A.'s Office that was prosecuting Gregory's high-profile case. That Mr. Ghee worked in that office for the first eight months of that prosecution—and worked directly with Gregory's trial prosecutor, Emmanuel Nneji, during a period of contentious litigation in this case—creates a strong appearance of impropriety, especially where Mr. Ghee, as a law clerk, first met *ex parte* with Mr. Kossover and then advised the judge as factfinder at the bench trial. If, as seems likely, Mr. Ghee as a prosecutor had some personal involvement in Gregory's case, obtained insider knowledge about the case, and/or formed opinions about the case, then the appearance of bias and impropriety is even stronger. Taken together, the above circumstances created a strong "facial appearance of impropriety which conflicted impermissibly with the notion of fundamental fairness" and violated due process. *Towns*, 33 N.Y.3d at 332 (internal quotation marks omitted).

At the very least, there was a strong appearance of impropriety that required Judge Rounds, as a matter of law, to exercise his discretion to disqualify himself, or, if he did not disqualify himself, to disclose all the above information to Gregory and Gregory's lead counsel so the defense could make a motion to recuse.

POINT IV

Mr. Kossover provided ineffective assistance of counsel under the State and Federal Constitutions by failing to inform Mr. Thayer and principal defense counsel, before trial, about the judge and law clerk's apparent and actual biases and improper conduct

A. The right to effective assistance of counsel under state and federal law

“The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions.” *People v. Rivera*, 71 N.Y.2d 705, 708 (1988) (citing U.S. Const., amends. VI, XIV; N.Y. Const., art. I, § 6); *see Strickland v. Washington*, 466 U.S. 668, 669 (1984); *People v. Caban*, 5 N.Y.3d 143, 155-56 (2005).

A federal ineffectiveness claim requires two showings. First, the accused must establish that counsel's performance was deficient because it “fell below an objective standard of reasonableness . . . under prevailing professional norms.” *People v. Clark*, 28 N.Y.3d 556, 563 (2016) (quoting *Strickland*, 466 U.S. at 688). Second, the accused must show prejudice, *Clark*, 28 N.Y.3d at 563—that is, a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” *Strickland*, 466 U.S. at 694.

The New York standard “offers greater protection” than the federal standard. *Caban*, 5 N.Y.3d at 156. The court must determine whether counsel provided “meaningful representation,” *id.*, a standard “ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case,” *People v. Benevento*, 91 N.Y.2d 708, 714 (1998). Thus, in New York, “even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial.” *Caban*, 5 N.Y.3d at 156. To meet this standard, “it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure[s].” *Rivera*, 71 N.Y.2d at 709. “A single error can constitute ineffective assistance . . . ‘when [it] is sufficiently

egregious and prejudicial.’’ *People v. Maffei*, 35 N.Y.3d 264, 269 (2020) (quoting *Caban*, 5 N.Y.3d at 152).

Counsel’s failure to advise his client about the consequences of waiving constitutional rights can make out ineffectiveness, including under circumstances resembling those here. In *Browne*, discussed above, the Appellate Division found counsel ineffective for failing to inform his client that the judge sitting as factfinder had, in a previous civil case, heard the defendant make “damaging admissions” about his criminal case. 220 A.D.2d at 313-14; *see also People v. Danthuluri*, 31 Misc. 3d 56, 59 (App. Term 2d Dep’t 2011) (finding counsel ineffective for not objecting to court’s acceptance of jury waiver during trial, as the court should have “advised defendant of his right to a mistrial and retrial before a jury” (citing *Finkle*, 262 A.D.2d at 973); *Commonwealth v. Duarte*, 477 Mass. 630, 638 (2017) (finding counsel ineffective for failing to inform client who waived jury that judge’s son worked in the prosecutor’s office, for “where defense counsel already has information about the trial judge that reasonably could bear on a right as fundamental as the right to a jury trial, defense counsel has an obligation to disclose the information to his or her client”); *cf. People v. Rupnarain*, 123 A.D.3d 1372, 1373 (3d Dep’t 2014) (“failure to advise defendant of the deportation consequences of his plea indeed constitute[s] deficient representation” (citing *Padilla v. Kentucky*, 559 U.S. 356, 366-69 (2010))); *People v. Davey*, 91 A.D.3d 1033, 1034 (3d Dep’t 2012) (“An allegation that a defendant entered a guilty plea based on counsel’s failure to advise regarding a viable defense is sufficient to raise a question of fact regarding counsel’s effectiveness.”); *United States v. Brown*, 623 F.3d 104, 112 (2d Cir. 2010) (“[C]ounsel’s failure to convey a plea offer falls below an objective standard of reasonableness and thus satisfies *Strickland*’s first prong.”).

The U.S. Supreme Court “long ha[s] recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable’” attorney conduct. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688); *id.* at 367 (describing ethical standards as “valuable measures of the prevailing professional norms of effective representation”). As Professor Green’s affirmation shows, ethical rules require counsel to advise a client of a court’s potential bias before he waives a jury trial. *See* Green Aff. ¶¶ 29-33. American Bar Association standards provide that, “[b]efore significant decision-points . . . , defense counsel should advise the client *with candor* concerning all aspects of the case,” ABA Criminal Justice Standards, Criminal Defense Function, Standard 4-5.1(b) (emphasis added); that “[t]he decisions ultimately to be made by a competent client, *after full consultation with defense counsel*, include . . . whether to waive jury trial,” *id.* Standard 4-5.2(b)(v) (emphasis added); and that “[d]efense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case,” *id.* Standard 4-5.1(f).

Similarly, the New York Rules of Professional Conduct provide that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions,” N.Y. Rule Prof. Con. 1.4(b); “shall abide by the client’s decision, *after consultation with the lawyer*, as to . . . whether to waive jury trial,” *id.* 1.2(a) (emphasis added); and shall “promptly inform the client of . . . any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required” and of any “material developments in the matter,” *id.* 1.4(a)(1)(i), (iii). “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct *after the lawyer has communicated information adequate for the person to make an informed decision.*” *Id.* 1.0(j) (emphasis added).

B. Mr. Kossover provided ineffective assistance counsel

As we have shown, the information concealed from Gregory about the judge and law clerk's actual and apparent biases in this case clearly was highly material to Gregory's decision whether to waive his right to a jury and to whether he should have sought the judge's disqualification. The numerous cases and ethical rules cited above, as well as the affirmation of ethics expert Bruce Green, make clear that Mr. Kossover was obligated to candidly inform Gregory about this information. A lawyer acts utterly contrary to the profession's prevailing norms when he learns, but conceals from his client and from co-counsel, that the judge designated to sit at a bench trial has signaled he is likely to reject the defendant's affirmative defense and wishes not to act as factfinder. It is fundamental that a defense lawyer, as "single-minded counsel for the accused," *People v. Rosario*, 9 N.Y.2d 286, 290 (1961), has duties of loyalty and confidentiality to his client but no such duties to the court.

Mr. Kossover had no legitimate strategic reason for concealing this information from Gregory and Mr. Gottlieb, as Mr. Kossover himself acknowledges. Faced with a conflict between his client's interest and his own in not alienating Mr. Ghee or Judge Rounds, he chose his own, violating his ethical duty to his client and his client's right to effective assistance of counsel. *See* Affirmation of Andrew Kossover ¶ 13.

Mr. Kossover's errors unquestionably prejudiced his client. As Gregory and Mr. Gottlieb both have attested, if Mr. Kossover had properly conveyed the information discussed above, there is little chance that they would have agreed to a bench trial before this judge. Their claims cannot be seriously doubted. No reasonable defendant or defense lawyer who learned of such strong indications of bias by the trial judge would have stayed the course.

A verdict founded on such a corruption of the lawyer-client relationship as occurred here cannot stand. A new trial is required.

POINT V

The Court should decide this motion under CPL § 330.30(2) or, in the alternative, under CPL § 440.10(1)(b), (f), or (h)

CPL § 330.30 provides:

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: . . .

2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict . . .

CPL § 440.10 provides:

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . .

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or . . .

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or . . .

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States . . .

Points II and III above require the Court to set aside the verdict under § 330.30(2). Both involve “improper conduct by a juror”—here the judge, who was factfinder at the bench trial—or “by another person in relation to a juror”—here the law clerk. The improper conduct was the *ex parte* meeting and the withholding from Gregory of all the information that was material to his decisions whether to waive a jury (Point II) and whether to seek the judge’s disqualification based on actual or apparent bias (Point III). Gregory did not know the above information before

the verdict, and the concealment of the information “affected a substantial right,” *id.*, because it violated his constitutional rights to a jury trial unless he waived that right knowingly and intelligently, and to a fair trial before a tribunal that was impartial both in appearance and in fact.

The improper conduct by the “[j]other person in relation to a juror” occurred “out of the presence of the court,” *id.*, because the judge did not personally participate in the secret, *ex parte* conversation between Mr. Ghee and Mr. Kossover. It is true that the judge presumably knew about and allowed the secret meeting. But it was not in his “presence” and thus § 330.30(2) applies. Construing the statute to deprive Gregory of immediate post-verdict review would contradict the purpose of the statute to give defendants an immediate remedy when they discover, before sentencing, improper conduct by the factfinder. An impartial factfinder is a fundamental structural component to a fair trial. The Legislature could not have intended that, where proof of such a defect emerges after the verdict, a defendant should have to proceed to judgment, and begin serving his sentence, before raising the claim.¹

Should the Court decline to review this motion, or any part of it, under CPL § 330.30(2), then it should rule on Gregory’s claims immediately after the entry of judgment under CPL § 440.10(1)(b), (f), and (h). *See People v. Thompson*, 177 Misc. 2d 803, 809 (Sup. Ct. Kings Cty. 1998) (to the extent that “[t]he Legislature has created a vacuum for off-the-record claims not covered by CPL 330.30 and discovered between conviction and sentencing,” a defendant may “mak[e a] premature motion under CPL 440” and obtain a hearing before sentencing).

¹ We note too that, unlike the denial of a 330 motion, there is no appeal as of right from the denial of a 440 motion. To require a defendant to raise such a fundamental claim only via § 440.10 is to risk that he will never obtain appellate review of this issue, in violation of his state-guaranteed right to appellate review and thus of federal due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

CPL Article 440 clearly applies. Section 440.10(1)(b) applies to Points II and III because the judgment will have been procured by “misrepresentation[s]” by “the court” and “a person acting for or in behalf of [the] court”—i.e., the judge and Mr. Ghee.

Section 440.10(1)(f) also applies to Points II and III because the judgment will have been procured by the judge and Mr. Ghee’s “[i]mproper and prejudicial conduct not appearing in the record,” which, had it appeared in the record, “would have required a reversal of the judgment upon an appeal.”

Finally, § 440.10(1)(h) applies to Points II, III, and IV, because the errors established in those points violated Gregory’s constitutional rights. Point II establishes that the judge’s concealment of material information prevented Gregory from making a knowing, intelligent, and voluntary waiver of his constitutional right to a jury trial and violated due process. Point III establishes that the concealment of the same information deprived Gregory of his constitutional right to fair trial before an impartial tribunal and factfinder. Point IV establishes that Mr. Kossover’s concealment of the same information deprived Gregory of his state and federal constitutional rights to the effective assistance of counsel.

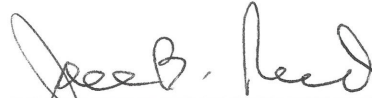
CONCLUSION

Gregory Thayer’s conviction resulted from a deprivation of some of the most fundamental constitutional protections governing the structure of a fair criminal trial. Nothing is more fundamental than that the factfinder must be fair and impartial, that the waiver of a jury trial in favor of a bench trial must be knowing and informed, and that a defense lawyer must be loyal to his client. Judge Rounds should disqualify himself from deciding the issues raised in Points II-V; the scheduled sentencing proceeding should be adjourned so the § 330.30 motion can be decided before sentence is imposed; the verdict should be set aside under

CPL § 330.30(2) or, in the alternative, the judgment to be entered after sentencing should immediately be vacated under CPL § 440.10(1)(b), (f), and (h); and a new trial should be ordered on charges for which Gregory has not been acquitted. To the extent that any material issues of fact preclude granting this motion on the papers, an evidentiary hearing should be held.



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Attorneys for Defendant Gregory Thayer

Jacob Loup
Law Offices of Joel B. Rudin, P.C.
Of counsel and on the memorandum

Dated: New York, New York
July 11, 2023

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

- against - : Indictment No. 70188-21

GREGORY THAYER, :

Defendant. :

-----X

**AFFIRMATIONS, AFFIDAVIT, AND EXHIBITS ACCOMPANYING
DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION
TO VACATE HIS CONVICTION AND FOR A NEW TRIAL**

Affirmations and affidavit

Affidavit of Gregory Thayer, July 10, 2023

Affirmation of Robert C. Gottlieb, July 10, 2023

Affirmation of Andrew Kossover, July 5, 2023

Affirmation of Bruce A. Green, July 11, 2023

Exhibits

Exhibit A Indictment

Exhibit B Notice to Present Psychiatric Evidence, November 9, 2021

Exhibit C Notice to Present Psychiatric Evidence, August 18, 2022, with appended
Psychiatric Report of Dr. Eric Goldsmith, dated August 2, 2022

Exhibit D Report of Dr. Lawrence A. Siegel, January 24, 2023

Exhibit E Letter from Robert C. Gottlieb to the Honorable Bryan E. Rounds, January 20,
2023

Exhibit F Email from Andrew Kossover to Robert Gottlieb, February 28, 2023

Exhibit G Waiver of Jury Trial, April 14, 2023

- Exhibit H Transcript of jury-waiver proceeding, April 14, 2023
- Exhibit I Defendant's Trial Exhibits A20-A22 (Kitchen table)
(Provided on accompanying USB thumb drive)
- Exhibit J Defendant's Trial Exhibit E11 (Interrogation-room video)
(Provided on accompanying USB thumb drive)
- Exhibit K Amended Notice to Present Psychiatric Evidence, May 2, 2023
- Exhibit L Patricia R. Doxsey, *Elizabeth Culmone-Mills promoted to top role at Ulster County Districts Attorney's office [sic], replaces departing ADA*, Daily Freeman, May 12, 2022

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

- against - :

GREGORY THAYER, :

Defendant. :

-----X

**AFFIDAVIT OF
GREGORY THAYER**

Indictment No. 70188-21

STATE OF NEW YORK)
 : ss.:
COUNTY OF ULSTER)

GREGORY THAYER, being duly sworn, hereby deposes and says:

1. I am the defendant in this case. I make this affidavit in support of my motion to vacate my conviction for manslaughter in the first degree and criminal possession of a weapon in the second degree under CPL § 330.30(2) or CPL § 440.10(1)(b), (f), and (h).

2. On September 29, 2021, I was arrested for the shooting death of my close friend Bruce Swierc. Shortly after that, I retained Robert Gottlieb as lead counsel. On his advice, I then retained attorney Andrew Kossover as local counsel.

3. In October 2021, Dr. Eric Goldsmith interviewed me. I later learned that Dr. Goldsmith had concluded that I shot Bruce while in the midst of a psychotic episode and that I did not know what I was doing. After consulting with my attorneys, I understood that this expert opinion could serve as the basis for arguing at trial that I was not responsible for Bruce's death by reason of mental defect. In further consultation with my attorneys, I agreed to waive my constitutional right to a jury trial and present this defense in a bench trial before Judge Bryan Rounds. At the end of my trial, Judge Rounds found me not guilty of murder but guilty of

manslaughter in the first degree and of a gun charge. My understanding was that the judge rejected the defense that I was not responsible for Bruce's death by reason of mental defect. Instead, he found that I had suffered from an extreme emotional disturbance that meant I was guilty of manslaughter.

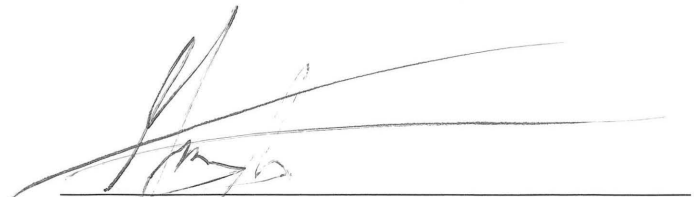
4. After the guilty verdict, I learned that Mr. Kossover had had a private conversation about my case with the judge's law clerk, William Ghee, before trial. Mr. Gottlieb described for me the content of this conversation, which had been told to him by Mr. Kossover. Mr. Gottlieb informed me that this kind of private conversation between a defense lawyer and a representative of the court was improper.

5. At no point before my verdict was I aware of Mr. Kossover's private conversation with Mr. Ghee or of any of the information that Mr. Kossover learned in that conversation.

6. Recently, I also learned from Mr. Gottlieb that, before Mr. Ghee became the judge's law clerk, he was a prosecutor with the same District Attorney's Office that has prosecuted me, including during a substantial period of time when my prosecution was being conducted, and that Mr. Ghee worked with the prosecutor in my case, Emmanuel Nneji.

7. At no point before my verdict was I aware of Mr. Ghee's relationship with the Ulster County District Attorney's Office.

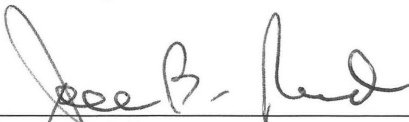
8. If I had known that the judge's law clerk had had an improper private conversation with my lawyer, or been aware of the contents of that conversation, or known of Mr. Ghee's former role at the District Attorney's Office, I would have been strongly inclined not to agree to a bench trial before Judge Rounds. If Mr. Gottlieb had advised me that I should not agree to such a bench trial, I would have followed his advice. If he had advised me that we should seek to disqualify Judge Rounds from my case, I would have followed his advice.



Gregory Thayer

Sworn to before me this 10th

day of July 2023



Notary Public

JOEL B. RUDIN
Notary Public, State of New York
No. 02RU4744885
Qualified in New York County
Commission Expires January 31, 2024

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :	AFFIRMATION OF
- against - :	ROBERT C. GOTTLIEB
GREGORY THAYER, :	Indictment No. 70188-21
Defendant. :	

-----X

ROBERT C. GOTTLIEB, an attorney duly admitted to practice in the courts of the State of New York, hereby states, under penalty of perjury, upon information and belief, that the following is true:

1. I am counsel of record for the defendant, Gregory Thayer. I make this affirmation in support of Gregory's post-verdict motion for a new trial.

2. I am the principal of the law firm Robert C. Gottlieb & Associates PLLC, whose offices are in Manhattan. On October 5, 2021, Gregory retained my law firm to defend him against murder and firearm charges in the shooting death of Bruce Swierc in Ulster County Court in Kingston, New York. Being based in New York City and having represented individuals in counties outside of New York City as well as in other states, I have learned that it is prudent to have my client retain local counsel to serve as co-counsel to advise me on local practices in the court where the charges have been filed. In this case, I advised Gregory to retain a local attorney as co-counsel. In October 2021, upon my advice, Gregory retained Andrew Kossover, an attorney based in New Paltz, New York, as local counsel.

3. After Gregory retained me, I promptly enlisted a forensic psychiatrist, Dr. Eric Goldsmith, to assess the possibility of presenting, as a complete affirmative defense to all charges, that Gregory had shot Swierc as a result of mental disease or defect and therefore lacked

criminal responsibility under Penal Law § 40.15. Dr. Goldsmith examined Gregory at the Ulster County Jail on October 11, 2021. Dr. Goldsmith also interviewed collateral sources and reviewed numerous relevant records.

4. On August 2, 2022, Dr. Goldsmith issued a report stating his expert opinion that Gregory had shot Bruce Swierc as a result of mental disease or defect. On August 18, 2022, I filed with the court and served on the prosecution an amended notice of Gregory's intention to present psychiatric evidence as part of a mental-defect defense under CPL § 250.10. Dr. Goldsmith's report was appended to this notice.

5. After Dr. Goldsmith issued his report, I recommended to Gregory that he waive his right to a jury trial and opt for a bench trial before the assigned judge, the Honorable Bryan Rounds.

6. Gregory's trial initially was scheduled to begin on January 30, 2023. Before that date, on or about January 20, I gave written notice to Judge Rounds and to the prosecution that Gregory intended to waive his right to a jury trial and have Judge Rounds preside at bench trial. For reasons unrelated to this, the trial was delayed and rescheduled to begin on April 24, 2023.

7. On February 28, 2023, I received an email from Mr. Kossover regarding Mr. Thayer's defense. He began the email by stating, "I've been reflecting on our defense in the Thayer case and wish to share some thoughts and concerns." Based on this, I believed that what followed was a product of his own conclusions. He continued, "Reading Dr. Goldsmith's report, it appears to support Intoxication ... to negate the 'intent' requirement of Murder 2, but Goldsmith seems to be primarily addressing Gregory's lack of capacity to know right from wrong (M'Naghten) RATHER than setting forth Extreme Emotional Disturbance Goldsmith

never mentions ‘extreme emotional disturbance’ in his report.” Mr. Kossover then “cut and pasted” some of his research on extreme emotional disturbance and when it applied.

8. Towards the end of his email, Mr. Kossover wrote, “I know you are trying to get Rounds (if we continue to waive a jury) to go all the way to Crim. Neg., but I am concerned that an objective view of the evidence and Goldsmith’s conclusions only gets us to Man 1, which we both agree doesn’t really apply to the facts of this case.” (Mr. Kossover’s statement about what I was “trying” to do was inaccurate. Although we had discussed the possibility that the judge would find Gregory guilty of criminal negligence, my goal all along was to obtain either a complete acquittal or a verdict of not responsible by reason of mental defect.)¹

9. Upon receiving this email, I scheduled a telephone conference with Mr. Kossover and my colleagues who were trying the case with me, Paul Townsend and Kaylee Kreitenberg, to discuss Mr. Kossover’s email and the reasons why we disagreed with him.

10. By the end of our telephone conference, Mr. Kossover told us that he understood our position. At no point during this telephone conversation, through the trial, or before the verdict did Mr. Kossover inform us of the fact or the content of any *ex parte* conversation with Mr. Ghee.

11. Shortly before the trial began, Mr. Kossover was informed by Gregory’s sister, Stephanie Thayer, that the cost of legal fees made it impossible for the family to have him participate as a member of the trial team, and his involvement as co-counsel came to an end on or about March 24, 2023.

¹ Mr. Kossover also asked, “despite the focus group, are we better off taking our chances with a jury?” After conducting a focus group, although it was a very close call, we had determined that the better strategy was a bench trial before Judge Rounds.

12. At some point before the trial, approximately nine or ten months into the case, I learned that Judge Rounds had hired a new law clerk named William Ghee. During the early stages of the case, Judge Rounds had two previous law clerks. I have a vague memory of hearing that Mr. Ghee had formerly worked as a prosecutor, which didn't strike me as exceptional or concerning, but neither my colleagues nor I had any knowledge of any details, including that his experience was in the Ulster County District Attorney's office, had been very recent, and overlapped with the period of my client's prosecution by that Office.

13. At Gregory's April 2023 trial, after the People rested, the court held an off-the-record charge conference at the bench. During this off-the-record conference, the judge indicated that he and his law clerk, Mr. Ghee, had researched the law regarding the EED defense and whether the judge had to self-charge the defense. The judge stated that "we found" a case that clearly indicated the court was required to self-charge EED even if the defense did not request that it be considered. In response to this urging, I served and filed an amended notice under CPL § 250.10, which included notice of a potential EED defense.

14. Later, at the formal charge conference, as a result of the court's statements, the defense requested an EED charge, which the judge granted. The judge also decided to self-instruct an adverse inference against the People for their failure to call Dr. Lawrence Siegel, their expert psychiatric witness who had evaluated Gregory. Dr. Siegel had concluded that Gregory was not attempting to feign memory problems or to magnify or minimize mental health issues, but he said that he was unable to opine on whether Gregory lacked substantial capacity to know or appreciate the wrongfulness of his conduct.

15. The judge also self-charged an adverse inference against the People for loss and destruction of critical blood evidence that could have been drawn from Gregory and tested for

alcohol and alprazolam despite the People having applied for and obtained a search warrant to seize Gregory's blood shortly after he shot Bruce Swierc.

16. Judge Rounds deliberated for two days. There were numerous read backs of certain requested testimony. On May 10, 2023, the judge announced his verdict without elaboration or explanation. He rejected our mental-defect defense. He found Gregory not guilty of murder but guilty of manslaughter in the first degree on a theory of EED, and also guilty of the firearm charge. The judge did not explain his verdict—either why he rejected the complete defense of mental disease or defect or the basis for his finding of EED.

17. On May 12, 2023, two days after the verdict, I telephoned Mr. Kossover. I was dismayed by the verdict, since I thought we had overwhelmingly proved the mental disease and defect defense and the prosecution had failed to meet its burden of disproving that defense, having not called Dr. Siegel or any rebuttal expert to satisfy their burden of proving sanity. I also found the court's verdict strange because it appeared to rely on Gregory's psychotic break with reality, which was the basis for our un rebutted defense of complete lack of responsibility. I didn't understand how the court could find EED without also finding for us on the defense of mental defect.

18. During our telephone call, Mr. Kossover disclosed for the first time that before the trial, he had spoken *ex parte* to William Ghee, the judge's law clerk, about Gregory's case. Later that same day, Mr. Kossover joined a conference call with me, Mr. Townsend, and Ms. Kreitenberg. Over the course of these phone calls, Mr. Kossover recounted the details of what had occurred.

19. Mr. Kossover said that Mr. Ghee had initiated the *ex parte* conversation by contacting Mr. Kossover directly and asking him to come to the judge's chambers. Mr. Kossover

had agreed to do so because he assumed Mr. Ghee, whom he had known for a long time, wanted to discuss a personal matter. Instead of raising a personal matter, Mr. Ghee began to discuss Gregory's case.

20. According to Mr. Kossover, Mr. Ghee told Mr. Kossover that "we" had reviewed Dr. Goldsmith's report and were concerned that there was nothing in it addressing EED. Mr. Ghee's use of "we" implied to me that Mr. Ghee was speaking not just for himself but for Judge Rounds. Mr. Ghee's statements further implied that Judge Rounds had rejected, or at least was unpersuaded by, Dr. Goldsmith's report that Gregory was not responsible by reason of his psychotic break. This, it seemed to me, was why the court appeared to be reaching out through Mr. Ghee to cause the defense to present evidence supporting EED, a middle-ground defense under which the court would not have to relieve Gregory of all criminal responsibility, but could find him guilty of manslaughter.

21. Mr. Kossover also said that Mr. Ghee had told him the defense "may want to reconsider" the decision to waive a jury. I understood this to mean that the judge did not want to act as factfinder at a bench trial, whether because he knew he had prejudged the temporary mental-defect issue or for some other, or additional, reason.

22. Mr. Kossover also said that Mr. Ghee told Mr. Kossover their *ex parte* conversation was "off the record" and confidential.

23. I never knew the Ghee-Kossover *ex parte* conversation had occurred, or any of the contents of that conversation, before Mr. Kossover revealed this information to me and my colleagues on May 12, 2023.

24. Recognizing that Mr. Kossover's revelations gave rise to a post-conviction motion for a new trial and that my colleagues and I were potential witnesses at any such

proceeding, I recommended that Gregory retain attorney Joel Rudin to litigate such a motion, which Gregory then did.

25. After Gregory retained Mr. Rudin's firm, my colleagues and I learned for the first time that, for the first eight months of Gregory's prosecution, William Ghee had worked at the Ulster County District Attorney's Office, which prosecuted Gregory. I also learned that at that office, Mr. Ghee had directly worked with Emmanuel Nneji, who was the prosecutor in Gregory's case from day one until the verdict.

26. The first eight months of Gregory's prosecution featured frequent contentious courtroom battles and received significant media coverage at every appearance. As early as the arraignment, at which the prosecution sought a remand while I sought reasonable bail, the parties disputed the nature and the strength of the evidence against Gregory. Subsequent appearances, even those that were expected to take only a few minutes, would often last multiple hours as every issue was vigorously contested. During the eight months when Mr. Ghee was still working directly with trial prosecutor Nneji at the D.A.'s Office, the defense filed motions to invalidate the People's certificates of discovery compliance, to dismiss the indictment for prosecutorial misconduct, and to suppress evidence obtained from electronic sources. The oral arguments on these motions were long and heated and extensively covered in the media.

27. Given that the Ulster County District Attorney's Office is relatively small, that Gregory's case was high profile, that Mr. Ghee had worked with Mr. Nneji, and that a great deal of hotly contested litigation occurred in this case while Mr. Ghee was still at the D.A.'s Office, it is likely that Mr. Ghee, while still a prosecutor, was aware of Gregory's case, and that Mr. Ghee had obtained non-public information and formed opinions about the case.

28. I almost certainly would have advised Gregory not to consent to a bench trial before Judge Rounds, and I likely would have sought to disqualify the judge from sitting on the case at all, had I known before trial (a) the information that Mr. Kossover revealed to me after the verdict about the circumstances and contents of his *ex parte* conversation with Mr. Ghee and (b) the above information about Mr. Ghee's previous employment at the Ulster County District Attorney's Office.



ROBERT C. GOTTLIEB, ESQ.

Affirmed: July 10, 2023
New York, New York

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK,	:	AFFIRMATION OF
	:	ANDREW KOSSOVER
- against -	:	
	:	Indictment No. 70188-21
GREGORY THAYER,	:	
	:	
Defendant.	:	

-----X

ANDREW KOSSOVER, an attorney duly admitted to practice in the courts of the State of New York, hereby states, under penalty of perjury, upon information and belief, that the following is true:

1. I am an attorney based in New Paltz, New York, with several decades of experience practicing criminal law.

2. In October 2021, I was retained to join the defense team in the murder prosecution of Gregory Thayer for the shooting death of Bruce Swierc in Ulster County. Gregory's lead attorney was Robert Gottlieb, whose law firm is based in Manhattan. It was my understanding that I was being retained, in part, because of my experience practicing in the courts of Ulster County and my familiarity with the local procedural protocols.

3. During the early stages of Gregory's prosecution, I worked with Mr. Gottlieb to explore a defense that Gregory was not responsible for shooting Bruce Swierc as a result of a temporary mental defect. On August 18, 2022, the defense filed and served an amended notice of our intention to present such a defense under Penal Law § 40.15. It appended a copy of a report in which Dr. Eric Goldsmith opined that Gregory had shot Bruce Swierc while suffering from a temporary mental defect induced by mixing alcohol with Xanax. After consulting with counsel,

Gregory planned to waive his right to a jury trial and consent to a bench trial before the trial judge, the Honorable Bryan Rounds.

4. I became aware during the course of Gregory's prosecution that Judge Rounds had hired William Ghee as his law clerk. I knew Mr. Ghee was previously a prosecutor in both the Orange County and Ulster County District Attorneys' Offices. I don't have any recollection whether I informed Mr. Gottlieb, anyone in his office, or Gregory Thayer that Mr. Ghee formerly was employed by the Ulster County District Attorney's Office.

5. Gregory's trial initially was scheduled to begin on January 30, 2023. On or about January 24, 2023, the defense informed Judge Rounds and the prosecution that Gregory intended to waive his right to a jury trial. The trial was delayed and rescheduled to begin on April 24, 2023.

6. At some point after the defense informed the judge of its intention to waive a jury, I learned that Mr. Ghee wanted to speak with me. I followed up and arranged such an appointment.

7. During our meeting, among other things, Mr. Ghee told me that "we" had reviewed Dr. Goldsmith's report and were concerned that the report was not sufficient to support a defense of extreme emotional disturbance.

8. Mr. Ghee also told me that the defense may want to reconsider its decision to waive a jury.

9. Mr. Ghee told me our conversation was "off the record" and in confidence.

10. I recognized that it was improper for Mr. Ghee to initiate an *ex parte* discussion about Gregory's case with me and to ask me to withhold the details of the discussion from my client and co-counsel. All this made me very uncomfortable.

11. On February 28, 2023, I sent an email to Mr. Gottlieb raising what I described as some of my thoughts and concerns about the case. I tried to convey the substance of the concerns Mr. Ghee had expressed to me, noting that Dr. Goldsmith's report did not mention extreme emotional disturbance and questioning whether we should go through with our plan to waive a jury. I hoped that by sending this email I had done enough to bring the topics to Mr. Gottlieb's attention without violating the (uncomfortable) confidence Mr. Ghee had asked of me.

12. A short time later, I spoke with Mr. Gottlieb and his associates to discuss the issues raised in my email. They disagreed with the concerns I had raised regarding extreme emotional disturbance and Mr. Gottlieb expressly confirmed that extreme emotional disturbance was not part of the defense. Therefore, Mr. Gottlieb resolved to stick with his original defense at a bench trial before Judge Rounds. I still did not reveal to Mr. Gottlieb or his associates my *ex parte* meeting with Mr. Ghee or that part of my concerns had originated with him.

13. In retrospect, I should have suggested to Mr. Ghee that the court schedule a conference of the case for Mr. Ghee (and/or Judge Rounds) to openly share with all parties the issues raised by Mr. Ghee. In further retrospect, I should have set aside my wish to maintain the confidence uncomfortably imposed upon me by Mr. Ghee, and immediately informed Gregory Thayer and Mr. Gottlieb of the issues raised by Mr. Ghee.



ANDREW KOSSOVER, ESQ.

Affirmed: July 5, 2023
New Paltz, New York

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

- against - :

GREGORY THAYER, :

Defendant. :

-----X

**AFFIRMATION OF EXPERT
BRUCE A. GREEN**

Indictment No. 70188-21

BRUCE A. GREEN, an attorney duly admitted to practice in the courts of the State of New York, hereby states, under penalty of perjury, upon information and belief, that the following is true:

1. Counsel for the defendant, Gregory Thayer, has asked me to provide expert opinions concerning issues of legal ethics and judicial ethics implicated by Thayer's motion for a new trial.

Background and Qualifications

2. I am the Stein Chair at Fordham University School of Law. My curriculum vitae is attached hereto.

3. I have been an attorney admitted to practice in the State of New York since 1982 and a member of the full-time faculty of Fordham Law School since 1987, having previously served as a law clerk to Judge James L. Oakes of the U.S. Court of Appeals for the Second Circuit, as a law clerk to Justice Thurgood Marshall of the U.S. Supreme Court, and as an Assistant United States Attorney for the Southern District of New York.

4. I have substantial experience regarding lawyers' and judges' professional conduct. In summary, I have regularly taught courses on professional responsibility at Fordham Law School and elsewhere since 1987; I speak frequently at CLE programs on the subject; and I have authored a variety of scholarly articles and other writings on the subject, including several articles on judicial ethics. I have also co-authored a casebook on professional responsibility now in its fifth edition (*Professional Responsibility, A Contemporary Approach* (West 5th ed. 2023)), for which I have shared responsibility for writing and updating the section on judicial ethics. I have engaged in various other professional activities relating to lawyers' professional conduct. I chair the Multistate Professional Responsibility Examination drafting committee. I previously served for three years on the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility and currently serve as a liaison to that committee, which I will begin chairing in August. I also previously chaired the ethics committees of both the ABA Litigation Section and the ABA Criminal Justice Section, served on the ABA Litigation Section's Task Force on Settlement Ethics, served as reporter to the ABA Commission on Multijurisdictional Practice and to the ABA Task Force on Attorney-Client Privilege, and chaired the Section on Professional

Responsibility of the Association of American Law Schools. Additionally, I serve as a member and past chair of the New York State Bar Association's Committee on Professional Ethics, and I am a past chair of the New York City Bar's Committee on Professional Ethics.

5. My opinions in this case are solely my own. I offer them in my individual capacity and do not speak on behalf of any of the above-listed entities with which I have worked or served.

Factual Background

6. I have received and reviewed the Affirmation of Andrew Kossover, dated July 5, 2023, and the Affirmation of Robert C. Gottlieb, dated July 10, 2023.

7. For purposes of rendering opinions, I have been asked to assume the following facts, which are consistent with Mr. Kossover's and Mr. Gottlieb's affirmations.

8. This prosecution arose from an incident in Kingston, New York, in the early hours of September 29, 2021, in which Gregory Thayer shot and killed his longtime close friend, Bruce Swierc. Thayer was charged with murder. Thayer retained Robert Gottlieb's Manhattan-based law firm as lead counsel, and Gottlieb enlisted New Paltz-based attorney Andrew Kossover as local co-counsel.

9. Gottlieb retained Dr. Eric Goldsmith, a forensic psychiatrist, to examine Thayer. In August 2022, Dr. Goldsmith issued a report in which he concluded that Thayer had shot Swierc during an episode of psychosis caused by combining alcohol and Xanax, or alprazolam. He cited evidence from the case materials and his interviews of Thayer and collateral sources that Thayer and Swierc had hung out and drunk alcohol; that Thayer had likely snorted Xanax just before the shooting; that just after the shooting Thayer told multiple witnesses he had shot an unknown home intruder who had threatened to kill him; and that Thayer was in "disbelief" and "horrified" when he learned he had killed Swierc. Goldsmith explained that a "mixture of alprazolam and alcohol creates synergistic toxic effects on the brain" and stated his opinion, "to a reasonable degree of psychiatric certainty, that at the time of the killing, Gregory Thayer was in an acute substance-induced psychotic state of mind believing that he was a victim of a home invasion . . . [,] that his life was in danger[,] and [that] he needed to take action against the intruder. . . . Because of his mental defect, Gregory Thayer lacked substantial capacity to know or appreciate that what he had done was wrong."

10. A prosecution expert subsequently examined Thayer. He concluded that Thayer "was not attempting to feign memory problems" and "[t]here [wa]s no indication that [Thayer] was attempting to magnify or minimize mental health problems," but said he was unable to opine on whether Thayer "lacked substantial capacity to know or appreciate the wrongfulness of his specific conduct."

11. The presiding judge, the Honorable Bryan Rounds, received copies of these reports. In January 2023, Gottlieb informed Judge Rounds that Thayer intended to waive his fundamental constitutional right to a jury and request a bench trial before Judge Rounds.

12. In February 2023, Judge Rounds' law clerk, William Ghee, initiated a meeting with Kossover, asked Kossover to keep the meeting secret, and told Kossover, in words or in substance, (a) that he and Judge Rounds were concerned that Dr. Goldsmith's report did not address a potential defense of extreme emotional disturbance ("EED") (which would provide only a partial defense to murder, resulting in a conviction for manslaughter in the first degree); and (b) the defense "may want to reconsider" its decision to waive a jury and have Judge Rounds preside over a bench trial. Ghee's remarks implied that Judge Rounds had prejudged and had doubts about Thayer's planned defense of lack of responsibility due to mental disease or defect, since otherwise there would be no need to address EED, and that he doubted his ability to be fair and impartial.

13. During the first eight months of Thayer's prosecution, and before becoming Judge Rounds' law clerk, Ghee was a prosecutor at the Ulster County D.A.'s Office, which was prosecuting Thayer. This was a relatively small office, employing fewer than 20 prosecutors. During the eight months of Thayer's prosecution when Ghee was employed at this office, Ghee worked with Thayer's prosecutor, Emmanuel Nneji, and the parties litigated numerous hotly contested issues, including bail applications, discovery disputes, and a motion to dismiss, with these disputes being covered in the local media. The above circumstances suggest that Ghee, while employed at the D.A.'s Office, likely knew about Thayer's prosecution and may have played a role in the prosecution, had knowledge of the prosecution obtained by virtue of his position at the office, and formed views about the case. Gottlieb and his client did not know about Ghee's employment with the D.A.'s Office until after Judge Rounds had returned a guilty verdict against Thayer.

14. Kossover was faithful to Ghee's request for confidentiality and concealed their ex parte conversation from Gottlieb, the other members of the defense team, and Thayer. On February 28, 2023, Kossover emailed Gottlieb with "some thoughts and concerns" about Thayer's potential mental-defect defense, the failure of Goldstein's report to directly address EED, and the plan to waive a jury. However, he did not disclose that his "concerns" arose from what Ghee had told him about Judge Rounds, and subsequently Gottlieb and Thayer stuck to their original plan to proceed to a bench trial before Judge Rounds, at which they would argue that Thayer lacked criminal responsibility because of mental defect. A few months later, still in the dark, Thayer formally waived his right to a jury.

15. At the trial before Judge Rounds, numerous witnesses testified to the facts Dr. Goldsmith had relied on in his report. Dr. Goldsmith gave testimony along the lines detailed above. A second defense expert testified that mixing Xanax and alcohol can cause "frank psychoses" and "hallucinations," such that one experiences "a distortion of reality." Trial prosecutor Nneji did not call any expert witness in rebuttal. Judge Rounds found Thayer not guilty of murder in the second degree based on his finding that Thayer had acted under an extreme emotional disturbance, but guilty of the lesser-included offense of manslaughter in the first degree and guilty of criminal possession of a weapon in the second degree. He did not explain his decision.

16. On May 12, 2023, two days after the verdict, Kossover revealed his ex parte conversation with Ghee to Gottlieb and his colleagues. Thereafter, Gottlieb also learned about Ghee's history with the Ulster County D.A.'s Office and informed Thayer of it.

Opinions

17. I have been asked to provide expert opinions on the following three subjects.

18. First, I have been asked to address the professional norms applicable to the above-described conduct of Judge Rounds' law clerk, William Ghee. These norms relate to Mr. Thayer's post-conviction claim that he was denied the due process right to a fair trial before an unbiased court. *See, e.g., Williams v. Pennsylvania*, 579 U.S. 1, 13-14 (2016) (recognizing that due process establishes "the outer boundaries of judicial disqualification," and citing rules of judicial conduct to support the conclusion that due process was denied where a chief justice who participated in the state supreme court's review of the defendant's homicide conviction initially oversaw the prosecution in his role as chief prosecutor).

19. Second, I have been asked to address the professional norms applicable to the above-described conduct of Mr. Thayer's local counsel, Andrew Kossover. These norms relate to Mr. Thayer's post-conviction claim that he was denied the Sixth Amendment right to effective assistance of counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.").

20. Third, I have been asked to address the professional norms applicable to Judge Rounds in light of the above-described conduct, including whether Judge Rounds should refer Thayer's post-conviction motion to another judge to decide.

Ghee, Judge Rounds' law clerk, initiated an impermissible ex parte communication with Thayer's counsel.

21. For the following reasons, it was improper for Ghee, Judge Rounds' law clerk, to initiate and conduct the ex parte communication with Kossover, Thayer's counsel.

22. Section 100.3(B)(6) of the New York Code of Judicial Conduct generally provides that "[a] judge shall not initiate [or] permit . . . ex parte communications . . . made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding." The restriction is equally applicable to the judge's law clerk. *See* New York Code of Judicial Conduct, Section 100.3(C)(2) ("A judge shall require staff . . . to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.").

23. In this case, the judge's law clerk – presumably at the judge's direction, or at least with his knowledge – initiated a substantive communication with one of the defendant's lawyers, off the record, outside the presence of the prosecutor, lead counsel, and the defendant, and prevented anyone else from learning of the communication. The discussion concerned how the judge was likely to rule in the pending criminal case and whether the defendant should elect a bench trial. Although the rule against ex parte communications between a judge and counsel is subject to various exceptions, no exception applied here; if it occurred as described, the law clerk's secret communication plainly violated the applicable rule of judicial conduct.

Ghee's ex parte communication expressed an improper judicial bias warranting Judge Rounds' disqualification.

24. Thayer's defense was that he lacked the requisite mens rea for the charged homicide because he was in a substance-induced psychosis when he shot the victim. During the ex parte communication, Ghee said he and Judge Rounds were concerned about the lack of support in Dr. Goldsmith's report for an EED defense, which implied that Judge Rounds was skeptical of the mental-defect defense. Ghee also told Kossover the defense "may want to reconsider" waiving a jury, which implied that the judge worried he could not be an impartial factfinder at a bench trial, whether because he knew he had prejudged the temporary mental-defect issue, or for some separate, or additional, reason. That Ghee shared the above information with Kossover suggests that Ghee's objective was to influence the defense either to abandon its plan for a bench trial before Judge Rounds and instead opt for a jury trial, or at least to pursue a partial defense of "extreme emotional disturbance," which, if successful, would avoid a murder conviction but still result in a manslaughter conviction.

25. Section 100.3(E)(1) of the New York Code of Judicial Conduct provides that "[a] judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned." This provision includes a list of specific, recurring instances where a judge must disqualify himself, but the list is not exclusive. Even in uncommon or unique circumstances not enumerated in the rule, the judge's disqualification is required if a reasonable person, knowing all the facts, could reasonably question the judge's impartiality. *Cf. People v. Towns*, 33 N.Y.3d 326, 333 (2019) ("by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal'").

26. If it occurred as alleged, Ghee's ex parte communication with Kossover warranted Judge Rounds' recusal, because Judge Rounds' "impartiality might reasonably [have been] questioned." I acknowledge that a judge's impermissible ex parte communication does not necessarily, standing alone, require the judge to disqualify himself. I also acknowledge that a judge's comments that appear to reflect prejudgment of issues in the case do not ordinarily require the judge to disqualify himself, at least when the comments are made on the record in the course of a proceeding. But in this case, given the content of Ghee's communication together with the fact that the communication occurred in an impermissible ex parte communication and was shrouded in secrecy, a reasonable person would reasonably have questioned Judge Rounds' impartiality. *Cf. Matter of Merrill*, 2007 N.Y. Comm. Jud. Conduct Ops LEXIS 10 (N.Y. Comm. on Jud. Conduct, May 14, 2007). Even assuming that Ghee acted unilaterally, independently of Judge Ghee's knowledge or direction, his conduct and statements could (and, here, would) reasonably call Judge Rounds' impartiality into question. *See, e.g., Independence Party State Comm. v. Berman*, 20 A.D.3d 423 (2d Dep't 2015) (finding that the trial judge should have recused herself from an election law case, because a party to the proceeding had endorsed the judge's law clerk in her election campaign for a judgeship and, in her induction ceremony, the law clerk had lauded that party for his support).

27. In Thayer's case, an appearance of judicial bias was created by Ghee's attempt on Judge Rounds' behalf to influence Thayer to exercise his jury right or to change his defense; by Ghee's implication that the reason he was applying such pressure was because the judge already

was skeptical of Thayer's planned defense, without having heard the trial evidence, and had doubts about his own impartiality; and by Ghee's doing so through an impermissible ex parte conversation with Thayer's local counsel whom Ghee pressured to keep their conversation secret.

28. In some circumstances, a judge who is subject to disqualification under Section 100.3(E)(1) may nevertheless preside if the judge believes he will be impartial, the judge "disclose[s] on the record the basis of the judge's disqualification," and the parties and their lawyers, "without participation by the judge, all agree that the judge should not be disqualified." New York Rules of Professional Conduct, Section 100.3(F) ("Remittal of Disqualification"). Judge Rounds did not make the requisite disclosure here, however. Consequently, neither Thayer nor Thayer's lead counsel nor the prosecutor learned of Ghee's ex parte communication with local counsel – about which Kossover had been sworn to secrecy – or of the judicial bias acknowledged in Ghee's communication.

Kossover violated prevailing professional norms in maintaining the secrecy of Ghee's improper ex parte communication.

29. Under the professional conduct rules, a lawyer has a duty to reasonably communicate with the client. *See* New York Rules of Professional Conduct, Rules 1.2(a) & 1.4; *see also* Restatement (Third) of the Law Governing Lawyers sec. 20 (2000). When the client has decisions to make in the representation, the lawyer must consult with the client and "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions." *See id.*, Rules 1.2(a) & 1.4(b). Even when decisions are for the lawyer to make, the lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." *Id.*, Rule 1.4(b) & Rule 1.2, cmt. [1].

30. This ethical duty of reasonable communication derives from lawyers' fiduciary duty under agency law to communicate information relating to the representation that the client needs to make an informed decision. *See, e.g., Baker v. Humphrey*, 101 U.S. 494, 500 (1879) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive . . ."); Restatement (Third) of Agency, sec. 8.11 (2006) ("An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, . . . [when] the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal . . .").

31. A lawyer's failure to convey information the defendant needs to make an informed decision can constitute unreasonable representation for purposes of the right to effective assistance of counsel. *See, e.g., United States v. Brown*, 623 F.3d 104, 112 (2d Cir. 2010) ("[C]ounsel's failure to convey a plea offer falls below an objective standard of reasonableness and thus satisfies *Strickland's* first prong." (citing *Pham v. United States*, 317 F.3d 178, 183 (2d Cir. 2003))).

32. Kossover had both an ethical duty and a fiduciary duty to provide information relating to the representation that Thayer needed to know to make certain informed decisions. Kossover breached these obligations by failing to tell Thayer and his lead counsel, Robert Gottlieb, about the ex parte communication with Ghee. This information was necessary for two independent reasons: (1) so that Thayer could make an informed decision whether to waive the jury right with

the benefit of Gottlieb's disinterested legal advice, and (2) so that the defense could decide whether to seek Judge Rounds' disqualification.

33. Under Rule 1.2(a) of the New York Rules of Professional Conduct, the decision "whether to waive jury trial" was ultimately for Thayer to make "after consultation with" counsel. Thayer's lawyers were required to "explain [the] matter to the extent reasonably necessary to permit [Thayer] to make[an] informed decision[]" on this question. *Id.*, Rule 1.4(b). An account of Kossover's ex parte meeting with Ghee would have been important to Thayer's decision whether to waive the jury right in favor of a bench trial in which Judge Rounds would be the factfinder. The defense had previously determined that a bench trial was likely to be in Thayer's best interest. But neither Thayer nor his defense team (other than Kossover, who was sworn to secrecy) knew of Kossover's ex parte communication with Ghee. Gottlieb has attested that he would have advised Thayer against trying his case before Judge Rounds if he had known that Judge Rounds and his law clerk were "concerned" about the lack of support for an EED defense and wanted the defense to "reconsider" whether to waive a jury, and that Judge Rounds apparently went to the extraordinary length of directing or allowing his law clerk to convey this information in an impermissible secret, ex parte communication with one of Thayer's lawyers.

34. Further, the defense needed to know of Ghee's ex parte communication to decide whether to ask Judge Rounds to recuse himself to enable Thayer to have a trial (and, if so desired, a bench trial) before an unbiased judge. Thayer and Gottlieb needed to learn of Kossover's meeting because it provided compelling factual grounds for a disqualification motion. Thayer was entitled to know this information whether the decision to make the motion ultimately rested with him or with counsel. Either defense counsel had a duty to enable Thayer to make an informed decision or they had a duty to consult with Thayer before making the decision themselves.

35. Kossover could not properly decide on his own, and in secret, to refrain from seeking Judge Rounds' disqualification. This is true for at least two reasons. First, even assuming the decision whether to move for disqualification was entrusted to defense counsel, not the client, Thayer's counsel had an obligation to consult with Thayer before making the decision. *See* New York Rules of Professional Conduct, Rule 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished"); *id.*, Rule 1.2, cmt. [1] ("The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. *See* Rule 1.4(a)(2)."). Second, as lead counsel, Gottlieb needed to be involved in the decision, and in any case, Kossover alone was incapable of making a disinterested decision. It was in Kossover's self-interest to avoid a disqualification motion, which, by embarrassing Judge Rounds and his law clerk, might undermine Kossover's standing with the court and in the local legal community generally, and which might make it appear that Kossover was complicit in the improper ex parte meeting with the judge's law clerk. In other words, Kossover had a conflict of interest under Rule 1.7 that would preclude him from making this decision unilaterally.

36. In some cases, a lawyer's ethical and fiduciary duties to communicate important information to the client are trumped by a superior obligation, such as a duty of confidentiality owed to another client, or a court order. There was no such superior obligation here, however. Kossover was not legally or ethically bound by whatever promise of secrecy he had given to Ghee.

Ghee had no legal authority to bind Kossover to secrecy. Therefore, Kossover violated his ethical and fiduciary duties by depriving Thayer of important information.

Ghee engaged in a further impropriety by seeking to induce Kossover to keep Ghee's communication secret, in violation of Kossover's ethical and fiduciary duties to Thayer.

37. At his meeting with Kossover, Ghee engaged in a further impropriety by swearing Kossover to secrecy, which, as noted, Ghee had no legal authority to do.

38. Whether acting directly or through their law clerks, judges have an obligation to promote the ethical and lawful conduct of the lawyers appearing in cases before them, not to encourage or induce unethical or illegal conduct by lawyers. *See* New York Code of Judicial Conduct, Section 100.1 ("A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."); *id.*, Section 100.2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); *id.*, Section 100.3(B)(1) ("A judge shall be faithful to the law . . .").

39. By inducing Kossover to breach his above-discussed ethical and fiduciary obligations to inform Thayer of the ex parte meeting, Ghee violated the judicial obligation to enforce high ethical standards. This further impropriety, evidently on Judge Rounds' behalf, would have raised further doubts about Judge Rounds' ability to be fair and therefore further compels the conclusion that Judge Rounds should have recused himself.

Judge Rounds should now recuse himself from deciding the new-trial motion for multiple reasons: he has personal, extrajudicial knowledge of the facts regarding Ghee's ex parte communication and is a potential witness, and his own interests are at stake in the proceeding.

40. As discussed above, a judge must "disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned." New York Code of Judicial Conduct, Section 100.3(E)(1).

41. This rule calls on Judge Rounds to recuse himself from deciding Thayer's new-trial motion. Among the potentially-applicable provisions of the disqualification rule are the following:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) **the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;**

(c) **the judge knows that he** or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest

in the subject matter in controversy or in a party to the proceeding or **has any other interest that could be substantially affected by the proceeding;**

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(iii) has an interest that could be substantially affected by the proceeding;

(e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or **is likely to be a material witness in the proceeding.** ***

(Emphases added.)

42. Judge Rounds' impartiality might reasonably be questioned for several related reasons. The new-trial motion directly implicates his and his law clerk's conduct, including by raising factual questions about (1) whether the alleged ex parte communication occurred and, if so, what was said; and (2) the extent to which the law clerk was acting pursuant to Judge Rounds' direction and/or with his knowledge. The judge has personal, extrajudicial knowledge of the relevant facts and is a potential witness regarding them. Further, Judge Rounds has a personal, reputational interest as well as a potential disciplinary interest in the proceeding, which raises questions about the propriety of his and his law clerk's conduct.

At the very least, Ghee's work in the District Attorney's Office during the early stages of the prosecution compounds the necessity for Judge Rounds' recusal from Thayer's trial as well as the necessity for Judge Rounds' recusal from deciding the present motion.

43. Under Section 100.3(E)(1)(b) of the New York Code of Judicial Conduct, a judge must disqualify himself in a proceeding in which "the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." These are among the specific circumstances in which "the judge's impartiality might reasonably be questioned."

44. This provision applies equally to a judge's law clerk. At minimum, a law clerk who previously participated as a lawyer in a case must be insulated from involvement in the case. *See, e.g., Estate of Kramer*, 2014 NYLJ LEXIS 1106 (Surr. Ct., King's C'ty, Feb. 25, 2014); N.Y. Jud'l Adv. Op. 09-27 (Jan. 29, 2009), <http://nycourts.gov/ipjudicialethicsopinions/09-27.htm> ("if the law clerk was involved in the case on which the law clerk's former employer is appearing, the judge must insulate the law clerk and disclose to the parties and their attorneys the law clerk's prior employment and involvement in the case and that he/she has insulated the law clerk"). In some instances, including where a law clerk previously worked on early stages of a case while a prosecutor, insulating the law clerk will not suffice, and the judge must recuse himself. *See People v. Hymes*, 193 A.D.3d 975, 976 (2d Dep't 2021) ("The trial justice improvidently exercised his discretion in denying the defendant's request to recuse himself from presiding over the sentencing

proceeding on the ground that the justice's law clerk was a former Queens County Assistant District Attorney who, in that capacity, worked on the early stages of the case.").

45. Unknown to Thayer and his lead counsel before the verdict, Judge Rounds' law clerk was employed as one of fewer than 20 prosecutors in the District Attorney's office, and worked with Thayer's prosecutor, during the first eight months of Thayer's high-profile prosecution, during which there occurred extensive contentious litigation. Under these circumstances, it is likely that Ghee heard confidential information or developed views on the Thayer case. At the very least, Judge Rounds should have disclosed this to the defense when he hired Ghee and insulated Ghee from involvement in the case, neither of which occurred. *Cf. United States v. Eargle*, 2023 U.S. Dist. LEXIS 20436 (W.D. Va. Feb. 7, 2023) (district judge's law clerk, who previously served as an assistant federal public defender, was walled off from all cases where the defendant was represented by the federal public defender's office). Under *People v. Hymes*, *supra*, even insulating Ghee would not have sufficed if Ghee assisted in the early stage of Thayer's case; in that event, Judge Rounds should simply have recused himself, independently of other grounds to do so.

46. In any event, regardless of whether Ghee's prior work in the prosecutor's office during the early stages of this highly publicized, contentious prosecution, followed by Ghee's work on the case as Judge Rounds' law clerk, would have been an independent ground for Judge Rounds' recusal, the failure to disclose Ghee's prior work and to insulate him compounds the other reasons to doubt Judge Rounds' impartiality. Together with the other relevant facts discussed above, Ghee's involvement in the case as a law clerk necessitated Judge Rounds' recusal before Thayer's trial.

47. Likewise, Ghee's work in the District Attorney's Office during the early stages of the prosecution, followed by the Court's failure to disclose Ghee's involvement and to insulate him from the case, compounds the above-discussed grounds for Judge Rounds' recusal from deciding Thayer's new-trial motion at this time.

Conclusion

48. For the reasons discussed above, I have formed the following opinions: (1) that Judge Rounds violated professional norms in failing to recuse himself prior to trial, both because of (a) his law clerk's ex parte communication with Kossover, expressing Judge Rounds' skepticism of the defense and misgivings about serving as fact-finder, and (b) his law clerk's prior work in the prosecutors' office while this case was pending; (2) that Kossover violated professional norms governing communications with, and disclosures to, clients, because he kept the law clerk's ex parte communication secret even though this information was important for Thayer and his lead counsel to know; and (3) for multiple independent reasons, Judge Rounds should recuse himself from deciding Thayer's motion for a new trial.



BRUCE A. GREEN, ESQ.

Affirmed: July 11, 2023
New York, New York

Exhibit A

SUPREME COURT
STATE OF NEW YORK: COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK

-against-

INDICTMENT

NO. 70188-21

GREGORY THAYER,

Defendant.

FIRST COUNT

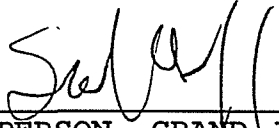
THE GRAND JURY OF THE COUNTY OF ULSTER, by this indictment, accuses the defendant of the offense of MURDER IN THE SECOND DEGREE (PL §125.25[1]) committed as follows:

The said defendant, at 50 Magic Drive in the Town of Ulster, County of Ulster, State of New York, at about and between the night of September 28, 2021 and 12:15 a.m. on September 29, 2021, with intent to cause the death of another person, caused the death of such person or of a third person, to wit, Bruce Swierc.

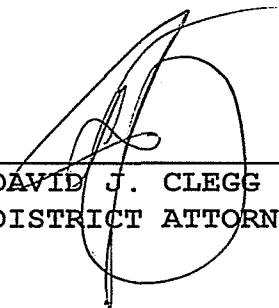
SECOND COUNT

AND THE GRAND JURY AFORESAID, by this indictment, further accuses the defendant of the offense of CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE (PL §265.03[1][b]) committed as follows:

The said defendant, at 50 Magic Drive in the Town of Ulster, County of Ulster, State of New York, at about and between the night of September 28, 2021 and 12:15 a.m. on September 29, 2021, with intent to use it unlawfully against another person, possessed a loaded firearm.



FOREPERSON, GRAND JURY



DAVID J. CLEGG
DISTRICT ATTORNEY OF ULSTER

Exhibit B

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ULSTER

----- X
THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

GREGORY THAYER, :

Defendant. :

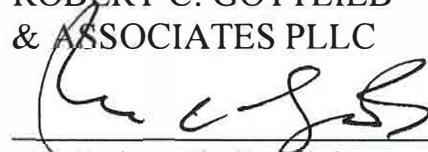
NOTICE TO
PRESENT
PSYCHIATRIC
EVIDENCE

Ind. No.
70188-21

----- X
PLEASE TAKE NOTICE THAT the Defendant in the above captioned case intends to offer at trial evidence of mental disease or defect in connection with the affirmative defense of lack of criminal responsibility by reason of such mental disease or defect as set forth in § 40.15 of the Penal Law.

DATED: New York, New York
November 9, 2021

ROBERT C. GOTTLIEB
& ASSOCIATES PLLC



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Attorneys for Defendant
GREGORY THAYER

Exhibit C

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GREGORY THAYER,

Defendant.

X
:
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X

**NOTICE TO
PRESENT
PSYCHIATRIC
EVIDENCE**

**Ind. No.
70188-21**

PLEASE TAKE NOTICE THAT pursuant to PL § 40.15, the Defendant in the above captioned case intends to offer at trial evidence of mental disease or defect in connection with the affirmative defense of lack of criminal responsibility by reason of such mental disease or defect as set forth in § 250.10(1)(a) of the Criminal Procedure Law as well as evidence of lack capacity to form criminal intent under § 250.10(1)(c). Specifically, as noted in the report produced by Dr. Eric Goldsmith, the combination of alcohol and intranasal alprazolam caused Mr. Thayer to become unable to appreciate the character and nature of his actions or to appreciate that his actions were wrong as well as prevented him from being capable of forming the necessary criminal intent to commit the crimes charged.

DATED: New York, New York
August 18, 2022

ROBERT C. GOTTLIEB
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PSYCHIATRIC REPORT

EXAMINEE: GREGORY THAYER
CASE No.: 2021-10691 (Ulster County, New York)
DATE OF BIRTH: December 26, 1972
DATE OF REPORT: August 2, 2022

PURPOSE OF EVALUATION: Robert C. Gottlieb, attorney representing Gregory Thayer requested that I conduct a psychiatric evaluation of his client. Gregory Thayer is a 49-year-old man who on September 29, 2021, while staying at his mother's home located at 50 Magic Drive, Kingston, New York reportedly killed his childhood friend, Bruce Swierc, by shooting him in the head.

The purpose of this evaluation is to conduct a comprehensive psychiatric assessment, provide a diagnostic impression, and give an opinion on Gregory Thayer's state of mind at the time of the killing.

PSYCHIATRIC OPINION: It is my opinion, to a reasonable degree of psychiatric certainty, that Gregory Thayer meets diagnostic criteria for an alcohol use disorder, severe and an alcohol and alprazolam-induced psychotic disorder, now resolved. At the time of the September 29, 2021 killing, Gregory Thayer was intoxicated with alcohol and without memory, the evidence indicates he had ingested alprazolam. Intranasal alprazolam in combination with significant alcohol intoxication resulted in a highly intoxicated state. Gregory Thayer experienced substance-induced blackout, confusion, and a loss of touch with reality with an impaired capacity to make sense of his environment. He evidenced a paranoid delusion that he was the victim of a home invasion, was fearful for his life, and needed to take action by shooting whom he believed to be an intruder.

It is my opinion, to a reasonable degree of psychiatric certainty, that Gregory Thayer evidences involuntary intoxication with intranasal alprazolam, a drug that he reports having no prior history of abusing. In his substance-induced psychotic state of mind, Gregory Thayer lacks substantial capacity to know or appreciate that what he had done was wrong.

SOURCES OF INFORMATION:

- In-person interview with Gregory Thayer on October 11, 2021, at the Ulster County Jail for approximately 4.0 hours.
- Telemedicine interviews with Gregory Thayer's sister, Stephanie Thayer, on October 12, 13, and 15, 2021 for approximately 2.5 hours.

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- Telemedicine interview with Gregory Thayer's mother, Patricia Thayer, on October 15, 2021 for approximately 0.75 hours.
- Telemedicine interview with Gregory Thayer's ex-wife, Lisa Hokans on October 13, 2021 and October 15, 2021 for approximately 1.5 hours.
- Telephone interview with Gregory Thayer's neighbor, Victoria Lowe, on October 27, 2021.
- Telemedicine interview with Gregory Thayer's ex-girlfriend, Nhu-Ha (Naomi) Lee on October 28, 2021 for approximately 1.0 hours.
- Review of extensive discovery file from Ulster County District Attorney's Office including but not limited to specific documents as follows:
- Seized Drugs Report documenting plastic container containing powder residue of alprazolam.
- DNA evidence including swabs of dollar bill and swabs from right finger of Thayer: The results matched from Swierc.
- Review of Ring Camera video and audio.
- Review of crime scene photographs including that of Bruce Swierc sitting in kitchen chair slumped over table after being shot on the back of his head on the left side.
- Review of September 29, 2021 video interview of Gregory Thayer and video from booking room.
- Review of 09/29/2021 video interview of Stephanie Thayer by Ulster County Police Department.
- Review of audio of police radio calls.
- Review of Police Body Cam video.
- Review of Officer Notes.
- Review of statement of Stephanie Thayer.
- Review of statements of Victoria Lowe and Brian Lowe.
- Review of November 18, 2021 video statement of Lisa Hokans with Ulster County Police Department.
- Review of Felony Complaint and Indictment.
- Review of Gregory Thayer's medical records from Maya Hambright, MD
- Review of Gregory Thayer's medical records from Stephen Leonard Hermele, MD.
- Review of Gregory Thayer's medical records from the Ulster County Jail.
- Review of Gregory Thayer's transcripts from the School of Visual Arts and SUNY Ulster Community College.
- Review of Gregory Thayer's medical records from Ari Klapholz, MD.
- Review of report from New York State Police Troop Forensic Unit.
- Review of photograph of handheld hatchet kept by Gregory Thayer at his bedside in Brooklyn.
- Review of text messages between Bruce Swierc and his mother, Diane Dousharm and text message sent to Gregory Thayer from Bruce Swierc.
- Review of picture of Gregory Thayer and Bruce Swierc from September 28, 2021 sent to their mutual friend, Diana Gallagher.
- Telephone interview on July 28, 2022 with Diana Gallagher.

CONFIDENTIALITY: Gregory Thayer was informed that the purpose of the evaluation was to provide a psychiatric assessment to his attorney, the Ulster County District Attorney's Office and the court. Mr. Thayer understood that information about our meeting was therefore not confidential to that extent. He understood that a treatment relationship was not being established.

INTERVIEW DATA: Gregory Thayer is a 49-year-old divorced Caucasian man who when interviewed on October 11, 2021 was incarcerated at the Ulster County Jail. He is charged with murder in the second degree, accused of killing his childhood friend, Bruce Swierc by shooting him in the head on September 29, 2021 at approximately 12:15 a.m. at the home of Gregory's mother located at 50 Magic Drive, Kingston, New York. At the time of the killing, Gregory Thayer was residing part time at his mother's home in Kingston and part time at his sister's apartment in Brooklyn, New York. Gregory Thayer says that he was not receiving mental health treatment. He was prescribed Prozac 10mg per day. Gregory Thayer was employed as a theatrical carpenter by the New York Shakespeare Festival and Blue Man Productions but due to the pandemic, he was not working on set.

Gregory Thayer reports that he was raised by his biological parents in Kingston, New York. His mother, Patricia Thayer, age 78, works as a nurse. His father, Thomas Thayer, died at the age of 57 in 2001. His father who worked for IBM and then government social services reportedly suffered from depression and was a heavy abuser of alcohol. Gregory Thayer has one live sibling, Stephanie Thayer, eight years older than he who lives in Brooklyn and works with the City Parks Department. Gregory's deceased brother, Christopher, older by six years, had worked for a nuclear power plant and was residing in Pennsylvania when he became ill with COVID and then suddenly died in early September 2020 after suffering a cardiac arrest. Gregory Thayer reports a strong family history of alcohol and substance abuse stating that he, his father and brother Christopher all had problems with addiction.

Gregory Thayer reports that he attended the Kingston Public School System and after graduating high school attended Ulster County Community College for two years where he received an associate's degree. He then came to New York City and attended the School of Visual Arts graduating in 1996 with a BFA. Gregory Thayer reports that he took a job working for production on the Blue Man Show and he worked his way up to becoming the lead carpenter. He attended performances and was in charge of constructing the sets. He reports doing similar work for Shakespeare in the Park and in the most recent years his work with that production company was more consistent.

Gregory Thayer denies an early childhood history of behavioral or learning problems. He reports that he experienced his home life with his father as stressful and traumatic. Gregory's ex-wife Lisa Hokans, reports that Greg spoke about how, "he was traumatized by his dad's rage alcohol behavior." Greg reports to this examiner that his father would be either "not present or verbally abusive." He reports episodes of witnessing physical abuse. He remembers one specific episode when he woke up in the morning seeing his mother's battered face. Police were called to the house and his father was taken away. Greg's father eventually entered an alcohol rehabilitation program. Greg reports that when he was in his 20s, his relationship with his father had improved. His father had achieved sobriety and they began to repair their relationship. However, his father became ill and then died at the age of 57 from cancer.

Gregory Thayer reports that he experienced childhood depression. Gregory Thayer reports that he recalls in the sixth grade having passive suicide thoughts, wishing that he would go to sleep and not wake up in the morning. He has no history of self-harm or suicide behaviors. He reports by his early adolescent years, he spent much of his free time skateboarding with friends. Reportedly, Bruce Swierc and he often had skateboarded together. Although Gregory Thayer says that at times he engaged in reckless behaviors on the skateboard "doing things that others wouldn't try." He says he had several accidents and broke his collar bone and ankle. By college, Gregory Thayer reports that he began to experience worsening anxiety and panic attacks with episodes of chest pain, shortness of breath and vomiting. Gregory Thayer denies a history of experiencing frank manic mood symptoms. He denies episodes of elevated mood with racing thoughts and excessive grandiosity and/or irritability. He denies experiencing a prior history of delusions, hallucinations or bizarre psychotic symptom such as thought insertion or thought withdrawal.

Gregory Thayer has no pattern of violence or poor impulse control. He reports one prior arrest for public urination and having an open container of alcohol. He reports that he did not appear in court which resulted in a bench warrant. Gregory Thayer reports having one other arrest for jumping a turnstile in the New York City Subway System. He reports both the cases were resolved and he has no prior criminal record. He denies a history of childhood antisocial behaviors such as thefts, fire setting or cruelty to animals.

In addition to being subject to the traumas of living with an abusive alcoholic father, Gregory Thayer reports that in the late 1990s while walking through Tompkins Square Park on the Lower East Side of Manhattan, he was robbed after being threatened with a broken bottle. He reports in 2011, he was robbed on the street by two teens, one of whom had a gun. He reports that his mother, who had worked as a psychiatric nurse, had experienced break-ins at her house by psychiatric patients whom she had contact with in a clinical context. He reports developing fears of being victimized in a home invasion crime. Gregory Thayer's sister, Stephanie, reports to this examiner that Gregory had complained of experiencing frightening home invasion dreams. She says he had concerns for his mother's safety at the house in Kingston, worrying that one of her psychiatric patients would once again break in. Stephanie says Greg was concerned over his safety

in the Brooklyn apartment. She says he slept with a handheld hatchet at his bedside. She provided this examiner with a picture of the hatchet.

Gregory Thayer reports a recent history of loss and trauma. Christopher had unexpectedly died in September 2020. Greg was spending time closing out the estate, including taking steps to sell his guns and rifles. Greg reports that in approximately June 2021 his "best friend", Max, who he knew from work committed suicide. Gregory Thayer says that Max did not have longstanding emotional problems but he clearly drank too much alcohol. Gregory Thayer says that Max had texted him to make plans and then a few days later, he learned that Max had hung himself. Gregory Thayer reports that approximately three months following that tragedy, Max's brother killed himself by hanging.

Gregory Thayer reports that in the context of his father's alcohol abuse and the effects on the family, he received a brief period of counseling in the eighth or ninth grade. He believes it was two or three sessions. Gregory Thayer reports that his first mental health treatment as an adult was in late 2019 following developing feelings of depression and overwhelming anxiety after the breakup with his girlfriend Naomi Lee. Gregory Thayer reports that he experienced distressing panic attacks and was "throwing up for no reason." In the spring of 2020, he began mental health treatment with Dr. Hermele, a psychiatrist in Kingston, New York. Gregory Thayer reports he did not receive medication treatment, but did participate in talk therapy. A review of Dr. Hermele's records confirms that history.

Gregory Thayer reports that in August 2020, at the request of his mother, he was evaluated by Dr. Hambright, a psychiatrist and substance abuse specialist. Gregory Thayer reports that Dr. Hambright prescribed him the SSRI medication Prozac. A review of Dr. Hambright's record documents that Gregory Thayer presented on August 13, 2020, for an alcohol evaluation. Dr. Hambright documents that Gregory Thayer reported that, *"since moving up here, he has been depressed. Living back with family has been depressing. He goes between feeling like it is good for him and that he is being smothered. Three-four beers per day. Buys it in six packs. He modifies to five beers per day (under 60). 35 beers per week. Starts drinking at 5:00 p.m. and finishes at 10:00 p.m. and watches TV...If he does not drink, he does not get sick. He did not drink on Wednesday. He developed a 'booze free day'-something he and his girlfriend developed...He claims he is depressed, not suicidal, though agrees with passive suicidality..."*

Dr. Hambright diagnoses Gregory Thayer with alcohol abuse and depression. He began Gregory on the SSRI antidepressant, Prozac and indicated that she would pursue a harm reduction, motivational interviewing approach as he was not ready to stop his use of alcohol. Gregory Thayer was seen on a subsequent telehealth visit on September 8, 2020. Dr. Hambright documents the following: *"The patient is doing well overall. He continues to drink, but he has decreased intake from many to three-four per night and not every night. He feels that the Prozac is helping him-he has recently seen his ex-girlfriend*

and she asked where his emotions were-we talked about that but in a positive sense where he was able to control how he was feeling and not feeling stressed or too many expectations from their meeting..." Dr. Hambright documents a diagnosis of alcohol abuse and depression with a plan to continue Gregory Thayer on Prozac 10 mg per day. Dr. Hambright documents that she was expecting to see Gregory Thayer in two weeks. However, there are no subsequent treatment notes. Presumably, Gregory Thayer stopped treatment.

Gregory Thayer denies a history of head injury or chronic medical problems. Although the medical record of Ari Klapholz, MD from 2018 documents a diagnosis of sleep apnea.

Gregory Thayer reports he first drank alcohol in the seventh grade. He says by age 17, he was engaging in binge drinking and had his first blackout. He gives a history of frequent alcohol blackouts throughout his life. He reports that by his 20s, his frequency of alcohol blackouts had diminished, but he was using alcohol on a daily basis. He reports there have been periods of heavy alcohol use. There were times where alcohol had interfered with his work performance as well as relationships. However, Gregory Thayer reports that he has no history of evidencing violent behavior when intoxicated with alcohol. He does not have a history of a pattern of aggression when intoxicated with alcohol.

Stephanie Thayer reports that her brother, Gregory, is an alcoholic. She reports that when intoxicated, he is "typically passive." She says that unlike her father she had not observed Gregory to become violent or argumentative when intoxicated with alcohol.

Gregory Thayer met Lisa Hokans while working at the Blue Man Show in New York City. Lisa Hokans reports to this examiner that they began their romantic relationship in September 1999. They married in 2004 but separated on January 9, 2013. Lisa Hokans reports that alcohol played a large role early in their relationship. She says that it was the culture at the Blue Man Show to go out drinking after each performance. She says there were times that she and Greg were out drinking until 6:00 a.m. Lisa reports that as they aged, she gave up alcohol, but Greg continued to go out to the bars after the show.

Lisa Hokans reports that she had great concerns about Greg's persistent heavy alcohol use. She reports there were several incidents of Greg experiencing blackouts related to alcohol. Lisa reports that she consistently observed that Gregory drank more alcohol with stress. She remembers after 9/11 and the associated loss of work at the Blue Man production, Gregory's alcohol use had greatly escalated. Both she and Greg report to this examiner that alcohol played a large role in their separation and divorce.

Gregory Thayer reports that he first smoked marijuana in the ninth grade. He reports that from age 18 through approximately age 26, he used cannabis on the weekends and in social situations. However, he reports by age 26, he mostly stopped using. Gregory Thayer denies a history of opioid abuse. He denies a history of buying opiate pills on the street or using heroin. Gregory Thayer reports that he began using cocaine in his 20s. He

reports having periods of sporadic intranasal abuse of cocaine but was never a daily user. He denies a history of experiencing toxic reactions from cocaine abuse. He believes in the year prior to his arrest, he used cocaine approximately four times. He has no history of abusing crack cocaine. He denies a history of buying other stimulants such as Adderall. He denies a history of abusing benzodiazepines, including alprazolam (Xanax); and he has no history of buying or using Xanax bars to enhance the intoxication from alcohol. He denies a prior history of intranasal alprazolam. He denies a history of methamphetamine abuse. He reports that he had used hallucinogenic mushrooms and LSD primarily in his 20s. Gregory Thayer other than the two visits with Dr. Hambright has no history of participating in a substance abuse treatment program.

HISTORY RELATED TO THE KILLING: Gregory Thayer's ex-girlfriend, Nhu-Ha (Naomi) Lee, reports that they were together approximately five years before breaking up in January 2000. Naomi reports that Greg's alcohol use had escalated and he reconnected with his ex-girlfriend, Renee. Naomi reports that Greg had emotionally shutdown and did not share his feelings. Lisa Hokans reports that it was also her observation that Gregory coped poorly with stress by repressing his feelings and self-medicating with alcohol. For Gregory, reconnecting with Renee was destructive. She is someone who is described by Stephanie and Naomi as being emotionally unstable. Naomi reports that she observed Greg to have been highly anxious with panic attacks.

Naomi reports that although they had broken up, Greg still had keys to her apartment. She says that after Christopher had died, she and Gregory briefly got back together. Naomi says that she wanted to support him. She reports that it was her observation that Gregory's alcohol use further escalated after Christopher's death. Naomi reports that although Gregory was a heavy user of alcohol, she had never seen him to evidence paranoid behavior when intoxicated.

Stephanie Thayer reports that she has observed Greg to experience tremors in the morning, which she believes is related to his heavy alcohol use. Stephanie reports that it had been her observation that Gregory's anxiety and alcohol use escalated in the context of the death of their brother and the stress that he experienced from the relationship with Renee. Stephanie reports that when Greg was staying with her she observed her brother on the telephone with Renee pacing and becoming panicked. She observed full blown panic attacks with Greg throwing up.

Gregory Thayer reports to this examiner that he was taking steps to sell Christopher's gun collection. He had hoped to settle the estate and give the money to Christopher's daughter. Gregory reports that he had to get the appropriate licenses so that he could liquidate his brother's large gun collection. Gregory himself, was not a hunter, but he owned four rifles which he stored in a gun safe located in his mother's garage. He reports that he enjoyed shooting target practice. He reports that he had never handled Christopher's handguns without his brother being present.

Gregory Thayer reports that on September 28, 2021, his mother had been at Christopher's house in Pennsylvania and was getting it ready to place on the rental market. Gregory reports that he had come up to Kingston from Brooklyn where he picked up his car at the body shop and was planning to get together with his childhood friend Bruce Swiere. Gregory Thayer reports they had been friends since the 7th grade. He says they grew up together in Kingston and Bruce who was living in California had come back to visit his mother and attend her boyfriend's funeral. Gregory Thayer says, "We were close friends." He was at my wedding. We spoke all the time.

Gregory Thayer reports that Bruce had been in the New York area for approximately two weeks and they had several conversations for the purpose of making plans to get together. On September 28, 2021, Gregory Thayer reports that he and Bruce had texted during the day and firmed up plans to meet up about 7:00 p.m. Gregory Thayer reports that before Bruce had arrived at the house, he had alerted his neighbors that he was going to the rock pit to shoot his rifles. He says he was there approximately half hour to 45 minutes and then returned to his mother's home. Gregory Thayer reports he started drinking alcohol. He says he made a fire in the pit outside of the house and had about three to four IPA beers before Bruce arrived. He says the plans were for them to sit on the patio, watch the fire, drink and catch up. Gregory Thayer says he asked Bruce to bring a bag of ice.

Gregory says that Bruce brought the ice but also a bottle of vodka. He says they sat on the patio for some time, drank beer and vodka and talked. He says that nothing unusual happened. Gregory says that Bruce and he polished off most of a case of beer and one liter of vodka. He estimates they were together for four hours. Gregory reports that he has a memory from earlier in the evening of going into the house with Bruce and showing him Christopher's guns. Gregory says there were two handguns in a bedroom and other guns in a safe. Gregory Thayer says that he has a memory of he and Bruce speaking about Gregory's ex-girlfriend and the current people that they were dating. He says they spoke about their mothers and what was going on in their lives and the lives of their mutual friends. Gregory says that one of their mutual friends, Diana, who lives in Maryland has been diagnosed with cancer. Gregory says that Bruce and he took photos and sent them to her. Stephanie Thayer forwarded one of those photos to this examiner. Diana Gallagher confirms that she was ill from chemotherapy and had received the picture of Greg and Bruce together. Diana says she has known the two of them since her high school years. Diana says that Greg and Bruce were best of friends and that there was no history of malice between them. Gregory says he has no memory of Bruce and he getting into any arguments or conflicts. He says, "We don't have anything to argue about." When asked specifically whether he remembered snorting a drug in addition to drinking that night, Gregory responds that he did not remember. He says he knows that Bruce had used cocaine from time to time but he had no memory of either of them using cocaine that night. Gregory says, "I have no memory of buying cocaine. I wouldn't know where to buy it from." He has no memory of using intranasal alprazolam.

Gregory Thayer says that he has a memory of going inside his house, climbing the stairs to use the bathroom to urinate. He has a memory of leaving the bathroom and having the perception that Bruce had told him there was an intruder in the house. Gregory Thayer says he has a memory of descending the stairs. He says, "My memory is fragmented." He says, "I have a memory of hearing the gun discharge." He says, "I have a memory of the small handgun in my hand." He says, "I deduce it was a Smith & Wesson 380 which was kept in my brother's bedroom which I was now sleeping in." Gregory Thayer says, "I have a memory of the handgun and the cartridge in my hand." He says he has a memory of walking to the patio and waiting for police to arrive. He says that he has no memory of calling the police. Gregory Thayer says he has a memory of seeing his neighbor, Victoria Lowe, who gave him a blanket and a glass of water. He says he has a memory of Victoria telling the police officers that he was in shock. He has a memory of Victoria rubbing his shoulders. Gregory Thayer says he remembers seeing his neighbor, Brian Lowe, an Ulster County police officer and Victoria's husband at the crime scene. Gregory Thayer says he remembers being in the police precinct and being asked questions and that he had asked for an attorney. He says that he has a memory of being told the following day that he did not kill an intruder, but rather he had killed his friend, Bruce.

Gregory Thayer says that he had never taken out a weapon and used it to defend himself. He says his use of weapons and firing his rifles had been a hobby. Gregory says that his brother was in the US Navy and Christopher had taught him how to shoot and be responsible with guns. He says, "I had always seen myself as very cautious with weapons."

Lisa Hokans adds that Greg has always taken gun safety with extreme seriousness. She says, "He follows the rules. He is very careful with guns." Lisa says that she knows that Greg and Bruce are close old friends. She says, "Whenever Greg and Bruce get together, they regress." She says, "They party hard." Lisa Hokans tearfully says, "Greg is the best person I know. He is very empathetic. He does right by his friends. He treats people well. He leads by example." "I know Bruce really well. They were best friends." Lisa Hokans says that Greg, "loved shooting cans in the woods and he had respect for it. How could there be a loaded gun in the house. He kept ammo separate from the weapons."

Stephanie Thayer reports to this examiner that Gregory and Bruce were close friends. He says when they were adolescent boys, they spent much time skateboarding together and that Gregory was "super excited to see Bruce" on September 28, 2021.

Stephanie Thayer reports that after Gregory had shot Bruce believing that he was an intruder, Gregory had placed a call to her. Stephanie says that Gregory told her, "I shot a man." "There was a man in the house." Stephanie says that Gregory either stated that the intruder had wanted to kill him or was going to kill him. Stephanie says that she told Gregory to stop "goofing around and to put Bruce on the phone." Stephanie says that Gregory informed her that Bruce had gone home.

Stephanie Thayer reports to this examiner that she believes that Gregory was intoxicated at the time with alcohol. She says, "I just know him." She says that although she was able to communicate with Gregory, she can tell by how he sounded on the phone that he had been drinking. A review of the post arrest records from the Ulster County Jail document that Gregory Thayer was treated for an alcohol withdrawal condition.

Stephanie reports that she discussed activating EMS with Gregory. Stephanie says that she informed Gregory that she would call the police, but Gregory said, "No, I have to do this because I'm here." Stephanie says that she agreed with Gregory and when she got off the phone, she placed a call to Brian Lowe. Stephanie reports that Brian had told her that he would get over to the residence, but she later learned that Brian had spoken to his wife Victoria who was the first one to arrive at the house.

Victoria Lowe in her statement to the Ulster County Police, states the following: *"...I knocked on the backdoor that leads into the kitchen and as I peered in, I saw a man slumped over on the kitchen table. I then saw Greg was standing up against the kitchen counter, near the sink, was facing the kitchen table and he was on his cell phone. It looked like Greg was texting. I went inside and told Greg that Stephanie called Brian and Brian wanted me to come and check on him. Greg appeared to be in the state of shock, looked blankly and shrugged and put his hands up and out. I could see the man at the table was not moving, his hands and fingers were blue, he was slumped over, there were drugs on the table, rolled up cash, a bottle of Vodka, a handgun, and a magazine, all on the kitchen table.*

I know Greg to drink beer and smokes cigarettes, not drink Vodka or use drugs. Greg started saying, "'I fucking killed him;' and 'I fucking shot him;' and 'I don't know what happened.' Greg took a glass of water from the kitchen sink and I told him we needed to go outside. ...He went outside to the back patio and sat down in silence. Greg then started to say again: 'I fucking shot him;' and 'there is a dead guy in my kitchen.' Greg mentioned that he had come home and found this guy, who he did not know, inside of the kitchen. Greg kept saying, multiple times that he did not know who the guy was that was in the house. At one point, I asked Greg if he thought it was one of his mother's psychiatric patients. Greg said he did not know. I know that Patty has had psych patients show up at the house in the past. Greg was rambling on and he started to talk about an old friend, Bruce, who had been over visiting him earlier. Greg also was talking about there being a guy in his house, he did not know who he was, but that the man was 'making fucked up comments' and was talking trash. Greg said that the comments pissed him off and that was why he went to his room to get a gun. Greg said that the guy in the house threatened to kill him (Greg), so Greg shot him. Greg said he took the magazine out and put the gun on the table. Greg told me that he called his sister, Stephanie, and that he told her that he shot and killed someone in the kitchen. While I was still there with Greg, Stephanie called Greg back and Ulster Police showed up around this time. Greg handed me the phone and I briefly spoke with Stephanie and then Greg got on the phone and talked to her. While Greg was on the phone with Stephanie, he said with a nervous laugh, 'gonna have to do that time, just shot and killed

the guy.' ...I did not hear any fighting, arguing, gunshots, or anything suspicious during the night..."

MENTAL STATUS EXAMINATION FROM OCTOBER 11, 2021: Gregory Thayer is a 50-year-old white man dressed in appropriate jail-issued fatigues. There are no odd behaviors or mannerisms. He is calm and cooperative with the lengthy exam. He reports his emotional state as being "disbelief." He reports feeling "horrified" that he had killed his close friend. He describes feeling anxious and emotionally upset. He reports that when he was first admitted to the Ulster County Jail, he had suicide thoughts. However, currently he denies suicide thinking. He reports that the medical staff at the jail had placed him on a medication but he does not know the name of the drug. He evidences a full range of affect. He is well related. He reports that since being incarcerated he has experienced problem with his sleep as well as a diminished appetite. He reports spending his time in jail reading. The content of his thoughts concern distress over the "tragedy" that he has caused. His thoughts are organized. There is no evidence of current delusions or hallucinations. He is alert and oriented.

DIAGNOSES:

Alcohol use disorder.

Alcohol and alprazolam-induced psychotic disorder, now resolved.

FORMULATION: Gregory Thayer is a 50-year-old man with a significant family history of addiction. Gregory Thayer has been abusing alcohol since age 17. He has experienced numerous alcohol blackouts in the context of heavy drinking. He has no prior history of violence or aggressive behavior while intoxicated. He evidences difficulties managing stress and trauma. He copes by repressing his emotions and is described by family and friends as emotionally shutting down. He uses alcohol to self-medicate feelings of emotional distress.

Gregory Thayer has no prior history of experiencing an alcohol or substance-induced psychotic disorder. Gregory Thayer has no history of abusing alprazolam. He had not previously engaged in intranasal alprazolam abuse.

Gregory Thayer was coping with multiple stressful external events in the time leading up to his arrest. In the context of the pandemic, he was not working and had lost the routine and camaraderie of work. His five-plus year relationship with Naomi Lee had ended and Greg returned to live with his sister in Brooklyn. Gregory started to re-engage in an unhealthy relationship with his ex-girlfriend, Renee, who had a history of harassing Greg. In September 2020, Gregory's brother, Christopher, unexpectedly died. Gregory Thayer was spending time assisting in closing out the estate, which included making efforts to liquidate Christopher's extensive gun collection. In June of 2021, Greg's very close friend, Max, without warning committed suicide. Three months later, Max's brother committed suicide. In addition, Gregory Thayer evidences persistent worries over he and his family's safety. While residing with his sister in Brooklyn, he slept with a handheld hatchet at his bedside. He was overly concerned about being victimized by home

invaders. He feared that his mother, who was living alone in the house in Kingston, would be victimized by a home invasion. Patricia Thayer, who worked as a psychiatric nurse, had a history of being victimized in the past by psychiatric clients who had broken into her home. Gregory Thayer experienced feelings of anxiety and depression. He repressed his feelings and his use of alcohol escalated. With encouragement of his mother, he presented to Drs. Hermele and Hambright. Gregory Thayer was diagnosed with an alcohol use disorder and depression. He was prescribed the antidepressant medication Prozac. However, he stopped treatment approximately one year prior to his arrest.

Gregory Thayer was not a hunter. He never had used a weapon against another individual. He enjoyed shooting his rifle at cans in the rock quarry near his Kingston home. Lisa Hokans describes Gregory as someone who was careful with his weapons. Gregory Thayer reports to this examiner that his brother, a navy veteran, taught him to respect gun safety. Gregory Thayer reports to this examiner that he had only fired Christopher's handguns in the presence of his brother.

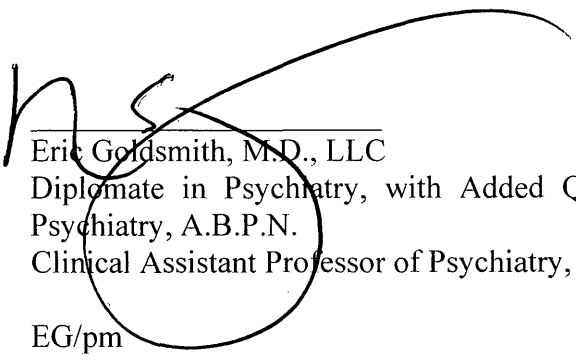
Gregory Thayer reports that he and Bruce Swierc were childhood friends. While growing up in Kingston, they spent many days skateboarding together. As adults, they spoke with some frequency. Gregory Thayer reports that he was looking forward to meeting up with his friend on September 28, 2021. Stephanie Thayer and Diana Gallagher report that Greg and Bruce had been close friends and they knew of no conflicts between the two of them. Lisa Hokans knew Bruce well. She reports that Gregory and Bruce were best friends and loved each other. Lisa Hokans adds that Gregory is a man of excellent character. He is good to his friends and family. He is respectful, gracious, and caring.

Gregory Thayer reports to this examiner that he remembers enjoying the evening with Bruce Swierc. He remembers they were drinking alcohol, sharing stories, and watching the fire pit. Gregory Thayer has no memory of using intranasal alprazolam on the night of September 28, 2021. In the early morning hours of September 29, 2021, Gregory Thayer under the delusional belief that he was the victim of a home invasion and his life was in danger, retrieved a handgun and ammunition belonging to his deceased brother and shot what he believed was a dangerous intruder.

Gregory Thayer has a long history of alcohol abuse with associated alcohol-related blackouts. However, he has no prior history of abusing alprazolam and no prior history of substance-induced psychotic experiences. The mixture of alprazolam and alcohol creates synergistic toxic effects on the brain. Gregory Thayer who had been ingesting alcohol throughout the evening prior to meeting up with Bruce Swierc likely ingested alprazolam. He has no memory of snorting the drug. The intranasal route of ingestion of the alprazolam creates a rapid rise in the blood level leading to the development of toxic neuropsychiatric adverse effects. It was the addition of the intranasal alprazolam in combination with the alcohol intoxication that induced Gregory Thayer's confused psychotic state of mind.

It is my opinion, to a reasonable degree of psychiatric certainty, that there is evidence of involuntary intoxication with intranasal alprazolam by Gregory Thayer who reports having no prior history of abusing alprazolam. It is my opinion, to a reasonable degree of psychiatric certainty, that at the time of the killing, Gregory Thayer was in an acute substance-induced psychotic state of mind believing that he was a victim of a home invasion. In his psychotic state of mind, he believed that his life was in danger and he needed to take action against the intruder. It is my opinion, to a reasonable degree of psychiatric certainty, that at the time of the killing related to intoxication with alcohol and alprazolam, Gregory Thayer was out of touch with reality. He was unable to make sense of his environment and was operating under a paranoid delusional state of mind. Because of his mental defect, Gregory Thayer lacked substantial capacity to know or appreciate that what he had done was wrong.

Respectfully submitted,



Eric Goldsmith, M.D., LLC

Diplomate in Psychiatry, with Added Qualification in the Subspecialty of Forensic Psychiatry, A.B.P.N.

Clinical Assistant Professor of Psychiatry, NYU-Langone School of Medicine

EG/pm

Exhibit D

LAWRENCE A. SIEGEL, M.D.

P.O. BOX 8217
WHITE PLAINS, N.Y. 10602
TELEPHONE (914) 478-7536

DIPLOMATE IN PSYCHIATRY
DIPLOMATE IN FORENSIC PSYCHIATRY

January 24, 2023

Emmanuel C. Nneji, Esq.
Chief Assistant District Attorney
Ulster County District Attorney
275 Wall Street
Kingston, New York 12401

Re: Gregory Thayer
Indictment No. 70188-21

Dear Mr. Nneji:

At your request, I evaluated 50-year-old Gregory Thayer to determine his mental state at the time of the alleged offense. The defendant is charged with Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. Between the night of September 28, 2021, and September 29, 2021, at 12:15 AM, with the intent to cause the death of another person, the defendant allegedly caused the death of Bruce Sweric.

In a report prepared for the defense, Eric Goldsmith, M.D., LLC found that the defendant acted due to alcohol and alprazolam-induced psychotic disorder, was in a blackout, was confused, and had a loss of touch with reality with an impaired capacity to make sense of his environment. He opines that the defendant evidenced "involuntary intoxication" with intranasal alprazolam and that, in his substance-induced psychotic state, he lacked substantial capacity to know or appreciate that what he had done was wrong. You have asked that I evaluate the defendant to assist you in managing the case.

I examined the defendant at the Ulster County Jail on October 21, 2022, for approximately two- and three-quarter hours. An additional 45 minutes was used to administer the Personality Assessment Inventory (PAI) and the Test of Malingered Memory (TOMM). On January 9, 2023, I administered the Minnesota Personality Inventory 3 remotely. I discussed the case and the results of the psychological testing with a psychologist, Cheryl Paradis, Psy.D.

Among the records reviewed are the following:

1. Psychiatric report by Eric Goldsmith, M.D., LLC. – August 2, 2022
2. Prior treatment records.
 - a. Treatment records with Ari Klapolz, M.D.

- b. Treatment records with Stephen Leonard Hermele, M.D.
 - c. Nuvance Health Record – Maya J. Hambright, M.D.
- 3. Text Messages from Bruce Sweric’s phone.
- 4. Cellebrite reader reports.
- 5. Ulster Police Department videos.
- 6. Officers’ notes.
 - a. Sickler.
 - b. Kight.
- 7. Crime scene photos.
- 8. Vehicle photos.
- 9. Investigative reports and lead files.
- 10. Lab discovery files.
- 11. Precinct videos.
- 12. Grand Jury Testimony.
- 13. The Indictment.
- 14. Securis extracted phone calls.
- 15. Notes from jail calls.
- 16. Jail records.

REVIEW of RECORDS:

Not all records reviewed are abstracted in this report. Some quoted materials may have been grammatically corrected to make the material more readable.

Psychiatric report by Eric Goldsmith MD, LLC – August 2, 2022

The defendant shot and killed a friend on September 29, 2021, while staying at his mother’s home in Kingston, New York.

Dr. Goldsmith diagnoses an alcohol use disorder, severe, and an alcohol and alprazolam-induced psychotic disorder, now resolved. He finds that the defendant had been intoxicated with alcohol “and without memory.” He found evidence indicating that the defendant had ingested alprazolam. The defendant, he found, experienced a substance-induced blackout, confusion, and a loss of touch with reality with an impaired capacity to make sense of his environment. “He

evidenced a paranoid delusion that he was the victim of a home invasion, was fearful for his life,” and needed to act by shooting at a person he thought to be an intruder. Dr. Goldsmith found that the defendant lacked substantial capacity to know or appreciate that what he had done was wrong.

The defendant reported that he began to experience worsening anxiety and panic attacks when he was in college. He reported having been robbed while threatened with a broken bottle while walking through Tompkins Square Park in the 1990s. In 2011, he reported having been robbed by two teens on the street, one of whom had a gun. His mother experienced break-ins at her home by psychiatric patients with whom she had had contact while working as a psychiatric nurse.

The defendant’s sister reported that the defendant had complained of experiencing frightening home invasion dreams. He was concerned about his safety and “the Brooklyn apartment.” He slept with a small hatchet at his bedside.

His brother, Christopher, who had been six years his senior, died in September 2020. The defendant was closing out his brother’s estate. This included taking steps to sell his brother’s guns and rifles. In June 2021, his “best friend,” Max, committed suicide.

In August 2020, the defendant was seen by a psychiatrist specializing in substance abuse. The defendant was prescribed Prozac, an antidepressant. The defendant reported drinking 35 cans of beer per week. He denied withdrawal symptoms. The doctor diagnosed the defendant with alcohol abuse and depression. When seen for a follow-up on September 8, 2020, the defendant was doing well overall. He was still drinking but had cut down his consumption. The doctor planned to see the defendant in two weeks. The defendant presumably stopped treatment as there were no subsequent treatment notes.

The defendant’s ex-wife reported that the defendant had several incidents of alcohol-related blackouts. His alcohol use played a large part in their separation and divorce.

His ex-girlfriend Naomi reported that they had been seeing each other for about five years before breaking up in January 2000. She said the defendant’s alcohol use had escalated. After the defendant’s brother died, she and the defendant briefly got back together. Naomi observed the defendant’s alcohol use escalate after his brother’s death.

On September 28, 2021, his mother was at Christopher’s house in Pennsylvania. The defendant had traveled to Kingston from Brooklyn and planned to see his childhood friend Bruce at about 7 PM. Before Bruce came to the house,

he shot his rifles in a rock pit. The defendant reported that he started drinking alcohol. He had four beers before Bruce arrived.

Bruce brought ice and a bottle of vodka. He and Bruce sat on the porch drinking beer and vodka. Nothing unusual happened. He and Bruce drank most of a case of beer and a liter of vodka. They were together for approximately four hours. The defendant recalled having shown Bruce Christopher's guns, which were kept in the house. He and Bruce took a picture together and sent it to a mutual female friend with cancer.

The defendant had no memory of getting into an argument or a conflict with Bruce. He had no recollection of having snorted any drugs. He had no memory of using intranasal alprazolam.

The defendant recalled having urinated in an upstairs bathroom. He recalled leaving the bathroom and having perceived that Bruce had told him there was an intruder in the house. He had fragmented memories of what had happened. He recalled hearing a gun discharge. He recalled having a small handgun in his hand. He remembered waiting for the police to arrive on the patio. He did not recall having called the police. He recalled that a neighbor gave him a blanket and a glass of water and that she told the police that he was in shock.

He recalled having been in the police precinct, being asked questions, and asking for an attorney. He recalled being told the following day that he had not killed an intruder but had killed his friend Bruce.

The defendant's sister said she had received a call from the defendant. He told her he had shot a man and a man was in the house. She said that the defendant stated that the intruder wanted to kill him or would kill him. She told the defendant to stop fooling around and put Bruce on the phone. The defendant told her that Bruce had gone home.

A female neighbor, Victoria, looked into the kitchen and saw a man slumped on the kitchen table. The defendant was standing near the sink, facing the kitchen table. The defendant was on his cell phone. The defendant "appeared to be in the state of shock, looked blankly and shrugged and put his hands up and out." She saw that the man at the table slumped over was not moving. There were drugs on the table, rolled-up cash, a bottle of vodka, a handgun, and a magazine.

The defendant began to say that he "killed him." He said he shot him and did not know what happened. She took the defendant outside. The defendant said that there was a dead person in his kitchen. The defendant said he had come home and found a person he did not know inside the kitchen. The defendant rambled and began talking about his friend Bruce who had been visiting

earlier. He spoke about a person in his house whom he did not know. He said that person was making comments and talking trash. The defendant said the comments “pissed him off” and caused him to go to his room to get a gun. The defendant said the person in the house had threatened to kill him, so he shot him. The defendant said he had called his sister and told her he shot and killed someone in the kitchen.

His sister called while they were on the porch. The defendant said he would have to do some time and had just shot and killed a person.

Dr. Goldsmith diagnosed alcohol use disorder and alcohol and alprazolam-induced psychotic disorder, now resolved. Dr. Goldsmith opined that there was evidence of “involuntary intoxication with intranasal alprazolam.” Dr. Goldsmith opined that at the time of the homicide, the defendant had been out of touch with reality and unable to make sense of his environment. The defendant had been delusional. Because of this, the defendant lacked substantial capacity to know or appreciate that what he had done was wrong.

Prior Treatment Records

Treatment records with Ari Klapolz, M.D.

The defendant was evaluated in April 2018. A study was interpreted as showing high-moderate to severe obstructive sleep apnea. CPAP therapy was indicated. A May 15, 2018, note indicates he was given a CPAP device and mask.

Treatment records with Stephen Leonard Hermele, M.D.

A form filled out by the defendant on March 25, 2021, indicates that his mother referred him. The defendant wrote that the main reason for the visit was “relationships/communication.” The problems had been present for 20 years. The problems usually became worse “when faced with conflict, alcohol.”

The defendant reported sleep apnea. He got along poorly with his father as a child. His father had problems with alcohol and violence. Among the problems endorsed was alcohol dependence. His main social difficulty was anxiety.

He reported prior use of marijuana, cocaine, LSD, and mushrooms. He was not using those drugs at the time of the assessment. He snored and had trouble sleeping.

An April 1, 2020, note indicates the defendant reported a tendency to make poor decisions that had recently worsened. He had trouble admitting that he was wrong in relationships and, at times, was stubborn.

Subsequent progress notes reflect a process of verbal therapy. The defendant agreed he was a spectator to things.

An October 28, 2020, note indicates his brother died suddenly. The last progress note is dated December 9, 2020. The defendant said he was okay.

Nuvance Health Record – Maya J. Hambright, M.D.

The defendant was seen on August 7, 2020, for a general checkup. “Patient is not aware that he was here for an alcohol evaluation. His drinking became problematic after his divorce eight years earlier. He ended a four-year relationship seven months earlier. He peaked drinking in the relationship leading to the breakup.

The defendant had been depressed since moving back to Kingston. He was having 3 to 4 beers a day. He modifies to five beers a day. He did not become ill if he did not drink. He was diagnosed with alcohol abuse and depression. He was prescribed Prozac.

Text Messages from Bruce Sweric’s Phone

On page 31 of 54, the defendant texted that he would take the victim shooting and put some hair on his “balls.” The victim responded that it sounded fine. “No getting drunk and shooting at each other though...” The defendant answered that it was totally safe with no drinks.

On September 27, the defendant asked if the victim had a car. The victim responds that he might be able to get his mother’s car but would not be able to drink. The defendant responds that they have to figure it out. The defendant suggests that he come over to his mother’s house, and they can have a sleepover. “Because there is no way we ain’t drinking.”

On the afternoon of September 28, the victim asks if the defendant has booze. The defendant responds that he has enough beer but no booze. The victim says he will bring some.

At 4:47 PM, the victim texts that he thinks he is at the correct house and asks if the defendant is there. That is the last text message.

The text messages reflect that the defendant and the victim know each other well and are longtime friends.

Cellebrite Reader Reports

The defendant and the victim took a photo together that was texted to a third party.

UFED Reader Reports

September 21, 2020 - Bruce: I'd shoot you with a BB if I could.

Greg: Love you man...

September 23, 2020 - Greg: Aww got your flowers ya big softie!! They were beautiful and ya made my mom cry.

Many texts contain references to excessive alcohol consumption.

September 29, 2021 – Bruce Sweric initiated a conversation with Brian B. at 11:06 PM. He asked if Brian recalled when they stole liquor from an open bar at a wedding. The conversation continued until 11:51 PM. Brian asked what made Bruce think of it. Bruce replied, “Just talking shit with Greg... Drunk stories.”

September 29, 2021 – 12:13 PM – The defendant's phone contains several photographs of the deceased seated on a chair, facing downwards, with a pool of blood on the victim's left.

Ulster Police Department Videos

Officer Anthony Scarselli

The audio is sometimes unclear. Victoria says something about “in shock.” The defendant asks for cigarettes. A female talks to the defendant about covering himself. For much of the recording, it is difficult to know who is talking to whom.

Officer Jonathan Wolf

The defendant seems to be going to jail. The officer questions the person about knives. Other people are present in receiving dock.

Officer Noah Kight

Victoria says she did not ask too many questions because he seemed in shock. The defendant asks for a pack of cigarettes. “Thank you. I appreciate it.” The defendant speaks clearly, with good articulation.

The defendant gives his name. He is a carpenter. The officer asks if the defendant knows the person inside. The defendant seems to ask if he can walk inside. “I have no idea what happened tonight. It's like the weirdest thing... Can I look?”

The defendant agrees he had a fire going on a while earlier. He agrees he lit it. Parts are inaudible. He agrees he lives there. His mother is a nurse, sort of retired. His brother passed away. He asks about checking something. "I'm not going anywhere."

The defendant is told he will get a ride to the police department. He asks the officer to get Camel cigarettes. Another officer offers to get him some cigarettes. The defendant asks to do something. The officer tells him to sit down. Asked if he knows the person, he asks, "The dead guy?" He gives an emphatic "No."

He talks about his brother having died the year before. He has an ex-wife and an ex-girlfriend. The defendant asks if the officer likes working nights. "Can I just look? Can I just look in there?"

The defendant was in the city full-time pre-COVID. He was living in Kingston after.

The defendant says that Bruce is in New York from California because Bruce's mother's boyfriend died. The defendant's sister is 58. "My brother just passed away recently. His place is in Pennsylvania." His brother died at 54. "Pretty much last year at this time."

The defendant gives his cell phone number, 646 241-3060. He says it is the worst day of his life several times. He asks what the normal procedure is. "I got to see what it is." The officer tells the defendant to breathe. The defendant asks if he can close the garage door.

The defendant starts to give a phone number to contact his mother. Victoria ends up giving the phone number. She says his mother is 78, and the defendant agrees.

Asked if he is ok, he says he is freaking out. He agrees to go to the station to speak with Joe Trapanese, an Ulster police officer. The defendant walks with his hands in his pants. He does not look unsteady on his feet. The police mention that he is not under arrest. The defendant denies having knives or weapons. The police drive off with the defendant in the car.

Officers' Notes

Officer Sickler

Information from Victoria Lowe. She went to the house's rear door and saw the defendant leaning against the sink with his backside. He was on his cell phone. The defendant did not acknowledge her knock on the door. She then opened the door and saw a male slumped over in a chair with a bottle of vodka

in front of him and rolled up currency bills with what appeared to be cocaine. The defendant told her he found someone in the house he didn't know and shot him. She had the defendant step out to the patio and called her husband to get there as soon as possible. Her husband arrived, was told of the situation, and contacted the police.

Ms. Lowe told the police that at about 6 PM, the defendant had posted to the neighborhood Facebook page that he was going into the woods to shoot. This was a routine procedure. She checked her Ring doorbell and saw a white SUV leave the defendant's home at 6:56 PM and return at about 10:30 PM.

Officer Kight

At about 12:29 AM on September 29, the defendant said he had just shot "a dude in the kitchen." He was overheard on the phone saying he would do his time. The defendant appeared impaired by alcohol. He was anxious and was trying to look at the crime scene. He started to cry numerous times. He appeared very upset. He continuously asked if he could look at the scene in the kitchen for closure. He said he needed to process everything. He repeatedly said that his whole night went to "shit." He said it had been the craziest night of his life. He was surrounded by beer bottles while speaking with the officer outside. The defendant said he did not know the guy in the kitchen that he shot. He said this repeatedly. He said his friend Bruce was visiting from California. He said the man inside was someone he did not know. The officer smelled a strong odor of an alcoholic beverage while sitting next to the defendant.

Crime Scene Photos

FAM_0251 shows a picture of a vodka bottle. It is 40% alcohol by volume and is 1.75 L. It is approximately one-half full.

Photo 0268, in addition to three glasses and a bottle of beer, has a corkscrew on a table.

On the back terrace is a cooler. There are nine bottles of beer and what looks like cranberry juice. There is still ice in the cooler. Photo 291 shows a six-pack of bottled beer. There are five bottles of beer on the refrigerator door. There is what appears to be a six-pack of tall cans that have white in the name. Also seen is the word hard.

Photo 0634 and the ones before and after show quite a few boxes of bullets on a metal-type shelf that appears to be in the garage. Photo 701 is a bill of sale that seems to be for a gun sold to Christopher.

Photo 0732 shows two apparently empty beer bottles in a garbage pail lined with a plastic bag. Photo 736 is a statement of claim from MetLife. The

insured was Christopher Thayer. The payee was Gregory Thayer. The amount was \$157,000.

Photo 791 is the contents of a large garbage pail. Inside are at least two apparently empty bottles of beer. A second garbage pail in 793 has two bottles of beer and twisted tea. FAM 0384 FAM 401 The white powder is adjacent to the arm of the deceased. The dollar bill does not have noticeable residue.

Vehicle Photos

0081 shows a prescription for fluoxetine prescribed for Gregory Thayer. The prescription was filled on 8/7/20. There were approximately seven capsules left. The defendant was not taking the medication as prescribed.

Investigative Reports and Lead Files

Lead 16 Ring Camera 40 Magic Drive Videos

The white SUV left at 5:20 PM and returned at 5:49 PM. It left at 6:56 PM and returned at 10:01 PM.

2021 – 10691 Lead Number One

Police Officer Scarselli noted that at about 12:35 AM, the defendant was on the phone while on the back patio. The defendant said, “Yeah, I just shot a dude in the kitchen, so that’s like I’ll do the time but yeah.”

2021 – 10691 Lead Number Four

A statement was taken from Victoria Lowe. In the past, when the defendant had gone into the woods shooting, the police had been called. Since then, the defendant posted on a Facebook page that he was going into the woods and would be making noise for a little while. This was posted at 6:20 PM.

The defendant lived in New York City and had been at his mother’s house. He went back and forth. It was unusual for him to be in the house when Patty was not there. Patty was in Pennsylvania since the weekend. Victoria thought Patty might have left on Saturday, September 25.

On September 28, Ms. Lowe saw the defendant come out of the woods around 7 PM. The defendant built a fire in the back of the house. She fell asleep around 10 PM. When she woke up at 11:30 PM, she noticed the fire was still going, but not as big as it had been earlier. She did not hear any noise or commotion. She received a phone call from her husband at about 12:11 AM.

She was asked to check on the defendant. She went to the back door and saw a man slumped over the kitchen table. She saw the defendant standing up against the kitchen counter near the sink facing the kitchen table and on his cell phone. It looked as if he were texting. She went inside and told the defendant that Stephanie (his sister) had called her husband, Brian. Brian wanted her to check on the defendant. The defendant appeared to be in shock, looked blankly, and shrugged. He put his hands up and out.

She saw that the man slumped over the table was not moving, and there were drugs on the table, rolled up cash, a bottle of vodka, a handgun, and a magazine.

The defendant said, "I fucking killed him." He said, "I fucking shot him." He said he did not know what had happened.

Ms. Lowe asked the defendant if he had anything else on him and told him that her husband was on the way over. "Greg said that everything was on the table." They were on the back patio and sat in silence. The defendant said again that he "fucking shot him" and that there was a dead guy in the kitchen. The defendant mentioned having come home and found the person he did not know inside the kitchen. He said multiple times that he did not know the guy that was in his house. Ms. Lowe asked if the person was one of his mother's psychiatric patients. The defendant said he did not know. The defendant rambled on and started to talk about an old friend Bruce who had been visiting earlier. He said the man in the house had been making "Fucked up comments" and talking trash. He said the comments "pissed him off," which was why he went to his room to get a gun. He said the person in the house had threatened to kill him, so he shot him. The defendant said he took the magazine out and put the gun on the table. He said he called his sister Stephanie and told her he shot and killed someone in the kitchen.

While she was with the defendant, his sister Stephanie called the defendant. The police showed up around that time. Greg handed Ms. Lowe the phone, and Ms. Lowe briefly spoke with Stephanie. Greg then got on the phone and talked to Stephanie. Speaking with his sister, he said with a nervous laugh that he would have to do time and that he had just shot and killed a guy.

Ms. Lowe had not heard any fighting, arguing, gunshots, or anything suspicious during the evening.

2021-10691 Lead #12A

Scarselli saw the defendant making hand motions firing a handgun with his right hand while monitoring him in the interview room on 9/29 at 10:58 AM. (Next document indicates it was 10:42.)

2021-10691 Lead #12B

In notes regarding the video interview room, the defendant is noted to have emptied his pockets several times. He asked if he could leave at 4:34.

2021-10691 Lead #22 Update

This is a text conversation with Renee from August 12, 2021. The defendant wrote, "I'm not trying to figure out what small caliber to shoot out your spine with" Renee wrote that Naomi antagonized her. Renee warned her not to, or she would destroy her. She writes that the answer is a hollow point .22. The defendant responds, "Naw. .380... Smith & Wesson."

2021 – 10691 Lead Number 20

On page 41 of a document about the victim is a sheet with the logos of numerous car manufacturers and pictures of handguns, rifles, knives, and a bat.

Ulster Police Email from Scott Fiordaliso – 3-18-22

No alprazolam was detected in the autopsy sample for forensic toxicology.

Tox Autopsy Comparison Notes in Lead 71 Lead update 6-21-22

Mr. Sweric had been prescribed Inderal, Zoloft, Xanax, and Seroquel by NP Monica Keo.

21-227 Geni 52 Report

A firearm with one live round in the chamber was on the kitchen table. The magazine was next to the handgun and had three live rounds. There was a spent casing on the floor underneath a table in the hallway that leads to the kitchen from the front door and upper level. On the table to the right of the victim was a wallet. On top of the wallet was a Chase Bank Visa debit card with the victim's name. There was a half-consumed bottle of vodka and an approximately half-consumed bottle of Brooklyn Beer. A glass cup half full of a clear liquid, a rolled-up one-dollar bill, and a white powdery substance were near the victim's right arm.

There was a gunshot wound to the back left side of the victim's head. There was a vape pen and keys in the victim's left pocket. There were two empty New Belgium Beer bottles in the kitchen garbage.

The rear patio had a glass cup about half full of a clear liquid and a bottle of New Belgium Beer approximately three-quarters full. A small metal patio table

had an empty bottle of New Belgium Beer, an empty bottle of Dogfish Head Beer, an empty tall glass cup, an empty glass cup with the base in a floral design, and a Harley-Davidson shot glass about half full of a clear liquid.

A gun safe in the garage was closed and locked. The garage contained three large garbage/recycling cans containing four empty New Belgium Beer bottles.

At 9:25 AM on September 29, 2021, the defendant was photographed and processed. Blood was seen on the defendant's pants and boots. A small amount of blood was observed on his right ring finger. "There was an odor of alcoholic beverage emanating from Gregory Thayer."

Lab Discovery Files

Seized drugs report

A plastic container containing powder residue tested as alprazolam.

Lab discovery files 21 ML – 1984 sero page 49 of 110

A plastic container enclosing a rolled-up dollar bill on the following pages is unrolled.

File 21 ML – 1984

There was minimal residue in the cup. The dollar bill did not appear to have visible residue. A substance consistent with alprazolam was detected.

21ML-01984-4

"Swabs of Dollar Bill (41546A1-2) and Swabs from Right Ring Finger of Thayer (41590A-B): The results match Bruce Sweric (41607). The probability of selecting an unrelated individual that matches this evidence is less than 1 in 320 billion."

Tox_152

The deceased blood alcohol was 167.

Precinct Videos

Discovery Uploads Thayer Upload 12-20-21 Lead 12a Clips

Clip 1 – While alone in the interview room, the defendant seems to be thinking about shooting a gun. He points a finger and subsequently looks like he is pulling a trigger. He also points a finger while holding his right wrist with his left hand. He seems to be talking to himself

20210929172941

The defendant is calm and cooperative with fingerprinting. He is calm.

Video in Interview Room 2 – Gregory Thayer

He is sitting in dark clothes. He is not moving much. He does not look happy. Arms are crossed. The officers begin chatting with him. The defendant is smiling.

Video Statement of the Defendant

The defendant is asked pedigree questions, to which he responds. His smile is incongruous with the seriousness of what occurred. Speech is without pauses. Articulation is good. The defendant is told that he is not under arrest. He has his rights read and says, "I watch a lot of Law and Order."

He was in New York City the morning before. He came to Kingston to pick up his car from the shop. He smiles nervously and seems embarrassed as he says he slept with a lady friend the night before. After picking up his car, he went to his mother's home. He says it is where the incident happened.

The defendant is reluctant to talk when asked what happened as the day progressed. He says he feels he should have a lawyer involved. The detective says they have yet to talk about the incident. The defendant says they are getting to that.

After arriving home, he contacted a friend from California, Bruce. He has known Bruce since the sixth grade. He hasn't seen Bruce in 8 or 10 years. When asked what he did with Bruce, he seems to say that he stayed with him, but his words are difficult to understand.

He doesn't know what time Bruce came over. He says he doesn't know what time it is now. He thinks it was about 7 when Bruce came over.

He is asked what he did with Bruce. At 2:56 AM, he says, "I think this is the lawyer time." He says he is asking for a lawyer. He says he wants to know who the hell was in his house.

The detective says he feels a little confused. He points out that the defendant said he wanted a lawyer as they started talking about Bruce. The defendant says that they are speaking casually with an upward inflection in his voice. At 2:57 AM, the detective tells him he can stop anytime and request an attorney. The defendant responds, "I'm doing that now." The detective tells the defendant they can no longer talk to him since he asked for an attorney. They cannot talk

about who was in his house. The defendant asks if they can get to that, and then he will make the request.

The defendant says it is the worst thing that's happened in his life, and nothing has come close. The defendant says he has to protect himself but also thinks it is the weirdest day in his life. He says he is clueless about what happened. The defendant says he knows he has to protect himself, which is why he said he would like a lawyer.

One of the detectives reflects that the defendant said it was a bad day. The defendant says it was a bad day because someone was dead in the kitchen. The detective tells him that because he asked for a lawyer, they cannot discuss with him what happened or how the individual got into the place. The defendant responds that he does not even know.

The investigator tells him that they are investigators and that they cannot work with him because he asked for an attorney. *He tells the detective to understand that he shot somebody.* "I know that's a big fucking thing." He says he does not want to say something that will mess him up. "But there's a dude in my kitchen..." The detective says that the defendant has requested an attorney a couple of times and that they have to respect that. The detective says he can no longer ask any questions. The defendant says it is a life-changing event that happened. He says he will never recover. He tells the detectives they have to do what they have to do, but he has to protect himself. The investigators leave the room.

While sitting alone, the defendant appears to be talking or thinking to himself. He gesticulates with his hand.

At 3:05, the defendant is brought a cup of water. At 3:26:38, the defendant yawns. He says something at a low volume that I am unable to decipher. At 3:38, he knocks on the door. He asks the entering officer if they are done. The officer indicates they are not. The defendant asks what is next. The officer says that the investigators will be coming in to talk to him. At 3:43:23, the defendant makes vocalizations that are not loud enough to be understood. At 7:49:52, he pulls his pants pockets out. He appears to have a white object in his left hand. It seems as if it came out of his left back pocket. He looks at it and puts it back in the rear pocket.

At 9:56 AM, he is taken out of the interview room. He smiles as he goes out to get processed. He returns to the interview room at 10:20 AM. He is now wearing sweat clothes with tags on them. He smiles somewhat inappropriately while entering the room.

At 15:24, when told that it was Bruce in the house, he sits still and says nothing. His eyes redden. He puts his hands over his face. He puts his head on the table. At 15:43, he begins to wretch and vomit.

Interview of Stephanie Thayer

The defendant said that there was a stranger in the house. He seemed in “Shell shock.” At one point, Gregory wasn’t picking up the phone. Stephanie asked Tori to tell Gregory not to talk to anyone until he got a lawyer. “This whole episode is out of character.” Stephanie says that he is gentle and is not a “hot-head.” Stephanie chooses which questions she wants to answer.

Video of ex-wife Lisa

They were shooting. They were going out. They were sitting around the campfire. He said that Bruce had left. There was someone he didn’t know inside the house. The Detective says that Greg stared over Bruce until Victoria entered the house. Lisa asks if Greg was under the influence. The detective says the defendant threw up when he was told he had shot Bruce. The detective wants to know what Bruce could have said to tick off Greg. Lisa asks if Bruce was on LSD or something.

Grand Jury Testimony

Victoria Lowe

The defendant was texting when she came into the kitchen. (Cellebrite indicates he sent no messages. Renee was texting him. She continued texting until 1:24 AM on September 29.)

The body was about 5 feet from where the defendant was standing. He said that the person had been making “fucked up comments” and talking trash to him, making him angry. The person said that he would kill him, and Greg shot him.

Securis Extracted Phone Calls

October 1, 2021 – He has a call with his sister. He has the shakes pretty bad. His sister asked that he be put on suicide watch. The volume of his voice on the call is low. He cannot sleep. He is on medications for alcohol withdrawal. He agrees he is having nightmares. His sister tells him that this is an opportunity “in a weird way” to dry himself out. His life has changed, but it is not over. He describes the jail.

October 11, 2022 - 19:37 He says that he saw a lawyer. He tells the female on the call that she will be called and, to be honest. He says that there will

definitely be a trial. The State is pressing the charges. He tells her that she will be asked about his drinking a lot.

Notes from Jail Calls

October 11, 2021 – He tells everyone that Dr. Goldsmith will call to ask about his drinking.

Jail Treatment Records

October 2, 2021 - “I don’t remember what happened. I was drinking. I shot my best friend.” Very articulate. Still thinking about killing self.

October 5, 2021 – He cannot say why he was treated briefly with suboxone. (by Hambright) [Not in records provided]

November 22, 2021- His ex-girlfriend is stalking him in jail. She said she “will expose who he really is to his mother, sister, and everyone else.”

December 7, 2021 - He reported thinking better since he stopped drinking. His ex-girlfriend stopped saying bizarre things.

December 22, 2021 - He had bad dreams about his dad and brother. He had positive dreams about his best friend but woke up and remembered his friend was no longer there. His ex-girlfriend was harassing him daily.

February 7, 2022 - He was able to ignore the letters he was getting from his ex-girlfriend.

March 8, 2022 - He said he had no memory of “a lot.” His sister asked what he thought of an attorney she sent. He had no memory of speaking to the attorney but later found the attorney’s business card in his belongings.

MENTAL STATUS and EXAMINATION:

Before interviewing the defendant, I ask if one of his cuffs could be undone and attached to the arm of his chair to increase his comfort. The Sheriff accomplishes this.

The examination is conducted in person in an interview room at the Sheriff’s office. Present in the room is the defendant’s attorney, Mr. Gottlieb. ADA Nneji sits in an adjoining room and observes the examination on a monitor. Before the examination, I advise the defendant of the purpose of the examination, who has asked for it, and the lack of confidentiality involved.

The defendant is 49 years old. He is housed in the general population at the Ulster County Jail. He sees a social worker for therapy and a psychiatrist for medication. He receives trazodone and melatonin for sleep. He had been on mirtazapine¹ until about two months earlier. While on mirtazapine, he gained about 40 lbs., and it was thought the mirtazapine caused a rash. The rash persisted after stopping the mirtazapine.

He is visited weekly by his mother. Other visits are by his sister and his friend Randall. His ex-wife Lisa came to see him twice. He finds the visits “great.”

He came into the jail on September 29, 2021. He has not had any disciplinary actions. He has not been involved in fights. When he first entered the jail, another inmate asked him to buy a honey bun. At that time, he felt terrified because he was new to the jail. He purchased the honey bun and gave it to the other inmate. In retrospect, he thinks the other inmate was taking advantage of him. He does not believe he was being threatened.

The defendant was born in Massachusetts. His 80-year-old mother lives in Kingston and works as a nurse for a psychiatrist. His father died in 2000 at age 58 from lung and throat cancer. His father used to smoke cigarettes. His father worked for IBM and then for the Department of Social Services.

His brother Christopher died two years earlier at age 56. Christopher separated from his wife and had joint custody of their daughter, now 18 years old. His brother stayed in Kingston with their mother when visiting his daughter. Christopher had a home in Pennsylvania. Christopher’s first marriage lasted for 13 years. At that time, he moved from Connecticut to Pennsylvania. The first marriage ended when his wife wanted to move to Seattle. She left without him. Christopher worked at the Indian Point nuclear plant as a technician. His 58-year-old sister Stephanie lives in Brooklyn. She retired from the Parks Department, is single, and has no children. She had a few long-term relationships.

His parents raised him in Kingston. His father used to drink excessively. His father became verbally abusive to everyone and physically abusive to his mother when intoxicated. His father drank daily and constantly. His father went to detox and rehab after a violent incident, after which the family moved out of the house. His father stopped drinking while he was in the 9th grade.

He was disciplined by being yelled at and verbally humiliated by his father. His mother did not punish him. He got along well with his siblings. His father and brother have a history of mental illness. His father became depressed after stopping alcohol use and was treated with medication. His brother saw the

¹ A sedating antidepressant.

psychiatrist his mother works for. He denies having been physically or sexually abused as a youngster. He denies a family history of suicide.

He attended elementary through high school in the Kingston area. He graduated from high school in 1991. He denies having repeated any grades. He denies having been suspended or expelled. He began skipping school in the ninth grade to go skateboarding. He was caught by the school and his mother's friends. He had thought his truancy would be overlooked. His parents were disappointed with him. As high school continued, he skipped classes. Sometimes he went to parties. He mostly missed classes in his senior year because he knew he would graduate anyway. His grades were typically in the 70s or 80s. His teachers said he did not apply himself. His father compared him to the defendant's more successful friends.

He attended Ulster Community College for two years, studying advertising and graphic design. He wanted to work in the art world. He then attended the School of Visual Arts in New York City for four years. Very few of his community college credits transferred over. He paid for school with the help of his parents and student loans. While his grades were not fantastic, he left school with "a decent portfolio."

In his senior year at the School of Visual Arts, he interned at a graphic design house. He also did construction work. After getting out of school, he got a job with the Blue Man Group. Initially, he did set designing but later focused on fabrication. He also worked for Shakespeare in the Park. He was so employed until his incarceration. He enjoyed his job. The pandemic slowed down his work. He denies having had problems at work. His drinking caused him to be hung over often but did not interfere with his work. He smelled of alcohol some of the time he was at work.

He lived with his mother until he went to school in New York City. He spent the first year in the dorms and then moved into his sister's apartment in the city. His sister stayed with a friend.

He moved in with his girlfriend Lisa in Brooklyn in 1998. He met her at Blue Man Group. They went out for about seven years before getting married in Wisconsin, where her family lived. Their relationship was good. However, they became more friends than lovers. In the last three years of the relationship, the sex slowed down. He drank a lot during their relationship.

In 2009 he moved in with his sister in Williamsburg until moving in with a girlfriend, Naomi, in 2015. He met her online. They got along well and had great energy together. After his brother died in 2020, there was tension between his girlfriend, his mother, and his sister. There was much work to be done with

his brother's estate. In 2020 he moved in with his sister. He also stayed with his mother upstate.

He was friends with neighbors in Kingston and coworkers in New York. Bruce has been his friend since the seventh or eighth grade. Bruce moved to Atlanta to go to school and later moved to California to work. When they were younger, they skateboarded together. When they were older, they went to concerts, drank alcohol, and used drugs.

He denies medical problems. He was given a ticket for jumping the turnstile in 2006 or 2007. The MetroCard vending machine was not working, and the token booth was not in service. He was going home from a bar. He jumped the turnstile and was stopped by the police. They were going to let him go after he explained things, but he was held after they found two outstanding tickets that he had not properly addressed. In early 2000 he received tickets for public urination and having an open container. He thought he had mailed back a response to one of the tickets and "blew off" the other. The police told him he could have walked to another train station to purchase a MetroCard.

He began drinking alcohol in the eighth grade. He was a binge drinker on weekends. He went into the woods with a group of friends to drink. He mostly drank beer and occasionally vodka. He had considered stopping the consumption of alcohol but thought it was not a problem; he had not become violent. He also smoked cigarettes and figured he would smoke them until he got addicted and would then stop. When his parents found him intoxicated, they were initially upset and grounded him. One time a friend was injured while intoxicated by falling in a ditch. The friend suffered a concussion and required stitches.

He began smoking marijuana in high school, mainly on the weekends. He began using acid when he was in college. He recalls one bad trip with acid and cocaine that caused him a panic attack. He was with friends, including Bruce. The defendant left the group to obtain more cocaine. He became anxious and tried to get back to his friends before obtaining the cocaine. He recalls later walking with Bruce toward the Twin Towers and his sister's house. He eventually fell asleep, and the anxiety passed. He stayed away from acid for a time. He used hallucinogenic mushrooms. He smoked opium two times, causing him euphoria. He smoked hashish with pot. He found it gave a more intense high than marijuana.

The defendant is neatly groomed. He makes good eye contact. His self-reported emotional state is okay. He feels a little nervous about his case and his situation. He denies feeling depressed. His sleep is horrible. He has nightmares.

He wakes up during the night. He was prescribed trazodone², mirtazapine, and melatonin³, which helped initially. He denies problems with his appetite. He denies hallucinations. He is not feeling suicidal or homicidal. He had suicidal thoughts when he was first arrested. He was put on a watch, and the feeling passed. Speaking with the mental health staff was helpful.

He is oriented to time and place. He recalls three out of three objects he is asked to remember after several minutes. He correctly does a simple arithmetical calculation. He can name the president, vice president, and governor. He can describe the similarities between different objects.

He is charged with Murder. The incident occurred on September 28, 2021, at 50 Magic Drive. A handgun was involved. The victim was his friend, Bruce.

His attorney is his legal advocate. The district attorney prosecutes and tries to carry out the punishment of the law. The jury decides guilt or innocence based on the evidence. The judge interprets and explains the law, carries out judgment, and gives people jail time. If someone is found not guilty, they are set free.

Asked to describe what happened, he says that Bruce came over, they were hanging out, and “apparently, I shot him.” He does not remember doing it. “I don’t see any reason that I would.” Asked if he had been angry with Bruce, he says, “Not at all.”

Asked to describe what happened earlier in the day, he says he texted Bruce. The defendant picked up his car from the shop. He went shooting in the woods in the afternoon.

He shot at paper targets in the woods with a scoped rifle. There were seven or eight scoped rifles between him and his deceased brother’s estate. There was a collection of ammunition. He does not recall which gun he used in the woods. He knows he did not use a shotgun. He knows he did not use the rifle with a digital scope because he did not know how to use that scope. He took one or two rifles when he went into the woods. He thinks he took one rifle that evening. He typically did not bring handguns to shoot at targets. He had quite a few handguns. Many of the rifles and handguns belong to his brother’s estate. If he had taken one of his brother’s firearms, he would have had to reimburse the estate. His niece was the beneficiary of his brother’s estate. He set up a target in the woods about 100 yards away. He found that the scope attached to the rifle was

² A sedating antidepressant used to promote sleep.

³ A hormone that the brain produces in response to darkness that can aid in sleep.

adjusted well. He estimates he was in the woods for one or two hours. The shooting took about one-half hour.

He says that he began drinking at about 6 PM after having gone shooting in the woods. He had about four or five beers before Bruce arrived. He also says that he got home around 7 to 7:30 PM. Bruce was coming around 7:30 PM. He recalls arriving at his house near the time he and Bruce had agreed to meet. They had planned to catch up with each other and to “drink a bunch.”

They had tried to meet in New York City. Bruce had been staying at a hotel in Harlem. The defendant was working downtown and living in Brooklyn. They tried to figure out if the meeting was going to be feasible. The defendant spoke with Bruce from a bar. They were unable to set up an appointment in New York City.

The defendant set up the patio for a meeting with Bruce. He started a fire on the deck to keep them warm. They began drinking and catching up. They spoke about relationships and times in high school. He recalls being upstairs and hearing a ruckus and a threat. “I’m going to kill you.” He does not remember walking downstairs. He recalls being on the patio with a neighbor, Tori.

He understands that he called his sister and that his sister contacted Tori. He knew someone inside the home had been shot. Asked if he knows anything else he did before shooting Bruce, he says, “No.” He cannot say if Bruce left his house at any time after Bruce arrived. He says Bruce had a rental car because Bruce drove the vehicle from Harlem.

During the evening, he and Bruce took a selfie and sent it to a mutual friend, Diana. He does not know what time the selfie was sent to her. Asked if Diana had a problem, he says she had cancer. He does not know if Diana responded to the selfie.

The defendant has not looked at the discovery materials. He saw part of a crime scene photo that had Bruce’s body. It was on a pile of papers in court. He quickly glanced at it and looked away because he did not want that image in his head.

He agrees he had invited Bruce to shoot with him. Bruce said he could not get there until 7:00 or 7:30. He is not aware of Bruce’s perspective about guns. He never had any friction with Bruce.

The defendant does not recall why he was upstairs, although there was a bathroom upstairs. He agrees he is logically concluding he had gone to the bathroom. Asked whether there was a bathroom elsewhere in the house, he says one was a half-level down from the kitchen. That bathroom was infrequently used.

Typically, handguns were kept in a safe. One of the handguns, a Smith & Wesson, was kept in his bedroom table. His brother had kept the gun there for self-defense. His brother used the same room he slept in at their mother's house. The gun is semiautomatic. Typically, the magazine was near the gun or in the gun. He does not think there is a safety. He thinks that to shoot the gun, one needs to put a cartridge in the chamber by pulling a lever.

He always thought about protection. He was worried about his mother being alone in the house.

One of his brother's guns was taken by the police when his brother died. The defendant had been in QuickChek when he received a call from his mother, who was in tears. She did not tell him exactly what was going on. He found out that his brother had died when he got home. As he got to the house, he saw fire trucks leaving. There were police cars and an ambulance. There was a gun in the bedroom, and the police took it.

The defendant has no recollection of shooting the handgun. He posits he was in the kitchen when Bruce was shot. While he knows that Bruce was shot in the "head area," he does not know how the bullet entered. He does not know if it entered in the forehead, the temple, or the back of the head. He has not thought about whether Bruce suffered any pain.

He is aware that lines of white substance were cut next to Bruce. The defendant had never taken Xanax before. He says he would have likely snorted a powdery substance if it were offered to him. At first, he says that he would have been likely to have taken Xanax. He and Bruce had a history of using drugs together. He then says he would have snorted the powder if it were cocaine. He is less certain he would have snorted the substance if he had been told the lines were composed of Xanax. He probably would have used a rolled-up dollar or straw to snort a powdered substance. He has no recollection of a white powdery substance or of having snorted it.

The defendant is aware that Dr. Goldsmith wrote a report. He has not seen the report. The defendant does not want to see photographs. He does not want to see his friend like that.

I ask the defendant about some things in Dr. Goldsmith's report. He had panic dreams in which someone breaks into the house while he was in Brooklyn. He had placed a hunting hatchet near his bed in Brooklyn.

About a month before his brother's death, he went to a doctor who prescribed medication for him, which he took two or three times. He had gone with his mother to see a doctor and found out it was an intervention. When his brother died, he stopped taking medication.

He reports prior blackouts. One time he woke up at night and ran in the direction of an apartment window. He crashed into a coffee table. When he woke up in the morning with bruises and observed a broken table, Lisa told him that he had gotten up during the night. He had no recollection. Other times, friends told him about having gone to a third bar together, and he did not recall the third one. Sometimes, he woke up, found his shoes were off and did not know how they had gotten off. One time his girlfriend Naomi said he had been rude while intoxicated. He did not recall. Another time he woke up covered in vomit. He asked his friends who threw up on him. They gave him a look and told him he had done it to himself.

Because Dr. Goldsmith's report indicates he had recalled urinating in the upstairs bathroom, I ask him if he remembers urinating in the upstairs bathroom. He does not recall having urinated in the bathroom. He has no recollection of hearing Bruce. He does not recall having had a handgun in his hand. He has a recollection of someone in the kitchen. He does not remember having waited for the police. He recalls having been surprised when the police arrived. He does not recall having spoken with his sister on the phone. He does not recall Bruce having left the house. He does not remember having told his sister that Bruce had gone home. He does not recall having thought that Bruce had gone home. He is uncertain if he had thought Bruce had gone home prior to the shooting.

He does not recall having told Tori that he had killed a person. He remembers having been given a blanket and water. He heard in court that he had told Tori he had come home and found a person in the house. Although he heard in court that he had said that the person "pissed him off" and caused him to go to his room to get a gun, he does not recall having said that. He does not remember having said that he would have to do some time and that he had just shot and killed a person.

He says his report to Dr. Hambright in August 2020 that his drinking became problematic after his divorce was not totally accurate. He says that his drinking had been problematic before that time. His drinking increased with time. He acknowledges that he had blackouts while he was married to Lisa. Although he told Dr. Hambright he did not have symptoms if he did not drink, he says that he had the shakes at times when not drinking and did not go long without drinking. The longest he had gone without drinking was two years. He tried to go for a day or so without drinking. He agrees he was treated for withdrawal symptoms when he was in jail.

Asked about the girl harassing him in jail, he says it is René. He saw René after his divorce. They dated for about a year. Their relationship had a bunch of breakups. After his final breakup, he started seeing Naomi. When he broke up with Naomi around 2020, he called René. "It's hard to break up with René."

He recalls having asked the police if he could look inside the house to see what had happened. He was told, "No." He remembers that he gave a head nod to Tori's husband but does not recall having spoken with him.

PSYCHOLOGICAL TESTING:

On the Test of Memory Malinger, the defendant gave 50 correct responses on the first try. This shows that he was not attempting to feign memory problems. He inconsistently answered several questions on the PAI, making the test uninterpretable. He might not have paid attention to the questions. There is no indication that he was attempting to magnify or minimize mental health problems.

The defendant produced a valid MMPI-3 protocol. The results indicated emotional and behavioral dysfunction, with suicidal ideation and anxiety. The results showed that he had problems with substance abuse.

The defendant responded true to the following questions:

I've thought about how I might kill myself.

I have recently considered killing myself.

I've made a plan for killing myself.

"He is likely at risk for self-harm." There were indications of posttraumatic stress disorder "features, including intrusive ideation and nightmares, and panic." There was no indication of disordered thinking. Diagnostic considerations include "anxiety-related disorders including PTSD" and substance-related disorders.

DIAGNOSES:

Alcohol intoxication

Alcohol use disorder – in institutional remission at the time of the exam

Rule out Posttraumatic stress disorder

DISCUSSION:

Mr. Sweric had a blood alcohol level over twice the legal limit for driving. The defendant reported that he had begun drinking before Mr. Sweric arrived, and he was drinking with Mr. Sweric. There were a number of empty and partially beer bottles, a half-empty bottle of vodka, and half-empty glasses with clear liquid found at the scene. The defendant's neighbor said that the defendant appeared to be in shock when she saw him after the shooting. After the police arrived at the defendant's home, an officer sitting next to the defendant smelled a strong odor of an alcoholic beverage. When the defendant was processed in the precinct nine hours later, he still smelled of alcohol. These facts and observations are not inconsistent with the defendant having been intoxicated.

In determining a defendant's mental state during an offense, one can first consider the defendant's personality. If an offender had a history of violent or anti-social behavior, then the chance that the offender could have chosen to act in an antisocial or violent manner at the time of the offense would be greater. In this case, the defendant was not a violent person. In addition, the individual that he shot was one of his best friends, with whom he had no discernable conflict.

The defendant's lack of recollection of events around the time of the homicide is not inconsistent with a blackout. Being in a blackout is characterized by a lack of memory of what occurs while in the blackout. It does not mean that the individual in a blackout is psychotic or out of touch with reality.

In general, the defendant's problems with his memory impress as genuine. He was perplexed in the aftermath of the shooting. After the police arrived, he kept asking to look inside the house, consistent with his having been unsure what had happened. He was upset while on the porch of his home and said it was the worst day of his life, showing an appropriate initial response to "finding" and shooting someone in his home. When he later spoke with the police in the precinct, he did not want to talk about what had happened. His demeanor was generally positive, and he did not appear upset. His positive demeanor is more understandable in light of his assertions that he had shot an intruder and was not under arrest at that time. When he was finally told that the person he shot was his friend Bruce, he had a visceral reaction and began to wretch and vomit. These things suggest that his lack of memory was not feigned.

The defendant has a history of blackouts. When I examined him, he did not indicate that anyone had observed him acting bizarrely while he was in a blackout.

There are aspects of the defendant's account to me that differ from his account to Dr. Goldsmith. Part of the differences might be the way that questions were posed during Dr. Goldsmith's examination and my examination.

1. The defendant tells me that he does not recall urinating in the bathroom. He told Dr. Goldsmith that he recalled climbing the stairs to use the bathroom to urinate and leaving the bathroom.
2. The defendant says he does not recall walking down the stairs. He told Dr. Goldsmith that he had a memory of descending the stairs.
3. The defendant tells me that he does not recall Bruce saying anything to him. In the context of leaving the bathroom, he told Dr. Goldsmith that he had a perception that Bruce had told him that there was an intruder in the house.
4. The defendant tells me he has no recollection of having had a gun in his hand. He says he has a “vague picture of unloading it.” He told Dr. Goldsmith, “I have a memory of the small handgun in my hand... I have a memory of the handgun and cartridge in my hand.”
5. The defendant tells me that he does not recall shooting the handgun. He told Dr. Goldsmith, “I have a memory of hearing the gun discharge...”
6. The defendant tells me that he does not recall waiting for the police and that he was surprised when the police arrived. He told Dr. Goldsmith that he had a memory of walking to the patio and waiting for the police.

In the wake of the shooting, the defendant took photos of the deceased on his phone. If he had tried to clean up blood, then some inference might be drawn about his thinking. If he had tried to move the body, then some inference might be drawn about his thinking. I do not know why he took the photos. If it had been his thought to avoid detection, incarceration, or responsibility for his actions, taking a photo of the crime scene would not have been likely to further those goals. There is an appearance of what looks like a bloody handprint on the deceased's face. I do not know why he might have touched the face of the deceased.

Alcohol intoxicationⁱ is a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders 5. Whether or not it can qualify as a mental disease or defect for a not-responsible defense is a legal issue. Alcohol can cause impairment in attention and memory. Despite the defendant's spotty recall of events after his neighbor came to his kitchen, he was able to cooperate with the police. He was able to ask for cigarettes. He said that he had shot and killed someone. While he does not remember all he did, descriptions of his conduct and demeanor after the shooting suggest that he was able to use his phone, was able to recognize his neighbor, was capable of focusing, and was not incoherent. He was upset about having shot someone, which is consistent with his having known that the shooting was extraordinary. He also made statements about going to jail, showing an awareness of the general prohibition of killing another person.

Assuming that the defendant is found to have a legally acceptable mental disorder for a not-responsible defense, his statements after the shooting indicate that he thought there was an intruder who had been “talking trash.” While the defendant said that the intruder threatened to kill him, the “intruder” was seated and facing away from the defendant when shot. The defendant’s subsequent offering of a reason for shooting the victim is consistent with an awareness that one cannot shoot a person without justification.

If not under the influence of alcohol, there is nothing to suggest that the defendant would have chosen to shoot Mr. Sweric. Nothing indicates that he would have wanted to kill his friend even while intoxicated. In my opinion, the defendant’s attention and concentration were impaired due to his intoxication, causing him to misapprehend external circumstances. He did not shoot an intruder; he tragically shot one of his best friends.

In the immediate aftermath of the shooting, the defendant knew he had shot and killed someone. In my opinion, this points to his having had the capacity to know and appreciate the nature and consequences of his behavior. While he spoke about an intruder who was talking trash and made a threat to kill him, the fact that he shot the victim in the back of the head does not impress me with his having had reason to perceive that he was in imminent danger.

The defendant does not have a settled, underlying mental disorder capable of causing him to lack substantial capacity to know or appreciate the nature and consequence of his conduct or that his conduct was wrong. I find no substantiation that the defendant snorted alprazolam on the night of the instant offense. I understand that none of his DNA was found on the rolled-up dollar bill at the scene. Although the defendant was dependent on alcohol, as evidenced by his withdrawal when he stopped drinking after he entered the jail, he had planned to drink on the night of the shooting. There is no indication that his drinking that night was done to avoid withdrawal symptoms. I find no indication that his intoxication was involuntary.

The spotty memory of what led up to the shooting, the shooting, and much of the aftermath makes it difficult, if not impossible, to know exactly what he was thinking at the time of the homicide. Compounding this are the seeming inconsistencies in his recollections after his arrest, which are not attributable to intoxication.

From the information available, it is my opinion that the defendant did not lack substantial capacity to know or appreciate the nature and consequences of his conduct. He knew he was shooting at a person. In my opinion, he had the capacity to know and appreciate, in general, that it was wrong to shoot and kill someone. His reaction after the shooting shows he was aware of the horrible nature of what had occurred.

In trying to piece together what happened, I think that Mr. Thayer thought there was an intruder in the house who presented some danger to him. That the person the defendant shot was facing away from him suggests that there was no objective imminent threat at the time he shot the victim. The defendant did not describe the intruder as having made any aggressive moves toward him or that the intruder had a weapon. I think that his intoxication interfered with his ability to accurately assess the degree of risk he faced, and he might have thought he was in mortal danger. His intoxication caused him to not consider calling the police or leaving the house for his own safety as better alternatives. The question of whether he lacked substantial capacity to know or appreciate the wrongfulness of his specific conduct presents mixed questions of morality, law, facts, and psychiatric expertise. I am unable to give an opinion on this last issue within a reasonable degree of psychiatric certainty.

Sincerely,



Lawrence A. Siegel, M.D.

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Alcohol Intoxication

Diagnostic Criteria

- A. Recent ingestion of alcohol.
- B. Clinically significant problematic behavioral or psychological changes (e.g., inappropriate sexual or aggressive behavior, mood lability, impaired judgment) that developed during, or shortly after, alcohol ingestion.
- C. One (or more) of the following signs or symptoms developing during, or shortly after, alcohol use:
 - 1. Slurred speech.
 - 2. Incoordination.
 - 3. Unsteady gait.
 - 4. Nystagmus.
 - 5. Impairment in attention or memory.
 - 6. Stupor or coma.
- D. The signs or symptoms are not attributable to another medical condition and are not better explained by another mental disorder, including intoxication with another substance.

Coding note: The ICD-10-CM code depends on whether there is a comorbid alcohol use disorder. If a mild alcohol use disorder is comorbid, the ICD-10-CM code is **F10.120**, and if a moderate or severe alcohol use disorder is comorbid, the ICD-10-CM code is **F10.220**. If there is no comorbid alcohol use disorder, then the ICD-10-CM code is **F10.920**.

Exhibit E



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January 20, 2023

VIA EMAIL & FEDEX

The Honorable Judge Bryan E. Rounds
County Court Judge
Ulster County Courthouse
285 Wall Street
Kingston, New York 12401

RE: *People v. Gregory Thayer, Ind. No. 70188-21*

Dear Judge Rounds:

We write to inform you that after speaking with our client, he intends to waive a jury and proceed with a bench trial. He will place that decision on the record when he appears in court.

In anticipation of the trial, we want to bring to the Court's attention the fact that we still have not received the People's forensic psychiatrist's report from Dr. Siegel. We are ten days from the beginning of the trial, and despite requesting the report and asking when it will be turned over to the defense, ADA Nneji simply responded by stating that "Dr. Siegel has not finished or produced a report. I will turn it over upon receipt." As the Court knows, the defense is entitled to the report prior to trial and in sufficient time for our review and analysis. We are concerned that it will be turned over to us with insufficient time for that to be done.

We also write to request that the Court sign the attached subpoenas for law enforcement witnesses to appear at the trial. The People previously provided us with a list of their witnesses that included many law enforcement personnel assigned to multiple police agencies. We inquired whether the assistant district attorney would facilitate their appearance in court should the People not call them as witnesses and the defense wishes to call them on the defense case. Our request was rejected. We were informed that we should serve them with subpoenas to appear.

We would like to come to Kingston on Tuesday, January 24, 2023 to inspect the courtroom's audio-visual capabilities so that we will be prepared to present our evidence to the court without difficulties. If the Court wishes, we will also be prepared to appear in court to address the issues raised in this letter and pick up the signed subpoenas so that they can be served promptly.

Thank you very much for the Court's consideration of these matters.

Very truly yours,

ROBERT C. GOTTLIEB
& ASSOCIATES PLLC



Robert C. Gottlieb

CC: Andrew Kossover, Esq. (via e-mail)
ADA Emmanuel C. Nneji, Esq. (via e-mail)

Exhibit F

From: Andy Kossover <AK@kossoverlaw.com>
Sent: Tuesday, February 28, 2023 12:25 PM
To: Robert Gottlieb <rgottlieb@robertcgottlielaw.com>
Subject: Thayer

Hi Robert,

I've been reflecting on our defense in the Thayer case and wish to share some thoughts and concerns.

Reading Dr. Goldsmith's report, it appears to support Intoxication (see Penal Law Section 15.25) to negate the "intent" requirement of Murder 2, but Goldsmith seems to be primarily addressing Gregory's lack of capacity to know right from wrong (M'Naghten) RATHER than setting forth Extreme Emotional Disturbance (as defined in PL Section 125.25 [1][a]). While it may be implicit, Goldsmith never mentions "extreme emotional disturbance" in his report. I've cut and pasted some commentary on EED below:

Thoughts on Extreme Emotional Disturbance (EED) Defense

First, the defendant must prove he was more than just angry. Doubtless, anyone who fatally attacks another is angry. He must prove that he was so emotionally disturbed that he actually lost control.

Second, the defendant must prove that there was, in the words of the New York Penal Law, a "reasonable explanation or excuse" for his emotional disturbance. What's reasonable is determined from the defendant's viewpoint.

New York law is clear, however, that an extreme emotional disturbance is something less than insanity. You don't have to be crazy to reduce the charges from murder to manslaughter; you just have to be really, really wiggled out. Nor do you have to legitimately believe you are in danger at any time - current, past, or future - to establish the extreme emotional disturbance defense.

The illogic of the extreme emotional disturbance defense is manifest in its elements, which are a quixotic mix of the elements of the insanity defense and the elements of self-defense.

The criminal law aims to separate those who are responsible for their actions from those who aren't. If the defendant is actually unable to control himself - if he's insane, for example - the reason for his insanity is legally irrelevant.

Yet the extreme emotional disturbance defense - which is based on the idea that the defendant was unable to control himself emotionally - nevertheless finds relevant the reason for the disturbance that led to the loss of control. It asks: Was the disturbance based on a "reasonable explanation or excuse"?

In sum, the "extreme emotional disturbance" defense borrows one element - loss of control - from the insanity defense, and one element - the reasonableness of the defendant's actions - from the doctrine of self-defense. The problem is that these two elements have nothing to do with one another. Indeed, they actually conflict with each other - for the first presumes the defendant is irrational, and the latter that he is rational.

The self-defense doctrine is for the rational: if you correctly apprehend the danger you're in, you are allowed to protect yourself. The insanity defense, of course, is for the irrational: If you can't control yourself due to a mental disease or defect, we will not hold you responsible for your actions.

By definition, the defense of extreme emotional disturbance is also for the irrational: you have lost control. If you truly cannot control yourself, why should the reason matter? Accordingly, if we have this defense at all, it ought to run parallel to the insanity defense, and have no "reasonableness" requirement.

Another problem with having the reasonableness requirement for the "extreme emotional disturbance" defense is that, in practice, it means that juries and courts will make essentially political decisions about when it's acceptable to lose control, and when it's not.

Rob, even Dr. Siegel seems to agree with the conundrum discussed above when, at the very end of his report, concedes he is unable to give an opinion on Gregory's mental state other than the intoxication.

I know you are trying to get Rounds (if we continue to waive a jury) to go all the way to Crim. Neg., but I am concerned that an objective view of the evidence and Goldsmith's conclusions only gets us to Man 1, which we both agree doesn't really apply to the facts of this case. At least Man 2 has the "recklessly" provision. So I thought it might be appropriate for us to further research and define exactly what our psychiatric (mental disease or defect) defense is. Is it Intoxication, EED, or Insanity and where does that ultimately leave us? And, should we revisit our decision to go non-jury? I'm confident Rounds now understands that Gregory had a psychotic break, but will he (Rounds) have anything to hang his hat on to convict him of Man 2 or Crim Neg OR, despite the focus group, are we better off taking our chances with a jury?

I trust we haven't heard anything about Nneji replacing Siegel as the People's expert. If the new forensic psychiatrist for Nneji wishes to re-interview Gregory, the clock is ticking. I know Nneji is overloaded, plus he now has a political campaign to run.

Lastly, I haven't heard back from Stephanie in response to my January 30th trial legal fee email, which I blind-copied to you. I am also concerned about that piece.

Good ski day tomorrow.

Best,

Andy

Andrew Kossover
Kossover Law Offices, LLP
P.O. Box 399
New Paltz, NY 12561
Office: (845) 255-4655
Cell: (845) 797-9567

Exhibit G

County COURT OF THE STATE OF NEW YORK
COUNTY OF Ulster

----- x
THE PEOPLE OF THE STATE OF NEW YORK,

Waiver of
Jury Trial
(CPL 320.10)

-against-

Gregory Thayer
Defendant.

Indictment #
70188-21

----- x
I, the defendant in this case, having been indicted for the crime(s) of:

as specified in the above-numbered indictment, and having been informed of my right to be tried under that indictment by a jury of (six/twelve) persons, hereby, in open court, waive my right to trial by jury, as guaranteed by the Constitution of the United States, the Constitution of the State of New York, and the New York Criminal Procedure Law, and request that I be tried by the Court without a jury.

Date: April 14 2023

[Signature]
Defendant

[Signature]
Attorney for the Defendant

SO ORDERED:

[Signature]
Judge



Exhibit H

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF ULSTER: CRIMINAL TERM

3 -----X
4 THE PEOPLE OF THE STATE OF NEW YORK,

5 -against-

CALENDAR CALL

6 GREGORY THAYER, Indictment No.:
70188-21

8 Defendant.

9 -----X
10 JURY TRIAL WAIVER 285 Wall Street
11 Kingston, New York 12401
12 April 14, 2023

13 B E F O R E: HON. BRYAN ROUNDS
14 County Court Justice

15 A P P E A R A N C E S:

16 DAVID J. CLEGG, ESQ.
17 DISTRICT ATTORNEY OF ULSTER COUNTY
18 BY: EMMANUEL NNEJI, ESQ.

19 ROBERT C. GOTTLIEB & ASSOCIATES PLLC
20 Attorneys for the Defendant
21 111 Broadway - Suite 701
22 New York, New York 10006
23 BY: ROBERT C. GOTTLIEB, ESQ.
24 PAUL TOWNSEND, ESQ.
25 KAYLEE KREITENBERG, ESQ.

VANESSA MOORE
Senior Court Reporter

Proceedings

1 THE COURT: People of the State of New York
2 versus Gregory Thayer. This is indictment 70188-21.
3 First, appearances for the People, Mr. Nneji.

4 MR. NNEJI: Emmanuel Nneji, assistant DA for
5 Ulster County. Thank you, Judge.

6 THE COURT: Good afternoon, Mr. Nneji. And
7 Mr. Gottlieb.

8 MR. GOTTLIEB: Your Honor, good afternoon.
9 Robert C. Gottlieb and Associates by Robert Gottlieb.

10 THE COURT: And associates.

11 MR. TOWNSEND: Also from Robert C. Gottlieb and
12 Associates, Paul Townsend. Good afternoon.

13 THE COURT: Good afternoon. Nice to see you too,
14 Mr. Townsend. And Mr. Thayer, with whom I'm familiar, also
15 appears. Sir, can you confirm; are you Gregory Thayer?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: What's your date of birth?

18 THE DEFENDANT: 12/26/1972.

19 THE COURT: And what's your address?

20 THE DEFENDANT: 50 Magic Drive.

21 THE COURT: What town?

22 THE DEFENDANT: Kingston.

23 THE COURT: All right. We're here today -- this
24 matter is already scheduled for trial. Mr. Thayer, I'm
25 sorry, Mr. Gottlieb has indicated that Mr. Thayer wishes to

Proceedings

1 exercise his right to waive a jury trial and instead invoke
2 his right to a single-judge trial. Is that correct,
3 Mr. Gottlieb?

4 MR. GOTTLIEB: Yes, Your Honor.

5 THE COURT: And then do I have your permission to
6 address your client?

7 MR. GOTTLIEB: Yes, Your Honor.

8 THE COURT: That includes swearing him in for
9 purposes of the colloquy. You understand that?

10 MR. GOTTLIEB: Yes, Your Honor.

11 THE COURT: Very good. Mr. Thayer, please stand
12 and listen to my court officer.

13 A COURT OFFICER: Raise your right hand. Do you
14 swear or affirm the testimony you're about to give is the
15 truth, the whole truth, and nothing but the truth?

16 THE DEFENDANT: Yes.

17 A COURT OFFICER: Be seated. State your full
18 name.

19 THE DEFENDANT: Gregory Thayer, December 26,
20 1972.

21 THE COURT: All right. Mr. Thayer, your attorney
22 has indicated that you wish to waive your right to a trial
23 by jury. I must, however, decide whether to accept that
24 waiver. In order to make that decision, I must ask you
25 certain questions and of course listen to and evaluate your

Proceedings

1 answers. Before you answer a question, you may talk to
2 your lawyer about the question and then answer. If you do
3 not hear or you don't understand a question, tell me. Do
4 you understand?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Have you spoken with your lawyer
7 about your case and about waiving your right to trial by
8 jury?

9 THE DEFENDANT: Yes.

10 THE COURT: Are you satisfied with the services
11 of your attorney and his advice?

12 THE DEFENDANT: Yes, I am.

13 THE COURT: Do you understand that under the
14 Constitution and laws of New York, you are guaranteed the
15 right to trial by jury?

16 THE DEFENDANT: I do. Yes.

17 THE COURT: Your lawyer has indicated that you
18 wish to waive your constitutional and statutory right to
19 trial by jury and in turn request a trial by judge. Is
20 that what you wish to do?

21 THE DEFENDANT: Yes, sir. That's correct.

22 THE COURT: I'm going to explain to you the
23 difference between a trial by jury and a trial by a single
24 judge. I'll start by explaining what a trial by jury is.

25 In a trial by jury, 12 people from Ulster County

Proceedings

1 are chosen as the jury. You, through your lawyer,
2 participate in the selection of those people. Do you
3 understand?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: In a trial by jury, the jury
6 determines whether you are guilty or not guilty of the
7 crime or crimes charged. Do you understand?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: In a trial by jury, the judge only
10 presides over the trial, makes rulings of law and instructs
11 the jury on what the law is that it must follow. The judge
12 does not decide whether the defendant is guilty or not
13 guilty. Do you understand?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: In a trial by jury, the jury's
16 verdict of guilty or not guilty of a charged crime must be
17 unanimous. That is, all 12 jurors must agree on the
18 verdict, guilty or not guilty. Thus, in effect, in a trial
19 by jury you have 12 people who act as judges of the facts
20 and who must be unanimous in their decision. Do you
21 understand.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: In effect, the Constitution and laws
24 of New York express the belief that a defendant is normally
25 better served by a trial, by a jury of citizens rather than

Proceedings

1 one judge. Do you understand?

2 THE DEFENDANT: I do, sir.

3 THE COURT: Now, I'm going to explain to you what
4 a trial by a single judge is. In a trial by a single
5 judge, that judge alone, this judge alone, will decide
6 whether you are guilty or not guilty of the crime charged.
7 Do you understand?

8 THE DEFENDANT: I do. Yes.

9 THE COURT: I will be that judge. Do you
10 understand?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Have I indicated to you or, to your
13 knowledge, to your lawyer or anyone else what the verdict
14 on any count will be?

15 THE DEFENDANT: No, sir.

16 THE COURT: Do you understand that I have reached
17 no decision whatsoever with respect to any crime charged
18 and that my ultimate decision will rest on the law and on
19 the evidence presented at trial?

20 THE DEFENDANT: I understand. Yes.

21 THE COURT: Knowing all of this, is it still your
22 desire to waive your right to trial by jury and, in turn,
23 be tried by a single judge?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anyone anywhere made any promise

Proceedings

1 or commitment of any kind to get you to waive your right to
2 trial by jury?

3 THE DEFENDANT: No, sir.

4 THE COURT: Has anyone threatened you, forced you
5 or pressured you to waive your right to trial by jury
6 against your will?

7 THE DEFENDANT: No, sir.

8 THE COURT: Have I or your lawyer or lawyers or
9 anyone else said anything to you to have you waive your
10 right to a trial by jury against your will?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you waiving your right to a trial
13 by jury voluntarily?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Of your own free will and choice?

16 THE DEFENDANT: Yes, I am.

17 THE COURT: Finally, for your waiver to be
18 acceptable, you must sign here in court a writing expressly
19 stating that you waive your right to a trial by jury. The
20 text of that writing reads as follows. I, the defendant in
21 this case, having been indicted -- give me one moment.
22 Having been indicted for the crimes of murder in the second
23 degree and criminal possession of a weapon in the second
24 degree as specified in the above-numbered indictment, and
25 having been informed of my right to be tried under that

Proceedings

1 indictment by a jury of 12 persons, hereby in open court
2 waive my right to trial by jury as guaranteed by the
3 Constitution of the United States, the Constitution of the
4 State of New York and the New York Criminal Procedure Law,
5 and request that I be tried by the Court without a jury.
6 Do you understand what I just read to you?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: If you still wish to go forward with
9 the waiver of your right to a trial by jury, please now
10 sign the form in the presence of your counsel and the
11 Court. Counsel must sign as a witness.

12 Thank you, officer. The record should reflect I
13 witnessed the defendant signing the form as well as his
14 counsel, but let me confirm. Is this your signature,
15 Mr. Thayer?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: By signing here, are you telling the
18 Court you read this, you understand it, and this is your
19 request to the Court?

20 THE DEFENDANT: Yes, it is.

21 THE COURT: Is that correct, Mr. Gottlieb?

22 MR. GOTTLIEB: Yes, Your Honor.

23 THE COURT: The form having been signed and
24 witnessed here in open court and the Court being satisfied
25 that the defendant is intelligently, knowingly and

Proceedings

1 voluntarily entering upon that waiver, the waiver of a
2 trial by jury is accepted. The defendant will be tried by
3 a single judge. The Court is accordingly signing the
4 waiver form as so ordered. That will be marked as Court
5 Exhibit one. Let's go off the record for a moment while we
6 talk about scheduling. Before that, is there anything
7 further for the record, Mr. Nneji?

8 MR. NNEJI: No, Judge. Thank you.

9 THE COURT: Mr. Gottlieb?

10 MR. GOTTLIEB: No, Your Honor.

11 THE COURT: Associates?

12 MR. TOWNSEND: No, Your Honor.

13 THE COURT: Mr. Townsend.

14 MR. TOWNSEND: No, Your Honor.

15 (A discussion is held off the record.)

16 * * * *

17 Certified to be a true and accurate transcript of
18 the stenographic minutes taken within.

19
20
21 VANESSA MOORE
22 Senior Court Reporter
23
24
25

Exhibit I

(provided separately on
USB flash drive)

Exhibit J

(provided separately on
USB flash drive)

Exhibit K

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

GREGORY THAYER,

Defendant.

X
:
:
:
:
:
:
:
:
:
:
X

AMENDED
NOTICE TO
PRESENT
PSYCHIATRIC
EVIDENCE

Ind. No.
70188-21

PLEASE TAKE NOTICE THAT pursuant to PL § 40.15, the Defendant in the above captioned case intends to offer at trial evidence of mental disease or defect in connection with the affirmative defense of lack of criminal responsibility by reason of such mental disease or defect as set forth in § 250.10(1)(a) of the Criminal Procedure Law as well as evidence of lack capacity to form criminal intent under § 250.10(1)(c). Further, the defendant intends to offer evidence of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25 of the Penal Law pursuant to CPL section 251.10(1)(b). Specifically, as noted in the report produced by Dr. Eric Goldsmith, the combination of alcohol and intranasal alprazolam caused Mr. Thayer to become unable to appreciate the character and nature of his actions or to appreciate that his actions were wrong as well as prevented him from being capable of forming the necessary criminal intent to commit the crimes charged. This amended notice is being filed as a result of the evidence which has been elicited during the trial in this matter.

DATED: New York, New York
May 2, 2023

ROBERT C. GOTTLIEB
& ASSOCIATES PLLC

/s/ Robert C. Gottlieb
By: Robert C. Gottlieb
rgottlieb@robertcgotliebllaw.com

111 Broadway, Suite 701
New York, NY 10006
T: (212) 566-7766

Attorneys for Defendant
GREGORY THAYER

Exhibit L

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Elizabeth Culmone-Mills promoted to top role at Ulster County Districts Attorney's office, replaces departing ADA



Elizabeth Culmone-Mills (Patricia R. Doxsey/Daily Freeman, file)

By **PATRICIA R. DOXSEY** |

pdoxsey@freemanonline.com | Daily Freeman

PUBLISHED: May 12, 2022 at 4:33 p.m. | UPDATED: May 12, 2022 at 4:56 p.m.

KINGSTON, N.Y. — Senior Assistant District Attorney Elizabeth Culmone-Mills is slated to assume one of the top three management roles in the Ulster County District Attorney's Office.

She will replace William Ghee, who is returning to the Orange County District Attorney's Office.

District Attorney David Clegg said Ghee will leave the office next week. He called Ghee's decision to return to the Orange County District Attorney's Office a "personal one."

"He's a good guy, he's a good friend," said Clegg. "We wish him well."

A 16-year veteran assistant district attorney in the Ulster County District Attorney's Office, Culmone-Mills currently heads the department's Special Victims Unit and is the operational director for the Intimate Partners Violence Intervention program.

Clegg said Culmone-Mills will remain in charge of the Special Victims Unit. He said Assistant District Attorney Sajaa Ahmed will replace Culmone-Mills in the Intimate Partners Violence Intervention program.

Culmone-Mills will join Clegg and Chief Assistant District Attorney Emmanuel Nneji in running the District Attorney's Office.



Patricia R. Doxsey

More discussion on [Dailyfreeman.com](https://www.dailyfreeman.com)



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MAY 14, 2022

Congrats to Liz Culmone-Mills. An excellent career prosecutor dedicated to victims and doing real justice to this community. Keep the faith. Public confidence in the system will return through hard work and integrity.

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