

To be argued by:
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(15 minutes requested)

NEW YORK SUPREME COURT
APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

- against -

GREGORY THAYER,

Defendant-Respondent.

**Appellate
Case No.
CR-25-116**

BRIEF FOR DEFENDANT-RESPONDENT

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INTRODUCTION

After holding an evidentiary hearing and crediting Respondent Gregory Thayer's witnesses, the court below granted Thayer's CPL § 440.10 motion and vacated his criminal conviction for manslaughter and gun possession. This Court should affirm that order. It should do so, first, because the order was premised upon two independent grounds, but the People have appealed only one of them. And second, *both* grounds for the order are plainly correct.

Mr. Thayer was convicted by an Ulster County Supreme Court Justice after waiving his absolute right to a jury trial, but this waiver, as the court below correctly found, was invalid. It was invalid, first, because Thayer's jury-trial waiver was not knowing or intelligent. This was because one of Thayer's lawyers deprived him of essential information, known only to that lawyer, indicating that the judge set to try his case, or at least the judge's law clerk, was biased against Thayer's defense. Thayer's waiver was invalid, second, because the lawyer's omission deprived Thayer of his constitutional right to the effective assistance of counsel.

In this appeal, the People directly challenge *only* the ineffectiveness ruling. Since the *unchallenged* jury-waiver ruling fully and independently supports the court's grant of relief, the People's appeal must be summarily denied.

The People's appeal also completely fails on the merits. The District Attorney contends that Thayer and four attorneys he called as witnesses lied at the 440

hearing. The District Attorney of Ulster County sees an elaborate conspiracy to build reversible error into the case and thinks the highly experienced Supreme Court Justice who decided this motion was duped. This is utter, fantastic nonsense. Contemporaneous records corroborated these witnesses' testimony. The District Attorney had every chance to cross-examine these witnesses, did so feebly, and then elected to present no evidence of his own. He points to nothing that would entitle this Court, on a cold record, to overturn the credibility determinations of the judge who personally observed these witnesses testifying.

The District Attorney contends that, because he is blameless for the defects in the jury trial waiver, he should not be burdened with having to retry this case. But his lack of fault is irrelevant. Whenever a conviction is vacated for reasons not attributable to the prosecution—such as ineffective assistance, judicial error, jury misconduct, or newly discovered evidence not known to the prosecutor—a new trial must be held. It is elementary that a prosecutor's blamelessness, and the burden of mounting a second prosecution, do not outweigh the imperative to correct the deprivation of fundamental constitutional rights.

That is certainly true when the right denied the defendant is as basic as the guarantee of a jury trial. The right to a jury trial is “fundamental to the American scheme of justice.” *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). Courts must “scrupulous[ly]” ensure

that any waiver of this right is knowing, intelligent, and voluntary. *People v. Page*, 88 N.Y.2d 1, 10 (1996). This means that, at the very least, the accused must personally possess all information material to his waiver decision. That did not happen here.

Thayer's prosecution arose in Ulster County after his bizarre fatal shooting, for no apparent reason, of his best and life-long friend. He retained a New York City law firm, led by Robert Gottlieb, as well as local counsel, Andrew Kossover of New Paltz, to defend him. As trial approached, Gottlieb announced that he intended to present a complete defense to the murder charge of temporary insanity. He submitted to the court (the Honorable Bryan Rounds) a supportive report of a forensic psychiatrist. Judge Rounds's law clerk, William Ghee, then asked local counsel Kossover for a meeting. The two men held it, clandestinely and *ex parte*, in a deserted courtroom.

At this meeting, law clerk Ghee indicated that he and Judge Rounds were skeptical of the temporary insanity defense. Ghee suggested that Thayer might be better off with a jury that could consider a lesser conviction of manslaughter based upon the partial defense of extreme emotional disturbance. Kossover, understanding that the law clerk did not want him to disclose the meeting to anyone, including principal defense counsel Gottlieb and their mutual client, kept the meeting secret.

Ignorant of Ghee's and Judge Rounds's apparent skepticism of his defense, Thayer then formally waived his right to a jury and proceeded to trial before a judge who was predisposed to convict him—and that is what happened. Judge Rounds, while acquitting Thayer of murder, convicted him of first-degree manslaughter based upon extreme emotional disturbance, the very verdict that law clerk Ghee had signaled before the trial. When local counsel Kossover, after the verdict, finally revealed the *ex parte* meeting, Thayer moved for a new trial. Judge Rounds recused himself and a hearing was ordered by a veteran Supreme Court Justice based in Albany, Roger McDonough.

At that hearing, Thayer, Kossover, Gottlieb, and two colleagues from Gottlieb's law firm all testified to the above events. Contemporaneous emails, phone records, and memoranda fully corroborated their testimony, which was not impeached in any way. Kossover's testimony was especially credible because he admitted unethical behavior that could very well result in bar sanctions (a complaint is currently pending). Although the District Attorney had interviewed Judge Rounds and Ghee before the hearing, he called neither to testify. Indeed, he presented no case at all. Judge McDonough then did what the evidence obviously required: he credited the defense case and, in a thorough written decision, granted Thayer's motion. As noted above, he did so on two independent grounds, but the People now challenge only one of them, which is fatal to their appeal.

Which brings us to the second issue the People raise in their extraordinary appeal: what charges may be retried? The answer is simple. Thayer may not be retried for murder: he was acquitted of that charge and double jeopardy protections preclude a second trial. Under *People v. Mayo*, 48 N.Y.2d 245 (1979), there may not be a trial for manslaughter because Thayer is not indicted for manslaughter. He may be tried only on the sole remaining indictment count: the gun charge.

COUNTERSTATEMENT OF RELEVANT FACTS

Appellant’s “Factual Background” section misstates the evidence, ignores large swathes of relevant testimony, fails to mention the lower court’s independent ruling that Thayer’s jury-trial waiver was not knowing, and contains *no record citations*, in violation of 22 NYCRR §§ 850.5(3), 1250.6, and 1250.8(b)(4), and CPLR § 5528. This is another reason to summarily deny the appeal. Below, Mr. Thayer accurately presents the relevant facts with the requisite record citations.¹

A. Gregory Thayer is charged with murdering his close childhood friend, and a forensic psychiatrist concludes that Thayer unknowingly shot his friend during an episode of substance-induced psychosis.

On September 28, 2021, Gregory Thayer and his close childhood friend, Bruce Swierc, spent time together at the Kingston, New York, home of Thayer’s

¹ References to the 440 hearing transcript cite the record on appeal, prefixed “R.”, followed by the transcript’s original pagination in parentheses, prefixed “H.” References to the trial transcript—which was received in evidence at the 440 hearing in electronic form and has been filed on a thumb drive as part of the record on appeal, *see* R.657—are prefixed with the date of the trial proceeding and “T.”

mother. 4/24/23 T.48-49; 5/3/23 T.98. At 11:49 p.m., Swierc texted another friend that he was telling “[d]runk stories” and “talking shit with Greg.” 5/1/23 T.63-64.

Fifteen minutes later—at 12:04 a.m. on September 29—Thayer called his sister, Stephanie Thayer, saying he had shot and killed an intruder. 4/28/23 T.89-90; 5/1/23 T.64; 5/3/23 T.105. Stephanie and responding officers heard Thayer say he had shot an unknown intruder who “threatened to kill him.” 4/25/23 T.110; *see* 4/24/23 T.95-96, 132; 4/25/23 T.103, 108-09, 139, 141; 4/28/23 T.102. Officers observed on the kitchen table a vodka bottle and lines of white powder that was later determined to be alprazolam, or Xanax. 4/25/23 T.112; 4/26/23 T.17-18. Thayer was taken to a police station, where police eventually told him the person that he had killed was Swierc.

On or about September 30, 2021, an Ulster County grand jury indicted Thayer on one count of murder in the second degree and one count of criminal possession of a weapon in the second degree. R.4-5.

In October 2021, Thayer retained New York City–based attorney Robert Gottlieb and his law firm colleagues Paul Townsend and Kaylee Kreitenberg (collectively, the “Gottlieb Attorneys”). R.336, 338-39 (H.22, 24-25). On Gottlieb’s recommendation, Thayer also retained Andrew Kossover as local counsel. R.437 (H.123); *see* R.339, 473, 479 (H.25, 159, 165). Thayer’s interactions with

Kossover were “very limited,” R.624 (H.310), and lead attorney Gottlieb made all final decisions regarding defense strategy, R.479-80 (H.165-66).

Gottlieb enlisted a board-certified forensic psychiatrist, Dr. Eric Goldsmith, to examine Thayer. R.342 (H.28). In November 2021, pursuant to CPL § 250.10(2), Gottlieb filed a notice of intention to pursue “the affirmative defense of lack of criminal responsibility by reason of ... mental disease or defect.” R.676; *see* R.340-41 (H.26-27). This defense requires proof that the accused “lacked substantial capacity to know or appreciate either ... [t]he nature and consequences of [his] conduct” or “[t]hat such conduct was wrong.” Penal Law § 40.15. It is a “complete defense” to murder. *People v. Lancaster*, 69 N.Y.2d 20, 28 (1986).

By contrast, the defense of “extreme emotional disturbance” (“EED”) requires proving “a mental infirmity not rising to the level of insanity ... , typically manifested by a loss of self-control.” *People v. Israel*, 26 N.Y.3d 236, 239 n.* (2015) (internal quotation marks omitted). EED is not a complete defense but rather reduces a murder count to manslaughter in the first degree. *Id.*

On August 2, 2022, Dr. Goldsmith, after reviewing relevant records and interviewing Thayer and people who knew him, issued a detailed report. R.678-79. Dr. Goldsmith noted Thayer’s family and personal history of alcoholism. R.680, 682-84. He documented Thayer’s “fear of being victimized in a home invasion,” which stemmed from incidents in which patients of his mother, a psychiatric nurse,

had broken into her home. R.681. He noted Thayer's statements that Thayer had consumed multiple alcoholic drinks before and after Swierc arrived at his mother's house the night of the shooting, R.685; that Thayer's memories of the moments surrounding the shooting were "fragmented," R.686; and that Thayer was in "disbelief" and "horrificed" about having killed Swierc, R.688.

Dr. Goldsmith wrote that Thayer "likely ingested alprazolam" after consuming alcohol and that such a mixture "creates synergistic toxic effects on the brain." R.689. Dr. Goldsmith opined, "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" and that, "[b]ecause of his mental defect, Gregory Thayer lacked substantial capacity to know or appreciate that what he had done was wrong." R.690. Appellant's assertion that there were "no maladies identified" in this report, App. Br. 18, is thus incorrect.

On August 18, 2022, Gottlieb filed a second CPL § 250.10 notice. R.677-90; *see* R.342-43 (H.28-29). This notice again indicated Thayer's intention to pursue a "mental disease or defect" defense but now referenced Dr. Goldsmith's findings and appended his report. R.677-90. Neither of the defense CPL § 250.10 notices mentioned EED, and Dr. Goldsmith's report did not contain any indication that Thayer had merely lost self-control as the EED defense requires. R.345 (H.31).

B. Although a “close call,” Gottlieb advises Thayer to waive his right to a jury and informs the court that Thayer intends to do so.

Gottlieb testified at the 440 hearing that it was “difficult ... to decide whether or not to waive a jury” and a “close call.” R.352-54 (H.38-40); *see* R. 441 (H.127). Ultimately, in January 2023, Gottlieb advised Thayer to opt for bench trial before Judge Rounds. R.354, 451 (H.40, 137); *see* R.618-20 (H.304-06). In Gottlieb’s experience, the “mental disease” defense is “a very difficult concept for jurors to embrace”; he believed a judge might be better able to apply the law to complex psychiatric evidence. R.353 (H.39); *see* R.443-44, 625-26 (H.129-30, 311-12). The results of a pretrial focus group were “a factor” in the decision, though “[n]ot the biggest factor.” R.441 (H.127).

Thayer similarly testified at the 440 hearing that Gottlieb advised him to waive a jury because it would be “an emotionally charged case” with “a lot of technical issues” regarding the “medical and clinical” evidence, and Gottlieb believed Judge Rounds would be more “objective and less emotional” than a jury. R.625-26 (H.311-12).

Kossover testified that, due to his limited role, he was not present for any conversations with Thayer about whether he should waive a jury. R.480 (H.166).

On January 20, 2023, ten days before the trial date, Gottlieb wrote to the court that Thayer “intend[ed] to waive a jury.” R.691. Thayer did not then enter his waiver, however, because the trial was delayed until April. R.352 (H.38). This was

because, on the eve of trial, the prosecution still had not complied with the requirement that it produce its own expert's report. *See* R.696-709.

C. The trial judge's law clerk summons Mr. Kossover to an *ex parte* meeting and voices doubts about Thayer's psychiatric defense.

Kossover testified at the 440 hearing that in February 2023, a colleague told him that Judge Rounds's chambers wished to speak with him. R.510 (H.196); *see* R.486, 508-10 (H.172, 194-96). Having received this request "without any notification to the People," Kossover assumed he was being summoned to discuss something unrelated to any pending case, perhaps an administrative matter. R.487 (H.173).

Kossover had known Judge Rounds "for many years" and had been his superior in the public defender's office. R.534 (H.220). Kossover had known the judge's law clerk, William Ghee, for approximately two years, starting when Ghee was a prosecutor in Ulster and Orange Counties. R.483-85 (H.169-71). When the Thayer prosecution began in September 2021, Ghee was still an Ulster County prosecutor—in the same office prosecuting Thayer. R.485 (H.171). Kossover did not recall telling the Gottlieb Attorneys or Thayer that Ghee had previously worked for the D.A.'s Office, *id.*, and the Gottlieb Attorneys and Thayer testified they did not learn this until after Thayer's conviction, R.367, 588, 622 (H.53, 274, 308).

On February 21, 2023, Kossover went to chambers as requested. R.487 (H.173). He and Ghee then went to the courthouse's ceremonial courtroom, where

they spoke privately. R.487-88, 506, 528 (H.173-74, 192, 214). Ghee told him, “we have read the expert report ... and we don’t see the defense of extreme emotional disturbance.” R.488-89 (H.174-75) (emphasis added). Kossover understood Ghee to be implying “that if [the defense team] wanted to present a defense of extreme emotional disturbance, [it] needed to develop more evidence or [a] further report.” R.567 (H.253).

After this remark about EED, Ghee “went on to say, you may, you know, wish to consider going to a jury not a bench trial.” R.489 (H.175).

Kossover understood that Ghee’s use of the word “we” meant that Ghee was speaking for both himself and Judge Rounds. R.564, 567 (H.250, 253). Kossover understood Ghee to be representing that, based upon the forensic psychiatrist’s report, Judge Rounds “was pre-disposed not to find EED.” R.552 (H.238).

Kossover understood that Ghee did not want him to inform Gottlieb or Thayer of the meeting. In Kossover’s words, Ghee made it “very clear that he was directing or insisting that it was a completely confidential meeting.” R.489 (H.175). When Kossover “expressly asked if [he] c[ould] share this with Mr. Gottlieb,” Ghee “said no.” *Id.*

Kossover’s 440 hearing testimony about the *ex parte* meeting was uncontradicted. Neither Ghee nor Judge Rounds were called as witnesses.

The People write of a “patently self-serving” affirmation by Ghee in which Ghee supposedly asserted that the meeting “pertained only to scheduling and ministerial matters.” App. Br. 21. This is inaccurate. In the affirmation, which *the prosecution itself obtained and submitted* in opposition to Thayer’s post-conviction motion, *see* R.201-02—Ghee *corroborated* Kossover’s testimony that the *ex parte* meeting occurred, R.202 ¶¶ 12-19; *corroborated* that he told Kossover that the defense expert’s report lacked evidence of EED; and *corroborated* that he had suggested that the psychiatric defense “might be a good sell to a jury” instead of to Judge Rounds at a bench trial, *id.* ¶ 16. Ghee also confirmed that he worked at the Ulster County D.A.’s Office from April 2020 to April 2022, R.201 ¶ 4—that is, for the first seven months of Thayer’s prosecution.

The prosecution implicitly conceded these allegations by submitting Ghee’s affirmation in response to Thayer’s post-conviction motion. *See People v. Gruden*, 42 N.Y.2d 214, 216 (1977) (noting that “[n]ormally what is not disputed is deemed to be conceded,” including in the briefing of “motions to vacate a judgment” (citing CPL § 440.30(3)(c))). Further, as pointed out above, the prosecution never submitted to the hearing court any contrary evidence.

D. Concealing the *ex parte* meeting, Kossover presents Ghee’s and Judge Rounds’s reservations to Gottlieb as his own “thoughts and concerns.”

Kossover testified at the 440 hearing that he found the *ex parte* encounter with Ghee “shocking and bewildering,” and “stunn[ing].” R.489-90 (H.175-76).

Kossover “felt caught between a judge’s law clerk ... telling [him] not to reveal this conversation and [his] loyalty to the defense team and [his] client.” R.492 (H.178). He felt he “was balancing loyalties” to Judge Rounds on the one hand and his client on the other. R.535 (H.221). He “deliberated ... what to do.” R.490 (H.176). Ultimately, on February 28, 2023, Kossover sent Gottlieb an email that, at that time, he saw as a “compromise solution to convey the essence[] of Mr. Ghee’s concerns ... without providing the source”—although he came to “regret that decision.” R.492 (H.178); *see* R.357-59 (H.43-45).

In this email, Kossover wrote that he had “been reflecting” on the case and “wish[ed] to share some thoughts and concerns.” R. 981. He observed, accurately, that Dr. Goldsmith’s report “primarily address[ed] Gregory’s lack of capacity to know right from wrong ... RATHER than setting forth Extreme Emotional Disturbance.” *Id.* Kossover later testified that he intended with these remarks to convey what Ghee had suggested to him—that the defense should “bolster” its evidence of EED—but without revealing Ghee as the source. R.568-69 (H.254-55).

In the February 28, 2023, email, Kossover also asked, “should we revisit our decision to go non-jury?” and “are we better off taking our chances with a jury?” R.982. He wrote this “as a result of [his] meeting with Mr. Ghee,” “because Mr. Ghee expressed to [him] an indication that the defense might be better off not waiving a jury.” R.493 (H.179).

In response to this email, the Gottlieb Attorneys, as a “courtesy,” held a conference call with Kossover. R.361, 587, 633 (H.47, 273, 319). Emails arranging this call were received in evidence at the 440 hearing. *See* R.985-86. During the call, Gottlieb explained “why [they] were never pursuing EED”: because “the same evidence that could possibly support EED would also support [the] not responsible [by reason of] mental disease or defect defense, [and] would also support justification”—both complete defenses, whereas EED was not. R.361-62 (H.47-48); *see* R.494 (H.180). Gottlieb also “did not change his view” about waiving a jury. R.494 (H.180).

The Gottlieb Attorneys and Kossover all testified that, during this conference call, Kossover did not reveal that his “thoughts and concerns” had come from Ghee or indeed that he had met with Ghee at all. R.363, 493, 587-88, 633 (H.49, 179, 273-74, 319). Gottlieb testified that, had Kossover revealed the *ex parte* meeting, it “[g]oes without saying” that Gottlieb’s decision to reject Kossover’s comments and “to persist with waiving a jury” would have been different. R.454-55 (H.140-41).

E. Ignorant of the *ex parte* meeting, Thayer waives a jury and proceeds to a bench trial before Judge Rounds.

Because the Thayer family had decided not to pay local counsel Kossover to attend trial, on March 24, 2023, Kossover requested to withdraw. *See* R.429-30, 468-69, 482-83 (H.115-16, 154-55, 168-69); R.658 (Hr’g Exhibit 3). This

application was granted, and Kossover did not work on the case further. R.364-65, 482-83 (H.50-51, 168-69). Because his role was so limited, he had been paid just \$7,500 over approximately 15 months. R.480 (H.166).

On April 14, 2023, Thayer formally waived his right to a jury. *See* R.991-97. Kossover, having withdrawn, was not present. *See* R.617 (H.303); R.780-88 (Hr’g Exhibit H). Thayer and the Gottlieb Attorneys still knew nothing about the *ex parte* meeting. R.367, 576-77, 588-89, 619-20 (H.53, 262-63, 274-75, 305-06).

Before trial, the defense never gave any indication that it would pursue an EED defense; the prosecution explicitly conceded this at the hearing and concedes this in its brief now. *See* R.367-69 (H.53-55); App. Br. 3. At the 440 hearing, the Gottlieb Attorneys testified that, in fact, they had no intention of asserting an EED defense. R.589, 635 (H.275, 321).

At trial, Brian and Victoria Lowe, next-door neighbors of Thayer’s mother, testified that, early on September 29, 2021, in response to a call from Thayer’s sister, Stephanie, Victoria went to the Thayer home and “saw somebody slumped on the table” in the kitchen. 4/25/23 T.98; *see* 4/24/23 T.85-86, 130; 4/25/23 T.96. Thayer, standing at the kitchen sink, 4/25/23 T.99, appeared to be “in a state of shock,” “look[ing] blankly,” *id.* at 137. Victoria led Thayer to the back patio, *id.* at 103-06, where Thayer “made repeated comments that there was an intruder in his home, that he came home and found some dude in the house” and “shot and killed

him,” *id.* at 108-09. Victoria overheard Thayer tell Stephanie on the phone, “I’m just going to have to do my time. I just killed a guy.” *Id.* at 110. Thayer “stated that the person in his home had threatened to kill him and that’s why he shot him.” *Id.* Thayer told Victoria “many times while [they] were outside there [on the patio] that he didn’t know who this person was who he shot.” *Id.* at 141. Thayer also told Victoria that “his friend Bruce had been at the house earlier.” *Id.*

Brian Lowe, who was a Kingston police officer, soon arrived and also heard Thayer say he had shot an “intruder” who “broke in the house,” and “I don’t even know who the fuck that dude is.” 4/24/23 T.95-96, 132.

The Lowes both testified—unrebutted—about Thayer’s good character and reputation. *See id.* at 126-27 (Thayer was “a very nice guy,” “soft-spoken,” “gentle,” someone about whom Brian “never had any questions about his character, his good character”); 4/25/23 T.121 (Thayer was “very kind,” “compassionate,” and “caring”; Victoria “would never in a million years have thought Greg to be capable of murder”).

Thayer’s sister, Stephanie, a longtime manager at the New York City Department of Parks & Recreation, 5/3/23 T.73-74, testified that in recent years her brother would drink excessively and had become “fearful and hypervigilant,” *id.* at

77-80. He had seen a doctor who specialized in substance abuse. *Id.* at 86. Medical records from this treatment were introduced in evidence. 5/2/23 T.142.²

Stephanie testified that she got a call from Thayer at 12:04 a.m. on September 29, which telephone records in evidence corroborated. 5/3/23 T.105; *see* 4/28/23 T.89-90; 5/1/23 T.64. Thayer told her, “I shot a man inside the house, he was going to kill me.” 5/3/23 T.105. She asked whom he had shot, and Thayer said, “I don’t know, a stranger.” *Id.* She thought he was joking and asked him to put on Swierc, whom Stephanie knew was visiting; Thayer responded, “He’s not here. He went home.” *Id.* at 106-07.

Police officers recovered at the scene a half-consumed 1.75-liter vodka bottle (which Appellant’s brief doesn’t mention) from the table where Swierc’s body was found, 11 empty beer bottles, and an empty alcoholic iced tea can. 4/28/23 T.57, 69, 73-74. One officer testified that he encountered Thayer “surrounded by beer bottles,” and that Thayer appeared to be “impaired by alcohol” and gave off a

² Contrary to Appellant’s claim that Stephanie, submitting a document in support of Thayer’s gun permit, had “certified that defendant did not have mental illness *or alcohol and substance abuse*,” App. Br. 12 (emphasis added), Stephanie in that form denied only that Thayer had engaged in “illegal activity” or “been *treated* for mental illness,” 4/24/23 T.133, 137 (emphasis added).

“strong odor of an alcoholic beverage.” *Id.* at 112, 114.³ The officer heard Thayer say, “I just shot someone in the kitchen. I don’t know who it is.” *Id.* at 102.

Photographs of the kitchen showed Swierc’s body slumped in a chair and, on the kitchen table, the half-consumed vodka bottle and three lines of white powder. R.158 (Mtn. Exhibit I/Trial Exhibits A20-A22). Police witnesses testified, and the photographs corroborate, that one line was more pronounced than the other two, 4/26/23 T.93; 5/1/23 T.44—suggesting two lines had been snorted. Testing revealed the powder to be alprazolam, or Xanax. 4/26/23 T.18; 5/2/23 T.57. While Swierc had a prescription for Xanax, none was found in his blood after his death. 4/24/23 T.60, 64; 4/25/23 T.32; 4/28/23 T.95. This suggested that *Thayer* must have snorted the Xanax. The police obtained a search warrant to collect Thayer’s blood but, inexplicably, they never did, thereby depriving the defense of potential biological evidence showing alcohol or Xanax in Thayer’s blood. 4/26/23 T.128-29, 134-35.

Appellant asserts, with no citation or explanation, that “the scene and victim’s body appeared to have been tampered with.” App. Br. 7. Not only did no evidence show this, but the assigned detective testified that he investigated whether

³ Appellant claims some of the beer bottles had “weather impact indicating that they had been there” before the night of the shooting, App. Br. 8, but cites no record support for this assertion. There is none. Similarly, Appellant asserts that “video and audio recordings” show Thayer not to be “noticeably under the influence,” but cites no such recordings. App. Br. 10.

“the scene was staged” and “rejected” that theory, which Appellant ignores. 5/1/23 T.34-35. There also is no support for Appellant’s claim, lacking any record citation, that Swierc was found with “reflux of liquid mixed with white powder on [his] thigh ... consistent with the color of the crushed Xanax.” App. Br. 6.⁴

Evidence was introduced that Swierc died from a gunshot to the head, 4/25/23 T.23, and that his body showed no defensive wounds or injuries, meaning there was “no evidence of an altercation,” *id.* at 70-71; *see* 4/26/23 T.71.

Officers testified that they transported Thayer to a police interrogation room. 4/26/23 T.10. Video footage of the 13 hours Thayer spent in this room shows him repeatedly expressing confusion about what happened and whom he had shot. *See, e.g.,* R.159 (Mtn. Exhibit J/Tr. Exhibit E11), 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 video, an officer tells Thayer he is being charged with murder for shooting his “best friend, Bruce”; Thayer asks for water and then for a garbage can, saying he “might be sick,” and then retches into the can. R.159, Video “ch01_20210929150216.mp4,” at 15:35:55-15:45:00.

⁴ There are photographs that appear to show dried liquid, but it is impossible to tell where the liquid came from or its composition. These photographs are not in the appellate record.

F. After the prosecution rests, Judge Rounds indicates that he will self-charge EED if the defense does not request it, prompting defense counsel for the first time to request an EED charge.

The prosecution rested its case in chief on May 1, 2023. 5/1/23 T.69. The Gottlieb Attorneys testified at the 440 hearing, un rebutted, that the court then held an off-the-record pre-charge conference at which Judge Rounds asked if the defense was going to ask for an EED charge; when Gottlieb said no, the judge explained that he and Ghee believed the court must self-charge EED, and the defense therefore should decide if it wished to request the charge. R.369-71, 589-90, 634 (H.55-57, 275-76, 320).

The court's and DA Nneji's on-the-record remarks the next day corroborate this account. DA Nneji said, "yesterday ... at the end of court," there was "a discussion about extreme emotional disturbance being raised." 5/2/23 T.7. Judge Rounds agreed that "EED was raised at the end of court last night and I instructed them that if they wanted the Court to consider it, to file an amended notice." *Id.* at 15. He said he had "done the case law research on this issue" because, he claimed, he "could see it coming a mile away." *Id.* Appellant's brief falsely asserts that the trial court did not raise the EED issue "in the People's presence." App. Br. 16.

Although the Gottlieb Attorneys still firmly believed the trial evidence supported the full defense of temporary mental defect, not a manslaughter verdict, they decided to accede to the court's pointed suggestion to request a manslaughter

charge based on EED. Counsel were concerned that, if they did not, the judge would find Thayer guilty of second-degree murder after the defense “had rejected the opening to have him consider extreme emotional disturbance.” R.372 (H.58); *see* R.371-73, 590, 611, 634-35 (H.57-59, 276, 297, 320-21). Thus, on May 2, the defense filed an amended CPL § 250.10 notice adding the EED defense. *See* R.789.

The defense presented testimony by Dr. Goldsmith that was consistent with his August 2022 report, *see* pp. 7-8, *supra*: Thayer shot Bruce Swierc while suffering from a psychotic delusion. Dr. Goldsmith testified that Xanax, if snorted, “will enter the bloodstream extremely quickly,” and combining it with alcohol will very quickly cause “extreme toxic effects on the brain,” including “extreme confusion, delirium, memory deficits and psychosis.” 5/2/23 T.106-08. The defense presented similar testimony about the effects of combining alcohol and Xanax by Dr. Jimmie Valentine, a board-certified physician with no knowledge of the facts of Thayer’s case. *See id.* at 48-50, 59-68, 73.

Dr. Goldsmith opined that Thayer “was suffering from an alcohol and alprazolam induced psychotic disorder when he killed Bruce Swierc,” *id.* at 174, and was “under the delusional belief that an intruder was in the home and placing his life in danger,” and therefore “he lacked capacity, substantial capacity to appreciate, to know or appreciate that what he had done was wrong,” *id.* at 177-78. Dr. Valentine agreed that drinking alcohol and snorting Xanax could cause a

“psychotic break from reality,” such that a person would “not understand that certain actions that they take are wrong.” *Id.* at 68.

Dr. Goldsmith also testified that he had conducted at least “a thousand” forensic evaluations in his career, *id.* at 93, and had concluded that “probably 60 to 75 percent” of defendants had *not* “me[t] the criteria for the insanity defense,” *id.* at 102, but here he concluded that Thayer “honestly believed that there was an intruder in the house,” and there was “no evidence that Gregory Thayer was malingering this delusional belief,” *id.* at 179-80.

While Appellant claims that Thayer was “lucid” and his “mental faculties were clearly intact” when the shooting occurred, App. Br. 8, Appellant omits the extensive testimony about Thayer’s contemporaneous statements that he shot an unknown “intruder” and the unrebutted expert evidence that Thayer had a mental break. Appellant argues that Thayer was “lucid” enough to “invoke his right to counsel” at the police station, *id.*, but omits that this occurred at 2:23 a.m., more than two hours after the shooting, *see* 5/1/23 T.85-86.

The prosecution presented no rebuttal case. Presumably the prosecution did not call the expert it had retained because, after examining Thayer, this expert had written in his report that Thayer “was not attempting to feign memory problems” or “to magnify or minimize mental health problems.” R.134. Indeed, the expert did

not dispute Dr. Goldsmith's conclusion that Thayer had suffered a mental break but simply wrote that he was "unable to give an opinion" on this issue. R.138.

G. The trial court, without explanation, finds EED and convicts Thayer of manslaughter.

In his summation, Gottlieb cited "strong compelling circumstantial evidence" that Thayer had snorted Xanax before shooting Swierc. 5/8/23 T.46. First, the evidence suggested that two lines of Xanax were snorted, but Swierc had no Xanax in his blood, so Thayer must have snorted it. *Id.* at 46-50. Second, Thayer's out-of-character actions and fragmented mental state were consistent with the substance-induced psychosis described in the unrebutted expert testimony. *Id.* at 51-52. Third, the court should draw the adverse inference that, if the police detectives had not failed to draw Thayer's blood despite having a court order authorizing them to do so, the biological evidence would have been favorable to Thayer's psychiatric defense. *Id.* at 60. The court instructed itself that it could draw adverse inferences based on both the prosecution's failure to call a rebuttal expert and the police's failure to draw Thayer's blood. *Id.* at 16. Appellant is thus incorrect in asserting that "[t]here was no evidence that the defendant ingested Xanax." App. Br. 10.

Gottlieb argued that the court should either render a verdict of not responsible due to mental disease or defect or acquit Thayer based on justification. 5/8/23 at T.72, 74-75. He argued that the facts did not support a conviction on a lesser-included count. *Id.* at 72-74. He did not ask the court to charge or to find EED. *See*

R.373-74 (H.59-60); R.791-97 (Hr’g Exhibit J). Gottlieb continued to believe that “any evidence that could possibly support EED would support not responsible [by reason of] mental disease or defect, or justification.” R.375 (H.61).

On May 10, during the afternoon of his second day of deliberations, Judge Rounds found Thayer not guilty of murder in the second degree based on a finding of EED, but found him guilty of the lesser-included offense of manslaughter in the first degree and of criminal possession of a weapon in the second degree. 5/10/23 T.144-45. He never explained why he rejected a finding that Thayer had suffered a psychotic break from reality but still found, without any evidence of a non-delusional loss of control, that Thayer shot his own lifelong friend due to EED. R.375, 635 (H.61, 321).

H. Perplexed by the court’s EED verdict, Gottlieb contacts Kossover, who finally reveals the occurrence and substance of the *ex parte* meeting.

The Gottlieb Attorneys were shocked by the verdict and continuously discussed it for two days after the trial. R.375-76, 590-91, 635-36 (H.61-62, 276-77, 321-22). On the initiative of Ms. Kreitenberg, they revisited Kossover’s February 28, 2023, email; because of its “out of the blue” discussion of EED, they suspected Kossover might know something about the perplexing EED verdict. R.591 (H.277); *see* R.376-77, 463-64, 591, 607-09, 635-36 (H.62-63, 149-50, 277, 293-95, 321-22). Corroborating this testimony are Kreitenberg’s May 12, 2023, email to Gottlieb forwarding Kossover’s February 28 email with the note, “He [i.e.,

Kossover] sent us the email on February 28th,” R.798, as well as a memorandum by Mr. Townsend, dated May 11, 2023, expressing surprise about the verdict and noting that Kossover had raised EED “several months ago” while “never mention[ing] where he got the idea for EED from, or why he decided to raise it,” R.669; *see* R.607-13 (H.293-99). The Gottlieb Attorneys’ suspicions that Kossover might know something about the EED verdict thus are not “[i]nexpliable,” as Appellant claims, App. Br. 12, but rather are fully explained and documented.

On May 12, Gottlieb called Kossover and asked “about the conversation [Kossover] had with Judge Rounds about extreme emotional disturbance.” R.381 (H.67). Gottlieb *did not*, in fact, know whether Kossover had previously discussed EED with the judge; his plan was an interrogator’s ruse to extract information by pretending to know about it. R.379-80, 402 (H.65-66, 88). Kossover then revealed that he had been “beckoned” to speak privately with Ghee (not Judge Rounds as Gottlieb had suggested on the call) and conveyed to Gottlieb the substance of Ghee’s remarks, essentially as described at p. 11, *supra*. *See* R.381-83, 495 (H.67-69, 181).

Gottlieb demanded that Kossover repeat these revelations on a conference call with Townsend and Kreitenberg. R.383-84 (H.69-70). Kossover initially called Gottlieb back seeking to avoid the conference call but, on Gottlieb’s insistence, called the Gottlieb firm’s conference line. R.384-85 (H.70-71). Kossover repeated

his revelations. *See* R.592-93, 636-37 (H.278-79, 322-23). This was the first time Kossover ever revealed to any of them the occurrence or substance of the *ex parte* meeting. R.400, 495, 603 (H.86, 181, 289).

The above testimony was fully corroborated by documents in evidence at the 440 hearing. Gottlieb's cell-phone records show his initial, 16-minute outgoing phone call to Kossover at 12:25 p.m., calls with his colleagues and Kossover arranging the conference call, Kossover's incoming call to Gottlieb at 1:46 p.m. seeking to avoid the call, and finally, at 1:49 p.m., an outgoing 33-minute call to the firm's conference line. *See* R.817; R.392-94 (H.78-80). Screenshots of Gottlieb's text messages with Kossover and with the other Gottlieb Attorneys show them coordinating the conference call. *See* R.801-02. Memoranda created contemporaneously by Gottlieb and Townsend corroborate the contents of the call. *See* R.654-56, 667-68.

As documented in Mr. Townsend's memorandum, the Gottlieb Attorneys understood Ghee's *ex parte* remarks, as conveyed by Kossover, to indicate that Judge Rounds and Ghee, before trial, had been predisposed to reject Thayer's complete mental-defect defense and believed "this was likely an Extreme Emotional Disturbance case." R.667. The memorandum noted Kossover's inference from Ghee's remarks that "Judge Rounds did not [want] the political pressure of deciding a high profile trial as the finder of fact." *Id.*

Gottlieb testified at the 440 hearing that, had he known about the *ex parte* meeting before trial, “[t]here is no way [he] would have recommended to Mr. Thayer that he waive a jury.” R.395 (H.81); *see* R.452 (H.138). This is because Kossover’s revelations indicated that Judge Rounds and his law clerk “had concerns about [the defense team’s] most critical, essential witness [i.e., Dr. Goldsmith], who established the mental disease and justification” defense, and also because the judge and his law clerk were “saying it would be better tried in front of a jury.” R.394-95 (H.80-81); *see* R.452 (H.138). Gottlieb further testified that, even if it turned out that Judge Rounds had not asked Ghee to speak to Kossover, Gottlieb still would not have advised Thayer to waive a jury, because Ghee’s statement that “we reviewed Dr. Goldsmith’s report and we have problems” implied that there at least had been “conversations” between Ghee and the judge on these topics, which would have made Gottlieb “very, very uncomfortable.” R.453 (H.139) (emphasis added).

Townsend similarly testified that, had he known about the *ex parte* meeting, there is “absolutely no way [the defense] would have waived a jury,” because Ghee’s remarks “signified” that Judge Rounds had “pre-judged our defense” and that Thayer “should really not be waiving a jury.” R.594-95 (H.280-81).

Gottlieb testified that, separate from any issue concerning EED, Kossover had mentioned “that he *heard that* [Judge R]ounds had made [a statement] about

problems the DA may have disproving justification.” R.402 (H.88) (emphasis added). Gottlieb did not know where, when, or to whom Judge Rounds allegedly had made this statement. R.404, 419-20 (H.90, 105-06). Kossover did not recall whether he knew about such a statement. R.541-42, 558 (H.227-28, 244). Appellant contends that this testimony shows the Gottlieb Attorneys “knew” Judge Rounds “actively initiated and engaged in *ex parte* communications,” App. Br. 13, but there was no evidence that Judge Rounds really said this, let alone that he said it *ex parte* to one of the defense attorneys.

I. Thayer learns about the *ex parte* meeting, retains additional counsel, and files the present post-conviction motion seeking a new trial.

After Kossover’s revelations, Gottlieb approached undersigned counsel to potentially handle a post-conviction motion. R.386 (H.72). Gottlieb and undersigned counsel then met with Thayer at the Ulster County Jail and informed him of Kossover’s revelations. R.620 (H.306). Thayer testified at the 440 hearing that this was the first time he learned this information. *Id.*

Thayer further testified that, had he known about the *ex parte* meeting before trial, he would not have waived his right to a jury. He explained this was because Ghee’s remarks, as conveyed by Kossover, indicated “that the Judge was leaning in a certain direction” and saying that the defense “should go in a different direction” than its intended plan of presenting its psychiatric defense at a bench trial. R.621-22 (H.307-08).

On July 11, 2023, Thayer filed a motion, accompanied by an affirmation from Kossover, seeking a new trial pursuant to CPL §§ 330.30 and 440.10(1)(b), (f), and (h). *See* R. 8. Judge Rounds promptly recused himself, and the case was re-assigned to the Honorable Roger D. McDonough, for all purposes. *See* R.241-42. On August 21, 2023, the prosecution responded to the defense motion. *See* R.171. As noted above, its submission included an affirmation by Ghee that conceded key defense allegations about the *ex parte* meeting. *See* p. 12, *supra*.

On September 15, 2023, Judge McDonough issued a Decision and Order denying Thayer’s CPL § 330.30 claims only, leaving the § 440.10 claims to be litigated after sentencing. R.241-45. On October 25, 2023, the court sentenced Thayer to the maximum sentence of 25 years in prison and entered judgment. R.6. After the parties submitted supplemental briefing, the court ordered a 440 hearing. *See* R.246-308, 312.

J. After the 440 hearing, the court credits all defense witnesses and grants Thayer’s motion on two independent grounds.

The 440 hearing was held on May 7, 2024. The defense called Kossover, Thayer, and the three Gottlieb Attorneys; the prosecution called nobody and introduced nothing. *See* R.648-49 (H.334-35).

On October 1, 2024, the court granted Thayer’s 440 motion. It ordered a new trial “pursuant to CPL § 440.10(1)(h) upon the grounds of: (1) ineffective assistance of counsel attributable to Mr. Kossover; and (2) the established lack of a

knowing and intelligent waiver of [Thayer's] right to jury trial." R.1256. The court did not reach Thayer's other claims. *Id.*⁵

In its findings of fact, the court first noted that "there is no dispute that the meeting occurred and ... that it constituted an improper *ex parte* meeting." R.1257. The court observed that Ghee, in the affirmation submitted by the prosecution, "conceded that he told Kossover that he did not see anything in the expert report that showed an extreme emotion[al] disturbance and remarked that it might be a good sell with a jury." *Id.*⁶

The court found that "[t]he defendant, the trial counsel team and Kossover *all credibly testified* that Kossover never revealed the occurrence of the *ex parte* meeting, or its contents, prior to defendant's formal waiver of his right to a jury trial." *Id.* (emphasis added). This "finding of credibility [wa]s founded upon the

⁵ In addition to the two granted constitutional claims, Thayer had sought relief under CPL §§ 440.10(1)(b) and (f) because Judge Rounds and/or Ghee had improperly conducted and concealed the *ex parte* meeting, and under §§ 440.10(1)(b), (f), and (h) because the court was biased, or at least appeared biased, in violation of due process. *See* R.7-8, 31-32, 61, 248-52, 907-08, 915-17. While this brief focuses on the grounds the 440 court relied on, Thayer maintains that his other claims also entitle him to a new trial.

⁶ The court did not consider any parts of Ghee's affirmation that conflicted with the hearing evidence. It could not do so, because factual disputes must be resolved based only on evidence presented at the "hearing," and Ghee did not testify. CPL § 440.30(6); *accord* *People v. Davis*, 25 Misc. 3d 1207(A), at *5 n.1 (Sup. Ct. Bronx Cnty. 2009); *People v. Nikollaj*, 155 Misc. 2d 642, 643 (Sup. Ct. Bronx Cnty. 1992).

testimony when evaluated against the supporting documentary evidence”—discussed at pp. 13-14, 24-26, *supra*—as well as Kossover’s “stunning admission to the ethical/constitutional violations in which he engaged with no possible, concomitant, personal benefit arising from said testimony.” *Id.*

Granting Thayer’s ineffectiveness claim, the court wrote that Kossover’s concealment of the *ex parte* meeting “clearly constituted an inexcusable breach of Kossover’s duty of loyalty to his client” based solely on “his desire to maintain his good relationship with the trial judge and law clerk.” R.1258. Moreover,

. . . it str[uck] the Court as axiomatic that defendant’s bench trial decision would have been reconsidered had he known (1) that the law clerk had concerns about the defendant’s expert’s report; (2) that the law clerk thought defendant might be better off with a jury; and (3) that Kossover was under the distinct impression that the law clerk was conveying the thoughts of both the law clerk and the trial judge. This is particularly true in the face of at least the suggestion of a judicial prejudgment as to the viability of defendant’s complete defense of mental disease/defect.

Id. Had Kossover properly informed Thayer about the *ex parte* meeting, the court wrote, Thayer could have “opt[ed] to exercise his right to a jury trial” or moved for the case to be “reassigned to a new trial judge.” *Id.*

Notably, the concealed information that the court deemed “clearly material” to Thayer’s waiver decision, *id.*, was the same information the prosecution *conceded* the truth of: that the *ex parte* meeting occurred and, at the meeting, Ghee voiced concerns about the defense’s expert report and suggested the defense should

possibly opt for a jury. The court did not deem it necessary to address Kossover's further testimony that Ghee had sworn him to secrecy.

As an independent basis for relief, the court held that, “[f]or all the reasons set forth in the ineffective assistance section,” Thayer was “entitled to a new trial on th[e] alternative basis” that his “waiver of his right to a jury trial was neither knowing nor intelligent.” R.1259. The court found that Thayer ““was deprived of material information that led him down a path he might not have otherwise taken were full disclosure made””—that is, his “ignorance of the existence and contents of the wholly improper *ex parte* conversation caused his waiver to be legally inadequate.” *Id.* (quoting *People v. Canales*, 121 A.D.3d 14, 18 (2d Dep’t 2014)).

The court instructed the parties to “be prepared to discuss the remaining pending charge(s).” R.1260. However, the prosecution filed a notice of appeal on October 11, 2024, and, on March 3, 2025, responding to an application by the prosecution, the trial court stayed Thayer’s retrial pending resolution of this appeal. *See* R.3, 1262. The court simultaneously denied the prosecution’s “motion for reconsideration” of the 440 decision and declined to “address the double jeopardy arguments advanced by defendant or the People’s request for clarification of the charges defendant will face at the new trial” unless and until “the Appellate Division, Third Department affirms the October 1, 2024 Decision and Order.” R.1263. The prosecution did not file a second notice of appeal.

ARGUMENT

POINT I

Appellant has abandoned any appeal from the lower court's ruling that Thayer's jury-trial waiver was not knowing and intelligent, and thus the court's order must be affirmed.

This Court has held time and again that an appellant who fails in its brief to challenge a lower court ruling abandons appellate review of that ruling. *See Parris-Kofi v. Redneck, Inc.*, 204 A.D.3d 1180, 1181 n.1 (3d Dep't 2022); *People v. Brodus*, 307 A.D.2d 643, 644 n.* (3d Dep't 2003); *People v. Darby*, 206 A.D.3d 1165, 1166 n.* (3d Dep't 2022); *Lamphear v. State of New York*, 91 A.D.2d 791, 791 (3d Dep't 1982). Having abandoned an issue in its opening brief, an appellant may not revive the issue in its reply. *Morris v. New York State Police*, 233 A.D.3d 1415, 1417 (3d Dep't 2024); *Jimeno v. Comm'r of Lab.*, 231 A.D.3d 1467, 1467-68 (3d Dep't 2024); *Congregation Machne Ravtov Ya v. Cent. Hudson Gas & Elec. Corp.*, 198 A.D.3d 1237, 1238 (3d Dep't 2021); *Dinger v. Bend Ent., LLC*, 193 A.D.3d 1132, 1133 (3d Dep't 2021).

Here, one of the two independent grounds upon which the court below based its new-trial order was that Thayer's jury waiver was not knowing or intelligent. *See* p. 32, *supra*. Appellant nowhere even *mentions*, let alone challenges, that ruling, and thus has abandoned this issue. The lower court's order therefore should be summarily affirmed.

POINT II

The record fully supports the hearing court’s ruling that Mr. Thayer did not validly waive his jury-trial right.

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

A non-capital defendant in New York may waive his “inviolable” right to “[t]rial by jury” only “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; *accord* CPL § 320.10(2); *People v. Page*, 88 N.Y.2d 1, 10 (1996). Under the State and Federal Constitutions, courts must “indulge every reasonable presumption against waiver” of such a “fundamental constitutional right[.]” *Canales*, 121 A.D.3d at 17 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A court may approve a jury waiver only if it is “knowing, intelligent and voluntary.” *Page*, 88 N.Y.2d at 6; *see also United States v. Carmenate*, 544 F.3d 105, 108 (2d Cir. 2008) (Sixth and Fourteenth Amendments require jury waivers to be “knowing, voluntary, and intelligent”); *see generally Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights ... must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

For a jury-trial waiver to be valid, the accused must *personally* possess all information material to his decision. *See People v. Mineccia*, 185 A.D.3d 1408, 1409 (4th Dep’t 2020) (waiver invalid where counsel knew that client’s “former

prosecutor had become the trial judge's legal advisor" but counsel "failed to inform defendant"). Accordingly, "the trial court [must] disclose *to the defendant* all of the pertinent, material facts" before the accused can make a valid waiver. *Canales*, 121 A.D.3d at 18 (emphasis added). Where the court fails to do so, any purported waiver is invalid.

Thus, in *Canales*, the defendant's agreement to substitute an alternate juror was invalid because he did not know that the court already had made the substitution and the jury already had reached a verdict. *Id.* at 16. In ordering a new trial, the Appellate Division found that the accused "was deprived of material information that led him down a path he might not have otherwise taken were full disclosure made" and was deprived of "the opportunity ... to make an informed strategic decision." *Id.* at 18-19. Similarly, in *People v. Finkle*, 262 A.D.2d 971, 973 (4th Dep't 1999), a jury-trial waiver made at the end of trial was invalid where the accused was not advised of "his absolute right to a mistrial and a retrial before a jury." *See also Randall v. Rothwax*, 78 N.Y.2d 494, 496 (1991) (judge improperly induced a guilty plea by erroneously telling the defendant that the jury was leaning 10-2 to convict him when it actually was leaning 10-2 to acquit).

Numerous courts have held that a judge or a law clerk's possible bias requires the judge's disqualification, and thus it follows that such information is material and must be disclosed to the accused before his jury-trial waiver can be

accepted as knowing and intelligent. *See, e.g., People v. Browne*, 220 A.D.2d 313, 314 (1st Dep’t 1995) (judge at bench trial had, in previous civil case, heard accused make “damaging admissions”); *People v. Corelli*, 41 A.D.2d 939, 939 (2d Dep’t 1973) (judge at bench trial had, as a prosecutor, presented different case against accused to grand jury); *People v. Zappacosta*, 77 A.D.2d 928, 928-29 (2d Dep’t 1980) (judge at bench trial previously took guilty plea from codefendant who incriminated the defendant); *People v. Thornton*, 213 A.D.3d 987, 988 (3d Dep’t 2023) (hearing court’s law clerk was “former District Attorney responsible for defendant’s” prosecution); *People v. Hymes*, 193 A.D.3d 975, 976-77 (2d Dep’t 2021) (sentencing judge’s law clerk “worked on the early stages of” defendant’s case as prosecutor); *People v. Suazo*, 120 A.D.3d 1270, 1271-72 (2d Dep’t 2014) (hearing court’s law clerk was married to police witness).

B. Because, as the hearing court found, Thayer did not know that the court’s law clerk, and apparently the court as well, was biased against Thayer’s defense, his waiver was not a knowing or intelligent one.

The 440 court rightly found that the remarks the prosecution conceded Ghee made at the *ex parte* meeting were material to Thayer’s jury-waiver decision. The court considered it so obvious as to be “axiomatic” that a defendant who learned that the court’s law clerk, and apparently the judge himself, were predisposed to reject his principal defense would not waive his absolute right to a jury trial. R.1258.

As Appellant acknowledges, “[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.” App. Br. 38 (quoting *Hymes*, 193 A.D.3d at 977). Indeed, the prosecution argued below that Ghee “ha[d] no independent authority to do anything,” R.174, and, at the *ex parte* meeting, “was not acting of his own accord as he had/has no[] authority” to do so independent of Judge Rounds, R.255 (citing *Thornton*, 213 A.D.3d 987).

Moreover, as the hearing court correctly found, Kossover actually and reasonably believed the law clerk “was conveying the thoughts of ... the trial judge”—that is, that the court itself had “prejudge[d] the viability of defendant’s complete defense of mental disease/defect.” R.1258; *see* p. 31, *supra*. Even if there was no direct evidence at the 440 hearing of Judge Rounds’s actual state of mind, *see* App. Br. 37-38, Kossover’s reasonable perception that Ghee was transmitting Judge Rounds’s views would have been more than enough to alarm Thayer and his lead counsel about the dangers of agreeing to a bench trial before a judge who appeared biased against his defense.

The 440 court credited the overwhelming and uncontradicted defense evidence that, when Thayer waived a jury, neither Thayer nor the Gottlieb Attorneys knew about the *ex parte* meeting. The court’s determination to credit all five defense witnesses was not “clearly erroneous” and thus must be accepted on appeal.

People v. Nelson, 171 A.D.3d 1251, 1253 (3d Dep’t 2019) (quoting *People v. Britton*, 49 A.D.3d 893, 894 (2d Dep’t 2008)). Appellant, ignoring the applicable clear-error standard of review, has cited no evidence showing that any of the defense witnesses was lying or incredible.

Indeed, the hearing record shows there was good reason for the lower court to credit the defense witnesses. Kossover’s credibility was “buttressed by his stunning admission to the ethical/constitutional violations in which he engaged with no possible, concomitant, personal benefit arising from said testimony.” R.1257. He exposed himself to public embarrassment, professional and financial harm, and disciplinary proceedings—all after receiving just \$7,500 for 15 months of work in this case. As for Thayer and the Gottlieb Attorneys, their testimony was consistent with each other’s and Kossover’s, and the documentary evidence corroborated it.

Had any defense witness testified inaccurately, the prosecution could have called Judge Rounds, law clerk Ghee, or DA Nneji himself in rebuttal. The most reasonable inference from its failure to call these witnesses is that their testimony “would not [have] contradict[ed] the evidence offered by” the defense, since the prosecution knew what these witnesses would have testified to, their knowledge was “material to” to the hearing, and they were “available to” the prosecution. *DeVito v. Feliciano*, 22 N.Y.3d 159, 166 (2013) (internal quotation marks omitted). Indeed, Judge Rounds and Ghee had voluntarily submitted to interviews by DA

Nneji (while the defense was blocked from interviewing them, *see* R.221 ¶ 16; R.236), and DA Nneji had even obtained and filed Ghee's affirmation.

Appellant's argument that the Gottlieb Attorneys must have planned the EED defense and known of the *ex parte* meeting all along, *see* App. Br. 16-17, 24-25, is fantastical. Accepting this argument would require believing that these officers of the court elaborately choreographed and documented the post-trial events to make it look like they had discovered the *ex parte* meeting for the first time, then lied in numerous sworn statements and in sworn courtroom testimony. That is not plausible, and the 440 hearing court did not clearly err in refusing to believe it.

This Court should affirm Supreme Court's holding that Thayer's jury waiver was not knowing or intelligent, thus requiring a new trial under CPL § 440.10(1)(h).

POINT III

The 440 court rightly found that Mr. Kossover's concealment of the *ex parte* meeting, in violation of his duties to his client, deprived Mr. Thayer of his constitutional right to the effective assistance of counsel, requiring a new trial.

- A. A lawyer who deliberately withholds information material to a client's decision to waive a jury trial deprives his client of the effective assistance of counsel.**

"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., amend. VI; 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).

1. The federal standard

To establish ineffectiveness under the Sixth and Fourteenth Amendments, the accused must show, first, that counsel’s performance “fell below an objective standard of reasonableness ... under prevailing professional norms,” *Strickland*, 466 U.S. at 688, and second, that counsel’s errors prejudiced him, *id.* at 692.

Typically, the prejudice prong requires showing a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. However, “[i]n certain Sixth Amendment contexts, *prejudice is presumed.*” *Strickland*, 466 U.S. at 692 (emphasis added).

One context where prejudice is presumed occurs when “counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties.” *Id.* This includes when counsel “is burdened by an actual conflict of interest,” *id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)), meaning “that some plausible alternative defense strategy or tactic might have been pursued” but for the “the attorney’s other loyalties or interests,” *Eisemann v. Herbert*, 401 F.3d 102, 107 (2d Cir. 2005) (quoting *United States v. Feyrer*, 333 F.3d 110, 116 (2d Cir. 2003)).

Prejudice also is presumed when “a defendant’s right to a jury trial is denied as a result of his attorney’s deficient performance, ... because such misconduct is

tantamount to a structural error.” *Miller v. Dormire*, 310 F.3d 600, 603 (8th Cir. 2002); *see id.* at 602-04 (counsel waived jury on defendant’s behalf and without adequately explaining jury right).

Even in a jury-waiver case where prejudice is not presumed, an accused may establish it by showing “a reasonable probability that, but for counsel’s deficiency, [he] would have elected to proceed by way of jury trial.” *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 858 (3d Cir. 2017) (counsel inadequately explained jury right and failed to ensure written waiver). As the U.S. Supreme Court has written in the guilty-plea context, when a lawyer performs deficiently before trial, “the question is not the fairness or reliability of the trial but the fairness and regularity of *the processes that preceded it*, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance.” *Lafler v. Cooper*, 566 U.S. 156, 169 (2012) (emphasis added).

2. The New York standard

New York’s ineffectiveness standard “offers greater protection” than the federal one. *Caban*, 5 N.Y.3d at 156. The State standard “agree[s] with *Strickland* on the first prong,” requiring a showing of objectively deficient performance, but “depart[s] from the second (‘but for’) prong of *Strickland*.” *People v. Turner*, 5 N.Y.3d 476, 480 (2005). While the accused must show that counsel’s errors “prejudice[d] the defense or defendant’s right to a fair trial,” *People v. Benevento*, 91 N.Y.2d

708, 713-14 (1998) (quoting *People v. Hobot*, 84 N.Y.2d 1021, 1024 (1995)), “‘prejudice’ is examined more generally in the context of whether defendant received meaningful representation,” *Benevento*, 91 N.Y.2d at 713. This standard is “concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case.” *Id.* at 714. Thus, while the accused must “demonstrate the absence of strategic or other legitimate explanations for counsel’s failure[s],” *Rivera*, 71 N.Y.2d at 709, he need not show “a reasonable probability of a different outcome,” *Caban*, 5 N.Y.3d at 156. “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).

State courts have held that counsel is ineffective for failing to fully inform his client of information material to a jury waiver. *See Browne*, 220 A.D.2d at 314 (1st Dep’t 1995) (failure to inform client that judge sitting as factfinder had, in previous case, heard client make “damaging admissions”); *People v. Danthuluri*, 31 Misc. 3d 56, 59 (App. Term 2d Dep’t 2011) (defendant not advised of “right to a mistrial and retrial before a jury”); *Commonwealth v. Duarte*, 477 Mass. 630, 638 (2017) (failure to inform client that judge’s son worked in prosecutor’s office); *cf. People v. Rupnarain*, 123 A.D.3d 1372, 1373 (3d Dep’t 2014) (failure to advise client of deportation consequences of guilty plea (citing *Padilla v. Kentucky*, 559 U.S.

356, 366-69 (2010)); *People v. Davey*, 91 A.D.3d 1033, 1034 (3d Dep’t 2012) (failure to advise client of viable defense before he pleaded guilty).

Moreover, counsel’s representation must be not only “reasonably competent,” but also “conflict-free and singlemindedly devoted to the client’s best interests.” *People v. Payton*, 22 N.Y.3d 1011, 1013 (2013) (quoting *People v. Harris*, 99 N.Y.2d 202, 209 (2002)); accord *People v. Solomon*, 20 N.Y.3d 91, 97 (2012) (counsel’s “paramount responsibility is to th[e] defendant alone” (quoting *People v. Macerola*, 47 N.Y.2d 257, 264 (1979))).

3. Norms of practice

The above principles are in line with “[p]revailing norms of practice as reflected in American Bar Association standards and the like,” which federal and state courts rely on when assessing counsel’s performance. *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688); see *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 18 (2010); see also, e.g., ABA Criminal Just. Standards, Criminal Def. Function, Standard 4-5.1(b) (“Before significant decision-points . . . , defense counsel should advise the client with candor concerning all aspects of the case”); N.Y. Rule Prof. Con. 1.4(b) (counsel must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions”); *id.* Rule 1.4(a)(1)(i) (counsel must “promptly inform the client of” any “circumstance with respect to which the client’s informed consent . . . is required”); ABA Criminal Just.

Standards, Criminal Def. Function, Standard 4-1.7(b) (counsel “should not permit their professional judgment or obligations ... to be adversely affected by ... their personal political, financial, business, property, or other interests or relationships”).

B. By concealing from Thayer his *ex parte* meeting with the law clerk, Kossover deprived Thayer of his constitutional right to the effective assistance of counsel.

Kossover’s concealment of the *ex parte* meeting clearly fell below an objective standard of reasonableness, satisfying the New York standard and the first *Strickland* prong. As shown in Point II, *supra*, the information Kossover concealed was highly material to Thayer’s jury-waiver decision, and thus Kossover was duty-bound to reveal it to his client. Kossover admitted he had no legitimate strategic reason for withholding this information. Instead, his “sole” reason for concealing the information was his “desire to maintain his good relationship” with Judge Rounds and William Ghee. R.1258. This error deprived Thayer of meaningful representation as surely as the errors in the cases discussed above did. While those attorneys failed to advise their clients about more garden-variety conflicts of interest or procedural requirements, Kossover withheld information—obtained during an improper *ex parte* meeting—that strongly implied the law clerk and the trial judge himself were biased against Thayer’s defense. Moreover, he did so solely due to a professed “loyalty” to someone other than his client and thus due to a conflict of interest that he also did not disclose.

The second *Strickland* prong also is satisfied. *Strickland* prejudice must be presumed, first, because Kossover's misconduct deprived Thayer of his structural jury-trial right, and second, because Kossover's professed loyalty to Judge Rounds and Ghee was a conflict of interest that caused him to conceal the *ex parte* meeting, and thus prevented the defense from opting for a jury trial or seeking to have the case reassigned.

In the alternative, if prejudice must be shown rather than presumed, Thayer has established a reasonable probability that, but for counsel's deficiency, he would not have waived his right to a jury. As detailed above, Thayer and the Gottlieb Attorneys all testified credibly and unrebutted—and the 440 court found—that had Kossover revealed the *ex parte* meeting before trial, Thayer would not have waived, and the Gottlieb Attorneys would have advised Thayer not to waive, a jury. *See pp. 27-28, supra.*

Under any of the standards discussed above, Kossover was ineffective, and a new trial is required under CPL § 440.10(1)(h).

Appellant's arguments to the contrary are meritless. Appellant contends that the prosecution was the prejudiced party, and that Thayer in fact benefited, even if unknowingly, because the trial evidence proved he was guilty of murder. *See, e.g., App. Br. 2, 21-22, 28-31.* This is wrong for multiple reasons.

First, Appellant gets the prejudice standard wrong. As discussed above, if Thayer must show prejudice at all, it is only that he would not have agreed to a bench trial before Judge Rounds but for counsel's deficiencies, not that he would have been acquitted. He has shown he would not have agreed to the bench trial.

Second, prejudice to the *prosecution* plays no role in the analysis. Appellate courts regularly order new trials where the prosecution is not found to be at fault and must bear the burden of mounting a second prosecution. The supposed "unfairness" Appellant rails against is in fact a fundamental feature of a justice system that, in one constitutional provision after another, guarantees the constitutional rights of the criminally accused, as the lower court rightly pointed out. *See* R.1259.

Third, even though it is irrelevant to the prejudice analysis, the fact is that Thayer presented compelling evidence at trial—the *unrebutted* testimony of two highly-qualified forensic psychiatrists—that established his *complete* mental-defect defense. The prosecutor's cross-examination of these experts was ineffectual, and he chose not to call his expert or to present any other evidence refuting the defense case. Constitutionally entitled to present his defense to a fair and impartial jury unless he validly waived that right—which he did not—Thayer was tried by a judge, aided by a law clerk, who, unbeknownst to Thayer, were predisposed to reject his defense. That, without a doubt, shows Thayer was unfairly prejudiced.

Appellant further contends that Thayer must be deemed to have known about the *ex parte* meeting because “information known to his attorney, i.e., agent, is attributable and deemed known to him.” App. Br. 30. This is obviously wrong. It would write out of the law books the myriad cases, constitutional provisions, and statutes requiring *personal* waiver, by a fully-informed defendant, of his jury-trial right. The cases that Appellant cites, *see id.* at 30-31, have nothing to do with this case. They all involve corporate agents who, unlike Kossover, played a role in the very conduct giving rise to the lawsuit or prosecution, and where the corporation’s contemporaneous knowledge of that person’s conduct was relevant to the case.

Appellant argues that Kossover intentionally committed misconduct that could later be used as “a ‘delayed-trigger weapon’ . . . to ‘spring’ against the People” and obtain relief. App Br. 40 (quoting *People v. Sullivan*, 153 A.D.2d 223, 228 (2d Dep’t 1990)). This paranoid argument is absurd. Nothing in the record, or in logic, suggests that Kossover intentionally sacrificed his reputation and livelihood in this way. Why would anyone, for a small fee as local counsel, after which he withdrew from the case, risk his good name and his career to somehow set up an appellate issue for his former client? The cases Appellant cites are, typically, inapposite. *People v. Winkler* involved an improper contingency-fee arrangement, *known and agreed to by the defendant*, which the defendant later argued made his lawyer ineffective. 71 N.Y.2d 592, 594 (1988). The Court of Appeals declined to

award the defendant “a blind windfall triggered by his own conduct.” *Id.* at 598. In *Sullivan*, the Second Department wrote in dicta that it was reluctant to grant relief “[w]here the evidence [wa]s so overwhelming that it may truthfully be said that the defendant ha[d] no defense” and it appeared defense counsel may have “attemp[t]ed to ‘throw’ the case.” 153 A.D.2d at 228. Here, Thayer *did* have a defense and there is *no* evidence that local counsel Kossover tried to “throw” the case.

Appellant compares this case to *People v. DePallo*, 96 N.Y.2d 437 (2001), in which the Court held that the defendant was not entitled *to be present* at an *ex parte* meeting where his lawyer reported that the defendant had committed perjury on the stand. App Br. 39. Here, Thayer does not argue that he had a right to be present at the *ex parte* meeting (which after all should never have occurred at all), but rather that he was entitled to know it happened and what occurred during it.

Finally, Appellant cites *People v. Gelman*, in which “the Judge’s law clerk remarked to defendant’s counsel ... that he agreed that defendant would be better off with a Bench trial, and that the Judge would certainly give him a fair trial.” 93 N.Y.2d 314, 320 (1999). The Court held that the defendant’s ensuing jury waiver was voluntary, because the clerk’s remark did not amount to a “promise of favorable treatment.” *Id.* at 321. Thayer’s case is completely different. It is not about whether a promise of favorable treatment, known to him, induced him to waive a

jury to his apparent detriment, but whether information suggesting the court would be *unfavorable* was concealed from him and resulted in his *unknowing* waiver.

POINT IV

State and federal guarantees against double jeopardy bar any reprosecution of Mr. Thayer for murder, of which he was acquitted, and he cannot be prosecuted for manslaughter because it is not charged in the indictment.

The lower court declined to address “the People’s request for clarification of the charges defendant will face at the new trial” until this Court affirms the granting of Thayer’s 440 motion. R.1263. Because Appellant nevertheless has briefed these issues, and in the interest of judicial economy, Thayer does not object to this Court ruling on them.

A. Double jeopardy principles bar reprosecution on an acquitted count unless the court lacks all jurisdiction.

“[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final” and “is a bar to a subsequent prosecution for the same offence.” *McElrath v. Georgia*, 601 U.S. 87, 94 (2024) (quoting *Green v. United States*, 355 U.S. 184, 188 (1957)); *see also Benton v. Maryland*, 395 U.S. 784, 794 (1969) (double jeopardy protections apply to states through Fourteenth Amendment). Moreover, “the Double Jeopardy Clause prohibits second-guessing the reason for a jury’s acquittal”—even if it appears to be “the result of compromise, compassion, lenity, or misunderstanding of the governing law,”” *id.* (quoting *Bravo-Fernandez*

v. United States, 580 U.S. 5, 10 (2016))), or based on “impermissible reasons,” *id.* (quoting *Smith v. United States*, 599 U.S. 236, 253 (2023)). The federal and New York Double Jeopardy Clauses “provide[] the same protection.” *People v. Sanders*, 89 A.D.3d 106, 109 (4th Dep’t 2011).

Where, as here, a person is charged with murder but convicted only of the lesser-included offense of manslaughter, the acquittal rule prohibits retrial for murder. *Price v. Georgia*, 398 U.S. 323, 327 (1970); *People v. Gonzalez*, 61 N.Y.2d 633, 634-35 (1983).

The only exception to the acquittal rule is that “[a]n acquittal before a court having no jurisdiction is ... absolutely void, and therefore no bar to subsequent indictment and trial.” *Hoffler v. Bezio*, 726 F.3d 144, 157 (2d Cir. 2013) (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)). However, the circumstances in which a judgment of acquittal is “void” for lack of jurisdiction are “narrowly confined.” *Id.* at 156.

A judgment is “void” only “where a court ‘usurp[s] a power without jurisdiction,’ while a judgment is ‘voidable’ where a court commits error while properly exercising jurisdiction.” *Id.* (quoting *Dennison v. Payne*, 293 F. 333, 341 (2d Cir. 1923)). Thus, where a court has “jurisdiction to try the charged offense” (i.e., subject-matter jurisdiction), “territorial jurisdiction,” and “personal jurisdiction” over the accused, any resulting judgment is *voidable* only, not void. *Id.* at 159; *accord*

Boyd v. Meachum, 77 F.3d 60, 65-66 (2d Cir. 1996). In short, “a party claiming lack of jurisdiction to defeat a double jeopardy claim carries a particularly heavy burden,” because it ““must show that, in a larger sense, the state court was *without fundamental power to exercise jurisdiction over his person.*”” *Hoffler*, 726 F.3d at 159 (emphasis added) (quoting *Boyd*, 77 F.3d at 65).

In accordance with these principles, courts have long held that acquittals entered even after fundamental errors were not void. In *Ball*, a murder indictment was “fatally defective” for omitting material allegations. 163 U.S. at 664. Because the accused had been acquitted at trial, however, he could not be reprosecuted. *Id.* at 669. In *Benton*, the accused had been convicted of burglary but acquitted of larceny. 395 U.S. at 785. The burglary conviction had then been vacated on appeal due to defects in the grand and petit jury oaths. *Id.* at 786. The larceny acquittal barred retrial on that count, because a defendant who “decides to appeal his ... conviction” on one count cannot be “forced to suffer retrial on the [acquitted] count as well.” *Id.* at 796 (citing *Green*, 355 U.S. at 193-94). In *Hoffler*, the Second Circuit held that a jury venire-swearing error, just like the “constitutionally impermissible oath” in *Benton*, did not deprive the trial court of “the fundamental power or basic jurisdiction to try” the case. *Hoffler*, 726 F.3d at 157, 159; *see also Ohio v. Bentley*, Nos. 2022-L-076, 2022-L-080, 2023 WL 3721510, at *1 (Ohio Ct. App.

May 30, 2023) (where court conducted a bench trial without authorization and acquitted the defendant, double jeopardy barred a retrial on the acquitted count).

B. Because the trial court plainly had jurisdiction in this case, Thayer’s acquittal for murder bars reprosecution on that charge.

The double jeopardy guarantees discussed above prohibit any reprosecution for the acquitted murder count unless the judgment was void. It was not. As in the numerous cases cited above, the court here had subject-matter, territorial, and personal jurisdiction in this case; the prosecution does not argue otherwise. The constitutional errors that occurred while the court properly exercised jurisdiction made the judgment voidable, not void.

Appellant does not meet its “heavy burden” of showing that the trial court “lack[ed] the fundamental power or basic jurisdiction to try” Thayer. *Hoffler*, 726 F.3d at 159. Indeed, Appellant does not acknowledge or discuss the *Ball/Hoffler* line of cases at all. Appellant’s only argument that the court lacked “jurisdiction” is that it supposedly was “constructively” disqualified because it was an “interested” party. App Br. 49. But even if, for the sake of argument, the court was “interested” in the case, that did not deprive it of the fundamental power or jurisdiction to try to the case. And, ironically, its only apparent “interest” was to convict the defendant of manslaughter following its pretrial rejection of the defendant’s expert report contending that Thayer was not responsible for murder. That Thayer was prejudiced by this entitles *Thayer* to vacatur of the conviction for denial of his personal

constitutional rights; it surely does not entitle the prosecution to a do-over on the acquitted murder count because the court lacked all power to act. The court clearly had the power to act. It just exercised it in a way that prejudiced *the defendant* with regard to the charge that the court convicted him of.

Appellant's other arguments are equally meritless. Appellant contends, citing no authority, that double jeopardy does not apply "because the nullification of the previous trial was based on defendant's motion." App. Br. 46. This argument is foreclosed by the Supreme Court's holding in *Benton* that a defendant cannot face retrial on an acquitted count just because he chose to challenge his conviction on another count. Appellant does not discuss *Benton* or cite any case to the contrary.

Appellant contends that Kossover's ineffectiveness "occurred prior to the trial, so the vacatur restores the defendant to the position where he had been or would have been before trial." App. Br. 47. Appellant cites no authority for this argument, either, and it, too, is foreclosed by the caselaw discussed above. *Ball* and *Benton*, for example, involved defects at the grand jury stage, well before trial.

Finally, Appellant contends the double jeopardy bar should not apply because the "egregious misconduct" in this case was not "committed by the People." App. Br. 48. This argument, as we previously argued, is meritless. It is true that when the prosecution intentionally engages in misconduct to provoke a mistrial, double jeopardy may bar retrial. *See Oregon v. Kennedy*, 456 U.S. 667, 675-76

(1982). This is because the prosecutor should not be allowed to avoid a likely acquittal by deliberately sabotaging an accused's right to trial before the first jury he has selected. But that rule has no application here.

C. Under the present indictment, Thayer can be retried only on the firearm count.

Appellant contends that Thayer argues for “restrict[ing] his retrial solely to manslaughter instead of murder.” App. Br. 46. That is incorrect. Because Thayer was acquitted of murder and the present indictment does not charge manslaughter, the prosecution currently can retry him only on the single remaining count of criminal possession of a weapon.

The foundational case is *People v. Mayo*, 48 N.Y.2d 245 (1979). At Mayo's trial for a single count of first-degree robbery, the trial court found the evidence insufficient to establish that offense. Instead, it submitted to the jury the lesser-included offenses of second- and third-degree robbery. When the jury deadlocked, the court declared a mistrial. *Id.* at 248. The Court of Appeals held that there could be no retrial and that the indictment “must be formally dismissed.” *Id.* at 253. The Court reasoned that withdrawal of the first-degree robbery count “was equivalent to an acquittal,” *id.* at 249, and since that “sole count” in the indictment must be dismissed, “nothing remain[ed] to support further criminal proceedings under that accusatory instrument,” *id.* at 253.

People v. Gonzalez, which applies *Mayo*, is directly on point. In *Gonzalez*, the accused was indicted for second-degree murder, assault, and a weapon offense. 61 N.Y.2d 633, 634 (1983). The jury acquitted him of murder and assault, while convicting him of manslaughter and the weapon charge. *Id.* After the convictions were vacated, the Court held that, “[i]nasmuch as defendant had been acquitted of second degree murder, further prosecution on that charge was barred by double jeopardy,” and “[f]urther, the Appellate Division *could not order a new trial on the lesser included offense of first degree manslaughter* because the indictment had to be dismissed as to the murder charge and there was thus nothing remaining to support further criminal prosecution for manslaughter under that accusatory instrument.” *Id.* at 635 (emphasis added).

This case is indistinguishable from *Gonzalez*. Thayer’s indictment charged one count of murder and one weapon count. R.4-5. Thayer was acquitted of murder and convicted of manslaughter and the gun count, and the convictions were then vacated. “[T]he indictment ha[s] to be dismissed as to the murder charge and there [i]s thus nothing remaining to support further criminal prosecution” for a lesser-included crime. *Gonzalez*, 61 N.Y.2d at 635. Only the gun count remains.

CONCLUSION

The right to a jury trial is among the paramount guarantees of the State and Federal Constitutions, lying at the very “spinal column of American democracy.”

Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part). The lower court properly held that this right was impermissibly impaired when Gregory Thayer was deprived of information that any defendant waiving a jury would want, and would be entitled, to know. No conviction founded upon a denial of such a fundamental constitutional right can be allowed to stand. The Court should affirm the decision granting Gregory Thayer's 440 motion and ordering a new trial, whether because Appellant abandoned any challenge to the 440 court's dispositive jury-waiver holding or on the merits of the jury-waiver or ineffectiveness claim. If this Court reaches the double jeopardy issue, it should instruct that Thayer may be retried under the current indictment only for criminal possession of a weapon.

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Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

PEOPLE OF THE STATE OF
NEW YORK,

Appellant,

v.

GREGORY THAYER,

Defendant-Respondent.

Appellate Case No. CR-25-116

Indictment No. 70188-21
(Ulster Cnty.)

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