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Independent Review Panel
Office of the Hon. Kenneth Thompson
Kings County District Attorney
350 Jay Street
Brooklyn, New York 11201

Re: People v. Smith
Index No. 2183/86

INTRODUCTION

Kevin Smith was convicted of Murder in the Second Degree after a jury trial where the only evidence supporting that conviction was the testimony of one eyewitness. Mr. Smith served 27 years in jail, having been released on December 3, 2012.

This letter is respectfully submitted to the Independent Review Panel in connection with its mandate to review convictions to determine if a conviction can be defended as obtained with substantial integrity and consistent with proper police and prosecutorial practice, regardless of whether any particular defendant is actually innocent as a matter of fact. Such review is critical, particularly in cases where there is no forensic evidence linking a convicted individual to the crime and the conviction is based solely on the testimony of a single eyewitness. In such circumstance, no

one including the District Attorney or this Panel, can honestly say if such defendant was actually innocent or not. In fact, Mr. Smith has maintained his innocence since his arrest and evidence to support his innocence is set forth below. However, all that this panel can do is make a judgment as to whether the process which led to his conviction was so flawed as to have likely improperly influenced the outcome, thus requiring exoneration because the District Attorney's office cannot have confidence that the conviction rests on integrity. The case of Kevin Smith is one such case where there is substantial evidence the conviction resulted from improper and unprecedented prosecutorial coercion which corrupted the process and the proper administration of justice and, thus, the conviction should not stand.

At the outset, it is important to emphasize that our investigation has unearthed evidence of prosecutorial misconduct which directly affected the integrity of the prosecution. We trust that this independent unit will not be influenced by the fact that the then young Assistant District Attorney who tried the case (Paul Burns), is still in the office because the decisions on how to proceed had to have been directed or authorized by his supervisors who are no longer present.

BACKGROUND

On November 10, 1984, at approximately 12:00 midnight, Gary Hall was killed by a single gunshot in the vicinity of Bergen and Buffalo Avenues in Brooklyn. The sole eyewitness who identified Mr. Smith and co-defendant Calvin Lee as the shooters is one Vernon Richardson, a cousin of the deceased.

Richardson was interviewed on the night of the shooting and gave the first of many

contradictory statements. His first interview with the police produced a statement that he was with friends on the street when he saw 2 male blacks approach the group of people he was with and immediately started shooting in the direction of the group. Four shots were fired and he saw his cousin on the ground wounded. The shooters ran from the scene. Richardson stopped an auto (which was driven by a Kenneth Martin who knew Richardson) and together they drove Hall to St. Mary's Hospital where he expired shortly thereafter. That is the full extent of the information provided by Richardson the first time he had an opportunity to explain what he saw. (A copy of the DD5 of this interview is attached hereto as Exhibit A).

So that the panel can appreciate Richardson's character and with whom they are dealing, you should know that he was twenty-years old at the time of the shooting and a search of his criminal record reveals that he is a career criminal which began at the time of this incident and spanned 3 decades. Although at the time of trial there was an outstanding warrant for his arrest, and the Assistant District Attorney assigned to try the case disclosed that he had "a few" other arrests prior to 1987 (Trial Transcript p. 38 - Trial Transcript will be provided by District Attorney's Office separately) those arrests are not revealed on his criminal record. However, his record discloses no less than 28 arrests since then, for crimes ranging from burglary, robbery in the 2nd degree, criminal trespass, possession of burglar's tools, petty larceny, resisting arrest, escape, violations of conditional discharges and numerous charges for possession of drugs. He pled guilty to all 28 arrests and served significant jail time. His most recent arrest and conviction was in 2014. (Richardson's criminal record is attached as Exhibit B).

The Panel should be made aware that since Mr. Smith's release from prison, Mr. Smith has become a Chaplin licensed by the State of New York and a Senior Deacon in his church, where his ministry is to visit the sick in hospitals, nursing homes and prisons. He is also active in community groups such as Man Up, SOS and Gifted Community, which are all anti-violence outreach groups which seek to educate youths and direct them off the streets.

The police reports we obtained from the Conviction Review Unit in connection with this investigation revealed that after the shooting the police obtained "word in the street" information that the shooters were "Rennie" and "Devine". A confidential informant identified "Rennie" as Kevin Smith and "Devine" as Calvin Lee. The police interviewed a Frederick Shaw who initially told them he was in the vicinity of the shooting and saw Kevin Smith pass a gun to Calvin Lee but that he did not see the shooting because he left the scene. In another interview, Shaw did not say anything about seeing a gun but only that he saw Calvin Lee and that he left the scene before the shooting. In a further interview, he said that he saw Calvin Lee pull a gun from his waistband and he heard 2 shots as he was running away. He subsequently recanted all his statements and was not called as a witness at trial. The police obtained information from another individual, Eric Jones, who identified Rennie and Devine as being at the scene of the shooting but added that there was a third person present at the shooting, someone named "Shorty", who was "involved". (The police reports are all included in Exhibit C).

After getting this information, the police reinterviewed Richardson later the same day of the shooting and for some inexplicable reason Richardson then identified Smith and Lee as the shooters.

We say inexplicable because we have been unable to interview the detectives or Richardson, who we have been unable to locate . When re-interviewed by the police, Richardson gave a convoluted statement about a prior encounter with Smith and Lee earlier in the evening, that they returned to the location of the shooting and he saw them each shooting and passing a gun to each other. Richardson claimed that he chased them from the scene despite the fact that he was unarmed.

After giving that statement to the police Richardson was interviewed by an assistant district attorney and an audio tape of that interview was made. Neither the existence of that interview or the tape recording was disclosed by the District Attorney's Office until a typed transcript of the interview was recently turned over to me approximately 2 months ago. The District Attorney's Office has offered no explanation as to why the tape or transcript was not turned over in conformance with Rosario and Brady rules prior to the trial 28 years ago.

Richardson was the sole witness presented to two grand juries (one for Smith's Indictment and one for Lee's) to support the Murder indictments. In our present investigation, we contacted Lee's trial attorney Joseph Giannini. Smith's attorney, Theodore Jones has since died. We attach hereto as Exhibit D, Mr. Giannini's affirmation wherein he establishes that the audiotape interview or transcript of the District Attorney's interview with Richardson were never turned over to the defense and that the transcript contains major discrepancies of Richardson's version of events given to the police, the grand jury and at the trial. Mr. Giannini's Affirmation sets forth the glaring inconsistencies between Richardson's different versions of events including the recently obtained audiotape and the Panel is directed to Gianni's Affirmation for that explanation. Needless to say to

the extent inconsistencies existed in the audiotape as explained by Mr. Giannini, the trial jury was not aware of them because neither the transcript nor the tape was given to the defense.

Mr. Giannini further explains that had that tape or transcript been provided to the defense it would have demonstrated additional inconsistencies that may have been the straw that broke the camel's back of Richardson's credibility at trial. While the merits of the legal argument that the failure to disclose the audiotape is a violation of Brady and Rosario, requiring a new trial in and of itself, that issue is not before this panel. However, the panel should be aware of the manner in which the District Attorney's office has handled this evidence because that disregard for the defendant's rights is consistent with its other conduct at the Trial.

THE TRIAL

The case was set for trial on September 1, 1987. Immediately prior to trial, ADA Paul Burns advised the court that he was unable to locate his sole witness and requested a one-day continuance to locate the witness.[1] The District Attorney's office obtained a material witness order to arrest Richardson, which was executed by breaking down the door to his mother's apartment where they found him. (T-T p. 214; Trial Transcript to be provided by District Attorney's office). Detectives brought him to the District Attorney's office and then to court where he was assigned 18 B counsel Frank Paone. Although Richardson refused to speak with the defendant's counsel, he briefly spoke

[1] The conclusion that Burns' supervisors were involved and likely directed all the decisions in the case is demonstrated by the fact that they were involved in even this simple request. (Testimony p. 8)

to Burns to advise him that he would not testify.

When Richardson was brought to Court, Burns requested that Richardson be paroled into the custody of the District Attorney's Office and be guarded by a detective at a hotel. Burns advised the Court that Richardson's mother said that she and Richardson had been directly threatened by friends of the defendant and that if he testified that they would cause him serious physical injury or kill him. (Page 14 of the trial transcript testimony). Mrs. Richardson said she was afraid not just for herself but also for other members of her family. Based upon that representation, Burns requested that the Court conduct a Sirois hearing to determine if the reason the witness would not testify was because he was threatened by the defendant. Under those circumstances, his grand jury testimony could be used as evidence in chief at trial. After ordering that Richardson be held in custody of the District Attorney, the Judge adjourned the case to the next day. When the Court re-convened, Paone advised the Court that Richardson was still refusing to testify. For a reason unexplained in the record, the Trial judge then conducted an in-camera hearing prior to the Sirois hearing.

Under the Sirois case and its progeny the Court must conduct a hearing in the presence of the defendant to determine if conduct causing the witness to absent himself or not testify can be traced back to the defendant. The People have the burden to prove the defendant's misconduct and if met, the Grand Jury testimony could be used. Holtzman v. Hellenbrand, 92 AD2d 405, 460 N.Y.S. 2d 591 (2nd Dept. 1983). However, that procedure was not followed in this case. Rather, the Court inexplicably held an in-camera proceeding without the defendants present prior to the Sirois hearing to determine if a Sirois hearing, with the defendants present, would be warranted. There is no

authority for conducting such a preliminary hearing or to engage in such procedure, although no attorney requested this or objected. It was simply dictated by the trial judge.

The purported reason for this inquiry was for the judge to ask Richardson why he was refusing to testify and if the reason was that he was threatened, then the Grand Jury minutes could be used (Trial Transcript p. 45) Additionally the Court was going to inquire into what the police officers said to the witness to see if there was any coercion.

However, as soon as the proceedings began, the Court allowed the prosecutor to begin questioning Richardson and instead of directing questions as to whether he was threatened or not, the assistant began asking questions about the night of the shooting, including whether he knew the defendants, whether he saw them on the night of the shooting, whether he was present when Hall was shot and whether he saw Hall get shot. Richardson answered all the questions "no". Then, the assistant attempted to bring out Richardson's inconsistent Grand Jury testimony and his counsel objected, which was sustained. The Prosecutor's intent by this questioning can only be construed as an effort to set up a perjury charge on basis of inconsistent testimony. There is no plausible reason such elicit testimony in this proceeding, which was supposedly being conducted to see if the witness was threatened and then seek to impeach him with his prior testimony.

The Court then inexplicitly took over the questioning on the same subject concerning what Richardson did/did not see on the night of the shooting. This topic would not even have been a subject of a Sirois hearing since that hearing would be limited to a determination if threats were made, who made them and whether use of Grand Jury testimony was warranted. Thus, what

Richardson said or didn't see should not have been a topic of inquiry here.

The following are some of the improper and unauthorized questions and answers which resulted from this unauthorized and essentially coerced inquiry by the judge.

(T T- P. 63-74a)

Q Now, do you also know two people by the name of Renny and Devine?

A I don't know them.

Q You don't know them?

A No.

Q Never heard of them?

A I heard of the name.

Q Did you see them on the night of November 10th of 1984?

A No.

Q Were you present when Gary was shot?

A No.

Q You were not?

A No.

. . .

Q Did you see Gary get shot?

A No.

. . .

The Court: Do you remember somebody shooting at you?

The Witness: No, nobody shooting at me.

The Court: Nobody ever shot at you?

The Witness: No.

(This was despite the fact there was a count of attempted murder as to Richardson)

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The Court: A block away. And what did you do? You heard the shooting?

The Witness: Yes.

The Court: What did you see?

The Witness: Nobody, just him lying there and people around him.

The Court: Was Smith and Lee or Divine as he's known - - what's the other name, Renny, did you see them in the crowd?

The Witness: No.

The Court: Do you know them if you see them?

The Witness: Yeah, know them from before in the street.

• • •

The Court: So you went with Van Dorn to the hospital because he's your wife's cousin?

The Witness: Yes

• • •

The Court: And that you were going to testify at this trial?

The Witness: No, I told them I didn't want to testify.

The Court: Why?

The Witness: I don't know nothing.

• • •

The Court: You didn't see who shot Mr. Van Dorn. Is that what you're telling me now?

The Witness: Yes

The Court: And that you won't testify.

The Witness: No.

After approximately 38 questions by the prosecutor and judge about the events that night, the judge finally got around to asking questions that the hearing was supposedly called for, namely whether Richardson was threatened and if so, by whom. But no more than 15 questions were asked on this topic, which only resulted in eliciting some vague rumors and generalized fear of testifying because of possible recrimination. The Court then returned to the events of the night and asked some additional 12 questions about Richardson not seeing the shooting and not know who did it.

Despite the fact that Burns was offered an opportunity to question Richardson, he did not even question him about the supposed threats and failed to establish that any threats were made to the witness, let alone by the defendants. Incredibly, Burns did not confront Richardson with the alleged statements of his mother that there were threats or call the mother to testify who was actually in Court.

The manner in which this proceeding was conducted and the conduct by the prosecutor only leads to the inescapable conclusion that this hearing was used solely to set-up Mr. Richardson for a perjury charge on the basis of inconsistent statements so that the prosecutor could use that as leverage against the witness to force him to testify as they wished, namely consistent with his Grand Jury testimony. There was no other reason for the prosecutor to immediately launch into questions about the underlying event and whether Richardson saw the shooting and not ask a single question about supposed threats to him even though that was the purported reason the District Attorney's office asked for the hearing. The District Attorney's office was not interested in using the Grand Jury minutes at Trial if the witness was threatened. It wanted a perjury charge against him to use as leverage to get his live testimony.

And the Court was complicit in this maneuver since it permitted the questioning and asked its own questions which also helped to set up the perjury charge. To make matters worse, the Court tricked Richardson into believing he had nothing to fear about the way he was testifying when the Court said:

> The Court: As I said, Mr. Richardson, if you didn't see anything on that night and you didn't see anything happen to Mr. Van Dorn – you see all I expect of you, if you testify in my court, that you tell me the truth. What you said anyplace else or some other time, I'm not concerned with. I am interested in the truth today.
>
> Do you understand what I am saying?

The Witness: Yes. (Trial Transcript p. 70; (Emphasis supplied).

This could only have supported Richardson's belief that he was not in jeopardy for anything he said without appreciating what the Prosecutor had done to him. Eventually, the Court ruled that a Sirois hearing was unnecessary and that he would not permit the grand jury minutes to be used. In light of this development, the judge ordered Smith's immediate release on his own recognizance.

The unauthorized hearing and improper use of it to lay a foundation for a perjury charge was only the first step leading to the prosecutorial misconduct which was about to follow. All the hearing accomplished was that the judge improperly established a foundation for a charge of perjury against the witness on the basis of an inconsistent statement given under oath. Burns advised the Court that he would not immunize the witness based on his testimony at the hearing and stated his opinion that if the witness testified at trial consistent with what he just told the judge, Burns would be unable to make out a prima facie case.

What transpired next was an extended discussion about what they were going to with the witness and the material witness order. These events occurred on the Friday before Labor Day weekend and the judge was going to adjourn the case until Tuesday after the long weekend to begin the trial. Burns told the Court that the District Attorney's office would no longer guard the witness or keep him in its custody, but requested that he be incarcerated at Rikers over the weekend under the material witness order. The judge flatly refused. Burns stated "I don't care if he goes to jail or what happens to him, but we will not be responsible for his safety". The Court reminded Burns that it was his office that asked that Richardson be paroled into their custody, which he granted, and was ordering the same be done again. Burns refused, telling the judge "We're not going to keep this

witness in our custody over the weekend and will not be responsible for his safety nor will we be responsible for anything that may happen to any members of his family". He also advised the Court that there was an outstanding warrant for the witness, which Paone explained was to pay a fine, which Richardson was willing to pay and that his mother was in Court and she indicated that they would pay the fine that day. Additionally, Paone objected to the District Attorney's washing their hands of the witness and requesting that he be incarcerated. The court repeated that it would not incarcerate Richardson and he directed the District Attorney's office to maintain custody "as long as they wanted him" as a material witness. Burns repeated "as long as we want him." The Court agreed that if they no longer wanted him as a material witness, the order would end and he should be taken by a detective to Criminal Court to satisfy the warrant.

Smith's attorney, Mr. Jones, then specifically requested that Richardson not be questioned by anyone or "coerced" without his attorney being present. The Court reminded Burns that he should not do that and Burns represented to the Court that he wouldn't and added "to be frank I would like to spend as little time with Mr. Richardson as possible. I find him to be a truly contemptible person." At the conclusion, the judge advised Burns that he should have the witness in his office at 9 o'clock Tuesday morning and to talk to him about the upcoming testimony scheduled for Tuesday afternoon. Burns replied "if, in fact we keep him."

Then Mr. Paone specifically asked Burns what was the District Attorney's intentions as to Richardson. Burns responded "if they don't incarcerate him on the warrant your Honor my inclination is he will probably be released" and the Court warned him not to release him without car fare. The last statement of the day was that Burns represented that Richardson would be taken to his

office to find out which court part the warrant emanated from and he would produce Richardson there at 2 o'clock that afternoon to answer the warrant. That concluded the proceedings. (This is all included in trial transcripts, pp 60 to 87).

What happened next is unprecedented and evidences utter misrepresentation to the Court and prosecutorial misconduct so egregious as to warrant exoneration of this defendant because of the manipulation and corruption of the criminal justice system which directly led to Smith's conviction. Within 5 minutes of the end of the proceedings, the District Attorney's Office, without advising Paone, arrested Richardson as he was leaving the courtroom where the hearing had just taken place. Richardson was handcuffed and brought to the District Attorney's Office (trial transcript page 287 to 88; 314 to 315). There he met ADA Burns and another Assistant (perhaps his supervisor) who told him that he was being charged with Perjury in the First Degree on the basis of inconsistent statements which Burns had just elicited moments earlier, which charge carried a 7 year sentence. Although Richardson testified that an attorney, Leo Kimmel was present, that would have been impossible. Mr. Paone was just in Court representing Richardson and there would have been no way for the Court to ignore Mr. Paone's representation and appoint another 18 B lawyer for Richardson in 5 minutes or any time that afternoon. Thus, Richardson must have been spoken to by ADA Burns when he knew he had an attorney without the attorney present, in direct violation of the then existing Disciplinary Rule 7 – 104 (A) which stated that during the course of representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such party or is authorized by law to do so

on". ADA Burns was well aware of this rule since the issue of speaking to the witness outside the presence of his attorney was repeatedly referred to by the Court during the proceedings at the above stated hearing. Mr. Kimmel can shed no light on this as he recently told our investigator that he has absolutely no recollection of Mr. Richardson or the events surrounding his representation of him.

Attached as Exhibit E is an affirmation recently obtained from Mr. Paone, stating that he was never informed of any intention to arrest his client and that had he been so informed he would have advised his client not speak to anyone and would have advised the District Attorney's office and the Police Department not speak to him without him being present. By not advising Mr. Paone of their intentions, Burns circumvented Richardson's rights after using the hearing to set him up for a perjury charge in an obvious effort to put pressure on him to testify in a manner in which his office wanted. Mr. Richardson was brought to the 81st precinct (not Central Booking) and held for 4 days without speaking to anyone or having a phone call. He was detained and remained in the same clothing without being able to bathe or wash, brush his teeth, have a hot meal, have any visitors or contact with the outside world. He was finally brought to court on Tuesday morning September 8 for arraignment on the perjury charge. We have been unable to obtain information as to why he was held 4 days and in a place other than Central Booking. We asked the District Attorney's office Conviction Review Unit months ago for their file on the Richardson perjury charge. They initially said they would produce it but then later told us it had been destroyed. They produced Smith's full homicide file from 1987, but it is suspicious that Richardson's perjury file was destroyed.

The practice at the time was that an arraignment had to occur within 24 hours of the arrest, which would have been some time on Saturday or certainly no later than Sunday. Considering the

DA offices subterfuge with Richardson and the Court, the strong possibility exists that this delay in arraignment was orchestrated by the District Attorney's Office which could easily have been accomplished by delaying sending his fingerprints to Albany, thus delaying the arraignment and keeping him incarcerated for 4 days. When Richardson was finally arraigned on Tuesday, ADA Silverstein from the Homicide Bureau was present and arranged for his immediate release once Richardson agreed to testify. Richardson was first brought to the District Attorney's Office and then brought to Court later Tuesday afternoon when he identified Smith as the shooter. Richardson testified at Trial that he knew if he testified according to what the District Attorney's office wanted, he would be released and the perjury charge dropped.

The events which transpired as set forth above can only be interpreted as corruption and pervasion of the criminal justice system by orchestrating a hearing for one reason and using it for another and then intentionally misleading the Court and all of the attorneys as to the District Attorney's offices' intentions regarding Richardson. Their first effort was to attempt to get the judge to incarcerate Richardson for the long weekend, obviously to put pressure on him to testify to what they wanted. Rebuffed by the judge, the office then took matters into its own hands and used the unauthorized hearing testimony as a predicate for the inconsistent statement perjury charge. Given the timing of the arrest immediately at the conclusion of the hearing, Burns had to have known he was going to arrest Richardson at the very time he was telling the judge his inclination was "to release Richardson", an obvious misrepresentation. It is also clear that charging Richardson with a crime carrying a potential seven-year sentence was the hammer used to coerce the 23-year-old Richardson to testify in a manner in which the office wanted, not because it was actually interested

in punishing Richardson for inconsistent statements. If that was the intent, the perjury case could have been directly presented to a Grand Jury and Richardson be given an opportunity to testify to explain himself in an effort to avoid arrest and indictment. Ordering Richardson's immediate arrest for perjury gave Richardson (or anyone in his situation) no choice, either go along with the District Attorney's office or face 7 years in jail. This tactic was especially effective on a person such as Richardson, who we know from his criminal record only puts his own interest ahead of society or anyone else's, because if the only way for him to avoid the 7 year sentence and get out of jail after 4 days was to testify to what the DA wanted, he would do it, despite the fact that he told the judge at the hearing that it was true that he did not see the shooting.

Further proof that this was the Office's intention is demonstrated by the fact that Richardson was never taken to the Criminal Court to pay the fine on the outstanding warrant after Burns told the judge that he was taking Richardson there at 2 o'clock that afternoon. Instead, he was simply arrested for perjury. None of these issues were raised on appeal of Smith's conviction except the argument that 4 days of incarceration was police coercion as a matter of law. That argument was not successful in the Appellate Division but they did not pass on any of the other issues raised herein.

SUMMARY

The conduct here cannot be called "the Fair Administration of Justice". We are left with a case of a one eyewitness career criminal with other serious credibility issues due to his numerous inconsistent statements, where the prosecution withheld a critical piece of evidence at trial, the audiotape, and a potentially critical piece of evidence for this review panel, i.e., the Richardson

perjury file, which has been destroyed. God only knows what could be in that file which now will not see the light of day, that would shed light in the prosecutor's motives. The representations about threats supposedly made by the defendant to get Richardson not to testify were not seriously advanced by the prosecutor and ultimately were not borne out. These allegations only resulted in an unauthorized hearing in which the prosecutor and Court asked improper and unauthorized questions, given the reason for the hearing, which created the predicate for the perjury charge. Furthermore, the District Attorney's office engaged in unethical conduct by misrepresenting to the Court what its intentions were regarding the witness. The penultimate offense was then arresting the witness and using the potential 7 year sentence and 4 days of incarceration as coercion to obtain the witness's testimony. This threat was accomplished by speaking to the witness without his attorney present, knowing that he had an attorney.

Our inability to demonstrate a motive on the part of Richardson or whether it was mistaken identity to explain his Grand Jury testimony should not factor into this Panel's discussion. Being unable to locate and interview Richardson has prevented us from gaining such insight. Regardless of his reasons, the fact is the administration of justice was corrupted and the tactics used were indefensible.

Our research has been unable to find any other instance in American jurisprudence where this tactic has been utilized against a witness in a criminal case. Because we cannot locate Richardson, we have no information about what the police said to him to get him to change his initial statement to identify Smith or to attempt to have him confirm which version of facts to which he testified were true. However, we do know that the now disclosed audiotape contains many serious inconsistencies

with his other versions of events, casting further doubt on the veracity of his testimony at trial.

Finally, regarding Smith's actual innocence, attached hereto as Exhibit F is an affidavit from one Kevin Bazemore sworn to in front of an attorney who used it as part of an unsuccessful 440 motion, in which he said he saw the shooting, he knew "Devine and Rennie" and they were not the people who shot the decedent. He only learned shortly before he gave the affidavit that they had been convicted and that he would so testify at a Trial that they were not the shooters. He was employed by the New York City Board of Education as a custodian but has since passed away. Attached as Exhibit G is the Affidavit of Ronald Moore who Mr. Smith met in prison and learned he had been at the shooting scene. He also swears that he witnessed the murder and that the shooter was a light-skinned male black (Smith is not light skinned but rather very dark skinned) and he was "100% sure that Rennie did not shoot and kill Gary Van Dorn" (a.k.a. Gary Hall). Mr. Moore cannot be located.

Additionally, attached as Exhibit H is a report from our investigator dealing with efforts to locate Richardson. In interviewing his cousin, Vivian Braithwaite, she disclosed a conversation she had with Richardson years ago in which he essentially admitted to her that he lied at the trial. The investigator reported the following:

> Vivian knows Kevin Smith from the neighborhood where they grew up and many years ago Vivian confronted Vernon about his testimony against Kevin Smith. Vernon said, "I do what I do." Then she said "Did you lie about what happened?" He said, "I did what I did and so what?" She again said, something like, "So you lied? He replied, "So what, I did what I did." It was enough to convince Vivian that Vernon had lied in his testimony against Kevin.

This Panel must thus ask itself whether the coercive tactic of setting up a witness for a perjury charge by orchestrating and then misusing a hearing, then arresting the witness for perjury in the very case in which he is expected to testify and threatening a 7 year sentence and holding him for 4 days in virtual isolation is the type of conduct which should be the foundation for a murder conviction.

This Panel should ask itself whether whatever the District Attorney's office belief about what it thought truth was, warranted Machiavellian conduct that the ends justifies the means. What if the District Attorney's belief was wrong? Two people have sworn that Mr. Smith was not the shooter and the People's only eyewitnesses also testified to that under oath. In light of the manner in which that witness was forced to change his story, this panel must ask itself whether good conscience permits sustaining this questionable conviction under the circumstances.

It is clear that this conviction was obtained contrary to proper prosecutorial function and with corruption of the criminal justice process thereby undermining the integrity of the conviction. The current administration of the Kings County District Attorney's office would not countenance or authorize such conduct today and should not condone this conduct committed by another administration. In fact, no District Attorney's office in this country has been found to have ever used a similar tactic in obtaining a conviction to any crime, let alone murder. As such, this Review

Panel should recommend the conviction be vacated and Kevin Smith be exonerated and the District Attorney's office should follow that recommendation.

Respectfully submitted,

Scott Brettschneider

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Enclosures