People v Fields
2019 NY Slip Op 33136(U)
July 17, 2019
County Court, Westchester County
Docket Number: 17-0893
Judge: Anne E. Minihan

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

JAMIL FIELDS,

Defendant.

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DECISION and ORDER
Indictment Number: 17-0893

Minihan, J.,

An indictment has been filed against the defendant charging him with attempted murder in the 2nd degree (Penal Law §§ 110/125.25[1]), assault in the first degree (Penal Law § 120.10[1], criminal possession of a weapon in the 2nd degree (Penal Law § 265.03[3]) and criminal possession of a weapon in the 3rd degree (Penal Law § 265.02[1]). The People allege that on July 18, 2017, at approximately 5:45 p.m. in the vicinity of Exit 18B on Interstate 95 northbound in the Town of Harrison that the defendant, Jamil Fields, with the intent to cause the death of, and serious physical injury to, Mouhamed Cisse, did attempt to cause the death of Mr. Cisse by shooting him in the head, sternum, armpit, abdomen, and arm, causing Mr. Cisse to sustain serious physical injury including the loss of vision in his right eye. They allege further that, in so doing, the defendant possessed a loaded and operable firearm, that the possession did not take place in the defendant's home or place of business and that the defendant had been previously convicted of assault in the 1st degree in Bronx County on or about May 19, 2008.

Defendant Fields, claiming to be aggrieved by the improper or unlawful acquisition of evidence, has moved to suppress a number of noticed statements allegedly made by him to various members of the New York State Police on the grounds that they were involuntarily made as a result of his illegal detention and that they were made involuntarily within the meaning of CPL 60.45. Defendant Fields has also moved to suppress a noticed identification which was allegedly made of him by Mouhamed Cisse from a blinded photographic array procedure which took place at Burke Rehabilitation Center on August 18, 2017. The defendant moves to suppress physical evidence recovered in this case on the ground that he was unlawfully seized and detained and that his person and vehicle were unlawfully searched. Finally, defendant seeks a *Sandoval* ruling by the court.

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The People oppose the defendant's suppression motions, seek a *Ventimiglia/Molineux* ruling and, in addition, ask the court to rule on a motion *in limine* with respect to a statement attributed to the defendant, allegedly made to his then-attorney and overheard by a member of the New York State Police.

By Decision and Order dated December 20, 2017, this court (Blackwood, J.,), granted so much of the defendant's motions as sought suppression of defendant's noticed statements to the extent that a hearing pursuant to *People v Huntley* (15 NY2d 72 [1965]) was ordered to be held prior to trial for the purposes of determining the admissibility and voluntariness of these noticed statements (CPL 710.30[1][a]; CPL 710.20[3]; CPL 710.60[3][b]). As to the defendant's motion to suppress the noticed identification, his applications were partially granted by the court to the extent that a hearing was ordered to be held prior to trial to determine whether this noticed identification was, as the People allege, confirmatory (*People v Rodriguez*, 79 NY2d 445 [1992]) or, alternatively was unduly suggestive such that it would taint any in-court identification of the defendant at the trial of this matter (*United States v Wade*, 388 US 218 [1967]). In the event that this noticed identification were held to be impermissibly suggestive, the hearing court would, in that instance, consider whether the People have proven by clear and convincing evidence that an independent source exists for the witness's proposed in-court identification (*see People v Pacquette*, 17 NY3d 87 [2011]).

On July 11, 2019 and July 12, 2019, combined *Huntley, Wade/Rodriguez, Mapp/Dunaway* and *Sandoval* hearings were conducted before this court, which also received evidence as to the People's application with regard to *Ventimiglia/Molineux* and to the defendant's statement which was made to the defendant's former attorney and was overheard by a State Police Investigator. At the hearings, the People called five witnesses: New York State Police Investigators Anthony Favre, Timothy Miller, Steven Connelly and Ryan Cruickshank as well as Trooper Jenna Schear. Received into evidence at the hearing were the following exhibits: twelve sworn witness statements, the grand jury testimony of Mouhamed Cisse, the contractual agreement and supporting administrative documentation related to the rental of a U-haul GMC van, a video recording of defendant's interview with New York State Police on July 22, 2017 (together with a proposed transcript), an audio recording made in the State Police holding area at the Hawthorne barracks (together with a proposed transcript), a video taken at the New Rochelle toll plaza on Interstate 95, an e-mail from a Transit Authority employee regarding the time stamp on this video, crime scene photographs principally of a maroon-colored Honda, photographs of the exterior of a U-Haul van, photographs of a holding room at the Town of Harrison Police Department, a photographic array packet, and T-Mobile documents related to subscriber information and call data for a cellular telephone number which the People attribute to the defendant. The defense called no witnesses and offered no evidence.

The court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible and makes the following findings of fact and conclusions of law.

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FINDINGS of FACT

On July 18, 2017, following a 5:49 p.m. 911 call, New York State Police Investigator Anthony Favre was assigned to an investigation of a shooting that occurred on New York Interstate 95 at Exit 18B in Mamaroneck. Upon his arrival, other law enforcement officers from the State Police Troop T barracks were there as well as Emergency Medical Service personnel; however, the individual who had been shot, whom he later learned was named Mouhamed Cisse, had already been transported from the scene. Trooper Jermaine Benton informed Investigator Favre that there had been a hit and run accident approximately three-tenths of a mile from where Mr. Cisse was found and that there were civilian witnesses present at both scenes. Over the course of the next hours, Investigator Favre interviewed some of these witnesses and was present for the taking of the statements of others. A number of these sworn statements were introduced in evidence at the hearings.

Maureen Vaneer told State Police (People's Exhibit 11) that at approximately 5:50 p.m. on July 18, 2017 she was driving her daughter Johnasia Carr in a maroon Honda Accord in the right northbound lane of Interstate 95 when she observed a white U-Haul van next to her in the middle lane. The U-Haul van struck the rear driver's side of her vehicle, causing her Honda to spin.[1] Ms. Vaneer gained control of her vehicle and parked it on the right shoulder just past the on-ramp. A woman who identified herself as a nurse approached the car to see if she and her passenger were injured and Ms. Vaneer told the woman that they were shaken up and a little distraught. As Ms. Vaneer got out of her car, she observed the same U-Haul van in the grassy area near the on-ramp "bouncing" back and forth as if deciding whether or not to exit. As Ms. Vaneer got back into her car to move it out of the way of oncoming traffic, she observed the U-Haul van pull ahead and park in front of the Honda by the guard rail. Using her I-Pod, Ms. Carr took a photograph of the U-Haul van just as it "took off" down Interstate 95 and then called 911. Ms. Vaneer told police that she had a "severe headache" and that her left shoulder was hurt and that Ms. Carr had told her that while she had hit her back on the car door she was not in serious pain.

Ms. Carr told State Police (People's Exhibit 12) that at approximately 5:50 p.m. as she was a passenger in her mother's car as it traveled north on Interstate 95, she turned around and, out of the rear driver's side window, saw a U-Haul van very close to the left side of their car. She said that she observed the U-Haul van strike the left driver's side of their car in the area of the gas tank and that the vehicle had spun out of control until they were in the middle of the right lane just before the on-ramp merged with the interstate. Two other vehicles as well as the U-Haul van pulled over, ahead of their Honda, and her mother, Ms. Vaneer, got out of the car. Ms. Vaneer yelled to her to get the license plate and, in response, Ms. Carr picked up her I-Pod and took a picture of the U-Haul van as it was pulling away (People's Exhibit 90). Ms. Carr reported that she was uninjured and that she had not seen who was in the U-Hall van.

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[1]People's Exhibit 124 (photographs of maroon Honda Accord)

Suyen Taylor told State Police (People's Exhibit 10) that she was driving north on Interstate 95 near the Mamaroneck exit when she observed a U-Haul van moving erratically back and forth on the grass in an attempt to get off the grass and onto the roadway. As she turned on her hazzard lights and looked left, she saw a man lying against the median of the roadway, rolling about. She pulled her vehicle to the right and observed the man stumble across the highway and then fall by her driver's side door. Ms. Taylor called 911 while observing that the man was covered in blood. Another motorist brought a blanket and she and other motorists who had stopped tried to keep the man from attempting to stand. She indicated in her statement that she heard the man say, "Just shoot me" and that she reassured him that no one would shoot him. The man told them he was named Mouhamed.

Deborah Hutchins told State Police (People's Exhibit 19) that on July 18, 2017 she was traveling northbound on Interstate 95 in Mamaroneck when she noticed traffic was slowing and that two other vehicles had pulled onto the shoulder. Ms. Hutchins pulled her car from the middle lane to the right lane where she noticed someone lying in the roadway. Another vehicle had pulled over and she saw woman was looking down at the victim. Ms. Hutchins got out of her car and walked up to what she described as a young man in his late teens or early twenties lying in the roadway. She observed that his skin was torn up and she thought that perhaps he had fallen from the back of a truck. She went back to her car to move it and get some blankets. Ms. Hutchins and some of the others covered the man with blankets and attempted to render aid and, in so doing, she observed a large bump on his head. The man, who told her that his name was Mouhamed and that he was from the Bronx, attempted to get up while she and some of the others tried to convince him to lie down. At one point, the man rolled onto his side and, as he did, Ms. Hutchins saw that there was a significant amount of blood on his head and shirt. She and four other good samaritans stayed with the victim until emergency personnel arrived.

Terrence Wright told State Police (People's Exhibit 17) that on July 18, 2017 he was entering the northbound exit ramp for Interstate 95 from Mamaroneck Avenue when he noticed a black Jeep and several other cars with women standing outside of them. He observed a U-Haul van moving from a grassy area near the hard shoulder in front of the people who were standing outside their vehicles. The U-Haul van slammed its brakes hard before it took off. As Mr. Wright drove from the center lane to the right lane he observed first one and then a second shoe and then he saw that there was a man standing by the center concrete barrier. The man fell onto the pavement of Interstate 95's left shoulder. Mr. Wright saw a woman who appeared to be making a phone call and, as Mr. Wright stopped, he approached and saw that the man whom he had seen fall, was bleeding "a lot." Returning to his car, Mr. Wright got a jacket which he put under the head of the bleeding man and he then directed traffic until an ambulance arrived.

Eileen Laska told State Police (People's Exhibit 14) that she had been traveling northbound on Interstate 95, approaching Exit 18B, in the middle lane when she saw the U-Haul "small van truck" directly in front of her suddenly veer into the right lane and strike a maroon Honda on the right side of the driver's side, which put both vehicles to spin. The U-Haul van came to rest in the grassy area in the area of the exit and the maroon Honda stopped at the exit

between the on-ramp and the off-ramp. Ms. Laska, a nurse consultant, stopped her vehicle and got out to see if the occupants of the Honda were injured. After speaking with them, she observed the U-Haul van as it passed them on the right hand side, stalled and then started again. Ms. Laska stated that she believed that the U-Haul was going to stop but that it had taken off and, in so doing, she looked through the open driver's side window of the U-Haul and observed the driver whom she described as a nervous looking black male with dreadlocks. She said that he was smoking something and that she thought he might have been wearing a white shirt. Just before the U-Haul van drove away, she looked at the rear license plate and yelled out the numbers and letters several times to a good samaritan motorist who stopped her Jeep to render assistance. This motorist responded that she "got it" or that she "was getting it."

Laura Romano told State Police (People's Exhibit 15) that at approximately 5:34 p.m. on July 18, 2017, she was traveling northbound on Interstate 95 in the right lane when she observed a white U-Haul van "shoot directly across the roadway from the far left lane" and, as it crossed the center lane and careened towards the shoulder, it struck the back of a red Honda, sending it into a spin. The U-Haul van landed in a grassy area between the exit ramp and the on-ramp at Exit 18B. Ms. Romano pulled her Jeep over at the shoulder to check on the welfare of the Honda's occupants and, as she did, saw the U-Haul van drive from the grassy area back onto the roadway. As it did, she observed the operator whom she described as a tall African-American male with dreadlocks. She observed that the driver was smoking a cigarette in his left hand and was wearing a camouflage hat or bandana. Although she believed that the U-Haul van, which was stalling and starting, was pulling from the grass to the hard shoulder, "it took off fast." She thought there was another occupant in the vehicle. Another motorist who stopped to render aid called out the license plate of the van as it sped away and Ms. Romano's passenger recorded the license plate number.

Elizabeth Sutka told State Police (People's Exhibit 16) that on July 18, 2017 at approximately 5:45 p.m. she was the passenger in her friend Laura's car as it traveled northbound on Interstate 95 in the center lane. Ms. Sutka observed a U-Haul van driving about one hundred yards in front of their vehicle as it abruptly moved from the far left lane to the right lane, striking a red Honda, causing both vehicles to lose control. The U-Haul van ended up in the grass on the right side of the road. She described the driver of the U-Haul van as a black male with long, possibly braided, hair and she told police that as the van had recklessly sped away from the scene, crossing over the lane markings, she had unsuccessfully attempted to take a photograph of the vehicle. Another motorist called out the license plate of the U-Haul van as "'AH55984'"and that she herself was "99% sure" that it was an Arizona license plate.

Logan Irons, a volunteer EMT, told State Police (People's Exhibit 18) that at approximately 5:50 p.m. on July 18, 2017, he and his partner were dispatched to a call of a pedestrian struck on Interstate 95 at Exit 18. While en route, they were redirected to an area just past Exit 18. When they arrived seven to nine minutes later, he observed about four vehicles stopped and one man directing traffic. They pulled the ambulance in front of the stopped cars and got out to render assistance to a 23 year-old black male with dreadlocks who was bleeding from a head wound. Mr. Irons also noticed initially that the man had "severe road rash." The

man told him that he had been shot and, looking at him, Mr. Irons observed what appeared to be a gunshot wound to the man's chest and left arm. While transporting the man to the Jacobi Hospital, Mr. Irons and others attempted to communicate with the man who was only able to answer questions by raising and squeezing his hand.

A man named Harsimian Singh gave an verbal statement to State Police that was not reduced to writing. He said that he was traveling northbound on Interstate 95 when the driver of the car alerted him to a person hanging out of a U-Haul van. Looking up, Mr. Singh saw what he thought was someone being thrown from the U-Haul van.

From the New York State Thruway Authority, Investigator Favre obtained and reviewed toll booth video footage (People's Exhibit 84) from Interstate 95 in New Rochelle shortly after the shooting and vehicular accident which depicts a U-Haul van passing through the New Rochelle toll plaza. In the video recording, the side of the U-Haul bears the address "2800 White Plains Road, Bronx, NY" together with a telephone number. As the van pulls up to the toll window, the arm of an African-American man reaches out of the vehicle several times during the toll transaction and, on the wrist of the man, a white wristband is clearly visible.

On July 18, 2017, Investigator Timothy Miller was tasked with tracking down the U-Haul van based on the Arizona license plate number as reported by some of the civilian witnesses using the number he had been given. He learned that all U-Haul vehicles are registered in the state of Arizona. Through corporate assistance and a search of overdue GMC U-Haul vans rented in the Bronx with similar license plates, he ultimately discovered that on July 14, 2017, a GMC U-Haul van had been rented at a dealership at 2800 White Plains Road in the Bronx. The plate on this van was two digits off from the license plate number that he had been given by civilian witnesses. Investigator Miller contacted the dealership on White Plains Road and spoke with the general manager, Brunilda Lawrence who told him that the van with that license plate had been rented to Jamil Fields on July 14, 2017. In her statement Ms. Lawrence told State Police (People's Exhibit 22) that Mr. Fields had presented a valid New York State Driver's license and had completed the rental agreement which required the van to be returned on July 17, 2017. She claimed that the van had not been returned on July 17, 2017, that she wanted to report the vehicle as stolen and she requested that Mr. Fields be arrested. The actual rental agreement and documentation as well as video footage of the defendant, wearing a white wristband on his left arm, conducting the rental transaction were procured the following day (People's Exhibits 81, 82 and 85). Investigator Steven Connelly spoke with Ms. Goodman, the clerk depicted in the video of the rental transaction, who told him that the man depicted on the video was Jamil Fields.

On July 21, 2017, Investigator Favre received a call from a man named Anthony Ramos who had contacted State Police and asked to speak with an investigator. Mr. Ramos appeared personally and talked to Investigator Favre and told him that earlier that day he was getting pizza on White Plains Road and Nereid Avenue when he ran into a friend of his called "Dread" and he reported that he had asked Dread where "Dollaz" was. Mr. Ramos told the investigator that

Dollaz was his friend, Mouhamed Cisse. Dread told Mr. Ramos that Dollaz had been shot by "the one with the white U-Haul van who is always in the area on the corner of White Plains and Nereid Avenue." Mr. Ramos also told Investigator Favre that he knew the person that Dread was referring to as Jamil Reeds, whom he had known for approximately 9 years lived in a white U-Haul van parked in the Walgreen's parking lot since his girlfriend kicked him out. Mr. Ramos recalled that he had last seen Jamil the previous Saturday at 4:00 p.m. "dusted," listening to music and dancing out in front of the U-Haul van for a couple of hours. Mr. Ramos further stated that he had been told that Dollaz had gotten into the U-Haul van with Jamil to go on a "powertrip" to get "juice" which would be the only reason the two would have been together since Dollaz "wouldn't be caught dead hanging with that guy."

Mr. Ramos also gave Investigator Favre a cell phone video that was taken the Saturday before the shooting which depicts an African American man as described in the civilian witness statements. Investigator Favre testified that, with the permission of Mr. Ramos, he viewed the video and then downloaded it and that he recognizes the individual depicted in this video as the defendant. On this video, the man, who can be seen wearing white wristband on his left arm, is dancing to music on an urban street in front of a white U-Haul van emblazoned with "2800 White Plains Road Bronx, NY" and the telephone number of the U-Haul rental facility located there (People's Exhibit 155).

A cell tower dump and an exigent circumstances request for subscriber data associated with the cell phone number given at the time of the rental of the U-Haul were done as part of the investigation (People's Exhibit 135). Subscriber information revealed that Jamil Fields was the account holder for the number that had been given on July 14, 2017 when the U-Haul van was rented. Records showed calls between the telephone number associated with Mouhamed Cisse and Jamil Field's cell phone on July 18, 2017. Cell tower data for the period of time between July 17, 2017 and July 19, 2017 was retrieved and analyzed by Investigator Ryan Cruickshank who then plotted data regarding "tower hits" into Google Earth. Around the time of the shooting, two calls involving the Jamil Fields phone hit off of a Harrison cell tower about a mile from the incident. An 8:12 p.m. call that same day hit off of a cell tower in Bridgeport, Connecticut.

Investigators began contacting some of the individuals who were connected to the defendant through calls he had made and received. On July 22, 2017, Investigators Miller and Hoeverman went to Bridgeport to interview Angela Glover. Ms. Glover told investigators in her interview, and also related in a sworn statement (People's Exhibit 138), that the defendant called her on July 18, 2017 and said that he needed to come see her. When he arrived, alone, he was driving a U-Haul van with the music blasting. She told police that the defendant was upset and that she thought that he was "high on dust." When the defendant got out of the van, he was unclothed except for a towel around his waist and sneakers on his feet. During the 30-40 minute visit, the defendant was aggressive. He asked her for money. He told her that she ruined his life and he was living in the van and had broken up with his girlfriend. She gave him twenty dollars before he left and, she recalled, he asked for a charger for his phone. While investigators were there, she called the number she had for the defendant and asked him about the U-Haul van and the defendant told her that he had given it away.

While State Police were never able to locate the man Mr. Ramos called "Dreads," further investigation into the name Jamil Reeds involving, among other things, a criminal history check, linked the name Jamil Reeds with the defendant, Jamil Fields as an alias. Investigator Favre and a fellow investigator also canvassed the area in the Bronx where the defendant and Mr. Cisse reportedly resided, both to gather intelligence and to procure surveillance video. In so doing, they went to 638 Nereid Avenue and spoke with the owner of Gourmet Deli who gave them access to surveillance video from which they could identify the defendant, wearing a white wristband, entering the deli as well as a white GMC U-Haul van parked right outside.

While Investigator Farve was viewing the security video, his fellow investigator saw a white GMC U-Haul van fitting the description and bearing an Arizona license plate that appeared to match the number that had been reported. They immediately pursued the U-Haul van as it traveled down Nereid Avenue and turned right on Bronx River Road and then proceeded northbound on White Plains Road. Investigator Favre could see that the defendant was driving the U-Haul van. The investigators got caught at a traffic light and lost sight of the van but eventually observed it parked in front of the multi-family building at 4566 Richardson Avenue. The investigators called for assistance from the 47th precinct and, when a lieutenant and three officers arrived, they approached the defendant who was sitting on the stoop at 4566 Richardson Avenue.

Investigator Favre testified that he initially approached with his gun drawn, he quickly made the assessment that the defendant did not pose an immediate threat. He described the defendant as compliant and cooperative and testified that he could tell from the t-shirt and shorts that the defendant was wearing that there no suspicious bulges in the defendant's clothing. The defendant, who was wearing a white wristband, asked whether the officers were there for the van and Investigator Favre responded that they just wanted to talk to him about the van. The defendant showed the officers a lanyard he was wearing around his neck with the key to the white U-Haul van, said that he knew they were there about the overdue rental van and offered to call a tow truck. Investigator Favre reassured him that police would call for a tow and that they wanted to talk about what he had been doing, to which the defendant responded that he had been partying all weekend. When they asked him if he would come back with them, the defendant agreed. Prior to getting into the investigators' vehicle, Investigator Farve patted the defendant down, consistent with police procedure and, when the defendant raised his cell phone and asked "Do you want this?" Investigator Farve responded that he was going to want it and he took both it and the defendant's lanyard and necklaces which were later vouchered as personal property. The defendant was handcuffed and placed into the front seat of the police car where he waited while Investigator Favre walked over to inspect the white U-Haul van.

The U-Haul van had an Arizona license plate that matched the license plate of the suspect vehicle. Emblazoned on the side of the van was "2800 White Plains Road, Bronx, NY" and the telephone number of the dealership located there. There was damage to the passenger side door of the van that appeared to have been caused by a bullet and there was front-end damage that suggested that the vehicle had been in a recent collision (People's Exhibits 127a-c). The U-Haul van was secured by another investigator and towed to a State Police facility in Poughkeepise where it was later searched pursuant to a warrant.

The defendant was transported to the State Police barracks in Hawthorne and secured on a bench for about 50 minutes before Investigator Favre and Senior Investigator Kelly Taylor attempted to interview him around 6:50 p.m. During that time, Investigator Favre inventoried the defendant's personal property and, in so doing, observed what appeared to be blood in a small area of the phone near the charging port. *Miranda* warnings were read to the defendant at 6:53 p.m. In the video of this interview, the defendant, who is not handcuffed, is specifically told that he is not under arrest and asked by Investigator Taylor if he understands that to which the defendant responds that he does. Investigator Favre then reads the defendant each of his *Miranda* rights. The defendant acknowledged that he understood each of his rights and, at the conclusion of the *Miranda* warnings, stated "Alright. I'm good with everything you said. I don't want to answer nothing else. Talk to my lawyer." Investigator Favre then read the last question, "Having these rights in mind, do you wish to talk to us at all?" to which the defendant responded, "No" and "Talk to my lawyer." Senior Investigator Kelly asked the defendant if he needed a ride back and the defendant stated that he did and he reminded the investigators that they were going to get him something to eat (People's Exhibits 86 and 86a [transcript]). The defendant was told that he was being detained and was secured in the holding area and given something to eat.

While in the holding area, the defendant initiated conversation with a trooper and two investigators. In the audio recording of this conversation, the defendant teases the trooper, calling him "junior" and asks his age, compliments the food he had been given and says that he is so hungry he is going to eat it all. The defendant then offers, "I'm ready to rid the street of all the sin. I'm ready to rid the street of every crumb bunches of snatchin assholes out there," to which the investigator responds with a non-committal, "Oh yeah?" The defendant then responds "Yeah, any asshole out there, I'm gonna be a vigilante out there." The investigator responds in a seemingly bored or distracted way, "You're gonna be a vigilante. Hold on a second." In the conversation that follows, the investigator responds to each of the defendant's statements by either repeating what the defendant had just said, or by saying, "uh huh" or "yeah." The defendant talks about a man he had beaten with a tire iron, how he intends to collect insurance money and leave New York where people play games, mafiosos he knew, and he discusses how he rents vans and changes them frequently so that the rental facility will give him a freshly cleaned van. The defendant waited in the holding area until he was transported to the Harrison Police Department to await arraignment.

On July 23, 2017, Investigator Connelly was at the Harrison Police Department during the early morning hours for the defendant's arraignment. He and a trooper transported the defendant to the police department and placed him in a small holding room that the investigator estimated to be seven feet by eight feet (People's Exhibit 172a-c). The defendant was secured to a bench large enough to accommodate only one person and the investigator watched him from five feet away through an open door in full view. When the defendant's assigned counsel arrived, he was escorted into the room and a chair was placed right next to the bench. Investigator Favre stood outside the room in full view some five feet away. He testified that he did this because the defendant remained in State Police custody, Harrison Police Department personnel had directed him to that room for that purpose, and he was responsible to ensuring that the defendant and others around him remained safe. As the attorney walked in, he informed the defendant that he was being arraigned for attempted murder and the defendant expressed surprise, saying in a loud voice, "He's not dead?" Investigator Connelly described the defendant's voice as excited and loud.

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On August 18, 2017, Trooper Jenna Schear was asked by investigators to perform an identification procedure utilizing a photographic array. She had been, and thereafter remained, uninvolved with the investigation of the shooting of Mouhamed Cisse. She drove to Burke Rehabilitation Center where she met with Investigators Favre and Hoeverman and received the photographic array packet. She did not know the defendant and did not know which position in the array his photograph occupied. Trooper Schear met with Mr. Cisse alone and read the pre-printed directions on the first page of the packet (People's Exhibit 83). At the conclusion of the instructions, which she read during the hearing in the same way as she had on August 18, 2017, she asked Mr. Cisse if he recognized anyone in the array. Mr. Cisse, who squinted during the viewing, answered that he did. She then asked what the number of the position of the person he recognized and he responded number 5 (the defendant's photograph). When she asked Mr. Cisse from where he recognized this person, Mr. Cisse responded that he looks familiar and thought that he lived on Richardson Street in the Bronx.

Mr. Cisse's grand jury testimony from August 25, 2017 was received into evidence without objection (People's Exhibit 39). In it, Mr. Cisse stated that on July 18, 2017, he went on a car ride with "a guy named Jamil" whom he knew from the neighborhood of 238 White Plains Road in the Bronx. He testified that he had "told [Jamil] to drive him to the mall" and that Jamil was driving him in a U-Haul van on Interstate 95 when he was shot in the head. He could not remember if he had called Jamil but testified that he had the defendant's cell phone number and that the defendant had his. In response to getting shot at, Mr. Cisse testified that he jumped from the moving van in an attempt to save his life and that he thereafter got up and tried to cross the interstate before people intervened and helped him. As a result of the incident, Mr. Cisse had no vision in his left eye and was uncertain whether he was expected to regain his sight. Mr. Cisse testified that he was known in the neighborhood by his nickname "Dollars."

CONCLUSIONS of LAW

Mapp/Dunaway

At a *Dunaway* hearing, the People have the initial burden of going forward to show, by credible evidence, the lawfulness of the police conduct (*People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Wise*, 46 NY2d 321 [1978]; *People v Whitehurst*, 25 NY2d 389, 391 [1969]; *People v Berrios*, 28 NY2d 361, 367 [1971]; *People v Hernandez*, 40 AD3d 777, 778 [2d Dept 2007]; *People v Moses*, 32 AD3d 866 [2d Dept 2006]). In evaluating the police action, the court must determine whether it was justified at its inception and whether it was reasonably related in scope to the circumstances present at the time (*People v DeBour*, 40 NY2d 210, 215 [1976]). If the People satisfy this initial burden, the defendant "bears the ultimate burden of proving that the evidence should not be used against him" (*People v Berrios*, 28, NY2d 361, 367 [1971]).

In this case, the People presented ample evidence to meet their burden and to demonstrate that, at the time the defendant was detained at gunpoint, the police had evidence sufficient to establish probable cause. There were several witnesses who observed a U-Haul van strike a Honda Accord on Interstate 95 shortly after the shooting and the license plate of that van was observed and recorded as the van fled the scene. The driver of that van was described in witness

statements and those descriptions of an African American man are consistent with the defendant's physical appearance and hair style. Video from the New Rochelle toll booth, taken shortly after the shooting and accident, depicted the arm of an African American man, with a white wristband on his left arm, driving a U-Haul van emblazoned with the address and telephone number of a U-Haul dealership in the Bronx. Shortly after the shooting, a civilian witness reached out to State Police to provide information that he had heard indicating that the victim had been shot by a man he knew named Jamil Reeds from the area of the Bronx where the defendant resided (which, according to the defendant's criminal history, was an alias) and this witness also gave State Police a video of the man he knew as Jamil. In this video, a man matching the defendant's physical appearance appears dancing in front of a U-Haul van with the same U-Haul dealership address and phone number on the side. In that video, the man is wearing a white wristband on his left wrist. A U-Haul van, with a license plate that matched the one given in the accident investigation (except for two transposed numbers) was traced to the dealership in the Bronx at the address that appeared on the side of the van in both the toll plaza video and in the civilian's cell phone video. That dealership had rented a U-Haul van to the defendant just four days previously and video from the rental transaction depicts the defendant, wearing a white wristband on his left wrist, as he completed the rental transaction. In so doing, the defendant gave his cell phone number to U-Haul and that number was used by the State Police to determine both that there had been telephone calls made between the defendant's cell phone and Mr. Cisse's cell phone and also to establish that the defendant's cell phone had been used shortly after, and less than a mile from, the scene of the shooting and vehicular collision. State Police Investigators who were in the Bronx in the defendant's neighborhood further to the investigation when they, by happenstance, observed a U-Haul van (with the same license plate) they pursued that van and saw the defendant driving it. After losing the van in traffic, they managed to locate it and, seated on a stoop in front of the parked van (with damage consistent with having been involved in both a shooting as well as a front end collision) they encountered the defendant who was wearing a white wristband on his left wrist. The defendant spontaneously admitted possession of the U-Haul van which, pursuant to the rental agreement, should have been returned days earlier, he offered the keys to the van which were on a lanyard around his neck, and he offered his cell phone.

The People presented ample evidence to establish that the defendant was lawfully stopped and detained following an extensive investigation into the shooting incident which also involved a hit and run vehicular collision. There was probable cause to arrest him for the shooting, for the hit and run accident, and for the unauthorized use of the U-Haul van. Accordingly, the defendant's motion to suppress physical evidence is denied.

Huntley

The test for whether a statement is truly spontaneous is whether it was spoken by a defendant "without apparent external cause" (*People v Stoesser*, 53 NY2d 648, 650 [1981]). That is, courts look to whether a defendant spoke with true spontaneity and not as the result of "inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 NY2d 289, 302-303 [1978]; *see People v Lanahan*, 55 NY2d 711, 713 [1981]; *People v Stoesser*, 53 NY2d 648, 650 [1981]).

Here, there is no question but that certain of the noticed statements attributed to defendant Fields were truly spontaneous. Initially, when police approached the defendant as he sat on the stoop of the building at 4566 Richardson Avenue, and despite Investigator Favre's gun being drawn, said merely, "Are you here about the van?" and acknowledged that the van was overdue to be returned. Later, the defendant was given his *Miranda* warnings after which, as the People properly concede, he invoked his right to counsel. The credible evidence reveals that State Police honored the defendant's expressed wishes not to submit to an interview. Thereafter, while the defendant was eating the meal procured for him, the defendant initiated small talk with the officers present in the holding room. There is no record evidence that any officer engaged in verbal or non-verbal behavior having the design or effect of eliciting a statement from him. The topics of the recorded statements in the holding room veered quickly, at the defendant's whim, from a discussion of the apparently youthful appearance of the trooper and how hungry the defendant had been to the defendant's desire to become an American vigilante, to a man in the neighborhood whom the defendant had beaten with a tire iron because he "don't kill nobody with no gun, no weapon, or no knife. I kill them with my hands." Indeed, after saying this, the investigator quickly responds, "No one said anything about that" essentially communicating to the defendant that he had strayed beyond the conversational nature of the interaction. The responses to the defendant's bizarre statements were "uh hum," or "uh huh," or the investigator sometimes simply repeated the last part of what the defendant said as the conversation pivoted from one topic to another and cannot, on this record, be said to be the product of police inducement, provocation, or encouragement.

None of these statements were responsive to questions by police or their functional equivalent nor were they the product of an environment of interrogation. The defendant either volunteered them upon seeing police approach him or were prompted as the apparent product of his own, sometimes rambling, internal dialogue. The defendant's statement to police as they approached him on the stoop was uttered before any member of law enforcement had said a word to the defendant. With respect to the statements made at the State Police barracks subsequent to the defendant invoking his right to counsel, the defendant chose to initiate conversation to, and while amidst, law enforcement officers as he chose the topics of conversation. The remarks by the police officers in response to his statements, were neutral, noncommital, not directed towards the shooting of July 18, 2017, and not designed to trigger disclosures of an incriminating nature and thus not the product of interrogation. Accordingly there is no basis to suppress these entirely voluntary and spontaneous statements.

Turning to the defendant's exclamation of surprise that the victim was not dead, uttered upon being informed by counsel that he was to be arraigned for attempted murder, this statement was not uttered to, but in the hearing of, law enforcement and the People seek to introduce it at trial. The defendant maintains that he had an expectation of privacy in his conversation with the attorney representing him and that the statement is not properly admissible.

The attorney-client privilege, which is codified in CPLR 4503(a), allows one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not be later revealed against the wishes of the client (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). While confidential communications with counsel are protected in this way, the attorney-client privilege does not apply to communications

between an attorney and his client made in the known presence of third parties when the client has no reasonable expectation of confidentiality under the circumstances presented *(see People v Osorio*, 75 NY2d 80 [1989]). The burden of proving each element of the attorney-client privilege rests upon the party asserting it (*People v Osorio*, 75 NY2d 80 [1989]; *People v Mitchell*, 58 NY2d 368 [1983]).

When the defendant loudly uttered the statement, "He's not dead?" in response to his attorney informing him that he was to be arraigned for attempted murder, his statement was overheard by Investigator Connelly who was conspicuously standing a few feet away, fully in view of both the defendant and his attorney. The door to the holding room was open and there is no record evidence that the investigator took any affirmative steps whatsoever to secrete himself or to position himself any differently than he had been before the attorney's arrival. Had the defendant elected to speak in even a conversational tone to his attorney, as he certainly could have done inasmuch as a chair for the attorney had been placed immediately next to the bench where the defendant was seated, then he would have had an expectation of confidentiality. That the defendant's booming voice carried the few feet through an open door to the ears of the investigator who was obviously standing there in plain view, renders the defendant's expectation of privacy unreasonable under the circumstances presented.

Wade/Rodriguez

When a defendant challenges an identification procedure as unduly suggestive, the People have the initial burden of going forward to establish the reasonableness of police conduct and the lack of undue suggestiveness (*see People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]). At a *Rodriguez* hearing, the People bear the burden to demonstrate that the police-arranged identification procedure was merely confirmatory as a result of the defendant been known to the witness to such a degree so as to be impervious to police suggestion (*People v Rodriguez*, 79 NY2d 445, 452 [1992]). The confirmatory identification exception requires a case-by-case analysis which "rests on the length and quality of prior contacts between [the] witness and [the] defendant, but always requires a relationship which is more than 'fleeting or distant'" (*People v Waring*, 183 AD2d 271, 274 [2d Dept 1992], quoting *People v Collins*, 60 NY2d 214, 219 [1983]).

Although no single factor is determinative, under the totality of the circumstances, the court finds that the People sustained their burden to establish that the defendant was so well known to Mr. Cisse as to have made Mr. Cisse impervious to police suggestion. The credible record evidence demonstrates that, on the day of the incident, Mr. Cisse, who knew the defendant from their neighborhood in the Bronx, had "told" the defendant to drive him to the mall and that the two men were in the van together for that reason. Mr. Cisse, who testified that his nickname was "Dollars" had the defendant's telephone number stored in his phone and believed that the defendant had his number as well. Anthony Ramos, who contacted State Police to provide information that he had heard about the shooting, gave a sworn statement in which he said that he had known the defendant for approximately nine years and also knew Mr. Cisse by the nickname

"Dollaz" and that although the two did not "hang" together, they both hung out in the same area. Such is sufficient evidence that the length and quality of the defendant Mr. Cisse's prior interactions with the defendant were such that they were known to each other to such a degree such that the so-called identification of the defendant were not subject to police suggestion.

In any event, the identification procedure was conducted properly in all respects. The People satisfactorily demonstrated that the identification procedure itself was not unduly suggestive nor was the manner in which the array was shown to Mr. Cisse by a Trooper who was otherwise entirely uninvolved in the investigation. Notably, she did not know the defendant and she did not know where in the array the defendant's photograph had been placed. Trooper Schear read the pre-printed directions to the witness properly at the beginning, instructing Mr. Cisse that he could take whatever time necessary in viewing the array, that he was not to assume that she knew who the perpetrator was, that he was not to look for guidance from her during the procedure, that a photograph may not depict an individual exactly as he appeared on the day of the incident because certain features were subject to change and that he should not pay attention to any markings on the photographs. She told him the questions that she intended to ask when he had the opportunity to view the array and she followed, in all respects, the pre-printed instructions to the administrator showing the array. Trooper Schear recorded Mr. Cisse's responses and she noted that Mr. Cisse, who had lost sight in his left eye as a result of the incident, had squinted when viewing the photographs.

On this record, the People also established that the array itself was not unduly suggestive. The photograph of the defendant and all five of the filler photographs depicted individuals reasonably similar in appearance. There was no substantial likelihood that the defendant would be singled out for identification based on the choice of filler photographs as there is no significant or obvious discrepancy in age, race, gender, facial features, weight, hair style or complexion. There is no requirement that all participants in a photographic array be identical in appearance, rather all that is necessary is that the photographed individuals resemble each other sufficiently so as not to create a substantial likelihood that the defendant will be singled out for identification (*see People v Velez*, 222 AD2d 625 [2d Dept]).

Accordingly, that branch of the defendant's motion which is to suppress this noticed identification is denied.

Sandoval

Like every other witness in a civil or criminal matter, a defendant who chooses to testify on his own behalf at a criminal trial may be cross-examined regarding those of his prior crimes and bad acts which bear upon his credibility, veracity or honesty (*see People v Hayes*, 97 NY2d 203, 207 [2002]; *People v Bennett*, 79 NY2d 464, 468 [1992]; *People v Sandoval,* 34 NY2d 371[1974]; *People v Marable,* 33 AD3d 723, 726 [2d Dept 2006]). Although the questioning about prior crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged (*see People v Hayes,* 97 NY2d at 208;

People v Walker, 83 NY2d 455, 459 [1994]; *People v Pavao,* 59 NY2d 282, 292 [1983]), "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility" (*People v Sandoval,* 34 NY2d at 377; *see People v Brothers*, 95 AD3d 1227, 1228-1229 [2d Dept 2012]). Thus, "a balance must be struck between, on the one hand, the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf" (*People v Sandoval,* 34 NY2d at 375). By so doing, the defendant may make an informed decision as to whether or not to testify at his trial (*People v Sandoval*, 34 NY2d at 375).

The People, proposing a *Sandoval* compromise, ask that they be permitted to inquire as to the defendant's prior criminal convictions to the extent that, should he choose to testify, they be permitted to cross-examine him as to his 2008 conviction for attempted murder in the 2nd degree, his 2004 conviction for criminal possession of a weapon in the 4th degree and his 1989 conviction for criminal possession of a loaded firearm in the 3rd degree. They seek leave to inquire as to the respective dates of the incidents, the dates of conviction, the sentences and the underlying facts. In so doing, they maintain that each of these bear upon defendant's testimonial credibility and that they are demonstrative of his apparent willingness to place his own interests above those of society and that they would represent a fair compromise in light of the defendant's overall criminal history and prior interactions with the criminal justice system.

Defendant also proposes a compromise and asks that the People only be permitted to inquire as to whether he was convicted of a felony in 2008 and a misdemeanor in 2004 so to avoid the extraordinary prejudice that would inure to him should the learn that he has been previously convicted of possessing two gravity knives and a bludgeon and particularly the underlying facts of his attempted murder conviction which are, in many respects, similar to the allegations in this case. As to his 1990 conviction for criminal possession of a loaded firearm in the 3rd degree, he maintains that they are too remote to meaningfully bear upon his present testimonial credibility.

In order to properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether he should testify at the trial, the court directs the following *Sandoval* compromise. Pursuant to this compromise, the People will not be permitted to inquire at all as to the nature of the defendant's prior criminal convictions. In my view the type of crimes of which the defendant was convicted does not bear sufficiently upon the defendant's credibility, honesty or veracity so as to permit inquiry at the risk of unduly deterring the defendant from testifying on his own behalf and subjecting him to prejudice in the eyes of the jurors should he choose to testify. While each certainly does evince the defendant's willingness

to place his own interests above those of society, the fact is that none of these convictions are particularly recent and that the relative probative value is outweighed by the real and significant danger of these events being perceived by the jury as propensity towards violence, despite whatever curative instruction it was given. Since each of these convictions is demonstrative of defendant's demonstrated willingness to place his interest above those of the community and thus are germane to his testimonial veracity and integrity, the People may inquire, should the defendant testify, as to whether he has been convicted of a felony and a misdemeanor as well as the dates of the incidents and the dates of conviction. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that these offenses, like those charged here, involved violence, is ameliorated.

Defendant may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d 723, 725 [2d Dept 2006]). If he chooses to testify and then deny or equivocate as to having been convicted, or should he claim to have never acted in violence, or should he contend that in that prior cases that he pleaded guilty because he was in fact guilty, and that he did not plead guilty here because he is not guilty, he will have opened the door to cross-examination exploring his true motivation for the prior guilty pleas and the People will, upon their application to the court, be permitted to impeach his credibility with questions about all of the underlying facts of his prior criminal convictions (*People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Mirable*, 33 AD2d at 725). If defendant testifies and opens the door, the People may make their application, outside the presence of the jury, and the court will make a determination at that time.

Defendant is thus cautioned not to misuse the protection afforded him under this ruling. If the People believe that the defense has opened the door, and seek either a curative instruction or for leave to use his prior convictions that were limited by this decision and order they shall raise the issue outside the presence of the jury and the matter will be addressed at that time.

Ventimiglia / Molineux

The People have brought an application pursuant to *People v Molineux* seeking leave to introduce in their case in chief evidence of bad acts of defendant to show his motive in the shooting and to provide a contextual reference to permit the jury to understand the defendant's actions in light of what appears to be no personal hostility between the defendant and the victim. The People seek to introduce evidence that defendant was acting erratically at the time of the shooting because of his illicit drug use, and that phencyclidine (PCP) was found in defendant's U-Haul. Moreover, pursuant to *People v Sandoval* the People are seeking leave to inquire of these same bad acts if defendant testifies on his own behalf.

Specifically, the People seek to introduce evidence of the following. First, that on July 14, 2017 (four days before the shooting), the NYPD received a complaint that defendant was driving a U-Haul van near White Plains Road and Nereid Avenue in the Bronx, blasting music and using profanity. Second, that on July 15, 2017 (three days before the shooting), the NYPD

responded to a complaint that defendant had parked a U-Haul on the sidewalk, exited the vehicle with a stick, and was threatening people. Third, that Anthony Ramos, a nine-year acquaintance of defendant, reported to police that at 4 p.m. on July 15, 2017 (three days before the shooting) he saw defendant dancing and singing in front of his U-Haul and that he believed that defendant was "dusted," meaning under the influence of PCP. Fourth, that on July 18, 2017, at about 7:30 p.m. (about one-and-a-half hours after the shooting), defendant drove his U-Haul to the residence of Angela Glover, who observed defendant to be perspiring, agitated and talking quickly, that when defendant emerged from the U-Haul he was wearing only a towel around his waist and sneakers on his feet, that defendant was blasting music from the U-Haul and "singing and acting stupid," that Glover told police that defendant had a history of using "dust," and that Glover believed during that visit that defendant might be high and was "on that stuff." Fifth, that on July 19, 2017 at about 1:00 a.m. (about seven hours after the shooting), defendant drove his U-Haul to the residence of Audrey Toogood, a former girlfriend, and while at her residence started breaking things in her living room, and that in a subsequent interview Ms. Toogood related that defendant has used PCP for many years, that his actions at her residence that night were not precipitated by any conflict or argument, that she attributed defendant's actions to his being high on PCP, and that she called 911 and reported that defendant was under the influence of "angel dust," meaning PCP, and that the NYPD and EMS personal responded and transported defendant to Jacobi Memorial Hospital. Finally, the People seek to introduce evidence that after defendant's arrest a search of his U-Haul pursuant to a search warrant recovered a prescription pill bottle, labeled with defendant's name, in the driver's side door of the vehicle, and that the pill bottle contained a leafy substance which forensic experts tested and determined to contain PCP. In addition to the foregoing, the People seek to introduce expert testimony as to how PCP use can result in erratic or violent behavior.

The People maintain that without this proffered evidence they will be unable to explain to the jury why the defendant, who had no history of personal hostility to the victim and no apparent motive, would shoot the victim five times. Additionally, the People argue that the evidence will help the jury to understand the case in context, by completing the narrative.

By opposition papers dated July 14, 2019, the defendant argues that the People's application should be denied in its entirety because the proffered evidence does not establish a *Molineux* exception, and the prejudice it will cause far outweighs any probative value. Defendant argues that the People are not offering the subject evidence to prove motive but to prove propensity, namely, that defendant committed the shooting because he was allegedly high on "angel dust" on prior and subsequent occasions. Defendant argues that unlike in the *Molineux* exception cases, there is no overriding need in the present case for the jury to hear the proffered evidence, as the People have a witness list comprised of about 30 potential witnesses and the complainant allegedly knows the defendant and can make an identification and testify as to the shooting. Additionally, defendant argues that no limiting instruction by the court could "ever overcome the innate bias or perception, or misperception held by a juror as to what a person on angel dust may or may not have done."

People v Jamil Fields
Indictment Number 17-0893

The court finds that the proffered evidence is not admissible under *Molineux*. Pursuant to the well-established *Molineux* rule, "evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]; *see People v Alvino*, 71 NY2d 233, 241 [1987]; *People v Allweiss*, 48 NY2d 40 [1979]; *People v Molineux*, 168 NY 264, 291 [1901]). This "rule reflects the importance of an accused being judged only on relevant, probative evidence, rather than on the basis of propensity to commit crime" (*People v Gillyard*, 13 NY3d 351, 355-356 [2009];), and exists to avoid the danger that the jury will "misfocus . . . on defendant's prior crimes" (*People v Rojas*, 97 NY2d 32, 36-37 [2001]) and will, despite the lack of convincing evidence, "find against [the defendant] because his conduct generally merits punishment" (*People v Allweiss*, 48 NY2d at 46).

Where, however, relevant evidence of uncharged crimes has a bearing upon a material aspect of the People's case, other than the defendant's general propensity toward criminality, the probative value may justify its admission if the evidence is not unduly prejudicial (*People v Molineux*, 168 NY at 293). To that end, evidence of other crimes may be competent to prove specific crimes when that evidence tends to establish, inter alia, "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial" (*People v Molineux*, 168 NY at 293). The list of exceptions recognized in *People v Molineux* is "merely illustrative and not exhaustive" (*People v Rojas*, 97 NY2d at 37; *see People v Resek*, 3 NY3d 385 [2004]). Prior uncharged crimes may also be used to "provide[] necessary background information on the nature of the relationship and place[] the charged conduct in context" (*People v Dorm*, 12 NY3d 16, 19 [2009]).

Here, the court finds that the People met their burden of showing a non-propensity purpose for offering the subject evidence. The proponent of the evidence must identify some issue other than mere criminal propensity, to which the evidence is relevant (*People v Cass*, 18 NY3d at 560). Here, the People are offering evidence of defendant's prior and subsequent bad acts, with respect to illicit drug use and erratic behavior and the recovery of PCP from his vehicle, as relevant to his motive in shooting the victim, and to provide context for the charged conduct, given the lack of any evidence of personal hostility between defendant and the victim. Inasmuch as evidence of a defendant's drug use may be probative on the issue of motive and to complete the narrative of events regarding the commission of the offense (*see People v Yanes*, 243 AD2d 660 [2d Dept 1997] *lv. denied* 91 NY2d 883 [1997]; *People v Hardwick*, 140 AD2d 624, 625 [2d Dept 1988] *lv. denied* 72 NY2d 957 [1988]), the court finds that the People met their burden.

Moving to the second aspect of the *Molineux* inquiry, the court finds that the proffered evidence is not admissible because its probative value is outweighed by its potential for prejudice. Even if relevant under a recognized *Molineux* category, uncharged crimes and bad acts are not categorically admissible but rather, once the court has made a threshold finding in

law that the proffered evidence is probative, admissibility "turns on the discretionary balancing of the probative value and the need for the evidence against the potential for delay, surprise and prejudice" (*People v Alvino*, 71 NY2d at 242; *see People v Gillyard*, 13 NY3d, 355-356 [2009]; *People v Sayers*, 64 AD3d 728 [2d Dept 2009]). Here, the court finds that the proffered evidence is not necessary to the People's case-in-chief, that it is not needed to connect the dots or fill in any gaps (*see People v Leonard*, 29 NY3d at 7), and that it creates a risk that the jury will find against defendant not because of compelling evidence of the crime charged but because his prior bad acts and uncharged crimes merit punishment. As the Court of Appeals has warned, the trial court must "carefully monitor introduction of background evidence and take every precaution 'lest it spill over its barriers and distort the jury's contemplation of the determinative and critical evidence'" (*People v Frankline*, 27 NY3d 1113, 1116 [2016], *quoting People v Stanard*, 32 NY2d 143 146 [1973]). Here, the court finds the proffered evidence inadmissible under *Molineux* and, thus, denies the People's application to introduce it on their direct case.

However, should the defendant choose to testify, the People will be allowed to impeach defendant's credibility by cross-examining him about the proffered evidence as to his bad acts and uncharged crimes (*see People v Sandoval*, 34 NY2d 371, 374 [1974]; *see also People v Rojas*, 97 NY2d 32, 38 [2001] ["we have never held - - nor is it the law - - that evidence of a prior crime or bad act is admissible only if it passes through the *Molineux* prism").

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
July 17, 2019

Hon. Anne E. Minihan, A.J.S.C.

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