

EXHIBIT A

State of New York : County Court
County of Erie

People of the State of New York

Plaintiff

vs

AFFIDAVIT OF
JAMES P. HARRINGTON

Jonathan Parker,

Indictment # 97-0762

Defendant

James P. Harrington, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice law in the State of New York.
2. I have been requested by Robert Goldstein, Esq., attorney for Jonathan Parker, to prepare this affidavit regarding a post-trial motion pursuant to New York State Criminal Procedure Law ("CPL") §440.10 related to his conviction under Indictment Number 97-0762 in Erie County, New York.
3. I was Mr. Parker's lead attorney in this capital murder case under New York Penal Law ("PL") §125.27 and CPL ("CPL") §400.27.
4. Upon information and belief, Mr. Parker's motion raises an issue based upon *McCoy v. Louisiana*, 584 U.S. ____ (2018) which is a United States Supreme Court decision related to defense counsel admitting the commission of a crime by the defendant in summation to a jury during the guilt/innocence phase of a capital trial.
5. This affidavit is my recollection of this issue in Mr. Parker's case.

Background

6. I was admitted to the practice of law in January, 1970. Except for the first four years of my practice, I have always practiced criminal defense law.

7. In 1995, the Governor of New York State signed a law which reinstated the death penalty in New York State for specific types of murder. Part of that law created a Capital Defender Office ("CDO") which would have regional offices in New York City, Albany, and Rochester. These offices were staffed by attorneys trained in the defense of capital cases who would be assigned to represent capital defendants charged under New York's death penalty statute. In order to assure that there were sufficient available capital defense counsel and in case there were conflict of interest cases, very experienced private criminal defense lawyers in New York, but who did not have capital defense experience, were trained to be able to defend capital defendants. In addition, the CDO attorneys were available to assist private lawyers with these cases.

8. I was selected as one of the private criminal defense attorneys in 1995 to be trained for defending these cases in the first training session. I had extensive criminal trial experience in all types of criminal cases in New York State and in Federal courts at that time.

9. The CDO capital training focused on the concept that "Death is Different" in all aspects of a death penalty case. Because of the ultimate penalty which can result, defense attorneys had to look at capital cases differently than other criminal cases, including murder. The emphasis was on saving the client's life. Every part of the case, from its inception until its end had to have that principle in mind. This applied to the legal and factual aspects of the case. It was a different way of approaching and doing a criminal defense which was the product of years of defending cases in states where the death penalty had been used, unlike New York, which had not had a death penalty statute from 1977 until 1995.

10. As a result of my criminal defense experience and the CDO training I received, I was certified by the CDO to be assigned by Supreme Court Justices and County Court Judges to represent capital defendants within New York State.

11. Although several counties in New York State had initiated capital prosecutions, Erie County had not until 1997. Erie County's first capital case was against Jonathan Parker.

12. On April 9, 1997, a Buffalo Police Department Officer, Charles McDougald, was shot and killed on a street in Buffalo, New York. His partner, Officer Michael Martinez, was also shot, but did not die. Based on the investigation of the Buffalo Police Department, they made public that Mr. Parker was the person whom they believed did the shooting and who would be charged with the killing and other crimes.

13. On April 12, 1997, Mr. Parker's attorney for unrelated cases, Paul V. Hurley, Esq., arranged for his surrender to the Buffalo Police Department.

14. I was assigned to represent Mr. Parker as his capital counsel by the Hon. John Rogowski, Erie County Court Judge, within a day of Mr. Parker's surrender and arraignment in Buffalo City Court. Judge Rogowski also appointed John Elmore, Esq. as co-counsel with me for Mr. Parker.

15. I continued to represent Mr. Parker during pretrial proceedings, pretrial preparation, his guilt-innocence trial, his sentencing trial, and in filing a notice of appeal. I did not represent him in his appeals nor have I represented him in any post conviction proceedings.

16. On the day I was assigned to represent Mr. Parker, I had a meeting alone with Frank J. Clark, III, the Erie County District Attorney, at his invitation. He told me that he asked me to meet with him as a courtesy to me so I would know where he stood on this case

immediately. (I had known Mr. Clark for many years and had tried New York State cases against him when he was an Assistant Erie County District Attorney and federal cases against him Assistant United States Attorney. We knew each other very well and had deep respect for each other.) At that time of our meeting, I had little knowledge about Mr. Parker or the circumstances of his case.

17. During this meeting, Mr. Clark advised me that the killing of a police officer was one of the murder cases eligible for a death penalty sentence that he would seek the death penalty for if he believed he had proof beyond a reasonable doubt. He had no previous experience with capital cases in his long career as a prosecutor in state and federal courts. Although he had considered authorizing the death penalty in several other murder cases in Erie County after New York's re-instituting it in 1995, Mr. Parker's case for which he intended to seek the death penalty.

18. Mr. Clark told me that while he did not oppose the death penalty, he had decided that he would use it sparingly because it was arbitrary and he lacked the resources to prevent a disruptive burden on the orderly working of his office. He also said that he would not change his mind on this issue in Mr. Parker's case unless he learned of a significant legal or factual flaw in his case.

19. I advised him that I was not in a position to discuss the case because I did not know Mr. Parker, had not investigated the case, and was in no position to discuss the merits of the case. I also told him that capital cases were treated differently in many ways including investigation, preparation, legal challenges, motions, trial strategy, and sentencing. He said he understood and expected me to do whatever I could to defend Mr. Parker. His position on seeking the death penalty never changed throughout the case.

20. Mr. Parker was indicted by a Grand Jury of Erie County, New York under

Indictment Number 97-0762. The indictment charged violations of New York State Penal Law of Murder in the First Degree, PL§125.27; Murder in the Second Degree (Intentional), PL§125.25; Murder in the Second Degree, §125.25 (Depraved); Manslaughter in the First Degree (Intentional), PL§125.20; Manslaughter in the Second Degree (Reckless), PL§125.15; Attempted murder in the First Degree, PL §125.17(110.00); Attempted Murder in the Second Degree, PL §125.25(110.00); Aggravated Assault on a Police Officer, PL§120.11; Assault in the First Degree (Intentional), PL§120.10; Assault in the Second Degree (Reckless), PL§120.05; Criminal Possession of a Weapon in the Second Degree, PL§265.03; and Criminal Possession of a Weapon in the Third Degree, PL§265.02.

21. Mr. Elmore and I worked together on all aspects of Mr. Parker's case. In addition, the resources of the New York State Capital Defender's (CDO) regional office in Rochester, New York were made available to us for whatever assistance we needed. Throughout the motion, investigation, and trial preparation work on the case, we consulted with CDO attorneys many times.

22. As Mr. Parker's trial approached in June, 1998, the CDO's attorneys and support staff provided more and more assistance. Contributors included Thomas Dunn, Esq., Office Director; William Easton, Esq., Staff Attorney; Patricia Warth, Esq., Staff Attorney; Joseph Flood; Esq., Staff Attorney; Bryant Graham, Investigator; and Joan Podkul, Mitigation Specialist.

23. Because of the complicated nature of the issues, the amount of work necessary and the expertise needed to defend in a capital case, the CDO resources were necessary and welcomed by Mr. Elmore and me. None of them, however, entered notices of appearance on Mr. Parker's behalf.

24. As Mr. Parker's trial approached and through all stages of jury selection, the

guilt/innocence phase of the trial and sentencing phase of the trial, different members of the CDO mentioned above assisted Mr. Elmore and me. Mr. Dunn was especially involved in this process. He attended the trial daily, consulted on all parts of our defense work, and made recommendations for strategic decisions. He had extensive capital trial experience in Florida and Georgia before he joined the CDO office in Rochester after the enactment of New York's capital statute.

Issue before this Court

25. During the guilt/innocence phase of the trial, Mr. Elmore and I defended the case contesting the evidence against Mr. Parker.

26. Near the conclusion of the trial testimony and then after proof closed, Mr. Dunn and I spent hours reviewing the evidence and testimony against Mr. Parker. He and I came to the conclusion that the case, although circumstantial, was compelling, had been proven beyond a reasonable doubt, and that Mr. Parker would be found guilty.

27. I had, however, already outlined a summation to the jury arguing that the prosecution had not established proof beyond a reasonable doubt against Mr. Parker.

28. During the evening hours of the day before summations, Mr. Dunn and I discussed how my arguments in the case regarding the guilt/innocence verdict would affect the penalty or sentencing trial which would follow with the same jury assuming there was a conviction. Because in capital litigation the overriding mission is to save the client's life, Mr. Dunn and I discussed my credibility with the jury. The question was would I lose it for arguments against the death penalty if I argued against the compelling guilt evidence.

29. Based on my conversations with Mr. Dunn and other experienced capital lawyers and my own research, I knew that it was accepted within the death penalty defense

community that it was an acceptable strategic decision to concede guilt of a client if it was necessary for credibility with the jury in sentencing arguments. This strategy was not uncommon at that time.

30. This strategy, however, led to the decision by the United States Supreme Court in *McCoy v. Louisiana*, supra, holding that such a strategic decision was improper if done without the client's consent.

31. Mr. Dunn and I came to the same conclusion that this approach was the right one in Mr. Parker's case. While I valued Mr. Dunn's extensive experience and assistance defending Mr. Parker, the final decision was mine. When we parted very late that evening, we left it that I would defer my final decision until the morning. Conceding a client's guilt for a crime in a summation was something I had never done in my career as a criminal defense trial lawyer. (Mr. Elmore was not with us when this decision was made and did not play a part in this decision.)

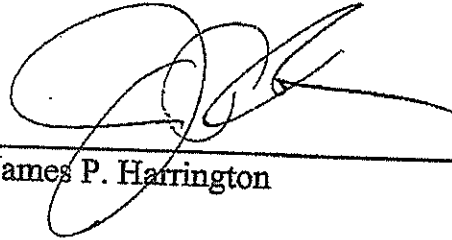
32. I agonized over this decision from the time I left Mr. Dunn until I arrived at my office in the morning before going to court for summations. Mr. Dunn had not changed his recommendation. I made the final decision as I walked to the courthouse with Mr. Dunn as we continued to discuss it.

33. When we arrived in the courtroom, Erie County Court Judge Michael D'Amico, who had presided over this case from indictment through trial, wanted to start summations promptly at 9:30 AM. Unfortunately, when Mr. Parker was brought into the courtroom, Judge D'Amico took the bench immediately. I did not have a chance to discuss my decision with him before my summation.

34. After my summation, Mr. Parker was extremely upset with me for what I had done. He had never admitted guilt to Mr. Elmore or me.

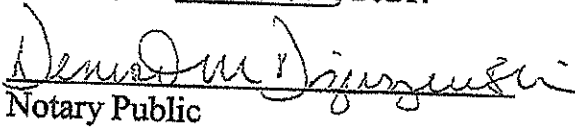
35. Also, as I had not advised him of what I was going to do, he did not consent to my decision, nor authorize me to do what I had done.

36. I make this affidavit knowing that a Court and the parties will rely on it in Mr. Parker's post conviction motion.



James P. Harrington

Sworn to before me on this
1st day of March, 2021.


Notary Public

DENISE M DZIERZEWSKI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Aug. 17, 2022

EXHIBIT B

AFFIDAVIT

Town of Dannemora]
County of Clinton] ss:

Jonathan Parker, being duly sworn this 21st of April, 2021, deposes and says:

1. That I am the Petitioner in this instant case, and that I bring this Affidavit in support of a Motion filed herein pursuant to C.P.L. 440.10, seeking vacatur of my 1997 convictions and sentence, under Indictment 97-0762, before this Court, based on (1) the decision by the United States Supreme Court in McCoy v. Louisiana, 584 U.S. ____ (2018); and (2) based on newly discovered evidence; and (3) based on ACTUAL INNOCENCE.

2. That the background of this case is as follows: On April 9, 1997, on Northhampton Street, near East Parade Street, a Buffalo Police Officer, Charles McDougald, was shot and killed.

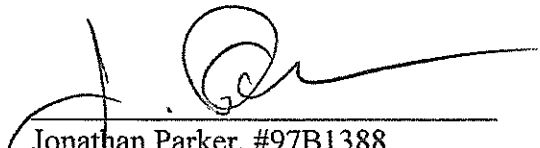
3. That I was represented at trial by James P. Harrington, Esq., and John V. Elmore, Esq.. In his summation Mr. Harrington told the jury that I had shot the cop "in a moment of panic". I did not know that he was going to make that statement in the summation and, had I known ahead of time, I would have objected to his making such a statement. During the time of being represented by Mr. Harrington and Mr. Elmore, I had always maintained my innocence.

4. That I had absolutely nothing to do with this shooting and was not at the scene of the crime at the time of the shooting.


5. That it is my understanding that, in the investigation of the killing, Buffalo Homicide Detective Andre Ortiz forced one citizen, Aaran Yarborough, to state that he had seen me at the scene of the crime. This was done by threatening to “take him out in the woods and kill him”. Inasmuch as Detective Ortiz has since been convicted of doing the same thing in another case, Aaran Yarborough is now willing to admit the truth, that he had never seen me at the scene of the crime. See Affidavit as Exhibit “B”.

6. That it is further my understanding that another citizen, Aaron Lott, had driven past the scene before the actual shooting. He was convinced by Police Officers to likewise falsely testify that he had seen me at the scene of the crime. They promised to assist him with a federal drug charge he was facing. Now that the Police Officers can do him no harm, he, also, is willing to tell the truth, that he had never seen me at the scene of the crime. See Affidavit as Exhibit “C”.

7. That I now assert, as I have done since I was originally charged with this crime, that I am innocent and had nothing to do with the murder of Police Officer McDougald.


Jonathan Parker, #97B1388
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Sworn and subscribed to before me
this 21st day of April, 2021:


Notary Public

Mark J. Wilson
Notary Public, State of New York
No. 01WI6354425
Qualified in Clinton County
Commission Expires 02/06/2025