

2017 NEW YORK STATE HIGH SCHOOL MOCK TRIAL TOURNAMENT MATERIALS

ROBIN BERKMAN V. COUNTY OF DOVER



Materials prepared by the Law, Youth & Citizenship Program
of the New York State Bar Association®

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New York State Bar Association

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LETTER FROM THE CHAIR

November 18, 2016

Dear Mock Trial Students, Teacher-Coaches and Attorney-Advisors:

Thank you for participating in the 2016-2017 New York State High School Mock Trial Tournament. The tournament is now entering its 35th year. Thanks to the continued financial and logistical support from the New York Bar Foundation and the New York State Bar Association, New York State continues to have one of the largest and longest running high school mock trial programs in the nation. Equally important to the success of the program is the continued support of the numerous local bar associations across the state that sponsor mock trial tournaments in their counties and the County Coordinators who spend many hours managing the local tournaments. We are grateful to the teacher-coaches and attorney advisors who give their time, dedication and commitment to the program. And finally, our special thanks to the students who devote their time and energy in preparing for the tournament. Every year, we are amazed at the level of skill and talent the students bring to the courtrooms. Congratulations to the 2015- 2016 New York State Tournament Champion, Fayetteville-Manlius High School, who turned in a winning performance last May at the State Finals in Albany.

Please take the time to carefully review all of the enclosed mock trial tournament information. The **Simplified Rules of Evidence** and the **General Tournament Rules** should be studied carefully. Please pay special attention to the information regarding the timing, redaction of evidence and constructive sequestration of witnesses. *This year's case is **Robin Berkman v. County of Dover**. In this civil case, a convenience store was robbed and the store clerk was shot. Witnesses identified the suspect by only the name "Robin." The Detective who investigated the crime focused on Robin Berkman as the prime suspect. Robin was eventually arrested and charged with the robbery and murder of the store clerk. After a trial by jury, Robin was found guilty and sent to State prison. Robin, who always denied committing the crime, contacted the Actual Innocence Association (AIA) while in prison. The AIA reviewed the case and, convinced that Robin was innocent, asked the District Attorney to reopen Robin's case. The DA's office did so and found that another person who was confined to another State prison had confessed to committing the robbery and murder. Robin was exonerated and released from prison. Robin subsequently filed a lawsuit for malicious prosecution against the County and its agents, stating that Detective Smith, who had originally investigated the robbery/ murder, did not pursue any other suspects and focused solely on Robin as the perpetrator of the crime. Robin is seeking monetary damages for the malicious prosecution.*

The mock trial program is, first and foremost, an educational program designed to teach high school students basic trial skills. Students learn how to conduct direct and cross examinations, how to present opening and closing statements, how to think on their feet, and learn the dynamics of a courtroom. Students will also learn how to analyze legal issues and apply the law to the facts of the case. Second, but equally important, is that participation in mock trial will teach the students professionalism. Students learn ethics, civility, and how to be ardent but courteous advocates for their clients. Good sportsmanship and respect for all participants are central to the competition. We thank the teachers,

coaches, advisors, and judges, not only for the skills that they teach, but for the example of professionalism and good sportsmanship they model for the students throughout the tournament.

We remind the teams that all participants (students, teachers, attorneys, parents and all spectators) must conduct themselves with the utmost respect and civility toward the judge, before, during and after each round. If there is a circumstance in which any participant does not abide by this standard, a referral will be made to the LYC Mock Trial Subcommittee to consider appropriate sanctioning.

Please be sure to encourage your students to consider participating in the Mock Trial Summer Institute (MTSI). MTSI is scheduled for July 16-21, 2017 at the Silver Bay YMCA on the shores of beautiful Lake George. If you have not had a student attend MTSI, now is the time! The students who return from MTSI become the team leaders of tomorrow and an inspiration to the rest of the team. Having a student or two attend MTSI will give you a definite leg up as you start the tournament season next year.

The tournament finals will be held in Albany, May 21-23, 2017. As in years past, the regional winners in each of the eight regions will be invited to participate in the semi-finals, and two of the teams will advance to the final round the last day. The New York Bar Foundation is generously supporting the tournament again this year and will fund the teams' room and board for the state tournament. More details will be available closer to the date of the tournament.

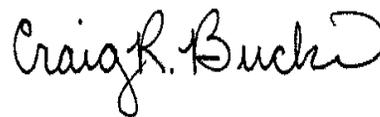
This year's Mock Trial Tournament materials will be posted on the Law, Youth and Citizenship website, www.lyc.org (click on the *NYS Mock Trial* tab). Updates will also be provided on Facebook at www.facebook.com/nysmocktrial and on Twitter [@NYSMockTrial](https://twitter.com/NYSMockTrial).

We trust you will enjoy working on this year's case. Best wishes to all of you for a successful and challenging mock trial tournament.

Sincerely,



Hon. Jonah Triebwasser, *Red Hook*
Chair, Committee on Law, Youth and Citizenship



Craig R. Bucki, Esq., *Buffalo*
Chair, Mock Trial Subcommittee

Subcommittee Members:

Melissa Ryan Clark, Esq., *New York City*
Christopher E. Czerwonka, Esq., *New Windsor*
Christine E. Daly, Esq., *Chappaqua*
Eugenia Brennan Heslin, Esq., *Poughkeepsie*
Seth F. Gilbertson, Esq., *Syracuse*

Stuart E. Kahan, Esq., *White Plains*
Susan Katz Richman, Esq., *Hempstead*
Lynn Boepple Su, Esq., *Old Tappan*
Oliver C. Young, Esq., *Buffalo*

STANDARDS OF CIVILITY

“ . . . [O]urs is an honorable profession, in which courtesy and civility should be observed as a matter of course.”

Hon. Judith S. Kaye, Former Chief Judge of the State of New York

The following standards apply to all Mock Trial Tournament participants, including students, teachers, attorneys, and parents/guardians. A Mock Trial Tournament participant’s failure to abide by any of these standards may result in the disqualification of his or her team from the Tournament, pursuant to the sole discretion of the New York State Bar Association Law, Youth and Citizenship Committee’s Mock Trial Subcommittee.

1. Lawyers should be courteous and civil in all professional dealings with other persons.
2. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
3. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. All participants in the Mock Trial Tournament shall avoid vulgar language or other acrimonious or disparaging remarks, whether oral or written, about other Mock Trial Tournament participants.
4. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.
5. A lawyer should adhere to all expressed promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.
6. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.
7. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.
8. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.
9. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.
10. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.
11. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

The foregoing Standards of Civility are based upon the Standards of Civility for the New York State Unified Court System.

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**NEW YORK STATE
HIGH SCHOOL MOCK
TRIAL TOURNAMENT
RULES**

PART I

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MOCK TRIAL TOURNAMENT RULES

1. TEAM COMPOSITION

- a. The Mock Trial Tournament is open to all 9th–12th graders in public and nonpublic schools who are currently registered as students at that school.
- b. If a school chooses to limit student participation for any reason, this should be accomplished through an equitable “try-out” system, not through disallowing participation by one or more entire grade levels.
- c. Each school participating in the Mock Trial Tournament may enter only **ONE** team.
- d. Members of a school team entered in the Mock Trial Tournament—including teacher-coaches, back-up witnesses, attorneys, and others directly associated with the team’s preparation—are **NOT** permitted to attend the trial enactments of any possible future opponent in the contest. This rule should not be construed to preclude teams from engaging in practice matches, even if those teams may meet later during the competition.

Violations of this rule can lead to being disqualified from the tournament.

- e. Immediately prior to each trial enactment, the attorneys and witnesses for each team must be physically identified to the opposing team and the judge by stating their first and last names. Please do not state the name of your school in front of the judge since the judge will not otherwise be told the name of the schools participating in the enactment he or she is judging.

2. OBJECTIONS

- a. Attorneys should stand when making an objection, if they are physically able to do so.
- b. When making an objection, attorneys should say “objection” and then, very briefly, state the basis for the objection (for example, “leading question”). Do not explain the basis unless the judge asks for an explanation.
- c. Witnesses should stop talking immediately when an opposing party makes an objection. Please do not try to “talk over” the attorney making an objection.

3. DRESS

We emphasize to the judges that a student's appearance is not a relevant factor in judging his or her performance. However, we strongly encourage students to dress neatly and appropriately. A "business suit" is not required.

4. ABOUT STIPULATIONS

Any stipulations are binding on all participants and the judge, and may **NOT** be disputed at the trial.

5. OUTSIDE MATERIALS

Students may read other materials such as legislative histories, judicial opinions, textbooks, treatises, etc., in preparation for the Mock Trial Tournament. However, students may cite only the materials and cases provided in these Mock Trial Tournament materials.

6. EXHIBITS

Students may introduce into evidence or use only the exhibits and documents provided in the Mock Trial Tournament materials. Students may not create their own charts, graphs or any other visual aids for use in the courtroom in presenting their case. **Evidence is not to be enlarged, projected, marked or altered for use during the trial.**

7. SIGNALS AND COMMUNICATION

The team coaches, advisors, and spectators may not signal the team members (neither student attorneys nor witnesses) or communicate with them in any way during the trial, including but not limited to wireless devices and text messaging. The use of cellular telephones, laptop computers, or any other wireless devices by any student attorney or witness, other than a timekeeper for the purpose of keeping time during the trial, is strictly prohibited. A student witness may talk to a student attorney on his/her team during a recess or during direct examination, but may not communicate verbally or non-verbally with a student attorney on his/her team during the student witness' cross-examination.

8. VIDEOTAPING/AUDIOTAPING

- a. During any tournament round, except State semi-finals and State finals, a trial may be videotaped or audio taped but only if each of the following conditions is satisfied:
 - i. The courthouse in which the tournament round is taking place must permit video or audio taping, and the team wishing to videotape or audiotape has received permission from the courthouse in advance of the trial. *We note that many state and Federal courthouses prohibit video or audio taping devices in the courthouse.*
 - ii. The judge consents before the beginning of the trial.
 - iii. The opposing team consents in writing prior to the time the trial begins. Written consents should be delivered to the County Coordinator. Fax or e-mail is acceptable.
 - iv. A copy of the video or audio tape must be furnished to the opposing team (at no cost) within 48 hours after the trial.
 - v. The video or audio tape may not be shared by either team with any other team in the competition.
- b. Video or audio taping of the State semi-finals and final rounds is **NOT** permitted by either team.

9. MOCK TRIAL COORDINATORS

The success of the New York State Mock Trial Program depends on the many volunteer county and regional coordinators. **The appropriate supervisor will be contacted if any representative from a high school, parent, coach, or team member addresses a mock trial volunteer or staff person at any level of the competition in an unprofessional or discourteous manner. County Coordinators may also refer any such matters to the Law, Youth and Citizenship Committee of the New York State Bar Association for appropriate action by the LYC Committee.**

The following paragraph was added in November 2016:

Absent prior approval by the Mock Trial Subcommittee of the New York State Bar Association's *Law, Youth and Citizenship Committee*, a county or regional Mock Trial Tournament coordinator or assistant coordinator may not be an employee of a school that competes, or of a school district that includes a high school that competes, in that county or regional Mock Trial Tournament. Nothing

in this rule shall prohibit an employee of a Board Of Cooperative Educational Services (BOCES) or the New York City Justice Resource Center from serving as a county or regional Mock Trial Tournament coordinator or assistant coordinator.

10. ROLE AND RESPONSIBILITY OF ATTORNEYS

- a. The attorney who makes the opening statement may not make the closing statement.
- b. Requests for bench conferences (i.e., conferences involving the Judge, attorney(s) for the plaintiff or the people and attorney(s) for the defendant) may be granted after the opening of court in a mock trial, but not before.
- c. Attorneys may use notes in presenting their cases, for opening statements, direct examination of witnesses, etc. Witnesses are **NOT** permitted to use notes while testifying during the trial.
- d. Each of the three attorneys on a team must conduct the direct examination of one witness and the cross examination of another witness.
- e. The attorney examining a particular witness must make the objections to that witness's cross-examination, and the attorney who will cross-examine a witness must make the objections to the witness's direct examination.

11. WITNESSES

- a. Each witness is bound by the facts of his/her affidavit or witness statement and any exhibit authored or produced by the witness that is relevant to his/her testimony. Witnesses may not invent any other testimony. However, in the event a witness is asked a question on cross examination, the answer to which is not contained in the witness's statement or was not testified to on direct examination, the witness may respond with any answer that does not materially alter the outcome of the trial.
- b. If there is an inconsistency between the witness statement or affidavit and the statement of facts or stipulated facts, the witness can only rely on, and is bound by, the information contained in his/her affidavit or witness statement.
- c. A witness is not bound by facts in other witnesses' affidavits or statements.

- d. If a witness contradicts a fact in his or her own witness statement, the opposition may impeach the testimony of that witness.
- e. A witness's physical appearance in the case is as he or she appears in the trial re-enactment. No costumes or props may be used.
- f. Witnesses, other than the plaintiff and the defendant, may be constructively sequestered from the courtroom at the request of opposing counsel. A constructively sequestered witness may not be asked on the stand about the testimony another witness may have given during the trial enactment. A team is **NOT** required to make a sequestration motion. However, if a team wishes to make such motion, it should be made during the time the team is introducing itself to the judge. Please note that while a witness may be constructively sequestered, said witness **WILL REMAIN** in the courtroom at all times. (Note: Since this is an educational exercise, no participant will actually be excluded from the courtroom during an enactment.)
- g. Witnesses shall not sit at the attorneys' table.

12. PROTESTS

- a. Other than as set forth in 12(b) below, protests of judicial rulings are **NOT** allowed. **All judicial rulings are final and cannot be appealed.**
- b. Protests are highly disfavored and will only be allowed to address two issues:
 - (1) Cheating (a dishonest act by a team that has not been the subject of a prior judicial ruling)
 - (2) A conflict of interest or gross misconduct by a judge (e.g., where a judge is related to a team member). All protests must be made in writing and either faxed or emailed to the appropriate County Coordinator and to the teacher-coach of the opposing team. The County Coordinator will investigate the grounds for the protest and has the discretion to make a ruling on the protest or refer the matter directly to the LYC Committee. The County Coordinator's decision can be appealed to the LYC Committee.
- c. Hostile or discourteous protests will not be considered.

13. JUDGING

THE DECISIONS OF THE JUDGE ARE FINAL.

14. ORDER OF THE TRIAL

The trial shall proceed in the following manner:

- Opening statement by plaintiff's attorney/prosecuting attorney
- Opening statement by defense attorney
- Direct examination of first plaintiff/prosecution witness
- Cross-examination of first plaintiff/prosecution witness
- Re-direct examination of first plaintiff/prosecution witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of second plaintiff/prosecution witness
- Cross-examination of second plaintiff/prosecution witness
- Re-direct examination of second plaintiff/prosecution witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of third plaintiff/prosecution witness
- Cross-examination of third plaintiff/prosecution witness
- Re-direct examination of third plaintiff/prosecution witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Plaintiff/prosecution rests
- Direct examination of first defense witness
- Cross-examination of first defense witness
- Re-direct examination of first defense witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of second defense witness
- Cross-examination of second defense witness
- Re-direct examination of second defense witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of third defense witness
- Cross-examination of third defense witness
- Re-direct examination of third defense witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Defense rests
- Closing arguments by defense attorney
- Closing arguments by plaintiff's attorney/prosecuting attorney

15. TIME LIMITS

- a. The following time limits apply:
- Opening Statement5 minutes for each team
 - Direct Examination.....10 minutes for each witness
 - Cross Examination.....10 minutes for each witness
 - Closing Argument10 minutes for each team
- b. At all county and regional trials, the time will be kept by two timekeepers. Each team shall provide one of the timekeepers. Timekeeper shall be a student of the participating school. A school may use a student witness who is not a witness during a particular phase of the trial. (For example, a defense witness can keep time when the plaintiff/prosecution attorneys are presenting their case.)

The timekeepers will use one watch and shall agree as to when a segment of the trial (e.g., the direct examination of a witness) begins. When one minute remains in a segment, the timekeepers shall flash the “1 Minute Remaining” card (found in the *Appendices*), alerting the judge and the attorneys. The timekeepers will not stop the clock during objections, *voir dire* of witnesses or bench conferences.

Since the number of questions allowed on redirect and re-cross is limited to three, time limits are not necessary. Any dispute as to the timekeeping shall be resolved by the trial judge. The judge, in his/her sole discretion, may extend the time, having taken into account the time expended by objections, *voir dire* of witnesses and/or bench conferences, thereby allowing an attorney to complete a line of questioning.

16. TEAM ATTENDANCE AT STATE FINALS ROUND

Eight teams will advance to the State Finals. All eight teams are required to participate in all events associated with the Mock Trial Tournament, including attending the final round of the competition.

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**NEW YORK STATE
HIGH SCHOOL MOCK
TRIAL TOURNAMENT
POLICIES AND
PROCEDURES**

PART II

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MOCK TRIAL TOURNAMENT POLICIES AND PROCEDURES

New York's Annual Mock Trial Tournament is governed by the policies set forth below. The LYC Committee and the Law, Youth and Citizenship Program of the New York State Bar Association reserve the right to make decisions to preserve the equity, integrity, and educational aspects of the program.

By participating in the Mock Trial Tournament, participants agree to abide by the decisions rendered by the LYC Committee and the Mock Trial program staff and accept such decisions as final.

1. GENERAL POLICIES

- a. All mock trial rules, regulations, and criteria for judging apply at all levels of the Mock Trial Tournament.
- b. The Simplified Rules of Evidence and Procedure contained in Part III govern the trial proceedings.
- c. County Coordinators administer county tournaments. County Coordinators have sole responsibility for organizing, planning, and conducting tournaments at the county level and should be the first point of contact for questions at the county level.
- d. For any single tournament round, all teams are to consist of three attorneys and three witnesses.
- e. For all tournament rounds, one judge will be utilized for trial re-enactments.
- f. Teams must not identify themselves by their school name to the judge prior to the announcement of the judge's decision.
- g. If a team member who is scheduled to participate in a trial enactment becomes ill, injured, or has a serious conflict and as a result cannot compete, then the team may substitute an alternate team member. If an alternate team member is not available, the local coordinator may declare a forfeit or reschedule the enactment at his or her sole discretion.

- h. Members of a team may play different roles in different rounds, or other students may participate in another round.
- i. Winners in any single round will be asked to switch sides in the case for the next round. Where it is impossible for both teams to switch sides, a coin flip will be used to determine assignments in the next round.
- j. Teacher-coaches of teams who will be competing against one another are required to exchange information regarding the names and gender of their witnesses at least three days prior to each round.
- k. No attorney may be compensated in any way for his or her service as an attorney-advisor to a mock trial team or as a judge in the Mock Trial Tournament. When a team has a student or students with special needs who may require an accommodation, the teacher-coach **MUST** bring this to the attention of the County Coordinator at least two weeks prior to the time when the accommodation will be needed.
- l. The judge must take judicial notice of the Statement of Stipulated Facts and any other stipulations.
- m. Teams may bring perceived errors in the problem or suggestions for improvements in the tournament rules and procedures to the attention of the LYC staff at any time. These, however, are not grounds for protests. Any protest arising from an enactment must be filed with the County Coordinator in accordance with the protest rule in the Tournament Rules.

2. SCORING

- a. Scoring is on a scale of 1-5 for each performance (5 is excellent). Judges are required to enter each score on the Performance Rating Sheet (Appendix) after each performance, while the enactment is fresh in their minds. Judges should be familiar with and use the performance rating guidelines (Appendix) when scoring a trial.
- b. Judges are required to also assign between 1 and 10 points to **EACH** team for demonstrating professionalism during a trial. A score for professionalism may not be left blank.
Professionalism criteria are:

- Team’s overall confidence, preparedness and demeanor
 - Compliance with the rules of civility
 - Zealous but courteous advocacy
 - Honest and ethical conduct
 - Knowledge and adherence to the rules of the competition
 - Absence of unfair tactics, such as repetitive, baseless objections; improper communication and signals; invention of facts; and strategies intended to waste the opposing team’s time for its examinations. ***A score of 1 to 3 points should be awarded for a below average performance, 4 to 6 points for an average performance and 7 to 10 points for an outstanding or above- average performance.***
- c. The appropriate County Coordinator will collect the Performance Rating Sheet for record-keeping purposes. Copies of score sheets are **not** available to individual teams; however, a team can get its total score through the County Coordinator.

3. LEVELS OF COMPETITION

- a. For purposes of this program, New York State has been divided into eight regions:

Region 1West	Region 5New York City (NYC-A)
Region 2Central	Region 6New York City (NYC-B)
Region 3Northeast	Region 7Nassau County
Region 4Lower Hudson	Region 8Suffolk County

- b. See Map and Chart of Counties in Regions (Appendix).

4. COUNTY TOURNAMENTS

- a. All rules of the New York State Mock Trial Tournament must be adhered to at tournaments at the county level.
- b. In these tournaments, there are two phases. In the first phase, each team will participate in at least two rounds before the elimination process begins, once as plaintiff/prosecution and once as defendant. After the second round, a certain number of the original teams will proceed to

the second phase in a single elimination tournament. Prior to the competition, and with the knowledge of the competitors, the County Coordinator may determine a certain number of teams that will proceed to the Phase II single elimination tournament. While this number may be more or less than half the original number of teams, any team that has won both rounds based on points, but whose combined score does not place it within the established number of teams, **MUST** be allowed to compete in the Phase II single elimination tournament.

- c. The teams that advance to Phase II do so based on a combination of wins and point differential, defined as the points earned by a team in its Phase I matches minus the points earned by its opponents in those same Phase I matches. All 2-0 teams automatically advance; teams with a 1-1 record advance based upon point differential, then upon total number of points in the event of a tie; if any spots remain open, teams with a record of 0-2 advance, based upon point differential, then upon total number of points in the event of a tie.
- d. If the number of teams going into the single elimination phase is odd, the team with the most wins and highest combined score will receive a bye. If any region starts the year with an odd number of teams, one team from that region may receive a bye, coin toss, etc.
- e. Phase II of the contest is a single round elimination tournament; winners advance to the next round.
- f. At times, a forfeit may become a factor in determining aggregate point totals and which teams should advance to the single elimination tournament. Each county should review its procedures for dealing with forfeits, in light of the recommended procedures below. Please note that due to the variety of formats in use in different counties, it is strongly urged that each county develop a system which takes its own structure into account and which participants understand prior to the start of the local tournament. That procedure should be forwarded to the New York State Mock Trial Program Manager, before the first round of competition is held.
- g. If a county has an established method for dealing with forfeits, or establishes one, then that rule continues to govern. If no local rule is established, then the following State rule will apply: *In determining which teams will advance to the single elimination tournament, forfeits will first be considered to cancel each other out, as between two teams vying for the right to advance. If such canceling is not possible (as only one of two teams vying for a particular spot has a forfeit victory), then a point value must be assigned for the*

forfeit. The point value to be assigned should be derived from averaging the team's point total in the three matches (where possible) chronologically closest to the date of the forfeit; or if only two matches were scheduled, then double the score of the one that was held.

5. REGIONAL TOURNAMENTS

- a. Teams who have been successful in winning county level tournaments will proceed to regional level tournaments. Coordinators administer regional tournaments. Coordinators have sole responsibility for organizing, planning and conducting tournaments at the regional level. Participants must adhere to all rules of the tournament at regional level tournaments.
- b. Regional tournaments are held in counties within the region on a rotating basis. Every effort is made to determine and announce the location and organizer of the regional tournaments before the new mock trial season begins.
- c. All mock trial rules and regulations and criteria for judging apply, at all levels of the Mock Trial Tournament.
- d. The winning team from each region will be determined by an enactment between the two teams with the best records (most number of wins and greatest number of points) during the regional tournament. The winning team from each region will qualify for the State Finals in Albany.
- e. The regional tournaments **MUST** be completed 16 days prior to the State Finals. Due to administrative requirements and contractual obligations, the State Coordinator must have in its possession the schools' and students' names by this deadline. Failure to adhere to this deadline may jeopardize hotel blocks set aside for a region's teacher-coaches, attorney-advisors and students coming to Albany for the State Finals.

6. STATEWIDE FINALS

- a. Once regional winners have been determined, The New York Bar Foundation will provide the necessary funds for each team's room and board for the two days it participates in the State Finals in Albany. Funding is available to pay for up to nine students, one teacher coach and one attorney-advisor for each team. Students of the same gender will share a room, with a maximum of four per room. Transportation costs are **not** covered. However, if a school can cover the additional costs for room and board for additional team members above the nine

students, one teacher coach and one attorney-advisor sponsored through the Bar Foundation, all members of a team are welcome to attend the State Finals. However, requests to bring additional team members must be approved by the Mock Trial Program Manager in advance.

- b. Costs for additional students (more than 9) and adult coaches and/or advisors (more than 2) will **not** be covered by the New York Bar Foundation grant or the LYC Program. The Mock Trial Program Manager is **not** responsible for making room arrangements and reservations for anyone other than the nine students, one teacher-coach and one attorney-advisor for each team. However, the Mock Trial Program Manager may choose to make those arrangements for the additional team members. This applies to team members only, not guests. If the Program Manager chooses **not** to make the arrangements, every attempt will be made to pass along any special hotel rates to these other participants. Additional team members attending the State Finals may participate in organized meal functions but will be responsible for paying for their participation. The teacher coach must advise their school administration of the school's responsibility to cover those additional charges and obtain their approval in advance. In most cases, the school will be billed after the State Finals. However, it is possible that a school may be required to provide payment in advance for their additional team members.
- c. Each team will participate in two enactments the first day, against two different teams. Each team will be required to change sides—plaintiff/prosecution to defendant, defendant to plaintiff/prosecution—for the second enactment. Numerical scores will be assigned to each team's performance by the judges.
- d. The two teams with the most wins and highest numerical score will compete on the following day, except that any team that has won both its enactments will automatically advance, regardless of its point total. In the rare event of three teams each winning both of their enactments, the two teams with the highest point totals, in addition to having won both of their enactments, will advance.
- e. The final enactment will be a single elimination tournament. Plaintiff/prosecution and defendant will be determined by a coin toss by the Mock Trial Program Manager. All teams invited to the State Finals must attend the final trial enactment.
- f. A judge will determine the winner. **THE JUDGE'S DECISION IS FINAL.**

The following (Section 7) regarding MCLE credit was revised in November 2016:

7. MCLE CREDIT FOR PARTICIPATING ATTORNEYS AND JUDGES

Attorneys and Judges participating in the New York State High School Mock Trial Program are eligible to receive MCLE credit based on their participation in a specific activity (an *Attorney-Judge* or *Presiding Judge* earns credits for trial time only; an *Attorney-Coach* earns credit for time spent working with students—this does not include the attorney’s personal preparation time.)

One (1) CLE credit hour may be earned for each 50 minutes of participation in a high school or college law competition. **A maximum of three (3) CLE credits** in skills may be earned for judging or coaching mock trial competitions **during any one reporting cycle**, i.e., within a two-year period¹ **Newly admitted attorneys (less than 24 months) are NOT eligible for this type of CLE credit.**

The LYC Program will process all requests for MCLE credit through the New York State Bar Association’s Continuing Legal Education Department, an accredited provider of CLE approved by the New York State Continuing Legal Education Board. The procedure is as follows:

- a) County Coordinators receive and disseminate the Request for CLE Credit Verification Form² to attorneys and judges that participate in their counties.
- b) The County Coordinators will collect the Verification Form from attorneys and judges who participated in the Mock Trial Tournament during the current year and mail the original signed copy to the Mock Trial Program Manager in Albany by June 1. Once the form is received in Albany, the Mock Trial Program Manager will forward it to the CLE Department for processing.
- c) MCLE certificates will be generated and sent by **email** to the attorney or judge requesting the credit. **MCLE credit cannot be provided without the signed Request for CLE Credit Verification Form.** A valid email address must be included on the form.

A sample of the Request for CLE Credit Verification Form follows.

¹ 1) The biennial reporting cycle shall be the two-year period between the dates of submission of the attorney's biennial registration statement; 2) An attorney shall comply with the requirements of this Subpart commencing from the time of the filing of the attorney's biennial attorney registration statement in the second calendar year following admission to the Bar.

² County Coordinators will begin disseminating this new form to participating attorneys and judges during the 2016-2017 New York State Mock Trial tournament season.

New York State Bar Association

HIGH SCHOOL MOCK TRIAL PROGRAM VERIFICATION FORM REQUEST FOR CLE CREDIT

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program in the State of New York, as an accredited provider of CLE programs, we are required to carefully monitor requests for earning CLE credit through participation in our high school mock trial program.

Each *Attorney Coach*, *Attorney Judge* or *Presiding Judge* may earn CLE credit by participating in a specific activity. That is, an *Attorney Judge* or *Presiding Judge* earns credit for trial time only; an *Attorney Coach* earns credit for time spent working with students only, which does **NOT** include the advisor's personal preparation time.

Participation in a high school or college law completion earns one (1) CLE credit hour for each 50 minutes. **A maximum of three (3) CLE credits** in skills may be earned for judging or coaching mock trial competitions during any one reporting cycle, i.e., in a two-year period* (see below): **Newly admitted attorneys (less than 24 months) are NOT eligible for this type of CLE credit.**

IMPORTANT!

To receive a CLE credit certificate, **you must complete this form and return it to your County Coordinator.** The Coordinator will send the original signed form to the Mock Trial Program Manager at the NYS Bar Association by June 1 for processing. Certificates will be emailed directly to you once they have been issued by the NYSBA, so be sure to include your email address below.

Name (please print): _____

Address: _____

Specific Activity: ATTORNEY COACH ATTORNEY JUDGE PRESIDING JUDGE

Date(s) of Service: _____ County of Service: _____

of Hours of Service: _____ Email address (required): _____

I certify that the information provided on this form is accurate.

Signature: _____ Date: _____

** 1) The biennial reporting cycle shall be the two-year period between the dates of submission of the attorney's biennial registration statement; 2) An attorney shall comply with the requirements of this Subpart commencing from the time of the filing of the attorney's biennial attorney registration statement in the second calendar year following admission to the Bar.*

**NEW YORK STATE
HIGH SCHOOL MOCK
TRIAL SIMPLIFIED
RULES OF EVIDENCE
AND PROCEDURE**

PART III

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SIMPLIFIED RULES OF EVIDENCE AND PROCEDURE

In trials in the United States, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy, or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge.

The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the judge will probably allow the evidence. The burden is on the attorneys to know the rules of evidence and to be able to use them to protect their client and to limit the actions of opposing counsel and their witnesses.

Formal rules of evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of this Mock Trial Tournament, the New York State rules of evidence have been modified and simplified. Not all judges will interpret the rules of evidence or procedure the same way, and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule that you think is proper. No matter which way the judge rules, you should accept the ruling with grace and courtesy.

1. SCOPE

Rule 101: SCOPE. These rules govern all proceedings in the mock trial competition. The only rules of evidence in the competition are those included in these rules.

Rule 102: OBJECTIONS. The court shall not consider an objection that is not contained in these rules. If counsel makes an objection not contained in these rules, counsel responding to the objection must point out to the judge, citing Rule 102 that the objection is beyond the scope of the listed objections. However, if counsel responding to the objection does not point out to the judge the application of this rule, the court may exercise its discretion and consider such objection.

2. RELEVANCY

Rule 201: RELEVANCY. Only relevant testimony and evidence may be presented. This means that the only physical evidence and testimony allowed is that which tends to make a fact which is important to the case more or less probable than the fact would be without the evidence. However, if the probative value of the relevant evidence is substantially outweighed by the danger that the

evidence will cause unfair prejudice, confuse the issues, or result in undue delay or a waste of time, the court may exclude it. This may include testimony, physical evidence, and demonstrations that do not relate to time, event or person directly involved in the litigation.

Example:

Photographs present a classic problem of possible unfair prejudice. For instance, in a murder trial, the prosecution seeks to introduce graphic photographs of the bloodied victim. These photographs would be relevant because, among other reasons, they establish the victim's death and location of the wounds. At the same time, the photographs present a high danger of unfair prejudice, as they could cause the jurors to feel incredible anger and a desire to punish someone for the vile crime. In other words, the photographs could have an inflammatory effect on the jurors, causing them to substitute passion and anger for reasoned analysis. The defense therefore should object on the ground that any probative value of the photographs is substantially outweighed by the danger of unfair prejudice to the defendant. Problems of unfair prejudice often can be resolved by offering the evidence in a matter that retains the probative value, while reducing the danger of unfair prejudice. In this example, the defense might stipulate to the location of the wounds and the cause of death. Therefore, the relevant aspects of the photographs would come in, without the unduly prejudicial effect.

Rule 202: CHARACTER. Evidence about the character of a party or witness may not be introduced unless the person's character is an issue in the case or unless the evidence is being offered to show the truthfulness or untruthfulness of the party or witness. Evidence of character to prove the person's propensity to act in a particular way is generally not admissible in a civil case.

In a criminal case, the general rule is that the prosecution cannot initiate evidence of the bad character of the defendant to show that he or she is more likely to have committed the crime. However, the defendant may introduce evidence of her good character to show that she is innocent, and the prosecution may offer evidence to rebut the defense's evidence of the defendant's character. With respect to the character of the victim, the general rule is that the prosecution cannot initiate evidence of the character of the victim. However, the defendant may introduce evidence of the victim's good or (more likely) bad character, and the prosecution may offer evidence to rebut the defense's evidence of the victim's character.

Examples:

A limousine driver is driving Ms. Daisy while he is intoxicated and gets into a car accident injuring Ms. Daisy. If Ms. Daisy sues the limousine company for negligently employing an alcoholic driver, then the driver's tendency to drink is at issue. Evidence of the driver's alcoholism is admissible because it is not offered to demonstrate that he was drunk on a particular occasion. The evidence is offered to demonstrate that the limousine company negligently trusted him to drive a limousine when it knew or should have known that the driver had a serious drinking problem.

Sally is fired and sues her employer for sexual harassment. The employer cannot introduce evidence that Sally experienced similar problems when she worked for other employers.

Evidence about Sally's character is not admissible to prove that she acted in conformity with her prior conduct, unless her character is at issue or it relates to truthfulness.

If an attorney is accused of stealing a client's money, he may introduce evidence to demonstrate that he is trustworthy. In this scenario, proof of his trustworthiness makes it less probable that he stole the money.

Richard is on trial for punching his coworker, Larry, during an argument. The prosecution wants to offer that Richard has, in the past, lost his temper and has neared physical altercations. This evidence constitutes character evidence within the meaning of the rule, because it is being offered to show that Richard has a propensity for losing his temper and that he may have acted in conformity with this character trait at the time he struck Larry.

Therefore, it would only be admissible if Richard, as the defendant, has decided to place his character at issue.

Rule 203: OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person. Such evidence, however, may be admissible for purposes other than to prove character, such as to show motive, intent, preparation, knowledge, or identity.

Examples:

Harry is on trial for stealing from a heavy metal safe at an office. The prosecution seeks to offer evidence that, on an earlier date Harry opened the safe and stole some money from the safe. The evidence is not being offered to show character (in other words, it is not being offered to show that Harry is a thief), but rather it is being offered to show that Harry knew how to crack the safe. This evidence therefore places Harry among a very small number of people

who know how to crack safes and, in particular, this safe. The evidence therefore goes to identity and makes Harry somewhat more likely to be guilty.

William is on trial for murder after he killed someone during a fight. The prosecution seeks to offer evidence that a week earlier William and the victim had another physical altercation. In other words, the victim was not some new guy William has never met before; rather, William and the victim had a history of bad blood. The evidence of the past fight would be admissible because it is not being offered to show that William has bad character as someone who gets into fights, but rather to show that William may have had motive to harm his victim.

In the same trial, the evidence shows that the victim died after William struck him in the larynx. William’s defense is that the death was completely accidental and that the fatal injury suffered by his victim was unintended and a fluke. The prosecution seeks to offer evidence that William has a black belt in martial arts, and therefore has knowledge of how to administer deadly strikes as well as the effect of such strikes. This evidence would be admissible to show the death was not an accident; rather, William was aware that the strike could cause death.

3. WITNESS EXAMINATION

a. Direct Examination (attorneys call and question witnesses)

Rule 301: FORM OF QUESTION. Witnesses should be asked direct questions and may not be asked leading questions on direct examination. Direct questions are phrased to evoke a set of facts from the witnesses. A leading question is one that suggests to the witness the answer desired by the examiner and often suggests a “yes” or “no” answer.

Example of a Direct Question: “*What is your current occupation?*”

Example of a Leading Question: “*Isn’t it true that in your current position you are responsible for making important investment decisions?*”

Narration: While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or “narrate” a whole story. Narrative questions are objectionable.

Example of a Narrative Question: “*Please describe how you were able to achieve your financial success.*” Or “*Tell me everything that was said in the board room on that day.*”

Narrative Answers: At times, a direct question may be appropriate, but the witness’s answer may go beyond the facts for which the question was asked. Such answers are subject to objection on the grounds of narration.

Objections:

“Objection. Counsel is leading the witness.” “Objection. Question asks for a narration.” “Objection. Witness is narrating.”

Rule 302: SCOPE OF WITNESS EXAMINATION. Direct examination may cover all the facts relevant to the case of which the witness has first-hand knowledge. Any factual areas examined on direct examination may be subject to cross-examination.

Objection:

“Objection. The question requires information beyond the scope of the witness’s knowledge.”

Rule 303: REFRESHING RECOLLECTION. If a witness is unable to recall a statement made in an affidavit, the attorney on direct may show that portion of the affidavit that will help the witness to remember.

b. Cross-Examination (questioning the other side’s witnesses)

Rule 304: FORM OF QUESTION. An attorney may ask leading questions when cross-examining the opponent’s witnesses. Questions tending to evoke a narrative answer should be avoided.

Rule 305: SCOPE OF WITNESS EXAMINATION. Attorneys may only ask questions that relate to matters brought out by the other side on direct examination, or to matters relating to the credibility of the witness. This includes facts and statements made by the witness for the opposing party. Note that many judges allow a broad interpretation of this rule.

Objection:

“Objection. Counsel is asking the witness about matters that did not come up in direct examination.”

Rule 306: IMPEACHMENT. An attorney may impeach the credibility of a witness (show that a witness should not be believed) in the following ways:

1. A witness may testify as to another witness’s reputation for truthfulness, provided that an adequate foundation is established for the testifying witness’s ability to testify about the other witness’s reputation.

Example:

Ben testifies at trial. Jeannette then takes the stand and is familiar with Ben’s reputation in the community as not being truthful. Jeannette therefore would be able to testify to Ben’s reputation for truthfulness.

2. Counsel may ask questions demonstrating that the witness has made statements on other occasions that are inconsistent with the witness’s present testimony. A foundation must be laid for the introduction of prior contradictory statements by asking the witness whether he or she made such statements.

Example:

If a witness previously stated that the car was black but at trial testified that the car was red, the witness could be questioned about this prior inconsistent statement for impeachment purposes.

3. An attorney may ask questions demonstrating the witness’s bias in favor of the party on whose behalf the witness is testifying, or hostility toward the party against whom the witness is testifying or the witness’s interest in the case.

Examples:

“Isn’t it true that you are being paid to testify at this trial?” If the witness is paid to testify, he may have an incentive not to tell the truth while testifying.

Steve is on trial for bank robbery, and calls his father as a defense witness to testify that they were watching football at the time of the crime. On cross-examination, the prosecutor could attempt to demonstrate the father’s bias that could cause him to fabricate an alibi for his son. Proper questions to impeach the father’s credibility might include, “You love your son very much, don’t you?” and “You don’t want to see your son go to jail, do you?”

Rule 307: IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted, but only if the crime was a felony or involved moral

turpitude, regardless of punishment, and the court determines that the value of this evidence as reliable proof outweighs its prejudicial effect to a party. Crimes of moral turpitude are crimes that involve dishonesty or false statements. These crimes involve the intent to deceive or defraud, such as forgery, perjury, counterfeiting and fraud.

Example:

“Have you ever been convicted of criminal possession of marijuana?”

Objections:

“Objection. The prejudicial effect of this evidence outweighs its usefulness.”

“Objection. The prior conviction being testified to is not a felony or a crime involving moral turpitude.”

c. Re-Direct Examination

Rule 308: LIMIT ON QUESTIONS. After cross-examination, up to three, but no more than three questions, may be asked by the attorney conducting the direct examination, but such questions are limited to matters raised by the attorney on cross-examination. The presiding judge has considerable discretion in deciding how to limit the scope of re-direct.

NOTE: If the credibility or reputation for truthfulness of the witness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to ask several more questions. These questions should be limited to the damage the attorney thinks has been done and should be phrased so as to try to “save” the witness’s truth-telling image in the eyes of the court. Re-direct examination is limited to issues raised by the attorney on cross-examination. Please note that at times it may be more appropriate not to engage in re- direct examination.

Objection:

“Objection. Counsel is asking the witness about matters that did not come up in cross- examination.”

d. Re-Cross Examination

Rule 309: LIMIT ON QUESTIONS. Three additional questions, but no more than three, may be asked by the cross-examining attorney, but such questions are limited to matters on re-direct examination and should avoid repetition. The presiding judge has considerable discretion in

deciding how to limit the scope of re-cross. Like re-direct examination, at times it may be more appropriate not to engage in re-cross-examination.

Objection:

“Objection. Counsel is asking the witness about matters that did not come up on re-direct examination.”

e. Argumentative Questions

Rule 310: Questions that are argumentative should be avoided and may be objected to by counsel. An argumentative question is one in which the cross-examiner challenges the witness about his or her inference from the facts, rather than seeking additional facts.

Example:

“Why were you driving so carelessly?”

Objection:

“Objection. Your Honor, counsel is being argumentative.”

f. Compound Questions

Rule 311: Questions that are compound in nature should be avoided and may be objected to by counsel. A compound question requires the witness to give one answer to a question, which contains two separate inquiries. Each inquiry in an otherwise compound question could be asked and answered separately.

Examples:

“Tony, didn’t you get sued by the buyer of your company and get prosecuted by the IRS?”

“Did you see and feel the residue on the counter?”

Objection:

“Objection. Your Honor, counsel is asking a compound question.”

g. Asked And Answered Questions

Rule 312: A student-attorney may not ask a student-witness a question that the student-attorney has already asked that witness. Such a question is subject to objection, as having been asked and answered.

Objection:

“Objection. Your Honor, the witness was asked and answered this question.”

h. Speculation

Rule 313: Questions that ask a witness to speculate about matters not within his personal knowledge are not permitted, and are subject to an objection by opposing counsel.

Example:

“Do you think your friend Robert knew about the robbery in advance?”

Objection:

“Objection. Your Honor, the question asks the witness to speculate.”

4. HEARSAY

Understanding and applying the Hearsay Rule (Rule 401), and its exceptions (Rules 402, 403, 404, and 405), is one of the more challenging aspects of the Mock Trial Tournament. We strongly suggest that teacher-coaches and students work closely with their attorney-advisors to better understand and more effectively apply these evidentiary rules.

Rule 401: HEARSAY. A statement made out of court (i.e., not made during the course of the trial in which it is offered) is hearsay if the statement is offered for the truth of the fact asserted in the statement. A judge may admit hearsay evidence if it was a prior out-of-court statement made by a party to the case and is being offered against that party. The party who made the prior out-of-court statement can hardly complain about not having had an opportunity to cross-examine himself regarding this statement. He said it, so he has to live with it. He can explain it on the witness stand. Essentially, the witness on the stand is repeating what she heard someone else say outside of the courtroom. The hearsay rule applies to both written as well as spoken statements. If a statement is

hearsay and no exceptions to the rule are applicable, then upon an appropriate objection by opposing counsel, the statement will be inadmissible.

REASONS FOR EXCLUDING HEARSAY: The reason for excluding hearsay evidence from a trial is that the opposing party was denied the opportunity to cross-examine the declarant about the statement. The declarant is the person who made the out-of-court statement. The opposing party had no chance to test the declarant’s perception (how well did she observe the event she purported to describe), her memory (did she really remember the details she related to the court), her sincerity (was she deliberately falsifying), and her ability to relate (did she really mean to say what now appears to be the thrust of her statement).

The opportunity to cross-examine the witness on the stand who has repeated the statement is not enough because the judge or the jury is being asked to believe what the declarant said.

Example:

Peter is on trial for allegedly robbing a Seven-Eleven store on May 1. A witness who is testifying on Peter’s behalf testifies in the trial, "I heard Joe say that he (Joe) went to the Seven-Eleven on May 1." Peter, the party offering the witness’s testimony as evidence, is offering it to prove that Joe was in the Seven-Eleven on May 1, presumably to create a question as to whether it could have been Joe at the scene of the crime, rather than Peter. In this example, Joe is the declarant. The reason why the opposing party, in this case the prosecution, should object to this testimony is that the prosecution has no opportunity to cross-examine Joe to test his veracity (was he telling the truth or just trying to help his friend Peter out of a mess) or his memory (was Joe sure it was May 1 or could it have been May 2)?

5. EXCEPTIONS

Hearsay may be admissible if it fits into certain exceptions. The exceptions listed below are the only allowable exceptions for purposes of the Mock Trial Tournament.

Rule 402: ADMISSION OF A PARTY OPPONENT: A judge may admit hearsay evidence if it was a prior out-of-court statement made by a party to the case that amounts to an admission that is against that party’s interest at trial. Essentially, the party’s own out-of- court statement is being offered into evidence because it contains an admission of responsibility or an acknowledgment of fault. The party who made the prior out-of-court statement can hardly complain about not having

had the opportunity to cross-examine himself. He said it, so he has to live with it. He can explain it on the witness stand.

Example:

Pam is involved in a car accident. Wendy was at the scene of the crash. At Pam's trial, Wendy testifies that she heard Pam say, "I can't believe I missed that stop sign!" At the trial, Wendy's testimony of Pam's out-of-court statement, although hearsay, is likely to be admitted into evidence as an admission against a party's interest. In this example, Pam is on trial so she can testify about what happened in the accident and refute having made this statement or explain the circumstances of her statement.

Rule 403: STATE OF MIND: A judge may admit an out-of-court statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health). Such out-of-court statements of pain or intent do not present the usual concerns with the reliability of hearsay testimony. For instance, when a witness testifies as to a declarant's statement of intent, there are no memory problems with the declarant's statement of intent and there are no perception problems because a declarant cannot misperceive intent. When applying this exception, it is important to keep in mind that the reliability concerns of hearsay relate to the out-of-court declarant, not to the witness who is offering the statement in court.

Example:

Mike is on trial for a murder that occurred at the West End Restaurant. Mike's defense relies upon the theory that another person, Jane, committed the murder. The defense then calls a witness who testifies that on the night of the murder he heard Jane say that she intended to go to the West End Restaurant. This hearsay statement is admissible as proof of Jane's intent to go to the restaurant.

Rule 404: BUSINESS RECORDS. A judge may admit a memorandum, report, record, or data compilation concerning an event or act, provided that the record was made at or near the time of the act by a person with knowledge and that the record is kept in the regular course of business. The rationale for this exception is that this type of evidence is particularly reliable because of the regularity with which business records are kept, their use and importance in the business and the incentive of employees to keep accurate records or risk being reprimanded by the employer.

Example:

Diane is on trial for possession of an illegal weapon. The prosecution introduces a written inventory prepared by a police officer of items, including a switchblade knife, taken from Diane when she was arrested as evidence of Diane's guilt. The written inventory is admissible. In this example, the statement that is hearsay is the written inventory (hearsay can be oral or written), the declarant is the police officer who wrote the inventory and the inventory is being offered into evidence to prove that Diane had a switchblade knife in her possession. The reason that the written inventory is admissible is that it was a record made at the time of Diane's arrest by a police officer, whose job required her to prepare records of items taken from suspects at the time of arrest and it was the regular practice of the police department to prepare records of this type at the time of an arrest.

Rule 405: PRESENT SENSE IMPRESSION. A judge may admit an out-of-court statement of a declarant's statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. The rationale for this exception is that a declarant's description of an event as it is occurring is reliable because the declarant does not have the time to think up a lie.

Example:

James is witnessing a robbery and calls 911. While on the phone with the 911 operator, James describes the crime as it is occurring and provides a physical description of the robber. These hearsay statements are admissible because they are James's description or explanation of an event – the robbery – as James perceives that event.

Rule 406: STATEMENTS IN LEARNED TREATISES. A statement contained in a treatise, periodical, or pamphlet is admissible if:

- (A) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
- (B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Example:

Dr. G, plaintiff's expert witness, is being cross-examined by defendant's counsel. During the cross-examination Dr. G is shown a volume of a treatise on cardiac surgery, which is the subject of Dr. G's testimony. Dr. G is asked if s/he recognizes the treatise as reliable on the subject of cardiac surgery. Dr. G acknowledges that the treatise is so recognized.

Portions of the treatise may then be read into evidence although the treatise is not to be received as an exhibit. If Dr. G does not recognize the treatise as authoritative, the treatise may still be read to the jury if another expert witness testifies as to the treatise's reliability or if the court by judicial notice recognizes the treatise as authoritative.

Rule 407: STATEMENTS BY AN UNAVAILABLE DECLARANT. In a civil case, a statement made by a declarant unavailable to give testimony at trial is admissible if a reasonable person in the declarant's position would have made the statement only if the declarant believed it to be true because, when the statement was made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to expose the declarant to civil or criminal liability.

Example:

Mr. X, now deceased, previously gave a statement in which he said he ran a red light at an intersection, and thereby caused an accident that injured plaintiff P. Offered by defendant D to prove that D should not be held liable for the accident, the statement would be admissible as an exception to the exclusion of hearsay.

6. OPINION AND EXPERT TESTIMONY

Rule 501: OPINION TESTIMONY BY NON-EXPERTS. Witnesses who are not testifying as experts may give opinions which are based on what they saw or heard and are helpful in explaining their story. A witness may not testify to any matter of which the witness has no personal knowledge, nor may a witness give an opinion about how the case should be decided. In addition, a non-expert witness may not offer opinions as to any matters that would require specialized knowledge, training, or qualifications.

Example:

(General Opinion)

The attorney asks the non-expert witness, “Why is there so much conflict in the Middle East?” This question asks the witness to give his general opinion on the Middle East conflict.

Note: This question is objectionable because the witness lacks personal perceptions as to the conflict in the Middle East and any conclusions regarding this issue would require specialized knowledge.

Objection:

“Objection. Counsel is asking the witness to give an opinion.”

Example:

(Lack of Personal Knowledge)

The attorney asks the witness, “Why do you think Abe skipped class?” This question requires the witness to speculate about Abe’s reasons for skipping class.

Objection:

“Objection. The witness has no personal knowledge that would enable him/ her to answer this question.”

Example:

(Opinion on Outcome of Case)

The attorney asks the witness, “Do you think the defendant intended to commit the crime?” This question requires the witness to provide a conclusion that is directly at issue and relates to the outcome of the case.

Objection:

“Objection. The question asks the witness to give a conclusion that goes to the finding of the Court.”

Rule 502: OPINION TESTIMONY BY EXPERTS. Only persons qualified as experts may give opinions on questions that require special knowledge or qualifications. An expert may be called as a witness to render an opinion based on professional experience. The attorney for the party for whom the expert is testifying must qualify the witness as an expert. This means that before the

expert witness can be asked for an expert opinion, the questioning attorney must bring out the expert’s qualifications, education and/or experience.

Example:

The attorney asks the witness, an auto mechanic, “Do you think Luke’s recurrent, severe migraine headaches could have caused him to crash his car into the side of George’s house?”

Objection:

“Objection. Counsel is asking the witness to give an expert opinion for which the witness has not been qualified.”

However, a doctor can provide an expert opinion on how migraine headaches affect eyesight.

7. PHYSICAL EVIDENCE

Rule 601: INTRODUCTION OF PHYSICAL EVIDENCE. Physical evidence may be introduced if it is relevant to the case. Physical evidence will not be admitted into evidence until it has been identified and shown to be authentic or its identification and/or authenticity have been stipulated to. That a document is “authentic” means only that it is what it appears to be, not that the statements in the document are necessarily true.

A prosecutor must authenticate a weapon by demonstrating that the weapon is the same weapon used in the crime. This shows that the evidence offered (the weapon) relates to the issue (the crime). If the weapon belonged to the prosecutor, it would not be relevant to the defendant’s guilt. The evidence must be relevant to the issue to be admissible.

PROCEDURE FOR INTRODUCING EVIDENCE: Physical evidence need only be introduced once. The proper procedure to use when introducing a physical object or document for identification and/or use as evidence is:

Have exhibit marked for identification. *“Your Honor, please mark this as Plaintiff’s Exhibit 1 (or Defense Exhibit A) for identification.”*

- a. Ask witness to identify the exhibit. *“I now hand you what is marked as Plaintiff’s Exhibit 1 (or Defense Exhibit A). Would you identify it, please?”*
- b. Ask witness questions about the exhibit, establishing its relevancy, and other pertinent questions.

- c. Offer the exhibit into evidence. *“Your Honor, we offer Plaintiff’s Exhibit 1 (or Defense Exhibit A) into evidence at this time.”*
- d. Show the exhibit to opposing counsel, who may make an objection to the offering.
- e. The Judge will ask opposing counsel whether there is any objection, rule on any objection, admit or not admit the exhibit.
- f. If an exhibit is a document, hand it to the judge.

NOTE: After an affidavit has been marked for identification, a witness may be asked questions about his or her affidavit without its introduction into evidence. In order to read directly from an affidavit or submit it to the judge, it must first be admitted into evidence.

Rule 602: REDACTION OF DOCUMENT. When a document sought to be introduced into evidence contains both admissible and inadmissible evidence, the judge may, at the request of the party objecting to the inadmissible portion of the document, redact the inadmissible portion of the document and allow the redacted document into evidence.

Objection:

“Objection. Your Honor, opposing counsel is offering into evidence a document that contains improper opinion evidence by the witness. The defense requests that the portion of the document setting forth the witness’s opinion be redacted.”

Rule 603: VOIR DIRE OF A WITNESS. When an item of physical evidence is sought to be introduced under a doctrine that normally excludes that type of evidence (e.g., a document which purports to fall under the business record exception to the Hearsay Rule), or when a witness is offered as an expert, an opponent may interrupt the direct examination to request the judge’s permission to make limited inquiry of the witness, which is called *“voir dire.”*

The opponent may use leading questions to conduct the *voir dire* but it must be remembered that the *voir dire’s* limited purpose is to test the competency of the witness or evidence and the opponent is not entitled to conduct a general cross-examination on the merits of the case.

The *voir dire* must be limited to three questions. The clock will not be stopped for *voir dire*.

8. INVENTION OF FACTS (Special Rules for the Mock Trial Competition)

Rule 701: DIRECT EXAMINATION. On direct examination, the witness is limited to the facts given. Facts cannot be made up. If the witness goes beyond the facts given opposing counsel may object. If a witness testifies in contradiction of a fact given in the witness’s statement, opposing counsel should impeach the witness during cross- examination.

Objection:

“Objection. Your Honor, the witness is creating facts which are not in the record.”

Rule 702: CROSS-EXAMINATION. Questions on cross-examination should not seek to elicit information that is not contained in the fact pattern. If on cross-examination a witness is asked a question, the answer to which is not contained in the witness’s statement or the direct examination, the witness may respond with any answer that does not materially alter the outcome of the trial. If a witness’s response might materially alter the outcome of the trial, the attorney conducting the cross-examination may object.

Objection:

“Objection. The witness’s answer is inventing facts that would materially alter the outcome of the case.”

9. PROCEDURAL RULES

Rule 801: PROCEDURE FOR OBJECTIONS. An attorney may object any time the opposing attorneys have violated the “Simplified Rules of Evidence and Procedure.” Each attorney is restricted to raising objections concerning witnesses, whom that attorney is responsible for examining, both on direct and cross-examinations.

NOTE: The attorney wishing to object (only one attorney may object at a time) should stand up and do so at the time of the violation. When an objection is made, the judge will ask the reason for it. Then the judge will turn to the attorney who asked the question and the attorney usually will have a chance to explain why the objection should not be accepted (“sustained”) by the judge. The judge will then decide whether a question or answer must be discarded because it has violated a rule of evidence (“objection sustained”), or whether to allow the question or answer to remain on the trial record (“objection overruled”).

Rule 802: MOTIONS TO DISMISS. Motions for directed verdict or dismissal are not permitted at any time during the plaintiff's or prosecution's case.

Rule 803: CLOSING ARGUMENTS. Closing arguments must be based on the evidence presented during the trial.

Rule 804: OBJECTIONS DURING OPENING STATEMENTS AND CLOSING ARGUMENTS. Objections during opening statements and closing arguments are **NOT** permitted.

Rule 901: PROSECUTION'S BURDEN OF PROOF (criminal cases).

Beyond a Reasonable Doubt: A defendant is presumed to be innocent. As such, the trier of fact (jury or judge) must find the defendant not guilty, unless, on the evidence presented at trial, the prosecution has proven the defendant guilty beyond a reasonable doubt. Such proof precludes every reasonable theory except that which is consistent with the defendant's guilt. A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary one. It is a doubt that a reasonable person would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence. While the defendant may introduce evidence to prove his/her innocence, the burden of proof never shifts to the defendant. Moreover, the prosecution must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed the crime charged. (Source: NY Criminal Jury Instructions).

Rule 902: PLAINTIFF'S BURDENS OF PROOF (civil cases).

902.1 Preponderance of the Evidence: The plaintiff must prove his/her claim by a fair preponderance of the credible evidence. The credible evidence is testimony or exhibits that the trier of fact (jury or judge) finds to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, *i.e.*, its convincing quality, the weight and the effect that it has on the trier of fact. (Source: NY Pattern Jury Instructions, §1:23).

902.2 Clear and Convincing Evidence: (To be used in cases involving fraud, malice, mistake, incompetency, etc.) The burden is on the plaintiff to prove fraud, for instance, by clear and convincing evidence. This means evidence that satisfies the trier of fact that there is a high degree of probability that the ultimate issue to be decided, *e.g.*, fraud, was committed by the defendant. To decide for the plaintiff, it is not enough to find that the preponderance of the evidence is in the plaintiff's favor. A party who must prove his/her case by a preponderance of the evidence only needs to satisfy the trier of fact that the evidence supporting his/her case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish his/her case by clear and convincing evidence must satisfy the trier of fact that the evidence makes it highly probable that what s/he claims is what actually happened. (Source: NY Pattern Jury Instructions, §1:64).

Rule 903: DIRECT AND CIRCUMSTANTIAL EVIDENCE

903.1 Direct evidence: Direct evidence is evidence of a fact based on a witness's personal knowledge or observation of that fact. A person's guilt of a charged crime may be proven by direct evidence if, standing alone, that evidence satisfies the fact-finder (a judge or a jury) beyond a reasonable doubt of the person's guilt of that crime. (Source: NY Criminal Jury Instructions).

903.2 Circumstantial evidence: Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or non-existence of another fact. A person's guilt of a charged crime may be proven by circumstantial evidence, if that evidence, while not directly establishing guilt, gives rise to an inference of guilt beyond a reasonable doubt. (Source: NY Criminal Jury Instructions).

NOTE: The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case as the fact-finder (a judge or a jury) finds them to be. [Source: NY Criminal Jury Instructions].

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**NEW YORK STATE
HIGH SCHOOL MOCK
TRIAL SCRIPT**

PART IV

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CASE SUMMARY

ROBIN BERKMAN V. COUNTY OF DOVER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF DOVER

INDEX NO: 2016–00914

1. Plaintiff Robin Berkman was 20 years old when Robin³ was convicted of attempted murder in the second degree and robbery in the first degree in connection with the December 17, 2011 robbery of a convenience store in the Town of Wilmington. Robin was sentenced to two determinate terms of nine years' imprisonment to run concurrently and to be followed by a five-year period of post-release supervision (PRS).
2. Prior to the December 17 robbery, the Dover County Sheriff's Department ("DCSD") had been investigating a number of convenience store robberies, none of which had been closed. The lead investigator was Detective Leslie Smith, a 14-year veteran of the DCSD. Detective Smith, along with other members of the DCSD, actively pursued leads relating to the December 17 robbery. Detective Smith was also particularly concerned because the December 17 robbery resulted in grievous injury to the convenience store's owner, who was shot during the robbery.
3. Detective Smith utilized various techniques to investigate the December 17 robbery, including communicating with confidential informants and collecting evidence. One of those confidential informants, identified as "X," told Detective Smith that a person the informant knew as "Robin" was involved in the December 17 robbery. Using this limited information, Detective Smith identified three possible suspects, one of whom was the plaintiff, Robin Berkman. Robin, who had always lived in the Town of Wilmington, resided in a small apartment with Robin's mother Ann and half-sibling Kelly Connolly. The Berkman apartment was several blocks from the convenience store. Robin had no contact with Robin's father for many years. Robin's mother worked nights, so Robin was the primary caregiver for

³ "Robin," when stated without an accompanying surname, means Robin Berkman, (1) unless the name "Robin" is offset by quotation marks or (2) except as otherwise provided in these case materials.

Kelly. The other two suspects identified by Detective Smith were Robin Carmichael, a felon with a history of armed robberies, and Robin Roberts, a convicted burglar.

4. Based upon the information received from “X” and the police investigation, Detective Smith arranged to meet Robin Berkman. That initial meeting took place at the Berkman apartment in the Town of Wilmington. Detective Smith explained to Robin that Detective Smith was conducting an investigation regarding the December 17, 2011 convenience store robbery. Robin, who was happy to have a conversation, readily agreed to speak with Detective Smith. Kelly was present when the interview took place. Robin’s mother was not present and did not know about the interview.
5. Responding to a question from Detective Smith, Robin denied any involvement in the December 17 robbery. Robin indicated that Robin had been in the nearby Village of Briarcliff around the time of the robbery. Robin expressed interest in helping Detective Smith solve the crime. Robin told Detective Smith that if Robin heard anything, Robin would contact Detective Smith immediately. Detective Smith then left the Berkman apartment to continue the investigation. Despite Robin's denial of any involvement, Detective Smith believed that Robin was involved. Detective Smith learned that Robin had been charged as a youth with “tagging” buildings in Wilmington with spray paint. The matter was handled in the Dover County Youth Court, where Robin was required to perform 250 hours of community service. One of the buildings Robin tagged was next door to the convenience store robbed on December 17. Therefore, the detective continued to investigate the December 17 robbery with an emphasis upon Robin Berkman as the primary perpetrator. This continued investigation included interviewing many of Robin's friends, co-workers and acquaintances.
6. Robin, in an effort to assist Detective Smith with the investigation, began regularly contacting the detective with information that Robin believed pertinent. Sometimes Robin would call Detective Smith on Robin’s cell phone (Detective Smith had provided Detective Smith’s business card to Robin), and on other occasions, Robin would show up at the DCSD offices to speak with Detective Smith. It became somewhat of a running joke among the detectives at the DCSD that Detective Smith had a “Junior Detective” helping Detective Smith investigate the convenience store robbery. On one of the occasions when Robin met with Detective

Smith at the DCSD offices, Robin reportedly provided Detective Smith with information which allegedly was not publicly available. That information included the type of weapon used and the specific pieces of jewelry taken from the convenience store owner during the robbery.

7. This allegedly undisclosed information, coupled with Robin's continuing efforts to assist in the investigation, caused Detective Smith to believe even more strongly that Robin Berkman was the perpetrator of the December 17 robbery. Although Robin did not have a police record, other than the tagging incidents for which Robin received 250 hours of community service, Detective Smith believed that with a little more investigating, there would be sufficient information to arrest Robin. Critically, the weapon was never recovered, nor was any evidence found connecting Robin to the robbery. During one of Robin's many visits to the DCSD offices, Robin was asked for and gave a DNA sample to Detective Smith, presumably in an effort to rule out Robin as a possible suspect. Berkman's DNA was not found at the scene.
8. Despite the information obtained in the investigation, Detective Smith still believed that there was not enough evidence to warrant arresting Robin. Smith, who had developed a friendly relationship with Robin, expressed concern to Robin that no arrest had been made.
9. Detective Smith suggested to Robin that in a further effort to assist the investigation, perhaps Robin would agree to undergo a polygraph examination to definitively rule Robin out as a suspect. While initially hesitant, Robin agreed, in part, because Detective Smith explained that once Robin was ruled out as a suspect, Robin would be allowed to provide additional assistance to the DCSD.
10. Detective Smith arranged for the polygraph examination to be conducted by the New York State Police because the DCSD did not have a polygraph examiner on staff. Detective Smith arranged for Robin to be transported to the New York State Police barracks in the Town of Wilmington for the polygraph examination. Kelly Connolly, Robin's half-sibling, accompanied Robin because their mother was at work. Robin's mother did not know that Robin had agreed to a polygraph examination.

11. In response to questions from the polygraph examiner, Sam Perkins, Robin denied any involvement in the December 17 robbery and attempted murder of the convenience store owner. During the polygraph examination, Robin reportedly made incriminating statements to the polygraph examiner by providing details as to how the crime was committed, including how the perpetrator could have avoided detection by the store's security system. During the polygraph examination, Robin became quite emotional and began sobbing uncontrollably. Robin apologized for any trouble Robin may have caused, including the injuries sustained by the owner of the convenience store. Detective Smith, who observed the polygraph examination and questioning by the polygraph examiner in an adjoining room, entered the polygraph examination room after Robin began crying. Detective Smith comforted Robin and told Robin that “everything would be okay.” Robin again apologized for any trouble that Robin may have caused. Kelly also observed Robin crying and repeatedly saying, “I'm sorry, I'm sorry.”
12. Detective Smith placed Robin under arrest for the crimes relating to the December 17 convenience store robbery. After the matter was presented to the grand jury, Robin was indicted and subsequently convicted by a jury in Dover County.
13. Immediately after Robin's arrest, through trial including sentencing and appeals, Robin maintained innocence. Robin reiterated having nothing to do with the robbery, and purported to have been in the Village of Briarcliff when the robbery occurred. Robin appealed the conviction to the Appellate Division, where the judgment of conviction was affirmed. An application for leave to appeal to the New York Court of Appeals was denied.
14. Robin, family members, and friends continued to press the claim that Robin was innocent and wrongfully convicted. Robin contacted officials with the Actual Innocence Association (“AIA”) to have Robin's case reviewed. Representatives from the AIA reviewed the trial transcript, interviewed Robin, and conducted their own investigation. That investigation turned up an individual named Robin Carmichael, who had a lengthy criminal history, including robbery and the use of a weapon. Importantly, Robin Carmichael was one of the three individuals with the first name “Robin” known to Detective Smith after Smith obtained information from confidential informant “X.” While the AIA representatives could not find

any documentation that Detective Smith had investigated whether Robin Carmichael was involved with the December 17 robbery, Detective Smith purports to have checked out Carmichael and determined that Carmichael was not involved with the December 17 robbery.

15. As part of their investigation, representatives from the AIA traveled to the correctional facility where Robin Carmichael was incarcerated. The AIA representatives spoke with Robin Carmichael in the presence of Carmichael's court-appointed attorney. Carmichael, serving a lengthy term for murder as a result of a botched robbery in July 2013, claimed not to know Robin Berkman. Further, while Carmichael did not admit any role in the December 17 robbery, Carmichael told the AIA representatives that Carmichael regularly “worked” in the County of Dover, and specifically, in the Town of Wilmington. Carmichael was very familiar with the convenience store and provided information about the robbery which was not publicly known. The AIA representatives believed that Robin Carmichael may well have been the individual responsible for the December 17 robbery.
16. As part of their investigation, the AIA representatives also attempted to confirm Robin Berkman's claimed presence in the nearby Village of Briarcliff at the time of the December 17 robbery. AIA investigators could not definitively prove that Robin Berkman was in Briarcliff. Further, the investigators noted that Briarcliff is just minutes from the convenience store. The AIA investigators also spoke with Robin Berkman and Kelly Connolly about the contacts between Robin and Detective Smith and what transpired at the polygraph examination.
17. Representatives from the AIA then contacted the Dover County District Attorney, who initially was reluctant to reopen the case. However, the District Attorney agreed to have an investigator interview Robin Carmichael. During that interview, Carmichael acknowledged involvement in the December 17 robbery. Carmichael reiterated that Berkman was not involved. Based upon that interview, the investigator reported to the District Attorney that, in his opinion, Robin Berkman had been wrongfully convicted of the December 17 robbery and that Robin Carmichael was the perpetrator. The District Attorney then opened up a formal investigation, including review of the entire DCSD file, trial transcript and interviews with the responsible investigators including Detective Leslie Smith. That investigation resulted in the decision by the District Attorney to ask the Dover County Supreme Court to vacate Robin

Berkman's conviction on the ground of actual innocence. That motion was granted without opposition and the conviction was vacated. Robin Berkman subsequently was released from custody.

18. Shortly after Robin's release from state prison, Robin filed a Notice of Claim pursuant to New York's General Municipal Law against the County of Dover. Robin asserted that the County, through the DCSD and other agents, had maliciously prosecuted Robin for crimes that Robin did not commit and that Robin is entitled to recovery of monetary damages. As the matter could not be resolved at the Notice of Claim stage, Robin, through counsel, filed a summons and complaint in the Supreme Court of the State of New York, County of Dover. The complaint contains a single cause of action based upon malicious prosecution. Robin asserts that the County, through the DCSD and more particularly Detective Smith, lacked probable cause to arrest and prosecute Robin for the crimes associated with the December 17 robbery. Robin asserts that the investigation undertaken by the DCSD was incomplete, thereby resulting in Robin's conviction for crimes that Robin did not commit. Robin may argue at trial that the information Robin provided to Detective Smith was, in fact, either publicly available or provided by Detective Smith, and that at no time did Robin say anything which would implicate Robin in the December 17 robbery. Moreover, Robin may assert that the investigation by Detective Smith and other members of the DCSD fell well below standards of proper police investigative techniques. Despite having been made aware that there were three individuals with a first name "Robin" as described by confidential informant "X," Detective Smith focused on Robin Berkman without giving any thought to the other potential suspects, including the actual perpetrator, Robin Carmichael.
19. The defendant, County of Dover, will argue that there was sufficient probable cause to arrest Robin Berkman for the December 17 robbery. Robin Berkman provided Detective Smith with information that was otherwise not publicly available. Detective Smith will dispute that such information was ever provided to Robin. Further, the County can be expected to argue that with all of the information pointing to Robin Berkman as the perpetrator, there was ample probable cause to prosecute Robin Berkman. While Detective Smith concluded that Robin Carmichael was not involved in the December 17 robbery, this determination was based upon the investigation. Finally, the County can be expected to argue that, while it is

extremely unfortunate that Robin Berkman was convicted of a crime for which Robin was actually innocent, actual innocence, by itself, is an insufficient basis to warrant a jury finding of malicious prosecution. At trial, the County expected to call confidential informant “X” as a witness. However, as a result of a serious motor vehicle accident, “X” is in a coma and is unable to testify.

Witnesses for the plaintiff:

ROBIN BERKMAN – *Plaintiff*

KELLY CONNOLLY – *Robin Berkman's Half-Sibling*

DR. RANDY CORBETT – *Psychologist and Police Investigative Technique Expert*

Witnesses for the defendant:

DETECTIVE LESLIE SMITH

SAM PERKINS – *New York State Police Polygraph Examiner*

DR. LEE TRIMBLE – *Former Police Captain, Expert Witness Regarding Police Investigative Techniques.*

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LIST OF STIPULATIONS

1. All witness statements are deemed sworn or affirmed, and duly notarized.
2. All items of evidence are originals and eligible for use during the match, following proper procedure for identification and submission.
3. Any enactment of this case is conducted after the named dates in the Case Summary and the witness affidavits. (Please note that the Case Summary is provided solely for the convenience of the participants in the Mock Trial Tournament. Said summary itself does not constitute evidence and may not be introduced at the trial or used for impeachment purposes).
4. Robin Carmichael is the same gender, the same race, and the approximate weight and height of the participant playing the role of Robin Berkman. (For example, if the participant playing Berkman is female, Carmichael is to be referenced as female.)
5. No other stipulations shall be made between the plaintiff/prosecution and the defense, except as to the admissibility of evidentiary exhibits provided herein.
6. **Robin Berkman was in prison from 2013 until 2016, when the conviction was vacated on grounds of actual innocence.**
7. **Robin Carmichael is unavailable to attend trial or testify, because Robin Carmichael has contracted and is recuperating from a highly contagious super-infection resistant to all antibiotics, and must be kept under strict quarantine in prison. Carmichael became ill two weeks prior to the start of this trial.**
8. **The County of Dover originally asserted a defense of qualified immunity in its Answer, but Plaintiff has successfully moved to strike this defense, and the County may not assert a qualified immunity defense at trial.**

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AFFIDAVIT OF ROBIN BERKMAN

1. My name is Robin Berkman. I was born on March 8, 1992. I have lived my entire life at 412 East Broadway, Apartment 2D, Town of Wilmington, in the County of Dover. I live in the apartment with my mother Ann and my half-sibling Kelly Connolly, who is now 15 years old. I have not seen or heard from my father for many years and do not know his current whereabouts. While I attended Wilmington High School, I did not receive a high school diploma. I received my GED in 2015 while in prison.
2. Prior to my conviction in **2013**, I served as the primary caregiver for Kelly because our mother worked nights in a nearby factory. I had very few friends and spent a great deal of my time watching television, particularly police shows such as Law and Order, Criminal Minds, etc. I always wanted to be a detective, but without a high school diploma, I was unable to pursue my dream.
3. In 2011, there were a series of convenience store robberies in Dover County, particularly in the Town of Wilmington. One of those convenience store robberies, on December 17, 2011, occurred just a few blocks from our apartment. There was extensive coverage of the robberies in the local papers, including the Wilmington Gazette and the Wilmington Post-Dispatch. I read many articles and tried to get whatever information I could about these robberies.
4. I recall that the December 17 robbery was more violent than the other robberies, as the convenience store owner was seriously injured.
5. I also recall that I was running some errands in the nearby Village of Briarcliff at the approximate time of the December 17 robbery. Briarcliff is no more than ten minutes from my apartment in Wilmington. I learned of the robbery the following morning when I read about it in the local newspapers. Those newspapers included quotes from Detective Leslie Smith, who was identified as the lead investigator from the Dover County Sheriff's Department (“DCSD”).
6. On February 3, 2012, I was surprised to receive a telephone call from Detective Smith. Although I did not know Detective Smith, I was familiar with other detectives in the DCSD. In 2008, when I was 16, I got into some trouble for tagging local buildings in Wilmington. I

used neon colored spray paint to paint my name on buildings. I was caught and ended up in the County's Youth Court. I had to perform 250 hours of community service, which mainly consisted of cleaning the buildings I had tagged. Only later did I recall that one of those buildings was next door to the convenience store robbed in December 2011.

7. Detective Smith inquired about visiting my apartment to talk about the December 17 robbery. Even though I had no involvement with the robbery, I was happy to talk to Detective Smith. Since I spent most of my time watching Kelly, I had very little contact with adults, so I looked forward to speaking with Detective Smith.
8. When Detective Smith arrived at my apartment on February 6, 2012, Kelly was home. Detective Smith claimed to be investigating the December 17 convenience store robbery. I told the detective that I had nothing to do with the robbery and that I was in the Village of Briarcliff when the robbery occurred. Detective Smith told me that a .45 caliber weapon had been used, and that jewelry worn by the convenience store owner had been taken. Detective Smith asked that I "keep my eyes and ears open" and to let Detective Smith know if I came up with any information regarding the robbery. Detective Smith purported to be very interested in solving the case because the convenience store robberies were frightening the community. Detective Smith gave me a personal business card that bore Detective Smith's cell phone number. Detective Smith told me to call at any time if I had information, and that any such information I could provide could be of great significance.
9. Later that evening after my mom returned from work, I told her about Detective Smith's visit. My mother told me that if I had any information to share with the DCSD, I should do so. I told my mother that at that time I didn't have any additional information except what was given to me by Detective Smith. My mother told me to be careful and that I should avoid getting into any trouble.
10. Over the next few weeks, I looked for information regarding the December 17 convenience store robbery. I read everything I could about the robbery. I even went to the convenience store a few times to see what, if anything, I could learn. I would call Detective Smith and let the Detective know what information I had come up with. On some occasions I would drive to the DCSD offices and ask to see Detective Smith. On some of those occasions, I would

speak with the Detective directly, and on other occasions, I would leave a message that I had stopped by. I don't know if any of the information I gave to Detective Smith was helpful. I remember mentioning how the convenience store looked secure and I wondered how the robbers could have entered. As was always the case, Detective Smith thanked me for the information. During all of my interactions with Detective Smith, either on the phone or in person at the DCSD offices, I never admitted having any role in December 17 robbery. The information that I provided to the Detective was information that I had learned from the news or from my visits to the convenience store after the December 17 robbery. I did not have any personal knowledge about the robbery, and in fact, did not even know where I could get such information.

11. During one of my visits to the DCSD offices, Detective Smith asked if I would provide a DNA sample. The Detective explained that providing a sample would allow the DCSD to rule me out as a suspect. Detective Smith said that once I was ruled out as a suspect I could become "even more involved" with the investigation. Because I knew that I was not involved in the December 17 robbery and I very much wanted to help out Detective Smith, I agreed to a DNA sample. A cotton swab was put into my mouth and, as explained by the technician, my DNA would be matched against any DNA that was found at the crime scene. It is my understanding that my DNA was not found at the crime scene.
12. A few weeks later Detective Smith asked if I would be willing to undergo a polygraph examination. From watching police shows, I knew that the polygraph or lie detector is not admissible in court. Detective Smith explained that the polygraph examination would further rule me out as a suspect. When I mentioned that the Detective had said the same thing about the DNA test, Detective Smith told me that if I wanted to assist in the investigation, it was necessary that I take the polygraph examination. I understood that if I did not take the polygraph examination I could no longer help Detective Smith with the investigation. Because I wanted to help in any way I could, I agreed to the polygraph examination. I did not tell my mother about this development.
13. On the day of the polygraph examination, Kelly and I went to DCSD headquarters. We were met by Detective Smith, who told us that we would be driven to a nearby New York State

Police barracks where the polygraph examination would be administered. Detective Smith and another officer from the DCSD drove Kelly and me to the police barracks.

14. At the barracks we were met by the polygraph examiner, Sam Perkins. Perkins explained the purpose of the polygraph examination and how the test would be administered. I was told that I would be in a room with Perkins, and that Perkins would ask me a series of questions to which I was supposed to respond. I was asked to review and sign some forms, which I did. I told Perkins that I was doing this to help the police so that I could continue to help with the investigation. I also told Perkins that I had no involvement in the December 17 robbery.
15. I now understand that Kelly and Detective Smith were watching and listening to the polygraph examination from another room. In the polygraph examination room, I was hooked up to a machine and then the polygraph examiner, Sam Perkins, began questioning me. As the questioning proceeded, I became very nervous and stressed out. Other than three cups of coffee, I had nothing to eat that day prior to the examination. Perkins asked me about the December 17 robbery and injuries sustained by the convenience store owner. Perkins also asked me if I had any idea how the robbers had gotten into the convenience store. Since I thought that Perkins was just asking for my opinion, I may have said something about avoiding the security system. As the questioning continued, I began to cry and told Perkins that I was sorry about what had happened to the convenience store owner. I became more and more stressed out and began sobbing uncontrollably. While I repeatedly said to Perkins that I was sorry for what had happened, I never said I was involved with the robbery or the shooting of the convenience store owner. I do not recall Perkins saying that I was a liar. At some point during the polygraph examination, Detective Smith entered the room to comfort me. The Detective told me that everything would be okay as long as I told the truth and that I would be able to go home to my mom and Kelly. I kept repeating that I was sorry for what had happened.
16. Detective Smith placed me under arrest and charged me with robbery and attempted murder. I was subsequently indicted by a Dover County Grand Jury and after trial was convicted on all charges. The judge gave me nine years, plus five years post-release supervision.

17. I have always denied any involvement in the December 17 robbery. I continued to proclaim my innocence following my arrest to my court-appointed attorney, at trial and during my unsuccessful appeals. Despite my protests of innocence, I was convicted and sentenced to a lengthy prison term. While in prison, I learned about the Actual Innocence Association (“AIA”). I wrote to the AIA and also had people I knew, including my mom, Kelly, and others, write to the AIA to look into my case. Time passed and ultimately I was advised that the AIA had reviewed my file. I was interviewed by an AIA representative and told him that I was not involved in the December 17 robbery. I learned from the AIA representative that an individual by the name of Robin Carmichael may have been involved in the December 17 robbery. I do not know Robin Carmichael and have never met this individual. As the AIA investigation proceeded, I learned that the Dover County District Attorney also had commenced an investigation, which eventually caused my judgment of conviction to be vacated on the ground of my actual innocence.
18. I am now seeking damages from the County of Dover for malicious prosecution in connection with my arrest and conviction for the December 17 robbery. All I wanted to do was help Detective Smith and the DCSD. Instead, I became another victim of the December 17 robbery and lost years of my life because of the County's actions.

Dated: October 6, 2016

I affirm the veracity of the foregoing statement.

Robin Berkman

Robin Berkman

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AFFIDAVIT OF KELLY CONNOLLY

1. I live with my mother and half-sibling, Robin Berkman, in an apartment in the Town of Wilmington. All three of us have lived together, except for ~~a few months in 2012~~ when Robin lived in prison.
2. I was born on September 9, 2001. Robin is eight years older than I am.
3. Robin and I don't know our fathers, so we have to rely on each other a lot. Our mother works a lot, usually at night. Sometimes we'll go days without seeing her.
4. As long as I can remember, Robin has looked after me. Robin cooked us dinner every night and would even stay home with me when I got sick.
5. Now that I'm getting older, I'm beginning to realize how hard that must have been for Robin. Robin wasn't really able to go out much with friends because I couldn't be left alone. I had Robin to look up to and help me out when I needed it. Robin didn't really have anyone.
6. On February 6, 2012, I remember meeting Detective Smith when the Detective came to our apartment to talk to Robin. After Detective Smith left, Robin was really excited. Robin said that Detective Smith needed our help in solving a robbery where someone got hurt.
7. After Detective Smith left, Robin started doing all kinds of research on the internet about the case. Robin would talk about it all the time. Robin would go on and on about any information that Detective Smith provided—like the type of gun that was used and what had been taken from the store during the robbery. Robin would even search the internet to try to ~~find the~~ **find the** store clerk's watch for sale somewhere.
8. Robin said it was really important to help Detective Smith catch the person who hurt that clerk. Robin was very concerned about the clerk and would say that kind of thing could happen to any one of us if we didn't catch the culprit.
9. Robin also really liked Detective Smith. We'd go see Detective Smith at police headquarters in the Town of Wilmington. They'd talk about all the details of the case and Detective Smith would even call Robin a "Junior Detective," which Robin really liked. One time, Detective

Smith made a joke about getting Robin a pair of handcuffs, but I didn't like the way Detective Smith made it sound.

10. Robin even started talking about going to the police academy to be a detective one day. Sometimes when we watched crime shows (which we did a lot), Robin would point out things that the detectives did and compare them to the things that Detective Smith was doing.
11. Sometimes I thought Robin was spending too much time talking to Detective Smith and working on the case, but Robin would say that we had to do everything we could to help Detective Smith and be a good friend and partner.
12. At some point, Robin and I went with Detective Smith so that Robin could take a polygraph examination that was supposed to help the case. I didn't understand how it would help, but Robin said that we just have to trust Detective Smith.
13. Then another officer took Robin into an interrogation room like the ones on TV. The other officer started asking Robin questions in a really nasty way and I could tell it was upsetting Robin. Robin kept looking for Detective Smith, and I asked the Detective to help Robin and make it stop, but everybody just ignored me.
14. Eventually, when Detective Smith was getting coffee and talking to other officers, the jerk in the polygraph room called Robin a liar and Robin started crying. I could tell that Robin was worried that Robin had done something to hurt the investigation. By the time Detective Smith came back in the room, Robin was apologizing for whatever Robin had done and for what had happened to the clerk. I've never seen Robin so scared and confused.

Dated: October 7, 2016

I affirm the truth of this statement.

Kelly Connolly

Kelly Connolly

AFFIDAVIT OF RANDY CORBETT

1. My name is Randy Corbett. I am a Clinical Psychologist and expert in police investigative techniques. I have been in practice for 15 years, and a Professor of Clinical Psychology in a joint program between CUNY Graduate Center and John Jay College of Criminal Justice for the last ten years. Before that, I was a police officer for ten years with the New York City Police Department (“NYPD”), where I was trained in and developed expertise on police investigative techniques.
2. Toward the end of my tenure with the NYPD, I became concerned about the application of confrontational investigative techniques on impressionable young people. I decided I couldn’t be part of that anymore and elected to pursue a psychology degree to better understand these issues.
3. I received my Ph.D. in psychology from the State University of New York at Albany in 1999. I am Board Certified in Clinical Psychology with Special Qualification in Developmental Psychology.
4. My academic research and teaching cover developmental psychology and psychology in the criminal justice context. In my clinical practice, I treat children and young adults with anxiety and personality disorders. I also treat patients with concerns in the area of socialization.
5. One of my doctoral students was Lee Trimble, who has since earned a Ph. D. From the start of our candidate-advisor relationship, it was clear to me that Trimble had no good-faith interest in studying and advancing the kind of changes we so desperately need. I tried my best to guide Trimble, but Trimble insisted on finding a new advisor.
6. As a service to my former profession, I often lead training academies where the fundamentals of good police work are covered. I have also taught a Behavioral Analysis course at the FBI Academy in Quantico, Virginia. I am paid for these trainings at the rate of \$3500 per course.
7. I have been retained as an expert witness 24 times in my career. At first, these were roughly evenly divided between plaintiff/prosecution and defense, but now the vast majority of my

testimony comes in cases in which the AIA has sought my involvement. I have been Trimble's adversary in court on about five occasions.

8. Although there is no formal diagnosis in the DHA-5 (the official guidebook of mental health diagnoses), it is an acknowledged psychological phenomenon that sometimes, when a parent figure is missing in a young person's life, the young person will gravitate toward another person or persons whom the young person perceives as an authority figure to "fill the void."
9. It is also known that people may attach to an authority figure and freely volunteer information about actual or perceived wrongdoing on the part of themselves or another, even if the information isn't necessarily true.
10. I first became involved in this case at the request of the plaintiff after the judgment of conviction of Robin Berkman was vacated based on actual innocence. **At that time, the AIA sent me the complete materials relating to this matter, which I thoroughly reviewed, as is my usual practice.**
11. Normally, I charge \$5000 for an appearance as an expert witness. However, I handle AIA matters free of charge.
12. It is my professional opinion that Robin Berkman's actions in this case came from Berkman's desire to be accepted by a parental figure. Detective Smith fit into that role. In the absence of a father and the near-absence of a mother, Berkman likely felt that there was no place else to turn, and the sudden interest in Berkman was a welcome change, even under these circumstances.
13. Robin Berkman's constant offers of assistance to Detective Smith, including participation in DNA testing and polygraph examination, are all explained by Berkman's attachment to the Detective. Berkman likely feared the rejection that could result absent cooperation, and felt cooperation was necessary in order to keep this bond, even if it meant false self-incrimination. This also explains Berkman's behavior during and immediately following the polygraph examination administered by the New York State Police. Additionally, it should be noted that, because polygraph examinations are measuring relative indicators of stress (such as pulse rate, breathing rate, galvanic skin responses, and sweat output), Berkman may well have registered as deceptive in view of Berkman's emotional state.

14. As a former police officer and investigative techniques instructor, I can say with confidence that the police investigation was woefully inadequate. First of all, Detective Smith should not have disclosed to Berkman information that was not already public. By doing so, Detective Smith tainted the investigation. Secondly, based on information received from confidential informant “X,” several other suspects were identified as possible perpetrators, yet the record is clear that Smith never pursued any of these leads. Instead, Detective Smith zeroed in on Berkman and made Berkman the sole focus of the investigation.
15. Given the circumstantial nature of the case and the unusual circumstances, Smith, at the very least, had an obligation to follow up on these leads.

Dated: October 11, 2016

I affirm the truth of this statement.

Randy Corbett, Ph. D.

Randy Corbett, Ph.D.

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AFFIDAVIT OF DETECTIVE LESLIE SMITH

Dover County Sheriff's Department

1. My name is Leslie Smith. I am a 14-year veteran of the Dover County Sheriff's Department. I have been a Detective for the last seven years.
2. I am a 1998 graduate of Dover County Community College, with an Associate's Degree in Forensic Science. My first job after graduating was with the Town of Wilmington Police Department as a traffic cop. After one year on the job, I was promoted to the patrol unit. The patrol unit is usually the first to arrive at a crime scene. So, on many occasions, I was able to use my forensic knowledge obtained at DCCC to conduct the preliminary investigation of crime scenes.
3. Because the Wilmington Police Department is small and the opportunities for promotion are limited, I decided to apply for an opening in the county sheriff's department. I was appointed as a deputy sheriff in early 2002 and was assigned to the robbery/burglary investigation unit. I was promoted to detective in the major crimes unit in July 2009.
4. The training to become a detective, especially for robbery/burglary investigators, is both intensive and extensive. We learn about collecting evidence, such as hair samples, clothing fibers, fingerprints and shoe prints, just to name a few.
5. I love my job as a detective. Collecting evidence to solve a crime is thrilling to me. I watch all of the CSI-type shows on television. I usually solve the mysteries of "whodunit" before the show ends. I could be one of those characters on CSI Miami. Maybe Hollywood will call me one of these days to star in a police drama.
6. There was a rash of convenience store robberies in the Town of Wilmington in 2011. I was assigned as the lead investigator for these robberies. A particularly egregious robbery occurred on December 17, 2011 that, unlike the other robberies, involved an attempted murder of the store owner. The owner was shot, and while he survived the attack, his injuries were nevertheless life-threatening.

7. I employed various techniques in investigating the December 17 robbery, including the collection of evidence from the scene and contacting confidential informants. One of the informants, known as “X,” told me that a person he knew as “Robin” was involved in the December 17 robbery. Using only this information, I was able to identify three possible suspects. One of the suspects was Robin Berkman, the plaintiff in this civil action, who lives just several blocks from the Lucky Convenience Store that was robbed on December 17. The other two suspects were Robin Carmichael, a convicted felon who had been involved in previous armed robberies, and Robin Roberts, a convicted burglar, but not a person known to use a weapon.
8. Based on the information provided by the informant, I proceeded to contact Berkman to schedule an interview. Berkman seemed to expect my call and readily agreed to meet with me. It was my understanding that Berkman, who has always lived in the Town of Wilmington, resided in a small apartment with Berkman’s mother and Berkman’s half-sibling, Kelly Connolly. I met with Berkman in that apartment. Kelly Connolly was also present, but their mother was not. I explained to Berkman that I was conducting an investigation of the December 17 robbery and attempted murder at a convenience store located just a few blocks away from the apartment. Berkman appeared to be happy to talk to me.
9. Responding to a question from me, Berkman denied any involvement in the robbery. Berkman claimed to have been in Briarcliff running errands at the time of the December 17 robbery/attempted murder, although Berkman provided no proof of this. In any event, the Village of Briarcliff is just a few minutes from Wilmington. However, Berkman expressed interest in helping me solve the crime. If Berkman were to hear anything, Berkman said, Berkman would certainly contact me immediately. I gave Berkman one of my business cards. I then left Berkman’s apartment to continue the investigation.
10. Although Berkman had no felony record, Berkman was charged on several different occasions with possession of graffiti instruments when Berkman was sixteen years old. I believe the charges were resolved in Youth Court where Berkman admitted to the crimes and had to do several months of community service. I really hate these graffiti “artists.” They are

destroying our beautiful city. We should do whatever it takes to get their rear ends off the street.

11. I returned to the scene of the crime. It turns out that one of the buildings Berkman defaced is next door to Lucky Convenience Store. There is a very good view of the surveillance cameras from the wall Berkman had tagged. At that point, there was no need to continue to investigate other “Robins” and waste valuable police resources, because at that stage I knew Berkman was the perpetrator. All I needed was some evidence linking Berkman to the crime, which I knew would involve further lengthy investigation.
12. I decided it was best to keep Berkman close and talking, in the hopes that Berkman would say or do something self-incriminating. During our initial interview, Berkman purported to be fascinated by police TV shows. I took the opportunity to suggest that Berkman provide a DNA sample. I told Berkman this could rule Berkman out as a suspect, and once that happened, Berkman could help out with the investigation. Berkman agreed. Eventually I learned, much to my surprise, that Berkman’s sample DNA did not match any DNA recovered at the scene. But that stuff happens.
13. As part of my investigation, I provided statements to the local newspapers, The Wilmington Gazette and The Wilmington Post-Dispatch. Both newspapers published detailed information about the December 17 robbery/attempted murder, including reference to a weapon being used and some jewelry taken during the robbery. As far as I recall, no specific description of the weapon or the jewelry was reported in the papers. The clerk had described the weapon as a Glock handgun, but I don’t believe this information was ever provided to the press. I don’t have transcripts of my press conferences.
14. Berkman continued to contact me with information Berkman believed was pertinent. Most of the time, Berkman would contact me on my cell phone. On many occasions, Berkman would show up at DCSD to speak with me. In fact, it became a running gag around the department that I had a “Junior Detective” helping me solve the crime. On one occasion when Berkman met with me, Berkman provided me with information about the robbery that I don’t believe was publicly available. The information included the type of weapon and the specific pieces of jewelry taken from the store clerk. There’s no way Berkman could have known this from the

newspapers or DCSD. I don't think I said anything about the Glock or the jewelry to Berkman. Of course I can't be 100% sure. We were always talking.

15. The additional information about the type of gun and jewelry, coupled with Berkman's continued "efforts to help" with the investigation, convinced me even more strongly that Berkman was the perp. Clearly, Berkman's behavior evinced to me some form of consciousness of guilt. Anyway, the Chief of the Sheriff's Department was putting pressure on me to close this investigation. In the Chief's opinion, the investigation had gone on too long. I am not going to lose my job or my rank because of Berkman. Berkman is not worth it to me. Even though the weapon was never recovered, Berkman's DNA did not match any at the scene, and no other evidence directly connecting Berkman to the crime was ever found, I still believed that a little more investigating would yield results. I told Berkman that I was concerned I hadn't accumulated enough evidence to make an arrest. Suggesting that Berkman could further assist in the investigation, I asked Berkman to take a polygraph examination to definitively rule Berkman out as a suspect. Berkman agreed.
16. I arranged for the polygraph examination to be conducted by the New York State Police because the Town of Wilmington did not have the necessary equipment. I transported Berkman, along with Berkman's half-sibling, to the New York State Police barracks, which is located just south of the Town of Wilmington. I was able to hear and observe the examination from an adjoining room through a one-way mirror. In response to questions from the polygraph examiner, Berkman denied any involvement in the December 17 robbery/attempted murder. However, under repeated questioning by the polygraph examiner, Berkman made incriminating statements regarding details as to how the crime was committed, including how the perpetrator could have avoided detection by the store's security surveillance system. At the conclusion of the examination, Berkman became quite emotional and was sobbing uncontrollably. Berkman apologized for any trouble Berkman may have caused, including the injury sustained by the owner of the convenience store.
17. I then entered the examination room and tried to comfort Berkman by telling Berkman that "everything would be okay." Berkman again apologized for any trouble that Berkman may have caused and while still crying was heard saying repeatedly, "I'm sorry, I'm sorry." After

hearing what I considered to be a confession, I placed Berkman under arrest for the December 17 convenience store robbery. I know that Kelly Connolly is going around claiming that the polygraph examiner had called Berkman a liar and that is the reason why Berkman was crying, but I was there for most of the examination and never heard the examiner use the word “liar.” Although I did briefly leave the adjoining room a couple of times, once to get coffee and another time to talk to several state trooper friends of mine, I was not out of the room very long. Besides, these polygraph examiners are professionals and don’t use terms like that.

18. I was able to convince the prosecutors that Berkman was the perpetrator of the December 17 robbery/attempted murder. These overworked prosecutors don’t have time to do their own investigation. They take whatever the police give them. The District Attorney presented the case to a grand jury and Berkman was indicted. Following a trial by jury, Berkman was found guilty as charged. I believe Berkman’s conviction was unanimously affirmed. I heard from the prosecutors that Berkman’s application for leave to appeal to the Court of Appeals was denied.
19. I learned that Berkman, shortly after being sent to the Big House, got this bleeding heart liberal outfit AIA to look into Berkman’s case. Prisons are full of criminals who claim they are as pure and innocent as a newborn baby. Cut me a break! All I know is that I conducted a thorough investigation and made a good arrest. The evidence, in my opinion, was overwhelming.
20. Now you’ve got this quack Dr. Corbett questioning my investigative skills. I understand that at one time Dr. Corbett had been a decent police officer in New York City for ten years. Corbett then goes for a Ph.D. in psychology and gets all weird. Leave it to Corbett; nobody is ever guilty, just misunderstood. As I said before, this was darn good police work.
21. But this AIA group got this Robin Carmichael to confess to the December 17 robbery/attempted murder. Carmichael is a convicted felon serving a lengthy prison sentence for second degree murder. Carmichael has nothing to lose by confessing because Carmichael was probably never going to get out of prison anyway.

22. I did check out Carmichael at the time and concluded Carmichael had no involvement in the December 17 convenience store robbery. Prisoners talk and share information all the time. Who's to say Carmichael didn't get information about the December 17 robbery from other inmates! I considered Carmichael's possible involvement in the robbery, and my gut feeling was that Carmichael had nothing to do with the crime. Carmichael's modus operandi is to hit bigger targets such as community banks and large religious institutions, not "ma and pa" stores like the Lucky Convenience Store involved in the December 17 robbery/attempted murder. Anyway, the District Attorney and the court were too quick to exonerate Berkman. I will believe Carmichael was the perpetrator of the December 17 crimes when Carmichael is actually convicted of those offenses. I would not have arrested Berkman if Berkman were not indeed guilty.

Dated: September 21, 2016

I affirm the truth of this statement.

Leslie Smith

Leslie Smith

AFFIDAVIT OF SAM PERKINS

1. I am 42 years old and I am a lifelong resident of Wilmington, New York. In 1999, I graduated from the New York State Police Academy and began my employment with the New York State Police. Before my appointment, I had to submit to a psychological evaluation and a polygraph test. I was fascinated by the equipment and the process, and as soon as an opening came up, I applied for assignment in the Polygraph Unit. I have been employed as a polygraph examiner for fifteen years.
2. I am a member of the American Polygraph Examiners Association, a professional association which provides accreditation to various polygraph training programs throughout the country and internationally. I have never received academic training in polygraph examination because New York does not have an accredited program. New York does not require polygraph examiners to pass a test or obtain a license. My training came exclusively through the New York State Police. After I retire, I plan to start a private polygraph service for private investigators and reality television shows.
3. Many people just don't realize what a polygraph examiner does and doesn't do. A polygraph machine isn't a "lie detector." It is probably more accurate to say the examiner, not the equipment, is the "lie detector." In order to get an accurate reading and write a thorough report, the examiner has to do three things: 1) conduct a pre-test interview, 2) collect data through the equipment, and 3) accurately analyze the data.
4. The pre-test interview is extremely important. The purpose is to orient the subject to the testing procedures, the purpose of the test, and the investigative target questions. People will report more useful information when they are asked by an interested listener who builds rapport. I try to build as much trust as possible with the subject during the pre-test interview. This allows truthful subjects to become accustomed to hearing and responding to test questions, while increasing the likelihood that deceptive people will display behaviors that can tip me off to sensitive areas. I like to engage the subject in what we call a "free narrative"—for example, I will ask direct and probing questions about a known incident and encourage the subject to elaborate. This helps me structure the test questions in a way that will give me the

most valid results. In the final stage of the pre-test interview, I show the subject the machine and the sensors and get informed consent to the procedure.

5. In April 2012, Detective Smith of the Wilmington Police Department called me to ask if I could perform a polygraph examination of a possible robbery suspect for the Wilmington Police Department.
6. I know Detective Smith professionally through various police organizations, and that Detective Smith would be a good source of referrals when I start my private polygraph service. I made arrangements to reserve an interview room at the State Police barracks. I set up a table for the polygraph equipment and two chairs, one for me and one for the subject. The polygraph examination could be seen and heard through an adjoining room with a one-way mirror.
7. I had never met Robin Berkman before the date of the polygraph examination.
8. When Berkman and Detective Smith arrived, I noticed that a younger person was with them. That person was later identified as Kelly Connolly, Berkman's half-sibling.
9. Detective Smith discussed the crime with me and the information that Detective Smith wanted me to obtain during the pre-test interview. In police parlance, Smith “liked” Berkman for the crime, and was certain that with just enough motivation, the case could be cracked!
10. I began the polygraph examination by asking certain baseline questions of Berkman, with a focus on the areas Detective Smith had discussed with me, especially how the perpetrator could have avoided the store’s security cameras while brutally attacking the clerk. Berkman claimed not to know, but also purported to have “thought a lot about that,” and then began to get emotionally upset. In my usual probing way, I asked Berkman whether the last few answers were accurate. Berkman then began to sob uncontrollably. Although Berkman was crying so hard it was difficult to understand what Berkman was saying, I am pretty sure Berkman said that Berkman was sorry for what had happened to the convenience store owner. Unfortunately, Berkman never admitted involvement in the December 17, 2011 robbery.

11. I knocked on the one-way mirror. Berkman looked up, surprised, and asked if Detective Smith or Kelly had been able to hear or see our conversation. I answered, “Of course.” After a few minutes, Berkman regained composure and left.

Dated: September 19, 2016

I affirm the veracity of the foregoing statement.

Sam Perkins

Sam Perkins

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AFFIDAVIT OF DR. LEE TRIMBLE

1. My name is Lee Trimble. I am a retired member of the Cleveland Police Department in Cleveland, Ohio. After my retirement, I earned a Ph.D. from John Jay College of Criminal Justice. I reside at 757 Sea View Drive, Wilmington, New York.
2. I grew up in Staten Island, New York, and attended Kent State University in Ohio on a basketball scholarship. I earned a B.A. in Psychology from Kent State. After graduation, I joined the Cleveland Police Department. As a member of the Cleveland Police Department, I received training in criminal investigation, interrogation, and arrest procedures; community policing; firearms use and safety; and cultural awareness and implicit bias.
3. After two years on the job, I was promoted to the rank of detective. During my five years as a detective, I investigated a wide range of violent crimes, including homicides, robberies, kidnappings, and burglaries. After solving a high-profile murder case, I earned a series of promotions. I served as a sergeant for two years, lieutenant for three years, and captain for eight years. During my time on the police force, I conducted or supervised the investigation of approximately 575 criminal cases.
4. I retired from the Cleveland Police Department after 20 years—that was when I was able to start collecting my pension. After I retired, I moved back to New York and enrolled in a Ph.D. program at John Jay College of Criminal Justice. The program included courses on criminology, forensic science, social justice, and terrorism.
5. Two years ago, I received my Ph.D. in Criminal Justice from John Jay. My doctoral dissertation involved a study of best practices in community policing. My paper proposed policies to improve relations between the police force and the community and also discussed ways to shield police departments from frivolous lawsuits and civilian complaints. Randy Corbett, a teacher at John Jay, was my dissertation advisor for a few months. But after several meetings, it became clear that we had very different philosophies about community policing. While I believe there is some merit in the “broken windows” approach to reducing crime, Corbett had other ideas. So I found a new advisor and parted ways with Corbett.

6. After I received my Ph.D., I began doing consulting work for local government entities and private organizations. I've testified as an expert on police practices in 15 civil trials in which a police department or a local government was sued—I was a witness for the plaintiff in six cases and for the defendant in nine cases. Corbett and I have been adversaries at trial about five times. In those cases, I was the expert for the defense and Corbett testified for the plaintiff.
7. In 2016, the Town of Wilmington engaged me to review the propriety of the police conduct in the case of *People v. Robin Berkman*. To conduct this review, I evaluated the complete record of the case, including the trial transcript, police investigative file, and the investigation conducted by the Actual Innocence Association. My rate is \$250 per hour for case review and \$300 per hour for court appearances. So far, on this case, I've spent 23 hours in case review.
8. After conducting a thorough review of the record, it is my expert opinion that there was sufficient probable cause for the arrest and prosecution of Robin Berkman.
9. Based on the facts known by Detective Leslie Smith at the time of Robin Berkman's arrest, it was reasonable for Detective Smith to believe that Robin Berkman was the perpetrator of the December 17, 2011 robbery of the Lucky Convenience Store in Wilmington. Detective Smith learned from an informant that a person named "Robin" was involved in the robbery. Detective Smith used this lead to identify Robin Berkman, a resident of Wilmington, as a possible suspect. During a non-custodial interrogation, Berkman disclosed to Detective Smith certain information that was not otherwise publicly available, specifically the type of the weapon and the specific pieces of jewelry taken from the owner of the convenience store during the robbery.
10. In addition to Berkman's statement describing the weapon and jewelry, Berkman further self-incriminated during a polygraph examination. Berkman revealed details about how the crime was committed and how the perpetrator could have avoided detection by the store's security system. This information also had not been made publicly available.
11. At the conclusion of the polygraph examination, Berkman made additional inculpatory statements. Crying uncontrollably, Berkman apologized for the injury suffered by the owner of the convenience store owner and repeatedly said, "I'm sorry, I'm sorry."

12. The totality of the circumstances, including Berkman's inculpatory statements and unusual interest in the case, gave Detective Smith sufficient probable cause to arrest and prosecute Robin Berkman for the December 17, 2011 robbery of the Lucky Convenience Store.
13. It is my opinion that Detective Smith conducted an adequate and proper investigation, even though Detective Smith probably could have made further inquiry as to whether Robin Carmichael had been involved in the robbery. Although there was evidence pointing to another possible suspect, that fact does not vitiate that there was probable cause for Robin Berkman's prosecution. The information known to Detective Smith at the time of the arrest provided a good faith basis for bringing a case against Berkman.

Dated: September 26, 2016

I affirm the veracity of the foregoing statement.

Lee Trimble, Ph.D.

Lee Trimble, Ph.D.

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**NEW YORK STATE
HIGH SCHOOL
MOCK TRIAL
TOURNAMENT
EVIDENCE**

PART V

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EXHIBIT _____**Statement of Robin Carmichael**

1. My name is Robin Carmichael and I am writing this statement of my own free will. I am currently incarcerated in a state prison in upstate New York for a robbery gone wrong. But, I'm not going to talk about that here. What I want to talk about is the robbery that I pulled off in December 2011 in Wilmington, NY.
2. Here's what happened—I was living in Dover County in 2011 in a town called Morrisville. I couldn't find steady work because I had a felony on my record, so I was just picking up odd jobs here and there. Mainly, I made my money on salvaging lumber from old barns and reselling it as reclaimed wood. The problem was that once I salvaged all of the wood from the barns that I knew about, I ran out of money. And since it was difficult to find another job, I had to think outside of the box and I decided to rob the Lucky Convenience Store.
3. I knew about Lucky's Store because my friend Toby lives in Wilmington, and whenever I'd go over Toby's to hang out, I'd stop by Lucky's to pick up some smokes and a couple of drinks. I noticed that store did quite a business and that it was close to the highway and open all the time. It looked like an easy mark. Plus the counter clerk always looked a little out of it, if you know what I mean—the type of person who just watches the TV behind the counter and barely even looks up at the customer. And I noticed that the clerk always wore this fancy watch that looked like a Rolex.
4. So in December of 2011, I was feeling financial pressure with the holidays coming around and I thought that it would be an easy score to rip off Lucky's. That day was damp and foggy and I decided to hit the store late. I don't remember the exact time. I went there alone and packed my .45 for protection. When I got in the store, I told the clerk to give me all of the cash in the drawer and to do it quick. The clerk looked spaced out and so to clear up any confusion, I pulled out the .45 and told the clerk to move it and to hand over the watch too. That got the clerk's attention alright. The cash drawer was packed and I had it emptied into a store bag to take with me. But the clerk didn't want to give up the watch and mumbled something about it being a gift from grandparents or something like that. I wanted to get out of there and I couldn't believe what I was hearing, so when I saw the clerk reach over towards me, I was

surprised that all of a sudden the gun went off—I don't know how. I guess the clerk got shot somehow. I needed to get out of there, so I grabbed the watch and the bag of cash and ran out.

5. I drove out to the highway and spent the night at Toby's and then laid low for a while. It turns out that the clerk didn't ID me—I don't know why—and I heard that the cops locked up some kid for the job—a kid with the same name as me practically. Detective Smith is a joke—doesn't have a clue. Like I'd ever bring someone like that with me on a run.
6. So, I want to come clean on this. That kid, Robin, had nothing to do with robbing Lucky's back in December 2011. That job was all me. What's right is right and I have no problem talking about what really happened that night.
7. This statement is my own and I wrote it myself willingly and voluntarily. No one told me what to say.

Dated: October 14, 2016

Robin Carmichael

Robin Carmichael

EXHIBIT _____

SUPREME COURT: COUNTY OF DOVER
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against-

ROBIN BERKMAN,

DEFENDANT

Indictment No. **2012-2020**

THE GRAND JURY OF THE COUNTY OF DOVER, by this indictment, accuses the defendant of AN ATTEMPT TO COMMIT THE CRIME OF MURDER IN THE SECOND DEGREE, in violation of Section 110/125.25 Subdivision 1 of the Penal Law of the State of New York committed as follows:

The defendant, ROBIN BERKMAN, on or about the 17th day of December 2011, in the County of Dover, State of New York, with the intent to cause the death of another person, did attempt to cause the death of another person.

SECOND COUNT

AND THE GRAND JURY OF THE COUNTY OF DOVER, by this indictment, further accuses the defendant of the crime of ROBBERY IN THE FIRST DEGREE, in violation of Section 160.15 Subdivision 1 of the Penal Law of the State of New York committed as follows:

The defendant, Robin Berkman, on or about the 17th day of December 2011, in the County of Dover, State of New York, did forcibly steal property from another person and, in the course of commission of the crime or of immediate flight therefrom, the defendant caused serious physical injury to another person who was not a participant in the crime.

Dated: April 30, 2012
Dover, New York

BY: Noordsy Francis
NOORDSY FRANCIS
District Attorney

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EXHIBIT _____

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF DOVER

CERTIFICATE OF DISPOSITION

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

ROBIN BERKMAN,

DEFENDANT.

INDICTMENT #: **2012-2020**

CHARGES:

Attempted Murder in the Second Degree
PL 110/125.25 (1)

Robbery in the First Degree
PL 160.15 (1)

Date Filed: April 30, 2012
Date of Birth: March 8, 1992
Date of Arrest: April 26, 2012

I DO HEREBY CERTIFY that it appears from an examination of the records on file in this office, that on February 14, 2013, the above named defendant was convicted of the crimes of Attempted Murder in the Second Degree (PL 110/125.25[1]), and Robbery in the First Degree (PL 160.15[1]).

That on March 15, 2013, upon the aforesaid conviction, the Honorable Young, then a judge of this court, sentenced the defendant to nine (9) years determinate imprisonment on each count, said terms to run concurrently.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on this date, September 27, 2016.



Willie Killem

Willie Killem
County Clerk, Dover County

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EXHIBIT _____

N1-JL/4 M-52/4

UNIFORM SENTENCE & COMMITMENT

UCS-854 (8/2010)

STATE OF NEW YORK
SUPREME COURT, COUNTY OF **DOVER**
 PRESENT: HON **DEVIN YOUNG**

Court Part: **25**
 Court Reporter: **M. RIVERA**
 Superior Ct. Case #: **2020-12**

The People of the State of New York
 -vs-
ROBIN BERKMAN
 Defendant

SEX	D.O.B.	NYSID NUMBER	CRIMINAL JUSTICE TRACKING NUMBER
	3/8/92	00767611L	63331000N

Accusatory Instrument Charge(s): Law/Section & Subdivision:
 1 **ATT. MURDER 2°** **110/125.25(1)**
 2 **ROBBERY 1°** **160.15(1)**

Date(s) of Offense: _____ To _____

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY [PLEA OR VERDICT], THE MOST SERIOUS OFFENSE BEING A [FELONY OR MISDEMEANOR OR VIOLATION], IS HEREBY SENTENCED TO:

Crime	Count No.	Law Section and Subdivision	SMF, Hate or Terror	Minimum Term	Maximum Term	<input type="checkbox"/> Definite (circle: D, M or Y) <input checked="" type="checkbox"/> Determinate (in years) **	Post-Release Supervision
1 ATT. MURDER 2°	1	110/125.25(1)		_____ years	_____ years	9 days/months/years	5 years
2 ROBBERY 1°	2	160.15(1)		_____ years	_____ years	9 days/months/years	5 years
3				_____ years	_____ years	_____ days/months/years	_____ years
4				_____ years	_____ years	_____ days/months/years	_____ years
5				_____ years	_____ years	_____ days/months/years	_____ years

** NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].

- Counts **1 + 2** shall run CONCURRENTLY with each other Count(s) _____ shall run CONSECUTIVELY to count(s) _____
- Sentence imposed herein shall run CONCURRENTLY with _____ and/or CONSECUTIVELY to _____
- Sentence imposed herein shall run CONSECUTIVELY to a _____ term of [PROBATION OR CONDITIONAL DISCHARGE] with and Ignition Interlock Device condition to commence upon the defendant's release from imprisonment [PL § 60.21]
- Conviction includes: WEAPON TYPE: _____ and/or DRUG TYPE: _____
- Charged as a JUVENILE OFFENDER—age at time crime committed: _____ years
- Adjudicated a YOUTHFUL OFFENDER [CPL § 720.20] Court certified the Defendant a SEX OFFENDER [Cor. L § 168-d]
- Execute as a sentence of PAROLE SUPERVISION [CPL § 410.91] CASAT ordered [PL § 60.04(6)]
- Re-sentenced as a PROBATION VIOLATOR [CPL § 410.70] SHOCK INCARCERATION ordered [PL § 60.04(7)]

As a: Second Second Violent Second Drug Second Drug w/prior VFO Predicate Sex Offender Predicate Sex Offender w/prior VFO Second Child Sexual Assault Persistent Persistent Violent FELONY OFFENDER

Paid	Not Paid	Deferred—court must file written order [CPL § 420.40(5)]		Paid	Not Paid	Deferred—court must file written order [CPL § 420.40(5)]	
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> Mandatory Surcharge	\$ 300-	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> Crime Victim Assistance Fee	\$ 25-
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Fine	\$ _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Restitution	\$ _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> DNA Fee	\$ 50-	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Sex Offender Registration Fee	\$ _____
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> DWI/Other:	\$ _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Supplemental Sex Off. Victim Fee	\$ _____

THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:

- NYS Department of Correctional Services (NYSDOCS) until released in accordance with the law, and being a person sixteen (16) years or older not presently in the custody of NYSDOCS (the County Sheriff) (New York City Dept. Of Correction) is directed to deliver the defendant to the custody of NYSDOCS as provided in 7 NYCRR Part 103.
- NYSDOCS until released in accordance with the law, and being a person sixteen (16) years or older and is presently in the custody of NYSDOCS, said defendant shall remain in the custody of the NYSDOCS.
- NYS Office of Children and Family Services in accordance with the law being a person less than sixteen (16) years of age at the time the crime was committed.
- _____ County Jail/Correctional Facility

TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.

REMARKS: _____

Pre-Sentence Investigation Report Attached: YES NO Amended Commitment:
 Order of Protection Issued: YES NO Original Sentence Date _____
 Order of Protection Attached: YES NO
3, 15, 13 **A. PUGLIESE** **Br. Court Clerk** by: **A. Pugliese** **SCC**
 Date Clerk of the Court Signature Title

Commitment, Order of Protection & Pre-Sentence Report received by Correctional Authority as indicated:

 Official Name

 Shield No.



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EXHIBIT _____

Page 1 of 2

POLYGRAPH EXAMINATION REPORT			
DATE OF REPORT	DATE(S) OF EXAMINATION	ROI/FILE NUMBER	DOSSIER NUMBER
ORGANIZATION OR AGENCY REQUESTING EXAMINATION DCSD Smith			
DATE AUTHORIZED		TITLE OF AUTHORIZING REPRESENTATIVE Perkins Senior Polygraph Examiner	
<input type="checkbox"/> EXAMINEE NAME (Last, First, Middle Initial) OR MI SOURCE NUMBER Berkman, Robin		<input type="checkbox"/> GRADE	<input type="checkbox"/> SS NUMBER xxx-xx-9088
<input type="checkbox"/> DATE OF BIRTH 8 Mar 1992	<input type="checkbox"/> PLACE OF BIRTH Dover County		<input type="checkbox"/> CITIZENSHIP STATUS US
<input type="checkbox"/> ORGANIZATION, DOD AFFILIATION OR ADDRESS n/a			
<input type="checkbox"/> OFFENSE/BASIS FOR INVESTIGATION 12/17/2011 Robbery, First Degree / Attempted Murder, Second Degree			
<input type="checkbox"/> PURPOSE OF EXAMINATION Courtesy assistance to DCSC investigation			
<input type="checkbox"/> INVESTIGATIVE/OPERATIONAL SUMMARY Subject appeared nervous but within usual parameters Pre-test questions: knowledge of security camera locations/operations, knowledge of victim injuries; knowledge of specific items stolen from victim Criminal history if applicable Routine challenges to veracity during test administration			
<input type="checkbox"/> SPECIAL CATEGORY MARKINGS/WARNING NOTICES		<input type="checkbox"/> DOWNGRADING/DECLASSIFICATION/TERMINATION	

<input type="checkbox"/> LOCATION OF EXAMINATION NYSP Barracks Wilmington					
SYNOPSIS OF RESULTS					
	NO DECEPTION INDICATED		INCONCLUSIVE		PRE-TEST CONFESSION/ADMISSION
X	DECEPTION INDICATED		NO OPINION		POST-TEST CONFESSION/ADMISSION
<input checked="" type="checkbox"/> UNUSUAL PHYSIOLOGICAL RESPONSES (WERE) (WERE NOT) OBSERVED DURING THIS INVESTIGATION			POLYGRAPH INSTRUMENT DATA		
			MANUFACTURER Worldwide Sec. Equipment		
<input checked="" type="checkbox"/> EXAMINEE WAS (WAS NOT) COOPERATIVE			MODEL Jedi 451		
<input type="checkbox"/> ALL PARTS OF THIS EXAMINATION WERE (WERE NOT) COMPLETED			SERIAL NUMBER 12121955		
			DATE LAST CALIBRATED 11/20/2012		
<input type="checkbox"/> CONCLUSIONS Cannot rule out subject. Subject disclosed graffiti arrests at/near crime scene. Veracity challenge to questions about avoiding/disabling security camera system. DECEPTION INDICATED. Subject displayed emotional/traumatic responses to sustained questions about victim's injuries; possible remorse.					
TYPED NAME OF WITNESS, MONITOR, OR INTERPRETER			<input type="checkbox"/> EXAMINEE NATIVE LANGUAGE English		
EXAMINER (TYPED NAME AND CERTIFICATE NUMBER) Perkins, Sam NYSP 060488			<input type="checkbox"/> LANGUAGE(S) EXAMINATION CONDUCTED English		
ORGANIZATION OF EXAMINER NYSP			SIGNATURE OF EXAMINER <i>Sam Perkins</i>		

EXHIBIT _____

Wilmington Gazette

Week of December 19, 2011

Convenience Store Robberies Continue to Plague Wilmington

By Roberta Sinclair

On Saturday December 17, the Town of Wilmington was rocked by another convenience store robbery. The Lucky Convenience Store on Maiden Lane was the target this time. While the recent convenience store robberies did not result in personal injury or loss of life, this time was different. The owner of the Lucky Convenience Store was seriously injured when he was shot during the robbery. The owner is in serious but stable condition at a local hospital.

Detective Leslie Smith of the Dover County Sheriff's Department (DCSD) oversees the investigation. Detective Smith stated at a press conference, held at the Lucky Convenience Store, that the owner was shot but no weapon had been recovered. Detective Smith also said that the owner reported that his watch and some jewelry were taken from him.

Detective Smith said that the DCSD is adding additional detectives to the investigation. According to Detective Smith, "the investigation into these robberies is the highest priority of the DCSD. All areas of investigation are being explored to solve these crimes." Although there have been several convenience store robberies over the past few months, Detective Smith would neither confirm nor deny that one perpetrator or group of perpetrators is involved. Detective Smith urged the public to remain calm. Any information regarding the December 17 robbery or the earlier convenience store robberies should be reported to the Dover County Sheriff's Department at (518) 200-0000. All calls will be kept confidential.

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EXHIBIT _____Wilmington Post-Dispatch

December 21, 2011

Investigation into Convenience Store Robbery Continuing

By: Sam Draper

The Dover County Sheriff's Department (DCSD) is investigating the December 17 robbery at the Lucky Convenience Store in Wilmington. Lead investigator Detective Leslie Smith won't say whether the Lucky Convenience Store robbery was committed by the same perpetrators who robbed other convenience stores in Wilmington over the past few months. "We are looking at any connection between the December 17 robbery and the earlier robberies at other convenience stores in the town. We are not ruling out any connection but we are focused on the December 17 robbery."

The DCSD's "focus" on the December 17 robbery is due, in part, to the fact that the owner of the Lucky Convenience Store was seriously injured when he was shot during the robbery. The owner, who underwent emergency surgery, remains hospitalized in serious condition. The motive for the shooting is unknown although it has been reported that some of the owner's jewelry was taken during the robbery, including a watch, rings, bracelets and chains. According to members of the owner's family, the watch and jewelry are expensive and the owner may have been unwilling to give the items up.

Detective Smith had no information on the weapon used in the robbery. Detective Smith urged the public to contact the DCSD with any information regarding the December 17 robbery or any of the prior convenience store robberies. The DCSD phone number is (518) 200-0000. All calls will be kept confidential.

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**NEW YORK STATE
HIGH SCHOOL MOCK
TRIAL RELATED
CASES AND CASE LAW**

PART VI

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CASES

- *Martinez v. Schenectady*, 97 NY2d 78 (2001)
- *Smith-Hunter v. Harvey*, 95 NY2d 191 (2000)
- *Hollender v. Trump Village Co-op*, 58 NY2d 420 (1983)
- *Trottier v. West*, 54 AD2d 1025 (1976)
- *Casler v. State*, 33 AD2d 305 (1970)
- *Colon v. New York*, 60 NY2d 78 (1983)

IMPORTANT NOTE:

Only the names and the citations of the relevant cases are provided here.

Please go to www.nysba.org/mtcaselaw to **view** and/or **print** the text of each case.

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**NEW YORK STATE
HIGH SCHOOL MOCK
TRIAL APPENDICES**

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POINTS	MOCK TRIAL TOURNAMENT PERFORMANCE RATING GUIDELINES
<p>1 Ineffective</p>	<ul style="list-style-type: none"> • Not prepared/disorganized/illogical/uninformed • Major points not covered • Difficult to hear/speech is too soft or too fast to be easily understood • Speaks in monotone • Persistently invents (or elicits invented) facts • Denies facts witness should know • Ineffective in communications
<p>2 Fair</p>	<ul style="list-style-type: none"> • Minimal performance and preparation • Performance lacks depth in terms of knowledge of task and materials • Hesitates or stumbles • Sounds flat/memorized rather than natural and spontaneous • Voice not projected • Communication lack clarity and conviction • Occasionally invents facts or denies facts that should be known
<p>3 Good</p>	<ul style="list-style-type: none"> • Good performance but unable to apply facts creatively • Can perform outside the script but with less confidence than when using the script • Doesn't demonstrate a mastery of the case but grasps major aspects of it • Covers essential points/well prepared • Few, if any mistakes • Speaks clearly and at good pace but could be more persuasive • Responsive to questions and/or objections • Acceptable but uninspired performance
<p>4 Very Good</p>	<ul style="list-style-type: none"> • Presentation is fluent, persuasive, clear and understandable • Student is confident • Extremely well prepared—organizes materials and thoughts well and exhibits a mastery of the case and materials • Handles questions and objections well • Extremely responsive to questions and/or objections • Quickly recovers from minor mistakes • Presentation was both believable and skillful
<p>5 Excellent</p>	<ul style="list-style-type: none"> • Able to apply case law and statutes appropriately • Able to apply facts creatively • Able to present analogies that make case easy for judge to understand • Outstandingly well prepared and professional • Supremely self-confident, keeps poise under duress • Thinks well on feet • Presentation was resourceful, original and innovative • Can sort out the essential from non-essential and uses time effectively • Outstandingly responsive to questions and/or objections • Handles questions from judges and attorneys (in the case of a witness) extremely well • Knows how to emphasize vital points of the trial and does so
<p>Professionalism of Team Between 1 to 10 points per team</p>	<ul style="list-style-type: none"> • Team's overall confidence, preparedness and demeanor • Compliance with the rules of civility • Zealous but courteous advocacy • Honest and ethical conduct • Knowledge of the rules of the competition • Absence of unfair tactics, such as repetitive, baseless objections; improper communication and signals; invention of facts; and strategies intended to waste the opposing team's time for its examinations.

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2017 NEW YORK STATE MOCK TRIAL TOURNAMENT PERFORMANCE RATING SCORE SHEET

In deciding which team has made the best presentation in the case you are judging, use the following criteria to evaluate each team's performance. FOR EACH OF THE PERFORMANCE CATEGORIES LISTED BELOW, RATE EACH TEAM ON A SCALE OF 1 TO 5 AS FOLLOWS (USE WHOLE NUMBERS ONLY). INSERT SCORES IN THE EMPTY BOXES.

SCALE	1=Ineffective	2=Fair	3=Good	4=Very Good	5=Excellent	(Page 1 of 2)
T I M E L I M I T S						
OPENING STATEMENTS		DIRECT EXAMINATION		CROSS EXAMINATION		CLOSING ARGUMENTS
5 minutes for each side		10 minutes for each side		10 minutes for each side		10 minutes for each side
				PLAINTIFF / PROSECUTION		DEFENSE
➤ OPENING STATEMENTS (ENTER SCORE) →						
PLAINTIFF/PROSECUTION 1st Witness		Direct and Re-Direct Examination by Attorney				
		Cross and Re-Cross Examination by Attorney				
		Witness Preparation and Credibility				
PLAINTIFF/PROSECUTION 2nd Witness		Direct and Re-Direct Examination by Attorney				
		Cross and Re-Cross Examination by Attorney				
		Witness Preparation and Credibility				
PLAINTIFF/PROSECUTION 3rd Witness		Direct and Re-Direct Examination by Attorney				
		Cross and Re-Cross Examination by Attorney				
		Witness Preparation and Credibility				

PLEASE BE SURE TO ALSO COMPLETE THE OTHER SIDE OF THIS FORM (PAGE 2)

SCALE	1=Ineffective	2=Fair	3=Good	4=Very Good	5=Excellent	(Page 2 of 2)
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T I M E L I M I T S

OPENING STATEMENTS	DIRECT EXAMINATION	CROSS EXAMINATION	CLOSING ARGUMENTS
5 minutes for each side	10 minutes for each side	10 minutes for each side	10 minutes for each side

		PLAINTIFF / PROSECUTION	DEFENSE
DEFENSE 1st Witness	Direct and Re-Direct Examination by Attorney		
	Cross and Re-Cross Examination by Attorney		
	Witness Preparation and Credibility		
DEFENSE 2nd Witness	Direct and Re-Direct Examination by Attorney		
	Cross and Re-Cross Examination by Attorney		
	Witness Preparation and Credibility		
DEFENSE 3rd Witness	Direct and Re-Direct Examination by Attorney		
	Cross and Re-Cross Examination by Attorney		
	Witness Preparation and Credibility		
➤ <u>CLOSING STATEMENTS</u> (ENTER SCORE→)			
(1-10 points PER team)			
➤ <u>PROFESSIONALISM</u> (ENTER SCORE→)			
<ul style="list-style-type: none"> • Team's overall confidence, preparedness and demeanor • Compliance with the rules of civility • Zealous but courteous advocacy • Honest and ethical conduct • Knowledge of the rules of the competition • Absence of unfair tactics, such as repetitive, baseless objections; improper communication and signals; invention of facts; strategies intended to waste the opposing team's time for its examinations. 			
➤ <u>TOTAL SCORE</u> (ENTER SCORE)→			

➤ **JUDGE'S NAME** (Please print) →

In the event of a tie, please award one point to the team you feel won this round. Mark your choice below.

PLAINTIFF/PROSECUTION

DEFENSE

ORDER OF THE TRIAL

The trial shall proceed in the following manner:

- Opening statement by plaintiff's attorney/prosecuting attorney
- Opening statement by defense attorney
- Direct examination of first plaintiff/prosecution witness
- Cross examination of first plaintiff/prosecution witness
- Re-direct examination of first plaintiff/prosecution witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of second plaintiff/prosecution witness
- Cross examination of second plaintiff/prosecution witness
- Re-direct examination of second plaintiff/prosecution witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of third plaintiff/prosecution witness
- Cross examination of third plaintiff/prosecution witness
- Re-direct examination of third plaintiff/prosecution witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Plaintiff/prosecution rests
- Direct examination of first defense witness
- Cross examination of first defense witness
- Re-direct examination of first defense witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of second defense witness
- Cross examination of second defense witness
- Re-direct examination of second defense witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Direct examination of third defense witness
- Cross examination of third defense witness
- Re-direct examination of third defense witness, if requested
- Re-cross examination, if requested (but only if re-direct examination occurred)
- Defense rests
- Closing arguments by defense attorney
- Closing arguments by plaintiff's attorney/prosecuting attorney. There can be no deviation from this ordering.

Thank you,

Craig R. Bucki, Chair
NYSBA's Mock Trial Subcommittee

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PREPARING FOR THE MOCK TRIAL TOURNAMENT

Learning the Basics

Teachers and attorneys should instruct students in trial practice skills and courtroom decorum. You may use books, videos and other materials in addition to the tournament materials that have been provided to you to familiarize yourself with trial practice. However, during the competition, you may cite only the materials and cases provided in the Mock Trial Tournament materials contained in this booklet. You may find the following books and materials helpful:

Mauet, Thomas A., Trial Techniques (6th ed.), Aspen Law and Business Murray, Peter, Basic Trial Advocacy, Little, Brown and Company

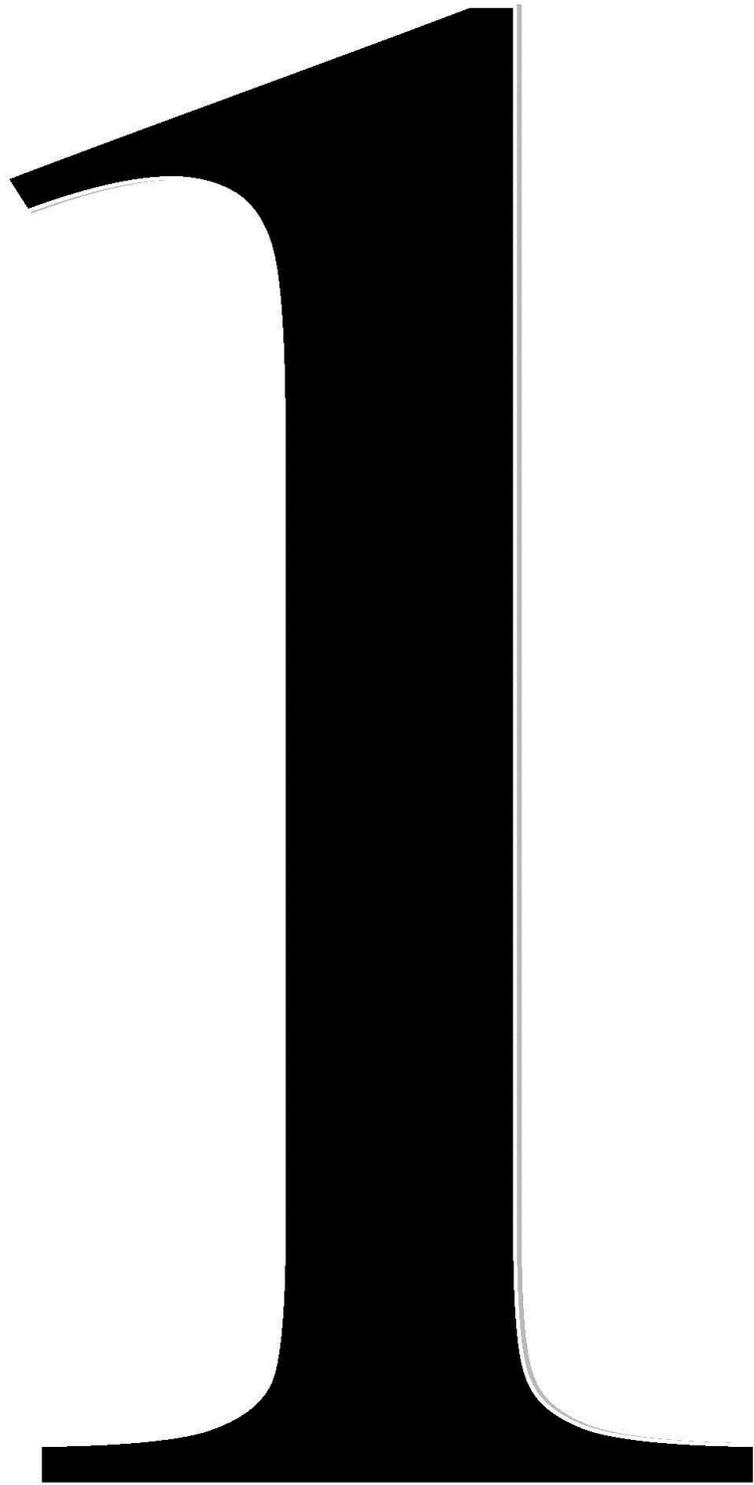
Lubet, Steven, Modern Trial Advocacy, National Institute for Trial Advocacy

Vile, John R., Pleasing the Court: A Mock Trial Handbook (3rd ed.), Houghton Mifflin Company

Preparation

1. Teachers and attorneys should teach the students what a trial is, basic terminology (e.g., plaintiff, prosecutor, defendant), where people sit in the courtroom, the mechanics of a trial (e.g., everyone rises when the judge enters and leaves the courtroom; the student-attorney rises when making objections, etc.), and the importance of ethics and civility in trial practice.
2. Teachers and attorneys should discuss with their students the elements of the charge or cause of action, defenses, and the theme of their case. We encourage you to help the students, but not to do it for them.
3. Teachers should assign students their respective roles (witness or attorney).
4. Teams must prepare both sides of the case.
5. Student-witnesses cannot refer to notes so they should become very familiar with their affidavits and know all the facts of their roles. Witnesses should “get into” their roles. Witnesses should practice their roles, with repeated direct and cross examinations, and anticipate questions that may be asked by the other side. The goal is to be a credible, highly prepared witness who cannot be stumped or shaken.

6. Student-attorneys should be equally familiar with their roles (direct examination, cross examination, opening and closing statements). Student attorneys should practice direct and cross examinations with their witnesses, as well as practice opening and closing arguments. Closings should consist of a flexible outline. This will allow the attorney to adjust the presentation to match the facts and events of the trial itself, which will vary somewhat with each trial. Practices may include a judge who will interrupt the attorneys and witnesses occasionally. During the earlier practices, students may fall “out of role”; however, we suggest that as your practices continue, this be done less and that you critique presentations at the end. Each student should strive for a presentation that is as professional and realistic as possible.
7. Each team should conduct a dress rehearsal before the first round of the competition. We encourage you to invite other teachers, friends and family to your dress rehearsal.



TIME LIMITS

OPENING STATEMENTS

5 minutes for each side

DIRECT EXAMINATION

10 minutes for each side

CROSS EXAMINATION

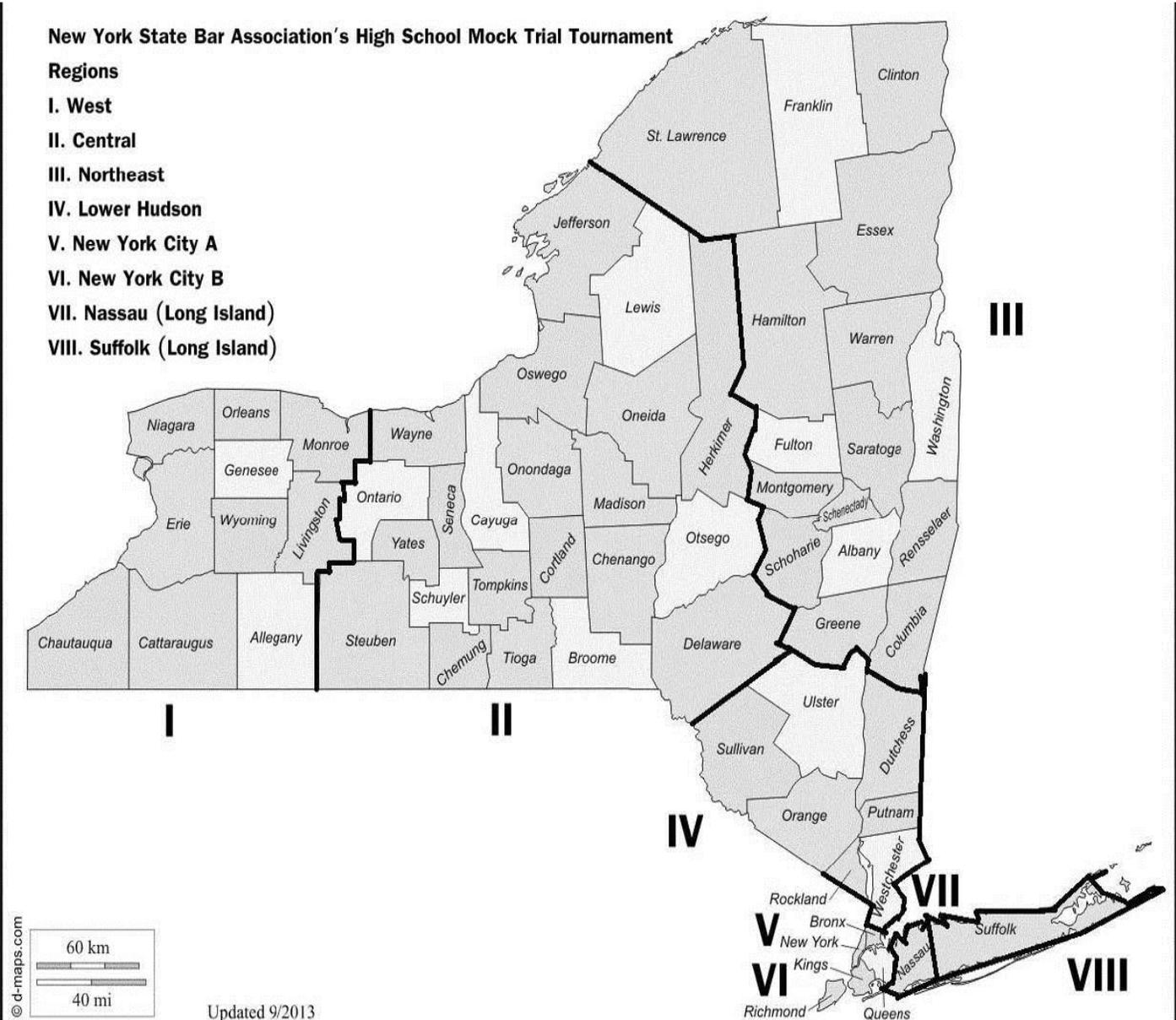
10 minutes for each side

CLOSING ARGUMENTS

10 minutes for each side

Regional Map for New York State Bar Association’s High School Mock Trial Tournament

A list of all the Past Regional Champions is available at www.nysba.org/pastchampions





**2016 NEW YORK STATE BAR ASSOCIATION
HIGH SCHOOL MOCK TRIAL CHAMPIONS**

FAYETTEVILLE-MANLIUS HIGH SCHOOL

Teacher Coach

Joseph Worm

Attorney Advisor

Danielle Fogel, Esq.

Team Members

Payton Brewer

Mathieson Byer

Sophia Byer

Patrice Calancie

Song Tao Guo

Connor Hargrove

David Haungs

Julie Howard

John Hrbac

Lauren Koss

Jordan Krouse

Nathan Montgomery

Grant Olick-Sutphen

Tyler VanBeveren

Richard Wang

Agatha Woodbury

Shawn Wu

With The Honorable Michael C. Lynch

Justice, State of New York Supreme Court
Appellate Division, Third Department– May 17, 2016

A list of all the Past Regional Champions is available at www.nysba.org/pastchampions

Mock Trial Summer Institute

July 16-21, 2017

Silver Bay YMCA

Lake George, NY



Get your application in early!

More details about **MTSI** are available online at www.nysba.org/mtsi

or contact Kim Francis at kfrancis@nysba.org

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STATE OF NEW YORK
SUPREME COURT: COUNTY OF DOVER

ROBIN BERKMAN,

Plaintiff

v.

COUNTY OF DOVER,

Defendants.

Index No. **2016-00914**

VERIFIED COMPLAINT

Plaintiff, Robin Berkman, by and through his/her attorneys, Smythe & Smith, LLP, for and as his/her Complaint against the County of Dover, respectfully alleges as follows:

1. Plaintiff is, and at all times mentioned was, residing at 412 East Broadway, Apartment 2D, Wilmington, County of Dover, State of New York.
2. Defendants, County of Dover, is, and at all times mentioned was, located in the State of New York.
3. Leslie Smith is, and at all times mentioned was, employed as a detective in the Dover County Sheriff's Department.
4. Plaintiff is informed and believes and therefore alleges that the County of Dover, by and through the actions of Detective Leslie Smith, is responsible, as set forth below, for the occurrences and injuries alleged in this complaint.
5. On April 12, 2012, defendants, by and through the actions of Detective Leslie Smith, caused an indictment to be filed against plaintiff, instituting a criminal action against

plaintiff in the Supreme Court of the County of Dover. In the action, defendants alleged that plaintiff, on or about the 17th day of December 2011, committed the crimes of Attempted Murder in the Second Degree and Robbery in the First Degree. The action was entitled People of the State of New York against Robin Berkman, Indictment No. 2012-2020. A copy of the indictment filed in the action is attached as Exhibit 1 to this complaint and incorporated by reference.

6. Plaintiff was convicted on both criminal charges on February 14, 2013 and was incarcerated in a state correctional facility for 3 years.
7. In or about March 2016, the District Attorney of Dover County requested that the Supreme Court dismiss the criminal charges against plaintiff, the charges were dismissed and plaintiff was released from the correctional facility on March 31, 2016.
8. Defendants, by and through the actions of Detective Leslie Smith, acted without probable cause in prosecuting plaintiff on the charges set forth in the indictment and did not honestly and reasonably believe that there were valid grounds for the action since Detective Leslie Smith had no reason to believe plaintiff had committed the criminal offenses.
9. Defendants, by and through the actions of Detective Leslie Smith, acted maliciously in bringing the mentioned criminal action against plaintiff, in that Detective Leslie Smith had no reason to believe plaintiff had committed the criminal offenses. In view of defendants' willful and malicious actions toward plaintiff, plaintiff is entitled to recover punitive damages in a just and reasonable amount.
10. As a proximate result of defendants' bringing the above-mentioned criminal action against plaintiff, plaintiff is entitled to compensatory damages in a just and reasonable amount.

WHEREFORE, plaintiff requests judgment against defendants for:

1. Compensatory damages in a just and reasonable amount;
2. Punitive damages in a just and reasonable amount;
3. Costs of suit; and
4. Such other and further relief as the court may deem just and proper.

Dated: Wilmington, New York
June 20, 2016

SMYTHE & SMITH, LLP

Taylor J. Smith, Esq.

Taylor J. Smith, Esq.

Attorneys for Plaintiff

432 Main Street, 10th Floor

Wilmington, New York 13998-5432

(585) 555-9535

VERIFICATION

I am the Plaintiff in the above-entitled action. I declare, subject to the penalties of perjury under the laws of the United States and the State of New York that the foregoing is true and correct, except as to matters alleged upon information and belief, and with respect to such allegations, I believe them to be true.

Dated: Wilmington, New York
 June 20, 2016

SMYTHE & SMITH, LLP

By: *Taylor J. Smith, Esq.*

Taylor J. Smith, Esq.

Attorneys for Plaintiff

432 Main Street, 10th Floor

Wilmington, New York 13998-5432

(585) 555-9535

STATE OF NEW YORK
SUPREME COURT: COUNTY OF DOVER

ROBIN BERKMAN,

Plaintiff

v.

COUNTY OF DOVER,

Defendants.

Index No. **2016-00914**

VERIFIED ANSWER

Defendants, by their attorneys, Solomon & Miller, LLP, as and for an Answer to the Complaint of the Plaintiff herein, respectfully allege as follows:

1. Admits the allegations contained in Paragraphs 1, 2, and 3 of the Complaint.
2. Denies each and every allegation set forth in Paragraph 4 of the Complaint.
3. States that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Complaint, except admits that Plaintiff was released from a correctional facility on or about March 31, 2016.
4. Admits the allegations contained in Paragraphs 5 and 6 of the Complaint.
5. Denies each and every allegation contained in Paragraphs 8, 9 and 10 of the Complaint.

First Affirmative Defense

6. Asserts that in carrying out the complained-of actions, defendants were acting in good faith and within the scope of their authority. In so acting, defendants did not breach any duty to plaintiff that was clearly established as a matter of law at the time of the

complained-of incidents. Thus, defendants are entitled to qualified, good-faith immunity from suit.

WHEREFORE, Defendants demand judgment as follows:

- (1) That the Complaint of the plaintiff be dismissed in its entirety; and
- (2) That the defendants be granted such other, further, and different relief as to this court may deem just and proper.

Dated: Wilmington, New York

July 8, 2016

Ryan A. Miller, Esq.

Ryan A. Miller, Esq.

Attorneys for Defendants

Solomon & Miller, LLP

123 Main Street, Suite 1200

Wilmington, New York 13999-4321

(585) 555-6677

VERIFICATION

I am the Defendant in the above-entitled action. I declare, subject to the penalties of perjury under the laws of the United States and the State of New York that the foregoing is true and correct, except as to matters alleged upon information and belief, and with respect to such allegations, I believe them to be true.

Dated: Wilmington, New York
July 8, 2016

By: *Ryan A. Miller, Esq.*

Ryan A. Miller, Esq.

Attorneys for Defendants

Solomon & Miller, LLP

123 Main Street, Suite 1200

Wilmington, New York 13999-4321

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