

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 99

THE PEOPLE OF THE STATE OF NEW  
YORK

- against -

MUHAMMAD A. AZIZ, also known as  
NORMAN BUTLER and NORMAN 3X  
BUTLER,

and

KHALIL ISLAM, also known as THOMAS  
JOHNSON and THOMAS 15X JOHNSON,

Defendants.

JOINT MOTION TO VACATE  
JUDGMENTS OF CONVICTION  
AND DISMISS INDICTMENT

Indictment No. 871/1965

Charles King, an attorney admitted to practice law in the courts of the State of New York, affirms under the penalties of perjury that:

**Introduction**

1. I am an Assistant District Attorney in the New York County District Attorney's Office and Deputy Chief of its Conviction Integrity Program. This affirmation and accompanying legal analysis are submitted in support of the joint motion of the People and the above defendants to vacate defendants' judgments of conviction for the 1965 assassination of Malcolm X,<sup>1</sup> on the grounds of newly discovered evidence and the failure to disclose exculpatory evidence, pursuant to Criminal Procedure Law (CPL) § 440.10(1)(g) and Brady v.

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<sup>1</sup> Malcolm X was also known as El-Hajj Malik El-Shabazz and Malcolm Little.

Maryland, 373 U.S. 83 (1963), and to dismiss the indictment against them pursuant to CPL § 210.40.

2. This affirmation is submitted on information and belief, the sources of which are a review of the files and transcripts in this matter, including documents obtained from the Federal Bureau of Investigation (“FBI” or the “Bureau”), the New York City Police Department (“NYPD”), the New York City Municipal Archives, and the New York State Parole Board; interviews of police and civilian witnesses and principals in this case; conversations with attorneys and investigators assigned to the reinvestigation who themselves conducted such reviews and interviews; and a review of the historical record since the time of the original trial. Based on the facts uncovered in the reinvestigation and for the reasons set forth below, both the People and the above defendants move the Court to vacate the defendants’ convictions and dismiss the indictment against them.

3. In January 2020, the New York County District Attorney opened a reinvestigation of the case at the behest of attorneys representing Muhammad A. Aziz<sup>2</sup> and later the Estate of Khalil Islam,<sup>3</sup> who died in 2009. Prosecutors, defense attorneys, investigators, and analysts worked collaboratively on the reinvestigation, which included a review of thousands of pages of court transcripts and other documents that were generated during the underlying investigation of the crime and during the grand jury, trial, and post-conviction proceedings. The file created and used by the original prosecutors was examined.

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<sup>2</sup> Muhammad A. Aziz has also been known as Norman Butler and Norman 3X Butler. He is referred to as Aziz in this motion.

<sup>3</sup> Khalil Islam has also been known as Thomas Johnson and Thomas 15X Johnson. He is referred to as Islam in this motion.

We obtained documents generated by the FBI and NYPD's Bureau of Special Services and Investigations ("BOSSI") that had not previously been shared with the New York County District Attorney's Office ("DANY") or the defendants' attorneys.<sup>4</sup> We interviewed Mr. Aziz and other witnesses and participants in the trial. We viewed and read recorded and transcribed interviews of witnesses and principals that were conducted by journalists, academics, and historians in the years following the convictions.

4. This affirmation does not describe the full scope of the review, reinvestigation, and reevaluation of this case that was undertaken by DANY and the defense attorneys. It outlines the principal issues that have been raised, summarizes some of the facts relevant to those issues, and explains the analysis undertaken to resolve them.

5. The reinvestigation faced significant challenges. The murder of Malcolm X occurred more than 56 years ago, on February 21, 1965. Many of the persons whom we wanted to interview are deceased. All of the main police investigators and the lead trial prosecutor are deceased. The defense attorneys at trial and during the 1970s post-conviction proceedings are deceased. Every eyewitness who testified at trial is deceased. All of the eyewitnesses who identified the defendants but did not testify at trial are deceased. Many of the other suspects who were not arrested are deceased or could not be located.

6. Mujahid Abdul Halim,<sup>5</sup> who admitted to shooting Malcolm X and was also convicted of his murder, refused to talk to us despite several attempts. We did, however, view

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<sup>4</sup> The FBI and the NYPD provided their full cooperation during the reinvestigation.

<sup>5</sup> Mujahid Abdul Halim has also been known as Talmadge Hayer, Thomas Hayer, and Thomas Hagan. He is referred to as Halim in this motion.

interviews of Halim that were conducted by journalists in the years after the trial. We also interviewed relatives of Halim.

7. Many important papers, including parts of DANY's file and NYPD records were lost. Notably missing from the file are complete records of the identification procedures conducted by NYPD. There are no lineup photographs or copies of photo-arrays; nor are there reports detailing what methods were used by the police and prosecutors in conducting the identification procedures. There is no record of what the police and prosecutors said to witnesses prior to their identifications of Aziz and Islam. It is impossible at this point to determine whether exposure to photographs of Aziz and Islam in the media after their arrests tainted subsequent identifications. In short, it is unknown whether the identification procedures used in this case were properly conducted.<sup>6</sup>

8. Much of the physical evidence could not be located or forensically tested using modern technology not available at the time of trial. For example, we were not able to locate and test the shotgun used in the murder.

9. Telephone records were apparently not obtained in the original investigation, and they are not available now. Such records might have corroborated or refuted the alibi evidence introduced at trial.

10. The missing identification, physical, and other evidence is especially significant here because, as discussed below, only eyewitness testimony linked Aziz and Islam to the murder.

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<sup>6</sup> No pre-trial hearings to suppress the identifications were held. Such hearings were not required at the time. The Supreme Court's decision in United States v. Wade, 388 U.S. 218 (1967), was decided on June 12, 1967, more than a year after the trial of this case commenced.

11. We were unable to determine whether any records of electronic surveillance were preserved after the trial.

12. Notwithstanding these challenges, for the reasons discussed below, and in the interests of fairness and justice, the reinvestigation led us to the conclusion that the defendants' convictions should be vacated and the indictment against them dismissed.

### **Factual Background**

13. On February 21, 1965, at approximately 3:00 p.m., Malcolm X was introduced to speak before an audience of hundreds at the Audubon Ballroom located at Broadway and West 165th Street in New York County. The event was sponsored by the Organization of Afro-American Unity, which Malcolm X led after he left the Nation of Islam ("NOI").<sup>7</sup>

14. As Malcolm X began to address the audience, one or more persons attempted to create a diversion by yelling about a fictitious pickpocketing attempt and throwing an improvised smoke bomb into the crowd. Amid the resulting confusion, a gunman armed with a sawed-off shotgun shot Malcolm X and he fell back.

15. Halim and a third gunman quickly approached Malcolm X as he lay prone on the stage and shot him repeatedly. Halim fired a forty-five caliber semi-automatic pistol, and the third gunman fired a nine millimeter semi-automatic Luger pistol.

16. Malcolm X was later pronounced dead from the injuries he sustained in the shooting.

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<sup>7</sup> While the reinvestigation did not reach a conclusion concerning the motive for Malcolm X's assassination, the hostility of members of the NOI toward Malcolm X after he left that organization and made disparaging statements about its leader Elijah Muhammad is a matter of public record.

17. The gunmen fled; however, Halim was shot in the leg by one of Malcolm X's bodyguards and apprehended by the crowd. Halim was arrested by the police outside the Audubon Ballroom, and found to be in possession of a magazine containing several rounds of forty-five caliber ammunition.

18. The forty-five caliber semi-automatic pistol was recovered later that day from Ronald Timberlake, who had picked up the weapon after Halim dropped it, brought it back to his home in Brooklyn, and disassembled it. Hours later, Timberlake contacted the New York Office of the FBI and arranged to give them the gun. The FBI turned over the gun to the NYPD.

19. The shotgun and Luger were retrieved from the front of the Ballroom by Charles Blackwell. Blackwell later testified before the grand jury that he wrapped the guns in coats and gave them to Reuben Francis and a man he called "Brother [Gene]." As noted below, he testified differently at trial.

20. Police found the shotgun in the anteroom to the stage. It is unclear what became of the Luger.

21. Aziz and Islam were arrested at their homes in connection with the shooting, Aziz on February 26, 1965, and Islam on March 3, 1965.

22. A New York County grand jury heard testimony and on March 10, 1965, the grand jury returned Indictment Number 871/1965, charging Halim, Aziz, and Islam with Murder in the First Degree, in violation of Penal Law § 1044.

## **The Trial**

23. Jury selection began on December 6, 1965, before Justice Charles Marks in Part 37 of the Criminal Term of this Court, located at 100 Centre Street. On January 20, 1966, twelve jurors and four alternates were sworn and the trial commenced.

## **The People's Case**

24. The People's theory of the case was that Malcolm X was shot and killed by Islam, Halim, and Aziz, who were armed with a shotgun and two pistols, respectively. The People argued that Halim and Aziz created a diversion causing Malcolm X's bodyguards to leave the stage where Malcolm X remained unprotected. Islam then fired two rounds from a twelve-gauge shotgun, striking Malcolm X and, simultaneously, Halim and Aziz ran to the stage firing pistols and striking Malcolm X, Halim shooting a forty-five caliber pistol and Aziz firing a nine millimeter Luger pistol.

25. Twelve eyewitnesses testified for the People that they were present in the Audubon Ballroom at the time Malcolm X was shot. The eyewitnesses were, in the order in which they testified: Cary Thomas, Vernal Temple, Edward DePina,<sup>8</sup> George Whitney, Jasper Davis, John Davis, Ronald Timberlake, Fred Williams, Charles Blackwell, Roland Wallace, Betty Shabazz, and Charles Moore.

26. Other than Shabazz and Moore, who did not make identifications, the remaining ten eyewitnesses identified Halim as having been present in the Audubon Ballroom. Many of the witnesses testified that they saw Halim shoot at Malcolm X and some also saw

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<sup>8</sup> DePina's last name is spelled alternatively in the trial record as "DiPina."

Halim being apprehended by the crowd. Seven of the ten witnesses (Thomas, Temple, DePina, Jasper Davis, Timberlake, Williams, and Blackwell) identified Aziz and/or Islam.<sup>9</sup> The following account is from those seven eyewitnesses' testimonies at the trial. Inconsistencies are noted below.

a. Two witnesses testified that they saw Islam inside the Ballroom shortly before the murder. Specifically, Vernal Temple testified that when he arrived at the Audubon Ballroom that afternoon, he saw Islam, a man whom he had seen once before at a mosque in Chicago, and whom he knew as "15X," already seated inside the Ballroom (Temple: 662-65, 799).<sup>10</sup> Cary Thomas testified that when he arrived at the Ballroom at approximately 2:20 p.m., he saw Islam, whom he had seen several times at the mosque in Manhattan, and whom he knew as "Thomas 15," sitting in a rear booth facing the stage (Thomas: 229-31, 241-42).

b. Several witnesses identified Aziz as the person who, with Halim, created the pickpocketing distraction. Jasper Davis testified that he was sitting towards the front of the Ballroom in the third seat from the aisle waiting for Malcolm X's speech to begin when a man he identified as Aziz sat down next to him and spoke with him for a few minutes. According to Davis, another man arrived and sat in the aisle next to Aziz, and several minutes later, as Malcolm X began to speak, this man or Aziz jumped up and said to the other, "take your hand

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<sup>9</sup> Based on newly discovered FBI reports and police reports in the DANY files, an additional seven individuals who did not testify at trial identified photographs of Aziz and/or Islam as having shot Malcolm X, or as having been present in the Audubon Ballroom at the time of the shooting.

<sup>10</sup> Parenthetical references to the trial transcript are to the witness followed by the page of the transcript where the witness's testimony appears.



out of my pocket” (Jasper Davis: 1093-1101).<sup>11</sup> Cary Thomas testified that Aziz, whom Thomas had seen in the Manhattan mosque and whom he knew by the name “Norman 3X Butler,” was sitting directly in front of him when, just as Malcolm X began to speak, Halim stood up and asked Aziz, “man, what are you doing with your hand in my pocket?” (Thomas: 235-38). Contrary to Davis, who stated that he and Aziz were seated towards the front of the Ballroom, Thomas testified that Aziz was sitting in around the fifteenth row (Thomas: 382).<sup>12</sup> Meanwhile, Fred Williams testified that he was sitting in the eighth or ninth row and that, two or three rows behind him, Aziz and another man got into an argument when one accused the other of trying to pick his pocket (Williams: 1511, 1513-16).

c. Eyewitnesses testified that as the crowd’s attention was drawn to this disturbance, Islam fired a sawed-off shotgun at Malcolm X from the front of the Ballroom near the stage. Cary Thomas testified that he heard the blast of the shotgun coming from near the stage, looked toward the stage, and saw a man facing the stage and standing just under where Malcolm X had been. According to Thomas, the man then turned and faced the audience, and Thomas saw that he was holding a sawed-off shotgun in his hand. Thomas identified this man as Islam (Thomas: 239-42). Fred Williams testified that, as Malcolm X tried to calm down the audience, he, Williams, heard a shotgun blast from near the stage, and

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<sup>11</sup> Davis originally told police that Aziz initiated the distraction by yelling at the man next to him to get his hand out of his pocket (Jasper Davis: 1189-91). This contradicted the accounts of the other eyewitnesses, who testified that it was Halim who yelled. At trial, Davis said he could not tell whether it was Aziz or Halim who yelled (Jasper Davis: 1101).

<sup>12</sup> Edward DePina, who placed himself in approximately the fifth row from the stage, testified that the creators of the diversion sat five rows in front of him, which would have put them in the front row (See DePina: 809-12, 852-53). This conflicted with the accounts of every other witness.

pushed his wife to the floor and bent over to protect her. When he looked up, after hearing another shotgun blast and some pistol shots, he saw a man, whom he identified as Islam, twelve to fourteen feet away from him and six to eight feet from the stage, facing the audience and holding a sawed-off shotgun in his hand (Williams: 1517-22).

d. Witnesses testified that, immediately after the shotgun blast, Aziz and Halim ran toward the stage, firing repeatedly at the prostrate body of Malcolm X. Cary Thomas testified that he saw Aziz and Halim race to the stage and shoot at Malcolm X (Thomas: 242-43, 249, 576-77). Edward DePina similarly testified that Aziz and Halim repeatedly shot at Malcolm X (DePina: 814-22, 910). According to Charles Blackwell, Aziz and Halim—who had earlier created the pickpocketing diversion—raced toward the stage and shot at Malcolm X, Halim from a forty-five caliber pistol, and Aziz from a Luger (Blackwell: 1617-18, 1622-23).

e. Finally, several eyewitnesses identified Aziz and Islam as they fled from the scene. After firing repeatedly at Malcolm X, Aziz, observed by DePina and chased by Blackwell, turned from the stage and ran to the Ballroom's rear exit (DePina: 816-23; Blackwell: 1624-25). Ronald Timberlake testified that he knocked Aziz down with a "body block" that sent Aziz tumbling down a flight of stairs and into the crowd, whereupon crowd members picked Aziz up by "both his legs" and held him on the ground, kicking and "pummeling" him (Timberlake: 1312-15, 1375). Timberlake further testified that he could see police officers outside the Ballroom "while [Aziz] was being pummeled by the crowd"

(Timberlake: 1375).<sup>13</sup> Blackwell testified that he “ran into” Islam, who turned away from Blackwell and ran into the ladies lounge (Blackwell: 1625-28).

27. In addition to the twelve eyewitnesses, the People called to the witness stand nine police officers and a medical examiner concerning the arrests of the defendants, the recovery of the weapons and other physical evidence, and the results of the autopsy performed on Malcolm X.

28. The People also presented physical evidence tying Halim to the murder, including the magazine and rounds of ammunition retrieved from Halim’s pocket. Police witnesses testified that the rounds found in the magazine had once been placed in and extracted from the pistol that Timberlake had found after Halim fled to the street (Scaringe: 2187; Sullivan: 1780-82; Reich: 2258-61, 2266-67, 2272-76, 2304-09). Certain bullets extracted from Malcolm X’s body were also determined to have been fired from this gun (Halpern: 2094, 2097-98; Reich: 2280-82, 2284). Additionally, Halim’s fingerprint was found on a strip of film in a homemade smoke bomb recovered from the Ballroom (Keeley: 1962-63, 2241; Meagher: 1978-86, 1991-93; Alexander: 1996-98; Meyer: 2026-28).

29. No physical evidence tied Aziz or Islam to the murder or crime scene. There was no evidence that Aziz or Islam had any connection to Halim, or had ever met him. Again, the People’s case against Aziz and Islam rested entirely on eyewitness testimony.

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<sup>13</sup> Timberlake was the only witness who asserted that both Aziz and Halim were captured by the crowd. Other witnesses described Halim alone as having been apprehended.

## The Defense Case

30. Aziz and Islam both testified in their own defense, asserting that they were innocent and had alibis.

31. Aziz testified that on February 21, 1965, he had injuries to his legs that prevented him from running or even walking without a limp, and that this condition began in January 1965 (Aziz: 3252-54, 3258-59).<sup>14</sup> He testified that because of pain in his right leg, he left his home early in the morning of February 21 to go to Jacobi Hospital, where he was examined by Dr. Kenneth Seslowe<sup>15</sup> and other doctors (Aziz: 3249-51). He returned home sometime before 1:00 p.m. and remained there the rest of the day, most of the time lying on the couch resting his legs, as his doctor had advised (Aziz: 3248-58, 3318). Aziz testified that a woman he referred to as Sister Gloria called his home sometime after 3:00 p.m., and that both he and his wife spoke with the woman (Aziz: 3319-20). Following the call with Sister Gloria, he called the mosque, where a man assigned to the telephone post answered (Aziz: 3327-28, 3348). Aziz then received a call from the mosque and spoke with a man he referred to as Captain Joseph, with whom he discussed hearing over the radio that Malcolm X had been shot (Aziz: 3342-43, 3350).

32. Aziz testified that he was in no way involved in the murder of Malcolm X (Aziz: 3259), that he was not in the Audubon Ballroom on February 21, 1965 (Aziz: 3256), and that he had never in his life seen Halim prior to his arrest (Aziz: 3259).

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<sup>14</sup> At trial, Aziz identified himself as Norman 3X Butler (Tr. 3244). For the sake of consistency, parenthetical references to his testimony identify him as “Aziz.”

<sup>15</sup> Dr. Seslowe’s name is misspelled in the trial transcript as “Saslowe.”

33. Aziz presented testimony from Dr. Seslowe, an emergency room physician at Jacobi Hospital, who corroborated Aziz's account of going to the hospital on the morning of February 21 complaining of pain in his right leg (Aziz: 3183-85).<sup>16</sup>

34. Aziz also presented testimony from Ernest Greene, who witnessed the shooting and saw the shotgun shooter, whom he described as "stout and very dark and had a very deep beard" (Greene: 2919).

35. Islam similarly testified that he was at home with his family at the time of Malcolm X's murder (Islam: 3517).<sup>17</sup> He testified that he stayed at home all day and did not leave until the evening (Islam: 3517), that he was not in the Audubon Ballroom on February 21, 1965, and that he did not see Aziz at any point that day (Islam: 3522).

36. Both Aziz and Islam presented testimony from their spouses and friends who either saw them or called them at their homes around the time of the murder (see, e.g., Theresa Butler: 3019-20, 3023, 3044; Wills: 3092; Gibbs: 3115-16; Etta Johnson: 3419-21, 3430-31; Muriel Long: 3466-68; Edward 4X Long: 3470).

### **Halim's Testimony at Trial**

37. When Halim first took the witness stand on February 23, 1966, he testified that he was not a member of the Black Muslims, had never been a member of the Black Muslims, and had never been a member of any organization promoted by Elijah Muhammad. He denied

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<sup>16</sup> Dr. Seslowe, who was interviewed by the defense during the reinvestigation, remembered telling the prosecutor before trial that, in his opinion, Aziz's injuries would not have made it impossible for him to run from a crime scene, but doing so would have been painful.

<sup>17</sup> Islam identified himself at trial as Thomas 15X Johnson (Tr. 3516). Parenthetical references to his testimony identify him as "Islam."

ever having sold the *Muhammad Speaks* newspaper in New Jersey or on 116th Street in Manhattan (Halim: 2676).<sup>18</sup> He denied having ever studied or practiced karate, or having been a member of any mosque in New Jersey, including in Paterson or Newark (Halim: 2677).<sup>19</sup> He admitted going to the Audubon Ballroom on February 21, 1965, but stated he was unarmed (Halim: 2677-78). He denied ever planning or discussing the shooting of Malcolm X (Halim: 2678).

38. Halim said the he found the “clip” (referring to the magazine found on his person when he was arrested) in the bathroom of the ballroom and put it in his pocket (Halim: 2680-81). He denied having ever seen Aziz or Islam before in his life prior to his arrest (Halim: 2690). He denied having a gun or shooting Malcolm X (Halim: 2682, 2686-88).

39. Later in the trial, on February 28, 1966, Aziz’s attorney called Halim as a witness and he retook the stand. In response to questions from Aziz’s attorney, he asserted the innocence of Aziz and Islam, recanted his previous testimony, and confessed his guilt.

40. Specifically, Halim testified that he had had a conversation with Aziz and Islam earlier on the day of his testimony, in the detention cell next to the courtroom (Halim: 3144, 3147-49). He testified that, in that conversation, he told his co-defendants that he knew they had nothing to do with the murder, because he himself had taken part in it, and that he

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<sup>18</sup> Halim used the name Talmadge Hayer at trial (Tr. 2675), but he is referred to here as Halim.

<sup>19</sup> Halim’s testimony in this regard appears to be in response to the trial testimony of Vernon Temple. Temple testified that he had seen Halim three times prior to February 21, 1965 (Temple: 669, 670). Temple claimed to have seen Halim selling the *Muhammad Speaks* newspaper on West 116th Street and Lenox Avenue in Manhattan and said that he purchased a paper from Halim (Temple: 672). Temple also said that on another occasion he saw Halim strike a man with a karate chop inside Mosque No. 7 in Manhattan (Temple: 672-74).

intended to exculpate them because they were completely innocent (Halim: 3145, 3146, 3149). He testified that he was speaking of his own free will because “I just want to tell the truth, that’s all” (Halim: 3143). He asserted that the testimony he had previously given at trial was a lie (Halim: 3163-64, 3171).

41. Halim further testified that he did not know Aziz or Islam before they became co-defendants (Halim: 3147), and that neither of them had any involvement with the murder (Halim: 3146).

42. Halim admitted that he shot Malcolm X with a forty-five caliber handgun but insisted that the testimony of the People’s witnesses claiming he was one of the men who created the distraction was “lies” (Halim: 3151).

43. Finally, Halim testified that three or four other men had been involved in Malcolm X’s murder and that he knew all of them (Halim: 3155-56.) He refused, however, to identify his accomplices (Halim: 3155.) Halim testified that he and another man sat in the front row armed with pistols, that another man sat a few rows back “with the shotgun,” and that a “man in the back” started a “commotion” by pretending his pocket was being picked (Halim: 3156). He described the shotgun shooter as “husky” with “dark skin” and a beard. (Halim: 3157). He refused to describe the others.

### **Additional Defense Arguments at Trial**

44. In addition to arguing that Aziz and Islam were innocent, the defense pointed out that there were numerous inconsistencies and contradictions in the testimony of the People’s witnesses. For example, the defense noted that Cary Thomas had testified before the grand jury that he saw Islam with a pistol, but then testified at trial that he saw Islam with a

shotgun (Islam Summation: 3680-81). The defense also noted the inconsistency between Charles Blackwell's grand jury testimony that he gave the shotgun and Luger to a "Brother Jean," and his trial testimony that he gave the guns to Reuben Francis (Islam Summation: 3689-90). The defense further pointed out that Blackwell had testified before the grand jury that he saw the shooters seated in the front row, but then testified at trial that that was a lie (Islam Summation: 3691; see also Blackwell: 1736-38). Yet another inconsistency was Timberlake's claim that he saw Aziz captured by the crowd, while other witnesses described Halim as the only one apprehended (Aziz Summation: 3741-42).

45. Defense counsel also argued that Cary Thomas had psychological issues that impeded his ability to testify truthfully. Early in Thomas's testimony, when defense counsel questioned his competence to testify, the court asked the People whether Thomas had been "declared" as "psychotic or anything else" (Tr.: 225.) The People responded that it "kn[ew] of no psychotic condition," and the court ended any further inquiry (Tr.: 225). On cross-examination, Thomas denied any recollection of ever receiving psychiatric treatment (Thomas: 277). When the defense obtained records of Thomas's psychiatric hospitalization, the court sustained the People's objection to their use (Thomas: 545-47), although the court later admitted the records after Thomas left the witness stand, during the defense case (Tr.: 2652).

46. Finally, the defense questioned the reliability of the NYPD's identification procedures. Jasper Davis, for example, testified on cross-examination that the lineup he viewed consisted of men of different sizes and complexions (Jasper Davis: 1181). He further testified that he originally said to the police that the man sitting next to him was "wearing a grey coat," "bare-headed," and "rather slim in the face" (Jasper Davis: 1159). The next day or



a few days later, the police showed Davis a lineup containing only two men wearing grey coats, one of whom was Aziz, whom Davis identified (Jasper Davis: 1161-62, 1173-74, 1176-77, 1179-80). At trial, Davis testified that the other man did not fit his description of the shooter (Jasper Davis: 1181). Other identification procedures were similarly called into question by the defense at trial.

### **Verdict and Sentencing**

47. On March 11, 1966, the jury found all three defendants guilty. On April 14, 1966, each of the defendants was sentenced to life imprisonment.

48. Aziz was released on parole in 1985, and Islam in 1987. Islam died in 2009. In 2010, Halim was released on parole.

### **Appeals and Other Post-Judgment Litigation**

49. Aziz and Islam appealed their convictions to the Appellate Division, First Department. In a decision dated April 18, 1968, the First Department unanimously affirmed the judgments of conviction. People v. Hagan, 29 A.D.2d 931 (1st Dept. 1968). Aziz and Islam subsequently appealed to the New York Court of Appeals which, in an opinion dated April 16, 1969, unanimously affirmed the judgments. People v. Hagan, 24 N.Y.2d 395 (1969). On October 27, 1969, the United States Supreme Court denied certiorari. Hayer v. New York, 396 U.S. 886 (1969).

### **The 1970s CPL § 440.10 Litigation**

50. On December 5 and 8, 1977, Aziz and Islam moved to vacate their convictions, primarily on the ground of newly discovered evidence, pursuant to CPL § 440.10(1)(g). From December 1977 through January 24, 1978, ten affidavits were submitted in support of the

motion. The motion was predicated chiefly on affidavits from Halim, who identified his co-conspirators by name and described their respective roles in the murder, together with the newly discovered fact that NYPD Officer Eugene “Gene” Roberts had been an eyewitness to the murder. Aziz and Islam also relied upon certain redacted FBI records obtained during the pendency of post-conviction proceedings, and an affidavit from Benjamin Karim, Malcolm X’s assistant minister, who spoke to the audience in the Audubon Ballroom immediately before Malcolm X on February 21, 1965.<sup>20</sup>

51. In his affidavits dated November 30, 1977, and February 25, 1978, Halim identified Malcolm X’s assassins as: (1) himself, (2) Leon Davis, (3) Benjamin Thomas, (4) William “X,” and (5) “Wilbur or Kinly.” Halim asserted that the other four men were NOI members from New Jersey. According to Halim, Thomas and Davis, both of whom Halim knew “well,” lived in Paterson, while “William X” and “Wilbur” both lived in Newark. The second affidavit described in detail the murder plot and each man’s role. Halim described how he was recruited to the plot, how it was planned, and what each man did on February 21, 1965. Halim stated that he and Davis sat in the front row of the Audubon Ballroom, with William just behind them and “Wilbur” in the far back.

52. Officer Roberts’s identity and the fact that he had witnessed Malcolm X’s murder were first publicly revealed in December 1970 during his testimony at the “Panther 21” trial in *People v. Shakur*, Ind. No. 1848-69, in New York State Supreme Court, New York County. Responding to questions about Malcolm X’s murder, Roberts testified that he was posing undercover as a member of Malcolm X’s security team, was assigned to “rostrum

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<sup>20</sup> Benjamin Karim was also known as Benjamin Goodman and Benjamin 2X.

security” on the day of the killing, and was relieved from his post just before Malcolm X took the stage. Roberts testified that “two individuals near the front of the auditorium jumped up” to create a distraction, and as Roberts “started down the aisle” toward them, gunfire erupted. He further testified that he came face to face with Halim, who shot at him but missed, and that he hit Halim with a chair, knocking him down.

53. In their motion, Aziz and Islam argued that Roberts’s account of the murder conflicted with those of the prosecution’s witnesses, given that no other trial witness testified that Roberts hit Halim with a chair, and that Roberts’s description of the distraction coming from “near the front” of the audience conflicted with Cary Thomas’s testimony that the distraction occurred “in the rear.”

54. In response, Roberts signed an affidavit in January 1978, submitted by the People, denying his or the NYPD’s involvement in Malcolm X’s murder,<sup>21</sup> and averring that he did “not have any information” or reason to believe Aziz and Islam were innocent.

55. Karim, the minister, in his affidavit, asserted he was certain that Aziz and Islam had not been in the Audubon Ballroom on February 21, 1965. Karim said that because he spoke before the crowd for some time, he had an opportunity to “observe the faces of all the people in the crowd,” and he saw neither Aziz nor Islam, both of whom he knew. He added that Aziz and Islam were known to Malcolm X’s security team and would not have been allowed into the Ballroom without drawing scrutiny.

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<sup>21</sup> Defense counsel in the CPL § 440.10 litigation argued that the murder had been orchestrated by the FBI and/or the NYPD. Our reinvestigation did not uncover any evidence to support such an assertion.

56. In a supplemental affirmation dated July 14, 1978, the People further opposed the motion and informed the court, among other things, that: (a) “[t]he District Attorney’s Office case file contains nothing which supports any of the defendant’s allegations or contentions” (p. 2, ¶ 4); (b) “[t]he District Attorney’s Office case file contains no papers of any kind from the Federal Bureau of Investigation” (p. 2, ¶ 5); and (c) “[i]n order to obtain unredacted copies of the FBI documents submitted by [defense counsel] in support of the instant motion, I have spoken with [an FBI agent]” (p. 3, ¶ 7).

57. In connection with the motion, the People obtained from the FBI unredacted copies of the redacted documents that had been earlier obtained by the defense, and provided them to the court for its examination (pp. 3-4, ¶¶ 8-9). The People stated that there was nothing in the newly obtained FBI records that “in any way supports any of the defendants’ contentions or allegations,” given that “there is no mention or indication of the name of, or reference to, any of the persons identified by [Halim] in his affidavits as having been his accomplices in the murder of Malcolm X” (pp. 3-4, ¶ 9).

58. The People further reported that the FBI had declined to provide additional unredacted FBI documents to the People, as follows:

I am informed by [an FBI agent] that the FBI documents he has not provided me with in their unredacted form are not on file in the New York Office of the FBI. [The agent] informs me that these documents are on file at the FBI’s headquarters in Washington, D.C., but that because of the volume of papers on file at FBI headquarters it would take a considerable period of time to obtain them. There appears to be nothing in any of these redacted documents which corroborates the allegations in [Halim’s] affidavits, or which is otherwise supportive of the instant motion. Many of these redacted documents are, [the agent] informs me, internal FBI memoranda which merely summarize and chronicle the New York City Police Department’s investigation into the murder,

*and which contain no original information developed by the FBI.* Others of these documents contain information developed by the FBI which paralleled information obtained by the New York City Police Department. . . .

(People’s supplemental affirmation, dated July 14, 1978, pp. 4-5, ¶¶ 10, 11) (emphasis added). As discussed below, given the FBI documents that we have newly obtained during this reinvestigation, the above representations made by the FBI to the People and the court in 1978 do not appear to be accurate. Also, as discussed below, DANY’s case file did contain certain documents from the NYPD which supported Halim’s version of the events.

59. In response to Karim’s affidavit, the People also argued that Karim’s professed certainty about Aziz’s and Islam’s absence from the Audubon Ballroom conflicted with his prior statements, including his grand jury testimony that he did not “know whether [Aziz] and [Islam] were in the audience as [Karim] spoke.”<sup>22</sup>

60. In a decision dated November 1, 1978, Justice Harold Rothwax denied the motion. Justice Rothwax wrote that he “must question the reliability of any identification which comes thirteen years after the events in question to inculcate persons who apparently were never the object of suspicion despite the thorough efforts of local, state and federal law enforcement officials.” People v. Amim, Ind. No. 0871/65 (Sup. Ct., N.Y. Co. 1978).<sup>23</sup> A petition for leave to appeal to the Appellate Division was denied.

61. On or around December 31, 1979, Aziz and Islam filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The

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<sup>22</sup> In his grand jury testimony, Karim testified that he did not know whether or not Aziz and Islam were in the ballroom, but that he did not see them there (Goodman, GJ, p. 481).

<sup>23</sup> Justice Rothwax’s decision misspelled Aziz’s name as “Amim.”

petition included additional details from Halim about the physical descriptions of the men he identified as his co-conspirators, and noted that William “X,” whose last name was by then identified as “Bradley,” was “known as a stick-up man.” On December 31, 1980, United States District Judge Thomas P. Griesa issued an opinion denying and dismissing the petition. Aziz v. Superintendent, No. 80 Civ. 1345, 1980 U.S. Dist. LEXIS 15800 (S.D.N.Y. Dec. 31, 1980); Islam v. Superintendent, No. 80 Civ. 1346, 1980 U.S. Dist. LEXIS 15800 (S.D.N.Y. Dec. 31, 1980).

62. Subsequent to Aziz’s and Islam’s unsuccessful post-conviction litigation in the late 1970s and early 1980s, there have been no post-conviction proceedings in this case prior to the filing of this motion.

### **The Joint Re-Investigation**

63. In January 2020, DANY’s Conviction Integrity Program (the “CIP”) began a collaborative reinvestigation of the case with the Shanies Law Office and the Innocence Project, counsel for Aziz and Islam.

64. Notwithstanding the restrictions imposed by the Covid-19 pandemic with which the reinvestigation coincided, the CIP and defense counsel conducted a cooperative and transparent investigation to determine what, if any, further action was warranted in the case. In the course of the reinvestigation, the CIP obtained and provided defense counsel with previously unseen documents from the FBI and NYPD concerning Malcolm X’s assassination, as well as documents that were previously seen only in redacted form. Defense counsel, in turn, turned over their own investigative files to the CIP, including FBI records obtained since the prior post-conviction proceedings.

65. Both the CIP and defense counsel were able to review all available materials from the DANY case file and the files of former defense counsel. This involved the cooperation of numerous third parties, including New York University, Columbia University, the City of New York Municipal Archives, and others.

66. The CIP and defense counsel discussed investigative plans regarding witness interviews, requests for and review of documents, and legal research.

67. Collectively, the CIP and defense counsel reviewed many thousands of pages of documents and interviewed numerous witnesses. The teams met frequently and were in regular communication throughout the process. The newly discovered evidence obtained through the joint reinvestigation is set forth below.

### **The New FBI Documents**

68. A significant portion of the new evidence uncovered through the reinvestigation consists of documents that were in the possession of the FBI prior to the trial, but which were not previously disclosed to DANY or to Aziz and Islam prior to their convictions or, for the most part, prior to the post-conviction proceedings. These newly discovered documents include the following:

- a. An FBI report<sup>24</sup> dated February 22, 1965, the day after the murder, states that “the killers of Malcolm X were possibly imported to NYC,” and that the shooters were “two men, occupying the front seats, left side of [the] middle aisle.” The report provides a detailed description of two suspects: Halim, who was known to the FBI, and a second assailant believed to have used the shotgun, who was described as “a negro male, age twenty-eight, six feet two inches, two hundred pounds, heavy build, dark complexion, wearing

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<sup>24</sup> The term FBI report will be used to encompass the many different forms in which the FBI communicated information from one office to another: teletype, memoranda, airtels, and Forms FD-204, to name a few.

[a] gray coat.” The source of this information is not specified. It is inconsistent with the description of Islam, who the prosecution claimed at trial wielded the shotgun, and who was five foot ten inches tall, one hundred ninety pounds, and very light-skinned. Instead, the description is closer to the description given by the defense witness, Ernest Greene, who testified that the shotgun assailant was dark skinned, heavy set, and had a deep beard.

b. Four FBI reports dated February 23, February 25, February 26, and March 22, 1965, reflect an interview of a witness to the murder who had a previous relationship to the Bureau as an FBI informant and who later identified Aziz as one of the killers at trial. The FBI reports further indicate that two other FBI informants identified Aziz and Islam as the shooters. Although neither of these informants testified at trial, the reports indicate that they cooperated with the NYPD.

c. An FBI report dated February 25, 1965, indicates that the Bureau ordered their local offices not to disclose to the NYPD the fact that any witness in the murder investigation was an FBI informant.<sup>25</sup> As a result, none of the parties at trial knew about the prior relationship between any of the above three witnesses and the FBI.<sup>26</sup>

d. An FBI report dated February 27, 1965, indicates that another FBI informant spoke to a member of Malcolm X’s organization who is named in the report. The member believed a third man, also named, engineered the murder, because Malcolm X had accused the third man of stealing money from his organization. In a second FBI report dated March 3, 1965, the informant reported that the member said four men were involved in the murder, and that two were in police custody and two were not. One of the unapprehended men was named James and the other was unknown, but both men were said to be associated with Malcolm X’s organization. According to the informant, the member admitted to the informant that he was not present in the Audubon Ballroom.

e. An FBI report dated March 2, 1965, reflects information gained from an NYPD lieutenant that a witness had accused a man (by name) as being one of the men who shot Malcolm X. Another man (also identified

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<sup>25</sup> Several FBI reports indicate that, on the orders of FBI Director J. Edgar Hoover, FBI informants were told not to disclose that they were FBI informants when talking to law enforcement about the murder.

<sup>26</sup> A fourth witness, Ronald Timberlake, was known to all parties to have a relationship to the FBI. He recovered the forty-five caliber pistol from the Audubon Ballroom and turned it over to the FBI. He and the FBI agent both testified at trial.



by name) was said by the witness to have been present during the murder. The FBI document does not identify the witness, but notes that the police lieutenant doubted the witness's account.

f. An FBI report dated March 3, 1965, contains information from another FBI informant who was present in the Audubon Ballroom at the time of the murder. According to the report, the informant stated that four men standing and facing the stage appeared to be firing at Malcolm X. The men were close to the front of the Ballroom standing several feet from each other. The informant could not see their faces since he was seated behind them. Immediately after the shooting the informant saw one of the gunmen running up the center aisle, holding a forty-five caliber pistol, being pursued by an armed guard from Malcolm X's entourage, who was firing his pistol at the gunman.

g. An FBI report dated March 3, 1965, reflects information received from an NYPD lieutenant concerning a witness identification of defendant Islam. The lieutenant stated that eventual trial witness Cary Thomas identified Islam as one of the assassins but that two other unnamed witnesses failed to identify Islam previously. The report does not name the witnesses or specify the type of identification procedure employed. A second similar FBI report dated March 4, 1965, indicates that New York FBI Office "sources" reviewed photos of Islam and another man and failed to place them in the Audubon Ballroom.

h. An FBI report dated March 4, 1965, indicates that an NYPD lieutenant told the FBI he was looking for an individual with the street name "Turk," whom the FBI Office in Newark believed was a NOI member of the Paterson mosque named Leon Davis, who was an associate of defendant Halim.<sup>27</sup>

i. An FBI report dated March 25, 1965, summarizes an interview of Leon Lionel Phillips, also known as Leon Ameer, a member of the NOI who attended a Boston mosque. Ameer recounted that, while attending Malcolm X's funeral, he had a conversation with a man whom he knew from the Newark mosque. The man stated that he was present at the time of the murder, and that the person who fired the shotgun was a black man, tall, dark-skinned, and a lieutenant from the Newark mosque. Ameer further stated that the man said the shooter appeared to be an "expert" in handling

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<sup>27</sup> No information connected Davis to the crime at the time of the report, but the name acquired significance in the 1977 CPL § 440.10 litigation when Halim for the first time named Davis as one of the assassins.

a shotgun.<sup>28</sup> Ameer could not remember the name of the person who gave him this information.<sup>29</sup>

j. An FBI report dated April 14, 1965, indicates that another FBI informant who was present in the Audubon Ballroom identified a man (by name) as having participated in the murder, although his identification was tentative. The report further notes that other informants who were also present did not identify that man.

k. An FBI report dated September 28, 1965, contains a file on an individual named William 25X Bradley, which had been compiled between 1963 and 1965.<sup>30</sup> The file was created by the Newark office of the FBI as a record of NOI members who had engaged in acts of violence. According to the file, Bradley was twenty-seven years old at the time of the murder. According to government records, his height was five feet eight inches or five feet ten inches, and his weight was recorded as one hundred eighty-two or two hundred pounds. He was dark skinned. He had been a lieutenant in the Newark mosque and was known as a “strongman” there. He was a machine gunner in the Marine Corps. At the time, he had a criminal arrest for weapons possession, but the weapon was not specified. The FBI possessed photographs of Bradley.

### **The New BOSSI Documents**

69. During the reinvestigation, the NYPD provided us with its BOSSI records which, among other things, reflect the fact that undercover NYPD detectives were present in the Audubon Ballroom when Malcolm X was shot. The reinvestigation identified the following new documents as relevant to the inquiry:

a. Two NYPD reports dated February 23 and 26, 1965, reflect information received from a New York Daily News reporter. The reporter received an anonymous call on the morning of February 21, 1965, saying that

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<sup>28</sup> While not disclosed at trial, defendants received this information at the time of their 1977 CPL § 440.10 motion, apparently through a Freedom of Information Act request.

<sup>29</sup> The interview with Ameer took place on March 12, 1965. The next day Ameer was found dead in his hotel room of a drug overdose.

<sup>30</sup> Although unknown at the time of the trial, during the 1977 post-trial litigation, a man referred to only as “William X” was claimed by Halim to be one of the killers.

Malcolm X, Senator Robert Kennedy, Mayor Robert Wagner, and Councilman Robert Lowe would be murdered. The reporter recognized the voice from past calls, and based on past experience, believed the information was false. But this time the caller said that the Revolutionary Action Movement would carry out the attacks.<sup>31</sup> After Malcolm X was killed, the reporter contacted police. BOSSI notified the other leaders and offered to arrange protection.<sup>32</sup>

b. An NYPD report dated February 24, 1965, documents information provided by City Councilman Robert Lowe of the Twenty-Second district. Lowe stated that a man he occasionally employed, whom he named, told Lowe that the murder of Malcolm X was the work of the Revolutionary Action Movement. Lowe felt his employee was erratic at times but he had no reason to doubt his credibility.

c. An NYPD report dated February 24, 1965, states that police received an anonymous telephone call from a male caller. The caller stated that a man named "Brown," at a specific address, was speaking about his connection to the murder of Malcolm X. Police went to the address but did not find anyone who admitted to being Mr. Brown.

d. An NYPD report dated February 25, 1965, reflects an anonymous telephone call from a male caller. The caller stated that on February 21, 1965, at 6:20 p.m., three hours after the murder, he overheard three men in a bar claiming responsibility for Malcolm X's death and planning the deaths of other public figures. The men were described as male blacks, in their thirties, and the report gives details of their height, weight, and manner of dress.

e. An NYPD report dated March 3, 1965, names three undercover detectives of the BOSSI unit, and appears to indicate that they were inside the Audubon Ballroom at the time of the murder. However, it is unclear if all three of them were present or only one or two of them. The report states that they "observed through a peephole" the Ballroom proper, but there is no account of their observations.<sup>33</sup>

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<sup>31</sup> The Revolutionary Action Movement was a radical group that was active at that time; shortly before Malcolm X's murder a number of their members were arrested in a plot to bomb the Statue of Liberty.

<sup>32</sup> NYPD had also offered Malcolm X protection, including days before his murder, but he declined.

<sup>33</sup> This is the only report found from the undercover detectives.

### **Additional Information in DANY's Files**

70. DANY's files contain three NYPD reports that would appear to support Aziz's and Islam's defense at trial. We are unable to determine whether these reports were shared with the defense at the time of trial.<sup>34</sup> They reflect the following:

a. According to a police report dated March 8, 1965, Earl Grant<sup>35</sup> was re-interviewed by an NYPD sergeant. Grant said that Charles Blackwell was a former member of the Jersey City mosque who told him that he, Blackwell, was stationed on the left side of the rostrum looking at the stage moments before the shooting; that Blackwell saw a man named Linwood (presumably referring to Agurs Linwood X Cathcart) enter the room and sit in the front row on the right side facing the platform; that two other men entered the room with Linwood but separated from him and sat in the front row on the left; and that all three men kept staring at Blackwell and he felt that they recognized him. At that point, Blackwell heard a commotion from the back of the ballroom and the shooting started. Blackwell saw a "member" fleeing from the chair area to the ladies room whom he thought was Islam. Blackwell said the two men in the front then began to fire their guns to escape. Blackwell also noticed another man he knew as Benjamin from Paterson or Newark seated in about the third row on the left side.

b. According to a police report dated March 25, 1965, Agurs Linwood X Cathcart was interviewed by NYPD Detective Keeley and other officers on March 22, 1965, at his residence in Plainfield, N.J. Cathcart said that he joined Mosque No. 7 in 1959 and later became associated with the Jersey City mosque. Cathcart said that he arrived at the Audubon Ballroom at approximately 1:45 p.m. on February 21, 1965, and took a seat in the front row. Cathcart said that he saw Brothers Charles (probably referring to Charles Blackwell), Benjamin (probably referring to Benjamin Karim also known as Benjamin Goodman and Benjamin 2X), and Ruben X (probably referring to Ruben X Francis). Ruben took Cathcart to the rear because he was wearing an NOI pin. Cathcart was allowed to return to the front row and was seated there when the shooting started. He said that he heard shots

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<sup>34</sup> It is unknown when DANY obtained the three NYPD reports. In addition to these reports, during his incarceration before trial, Cary Thomas wrote letters to the prosecutor that could have been used by defendants' attorneys to call Thomas's mental health into question and thus impeach his credibility before the jury. Those letters were in DANY's files and there is no indication that they were disclosed to defendants' attorneys.

<sup>35</sup> Earl Grant was a photographer and close associate of Malcolm X.

but didn't see anything. Cathcart stated that he knew Aziz and Islam well but did not see them that day. The police showed photographs to Cathcart and asked him if he knew any of the persons depicted or whether any of them were in the ballroom that day. Cathcart replied no. Photographs of Aziz and Islam were among those shown to him.

c. According to a police report dated April 8, 1965, Detective James Rushin interviewed a man (who is named in the report) who said, in sum and substance, that he was seated behind the two men who started the diversion. One man stood up and said, "get your hands out of my pocket." Then there were shots from the front of the hall and the men who created the diversion ran. The man then looked toward the front and observed three men shooting Malcolm X. The three men then turned and ran out of the hall. The man said that he would be unable to identify the men.

71. Even if all of information described in the above three paragraphs was disclosed to the defense at trial, it contradicts the representations made to the court during the 1970s CPL § 440.10 litigation that: "[t]he District Attorney's Office case file contains nothing which supports any of the defendant's allegations or contentions" (People's supplemental affirmation, July 14, 1978, p. 2, ¶ 4).

72. Finally, it appears that, prior to trial, the prosecutors were aware that undercover detectives were present at the time of the assassination, as is reflected in a note in the DANY file. The note recounts a conversation with a high-ranking NYPD officer who told prosecutors that NYPD had three undercovers present but only one of them observed the shooting. That undercover, the officer continued, identified Aziz as one of the men involved. The note does not identify the undercover nor does it provide an account of the events the undercover witnessed.<sup>36</sup> Additionally, there is no record of how the undercover identified

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<sup>36</sup> There is no indication that the prosecutors were aware of the role of NYPD undercover officer Roberts, whose role, as described above, was not revealed until he gave testimony in an unrelated case in 1971.

Aziz. The People did not call any undercover officers at trial. There is no record of this information having been disclosed to the defendants.

### **Interview of J.M.**

73. On February 9, 2021, the CIP and defense counsel jointly interviewed a witness, J.M., who had joined the NOI around 1959 and was affiliated with Mosque 7 in Harlem.

74. J.M., now 80 years old, lives in Brooklyn and has been a New York City employee for more than 25 years. J.M. reported that he knew Malcolm X and occasionally assisted with his security during public speaking engagements. J.M. also knew Aziz and Islam, both of whom were lieutenants at Mosque 7.

75. J.M. reported that, on the afternoon of February 21, 1965, he was on “phone duty” at Mosque 7, which had a phone booth that was staffed in shifts. J.M. described the duty as consisting of answering the phone, keeping a notepad to write down messages, and passing messages along to others at the mosque. J.M. recalled receiving a phone call from Aziz at around 3:00 p.m. on February 21st, informing him that Aziz had just heard Malcolm X had been shot. J.M. asked Aziz where he was before leaving to get the mosque’s captain, Joseph X (also known as Yusuf Shah). J.M. returned with the captain to the phone booth, and J.M. dialed Aziz’s home phone number. (J.M. could not recall during the interview whether he had Aziz’s phone number memorized or written in his notebook.) J.M. reached Aziz at home and told him the captain wanted to speak to him. J.M. then passed the phone to the captain and stood by while the two men spoke.

76. J.M. reported that he had told this account to various people over the years. J.M.'s daughter, who was present for the interview, stated that her father had told her the account numerous times.

### **Prior Statements of Eugene Roberts**

77. The CIP and counsel for Aziz and Islam also reviewed prior statements and recorded interviews of former undercover NYPD officer Eugene "Gene" Roberts, who is now deceased.

78. As described above in connection with the CPL § 440.10 litigation in the 1970s, the role and observations of Officer Roberts in the Audubon Ballroom were first revealed during testimony he gave in an unrelated case in 1971. That testimony included not only that he was acting in an undercover capacity as a member of Malcolm X's security team, but that he had come face to face with Halim after the shooting and knocked him down with a chair (an account that, in several ways, conflicted with other testimony elicited by the People at the defendants' trial).

79. Although Aziz's and Islam's attorneys knew of Roberts's identity prior to the post-conviction proceedings beginning in 1977, they apparently never interviewed Roberts in connection with that proceeding, nor did they seek to use the information he provided in the unrelated prior trial. The affidavit from Roberts submitted by the People in response to the defendants' CPL § 440.10 motion made no mention of what he saw in the Audubon Ballroom on February 21, 1965.

80. In later interviews, however, Roberts reported that the shooters had been seated in the front row of the audience. That account was consistent with the February 22, 1965,

FBI report described above, indicating that the shooters “occup[ied] the front seats, left side of [the] middle aisle.” It was also consistent with Halim’s testimony and later affidavits stating that Halim and Davis sat in the front row of the audience. At trial, no witness other than Halim testified that the shooters sat in the front row.

### **Attempted Interview of Mujahid Halim**

81. As noted above, both the CIP and counsel for Aziz and Islam attempted to interview Halim. Both teams made contact with Halim, but Halim was unwilling to speak to them. As such, the reinvestigation did not include an interview of Halim.

### **Interview of Muhammad Aziz**

82. The CIP interviewed Aziz on August 23, 2021, in the presence of his attorneys.

83. Consistent with his trial testimony, Aziz said that on the day of Malcom X’s murder, he was at home because of an injury to his leg. He said he heard on the radio that Malcolm X had been shot, and he called the “Captain” (Yusuf Shah also known as Captain Joseph) at the mosque at 3:00 p.m. to inform him of the news. He said he called Shah because Shah was the officer in charge, and he assumed that neither Shah nor anyone else at the mosque had yet heard the news since they were in the middle of a service. After Aziz told Shah what he had heard on the radio, Shah instructed Aziz to go to his neighbor next door and ask for a cup of milk and eggs. Aziz did not do so because he did not know his neighbors in the building. Shah did not tell Aziz why he was giving this instruction, but Aziz assumed it was because Shah wanted someone else to know where Aziz was or to be able to say they knew where he was. Aziz said he also had a call with a woman from the mosque named Gloria, but he does not recall who called whom.



84. Aziz said he first learned he was a suspect for Malcolm X's murder when police officers arrived to arrest him at his home.

85. Aziz was asked about the police processing following his arrest. He recalled the police having him stand in a room that had a door with a peephole. He said someone told him he had been identified in a lineup, but he did not remember ever being in a lineup. He had no recollection of police bringing anyone to view him in a holding cell or in a lineup, or of him holding a number as if in a lineup, or of police ever putting him in a room with other individuals standing up. He recalled being in a room with other people, but he was unaware of being subjected to any identification procedure. Aziz said the police photographed him nude at some point, and he does not remember police taking any other photographs of him, either alone or with others.

86. Aziz was asked about his relationship and contact with Halim. He stated that he first met Halim in the bullpen heading to court, after Aziz's arrest. He did not know Halim then, and still does not know him. Aziz further stated that he had never seen Halim at Mosque No. 7.

87. As to his relationship with Islam, Aziz said they were not friends and had only a professional relationship through the mosque. He said their duties at the mosque overlapped occasionally, but they did not work together often. He further stated that they did not get closer following their arrests, and they did not stay in touch following their convictions.<sup>37</sup>

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<sup>37</sup> On December 14, 2020, a polygraph examination was performed on Aziz by an examiner named Donald J. Krapohl. The examination was arranged by Aziz's attorneys. Aziz was asked if he fired a weapon at Malcolm X, and if he was present in the ballroom when Malcolm X was shot. Aziz answered "no" to both questions. The result of the examination was "no deception indicated."

### **Attempt to Interview “Talib”**

88. In 2020, Les Payne, a former editor and columnist at *Newsday*, and his daughter and co-author, Tamara Payne, published *The Dead Are Arising: The Life of Malcolm X*. The book includes a chapter, based in part on an account of a pseudonymous “Talib,” recounting what allegedly transpired in Mosque 25 in Newark on the day of Malcolm X’s murder, including information about the supposed planning and participants. Les Payne died prior to the start of our reinvestigation. We were unable to determine “Talib’s” identity or whether he is still alive.

### **Interview of Herbert Stern**

89. A member of the CIP team interviewed Herbert Stern, who was the assistant district attorney on homicide call who responded to the shooting on February 21, 1965, and who later presented the case to the grand jury. Stern left DANY before the trial commenced, and thus had no new information to impart about the conduct of the trial or its aftermath. He noted that DANY did not conduct its own independent investigation of the homicide, but that he relied on NYPD to find the witnesses and bring them to him. (As noted above, the lead assistant district attorney who tried the case is deceased.)

### **Interviews of Halim’s Relatives**

90. DANY investigators conducted separate interviews of two persons related to Halim. They both had expressed disbelief at the time of the murder that Halim could have been involved in such a crime. But both indicated that while visiting him in jail around the time of the trial, Halim had told them that Aziz and Islam had nothing to do with the murder of Malcolm X. They provided no further relevant information.

## Legal Analysis

### *The Newly Discovered Evidence*

Under CPL § 440.10(1)(g), newly discovered evidence must meet six criteria in order to justify the vacatur of a conviction: (1) it must be such that it would probably have resulted in a verdict more favorable to the defendant if it had been received at trial; (2) it must have been discovered since the trial; (3) it must be such that it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be cumulative; and (6) it must not merely impeach or contradict the prior evidence. People v. Salemi, 309 N.Y. 208, 215-16 (1955) (citations omitted). Accord People v. Velazquez, 143 A.D.3d 126, 131 (1st Dept. 2016). The vacatur of a conviction requires, not merely that new evidence exists, but that it be “of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.” CPL § 440.10(1)(g). In determining whether newly discovered evidence meets this standard, the evidence is not evaluated in a vacuum, but in light of the evidence contained in the record on appeal. See People v. Salemi, 309 N.Y. at 218-19; People v. Maynard, 183 A.D.2d 1099, 1102-03 (3d Dept. 1992).

In other words, an assessment of the likely impact of newly discovered evidence requires an appraisal of the strength or weakness of the case originally presented by the People. As discussed above, the case at trial against Aziz and Islam was based almost entirely on the testimony of six witnesses who identified Aziz at trial and four witnesses who identified Islam. One strength of these identifications is that two witnesses testified that they knew Islam from prior meetings. Cary Thomas testified that he knew him from his membership in the Harlem

mosque, and Vernal Temple testified that he had seen him once at a meeting at NOI's Chicago headquarters. Cary Thomas also testified that he knew Aziz. Like Islam, he also was an officer in the Harlem mosque that Thomas attended.

A fourth witness, Jasper Davis, testified that he had a good opportunity to observe the person he identified as Aziz, given that the person sat down next to Davis prior to Malcolm X's arrival on the stage, and they engaged in a brief conversation. Davis remained next to this person when the commotion and shooting erupted.

These identifications were not made for the first time at trial. The jury heard that the witnesses had picked the defendants out of lineups or from photographs during the investigation. Finally, the prosecution was able to establish a motive at trial: the hostility of members of the NOI to Malcolm X.

Nevertheless, the People's case contained several significant weaknesses. There was no forensic evidence connecting these defendants to the crime. Neither man was caught in or near the Audubon Ballroom. Moreover, there were questions raised about the accuracy of some of the identifications and contradictions existed among the testimony of the eyewitnesses, contradictions that were not resolved by other evidence. The manner in which the police conducted the identification procedures was also not placed before the jury or the court.

The most important weakness in the People's case, however, was the "second" testimony of Halim, when he retold the witness stand on February 28, 1966. His confession and exoneration of the defendants was supported by two other points. First, both Aziz and Islam called a number of alibi witnesses placing each of them at their respective homes at the

time of the murder. Second, Halim was from the Paterson, New Jersey mosque while the defendants were from the Harlem mosque. Aside from all three being members of the Nation of Islam, the prosecution drew no connection among the men. There was no proof that they knew each other or that Aziz and Islam had any connection to New Jersey. Nor was it shown that Halim had ties to the Harlem mosque.

The jury was aware of these facts and yet resolved them against the defendants. Nonetheless, the fact that these weaknesses existed gives added weight to the newly discovered evidence and increases the probability that this evidence would have resulted in a different verdict. While it is always speculative to assess the probability of a different verdict, the new evidence goes directly to the identification of the defendants.

The newly discovered FBI reports include descriptions of the man with the shotgun that are inconsistent with the description of Islam. Islam was a very light-skinned man and weighed less than two hundred pounds. He was not described as husky. And at least by the time of his arrest, slightly more than a week after the crime, he did not have a beard. The descriptions in these reports also conform to the one given by the defense witness Ernest Greene at trial. Had the defense been given these FBI reports and located the source or sources of the description, they might have produced witnesses to corroborate Greene. Unquestionably this would have cast doubt on the identification of Islam, and perhaps the testimony of all the eyewitnesses.

The FBI file on William Bradley also had the potential to call into question the identifications of defendants. While Halim had yet to mention his name, Bradley's profile fit the description Ameer had given of the shotgun shooter. Physically, he was dark-skinned,

husky, twenty-seven years old, and often wore a beard. And his background matched the other particulars Ameer provided. Bradley was a member of the Newark mosque, he had been a lieutenant there, and had military firearms training. While Ameer was deceased by the time of the trial, information existed that could have led to his source of information. Again, contrary testimony might have been developed.

The significance of the newly discovered FBI and NYPD reports containing the names of people identified by known sources as being the killer also cannot be discounted. These reports name three people other than the defendants, and at least one group, the Revolutionary Action Movement, as having been responsible. Since the reports were from sources known to the FBI, the witnesses might have been located and presented to the jury. And, again, the identifications of other suspects would have been especially important because of the testimony of Halim, who refused to name the men who were his accomplices. These potential suspects could well have been one or more of the four men Halim referred to in his testimony and the impact of such evidence might have swayed the jury.

The effect of anonymous sources naming other individuals is more speculative. The passage of time has made it impossible to predict if these sources could have been located. This is also true for the testimony of the undercover officers. The lack of records detailing the events they observed means that the effect of their testimony on the outcome of the trial cannot reasonably be calculated.

With regard to the first criteria in assessing newly discovered evidence, we respectfully submit that, given the new evidence discussed above, there is a probability that, had it been available to the jury, it would have resulted in verdicts more favorable to the defendants.

The remaining criteria are satisfied as well. All of the documents from law enforcement were discovered after the trial (a few during the 1977 CPL § 440.10 litigation, but most during the instant reinvestigation). Before trial, the defendants were unaware of these documents. There was no indication to the defendants that the documents existed, and the documents were central to the material issue at trial: the identity of the perpetrators. The documents are not cumulative to other information in the possession of the defendants at trial and, with the exception of the two witnesses who were FBI informants, the new evidence is not impeachment material. It is direct evidence that other individuals may have been responsible for the crime.

#### *Exculpatory Material*

The duty of every prosecutor is to provide the defense with all information in his or her possession which tends to exculpate the defendant. Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory material includes information that directly tends to establish the defendant's innocence and that directly implicates another person. See People v. Ennis, 41 A.D.3d, 271, 272-73 (1st Dept. 2007). Failure to identify the defendant in a police arranged procedure is also exculpatory material. People v. Torres, 289 A.D.2d 991, 991 (4th Dept. 2001). Impeachment material of a witness whose reliability may be determinative of guilt or innocence is also exculpatory. Giglio v. United States, 405 U.S. 150, 154 (1972); People v. Garcia, 46 A.D.3d 461, 462 (1st Dept. 2007). Similarly, any information that would show the existence of a bias or motive on a witness's part must be disclosed, including his status as a police informant. People v. Wright, 86 N.Y.2d 591, 596 (1995).

In the instant case, as detailed above, all of these types of exculpatory material were present. There was information that implicated other suspects; that identified witnesses who failed to identify defendant Islam; and that revealed witnesses to be FBI informants. The defendants apparently received none of this material. Brady was decided in 1963, and the doctrine was in effect when the defendants were tried in 1966. In the years following the original decision, the rules governing Brady disclosures have been expanded and clarified. Pursuant to the United States Supreme Court decision in Kyles v. Whitley, 514 U.S. 419, 438 (1995), prosecutors are responsible for exculpatory material in the hands of law enforcement agencies investigating the defendants, even if the prosecutors were unaware of the existence of such material. On the other hand, prior to Kyles and at the time of the 1966 trial, prosecutors were responsible only for exculpatory material in their actual possession. If they were unaware of the material, the prosecutors had no obligation to disclose it.

The reinvestigation found that, with the exceptions noted above, the prosecutors were not in possession or aware of the information gathered by the NYPD and the FBI which we have identified as exculpatory. Copies of the reports are not in the DANY file; there is no correspondence between the prosecutors and the law enforcement agencies referencing the reports; and there are no prosecution notes concerning or analyzing the reports in the DANY file. There is also no mention of this information in the record of the proceedings prior to or during trial. Finally, the FBI and NYPD files do not indicate that the information was ever disclosed to prosecutors; to the contrary, there are indications in the FBI materials that information was deliberately withheld.



Under most circumstances, even post-Kyles, state prosecutors are not charged with constructive knowledge of information possessed by the FBI. In part, this reflects a state prosecutor's lack of authority to subpoena the FBI's files. However, when state and federal law enforcement agencies are involved in a joint investigation, local prosecutors are responsible for the information possessed by the federal authorities. See People v. Santorelli, 95 N.Y.2d 412, 421 (2000). Here, while the investigation may not have been fully "joint," there was extensive cooperation and sharing of information. For example, a number of eyewitnesses, both testifying and non-testifying, were FBI informants who were sent to the NYPD by their FBI contacts. They were instructed by the FBI to truthfully recount their version of events, withholding only their status as FBI sources. An FBI agent delivered one of the murder weapons to the NYPD along with the witness who found it. Both the agent and the witness testified at trial. The FBI and the NYPD established a liaison system of higher ranking officers to exchange information. A number of reports showed each agency contacting the other with important facts. There were multiple progress reports sent to the FBI by the NYPD concerning the names of the current suspects, the dates the suspects were taken into custody, and their status in court. The FBI disclosed the information from the informant Ameer, including his description of the assailant with the shotgun and the assailant's connection to the Newark mosque. NYPD detectives from the BOSSI unit participated in certain interviews with FBI agents, most notably the interview of the reporter who received the call about the Revolutionary Action Movement. At the request of the NYPD, the FBI researched Halim's background and associates in Paterson, New Jersey. In short, there was extensive cooperation and sharing of information. For these reasons, the reinvestigation

concluded that a joint investigation existed, for purposes of the Brady analysis, between the FBI and the NYPD.

Therefore, pursuant to current Brady jurisprudence, the prosecutors were responsible for the exculpatory material in the possession of their law enforcement partners. Whether these rules, in particular that announced in Kyles, applies retroactively to a conviction that became final in 1969 is another matter entirely and one that, to our knowledge, is undecided by any appellate court. Nevertheless, given the unique facts of this case, and based on fundamental fairness and the interests of justice, we submit that, without the exculpatory material that was in law enforcement's possession, these defendants did not receive a fair trial, and we respectfully submit that their convictions should be vacated and the indictment against them be dismissed pursuant to CPL §§ 440.10(1)(g) and 210.40.

Given the information currently available, the People make no determination on the question of the defendants' actual innocence. All of the individuals who swore under oath that they observed Aziz and Islam shoot and kill Malcolm X are now deceased, as are the four individuals whom Halim identified as his co-conspirators in the murder. The identifying witnesses who did not testify also are all deceased, as are the police officers who conducted the identification procedures. Since the trial record did not examine the police procedures, this evidence is irretrievably lost. The reinvestigation could not question any of the central eyewitnesses. We are left only with the trial record, which is inadequate to assess the certainty and strength of each eyewitness. Most of the relevant physical evidence is not available for informative forensic testing. In addition, Halim refused to voluntarily submit to an interview

and the parties lacked the legal means in the context of the reinvestigation to compel him to do so.

The final determination of whether to vacate the judgments of conviction of Messrs. Aziz and Islam must, of course, be made by the Court. Should the Court, as requested by the parties, vacate their convictions, the People further ask the Court to dismiss the indictment against them, pursuant to CPL § 210.40(3). Under all the circumstances, there can be no retrial on any of the charges contained in the indictment.

### **Conclusion**

For the above reasons, the Court should vacate the judgments of conviction and dismiss the indictment against Messrs. Aziz and Islam.

Respectfully submitted,

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