



DISTRICT ATTORNEY KINGS COUNTY

DISTRICT ATTORNEY ERIC GONZALEZ

REPORT ON THE CONVICTION
OF
CHRISTIAN PACHECO

By: The Conviction Review Unit

February 2020

I. The Crime and Background

According to the trial evidence, on December 2, 1995, at about 1:45 a.m., approximately fifteen or sixteen members of the Latin Kings—including the defendant Christian Pacheco (a.k.a. “King Bade” or “King Bey”)—were celebrating a member’s birthday at the Con Sabor Latino Lounge (“the bar” or “the club”), located at 423 3rd Avenue, on the corner of 7th Street in Gowanus.

Around that time some unknown person bumped into the defendant on the dance floor. The defendant turned and punched Latin King Roberto Correa (“King Meg”). Thereafter, someone informed the defendant and Correa that “the black guy”—Lemuel “Lenny” Cruz (“the deceased”)—did it. The defendant and the other Latin Kings descended upon the deceased and kicked and punched him. While the Latin Kings assaulted the deceased someone yelled, “get the black guy, get the black guy.”

The assault moved outside where a former Latin King, “Witness 1,” observed the same fifteen to sixteen Latin Kings punch, kick, and fatally stab the deceased. Witness 1 observed the defendant slash the deceased’s throat with a “razor box cutter.” As the attack continued and the deceased was stabbed in the back, Witness 1 saw the defendant and the others hit the deceased. At some point, the defendant was stabbed in the back.

The defendant is serving a prison term of twenty-five years to life, and will be eligible for parole on December 14, 2020.

II. Reason for Vacatur

CRU did not uncover any error in the police investigation or the prosecution of the defendant’s case. Instead, new evidence shows that Witness 1’s trial testimony—that the defendant slashed the deceased’s throat—was most likely erroneous. Because Witness 1 was the only identifying witness at trial, because the prosecution relied on Witness 1’s testimony to obtain the defendant’s conviction, and because the singular nature of this testimony likely prejudiced the defendant such that we cannot assume he would have been convicted anyway on the basis of testimony that he struck the deceased (though other co-defendants were convicted of murder for striking only), the conviction of Murder in the Second Degree cannot be sustained.

III. The Police Investigation¹

The police investigation commenced on December 2 and concluded December 3, 1995. The lead investigator, Detective Alphonse Pascual, of the 78th Precinct (“the precinct”) Detective Squad, was assisted by Squad Detectives Christopher Ahern, William Crowe, John Sweeney, Peter

¹ Unless otherwise stated the police investigation facts are obtained from the DD5s of the detectives cited. Numbers in parentheses preceded by “H.” refer to the pretrial hearing; those preceded by “T.” refer to the defendant’s trial; and those preceded by “S.” refer to the sentencing minutes. The pretrial hearing issues are not relevant here and, thus, the hearing is not discussed. Certain hearing testimony is cited to fill in the narrative of the facts.

Brendel, Ronald Taylor, Victor Ruiz, Wilbert Bishop, Donald Faust, and Douglas Hopkins, and Brooklyn South Homicide Squad Detective Darcey Callahan.

A. *The Police Respond to the Scene*

On December 2, 1995, law enforcement personnel arrived at the scene pursuant to 911 calls (the first of which was 1:54 a.m.).² At 7:30 a.m., at the precinct, first responding Police Officer Donna Troeller told Detective Pascual the following: At approximately 2:00 a.m., Witness 2 flagged down Troeller and her partner, Officer Robert Ayala. Witness 2 reported that his friend, the deceased, was being attacked on the corner of 3rd Avenue and 7th Street. The officers and Witness 2 arrived at the scene within minutes. The deceased was lying on the sidewalk near the bar's side door on 7th Street, bleeding profusely from the head, neck, chest, and back. The deceased was transported to Saint Vincent's Hospital where he was pronounced dead on arrival.

B. *The Showup (Witness 3 Identifies the Defendant)*

Witness 3 flagged down Transit Bureau officers Lieutenant John Benintendo and Sergeant David Filnacek, who were driving to the scene. Witness 3 directed the officers down the street. There, the officers stopped a group of approximately ten individuals in front of 368 4th Avenue (between 5th and 6th Streets). Benintendo observed a male helping the defendant walk. The defendant was crying. He stated that he had been stabbed, that his back was bleeding from a "life-threatening" cut, and that he was going to die. Benintendo and Filnacek ordered everyone to stand against a wall. The defendant kneeled near the wall.³

After lead Detective Pascual arrived at the location, Witness 3 viewed the individuals at the wall and identified the defendant as a participant in the stabbing of the deceased.⁴ Witness 3 also identified other individuals as participants in the stabbing, including Roberto Correa, Hector Perez, and Codefendant 1.⁵

Sergeant Theresa Cohen then transported the defendant to Methodist Hospital. The defendant stated to her that he was "beaten up pretty badly."⁶

After the defendant was removed from the scene, Witness 4 viewed the remaining group by the wall, and identified the same individuals Witness 3 had identified. Witness 4 also identified

² "Sprint" (report of the 911 calls).

³ H.50-56.

⁴ KCDA Homicide Investigative Report ("Scratch") at 21.

⁵ Scratch at 21; Burke DD5, "Identification Clarification by Lt. Benintendo." Codefendant 1 is not named because his judgment of conviction was ultimately vacated and the indictment against him was dismissed (*infra* at 17, VIII).

⁶ H.20.

“Cooperator A.”⁷ He specified that Correa and Cooperator A were involved in stabbing the deceased and the rest were participants in the fight.⁸

On December 2, at approximately 3:00 a.m., those identified in the showup were arrested. Some were transported to the precinct, and others were transported to Long Island College Hospital for various minor cuts and wounds.⁹

C. The Documentation of the Crime Scene

On December 2, at approximately 4:30 a.m., Crime Scene Detective Edwin DeTorres sketched, photographed, and measured the scene. DeTorres photographed small drops of blood on the floor of the bar near the side door. A 5-inch knife blade, broken knife handles, a large knife with a green canvass sheath, and a metal razor knife were recovered near the crime scene.

D. The Defendant is Arrested and His Clothing Is Recovered

Pursuant to Witness 3’s showup identification of the defendant, Sergeant Filnacek arrested the defendant at Methodist Hospital. The sergeant recovered and vouchered the defendant’s clothing, under property invoice number G189816, as follows:

1. “Guess” blue jeans
2. Halves of torn, “Tommy Hilfiger” plaid shirt
3. Button-down shirt multicolor
4. “Starter” white T-shirt
5. Black belt
6. “Timberland” black boots
7. Waist length brown jacket

The defendant’s clothing was forwarded to the Office of Chief Medical Examiner of the City of New York (“OCME”) for serological testing.¹⁰

⁷ Cooperator A is not named to protect his identity because he was acquitted at trial (*infra* at 13, V. E.) and because he was a cooperator in a federal investigation into the Latin Kings (*infra* at 14, VII. A.).

⁸ Scratch at 21; Burke DD5, “Identification Clarification by Lt. Benintendo;” Pascual DD5, “Interview of Sgt. Christopher Betz.”

⁹ H.59.

¹⁰ Scratch at 29.

E. *Witness Statements and Identifications*¹¹

Witness 3

On December 2, at 3:00 a.m., at the scene, Witness 3 reported the following to Detective Crowe: He arrived at the bar at around 1:10 a.m. About an hour later, a fight broke out on the dance floor at the rear of the bar involving a Hispanic male, who was 5'11", about 28-29 years old, with an average build, a mustache/goatee, a gold upper front tooth, and wearing a full-length black leather coat, blue jeans, beige vest, and shirt.

After the fight broke up, the Hispanic male placed a razor blade in his mouth, said, "[w]e're going to get these motherfuckers," and went out the front door with four others. Twenty-five to thirty males went out the side door. Witness 3 went outside and saw the deceased fighting with a Latin King. The Hispanic male with the razor blade, and others who took out knives jumped into the fight. The Hispanic male slashed the deceased's neck.¹²

Witness 1 (identified the defendant in a photo array)

On December 2, at approximately 4:45 a.m., at the precinct, Witness 1 told Detective Taylor the following: He was a former Latin King. He lived above the club with his girlfriend, whose father owned the club and occasionally employed Witness 1 as a bouncer. Witness 1 stated that he observed an altercation on the dance floor where a Latin King bumped into a male, who was 6'3" and weighed 280 pounds (the deceased), who, in turn, pushed a Latin King. The defendant (who Witness 1 called "King Bey") attempted to punch the male, but accidentally hit Correa (who Witness 1 called "King Meg"), causing his nose to bleed.

Correa ran out outside. The defendant followed and apologized. Another Latin King, who Witness 1 did not know, followed the defendant and Correa and told them that "it was the black guy in the Kangol hat who did it." The defendant and Correa ran back inside and "someone" punched the deceased. The deceased threw a couple of punches and ran outside.

Outside, Witness 1 saw the defendant, Correa, and "Hector"—a Latin King punch and kick the deceased. Hector screamed, "[y]ou hit my brother." A Hispanic male, with gold "fronts" on his teeth, wearing a Shearling coat, also punched and kicked the deceased. A Latin King wearing a black shirt, stabbed the deceased. A light-skinned Hispanic male—about six-feet tall, weighing 190 to 200 pounds, and wearing white pants, a mixed-color Tommy Hilfiger jacket, and sunglasses on top of his head—stabbed the deceased about his body with a "Rambo knife."

¹¹ On December 2, between 2:55 and 7:50 p.m., Detectives Pascual and Hopkins and Sergeant Anthony Titi conducted six lineups at the precinct of the individuals identified during the showups, which were viewed by 23 witnesses, including the witnesses discussed herein. Because the defendant was hospitalized at the time, Pascual, Hopkins and Titi conducted a photo array, at the precinct, with the defendant as the subject—4 of 16 witnesses who viewed the array identified the defendant.

¹² Other than his showup identification and statement at the scene, Witness 3 did not view any other identification procedures or make any other statements.

Later that day, at 7:05 p.m., at the precinct, Witness 1 identified the defendant in a photo array stating that the defendant had on a brown Shearling coat with a hoodie and gold caps on his teeth, and had a razor and was swinging and kicking at the deceased on the ground. (Witness 1 told Detective Taylor that the defendant both kicked and punched the deceased and that the Hispanic male had gold caps and a Shearling coat).¹³

Between 3:06 and 7:08 p.m., Witness 1 viewed the six lineups (*supra* at 4 n. 11) and made a positive identification of each subject as either swinging at or punching the deceased and that one individual stabbed the deceased in the back.¹⁴

Witness 5 (identified the defendant in a photo array)

On December 2, at 5:00 a.m., Detective Ahern interviewed Witness 5 at the precinct. In pertinent part, Witness 5 stated that a male was “swinging on” the deceased inside the bar, and they were both thrown out. Outside, numerous males stabbed and assaulted the deceased.

At about 7:33 or 7:35 p.m., Witness 5 identified the defendant in the photo array. Witness 5 stated that the defendant had a big knife, stabbed the deceased two or three times, and kept coming back.¹⁵

Witness 6 (identified the defendant in the photo array)

On December 2, at 6:25 a.m., at the precinct, Witness 6 told Detective Ruiz the following: A fight started in the bar by the rear door, and someone hit the deceased in the face. Witness 6 ran outside and saw a male kicking the deceased. Witness 6 punched him in the face and kicked someone else. Witness 6 kneeled next to the deceased and tried to help him up, but he did not move. Witness 6 then noticed that his throat had been slashed from ear to ear.

At 7:25 p.m., Witness 6 identified the defendant in a photo array as the person whom Witness 6 punched in the face.¹⁶

Witness 2

On December 2, at 4:45 a.m., at the precinct, Witness 2 gave the following statement to Detective Crowe: At about midnight, Witness 2 went to the bar with the deceased, Witness 4, who was his brother, and Witness 7. After about a half hour, a fight broke out on the dance floor between two males. While the deceased was in the men’s room others joined the fight.

¹³ See Hopkins’s DD5, “Line Ups Conducted at the 75 Detective Office,” and Scratch, which were disclosed to the defense prior to the pretrial hearings (trial file, “Receipt for *Rosario* Material”). Notably, the defendant was wearing a waist length brown jacket (*supra* at 3, III. D.), and Cooperator A’s arrest photo shows him wearing a brown Shearling coat. The Shearling coat was not vouchered.

¹⁴ Hopkins’s DD5, “Line Ups Conducted at the 75 Detective Office” and Scratch.

¹⁵ Hopkins’s DD5, “Line Ups Conducted at the 75 Detective Office” and Scratch at 28.

¹⁶ Hopkins’s DD5, “Line Ups Conducted at the 75 Detective Office” and Scratch.

Witnesses 2, 7, and 8 left through the front door, and through the front window saw the group being pushed out the side door.

Witness 2 saw a Hispanic male with black hair, wearing a white ski jacket with blue and red stripes, stabbing the deceased. Witness 2 observed a male with black curly hair exit the side door flicking a butterfly knife.

At 6:58 p.m., Witness 2 viewed the photo array with the defendant as the subject. It is not clear whether he identified the defendant.¹⁷

On December 3, at 12:55 a.m., at the precinct, Witness 2 gave a sworn audiotaped statement to two Assistant District Attorneys (“the riding A.D.A.s”) in Detective Hopkins’s presence. His statement was consistent with his statement to Detective Crowe with the following additional details: When the deceased came out of the bathroom, he attempted to walk through the fighting crowd to the door. Someone yelled, “[I]et’s get the black guy,” and the men involved in the fight dragged the deceased out through the side door. Outside, a group of males surrounded and stabbed the deceased, and stabbed each other.

Witness 4

On December 2, at 3:50 a.m., at the precinct, Witness 4 gave a statement to Detective Pascual. His statement concerning the events leading up to the assault was consistent with his brother Witness 2’s statement (stated immediately above). Witness 4 added that a male wearing a Shearling coat with white fur brandished a knife and repeatedly stabbed the deceased.

At 2:55 p.m., Witness 4 identified Cooperator A in a lineup as the one who wore the Shearling coat and stabbed the deceased with a knife.¹⁸

At 6:55 p.m., Witness 4 viewed the photo array with defendant as the subject, but did not identify him.

On December 3, at 12:08 a.m., Witness 4 gave a sworn audiotaped statement to the riding A.D.A.s that was consistent with his statement to Detective Pascual.¹⁹

Witness 7

On December 2, at 5:10 a.m., at the precinct, Witness 7 gave a statement to Detective Sweeney, which was consistent with the accounts of incident given by Witnesses 2 and 7 (stated immediately above).

¹⁷ According to Hopkins’s DD5, “Line Ups Conducted at the 75 Detective Office,” Witness 2 did not recognize anyone in the defendant’s photo array. According to the Scratch, Witness 2 identified the defendant in the photo array as someone “being there when [the deceased] was getting stabbed and beaten up.”

¹⁸ Scratch at 18, 22.

¹⁹ Audio tape #A95-1743.

On December 3, at 1:29 a.m., Witness 7 gave a sworn audiotaped statement to the riding A.D.A.s, which was consistent with his statement to Detective Sweeney.

* * *

The photo used in the defendant's photo array shows that he is a light to medium-skinned Hispanic. His pedigree information includes that he was 18 years old, 5'5" tall, and weighed 150 pounds. The defendant remained hospitalized until December 20, 1995.²⁰ As stated above, he was identified in a showup (by Witness 3) and photo array procedures (by Witnesses 1, 5, and 6).

Numerous other witnesses made statements to law enforcement personnel. They are not discussed because they either did not make any identifications or provide new information.

None of the witnesses, including the ones discussed above, were asked about or mentioned seeing anyone other than the deceased on the ground during the incident. No witnesses, other than Witness 1, stated that they observed the defendant slash or cut the deceased's throat.

F. The Defendant's Statement

On December 2, at 11:00 p.m., while hospitalized, the defendant gave the following *Mirandized* statement to Detectives Pascual and Faust:

I got to the club at 11:00. I'm there with my Latin Kings brothers . . . two girls, G.Q., and Carletti. Two hours pass. I was dancing and drinking at the bar. The other gang members were also drinking. A fight started near the dance floor. I felt something in my back. I turned and saw fighting in the street. I went outside to stop the fight, and was stabbed two or three times. I then left the area walking towards Fourth Avenue. Police officers arrived and placed me against the wall. Police brought me to the hospital and I don't know who stabbed me or who was stabbed.²¹

²⁰ The defendant was treated for a stab wound to his upper right back, a collapsed lung, and blood in his lung (which was first noted on December 16). To the right of the stab wound were three small "superficial" stab wounds. The defendant did not sustain a hemorrhage, or require a blood transfusion or surgery. The defendant declined to give details of the incident to hospital personnel. He was discharged on December 20, 1995 (*see* medical records).

²¹ Pasquel's notes.

IV. The Grand Jury²²

On December 28, 1995, the defendant, Correa, Hector Perez, Codefendant 1, and Cooperator A were indicted, under an acting in concert theory, with two counts of Murder in the Second Degree (P.L. § 125.25[1], [2] [intent and depraved indifference]), and other related crimes.²³

V. The Trial

The defendant's trial commenced on September 11, 1996. The defendant was tried jointly with Correa, Hector Perez, Codefendant 1, and Cooperator A before the same jury.

A. *The People's Opening*

In their opening, the People told the jury that Witness 1 was a "very special witness," who would testify that the defendant slit the deceased's throat (T.39, 42).

B. *The People's Case*

*Witness 1*²⁴

Witness 1 testified against the defendant, Correa, and Hector Perez.²⁵ In pertinent part, he testified as follows: He was bouncer at the club, which his father-in-law owned. Witness 1 did not work at the club on December 2. Witness 1 was a member of the Latin Kings for five years and quit about one and a half to two years before the crime. He attended a Latin Kings meeting about three to four months before the crime because they wanted to know why he had quit. Witness 1 did not know the defendant's name on December 2, but he saw the defendant at the meeting, and at the club about one month before the crime (T.51-57, 60-62, 105-06, 151). He saw the defendant three or four times before the night of the murder. He did not speak with the defendant that night, and did not argue with the defendant before that night (T.135, 137).

Before the crime, at approximately 12:30 a.m., Hector Perez came to Witness 1's apartment with about six or seven others, including the defendant. Hector said that they wanted to hang out at

²² Because grand jury proceedings are secret (C.P.L. § 190.25[4][a]), discussions of the proceedings are redacted. Notably, the presumption of secrecy can only be overcome by demonstrating "a compelling and particularized need" for access to the grand jury material. *Matter of District Attorney Suffolk County*, 58 N.Y.2d 436, 444 (1983). If that threshold is met the court must then balance various factors to determine whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure. *James v. Donovan*, 130 A.D.3d 1032, 1039 (2d Dep't 2015) (refusing to release the grand jury transcripts in the investigation into the death of Eric Garner in Staten Island, citing the strong presumption in favor of grand jury secrecy and the "chilling effect" that a release of transcripts would have on witnesses before such a tribunal).

²³ Correa was also known as and indicted under the name of Suriel Esteban.

²⁴ Because Witness 1 was the only eyewitness who testified against the defendant, the testimony of other eyewitnesses are not relevant except for Witness 8, who testified that Cooperator A was wearing a sheepskin (Shearling) coat (T.472-73).

²⁵ Witness 1 identified the defendant, Hector Perez, and Correa in court repeatedly throughout his testimony as he described their actions.

the bar (T.53, 58). Witness 1 did not want to let the Latin Kings into the bar because there were too many (T.119). He agreed to let them in and told Hector to keep everyone “in line” (T.58).

At about 1:00 a.m., Witness 1 and his wife, who lived above the bar, went down to the bar (T.59). The defendant, Hector Perez, and Correa were drinking and dancing with approximately fifteen males (T.61).²⁶ Witness 1 assured his father-in-law and brother-in-law, who were there, that “everything was all right” (T.62).

After about 20 minutes, Witness 1 and his wife left to go home. Before they went upstairs, they stayed outside for several minutes during which time Correa came out of the bar with a bloody nose, and the defendant came out apologizing to Correa (T.62-64). A male then came out the side door and said to the defendant and Correa, “the black guy inside did it” (T.65). The defendant, Correa, and the male went back inside. Witness 1 did not think it was a problem and went home (T.65-66).

About four minutes later, Witness 1 noticed that the music in the bar stopped and he heard his brother-in-law outside screaming his name. Witness 1 ran into the bar through the side door (T.66-67). Inside, next the side door, there were 11 or 12 males, including the defendant, Correa, and Hector Perez on top of a “black guy” (the deceased) punching and kicking him (T.67-70). The defendant was punching the deceased in the face (T.138). Witness 1 jumped in and pushed everyone back (T.69-70). Witness 1 did not see any weapons or anyone stabbed (T.139). He grabbed the deceased as the assault continued and managed to get him out the side door and close it (T.69-70).

The defendant and others went out through the front door. Though the glass windows Witness 1 saw the defendant and others running over to the deceased. Witness 1 opened the side door, went in the club, and tried to help the deceased (T.70-71, 141).

The defendant, Correa, Hector Perez, and others jumped on the deceased and started hitting him. Witness 1 went outside and tried to pull the defendant and the others off the deceased, “but there were so many” of them (T.72-73). There were about 16 males on the deceased (T.73). Witness 1 screamed to Hector Perez to “stop this” (T.74).

Then “everything just stopped; everybody backed up” (T.73). The deceased was on the ground trying to get up (T.74). But “some other guy just jumped in” and kicked the deceased in the face (T.74-75). The defendant, Correa, Hector Perez, and 12 to 14 others jumped on the deceased, and “knives came out of nowhere” (T.75). Witness 1 tried to save the deceased by throwing off the attackers one by one (T.76).

Witness 1 observed the defendant with a “razor box cutter,” and at some point, when the deceased was standing, the defendant slit the deceased’s throat with the razor box cutter (T.76,

²⁶ The bar was located in the front of the club, and the dance floor and men’s bathroom were located in the rear.

82).²⁷ Witness 1 was inches from the defendant and observed the defendant from the waist up (T.77). At this point, Hector Perez and possibly others screamed, “You hit my brother” (T.94).

Witness 1 grabbed a male with a knife, or switchblade, and “threw him over a car,” causing him to cut himself with his own knife (T.78-79, 145). Witness 1 also saw an unidentified male with a “Rambo” knife. Witness 1 froze. The male stabbed the deceased in the back with the Rambo knife (T.78, 80-81). The deceased had been standing again, and started to fall when he was stabbed in the back (T.81).²⁸ As the deceased was falling, the defendant, Correa, Hector Perez, and others “kept on hitting him” (T.82). When the deceased fell everyone fled (T.88).²⁹

About fifteen or sixteen people had been involved in the attack (T.88). Witness 1 did not sustain any injuries, and he did not observe the defendant, Hector Perez, or Correa sustain injuries during the attack (T.118, 145). He did not see the defendant fall to the ground (T.145).

On cross-examination, Witness 1 testified that he did not recall telling a detective that he observed a Latin King bump into a black man on the dance floor, or that he observed the black man punch the Latin King. Witness 1 maintained that he told the detective that was what he had heard. Witness 1 testified that his brother-in-law told him about that incident (T.110-11).

Witness 1 “clearly” recalled telling a detective that he saw the defendant slash the deceased’s throat. He did not recall the detective’s name or the time he spoke to the detective (T.134-35).³⁰

OCME Forensic Analyst Mary Shenouda

OCME Forensic Analyst Shenouda testified about the serological tests she performed to compare the deceased’s blood type to the bloodstains on the defendant’s and the codefendants’s clothes, which the police recovered. Genetic marker tests performed on the deceased’s blood enzymes showed two types: PGM type 1+ and ACP type B (T.628-29, 642).

There were fifteen bloodstains on the defendant’s clothes (T.659). A bloodstain on the defendant’s white T-shirt, which Shenouda labeled “4A-1,” was “consistent” with the deceased’s

²⁷ The prosecutor noted that Witness 1 “has taken his hand and made a motion at the side of his neck across the front of his neck to the other side” (T.76).

²⁸ Fingerprints were lifted from the knife and other weapons recovered, but they did not match the fingerprints of the deceased, the defendant, or any of the codefendants (T.760).

²⁹ During a confusing cross-examination by a codefendant’s counsel, Witness 1 testified that: after the deceased fell the second time there was no further attack; and the deceased fell after the throat-slashing and there was no further attack (T.121-22). Thereafter, on cross-examination by defense counsel, Witness 1 testified that “last thing” that happened before the deceased fell were getting stabbed in the back (T.146).

³⁰ Witness 1 told Detective Taylor that the defendant kicked and punched the deceased (*supra* at 4-5, III. E.). Hours later, when Witness 1 identified the defendant in a photo array to Detective Pascual, Witness 1 stated that the defendant was swinging a razor and kicking the deceased, and wearing a Shearling coat and had gold teeth (*id.*). The defendant’s attorney did not question Witness 1 about the statements he made during the photo array procedure (*infra* at 10, V. B.).

blood type (T.627-28, 657-58).³¹ The test was inconclusive for the PGM, but positive for the ACP type B, which was shared by 54% of the population in New York City (T.647-48, 658). Regarding the other stains on the defendant's clothes, some originated from different foreign sources, and some were inconclusive (T.660-63). Shenouda noted that there was a hole in the back of the defendant's jacket that could have been caused by a sharp object (T.665-66).

Regarding the codefendants: A bloodstain from Hector Perez's jean pants was consistent with the deceased's blood type (T.630-31); five bloodstains from Codefendant 1's jean pants were consistent with the deceased's blood type (T.631-33); Cooperator A's clothes did not contain any bloodstains consistent with the deceased's blood type (T.634, 651); and a bloodstain on one of Correa's shoes was consistent with the deceased's blood type (T.634, 670).

On cross-examination, Shenouda acknowledged that her findings that bloodstains were "consistent" with the deceased's blood meant that it "could have" been the deceased's blood (T.639-40). Her conclusions were not based on a scientific certainty (T.652). Although the OCME was capable of performing DNA testing Shenouda was not an expert in DNA, and DNA testing was not requested in this case (T.653-64).

Shenouda acknowledged that she did not receive blood samples from the defendant or the codefendants and, thus, could not determine whether the bloodstains she analyzed came from the defendant or any codefendant (T.645). She acknowledged that she did not know how the deceased's blood ended up on the defendant's clothing, and agreed that blood can be transferred from one person to another (T.656, 666-67).

Medical Examiner Laura Seijo

Dr. Laura Seijo performed the deceased's autopsy and testified as follows: The cause of death was multiple stab and incised wounds to the front and back of the chest (T.725). The deceased sustained three stab wounds to the chest, which were all potentially fatal and could have been caused by the same weapon. There were twelve stab wounds to the back, which could have been inflicted by the same knife; three of these stab wounds were potentially fatal. A stab wound to the abdomen and six stab wounds to the buttocks were not fatal. All of the nonfatal wounds taken together could have hemorrhaged and been potentially fatal (T.701-10).

There were also three incised wounds to the head: One wound traveled from the top of the head to just in front of the left ear. One wound was to the back of the head. One wound traveled from the front of the ear along the jawline, under the chin, and to the front of the neck (T.713-15). None of these wounds were fatal (T.715). The wound across the neck could have been caused by a box cutter, or another type of sharp instrument (T.715-16).

The deceased sustained numerous blunt impact wounds, scrapes, abrasions, and lacerations to the forehead, temple, back of the head, right cheek, eyes, lip, and mouth. These injuries were

³¹ Shenouda assigned each bloodstain an identifier.

consistent with being punched and kicked (T.716-20). There were defensive incised wounds present on the body to the hands and lower right leg (T.710-13).

C. The Defendant's Case

Lieutenant Benintendo

Lieutenant Benintendo testified that when he arrived at the scene he saw the defendant being dragged or carried through the streets. He saw that the defendant had an injury to his back, and instructed an officer to drive the defendant to Methodist Hospital (T.761-64). The defense admitted into evidence the defendant's hospital records (T.804).

Detective Taylor

Detective Taylor testified that he interviewed Witness 1 and Witness 1 stated the defendant kicked and punched the deceased (T.782). Witness 1 did not tell him that the defendant slashed the deceased's neck (T.782-83).

D. Summations

The Defense

Defense counsel attacked Witness 1's credibility. Counsel pointed out that Witness 1 testified that he told Detective Taylor that the defendant slashed the deceased's throat, and Taylor testified that Witness 1 did not tell him that.

Counsel argued that the defendant was a victim, noting that Lieutenant Benintendo observed that the defendant was injured and had the defendant transported to the hospital. Counsel also argued that due to the severity of the defendant's wounds he was not physically capable of slashing the deceased's neck.

Counsel further argued that since the police had seen the defendant being carried up the street by others, it was possible that the blood on his shirt—even if it was the deceased's—had been transferred to his shirt from another person, as Shenouda conceded was possible (T.917-26).

The People

Although the prosecution elicited testimony from Witness 1 that the defendant jumped on, kicked and struck the deceased as well as slit the deceased's throat, the prosecution only mentioned the latter in summations. The prosecution argued that Witness 1's identification of the defendant was reliable because, as a former Latin King, he was familiar with the defendant. The prosecution maintained that Witness 1's testimony that the defendant slit the deceased's throat was accurate because Witness 1 was in the middle of the assault and his opportunity to observe was excellent. The prosecutor maintained that Witness 1's testimony was corroborated by other evidence. For example, Witness 1's testimony that he did not know the identity of the person with the knife, was corroborated by the fact that fingerprints lifted from the knife did not

belong to the defendant or the codefendants. Furthermore, the evidence confirmed that the deceased was slashed in the neck. Moreover, the prosecution maintained that Witness 1 had no motive to lie and every reason to stay silent because as a former Latin King he placed himself in danger by testifying against the defendant and the codefendants (T.937-43).

The prosecution argued that the serologist accurately concluded that the blood on the defendant's white T-shirt came from the deceased. In support, the prosecution noted that the serologist accurately concluded that the blood on the back of defendant's jacket was not from the deceased, since that was the location where the defendant was stabbed (T.935).

The prosecution argued that the defendant was not a victim because a victim would have remained at the scene. The defendant's attempt to leave the scene showed consciousness of guilt (T.945).

E. The Charge and Verdict

The jury was charged with the single count of Murder in the Second Degree (P.L. § 125.25[1]) for each defendant, under an acting in concert theory.

In pertinent part and as is standard, the jurors were instructed that if they determined that "any witness has willfully testified falsely as to any material fact," they "may disregard the entire testimony of that witness, or [they] may accept parts of what a witness told [them] as truthful and reject other parts as not being truthful or accurate" (T.970-71).

The jury found the defendant, Correa, Codefendant 1, and Hector Perez guilty. The jury acquitted Cooperator A.

F. The Sentence

Prior to sentencing the defendant was interviewed by the Department of Probation for a pre-sentence report. Defendant denied his guilt. He stated that "the father of the guy who stabbed him lied."³² The defendant stated that he did not slash the deceased's throat.

On October 21, 1996, at sentencing, the defendant stated, "[s]orry about what happened" (S.36). The court stated,

the evidence was very strong that [the defendant] had a knife or razor-like instrument and that he slashed the throat of [the deceased] when [the deceased] lay motionless and helpless on the ground

(*id.* at 39). The court sentenced the defendant to a prison term of twenty-five years to life (*id.*).

³² The "father of the guy" makes little sense, but the defendant likely meant that Witness 1 lied since Witness 1 was the only one who testified against the defendant at trial.

VI. The Post-Conviction Proceedings

On February 15, 2001, the defendant moved, *pro se*, to vacate the judgment pursuant to C.P.L. § 440.10, and for DNA testing pursuant to C.P.L. § 440.30(1-a). The defendant claimed that trial counsel was ineffective for failing to challenge the serological evidence and request DNA testing. The defendant requested DNA testing of the bloodstain recovered from his T-shirt, which the serologist had found to be consistent with the deceased's blood.

On April 16, 2001, the court summarily denied the motion in its entirety. The court stated, "the absence of DNA testing was more prejudicial to the prosecution than to the defense." The court also stated that whether the defendant had the deceased's blood on him "was not a material issue at the trial. There was no question the defendant had lots of blood on him and had been involved in a fight which led to the [deceased's] death."³³

VII. The Federal Investigation and Prosecutions³⁴

In January 1994 (almost two years before the deceased's murder), the United States Attorney's Office, with the FBI and the NYPD, commenced a citywide investigation into the Latin Kings narcotics trafficking activities. The investigation eventually led to the federal convictions of several members of the Latin Kings for the deceased's murder, all of whom had not been prosecuted by the state.³⁵

A. *Cooperator "A"*

In June 1998, Cooperator A was the first to inform the federal government ("the Government") about the deceased's murder. The Government determined that his information was credible. Cooperator A (who had been acquitted at the state trial) pled guilty to Conspiracy to Distribute Narcotics and was sentenced to 36 months of incarceration.

In pertinent part, on June 7, 1999, Cooperator A stated the following: He and several Latin Kings went to the club to celebrate his birthday. He and others had concealed knives and razors. Cooperator A gave an account of the dance floor incident consistent with that of most other witnesses. He stated that the defendant and Correa went out the side door to look for the person who bumped into the defendant. Outside, he saw the defendant with Hector Perez, Eduardo Velez, Melvin Garcia, and Cooperator B (*infra*). They all agreed to "get" the person who bumped the defendant. The defendant and Correa went inside to look for the individual.

³³ The defendant also filed a direct appeal and a *coram nobis*, neither of which raised issues relevant to CRU. The Appellate Division affirmed the judgment of conviction (*People v. Pacheco*, 265 A.D.2d 347 [2d Dep't 1999]), and denied the *coram nobis* application (*People v. Pacheco*, 294 A.D.2d 452 [2d Dep't 2002]).

³⁴ The information in this section was obtained from the federal law enforcement files.

³⁵ To protect the identities of the four Latin Kings who cooperated with the federal government they are not named. Cooperator A, who was acquitted of the deceased's murder at the state trial, pled guilty to Conspiracy to Distribute Narcotics. Cooperators B, C and D each pled guilty to Murder in the Aid of Racketeering relating to the deceased's murder.

A few minutes later, the defendant came out the side door and yelled something at Cooperator A. Cooperator A pulled out a knife and then got bumped hard. He turned and swung the knife at the person who bumped him, who turned out to be the defendant.

A crowd came outside and beat the deceased. Someone yelled to the defendant, "Yo, we got him!" Numerous Latin Kings were punching the deceased. At this point, the defendant was on the ground and two females were trying to help him up. Codefendant 1 was not near the deceased. Cooperator A told Codefendant 1 that the defendant was injured and needed help.

As the deceased attempted to go back in the club through the side door, Gregory Pirrone stabbed him and accidentally stabbed Correa's hand. Codefendant 1 removed his shirt and used it to wrap Correa's hand. Others approached and slashed and stabbed the deceased. Correa backed away.

Velez, Pirrone, and Cooperator D (*infra*) repeatedly stabbed the deceased. Hector Perez slashed the deceased with a razor. When the deceased fell, Melvin Garcia approached from behind and slashed his throat with a razor.

On October 27, 2000, Cooperator A gave another statement to the Government. This statement was consistent with his first, but added that after the stabbing, he went up the block and saw the defendant, who said he could not breathe. Witness 8 and 9 helped the defendant walk. He helped the defendant cross the street.

B. Cooperator "B"

Cooperator B's information was instrumental in obtaining other federal convictions. In pertinent part, on July 9, 1998, Cooperator B made the following statement: Correa had a bloody nose and left through the side door. The defendant, "King Chubby," Hector Perez, Pirrone, and Velez were on top of the deceased beating him. Everyone repeatedly punched the deceased.

Melvin Garcia grabbed the deceased's head from behind and sliced him across the throat with a razor. Pirrone and Velez each had a knife and stabbed the deceased. Hector Perez cut the deceased with a razor and accidentally cut Cooperator B, who did not have a weapon.

During the attack, Cooperator A accidentally stabbed the defendant. Codefendant 1 did not stab or assault the deceased.

After everyone backed away and the deceased fell, Cooperator C (*infra*) stomped on the deceased stating that he had been cut. A Latin Queen, "Queen Chucky," and another woman cradled the deceased.

C. Cooperator "C"

The Government determined that Cooperator C's information about the assault was credible. On June 9, 1999, Cooperator C gave a statement, which was generally consistent with Cooperators A's and B's statements. Cooperator C said that when Correa came out of the bar with a bloody face Cooperator A said, "nobody is leaving until I know who hit my brother." Cooperator C hit

the deceased and stabbed him in the chest with a knife. Melvin Garcia cut the deceased across the throat with a razor.

Cooperator C's single mention of the defendant was that when the defendant was taken into custody, he yelled the Latin King rally cry "Amor de rey," and "[f]uck the police, I killed him."

Cooperator C stated that a witness at the state trial was a Latin King, who lived above the club. This witness punched the deceased and lied at trial.³⁶

D. Cooperator "D"

The Government determined that Cooperator D's information was credible. In pertinent part, on January 8 and February 21, 2001, Cooperator D stated the following: He and ten to thirteen others attended a Latin Kings meeting. After the meeting, they went to the club where some of them spoke to a former Latin King, whose father owned the bar, and who lived above the bar. They arranged for everyone to enter the bar without the bouncer searching them for weapons. Cooperator D had a folding knife in his pocket.

Inside the bar a fight broke out involving some Latin Kings during which Correa sustained a bloody nose. The defendant, Correa, Pirrone, Hector Perez, Velez, Melvin Garcia and Cooperator A rushed out the side door. After a couple of minutes, Cooperator D went outside where the defendant and the others were punching, kicking, and stabbing the deceased, who was on the ground. Pirrone and other Latin Kings told Cooperator D, "Do your part, do your part."

The defendant, Pirrone, and Cooperator C were stabbing the deceased with knives. The defendant had a folding knife with a black rubber handle. Garcia and Correa slashed the deceased's throat with razors. Velez kicked the deceased and stabbed him with a knife.

The defendant and others shouted, "Amor de rey!" Someone passed Cooperator D a knife and said, "You know what you have to do, or you will wind up like him." Cooperator D stabbed the deceased in the lower body.

E. Garcia, Pirrone, and Velez Pled Guilty

Melvin Garcia, Pirrone, and Velez each pled guilty to Murder in the Aid of Racketeering, and other charges. In relevant part, at his plea, Garcia admitted that he caused the deceased's death by "cutting him up, slicing him up." At his plea, Pirrone admitted that he participated in the fight and "agreed to kill" the deceased. Neither Garcia nor Pirrone mentioned the defendant, or claimed that any of the defendants in either the state or federal proceedings were innocent.³⁷

³⁶ Apparently, Cooperator C was referring to Witness 1. Cooperator C told CRU that Witness 1 lied when Witness 1 testified that he did not punch the deceased inside the bar (*infra* at 25, XI. J.).

³⁷ CRU did not obtain Velez's plea minutes.

VIII. Vacatur of Codefendant 1's Conviction

Cooperators A and B had told the Government that Codefendant 1 was not involved in the murder (*supra* at 14-15, VII. A. and B.). On October 4, 2000, federal investigators interviewed Codefendant 1. He claimed that he was innocent, and that the blood on his clothes came from Correa and “Cooperator C,” who he had helped with their injuries: Correa had a bloody nose and Cooperator C had a cut on his hand.

In November 2001, the A.U.S.A. had the OCME conduct DNA testing on certain blood evidence recovered from the clothing of Codefendant 1, Correa, and Cooperator C.³⁸ The results revealed that the blood on Codefendant 1's clothing came from Correa and Cooperator C, and not the deceased. The DNA results were consistent with Codefendant 1's account.

On April 24, 2002, the Supreme Court, Kings County (Marrus, J.), vacated Codefendant 1's judgment of conviction on the KCDA's motion. The KCDA's position was that the DNA evidence did not establish his innocence, but that Codefendant 1 was entitled to a new trial because the only evidence against him had been the blood on his clothing and the testimony of one witness (Witness 2), who was a stranger to him. The indictment against Codefendant 1 was ultimately dismissed.³⁹

IX. Modification of Roberto Correa's Judgment of Conviction

On July 26, 2005, Correa, through counsel, filed a C.P.L. § 440.10 motion based on newly-discovered evidence and actual innocence. Correa argued that Codefendant 1's conviction was vacated because the 2001 DNA testing showed that his clothing did not contain the deceased's blood, but that Correa's conviction was not vacated because the 2001 DNA testing revealed a small amount of the deceased's blood on the sole of Correa's shoe.

In support, Correa submitted, among other documents, a letter dated November 8, 2004, from Melvin Garcia to Correa's attorney, and an affidavit from Garcia, dated January 21, 2005, both stating that Correa was innocent. In sum and substance, Garcia stated that: he cut the deceased's throat, head, and back with a razor; Pirrone repeatedly stabbed the deceased in the chest; and the other stab wounds were inflicted by Velez, and Cooperators A, B, C, and D. Garcia did not mention the defendant.

Also, Correa attacked the credibility of trial witnesses, who identified him as a participating in the fatal assault—including Witness 1. Correa argued that Witness 1's testimony was incredible

³⁸ Certified OCME file, FB number FB95-1349, dated November 19, 2001.

³⁹ The KCDA files do not contain any documents reflecting the reason for the dismissal of the indictment, and neither the Appeals A.D.A., who had handled the post-conviction proceedings, nor the trial prosecutor recalls the reason.

given that Witness 1 testified that the defendant (Pacheco) slit the deceased's throat, but Garcia committed that act.

On December 15, 2005, Correa's murder conviction was vacated, and he pled guilty to Assault in the First Degree (intent to cause serious injury with a weapon) and was sentenced to time served.⁴⁰

X. DNA Testing in 2007 of Bloodstains on the Defendant's Clothes Confirmed the Presence of the Deceased's Blood

In November 2006, OCME's legal liaison Mimi Mairs asked the trial prosecutor whether, in light of Codefendant 1's DNA results, he would agree to DNA testing of the bloodstains recovered from the defendant's clothes. The prosecutor contacted the defendant's then attorney and they jointly requested the DNA testing.⁴¹

In 2007, OCME Criminalist Melissa Smith performed the testing and concluded that the following three bloodstains on the defendant's clothes matched the deceased's DNA profile:

- 1) a bloodstain oriented vertically, directly in the center of the front of the defendant's white T-shirt, measuring 2.3 cm by 5.5 cm (stain #4A-1);
- 2) four small bloodstains on the upper, rear of the left leg of the defendant's jeans, measuring 2.5 cm by 0.8 cm (stain #1I-1), one bloodstain of which was a mixture of the deceased's and another male's DNA; and
- 3) a bloodstain oriented horizontally, on the lower right sleeve of the defendant's jacket, measuring about 10 cm by 2 cm (stain #7L-1).⁴²

XI. The CRU Investigation

The U.S. Attorney's Office forwarded KCDA a letter that it had received from Melvin Garcia, dated October 7, 2013, in which Garcia stated that he committed the crime and that the defendant was innocent.

Thereafter, the defendant wrote the KCDA stating that he was innocent and that the following witnesses support his claim: Garcia, Correa, Witness 8, Witness 9, and Cooperator A. The defendant added that:

[Cooperator A] is now an informant for the United States District Attorney's office (sic), is willing to testify to the truth that he stabbed me before Garcia cut

⁴⁰ By papers dated September 29, 2005, a former Appeals Bureau A.D.A. opposed Correa's motion in its entirety. The file does not contain any documents reflecting the reason for the modification, and neither the Appeals A.D.A. nor the trial prosecutor recalls the reason.

⁴¹ See certified OCME file, FB#1349, July 30, 2007.

⁴² All of the identifying stain designations were made by serologist Shenouda in 1996.

the [deceased's] throat. I never cut the [deceased]. Cooperator A will testify to that and how he was scared during the melee, and that's why he stabbed me in the first place. I was hospitalized for 27 days as a result of Cooperator A's stab wounds, and because I didn't cooperate with the detectives, I was indicted.

CRU's investigation included a review of the following: files of the KCDA, OMCE, and federal law enforcement; the defendant's medical records; and the transcripts of the grand jury, pretrial hearings, and trial.

CRU also conducted numerous interviews (discussed *infra*), and told the witnesses that it was conducting a general review of the murder.⁴³ The witnesses were not told that the defendant was the focus of the investigation. But the defendant's prior attorney told Garcia, Correa, Witness 8 and 9 that CRU was investigating the defendant's conviction, and Cooperator B had read a press account about it.

A. *The Interviews of Melvin Garcia*

1. Counsel's Interview of Garcia

The defendant's prior attorney provided CRU with a recorded phone interview the attorney had with Garcia. In sum and substance, Garcia stated the following: The defendant and Correa were friends, but fought each other on the night of the murder. The deceased was caught up in the melee and the Latin Kings thought the altercation involved the deceased. "We" jumped on the deceased, Garcia cut the deceased's throat from ear to ear, and someone fatally stabbed the deceased.

Garcia stated that Cooperator A was involved in the fight. His statements regarding the defendant are confusing and somewhat contradictory. He states that Cooperator A mistakenly stabbed the defendant in the back as the defendant attempted to stab the deceased. But Garcia also stated that the defendant was not involved in the attack. Garcia stated that when the defendant was stabbed, the defendant sat down, and the altercation happened a few minutes later.

Garcia speculated that Witness 1 was pressured to testify against the defendant because Witness 1 probably feared being implicated in the murder.

Garcia claimed that during his federal plea allocution he admitted that he slashed the deceased's throat and cut the deceased inside the bar, and that he and others dragged the deceased outside where the deceased was stabbed.⁴⁴

⁴³ Unless otherwise stated, all interviews were conducted in person.

⁴⁴ During the plea, Garcia stated that he killed the deceased "by slicing him up, cutting him up." Garcia first stated that he slashed the deceased's throat in his November 8, 2004 affidavit in support of Correa's C.P.L. § 440.10 motion.

2. CRU's Interview of Garcia

Thereafter, CRU conducted a recorded phone interview with Garcia, and he stated the following: A bouncer let the Latin Kings bring weapons into the bar. Garcia had a box cutter. An altercation ensued between the defendant and "Moses" over a woman. Correa pulled the defendant's shirt over his head, and the defendant punched Correa in the nose. The defendant and Correa fought Moses's crew. Cooperator A attempted to stab one of Moses's crew, but mistakenly stabbed the defendant in the lung and back.

During the altercation the deceased came out of the bathroom. Garcia and others mistakenly believed that the deceased was with Moses. Garcia ran toward the deceased and observed the defendant, bent over, on the floor. The defendant "never touched [the deceased] at any time." Garcia and others dragged the deceased outside where they "cut him up." Pirrone stabbed the deceased and Garcia cut his throat.

Witness 8 and 9 carried the defendant outside. As Garcia and others stabbed the deceased, the defendant headed up the block.

Garcia and other Latin Kings met Witness 1 that night. Witness 1 was a bouncer that night, and let the Latin Kings bring weapons into the club. Garcia did not see Witness 1 during the stabbing.

Garcia acknowledged that, in 2004, he wrote a letter and affidavit for Correa stating that Correa was innocent. Asked why he waited until 2013 to come forward for the defendant, Garcia replied that he left the Latin Kings in 2011, at which point he "became a better spiritual person," "got right with God," and "[g]uilt creeps up on you when you sit in a cell and think of all the bad things you've done, and things you want to make right."

B. DNA Testing of the Bloodstains on the Defendant's Clothes

In 2017, CRU had the OCME perform DNA testing of the bloodstains recovered from the defendant's clothes. The DNA testing confirmed the DNA test results conducted in 2007—the deceased's blood was on the defendant's T-shirt, jeans, and jacket. OCME forensic analyst Lori-Ann Walters opined, "this DNA result is approximately 2.47 quadrillion (2.47×10^{15}) times more probable if the sample originated from [the deceased] than if it originated from an unknown person."⁴⁵

C. Interview of the Defendant

The defendant gave an unsworn audiotaped statement to CRU in the presence of his current counsel. Counsel did not impose any restrictions on the interview. No agreement was entered into or discussed.

⁴⁵ Certified OCME files, FB#1349, dated August 11, 2017.

In sum and substance, the defendant stated the following: Earlier on the day of the incident he attended a Latin Kings meeting. Although weapons were not allowed at meetings, no one surrendered their weapons. Before entering the bar, the defendant, Hector Perez, Correa, and Cooperator A went up to Witness 1's apartment. The defendant met Witness 1 once, about three weeks before the crime, at a Latin Kings meeting. Witness 1, the defendant, and Perez spoke outside Witness 1's door, and Perez asked Witness 1 why he stopped attending meetings. They talked for about ten to fifteen minutes. The defendant stood at the top of the stairs during the conversation, with an unobstructed view of Witness 1. Witness 1 offered them food, which the defendant and the others declined. Witness 1 told them not to start any trouble in the bar.

The defendant and the others then went down to the club. Most of the other Latin Kings were present. The defendant saw Witness 8 and 9 at a table near the side door. The defendant and Correa joined them.⁴⁶

After a few minutes Moses approached the table, angry. The defendant and Moses exchanged words, and were separated by others. The defendant left the club for about fifteen minutes, and when he returned Witness 9 was dancing with Moses. The defendant danced nearby with another woman, when he felt a sharp blow to his back. He assumed that Moses had struck him, so he turned around and began punching the person behind him, who turned out to be Correa. Correa's face was bleeding; he was angry and left through the side door. The defendant followed, apologized, and explained what had happened.

The defendant then heard others yell out to him, "We got the guy inside." The defendant returned to the bar, and saw Cooperators A, B, and C assaulting the deceased. The defendant knew the deceased as "Lenny" from 5th Avenue and 52nd Street. The defendant did not see any weapons. He threw Cooperators A and B off of the deceased, but someone else jumped on the deceased.

The defendant then felt a sharp pain in his back. He felt that he was losing his breath and his vision blurred. He went out the side door and dropped to his knees. Witness 8 and 9 followed. The defendant felt pain in his stomach and thought he had been stabbed in the stomach. Witness 8 lifted his shirt, and blood was streaming down his front. The defendant was on his knees, facing the club, holding himself up with one hand, clutching his stomach with the other.

CRU showed the defendant a crime scene photo of the sidewalk next to the bar and asked him to mark the location where he fell to his knees. The defendant marked an area of the sidewalk on the 7th Street side of the bar—an area which, according to the forensic evidence, did not have any blood on the sidewalk.

The defendant stated that people came out and passed him on his right. His blurred vision prevented him from seeing whether the people were walking or running. He did not know whether these people were involved in a fight.

⁴⁶ The defendant stated that he and Witness 9 had been in a romantic relationship since April or May 2017.

Witness 9 yelled for help and Correa, Codefendant 1, and Cooperator A responded. They helped the defendant get up and supported him as they walked up 7th Street towards 4th Avenue, until they were stopped by the police.

The defendant maintained that he did not have a knife, and did not see anyone with a weapon, razor, or knife at any time. The defendant stated that he had no direct knowledge of the Latin Kings's criminal activity.

D. Interview of Roberto Correa

In the presence of the defendant's counsel Correa gave CRU the following statement: He and the defendant grew up in the same neighborhood and were close friends. On the night of the murder, a fight broke out inside the club and someone struck the defendant. Not recognizing each other, Correa and the defendant fought one another, and the defendant gave Correa a bloody nose. Although Correa did not see who started the fight, he and other Latin Kings went to find the person. People started to leave the club through the front door. Correa ran out of the side door over to the front of the club, and checked everyone as they left the club.

Correa then heard, "we got him, we got him." He went around to the side where a crowd rushed out the door. Some of Correa's friends were assaulting the deceased. Correa went to grab the deceased, but was stabbed in the hand. Correa saw Witness 8 and 9. Witness 9 said, "that's black Lenny" (the deceased), who Correa knew from his block. Correa called out, "that's not him" (the person who started the fight), but it was too late.

When the Latin Kings fled Correa saw the defendant on the ground. Correa picked the defendant up and hailed a cab, but the driver refused them because they were covered in blood. The police arrived and arrested Correa and the defendant.

Correa would not name the assailants, and claimed that he did not know what anyone did to the deceased. He claimed that he did not see any weapons, but knew the assailants were armed because he had been stabbed, and "everybody always had something." He said the incident happened fast and the deceased might have been stabbed before Correa went outside. Correa did not see the defendant get stabbed, but the defendant was on the ground by the time Correa went outside. Correa claimed that since his conviction he did not discuss the incident until now.

E. Interview of Witness 8⁴⁷

In the presence of the defendant's prior counsel Witness 8 told CRU the following: She was fifteen years old at the time of the incident. She went to the bar with Witness 9 to meet the defendant and Correa. A fight broke out between the defendant and Correa, followed by a commotion. Bouncers pushed people out of the bar, including Correa. Witness 8 and 9, and the defendant were locked inside. The defendant opened the side door and ran out to fight Correa.

⁴⁷ CRU's account of Witness 9's interview includes a follow-up audiotaped telephone interview.

Some people were behind the defendant, one of whom might have been Cooperator A. Witness 8 and 9 went out behind others.

Outside, the defendant was on the ground bleeding. There was a commotion “almost at 3rd Avenue.” It was not near the defendant, who was closer to the side exit. Witness 8 and 9 ran to the defendant and picked him up, with the help of Correa, who was also bleeding. Two males approached from the direction of the assault to help. Witness 8 did not see any weapons, she did not see the defendant holding anything. At no time did Witnesses 8 or 9 go near the incident or the deceased.

Witnesses 8, Witness 9, Correa, the defendant, and possibly the two others, walked up 7th Street towards 4th Avenue. The police stopped them and placed them against a wall. Witness 9 told the police that the defendant was bleeding and an ambulance was called.

About one month after the incident, Witness 8 learned that the defendant was going to be arrested for the deceased’s murder. She believed that the defendant “didn’t have anything to do with it,” but Witness 9 told her not to get involved. Witness 9 once brought her to visit the defendant in jail. She did not attend the trial, and lost touch with Witness 9 and others associated with the incident. Witness 8’s cousin is currently dating one of the defendant’s friends, who had recent contact with Correa. Her cousin told her that “they were trying to help out the defendant,” which is how Witness 8 contacted the defendant’s attorney.

F. Interview of Cooperator B

Cooperator B gave the following audiotaped statement to CRU: On the day of the incident, after attending a Latin Kings meeting, he and several other Latin Kings went to the bar to celebrate Cooperator A’s birthday. On the way they got “really drunk” and continued to drink at the bar.

A fight broke out and people poured out of the club. Cooperator B did not know what happened, but left through the front door. He went around the corner towards the side door where he saw the defendant, Velez, Pirrone, Hector Perez, Correa, and Latin King “Chubby” beating the deceased. Cooperator B and Garcia joined in. As Cooperator B punched the deceased, Perez accidentally cut his hand with a box cutter. At that point, he saw the deceased bleeding. Before then, he had not seen any weapons.

Cooperator B withdrew from the assault and several Latin Kings stabbed the deceased. Garcia slashed the deceased’s throat and the deceased dropped to the ground. Numerous Latin Kings had blood on them. Cooperator B did not know whether the defendant had a knife, but the defendant was “in the fracas.” He did not see the defendant get stabbed or fall.

G. Attempt to Interview Witness 5

Witness 5 did not testify at the trial despite having identified the defendant as someone who stabbed the deceased. CRU reached Witness 5 by telephone. He denied making any identifications in the case and refused to cooperate.

H. Interview of Witness 3

Witness 3 identified the defendant in a showup, and made a statement at the scene (*supra* at 2, III. B. and 3-4, III. E.). He refused an in-person interview with CRU, but agreed to a twenty-minute telephone interview.

Witness 3 did not fully recall the details of the crime. He recalled a fight outside the bar, on the 7th Street side, but did not know any of the assailants. He did not recall his statements to the police and claimed that he “only remembered calling 911.” He stated that he encountered two police officers in a police car, and pointed to a group of men fleeing the scene. The police grabbed the individuals running away and showed them to Witness 3 and twenty other witnesses, who made identifications.

Witness 3 confirmed that he gave a statement to Detective Crowe at 3:00 a.m., but denied virtually every detail contained in Crowe’s DD5. Witness 3 also maintained he had heard that there was a fight outside the bar, but not see it because “there was no light outside.”

I. Interview of Witness 6

Witness 6 had identified the defendant in a photo array as the person who stomped on the deceased and she punched in the face (*supra* at 5, III. E.). Witness 6 made an audiotaped statement to CRU. The deceased was Witness 6’s “best friend” and she was visibly upset during the interview.

Witness stated the following: A fight started at the back of the bar, and then they all went outside where everyone was fighting. She went out the front and went around to the side door. She saw people running, and she saw the deceased on the ground. She went over to the deceased and saw that his neck had been cut.

CRU showed Witness 6 her statement to Detective Ruiz. She did not recall her statement. She explained that she was upset and hysterical at the time.

Witness 6 did not recall viewing a photo array. She stated that while viewing lineups she identified someone with a bruise on his face because the police told her that she had punched an assailant in the face. She also stated that she identified someone at a showup just after the incident (Witness 6 is not listed as an identifying witness at the showup).

J. Interview of Cooperator C

CRU spoke to Cooperator C by telephone to set up an in-person interview. During this conversation, which was not recorded, he stated the following: He believed that Cooperator A accidentally stabbed and incapacitated the defendant before the deceased was stabbed. He observed the defendant punch the deceased, but he did not believe that the defendant stabbed the deceased.

Cooperator C stated that in the club, prior to the stabbing, Witness 1 repeatedly punched the deceased, and Witness 1 lied about it at trial. When the stabbing started, Witness 1 stopped punching the deceased, and attempted to pull the assailants off the deceased.

After these statements, Cooperator C ended the interview.

K. Interview of Witness 1

CRU interviewed Witness 1, who is incarcerated, on audiotape. Witness 1 stated the following: On the night of the murder he was not working at the club. He was sleeping upstairs and woke when he heard someone screaming for him. He ran into the club and observed numerous Latin Kings on the dancefloor beating the deceased. Witness 1 told the bouncer to secure the front door. Witness 1 pulled the deceased out through side door and locked it. Witness 1 told the deceased to run, but he refused because his relative was in the club.

The Latin Kings went out the front door, around to the side, and surrounded Witness 1 and the deceased. They began to assault the deceased. Witness 1 attempted to pull off the attackers, but there were too many. He saw someone holding a “Rambo” knife, and others with orange box cutters and square razors. Witness 1 did not recall seeing any of the assailants get cut.

Someone, whose identity he did not recall, slit the deceased’s throat with a box cutter. When knives were displayed, Witness 1’s focus shifted from faces to weapons. But he claimed that he saw their faces very well when they first approached from the front door, and he observed their clothing. During the attack, when knives came out, his focus shifted from faces to weapons. He knew what each participant did by his clothes. Witness 1 knew two or three of the assailants. He did not recall the names of any Latin Kings who assaulted the deceased.

In an effort to refresh his recollection, CRU read Witness 1 a list of the Latin Kings—by their Latin King names, as well as their real names—believed to have been present at the incident. Witness 1 did not recall any of them or their roles in the assault. He recognized the names of Garcia, Velez, and the defendant, but did not recall what, if anything, they did. In a further effort to refresh Witness 1’s recollection, CRU reviewed with Witness 1 portions of his statements to detectives and his trial testimony. It did not help refresh his recollection.

Witness 1 insisted that his statements and testimony were true and accurate when made, including his statements that he saw the defendant cut the deceased’s throat with a box cutter. Witness 1 denied that the police pressured him, or suggested any of his identifications. He

recalled identifying someone in a photo array, but not recall the person's identity or what that person did. Witness 1 denied that the police threatened him with prosecution if he did not cooperate. But Witness 1 said the police knew he was a witness, and had to "convince" him to come forward.

L. Interview of Witness 9

Witness 9 gave an audiotaped statement to CRU. Witness 9 stated that a couple of months before the CRU interview, Correa contacted her and said, "We're trying to help [the defendant], can I give your number to his attorney?"

Regarding the incident, Witness 9 stated the following: She arrived at the club at approximately 12:30 a.m. with her friend Witness 9 and Witness 9's sister. She knew Correa and the defendant. The defendant was wearing a beige Shearling jacket.

There was a commotion and she and her friends went to leave through the front door. The bouncer would not let them leave, and they went to the side door where at least eight others rushed out in front of her. Outside, people were rushing in different directions. The defendant was on the ground. Witness 8 and 9 helped the defendant get up and walk up 7th Street toward 4th Avenue, where the police apprehended him and took him to the hospital.

Witness 9 did not see the deceased, she did not witness an assault, and she did not see anyone holding a knife. She never spoke to the police.

M. Interview of Cooperator A

CRU spoke to Cooperator A by video conference. He lives out of state and the interview was audiotaped. He stated that he had "zero communication with anyone" involved in the murder since he spoke to Cooperator B about twelve years ago. On the night of the murder, he was at the bar celebrating his birthday. He believed that he had gold caps on his teeth that night. He with the defendant, Codefendant 1, Correa, Garcia, Velez, Pirrone, Cooperators B and C, and Witness 8 and 9.

A fight broke out on the dance floor involving Latin Kings. There was a pause in the fighting, and a couple of people went out the side door (he did not recall their identities). Cooperator A followed. He prepared to fight and took out his knife. He told CRU that:

I had my back to the side door, was shoved in the back, and then turned around swinging. At that point I stabbed someone, I don't remember who it was . . . I remember who it was, but I didn't know who I had stabbed at that point. I stabbed [the defendant]. The fight passed us. It was a melee.

Cooperator A stated that his attention then went from the fight to the defendant. Witness 8 and 9 were helping the defendant get up from the ground. He did not see a knife in the defendant's hand, or one near the defendant.

At first, Cooperator A thought that the commotion was a brawl, but he then realized that a group was assaulting the deceased. He observed many Latin Kings punching, kicking the deceased, and using knives. He did not see any knives before he accidentally stabbed the defendant.

Cooperator A helped the defendant for about a minute. His attention then turned to the assault. Numerous Latin Kings were assaulting the deceased, some of whom stabbed the deceased. Early in the attack, a Latin King accidentally stabbed Correa in the hand and Correa withdrew from the assault. Garcia slit the deceased's throat.

After the assault ended everyone fled. Cooperator A headed up 7th Street where he saw Codefendant 1 tending to Correa and the defendant. He believed that Witness 9, Witness 9, and Codefendant 1 were helping the defendant walk up the street. He did not see Codefendant 1 or either of the women near the deceased.

N. Interview of Witness 2

Witness 2 told CRU that he did not recall seeing any assailant stabbed in the back, or fall to the ground, although some assailants received cuts or slash wounds. He did not recall anyone being stabbed inside the bar. Almost immediately after the assailants left through the side door, he saw someone with a knife stab the deceased. A male holding a knife walked past him towards the assault, saying, "Someone is going to die tonight."

Witness 2 stated that he identified someone in a photo array, but did not recall the person's identity or what that person did.⁴⁸

O. Attempted Interview of Cooperator D

Despite repeated attempts CRU could not locate Cooperator D, who had entered and left the witness protection program. CRU eventually obtained his cell phone number and left several unreturned voice messages.

XII. Analysis

A. Defendant's Claim of Actual Innocence is Unavailing

CRU cannot credit the defendant's claim of factual innocence; on the contrary, there is now ample evidence of his factual guilt of this murder. Immediately after the crime, in addition to Witness 1, three eyewitnesses identified the defendant as a participant in the fatal attack: Witness 3 identified the defendant at the showup immediately after the crime as one of the attackers who stabbed the deceased. Hours later, Witness 5 identified the defendant in a photo array as someone who stabbed the deceased two to three times with a big knife, and "kept coming back." Also, hours after the crime, Witness 6 identified the defendant in a photo array as

⁴⁸ It is not clear that Witness 2 identified the defendant in the photo array (*supra* at 6, III. E., n. 17).

someone who stomped on the deceased. Witnesses 3, 5, and 6 did not testify at trial, but there are no apparent reasons to discredit their identifications.

Moreover, during the federal investigation into the narcotic activities of the Latin Kings, two cooperating gang members, who participated in the fatal attack, separately maintained that the defendant was involved and culpable: In 1999, Cooperator C told federal investigators that when the defendant was apprehended, the defendant yelled “[f]uck the police, I killed him.” And in 2001, fellow Latin King participant Cooperator D informed federal investigators that the defendant stabbed the deceased with a knife. Notably, neither Cooperator C nor D had an interest in inculping defendant, and we see no reason to discredit their accounts.

Additionally, when CRU interviewed Cooperator B, he stated that he observed the defendant “on top of the deceased, beating him” during the fatal attack outside.

Importantly, DNA testing conducted in 2007 and 2017, has conclusively established that a significant amount of the deceased’s blood was present on the defendant’s T-shirt, jacket, and jeans (*supra* at 18, X. and 20, XI. B.).

Finally, it is undisputed by all witnesses, both state and federal, that the defendant was at the scene and had the motive to assault whoever bumped into him on the dance floor.

CRU does not credit the witnesses, including the defendant, who have belatedly come forward claiming that the defendant is innocent. In fact, CRU believes the defendant and his witnesses intentionally fabricated their accounts to CRU to advance defendant’s claim. Not only are their claims contradicted by the indisputable DNA evidence, but also their accounts are rife with inconsistencies and simply implausible.

CRU could not find a reasonable innocent explanation for the presence of the deceased’s blood on the defendant’s clothes. If one exists, it contradicts the statements of every witness (Garcia, Correa, Cooperators A and C, Witness 8 and 9, and even the defendant) claiming that the defendant was not involved in the fatal attack having been injured and incapacitated before the attack began.

The defendant maintains that he fell to the ground outside the club before the assault spilled out the side door. In fact, during the CRU interview, the defendant indicated on a crime scene photograph the precise location where he fell. But the photograph does not show any blood at that location. Moreover, none of the defendant’s exculpatory witnesses say that he fell in the area where the deceased was attacked. Additionally, no one who helped the defendant leave the scene—Correa, Codefendant 1, Cooperator A, Witness 9, and Witness 9—could have possibly transferred the deceased’s blood to the defendant’s clothes for the following reasons: Regarding Correa, DNA testing in 2001 showed that he had a small amount of the deceased’s blood the sole of his shoe (*supra* at 17, IX.). Regarding Codefendant 1, DNA testing in 2001 showed that the blood on his clothes was that of Cooperator C and Correa, and not the deceased (*supra* at 17, VIII.). Regarding Cooperator A, the 1996 serology testing showed that the blood on Cooperator

A's clothing was not consistent with the deceased's blood type (no DNA tests were conducted on Cooperator A's clothes) (*supra* at 11, V. B.). Regarding Witness 8 and 9 there is no evidence they were near the deceased, and they confirmed to CRU that they were nowhere near the deceased or the incident (*supra* at 23, XI. E. and 26, XI. L.).

An exhaustive body of evidence has been developed by the NYPD, the U.S. Attorney's Office, and CRU. This evidence shows that the only reasonable explanation for the deceased's blood on the defendant's clothing is he was assaulting the deceased while he and/or other assailants were stabbing and cutting the deceased whereupon the deceased's blood, flowing from the cutting injuries, was transferred by contact to the defendant. Whether the defendant used a weapon is irrelevant to the issue of guilt because the defendant was prosecuted under an accomplice liability theory.

B. Based on Evidence Developed in the Subsequent Federal Investigation it Now Appears the Defendant Was Prejudiced by False Trial Testimony

Regardless of the strong direct and circumstantial evidence of guilt, CRU has concluded that the defendant did not receive a fair trial. The current evidence of the defendant's guilt was not available and presented at trial, and the principal evidence at trial—the testimony of Witness 1—now appears unreliable in significant part. At trial, there was evidence of motive, but there was no DNA evidence. Although the serologist's testimony—that the defendant's white T-shirt had blood on it was consistent with that of the deceased's blood type—proved to be correct, such circumstantial evidence was not compelling. It was premised on a 54% possibility that it was consistent with the deceased's blood (*supra* at 11, V. B.).⁴⁹

The only direct evidence of the defendant's guilt was Witness 1's testimony. Witness 1 testified at trial that he observed the defendant, who he knew, kicking and punching the deceased during the fatal assault, and also observed the defendant slash the deceased's throat with a "razor box cutter" (*supra* at 9-10, V. B.). CRU has determined that Witness 1's trial testimony that the defendant slashed the deceased's throat, and did so with a razor box cutter, was most probably false (though the rest of his testimony regarding defendant has since been corroborated numerous times). Moreover, although the court instructed the jury that it could discount the false portion of any witness's testimony and credit other portions (*supra* at 13, V. E.), it is highly unlikely that the jury did not consider the slashing account since the prosecution relied on that account and urged the jury to accept it as the truth, and since that account is so singular and prejudicial.

⁴⁹ Indeed, DNA results showed that the serologist's conclusion that five bloodstains on Codefendant 1's clothing was consistent with the deceased's blood type, while correct using that methodology (ABO blood typing), was erroneous.

1. CRU does not credit Witness 1's trial testimony that the defendant slashed the deceased's neck

For the following reasons, CRU does not credit Witness 1's account that the defendant slashed the deceased's neck, or that he possessed a razor boxcutter.

a. The statements of Latin Kings who participated in the attack belie Witness 1's account

CRU has learned that four Latin Kings who participated in the fatal attack—Cooperators A, B, C, and D—all maintained, after the defendant's conviction, that Garcia slashed the deceased's throat.⁵⁰ These four participants separately told that to federal investigators when they sought to become cooperating witnesses. They had no apparent agenda in making this particular claim and they had every incentive to tell the truth and were obligated to do so.

Moreover, Garcia and Cooperators A and B each told CRU that the Garcia slashed the deceased's throat.⁵¹ All accounts appear to be credible. Accordingly, it more likely that Garcia, and not defendant, slashed the deceased's throat. For this reason alone, Witness 1's account that the defendant slashed the deceased throat is not credible.

b. No other witness stated the defendant slashed the deceased's throat, or possessed a razor or boxcutter

Another factor undermining Witness 1's account is that no other witness maintained that the defendant slashed the deceased's throat. As stated (*supra* at 27-28, XII. A.), shortly after the murder, three eyewitnesses identified the defendant a participant in the fatal assault. Two witnesses stated that the defendant stabbed the deceased; one witness stated that the defendant stomped on the deceased. None of the witnesses stated that the defendant possessed a razor or box cutter.

Similarly, neither Cooperator C nor D, who implicated the defendant to federal investigators, maintained that the defendant slashed the deceased's throat, or possessed a razor or a box cutter (*supra* at 15-16, VI. C. and D.).

c. Witness 1 erroneously described the defendant

Witness 1's account that the defendant slashed the deceased's throat is further undermined by the fact that he gave the police an erroneous description of the defendant. In his initial statement to Detective Taylor, Witness 1 made clear that the defendant and the Hispanic male with the Shearling coat and gold teeth were two different people (*supra* at 4-5, III. E.). Shortly thereafter,

⁵⁰ At his plea allocution, Garcia said that he caused the deceased's death by "cutting him up, slicing him up" (*supra* at 16, VII. E.).

⁵¹ Cooperator C, who did not fully cooperate with CRU, did not repeat the claim, but stated that he did not believe that the defendant stabbed the deceased.

when Witness 1 viewed the photo array he identified the defendant and stated that the defendant wore a Shearling coat and had gold teeth (*id.*).

Moreover, Witness 1 was incorrect. Upon arrest, the police recovered and vouchered the defendant's clothing, and a Shearling coat was not recovered from the defendant. The defendant had been wearing a brown, waist length jacket (*supra* at 3, III. D.). Furthermore, Cooperator A is clearly depicted in his arrest photo wearing a Shearling coat, which appears to be brown.⁵² No other witness who identified the defendant after the crime placed him in a Shearling coat, and no witness reported seeing two participants wearing Shearling coats.⁵³ In fact, Witness 4 identified Cooperator A as wearing a Shearling coat with white fur (*supra* at 6, III. E.), and Witness 7 testified at trial that Cooperator A was wearing a Shearling coat (*supra* at 8, n. 24). Also, there is no evidence that the defendant had gold teeth and no witness reported that.

Notably, Witness 1 told CRU that when the knives and razors were produced, his focus shifted to the weapons. Witness 1 maintained that he knew each participant's acts because he distinguished the attackers by their clothes. Therefore, the reasonable inference is that these particular acts that Witness 1 attributed to the defendant were in fact those of someone other than the defendant, and that Witness 1 had no basis to know with any certainty the defendant's actions after the point at which the assailants produced their weapons.⁵⁴

A critical issue in determining the defendant's guilt of intentional murder (as opposed to misdemeanor assault), whether by direct commission or acting in concert, is whether the defendant participated in the assault once weapons were produced and, thus, shared the intent to kill. CRU does not credit Witness 1's testimony regarding the defendant's acts during that the fatal portion of the assault, and therefore concludes that Witness 1's testimony—the only direct evidence of the defendant's guilt—was unreliable.

2. The prosecution relied on Witness 1's inaccurate account

If the prosecution had known at the time of trial that which CRU has concluded based in substantial part on the subsequent federal investigation—that Garcia, and not the defendant, slashed the deceased's throat—the prosecution would not have relied on Witness 1, as it did, to powerfully argue to the jury that the defendant was the throat-slasher without mentioning in summation that he was also, according to Witness 1, a striker.

In its opening statement, the prosecution twice referred to Witness 1 as a “very special witness” because Witness 1 would testify that the defendant slit the deceased's throat (T.39, 42).

⁵² Cooperator A's arrest photo is black and white.

⁵³ Given all the evidence to the contrary, CRU does not credit Witness 9's recent statement to CRU that the defendant wore a Shearling coat.

⁵⁴ There is no evidence Witness 1 ever supplied this information concerning the rationale for his identification to anyone before doing so to CRU. Certainly, he never revealed this to the police or the A.D.A.s during the investigation and prosecution of the homicide so that they would be aware of this flaw in Witness 1's account.

The slashing of someone's neck with a razor is an exceptionally dramatic, gruesome, and sadistic act. It is undoubtable that the defendant was prejudiced by the account of this singular act, and that we cannot go back and now imagine that he would have been convicted without it (even though the jury had also heard evidence that he struck the deceased, and other co-defendants who only struck the deceased were convicted of murder).

Notably, the defense argued on summation that Witness 1 was incredible because Witness 1 insisted that he told Detective Taylor that the defendant slashed the deceased's throat, but Taylor testified that did not happen. On summation, the prosecution maintained that Witness 1 was credible. The prosecution argued,

Now, each and everything that [Witness 1] told you was corroborated by the other evidence, whether it's physical evidence or testimony, of the other witnesses. What else does Witness 1 tell you that's absolutely corroborated by the evidence in this case? He tells you that [the defendant] slits [the deceased's] throat. Well, what does Dr. Seijo [the medical examiner] tell you when she gets on the stand to testify? She tells you that when she conducts the autopsy that he has an injury to his neck from his ear to the middle of his throat. What does Police Officer Troeller tell you when she gets on the stand to testify? She tells you about the injury to [the deceased's] neck. What does [Witness 2] tell you when he discusses what he finds when he goes back to the corner of 7th Street and 3rd Avenue? Among other things, the gash to [the deceased's] neck. That injury, having the throat slit, is so unique that the only way you could know that it happened was if you saw it happen.

(T.943). This is not to fault the trial prosecutor. Without the highly coincidental and extraordinary circumstance of a federal prosecution for the same crime which flowed, not from a fresh look at this murder, but from cooperators caught up in a general investigation of Latin King narcotic activities as a criminal enterprise years after the fact, and Witness 1's dubious rationale for his identification of the defendant as the throat slasher uncovered by CRU many years later, the trial prosecutor certainly was warranted in arguing, forcibly and with good faith, that the defendant was a principal and accomplice in the homicide and evidenced irrefutable intent to kill by virtue of his role in cutting the deceased's neck with a razor box cutter.

XIII. Conclusion

There is a substantial body of evidence outside the trial record, and developed after the trial concluded, that the defendant stabbed the deceased with a knife during the fatal attack: the considerable amount of the deceased's blood on the defendant's clothes, and the statements of four non-testifying witnesses who all stated that the defendant stabbed the deceased, three of whom stated that the defendant used a knife. This is exacerbated by witnesses who came forward on the defendant's behalf, including the defendant himself, and clearly falsified their accounts of the incident to CRU. CRU therefore concludes that the defendant is not factually innocent.

Witness 1, however, was the only testifying witness who identified the defendant at trial as a participant in the fatal assault. While CRU does not doubt that Witness 1 and the defendant knew each other and saw each other just before the fatal attack—as the defendant even admits—CRU does not credit Witness 1’s testimony that the defendant slashed the deceased’s neck. While the former establishes the defendant’s presence at the crime scene, the trial evidence is insufficient to sustain an acting in concert offense without the latter—an affirmative act which established the defendant’s role as a principal or accomplice in the offense. As the prosecution relied solely on this testimony, it is reasonable to believe that the jury found the defendant guilty based on this unreliable evidence, which the trial court noted as “very strong” in imposing the maximum sentence for Murder in Second Degree on the defendant. Thus, CRU concludes that the defendant did not receive a fair trial because the evidence upon which the prosecution relied was inaccurate and incorrect. Consequently, as the Independent Review Panel and the KCDA agree, the judgment of conviction should be vacated, and the indictment should be dismissed.