DISTRICT ATTORNEY
KINGS COUNTY

DISTRICT ATTORNEY ERIC GONZALEZ

REPORT ON THE CONVICTION
OF
PHILLIP ALMEDA

By: The Conviction Review Unit

June 2021

I. The Crime and Background

According to the trial evidence, on January 1, 2000, at about 12:15 a.m., four anti-crime plainclothes officers observed a 16-year-old male (MH) on the sidewalk, in front at 1320 Eastern Parkway, firing a revolver in the air.[1] The officers fired at MH, who fled into 1320. Then 20-year-old Phillip Almeda (the defendant) from inside a courtyard in front of 1320, fired nine rounds from a semi-automatic pistol at the officers on the sidewalk. Three officers returned fire. No one was struck or injured. The defendant was immediately apprehended coming from behind the courtyard and his gun was recovered from another courtyard in front of the location. Nine discharged shell casings, recovered from the sidewalk, matched the defendant's gun. Upon apprehension, the defendant repeatedly stated that he hated the officers and should have killed them.

After serving almost nineteen years in prison the defendant is at liberty having been released to parole on December 17, 2018.

II. Reason for Vacatur

The integrity of the defendant's conviction was undermined by the officers' implausible trial testimony that the defendant possessed the recovered gun and shot at them from inside the courtyard, and, upon apprehension, made an inculpatory statement evincing his intent to kill the officers.

III. The Police Investigation[2]

A. *The Location*

All four officers—Sgt. Charles Broughton, Detective Sidney Strobert, Officer Patrick Coward and Officer William O'Brien—reported that the entire incident occurred in front of 1320 Eastern Parkway (*infra* at 3-5, III. E.). The location is south of Eastern Parkway, which runs east-west. It is a multi-family house, running the length of its lot, which the Crime Scene Unit (CSU) measured as about 25 feet wide. The front door is on the left when facing the house.[3] A 16-foot long and 5-foot wide paved walkway led to and from the sidewalk and the house, with a gate at the sidewalk end. On each side of the walkway was a "courtyard"—each of which was also 16 feet long (running the length of the walkway). The courtyard on the left was 8 feet wide; the courtyard on the right was 11 feet 8 inches wide.

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[1] The case against the 16-year-old is sealed and, thus, he is referred to as MH.

[2] Unless otherwise cited, the police investigation facts are obtained from the police documents and the officers' recorded interviews contained in the People's trial file. Numbers in parentheses preceded by "H." refer to the pages of the pretrial hearing transcript; those preceded by "T." refer to the pages of the trial transcript; and those preceded by "S." refer to the pages of the sentencing minutes.

[3] The location description is based on CSU photographs and reports, and the CRU's visit to the scene. All descriptions are from the vantage point of standing in the street facing the house.

Each courtyard was enclosed by a metal chain-link fence.[4] On the sidewalk side, in front of each metal chain-link fence, a shorter metal fence sat on a low brick wall. Each courtyard was accessed through a rear gate at the back fence immediately on either side of the end of the walkway.

The gate to the walkway (abutting the sidewalk) had a cement pillar on each side, which extended above the fencing. A cement pillar still borders the sidewalk on the far right end of the lot. Various sized bushes and shrubbery abutted the fencing inside each courtyard, much of which were higher than the fencing. The walkway and courtyards ended several feet from a cement "patio" area in front of the house which ran the length of the lot.[5]

B. *The Initial Report of the Defendant's Spontaneous Statement*

Detective John Lantino interviewed Sgt. David Cheesewright, who had arrived at the scene after the shooting. Lantino's handwritten notes reflect that, at approximately 12:25 a.m., as the defendant was being handcuffed, Cheesewright heard the defendant say—about four times—"I *gonna kill* those mother fuckers" (emphasis added). Lantino's typed report differs in that it reflects that Cheesewright heard the defendant say, "I hate you cops, I *should of killed you* mother fuckers" (emphasis added).[6]

C. *The Identifications*

At approximately 12:30 a.m., in front of 1320, Sgt. Broughton and Officer Coward identified the defendant and MH, in a show-up, as the individuals who shot at the officers.[7] At approximately 2:30 a.m., Detective Strobert identified the defendant and MH in a photo array as the shooters.[8]

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[4] There is no record that CSU ever measured the height of the fence. Broughton testified that the fence was four feet high (T.214 [*infra* at 9, VIII. B. n. 34]). The CRU determined that the fence was four feet, ten inches high, based on its own measurements and CSU photographs of the top bar of the fencing and the still existing pillar. The CRU's other measurements are based on CSU reports.

[5] The fencing and the shrubbery no longer exist.

[6] *Compare* Lantino handwritten notes, *with* Lantino DD5, "Interview of Sgt. Cheesewright," both of which are dated 1/1/2000 at 6:00 a.m. Both the notes and DD5 reflect that Cheesewright reported that the statement referred to Broughton, O'Brien, Coward, and Strobert. During the investigation and proceedings the officers involved in the shooting reported various non-inculpatory versions (*infra* at 3-5, III. E.; 6, IV.). The officers testified to the inculpatory version at the pretrial hearing and trial (*infra* at 8, VII.; 10-11, 13, VIII. B.).

[7] Detective Frank Neglia DD5, "Id of Perpetrators;" *see also* Detective [illegible] DD5, "Arrest for Attempted Murder of MOS [Members of Service]." Responding officers had removed MH and others from the house. A 3:50 a.m. radio communication states that (in addition to the defendant and MH) seven people were "under" (arrested). Their arrests were apparently voided because the KCDA has no record of the arrests.

[8] *Id*. Apparently, Strobert's photo array identification procedure occurred at the precinct. It is unclear why Strobert viewed a photo array since he took part in the defendant's apprehension (*infra* at 5, III. E.) and could have viewed a show-up at the scene as Broughton and Coward did.

At approximately 3:30 a.m., Officer O'Brien viewed a photo array "of male blacks from the location," and identified the defendant and MH as the shooters.[9]

D. *The Gun and Ballistics Evidence*

CSU Detective Samuel Gilford photographed, sketched, and documented the scene. He noted numerous discharged shell casings scattered on the sidewalk and by the entrance of the walkway (sidewalk side), and two undischarged live cartridges on the sidewalk by the post at the right end of the property line. The locations of the shell casings and cartridges were measured based on fixed points of references.

A "Double A Arms" nine-millimeter Lugar semi-automatic pistol was recovered from the left courtyard, just next to its rear gate. It was on top of hardened dirt inside a cement planter box. The ground around the planter was dirt. Detective Gilford photographed the gun. A cartridge was in the chamber of the gun with a cartridge jammed behind it, and there was a cartridge in the magazine. The discharged shell casings, cartridges, bullets, and the recovered gun were sent to the police laboratory for testing and analysis.[10]

It was determined that the two undischarged cartridges were consistent with the cartridges from the recovered gun, and not with those fired by the officers, which were "Speer" hollow point/copper jacketed nine-millimeter bullets.[11]

Detective Gilford did not locate additional ballistics evidence in his inspection of the rest of the property, which included both courtyards and the cement patio area.[12]

E. *The January 1, 2000 Interviews of the Officers*

On January 1, from approximately 6:00 to 7:00 a.m., various law enforcement officers interviewed Sgt. Boughton, Officer O'Brien, Officer Coward, and Detective Strobert. The officers' statements were essentially consistent regarding their response to the scene and their observations of MH. They stated they were traveling east, in an unmarked yellow taxi, on Eastern Parkway when they heard and saw MH standing on the sidewalk by the gate of 1320 Eastern Parkway, shooting in the air. The officers got out of the car and approached MH, who turned, and fired at them. Some of the officers fired back and MH fled into 1320. The officers' accounts regarding the defendant varied.[13]

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[9] Lantino DD5, "Interview of PO O'Brien 77 Anticrime." Apparently, O'Brien's photo array identification procedure occurred at the precinct. Only MH was granted a *Wade* hearing (*United States v. Wade*, 388 U.S. 218 [1967]) to determine whether the show-up identification procedure was so improperly suggestive as to taint an in-court identification at the trial.

[10] MH's revolver was not recovered.

[11] January 1, 2000 Report at 4 (*infra* at 6, III. F.).

[12] CSU's search of the house did not uncover any ballistic evidence relevant to the CRU's investigation.

[13] The officers referred to MH and the defendant as the first and second shooter, respectively.

Officer O'Brien

Officer O'Brien stated that when MH was firing into the air there was a crowd of people on the sidewalk. When O'Brien approached, Officer Coward was to his right, closest to MH, and said, "Police don't move." As MH turned to the officers, the defendant, who was a couple of feet behind the gate to 1320, was shooting multiple times. O'Brien had "no idea" how many times the defendant fired.

Officer O'Brien believed that the defendant first pointed his weapon in the air. As MH turned to run to house, the defendant shot at the officers' direction. O'Brien did not know, or was not sure, of the distance between him and the defendant, but estimated that it was 20 feet. He did not believe that defendant made it into the house. O'Brien did not know where the defendant was apprehended, but to the best of his knowledge, the defendant was found in front of the house.[14] O'Brien did not fire his weapon.

Officer Coward

Officer Coward only saw MH, and not the defendant. He stated that he was the first officer to approach MH. He identified himself and said, "police don't move." MH turned, looked at Coward, and started to run down the walkway to the house. MH then turned and pointed his gun at Coward. Coward "heard a shot, saw a muzzle flash, heard another shot, saw another muzzle flash" from MH's gun. He also heard a "ping" coming off a fence. Coward dropped to the ground and fired two shots in return. At that time, Coward saw Detective Strobert on his right. Coward was not sure whether Strobert fired his gun. The sidewalk area was well lit, but the courtyard area was "very dark."

Officer Coward thought he fired around five or six rounds. He fired the first two shots "in return" when MH fired at him, and fired the remaining shots in return to other gunfire. Coward did not see another individual shooting, or a second suspect with a gun.[15] The only gun Coward saw was MH's long black revolver.

Detective Strobert

Detective Strobert stated that as he approached MH, who was about 5'11" and slim, Officer Coward was the closest to MH. MH fled towards the house, and when he was about halfway down the walkway, he turned, and fired two shots towards Coward. Strobert saw Coward fall to the ground and thought that Coward had been shot. Strobert fired two shots at MH and then Coward fired. Strobert was about seven feet from MH.

Officer Coward was on Detective Strobert's left and Sgt. Broughton was to the far left. After he fired, Strobert rolled to the right taking cover along the low brick wall, which ran along the

[14] O'Brien did not mention whether the defendant made any statement.

[15] Coward was not asked and did not mention whether he heard any statement from the defendant.

sidewalk. Strobert then heard a number of shots. He thought MH came out of the house and was firing again, so he moved over to the "far right, stood up, and looked over to the grass" (the courtyard area). He then saw the defendant shooting. The defendant was moving "backward and forward," shooting in Coward's direction. Strobert yelled, "Police, don't move" and fired two shots at the defendant. The defendant "spun" the gun around and fired at Strobert, who returned fire.

After a few seconds of silence the defendant fired again. The defendant fired about ten to fifteen shots randomly at the officers, "spraying" from one side to the other. Detective Strobert said he was "about a foot" from the defendant. When the interviewer repeated "a foot," Strobert said, "make that three feet." Strobert could not see the type of gun the defendant used.

The shooting stopped as other officers arrived. By now MH had fled into the house. The defendant was "still in the bushes." When Detective Strobert and other officers went down the walkway to the back, the defendant came "around the bend" yelling, "*I don't have a gun, I don't have a gun*" (emphasis added).[16] Strobert dragged the defendant out and passed him to other officers, who handcuffed him.

Sgt. Broughton

Sgt. Broughton stated that he observed MH firing a black revolver into the air. When the officers approached, Broughton was the furthest from MH and Officer Coward was the closest. Coward announced, "Police, don't move." MH ran toward the house and fired at Coward. Broughton saw the muzzle flash from MH's gun. Coward "hit the ground" and returned fire. Broughton did not fire at MH.

After MH fired, a male Hispanic—the defendant—stood up from behind the bushes and began firing. He "punch[ed]" a black firearm "over" the bushes and fired at the officers. Sgt. Broughton returned fire, aiming his weapon westbound towards the defendant behind the bushes. The defendant was about fifteen feet from Broughton. Broughton did not know the number of shots the defendant had fired.

After MH ran in the house, the defendant retreated "back into the bushes." At this point, Sgt. Broughton and Detective Strobert proceeded up the walkway to the house. The defendant came from behind the bushes stating, "*I hate you police, I hate the cops*" (emphasis added).[17] The defendant was apprehended and turned over to Sgt. Cheesewright. ESU arrived and apprehended MH. Broughton described that there was lighting from streetlamps and an adjacent building. The courtyard was "kind of lit."

[16] Strobert did not mention that the defendant said anything else.

[17] Broughton did not mention that the defendant said anything else.

F. *The January 1, 2000 Report*

A January 1, 2000 report to the Chief of Department includes that "after [the defendant] was taken into custody he stated, 'I hate you cops, I *should have* killed you '" (emphasis added).[18] The source of that information was not mentioned.

IV. Officer O'Brien's Account to the KCDA

On January 1, 2000, by 10:07 a.m., the Early Case Assessment Bureau (ECAB) received the police paperwork.[19] Shortly thereafter, an A.D.A. interviewed Officer O'Brien, who was the arresting officer. O'Brien reported that MH fired at the officers; the defendant was standing near MH, and also fired at the officers; and he arrested the defendant outside the location and recovered a gun from the ground near the defendant.[20] Regarding the defendant's statement, O'Brien reported that the defendant stated in substance, "I hate cops I *should kill* those cops" (emphasis added).[21]

V. The Grand Jury[22]

Both the defendant and MH were indicted, acting as a principal and the accomplice of the other, with four counts Attempted Murder in the First Degree (P.L. §§ 110.00/125.27[1]); eight counts of Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]); four counts of Attempted Aggravated Assault Upon a Police Officer (P.L. §§ 110.00/120.11); one count of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[2]), and other charges.[23]

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[18] Presumably, the report relied on Lantino's DD5 containing an inculpatory version of the defendant's statement (*supra* at 2, III. B.). Prior to the pretrial hearing none of the officers involved in the shooting reported an inculpatory version of the defendant's statement (*supra* at 4-5, III. E.; *infra*, IV).

[19] ECAB screens all Brooklyn arrests, and determines whether to prosecute and what crimes to charge. Police officers and, in some instances, victims and witnesses are interviewed. ECAB drafts a complaint upon which the defendant will initially be arraigned, and prepares supporting documents and notices to be provided at arraignment.

[20] O'Brien stated in his January 1, 2000 interview that he did not know where the defendant was apprehended, but to the best of his knowledge the defendant was found in front of the house (*supra* at 4, III. E.).

[21] *See* ECAB screening sheet (containing a brief account of the incident and the statement based on O'Brien's account to the ECAB assistant).

[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] The indictment as to MH was dismissed, and on April 26, 2000, he pled guilty, as a youthful offender, to possession of an imitation pistol (Administrative Code of the City of New York § 10-131[g]).

VI. The May 16, 2000 Interviews

Officer O'Brien[24]

Officer O'Brien was re-interviewed on May 16, 2000. His statement was generally consistent with his prior statements regarding MH. O'Brien added that the defendant attempted to get into the house, but one of his friends must have locked the door because he could not get in. The defendant's gun, a Tec-9, was recovered "right next to [the defendant], a couple of feet away from him."[25] Investigator Brown asked, "so he had dropped it?" O'Brien said, "yes" and that the defendant dropped the gun "in the grass" to the right when standing at the door to the house (facing the door).[26]

Detective Lantino

Detective Lantino recounted his interview of Sgt. Cheesewright during which Cheesewright reported that at 12:25 a.m., when the defendant was handcuffed at the scene, the defendant stated four times, "I *gonna kill* those motherfuckers" (emphasis added).[27]

VII. The Pretrial Hearing

On January 16 and 17, 2001, a *Huntley/Dunaway* hearing was conducted.[28] Sgt. Broughton testified for the prosecution. The defendant did not present any evidence or testimony.

Sgt. Broughton's testimony was similar to his January 1, 2000 interview (*supra* at 5, III. E.). He testified that when he and the other officers pursued MH as MH ran into the house, they were met with gunfire coming from the courtyard to his right (H.7, 15-16, 19). The area was well-lit, and he saw the defendant shooting.[29] He was approximately twenty feet from the defendant (H.7-8, 17). He saw the defendant clearly and observed that the defendant was light-skinned (H.17).

Sgt. Broughton fired back. Broughton and the other officers were "pinned down." Broughton was kneeling behind the gate by the brick wall that ran beneath the fence (H.8-9). The defendant had a black firearm. Broughton could not describe the make of the gun, but believed it was a sub-machine gun due to the rapid fire (H.8, 17). The defendant fired four volleys followed by a long

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[24] O'Brien referred to MH and the defendant as the first and second shooters, respectively.

[25] The Tec-9 is a semi-automatic pistol. It was originally designed as a submachine gun and modified as a semi-automatic for domestic sale in the United States. Older models can be converted into a fully automatic weapon.

[26] As stated (*supra* at 3, III. D.), the gun was recovered from a planter inside a courtyard on the opposite side of the fence from the house, and the ground around the planter was dirt.

[27] This is the version of the defendant's statement contained in Lantino's handwritten notes, and not his DD5 (*supra* at 2, III. B). Lantino was not involved in the shooting or present during the defendant's apprehension and statement.

[28] The purpose of a *Huntley* hearing (*People v. Huntley*, 15 N.Y.2d 72 [1965]) is to determine the voluntariness of a defendant's statement. The purpose of a *Dunaway* hearing (*People v. Dunaway*, 442 U.S. 200 [1979]) is to determine whether probable cause existed for a defendant's arrest.

[29] Broughton identified the defendant in court.

delay. Broughton instructed Detective Strobert that they "had to go in there and get whoever's firing at us. We had to get them" (H.9).

Sgt. Broughton, ahead of Detective Strobert, entered the walkway. The defendant jumped out from the bushes on the right (H.9, 20-21). The defendant yelled, "I hate you police. *I wished I had killed you* motherfuckers. I hate you" (emphasis added) (H.9, 26-27). Broughton and Strobert grabbed the defendant and passed him to uniformed officers who had arrived at the scene (H.9, 21). The defendant "kept talking all the way through, yelling and screaming how he hated the cops; how *he wished he had killed* [*them*]" (emphasis added) (H.10). He repeated the same or similar statement numerous times when apprehended, and Broughton heard the defendant repeat it when Broughton arrived at the precinct an hour later.[30] Broughton did not question the defendant and did not hear any officer question the defendant (H.10-11). The defendant did not have a gun in his possession upon apprehension. It was recovered from the ground in "the yard" (H.22).[31]

The court found that Sgt. Broughton was credible. It held that probable cause to arrest the defendant existed because Broughton observed the crime in progress. The court also held that the defendant's statements were spontaneously made and, thus, admissible at trial (H.41-42).

VIII. The Trial[32]

The trial commenced on February 13, 2001.

A. *Opening Statements*

The People

The prosecutor began by stating, "I hate you cops, and I should have killed all you mother fuckers. I hate you cops, and I should have killed all you mother fuckers. Those are the words out of this defendant's mouth seconds after trying to kill four police officers" (T.12). The prosecutor told the jury that this was a serious, but "simple case" (*id*.). He stated, among other things, "in a nutshell," the defendant fired a foot-long gun at four officers "almost killing them." The defendant was the only one in the courtyard shooting at the police. When his gun jammed the defendant jumped out, put his hands up and yelled that he hated the cops and should have killed them—he "repeats that and he repeats that, and he repeats that." The prosecutor also stated that the nine or ten recovered shell casings matched the defendant's gun (T.12-18).

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[30] After the defendant was apprehended Broughton did not see him again (H.28). Broughton overheard the defendant in the precinct (T.228 [*infra* at 10, VIII. B.]).

[31] A *Mapp* hearing (*Mapp v. Ohio*, 367 U.S. 643 [1961]), to determine the admissibility of the gun, was not held because the defendant did not assert a property interest in the gun (H.39). Thus, no evidence was presented at the hearing to establish that the gun recovered was the defendant's gun.

[32] The defense disclosed prior to trial that a former NYPD Officer (unrelated to this case) polygraphed the defendant and determined that the defendant was truthful in denying that he possessed and fired a gun.

The Defense

The defense stated, among other things, that the police officers were incredible and that the defense would present a very different version of the events from individuals who were on the sidewalk at the time of the incident. The defense did not address the defendant's statements, the ballistic evidence, or the recovered gun.

B. *The People's Case*

Sgt. Broughton

Sgt. Broughton's testimony regarding MH was essentially the same as his January 1, 2000 interview and hearing testimony with additional details. Broughton testified it was known that "at the stroke of midnight" on New Year's people came out of their homes and fired gunshots in the air (T.207). As he and Officer O'Brien approached the walkway to 1320 to pursue MH, the defendant came from behind the bushes in the courtyard and fired at them (T.213-14, 256-57).[33] The defendant was behind the "steel" fence, which was four feet high (T.214-15).[34] Broughton observed the defendant from the chest up (T.273). No one else was in the courtyard (T.221).

The defendant fired "a volley of rounds" (T.213).[35] Sgt. Broughton fired about three shots at the defendant (T.216).[36] There was "a pause" followed by another volley (T.218). Broughton radioed for back-up (T.218-20, 265).[37] In all, the defendant fired four volleys at the officers, with a pause between the second and third volleys and a long pause after the fourth (T.221-22). During the first volley, the defendant fired "upward" (T.222). During the second, third, and fourth volleys "it seemed" that the defendant shot down at the officers, who were against the brick fence (T.222). Boughton heard the shots hitting the ground. No one was struck (T.222-23, 258-59).

After the fourth valley there was a "long pause." At that point, Sgt. Broughton instructed Detective Strobert that they "had to go in and get this guy" or they would be killed (T.221-22). When the firing stopped, the defendant had retreated from the front fence to the back where there was a little

[33] Broughton identified the defendant in court (T.217-18).

[34] Broughton described that the front of the courtyard had "a brick fence, a little white fence," and then a steel fence about four feet high (T.214). The steel fence to which Broughton referred was the chain-link fencing enclosing the courtyard (*supra* at 2, III. A.). The CRU determined that the chain-link fence was four feet, ten inches high (*supra* at 2, III. A. n. 4). Defendant's pedigree information reflects that he is 5'5" (T.318-20, 329-30).

[35] Broughton explained that a "burst" or volley consists of the firing of three to four rounds (T.213).

[36] Broughton pointed to a location in the courtroom to show his distance from the defendant at the time of the shooting, which the court estimated was 20 feet. Broughton agreed. The court then determined that the distance was 16½ feet. Broughton said he was not good with measurements (T.216-17, 260).

[37] Broughton called a "10-13" meaning that an officer needs emergency assistance. Broughton pressed the radio button throughout the incident. The recording of the call was played in court (T.219-20, 232-33; People's Exhibit 3). Broughton testified that he could be heard saying, "10-13 shots fired," as gunfire is heard in the background (T.232-33). Neither the People's file nor the Supreme Court's file contains a recording marked People's Exhibit 3.

"porch area" (T.272).[38] When Broughton reached the end of the walkway, the defendant came out from Broughton's right (T.271-72). Broughton testified that the defendant "jumped out" screaming, "*I should have killed you* fucking cops. I hate you fucking cops. *I should have killed you*" (emphasis added) (T.223, 268). When cross-examined as to whether he was surprised when the defendant jumped out, Broughton replied that he was not, and "I said, jumped, but actually [the defendant] just came from behind there" (T.270-71).[39] Broughton also testified that the defendant came out "on his belly, lying on all fours" (T.271). As the defendant was taken out of the walkway he continued yelling, "I hate you cops. I hate you fucking cops. *I wish I killed you cops*" (emphasis added) (T.223, 268).

When backup arrived the officers briefly canvassed the yard and determined that no one else was there (T.224, 244). Sgt. Broughton saw a gun in a flowerpot "to the right" of the courtyard (Broughton's perspective with his back to the house) (T.244). During his testimony, Broughton identified a photograph of the gun as the one that was recovered; he was not asked and did not identify the gun as the defendant's (T.245). He did not see the defendant discard a gun (T.279).

At about 1:00 a.m., Sgt. Broughton returned to the precinct and heard the defendant from the holding cell say, "*I wanted to kill the cops*" and "Don't worry about it, I'm going to take care of those cops." Broughton assumed that the defendant was talking to someone in the cell (emphasis added) (T.228).[40]

Officer O'Brien

Officer O'Brien's testimony was essentially consistent with his prior accounts of the defendant firing at the officers.[41] He had stated that the defendant was about 20 feet from him during the shooting (*supra* at 4, III. E.), and now testified that the defendant was about 10 to 15 feet from him when the defendant shot at him and Officer Coward (T.307, 309). He added that two fences and Coward were between him and the defendant, but nothing obstructed his view (T.308, 315). The defendant was either Hispanic or a light-skinned black, short, had very short black hair (T.308).[42]

Officer O'Brien "went down" to take cover behind the concrete fence (T.309). The defendant pointed the gun down towards him, and pieces of concrete hit him as the defendant fired (T.309). The defendant fired a volley, stopped, and then fired a second volley (T.312). Detective Strobert

[38] Broughton did not say whether he observed the defendant move to the back area.

[39] Broughton previously testified that the defendant "jumped out" from the bushes on the right (H.9, 20-21).

[40] Broughton was cross-examined about minor discrepancies between his trial testimony and January 1, 2000 interview regarding the defendant's *location* when he made his statements (whether they were made when the defendant came from the bushes or entered the police car) (T.290-92). Counsel did not ask him about the inconsistencies between the *substance* of the statements—*i.e.*, that Broughton testified at trial that the defendant stated he should have killed the officers (T.223, 268), but reported during his January 1, 2000 interview that the defendant said that he hated cops and did not mention anything about killing them (*supra* at 5, III. E.).

[41] O'Brien identified the defendant in court (T.309).

[42] Broughton testified that the defendant was light-skinned (H.17 [*supra* at 7, VII.]).

fired at the defendant. The defendant then moved to the back of the courtyard towards the front of the house, and the shooting stopped (T.312). O'Brien did not see anyone else in the courtyard (T.314).

The defendant was apprehended by Sgt. Cheesewright (T.357). Upon apprehension the defendant said, "*I should have killed you* motherfuckers, I hate you cops" (emphasis added) (T.314-15).[43]

The recovered gun was admitted into evidence through Officer O'Brien. First, the following exchange ensued:

> [The prosecutor]: Did there come a time when you went into the courtyard area after the defendant was brought out?
>
> [O'Brien]: Yes.
>
> [The prosecutor]: And what -- when was that?
>
> [O'Brien]: Immediately after he was brought out.
>
> [The prosecutor]: Okay.
>
> What, if anything did you observe when you went into that courtyard area when the defendant was brought out.
>
> [O'Brien]: I observed that the defendant had a gun when he was firing upon us.[44]
>
> [The prosecutor]: Where did you observe that gun?
>
> [O'Brien]: On the left-hand side of the [c]ourt yard.
>
> [The prosecutor]: Okay.
>
> When you say, the left-hand side, is that if you are facing 1320?
>
> [O'Brien]: Yes.

(T.316).

Officer O'Brien testified that, as the arresting officer, he vouchered the "weapon" and ballistic evidence, which Detective Gilford had physically recovered and handed to him (T.318-19). The prosecutor then asked,

> When you say the weapon, is that the same weapon that you observed the defendant firing from which was recovered in the courtyard?

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[43] When interviewed in ECAB, O'Brien reported that the defendant had stated, "I hate cops I *should kill* those cops" (*supra* at 6, IV.). Defense counsel did not cross-examine O'Brien about the inconsistency.

[44] Defense counsel raised a one-word objection to O'Brien's answer, which was overruled. Presumably, counsel objected because O'Brien's answer was not responsive to the prosecutor's question.

O'Brien replied, "Yes" (T.318).[45] The prosecutor then showed the gun to O'Brien who identified it as the one the defendant used to fire upon the officers (T.324). O'Brien said he recognized it as "the one I observed and also it's marked" with Detective Gilford's initials (T.324-25). After O'Brien agreed that the gun appeared to be in the same condition as it was on January 1, 2000, it was admitted into evidence, without objection (T.326-27; People's Exhibit 7 [the gun]).[46]

Officer O'Brien testified that there were numerous people in front of the location when the officers first arrived. A few of them were brought to the precinct for questioning. O'Brien did not speak to them. Other than the defendant and MH, O'Brien did not know whether anyone else had been arrested (T.353-54).

Officer Coward

Officer Coward's testimony was essentially consistent with his prior account (*supra* at 4, III. E.), and added some details. When MH ran into the house, Coward did not know where his fellow officers were, so rather than chase MH he took cover behind the pillar just left of the sidewalk gate (T.363-64, 367). At that point he heard numerous shots, which he thought came from the direction MH had fled. There was a pause and then a second round of gunfire, which "were coming from inside the front of the building [the house]" (T.365-66).

After the second round of gunfire there was a pause followed by more shots, which were "all coming from inside that building" (T.366). Officer Coward returned fire. Backup arrived and the shooting stopped. Coward saw the defendant come out from the right side of the walkway, with his hands up (T.367).[47] Sgt. Broughton and Detective Strobert went into the walkway and apprehended the defendant (T.368).[48]

Detective Strobert

Detective Strobert's testimony was essentially consistent with his prior account (*supra* at 4-5, III. E.). Strobert testified that after he fired two shots in return at MH he heard a volley of shots, and saw that they were coming from a courtyard (T.455-57, 472). He moved "down a little bit" to the corner of the property, looked up, and saw the defendant shooting in the direction of the officers on his left (T.458, 472).[49] The defendant was in the courtyard about three feet from Strobert (T.458-59, 464). Strobert testified, "[t]here was a courtyard with a couple of fences and directly on the other side of the courtyard was where the shots was (sic) being fired from" (T.457-58).

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[45] The defense did not object to the prosecution's leading question.

[46] Defense counsel did not cross-examine O'Brien about his numerous prior inconsistent statements regarding his observations of the recovered gun (*infra* at 25-26, XI. C. ii.).

[47] Coward identified the defendant in court (T.367-68).

[48] Coward testified in a prior proceeding that the defendant said that he hated the cops. At trial, he did not testify that the defendant made a statement. The defense did not cross-examine Coward about this.

[49] Strobert identified the defendant in court (T.459).

When backup arrived, Detective Strobert, Sgt. Broughton, and Officer Coward headed down the walkway. The defendant "came out from the right" with his hands up (T.462). Strobert believed that Coward ordered the defendant to get down on his knees and crawl out (T.462, 483). Broughton, Strobert, and others brought the defendant out of the walkway (T.462). The defendant stated a couple of times, "I hate you fucking cops. *I should have killed you* cops" (emphasis added) (T.463). On cross examination, Strobert acknowledged that the defendant did not possess a gun when apprehended. Strobert did not see the recovery of the gun; he saw the recovered gun for the first time the day of his trial testimony (T.479-80).

Sgt. Cheesewright

At about 12:15 a.m., Sgt. Cheesewright heard a radio call of "shots fires at M.O.S., Members of the Services" (T.540). About 10 to 15 seconds before he reached the scene he heard two gunshots, but did not know from where they came (T.540, 545).

The defendant was "on his stomach" coming out from the back area (T.542-53).[50] Sgt. Broughton grabbed the defendant and passed him to Sgt. Cheesewright (T.542). At that time, the defendant said, "I hate cops. *I should have killed you* mother fuckers" (emphasis added) (T.543, 549).[51]

Sgt. Cheesewright secured the scene to "make sure that no one was around to kick the shells or to disturb any of the crime scene" (T.545). The scene was safeguarded by another officer (T.495).

CSU Detective Samuel Gilford

Detective Gilford, a six-year veteran of the CSU, had been the lead crime scene detective on about 350 cases and assisted on "well over 700" others (T.489). At about 2:15 a.m., he and his partner, Detective Thompson, responded to the scene. They photographed and sketched the scene (T.491-93).[52] CSU canvassed the scene for "[a]ll the pieces of ballistics [they] could find" (T.529). Gilford marked, photographed, documented and collected the ballistics evidence (T.495-501).

Detective Gilford recovered 26 discharged shell casings and two unfired cartridges (T.498-502**,** 516-24).[53] Gilford recovered from "the front yard in the garden area," a double A Arms nine-millimeter Lugar semi-automatic pistol (T.503). There was one cartridge in the magazine, and

[50] Cheesewright identified the defendant in court (T.542-53).

[51] As stated (*supra* at 2, III. B.), Lantino's handwritten notes reflect that Cheesewright reported that the defendant stated, "I gonna kill those mother fuckers." Defense counsel did not cross-examine Cheesewright about the inconsistent version.

[52] The sketches were not to drawn scale. They included the locations of the streetlights.

[53] One of 26 shell casings came from ESU Officer Martinez's gun when it accidentally discharged as he entered the house after the defendant's apprehension (T.784). Also, a bullet fragment was recovered from the windowsill inside of 1320 (T.501). There was no further testimony from Gilford or any other witness about the two unfired cartridges. The January 1, 2000 Report (*supra* at 6, III. F.), however, indicates that the unfired cartridges were consistent with the recovered gun and not with the officers' guns.

two cartridges in the chamber, one of which was "jammed" behind the other (T.503-04). Gilford attempted to lift fingerprints from the gun, but did not find any prints of value (T.504-07).

Ballistics Expert Detective Sean Hart

Detective Hart, an expert in firearms analysis and examination (T.443), examined the recovered double A Arms nine-millimeter Lugar semi-automatic pistol, and the three cartridges in it. Hart tested two of the cartridges and determined that the gun and ammunition were operable. Hart explained that the magazine of that gun holds up to 21 cartridges. Each time the trigger is pulled a bullet is discharged, the cartridge is ejected, and a new cartridge enters the chamber from the magazine (T.444-46, 448-49).

Ballistics Expert Detective Joseph Ramirez

Detective Ramirez, an expert in microscopic comparison and firearms operability (T.558), testified that the officers' guns and the recovered gun were all nine-millimeter semi-automatic pistols. Ramirez determined that sixteen of the recovered shell casings had been fired from three of the officers' guns (T.571-73). Nine other recovered shell casings had been fired from the nine-millimeter gun recovered at the scene (T.574, 577).

Detective Ramirez was cross-examined about whether he could determine where the officers and the shooter were positioned based on the location of their respective recovered shell casings. Ramirez testified that there was no way to determine their positions unless the direction of fire and the manner in which the guns were held were known. He explained that if the gun was held straight out, perpendicular to the body, and in the right hand, the casings would "go over" the right shoulder and land five to ten feet behind the shooter (T.580). Thus, the shooter would be positioned anywhere within five or ten feet of where the casing landed—assuming that the casing stopped where it landed and did not move. But, casings were round and cylindrical and tended to bounce and roll. Also, there were many variables which affected the distance that the casing ejects—*i.e.*, not holding the gun straight out, but at a different angle and side, and the firmness of the grip (T.580-83).[54]

C. *The Defense Case*

Asim Jones

Asim Jones knew the defendant well for a couple of years. On the night of the shooting, Jones was at a "get-together" watching the Grand Army Plaza fireworks from the sidewalk in front of 1320 Eastern Parkway where Charles Donovan and his family resided. The Donovans and about fifteen others were present, including the defendant, and the defendant's brother, Michael Almeda. A couple of people were inside 1320, including MH, and Hector Hunt who was watching television (T.586-89, 611-12).

[54] Counsel did not question Ramirez any further on this issue.

Lamont Hunter, who lived about "a house away from 1320," arrived to watch the fireworks (T.589-90). Hunter had a black bag and shot a gun in the air (T.590). Jones described that Hunter was standing "in between 1320 and 1314 because they have two brick walls with designs on them and he was right there in the middle of it" (T.612). After Hunter fired some people went into 1320. Hunter reloaded and, again, fired into the air. Police officers jumped out of a taxi yelling, "Freeze." The police saw the shots in the air when they told Hunter to freeze. Jones "guess[ed]" that Hunter was still shooting at that time (T.593). Hunter then ran into the house (T.590-92).[55]

The police approached and started shooting towards the front of 1320 (T.592). They ordered everyone onto the ground (T.593). Jones was by the gate (at the walkway to 1320) with the defendant and Michael Almeda (T.590-91). Jones and the defendant got on the ground (T.591-92). Michael helped a pregnant woman move to side, and then they got on the ground (T.593-94).

The police ran into 1320 shooting. Uniformed officers arrived shooting their guns. No one other than the police were shooting (T.595).[56] Some of those watching the fireworks made it into the house and some took cover on the ground (T.595-96). The police "pulled out" three people from the yard—Charles Donovan, Michael Harding, and someone Jones did not know (T.596-97). Jones and everyone in the yards were arrested (T.597). Jones did not "recall" the defendant saying that the hated the police or that he "should have killed" them (T.611). The police arrested several individuals who ran into the house, including Michael Almeda, Charles Donovan, Hector Hunt, and Lamont Hunter (T.597-600, 602).

At the precinct Jones was placed in a holding cell, but he was not questioned and did not speak to Detective Neglia or any other officer, or report what he had seen (T.600-01, 603-04). Jones initially testified that he did not talk to police because he was under arrest, but he then admitted that he was released and not arrested (T.604-05). Everyone was released, except the defendant and MH (T.601-02, 605).

Hector Hunt

Hector Hunt, the defendant's best friend, testified that on the night of the shooting, he, the defendant, MH, Asim Jones, Lamont Hunter, and others were in front of 1320 watching the Grand Army Plaza fireworks (T.620-21, 623). Hunter arrived with a plastic bag and a fired a gunshot into the air (T.621).

Hunter reloaded "let off a couple of rounds" (T.642). The police arrived and yelled, "Freeze" and started shooting. As Hunter and the police fired shots, Hector Hunt ran into the house with MH, Hunter, and others. The defendant, Michael Almeda, and others were still on the sidewalk in front of the house (T.624-25).

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[55] Jones alternatively referred to Hunter by name and the guy with the gun.

[56] Jones testified, "I guess that [the police] were shooting at the person that ran in the house with the gun." This testimony was struck from the record as speculative (T.595).

Only Hunter had a gun, which Hunt believed was a "Tec" semi-automatic, because the shots were rapid (T.632). Hunt never saw the defendant with a gun (T.631). On cross examination, Hunt admitted that when he ran inside he did not know what happened to Hunter's gun or where the defendant was (T.637-38, 640-41).

Hunt was brought to the 77th Precinct where he spoke to officers and was released. MH was the only one apprehended from the house who was not released. Hunt maintained that he told the police that Lamont Hunter was shooting into the air (T.639-40, 643, 645, 647).

Michael Almeda

Michael Almeda, the defendant's brother, testified that he, the defendant, MH, Hector Hunt, Asim Jones, Charles Donovan, and others were watching the fireworks outside of 1320 Eastern Parkway (T.682-83). Lamont Hunter came from his building, 1330 Eastern Parkway, with his pregnant fiancé (T.683-84).

Hunter took a gun out of a bag and started firing it in the air (T.683-84).[57] Hunter was "shooting for a while." He had a "tec, automatic" and Michael repeatedly heard "rat-tat-tat-tat-tat" (T.711). Michael grabbed the defendant and they moved out of the way. Four officers jumped out of a taxi, yelled for everyone to get down, and started shooting (T.683-84, 709). Hunter ran into 1320 and the officers fired at the house (T.685). At this time, Michael and the defendant were on the ground, next to the light pole in front of 1314 Eastern Parkway, adjacent to 1320 (T.686). Hector Hunt, Donovan, and others ran into the house (T.687). The defendant crossed the street and was stopped by the officers (T.689).

Michael was brought to the precinct where he saw the defendant, Jones, Hunt, Hunter, Donovan, and others (T.694-95). Michael did not speak to the police at any time (T.697-99). Everyone was released, except the defendant and MH (T.698-99).[58]

Hunter was the only one who fired a gun (T.703-04). Michael acknowledged that he did not know what was going on inside the courtyard when the police were firing (T.714).

Charles Donovan

At the time of trial, Charles Donovan had resided at 1320 Eastern Parkway for 32 years (T.729). He knew the defendant since the defendant was a child (T.746). On the night of the shooting, people came to his house to watch the Grand Army Plaza fireworks. While they were out front, Lamont Hunter and Hunter's girlfriend showed up and were drinking in front of 1314 Eastern Parkway (T.728).

[57] Michael did not see Hunter take out the gun, but assumed it was in Hunter's bag (T.701-02).

[58] Michael testified that Hunter had a "warrant" and the police released him the next day. The prosecutor's objection to that testimony was sustained (T.698).

Hunter pulled out a weapon and began firing into the air. A few people across the street were also firing. Hunter was "aiming towards Grand Army Plaza and firing in the air, just like everyone else on the block" (T.734). Hunter had fired about ten shots when a taxi pulled onto the median, and officers got out and started firing (T.728-29). The defendant, Michael Almeda, and others were on the sidewalk (T.732).

Donovan pushed people towards his front door, and closed the door after his wife went inside. Donovan stayed outside. He crawled across the yard to the right side of the property as one faces the house, and over to some hedges (T.728-31, 751). No one else was in the yard (T.734).

Donovan and others were brought to the precinct. Donovan told the police that he did not know who did the shooting. After learning the defendant was not being released, Donovan returned to the precinct a day or two later and reported that Hunter was shooting (T.743-45).[59] Donovan testified that he did not see the defendant shoot at anyone. When the police were shooting, there was no return fire. No one shot at the police (T.767).

D. *The People's Rebuttal*

Detective Frederick Neglia

Detective Neglia testified that on January 1, 2000, at around 4:55 a.m., he and his partner interviewed Asim Jones at the 77th Precinct Detective Squad. He had not seen Jones prior to the interview and did not know whether Jones had been arrested, handcuffed, or placed in a holding cell prior to the interview (T.776-78).

E. *Summations*

The Defense

Counsel argued that the officers' accounts of the shooting were incredible, no one had fired at them, and they heard shots fired in the air and panicked. Counsel did not address the defendant's statement or the ballistics evidence (T.791-803).[60]

The People

The prosecutor reiterated his opening statement remark that this was a "simple case." He stated that certain facts were undisputed, including that four officers were performing their duties, the

[59] Donovan testified that when he was interviewed he was afraid to tell the police that Hunter was the shooter because Hunter was a known drug dealer. The court sustained the prosecutor's objection to this testimony (T.742).

[60] The defense summation is missing a page (T.801). On the prior page (T.800) counsel first addresses the defense case, which apparently continues and ends on the missing page. Thus, it is unknown what counsel argued about the defense case. But, it is clear that on summation counsel did not raise an issue about the ballistics evidence or the defendant's statement. Certainly, the People would have responded to any such arguments in their summation, but did not do so. Furthermore, the defense did not raise these issues in its opening statement (*supra* at 9, VIII.), and did not cross-examine any witness regarding these issues. Moreover, the defense did not raise these issues when moving for a trial order of dismissal at the end of the People's case (T.651, 771 [the defense rested on the record]).

defendant was present, and shell casings were recovered that matched the gun that was recovered (T.804-05). The defendant's intent to kill was not in dispute based on the way he fired at the officers and because he stated, "I should have killed you mother fuckers. I should have killed all of you mother fuckers" (T.806).

The prosecutor told the jury that the defendant's identity as the shooter was a non-issue because the officers clearly observed the defendant (T.806). The prosecutor maintained that the officers were all credible because, among other things, their testimony was consistent with one another, there were no major inconsistencies, they had no motive to lie, and their testimony was corroborated by the physical evidence (T.807-13). Regarding the defense case, the prosecutor argued, among other things, that the defense witnesses were inconsistent and they each had a motive to lie for the defendant (T.821-23).

F. *The Verdict and Sentence*

On February 28, 2001, the defendant was convicted of three counts of Attempted Aggravated Assault on a Police Officer (P.L. §§ 110.00/120.11 [O'Brien, Coward, and Broughton]). He was acquitted of that charge, as well as Attempted Assault as to Detective Strobert, and Attempted Murder in the First and Second Degrees as to each officer (T.941-44).

On April 5, 2001, before sentence was imposed, the defendant maintained his innocence. The defendant was sentenced to three consecutive prison terms of seven years and five years of post-release supervision (S.21-22).[61]

IX. The Post-Conviction Proceedings[62]

On direct appeal the defendant claimed that the evidence was legally insufficient to establish his guilt beyond a reasonable doubt and that the verdict of guilty was against the weight of the evidence. In pertinent part, the defendant raised two arguments: (1) since semi-automatic shell casings are discharged to the side, the shooter could not have been in the courtyard where the casings were recovered from the sidewalk; and (2) he could not have possessed the recovered gun because it was found on the other side of the yard, and nowhere near him.

The Appellate Division unanimously affirmed the judgment stating:

> Three police officers testified that when they confronted the defendant and identified themselves, he responded by shooting a firearm repeatedly in their direction. This evidence provided a sufficient factual basis for the jury verdict finding the defendant guilty of three counts of attempted aggravated assault upon a police officer. Inconsistencies regarding the location and source of shell casings

[61] In April 2018, the defendant appeared before the Parole Board and maintained his innocence. He was denied parole and was told that he would have another parole hearing in a year. In January 2019, however, when the CRU looked for the date of the second parole hearing, the CRU learned that the defendant had been released to parole in December 2018, without a second hearing.

[62] Only the issues and post-conviction proceedings relevant to the CRU are discussed.

> that fell during the gun battle were placed before the trier of fact and resolved in the prosecution's favor.

People v. Almeda, 10 A.D.3d 367, 368 (2d Dep't 2004). The defendant's application for leave to appeal to the Court of Appeals was denied. *People v. Almeda*, 3 N.Y.3d 703 (2004) (Graffeo, J.).

X. The CRU Investigation

The CRU's investigation first focused on the location of the shell casings ejected from the nine-millimeter semi-automatic recovered from the scene. The CRU, among other things, interviewed the crime scene detective and the trial prosecutor, and obtained an expert opinion. The CRU concluded that it was unlikely that the defendant, or any shooter, could have used the recovered gun to shoot at the police from inside the courtyard. Upon further review of all transcripts, interviews, and the case file, the CRU also determined that it was highly unlikely that the defendant had the opportunity to secret the recovered gun in the location where it was found—a different courtyard from where the officers placed the defendant.

In addition, in reviewing the officers' pre-trial accounts of the incident, the CRU questions whether they correctly testified at trial that the defendant made the inculpatory statement that he should have killed the officers, and whether Officer O'Brien correctly identified the recovered gun as the defendant's gun.

A. *Interview of CSU Detective Gilford*

The CRU interviewed Detective Gilford, who still worked for the NYPD CSU. Before the interview, the CRU provided Gilford with copies of his trial testimony, paperwork, photos of the scene, and notes, and the testimony of the four officers involved in the shooting.

Gilford stated that when he arrived at the scene he was given a general overview of the incident. He did not recall what he was specifically told about the shooting, but believed that had he not been told that the shooter was in the courtyard.

The CRU went through the details of the prosecution's case, including the defendant's position behind the fence. The CRU asked whether, given the details provided, the location of the defendant's shell casings were consistent with his shooting location and the direction he fired. In other words, was the prosecution's theory of the case plausible—that the defendant's shell casings were recovered from the sidewalk where the defendant was inside the courtyard shooting at the police on the sidewalk. Gilford said, "No."

The CRU posited possible explanations for the shell casings to have landed on the sidewalk while being fired from the courtyard, including that they bounced off the fences or bushes. Detective Gilford rejected this and other scenarios. Gilford maintained that he had inspected the courtyard, among other areas, and found no shell casings or any other ballistics evidence. He also said that, pursuant to his usual practice, he would have looked for indications of bullet strikes, and had he found any he would have photographed and marked them on his diagrams. Gilford opined that

given the number of shell casings he documented in the immediate vicinity of the walkway pillars where these strikes occurred, he did not believe that he could have missed all evidence of bullet strikes in that area.

B. *Interview of the Prosecutor*

The CRU asked the trial prosecutor whether he recalled discussing with anyone, or whether he considered how the defendant's shell casings landed where they did, given the defendant's position and where the defendant was aiming. The prosecutor believed he might have spoken to someone, possibly from the ballistics lab, but did not recall doing so.

C. *Independent Expert Review of the Ballistics Evidence*

A review of the literature concerning fired cartridge case ejection patterns suggests that what passes as common wisdom concerning how and where shell casings are ejected from a semi-automatic is often wrong. As touched on in Detective Ramirez's trial testimony, numerous factors can influence the result. Any single shot, depending on a number of variables, may result in a shell casing landing in an unexpected position. The CRU was concerned that, in this case, not one or two casings fell outside areas that would commonly be expected, but all of the nine recovered shell casings did.

Since Detective Gilford expressed concern about this issue the CRU retained an expert to review the evidence and take the necessary steps to formulate an opinion as to whether the ballistic evidence supported the officers' testimony about the shooting. The CRU retained an out-of-state expert, Knox and Associates (Knox) in Jacksonville, Florida, to avoid the appearance of, or the possibility of, a potential conflict of interest.[63]

Knox is expert in, among other things, crime scene reconstruction, and shooting and firearm analysis. Knox and Associates has testified for both defense and for various prosecutor's offices. The CRU provided Knox with copies of all materials in the trial file. The CRU also obtained the recovered gun—a Double A Arms nine-millimeter Lugar semi-automatic pistol—from the NYPD Property Clerk and brought it to Knox for testing. Knox issued a report of their findings. In sum, Knox concluded that, based on the location of the shell casings and cartridges of the recovered gun, it was *highly improbable* that they came from the reported firing position of the defendant (Knox Report at 22 ¶ 11.2).

[63] The CRU determined that there would be an appearance of a conflict of interest to obtain an opinion from the NYPD. In addition to Knox, the CRU attempted to obtain an opinion from an outside law enforcement agency—the FBI, the ATF, and the NYS Police. Each agency, however, declined to review the case as a matter of internal policy.

XI. Analysis

A. *The Location of the Ejected Shell Casings from the Recovered Gun Makes it Highly Improbable that the Shooter Was in the Courtyard*

The recovered nine-millimeter gun, as Detective Ramirez testified (T.580) and Knox confirmed, usually discharges shell casings to the right and rear of the shooter when the gun is held level.[64] Here, the testimony of the victim police officers was that the defendant was shooting from the fenced-in courtyard. But, all the shell casings matching the recovered pistol landed on the sidewalk outside the courtyard which, according to the police testimony, would be to the defendant's front and left.

According to the trial evidence, the defendant was pointing the gun east, essentially along the fence line. Thus, it would be expected that most of the discharged casings would eject behind the defendant and to his right, landing in the courtyard.[65] Lowering the barrel and raising the stock would have some influence on how far from the defendant the shell casings might eject (Ramirez testified that under normal circumstances it was about five to ten feet), but it should only have a minor influence on whether the casings eject to the shooters front or back, and even less influence on whether the casings eject to the shooter's right or left.

Knox fired numerous rounds from the recovered gun in a straight position, a rotated ninety degrees clockwise position, and a counterclockwise position. In total, ninety percent of the shell casings ejected behind the shooter (sixty percent to the right rear, thirty percent to the left rear). Only three percent landed to the shooter's front left. The overwhelming majority of the casings discharged during the test firings ejected behind the shooter, of which a substantial majority were to the back right—yet under the scenario described by the police witnesses and adopted by the prosecution not a single shell casing did the same.

Where the shell casings landed might have been affected by such factors as the casings bouncing on the sidewalk or officers accidently kicking casings before the scene could be secured, it does not account for how the casings went from inside the courtyard to the sidewalk.[66] To end up on the sidewalk *all* the casings would have had to bounce through shrubbery, a chain-link fence, and over a two-foot high brick wall (or somehow work their way through the small square holes in the brick wall) and past the metal fencing. The likelihood of that event occurring for all nine shell casings is so remote as to be virtually impossible. Thus, the CRU concludes that regardless of where the casings finally landed, they must all have first landed on the sidewalk side of the fence.

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[64] *See also* William J. Lewinski, Ph.D., *et al*., Fired Cartridge Case Ejection Patterns From Semi-Automatic Firearms, 2 *Investigative Sci. J.* 3 (Nov. 2010).

[65] Aiming in this direction, the sidewalk and Eastern Parkway would be to the shooter's left and the courtyard and house to the right. The ejector port is on the right side of the gun.

[66] The relatively tight grouping of the shell casings suggests that they were not kicked or otherwise disturbed by an unknown source.

Consequently, the location of the ejected shell casings from the recovered gun shows that it was substantially likely that the shooter was on the sidewalk, and not inside the courtyard. Consequently, the prosecution's theory of the case—that the defendant, from inside the courtyard, shot at the police on the sidewalk—was wrong.[67]

Although some of the salient facts were before the jury, the jury was never presented with this issue. At trial, defense counsel elicited from Detective Ramirez that nine-millimeter shell casings eject to the right and rear of the shooter. Counsel asked Ramirez whether he could determine the position of the officers and the shooter based on the location of the recovered shell casings. Ramirez's knowledge of the case, however, was limited to his examination of the ballistics evidence. He had no information about the shooting and said he could not determine the shooters' positions unless the direction of fire and the manner in which the gun was held were known (T.580-83). Inexplicably, counsel did not question Ramirez further on this issue. Had this issue been pursued, it very well might have been shown that the shooter could not have been inside the courtyard based on the location of the recovered shell casings.

To be sure, the officers testified that the defendant was in the right-side courtyard standing behind a chain-link fence and leafless shrubbery that ran along the interior of the fence and extended well above the fence top. He was somewhere between three feet from the far right-hand corner (per Strobert), to slightly closer to the center of the courtyard (per Broughton and O'Brien).[68] Sgt. Broughton testified that the fence was about four feet high, and that he observed the defendant from the chest up.[69] The defendant was holding the gun level with his head, and firing downward at the officers who were near the walkway entrance (T.221-22).[70]

Significantly, Sgt. Broughton made clear that the defendant did not point the gun outward, just down (T.259). Additionally, Detective Strobert, who was about three feet from the defendant, testified, "[t]here was a courtyard with a couple of fences and directly on the other side of the courtyard was where the shots was (sic) being fired from" (T.457-58 [*supra* at 12, VIII. B.]). Thus, there is no evidence to suggest that the defendant had his arms extended beyond or was leaning over the fence when firing, which might possibly explain the location of the shell casings. Indeed, Broughton's and Strobert's testimony demonstrates otherwise.

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[67] Although the trial prosecutor told the CRU that he might have spoken to someone, possibly from the ballistics lab, about this issue, it seems unlikely given his lack of recall and his clear surprise when the CRU pointed out the apparent anomaly.

[68] The courtyard was only 11' 8" wide. Therefore, both Strobert's and Broughton's estimates were not that far apart.

[69] CRU determined that the top bar running along the top of the fence was four feet, ten inches high. Since the defendant was 5'5" tall, at best, the defendant would have been exposed from the neck up.

[70] Broughton's testimony that the defendant from inside the courtyard fired "upward" before firing downward towards the officers (T.222; *supra* at 9, VIII. B.), and O'Brien's January 1, 2000 statement that he believed that the defendant first pointed the gun in the air (*supra* at 4, III. E.)—makes it even more problematic that no casings were found inside the courtyard and even more implausible that all the shell casings would have landed where they did.

Although the issue was raised on appeal to some extent (*supra* at 18-19, IX.), the Appellate Division's decision offers no guidance. Without elaborating the Appellate Division held that any "[i]nconsistencies regarding the location and source of shell casings" were before the jury. *Almeda*, 10 A.D.3d at 368. As shown above, the testimony was not inconsistent; rather, the issue was never before the jury. The defense did not cross-examine any witness regarding the issue or argue it to the jury. Moreover, in moving for a trial order of dismissal, the defense rested on the record and did not raise the ballistics issue (T.651, 771 [*supra* at 17, VIII. E. n. 60]).

B. *The Location of the Unfired Cartridges from the Recovered Gun Makes it Highly Likely that the Shooter Was on the Sidewalk*

Detective Gilford recovered from the sidewalk two unfired cartridges, which were consistent with the discharged shells matched to the recovered nine-millimeter gun (*supra* at 13, VIII. B. n. 53). One cartridge was found by the pillar of the adjacent property, just right of 1320's boundary (facing it). The other cartridge was 3'8" left of the other cartridge and seven feet closer to the street curb line.

Most likely, the two cartridges had misfired and jammed inside the gun.[71] Thus, in order for the defendant to re-fire, the cartridges had to be manually cleared.[72] Under the circumstances, in order for the cartridges to end up on the sidewalk it is implausible that the defendant, or anyone else, fired the recovered gun from inside the courtyard.

First, none of the four officers described any action by the defendant to suggest that he cleared the two cartridges from the gun before, during, or after the shooting. Certainly, no officer saw or heard the defendant prior to the shooting. And no officer testified about seeing any movement in the courtyard or hearing anything to suggest that a gun was being racked or a magazine was being loaded at any time, including the momentary pause between the two bursts.

Furthermore, if the defendant had unjammed the gun inside the courtyard, the cartridges would have landed inside the courtyard—which did not happen. For the cartridges to end up on the sidewalk as they did the defendant would have had to clear the cartridges while holding the gun through the shrubbery, and over and beyond the fence allowing the cartridges to fall to the sidewalk. This scenario not only strains credulity, but also it is not possible given Detective Strobert's account. Strobert, while standing just feet from the defendant, saw him firing at the other officers before Strobert fired at him. The defendant then turned towards Strobert and fired another burst. Strobert did not mention seeing the defendant discharge cartridges or pause to do so. Additionally, according to Strobert's testimony regarding his position when he fired at the

[71] Notably, Gilford found two unfired cartridges inside the gun—one cartridge was lodged in the chamber and another was in the cartridge area (commonly referred to as a double feed) (T.503-04). When Knox tested the gun, it frequently jammed (Knox Report).

[72] Such jams are cleared by removing the magazine, clearing the jam by racking the slide, or if the jam was in the magazine, manually clearing the magazine and then reinserting it. (*See* Howcast.com video, "*Jam-Clearing Drills for an Automatic Gun*"). These actions would most likely cause the jammed cartridge to fall near the shooter's feet.

defendant, and the location of the cartridges as documented by CSU, the two cartridges were essentially at Strobert's feet, yet he did not mention seeing or hearing them fall to the ground, or anything else to explain the location of the cartridges.

C. *There is Doubt as to Whether the Defendant Possessed the Recovered Gun*

The recovered Double A Arms nine-millimeter gun was directly linked to nine non-NYPD shell casings and the two cartridges found on the sidewalk. Thus, evidence that the defendant possessed the recovered gun supported the officers' testimony that the defendant was the shooter. Officer O'Brien, however, was the only officer who was asked at trial to identify the recovered gun as the one the defendant used. O'Brien's testimony and identification of the recovered gun was not challenged, but should have been because it was incredible for several reasons. First, it is unlikely that O'Brien had the ability or opportunity to observe the defendant's gun during the shooting. Second, O'Brien's pretrial accounts regarding the gun refute his trial testimony—which was elicited by improper and leading questions. Third, it is highly doubtful that the defendant possessed the recovered gun since it was found nowhere near him.

i. *Officer O'Brien's testimony that he observed the defendant's gun during the shooting is not credible*

The CRU questions the veracity of Officer O'Brien's testimony that he observed the defendant's gun during the shooting (T.316 [*supra* at 11, VIII. B.]). It defies logic that—in a life and death shootout with the defendant, who was in a dark courtyard hiding in the bushes—O'Brien, who took cover and did not fire back ([T.309 [*supra* at 10, VIII. B.), had a sufficient opportunity to observe the defendant's gun to recognize it at trial when no other officer who was closer and shooting at the defendant could do so.

Officer O'Brien initially reported in his January 1, 2000 interview that he was 20 feet from the defendant during the shooting (*supra* at 4, III. E.). At trial, he testified that the distance was about 10 to 15 feet (T.307, 309 [*supra* at 10, VIII. B.]). Regardless, whether it was 10, 15, or 20 feet, none of the other officers—including Detective Strobert, who was three feet from the defendant during the shooting (T.458-58, 464 [*supra* at 12, VIII. B.])—were able to observe the defendant's gun during the shooting. In fact, in his initial account, Strobert stated that he could not see the type of gun the defendant had (*supra* at 5, III. E.), and he testified that he saw the gun for the first time the day of his trial testimony (T.479-80 [*supra* at 13, VIII. B.]).

Notably, in his initial account, Officer Coward stated that courtyard was "very dark" and he did not observe the defendant's gun or the defendant during the shooting (*supra* at 4, III. E.). While Coward inexplicably testified at a prior proceeding that he saw the defendant holding an automatic weapon firing towards the other officers, he did not repeat that assertion at trial and he was not asked to identify the gun.

In his initial interview, Sgt. Broughton stated that he was about 15 feet from the defendant, the courtyard was "kind of lit," and he observed the defendant "punch over" a black firearm over the

bushes and fire at the officers (*supra* at 5, III. E.). At the pretrial suppression hearing, Broughton confirmed that he did not observe the type of gun, but believed it was a sub-machine gun only due to the rapidity of the fire (H.8, 17 [*supra* at 7, VII.]). Broughton did not repeat this during trial, and he was not asked to identify the gun. In fact, at trial, Broughton identified a photograph of the gun that was recovered, but was not asked and did not testify whether it was the gun used by the defendant (T.245 [*supra* at 10, VIII. B.).

ii. *Officer O'Brien's identification of the gun at trial is not credible*

Officer O'Brien's identification of the recovered gun as the defendant's is further undermined by his various contradictory pretrial accounts regarding the defendant's apprehension and the recovery of the gun. At trial, O'Brien testified that he "immediately" went into the courtyard after the defendant was apprehended and observed the gun used by the defendant (T.316 [*supra* at 11, VIII. B.]). He testified that the gun was in the left-hand side of the courtyard facing 1320 (*id*.). O'Brien testified further that Detective Gilford recovered the gun and handed it to him (T.318-19).

None of Officer O'Brien's prior accounts comported with his trial testimony, or with that of any other witness. To the contrary, O'Brien's prior accounts—which were not before the jury—changed from O'Brien last seeing the defendant running toward the house and not knowing where the defendant was apprehended, to O'Brien, himself, recovering the gun, to the gun being recovered in the vicinity of the defendant, or next to the defendant, and to O'Brien observing the defendant drop the gun at the door to the house.

Specifically, in his original account when interviewed six to seven hours after the shooting, Officer O'Brien stated that he did not know where the defendant was apprehended (*supra* at 4, III. E.). Several hours later that day, O'Brien told the ECAB assistant that he arrested the defendant outside the location and recovered a gun from the ground near the defendant (*supra* at 6, IV.). In a prior proceeding, O'Brien testified that the defendant ran towards the house, he next saw the defendant at the precinct, and he recovered the defendant's gun "in the vicinity" of the defendant. And finally, in his May 16, 2000 interview, O'Brien stated that the defendant attempted to get into the house, the gun was recovered "right next to [the defendant], a couple of feet away," and that the defendant dropped the gun "in the grass" to the right when facing the house (*supra* at 7, VI.).

Officer O'Brien's trial version—the only version consistent with the evidence—is even more troubling by the manner in which it was elicited by the prosecution. After O'Brien testified that he entered the courtyard area immediately after the defendant was brought out, the prosecutor asked O'Brien what he observed in the courtyard area (T.316 [*supra* at 11, VIII. B.]). O'Brien replied, "I observed that *the defendant had a gun when he was firing upon us*" (emphasis added) (*id.*). O'Brien's reply was not at all responsive to the question or suggested that he ever saw the defendant's gun after the shooting. Yet, the prosecution conflated O'Brien's observation with the recovery of the gun by asking, "Where did you observe *that* gun?" O'Brien then stated on the "left-hand side" of the courtyard, to which the prosecutor then made clear was, "the left-hand side,

"facing 1320" (*id*.). Thus, the prosecutor effectively told the jury that the gun O'Brien claimed to have observed during the shooting was the one recovered from the courtyard.

Next, through a leading question, the prosecutor reiterated that Officer O'Brien recognized the recovered gun as defendant's gun. Here, O'Brien testified he vouchered the "weapon," and the prosecutor asked, "When you say the weapon, is that the same weapon that you observed the defendant firing from which was recovered in the courtyard?"—to which O'Brien said, "Yes" (T.318 [*supra* at 11-12, VIII. B.]).

Accordingly, the CRU does not credit Officer O'Brien's testimony and identification of the recovered gun as the defendant's gun.

iii. *The location of the recovered gun cannot be explained if it was the defendant's*

Finally, the officers testified that the defendant was shooting from inside the courtyard on the right. The gun, however, was recovered on top of a flower planter located just inside the gate of the courtyard on the left. If the recovered weapon was the gun used by the defendant, there is no plausible explanation as to how it ended up where it was recovered.

All four officers place themselves either within the walkway heading towards the house, or by the entrance to the walkway after the shooting stopped and moments before the defendant was apprehended. From their vantage point, three officers saw the defendant after the shooting, coming from behind the right-side courtyard and moving towards the walkway—towards the officers, on their right. Specifically, Officer Coward testified that when the shooting ceased the defendant came out from right-side courtyard and he ordered the defendant to get on his stomach and crawl over to the officers (T.436). Similarly, Detective Strobert testified that when the shooting ceased the defendant came from the right-side courtyard with his hands up, and Coward ordered the defendant to get down (T.462). Sgt. Broughton testified that when the shooting ceased, the defendant went from the front of the right-side courtyard to the back of it, and then came out from the right-side of the walkway, on Broughton's right. Broughton saw the defendant on his belly (T.271-74).

Although Officer O'Brien corroborated that the shooting stopped after the defendant went from the front of the right-side courtyard to the back, and that he saw the defendant crawling, he testified that the defendant was crawling "in the middle back in the back where the gun was recovered" (T.354-55). To the extent that O'Brien was suggesting that he saw the defendant coming from the location of the gun, such suggestion is flatly contradicted by the testimony of Officer Coward, Detective Strobert and Sgt. Broughton, who all corroborated that the defendant came from the right-hand courtyard. Additionally, none of the officers testified at trial that they saw the defendant toss or place the gun in the left-side courtyard. Specifically, Coward did not testify about the gun

at all.[73] Strobert simply testified that he did not see the gun being recovered. Broughton testified that the gun was recovered "in the yard."

While the jury could have simply credited Officer O'Brien over the other officers, O'Brien's prior accounts of the defendant's apprehension—that were not before the jury (or part of the record on appeal)—undermines his own trial testimony. As set forth above, O'Brien stated in his initial interview that the defendant was apprehended "in front of the house." He stated during his May 16, 2000 interview that after the shooting the defendant attempted to get into the house, but the door was locked. And he testified in a prior proceeding that the defendant ran back towards the house and he next saw the defendant in the precinct. Thus, the CRU does not credit O'Brien's trial testimony that the defendant was crawling out from the location of the gun.

Even still, it strains credulity that the defendant would secret the gun in the left-side courtyard and then return to the right-side courtyard only to be found at the scene of the shooting. There is also no rational scenario as to how the defendant would conduct this maneuver—he would have had to somehow either: a) crawl across the walkway in full view of at least three if not four officers, reach into the left-hand courtyard and place the gun in the planter before inexplicably moving back across the walkway and returning to behind the right-hand courtyard without ever being seen or heard; or b) from a position behind the right-hand courtyard and out of view from the officers in the walkway, toss the gun either through the left-hand courtyard gate or over the courtyard fence only to have it land in a cement planter without the gun ever touching the metal fencing and without either being seen thrown, or heard landing.

Although the jury could have concluded on its own that there was this disconnect between the defendant and the location of the gun but decided the issue in favor of the prosecution, given the posture of the prosecution and the defense, the jury was never presented with this issue, or the relevant facts. There was no testimony or photographs clearly delineating where the gun was recovered in relation to where the defendant was apprehended, which limited the jury's ability to consider and intelligently evaluate this issue. Additionally, the absence of any remarks by the defense even suggesting to the jury that this was an issue greatly reduced any possibility that the jury seriously considered it, if at all.[74]

[73] During his January 1, 2000 interview Coward said he only saw MH with a gun and did not see another individual.

[74] Although this issue was raised on appeal to some extent, the Appellate Division did not address it (*supra* at 18-19, IX.).

D. *The Defense Witnesses Unwittingly Accounted for the Location of the Ballistics Evidence Connected to the Recovered Gun*

i. *The ejected shell casings*

The defense witnesses placed Lamont Hunter on the sidewalk at the far righthand edge of the property, firing into the air.[75] Hector Hunt testified that he believed Hunter had a "Tec" semi-automatic (T.632 [*supra* at 16, VIII. C.]). Michael Almeda testified that Hunter had a "tec, automatic" (T.711 [*supra* at 16, VIII. C.]). Given Detective Ramirez's testimony that as a general proposition a nine-millimeter semi-automatic predominately discharges shell casings to the shooter's right and rear, it would be expected that the shell casings discharged from such position would end up where Detective Gilford found the discharged shell casings from the recovered nine-millimeter.[76] In fact, the CRU asked Knox for its opinion about where the ejected shell casings would land if a shooter is on the sidewalk standing where the pillars of 1320 and 1314 meet with their back towards 1320 in the direction of the Grand Army Plaza, and firing towards the fireworks (as the defense witnesses testified). Knox opined that under those circumstances, "there is a *significant probability* that the fired cartridge cases would land in the area they were located" (emphasis added) (Knox Report at 22 ¶ 11.3).

ii. *The unfired cartridges*

The officers described a "pause" in the firing. The circumstances during which this pause occurred cannot account for the discharged cartridges. Detective Strobert was the only witness to describe in what direction the defendant was shooting before and after the pause and was the officer with the best view of the defendant. He described the pause occurring as the defendant turned his attention away from Sgt. Broughton, Officer O'Brien, and Officer Coward and responded to Strobert's gunfire by turning toward Strobert and firing. That would virtually preclude the possibility that the defendant cleared jammed cartridges from his gun during this pause. Thus, the cartridges either had to have been cleared after the shooting had ceased, or before it began, though neither possibility is supported by the officers' testimony.

The location of the unfired cartridges, however, can be explained by the defense witnesses. Jones and Hunt testified that Lamont Hunter fired shots in the air and then reloaded before firing a second series of shots (T.593, 642 [*supra* at 14-15, VIII. C.]). Although Jones and Hunt did not say that Hunter "paused" it is reasonable to conclude that what the witnesses' described as reloading was Hunter removing the magazine to clear the jammed cartridges before reinserting the magazine to resume firing.

[75] There are no documents in the trial file regarding Hunter, and the CRU was unable to locate any individual with the same or similar name.

E. *Whether the Defendant Made an Inculpatory Statement is Questionable*

At trial, Officer O'Brien (T.315), Detective Strobert (T.463), Sgt. Broughton (T.223), and Sgt. Cheesewright (T.543) each testified that when the defendant was apprehended he stated, in sum and substance—I hate you cops. I *should have* killed you mother fuckers. The prosecution stressed both in its opening statement and summation that the defendant's statement was evidence of his intent to kill the police (*supra* at 8, 18, VIII. A. and E.).

Based on the evidence the jury did not hear, the CRU questions whether the defendant made that statement. At 6:00 a.m., just hours after the shooting, Detective Lantino interviewed Sgt. Cheesewright. Lantino initially memorialized the interview in his notebook. According to Lantino's handwritten notes, Cheesewright reported that as the defendant was being handcuffed, he stated—about four times—"I *gonna kill* those mother fuckers" (emphasis added) (*supra* at 2, III. B.). Inexplicably, however, when Lantino subsequently typed a DD5 report based on his handwritten notes, the defendant's statement became, "I *should of killed you* mother fuckers" (emphasis added) (*id.*).[77] There is no evidence that the version of the defendant's statement in Lantino's DD5 was intended to correct the first version in his notes. To the contrary, months later, Lantino stated in his May 16, 2000 interview that Cheesewright reported the defendant's statement as "I gonna kill those mother fuckers" (*supra* at 7, VI.).[78]

There is an important distinction between the two versions. Unlike the second version—which became the trial version—the original version is not at all inculpatory. The defendant could have said the original version out of anger for being arrested, and not because he committed any crime. If the original version was the defendant's statement then the prosecution would not have been able to argue to the jury that the statement demonstrated an intent to kill during the shooting.

Notably, none of the officers reported the inculpatory version prior to the pretrial hearing and trial. At around 6:00 a.m., just hours after the shooting, Detective Strobert volunteered during his January 1, 2000 interview that when they found the defendant he stated, "I don't have a gun, I don't have a gun" (*supra* at 5, III. E.). Strobert did not mention his trial version of the defendant's statement. Nor did Sgt. Broughton, who volunteered during his January 1, 2000 interview that the defendant had stated upon apprehension, "I hate the police, I hate you cops" (*supra* at 5, III. E.).

Moreover, on January 1, at 10:00 a.m., Officer O'Brien, who had a duty to report to ECAB any statement made by the defendant, reported that the defendant stated upon apprehension, "I hate cops, I should kill those cops" (*supra* at 5, IV.) It is troubling that O'Brien, like Detective Strobert, and Sgt. Broughton, did not report his trial version of the defendant's statement.

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[77] Handwritten detective notes are taken during an interview and DD5s are drafted based on the detective's notes.

[78] The January 1, 2000 Report reflects that the defendant stated upon apprehension, "I hate you cops, I *should have* killed you motherfuckers" (emphasis added) (*supra* at 6, III. F.). Although the report does not indicate the source of the information it apparently relied on Lantino's DD5 of his interview of Cheesewright.

On January 5, Detective Coward, who did not testify at trial about the defendant's statement, nevertheless testified at a prior proceeding that the defendant stated upon apprehension, "I hate you mother fuckers." This statement was similar to Sgt. Broughton's initial version. Coward did not mention that the defendant stated anything about his intent to kill the officers, either in the past or the future.

One year after the crime, on January 16, 2001, Sgt. Broughton—who initially reported that the defendant stated, "I hate the police, I hate the cops"—testified at the pretrial *Huntley*/*Dunaway* hearing that the defendant stated, "I hate you police. I wished I had killed you motherfuckers. I hate you" (H.9, 10, 26-27 [*supra* at 8, VII.]).

The CRU concludes that the officers' initial versions of the defendant's statement—including the original version in Detective Lantino's handwritten notes—made shortly after the shootings suggest that the defendant never made the inculpatory version attributed to him at trial. Although he probably said that he hated the police and may have even indicated a desire to do something to them after the fact, this is vastly different from what the jury was repeatedly told. Also of significance is that the jury never learned about the officers' inconsistent versions of the defendant's statement because counsel inexplicably failed to confront them with their prior versions.

F. *The Inconsistencies and Various Versions of the Shootout*

At trial, Sgt. Broughton, Detective Strobert, and Officers Coward and O'Brien gave different accounts of the shooting. According to Coward, after MH ran into the house, gunshots came from MH's direction of flight, followed by two rounds of gunfire from inside the house (T.365-66). Coward never saw the defendant shooting.

According to Sgt. Broughton as he and Officer O'Brien approached the walkway to pursue MH, the defendant came from behind the bushes in the courtyard and fired at them. The defendant fired four volleys (T.213-14, 221-22, 256-57). The defendant initially fired "upward," and then "it seemed" that he shot down at the officers, against the brick fence (T.222). Notably, Broughton claimed that he observed the defendant from the chest up behind a four-foot high fence (T.214-15, 273). The CRU, however, determined it was not possible because the fence was four feet, ten inches high (*supra* at 2, III. A. n. 4), and the defendant is 5'5" (T.318-20, 329-30).

As discussed above, Officer O'Brien's trial testimony regarding his observation of the defendant's gun and the defendant's apprehension is refuted by his pretrial accounts. Additionally, contrary to Sgt. Broughton's testimony of hearing four volleys of gunshots, O'Brien testified that the shooting stopped after two volleys when the defendant moved to the back of the courtyard towards the front of the house (T.312).

According to Detective Strobert, after he fired two shots at MH, a volley of shots came from a courtyard where he saw the defendant just three feet from him (T.455-59, 464, 472).

While it is not unusual for eyewitnesses to have conflicting accounts of the same incident, under the circumstances here—where there are problems with the officers' credibility (as discussed above)—the CRU does not have confidence in their observations of the defendant during a life and death shootout.

XII. Conclusion

The trial evidence against the defendant consisted of three of four officers' observations of the defendant firing at them; a recovered gun, which one officer identified as the defendant's; recovered shell casings matching the gun; and the defendant's statement upon apprehension indicating that he had intended to kill the officers. But, as discussed above, in light of all of the pretrial and trial inconsistent and various versions, the CRU questions the veracity and accuracy of the officers' trial testimony.

The CRU believes that the case should not have proceeded without the prosecution fully evaluating the evidence, including the ballistics evidence—particularly, the location of the discharged shell casing matched to the recovered firearm—Officer O'Brien's identification of the recovered gun, and the officers' final trial version of the defendant's statement effectively admitting his intent to kill. As evidenced by the People's opening statement and summation, the prosecution believed that this was a "simple case" (*supra* at 8, 17, VIII. A. and E.). The prosecution embraced the evidence without analysis, examination, or consideration of any of the above issues. This was due to confirmation bias, which explains the tendency to unconditionally embrace information that supports existing beliefs and reject information that contradicts those beliefs. One behaving with a confirmation bias acts with "unwitting selectivity in the acquisition and use of evidence. . . . [T]hat people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so, is fundamental to the concept." Raymond S. Nickerson, *Confirmation Bias: Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol. 175, 175-76 (1998).

For prosecutors such bias is particularly toxic. It can result in a prosecutor firmly believing in a defendant's guilt, ignore or minimize conflicting evidence—or prior accounts—of incidents provided by the police regardless of whether those accounts are implausible or non-sensical. Here, confirmation bias prevented the prosecution from considering, or perhaps ignoring, the officers' various and inconsistent pretrial accounts, and questioning the apparent issues concerning the location of ballistics evidence of the recovered gun. Instead, the prosecutor (and the interviewers during the police investigation) accepted the officers' versions of the shooting to comport with the initial conclusion that the defendant was guilty and that it was an easy case. Accordingly, this led to the incorrect trial tactic of failing to question the credibility of the police, and seeking a conviction.

The CRU has no confidence in the integrity of the conviction, and there is no reliable credible evidence of guilt. Consequently, as the Independent Review Panel and the KCDA agree, the judgment of conviction should be vacated, and the indictment should be dismissed.