



DISTRICT ATTORNEY  
KINGS COUNTY

DISTRICT ATTORNEY ERIC GONZALEZ

REPORT ON THE CONVICTION  
OF  
DETROY LIVINGSTON

By: The Conviction Review Unit

November 2023

## **THE CRIME**

According to the People’s theory at trial, on December 11, 1982, at approximately 10:30 p.m., defendant, along with Dwayne Cook and two accomplices, entered a small grocery store at 899 Dekalb Avenue (“the grocery store”) and robbed it of marijuana. During the robbery, defendant shot and killed employee Jairam Gangaram (“the deceased”). Cook shot employee Edward McClean, who survived his injuries.

Defendant is at liberty, having been released to parole in April 2021.

## **OVERVIEW OF THE ERRORS**

CRU has determined that defendant’s conviction should be vacated and the indictment dismissed. The only evidence against defendant—a single eyewitness, Tracey Evans (“Evans”)—gave myriad conflicting pretrial accounts about defendant’s involvement in the crime, the physical evidence casts doubt on her ability to observe what happened, and newly discovered evidence of her addiction to crack cocaine at the time of the crime and its detrimental impact on her memory would probably have resulted in a verdict more favorable to the defendant. Furthermore, the prosecution misrepresented facts at trial in order to reconcile Evans’ inconsistent accounts.

## **THE POLICE INVESTIGATION<sup>1</sup>**

Leonard Ayers, of the 79th Precinct Detective Squad, was the lead detective, assisted by numerous detectives, including Al Cachie, of Brooklyn North Detective Task Force, and Andrew Burns, of Brooklyn South Detective Task Force. In 1986, Stephen Chmil, of the 79th Precinct Detective Squad, became the lead detective, assisted by Det. Casper Gibbs.

### **The First Officer at the Scene and Interviews of McClean**

On December 11, 1982, at 10:32 p.m., an anonymous male caller reported to 911 that someone had been shot and killed in a store at 899 Dekalb Avenue.<sup>2</sup> Police were advised to look for a black Chevy Nova with an orange pinstripe occupied by four black males.<sup>3</sup>

At approximately 10:36 p.m., Police Officers Christopher Dietz and (first name unknown) Collazo, of the 79th Precinct, arrived at the scene pursuant to a radio run of an assault in progress.<sup>4</sup> They observed that the store’s two security gates were down. They lifted the gate covering the entrance door and went inside.<sup>5</sup>

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<sup>1</sup> Unless otherwise cited, the police investigation account is obtained from the police documents. Numbers in parentheses preceded by “H.” refer to the pages of the pretrial hearing transcript (some of which is missing and could not be reconstructed); those preceded by “T.” refer to the pages of the trial transcripts which are separately paginated because they were reconstructed from the original stenographic notes, and those preceded by “OT.” refer to pages of the original trial transcript.

<sup>2</sup> Sprint report.

<sup>3</sup> Sprint report.

<sup>4</sup> Sprint report; Dietz memo book.

<sup>5</sup> See below, Deitz’ trial testimony.

Inside, Officer Dietz spoke to McClean, who had been shot.<sup>6</sup> McClean stated that he was delivering potato chips to the grocery store when two individuals followed him inside. The individuals waited until the deceased, “the counterman,” opened a locked steel door and then pushed in behind him. The two individuals displayed firearms, demanded money, and shot McClean and the deceased. They fled without taking any money.<sup>7</sup>

On December 12, at 10:20 a.m., Det. Ayers attempted to interview McClean at Cumberland Hospital, but he was in serious condition in the I.C.U. and could not be interviewed that day.<sup>8</sup>

At 10:45 a.m., Det. Cachie interviewed Annibal Rodriguez at a store located at 905 Dekalb Avenue. Rodriguez reported that prior to the shooting he saw three black males go in and out of the grocery store a few times. The three men had on blue jackets, blue jeans, and hats; two of them had on leather “Greek” fisherman’s hats, and one had on a cloth hat. Rodriguez heard three gunshots and immediately called his boss, who instructed him to close the store. A few minutes after the shooting, Rodriguez closed the store and spoke to “a kid named Diego,” who lived on the “8th floor second building” on Dekalb Avenue. Rodriguez told Cachie that Diego may have information. After he closed and left his store, Rodriguez observed an ambulance and the police on the scene.<sup>9</sup>

At 1:20 p.m., Det. Ayers and Crime Scene Unit (“CSU”) Det. Cirincione went to the grocery store to search for evidence. The store had been “cleaned and mop[p]ed” and no physical evidence was found.<sup>10</sup> CSU took seven photographs of the scene.<sup>11</sup>

At 9:25 p.m., Officer Dietz responded to another call regarding the grocery store. At this time, a burglary in progress was reported. Dietz observed the point of entry was in the rear of the building. The scene was then safeguarded.<sup>12</sup>

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<sup>6</sup> Dietz, complaint report. McClean was in the back storage room of the employee area, possibly sitting on a milk carton or on the floor.

<sup>7</sup> UF61 Complaint Report #9505 for assault/attempted robbery. In the early morning of December 12, the deceased was pronounced dead, and the assault/attempted robbery case was closed and the case was classified a homicide under UF61 Complaint #9524 (Ayers DD5, Subject: “Interview of Complainant”, Contents: Request case be investigated under UF61 #9524...”; Ayers DD5, “Request Classification be Changed from Assault 1 to Homicide”); *see also* DD5, “1B” (“Complainant Expired”).

The original Homicide Bureau Information Sheet (“Scratch”) indicates Ayers told an ADA that McClean reported to Dietz that three individuals entered the grocery store (*see* Original Scratch dated 12/12/82). Specifically, the original scratch states that McClean was the owner of the “smoke shop,” and that “3 males” entered behind him, displayed guns, started shooting, and left without taking any property.

<sup>8</sup> Ayers DD5, “Visit Cumberland Hospital.”

<sup>9</sup> Cachie DD5, “Interview Annibal Rodriguez.” Crime scene photos show that Rodriguez’s store was three doors from the grocery store. An undated note in Ayers’ spiral reflects an address and date of birth for a “Deiggo.” There is no evidence of an interview of Deiggo or Diego.

<sup>10</sup> Ayers DD5, “Visit Crime Scene.”

<sup>11</sup> CSU photographs, run #3510, 12/12/82. The complete set of CSU photographs are attached as CRU Exhibit 1.

<sup>12</sup> Dietz memo book. There is no DD5 regarding the burglary.

On December 13, at about 9:30 a.m., Det. Ayers interviewed Edward McClean in the I.C.U. McClean stated that prior to the shooting, as he entered the store carrying a box of potato chips, a black male was inside the store and told the deceased, “Open the door for your partner.”<sup>13</sup> McClean recognized this male, having seen him several times in the area. The deceased opened the door and another black male, with a stocking over his face, pushed McClean inside and shot him. McClean fell and then heard two to three gunshots. McClean then stopped the interview because he was too tired to answer any more questions.<sup>14</sup>

### **Tracey Wells (Evans) First Statement—Does Not Name Defendant**

On December 24, 1982, at approximately 10:00 a.m., 19-year-old Tracey Wells (later identified as Tracey Evans) approached Patrol Officer Deborah Gear of the 79th Precinct.<sup>15</sup> Evans reported that she had witnessed three men shoot “a male” inside the store. The three men were Mickey (who she later identified as Dwayne Cook), James (who she later identified as James Mays), and Life (who she later identified as Wayne Hunter). In pertinent part, Gear memorialized Evans’ statement as follows:

Tracey state[sic] she witnessed the shooting of a male and gave me the names . . . Mickey, James, and Life, they hang out on Gates and Fulton Aves . . . Tracey further stated that on the night of the incident she was smoking reefer with the guys. They were boosting [sic] about killing the guy and taking a shopping bag full of reefer. The perps also held up a number hole.

Evans stated that she would view pictures, and be available for an interview after she returned from the South—where she planned to spend Christmas—on January 14, 1983, at 8:00 a.m. She stated that she lived at 518 Putnam Avenue and “would like to remain unknown.”<sup>16</sup> Officer Gear immediately went to the 79th Precinct Detective Squad and reported Evans’ information to Det. Brady.<sup>17</sup>

On April 27, at 10:00 p.m., more than four months later, Det. Ayers went to Evans’ address at 518 Putnam and spoke with Reggie. Reggie stated that Evans used to live with Sam, but now lived on Kosciusko Street between Sumner and Lewis “in one of the houses that burnt down.”<sup>18</sup>

On May 9, 1983, at 5:10 p.m., Ayers interviewed Bernard Evans at 250 Glenmore Avenue. Bernard stated that Evans was his daughter and did not live with him, because he did not like Sam. Evans was

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<sup>13</sup> Ayers DD5, “Interview of Witness at Cumberland Hospital.” A metal half door inside the store separated the customer area from the employee area. *See* Ayers DD5, “Sketch of Scene 899 Dekalb;” CSU photo.

<sup>14</sup> Ayers DD5, “Interview of Witness at Cumberland Hospital.” Ayers informed the KCDA that the hospital would not allow an ADA to bring a tape recorder into the I.C.U. (*id.*). Follow-up scratch, dated 12/13/82, indicates the Ayers told KCDA that “three males” entered with guns, announced a stickup, left without taking any property, and that McClean stated that he could not identify the shooters.

<sup>15</sup> Her name is spelled as Evans in most police documents and as Evans at trial.

<sup>16</sup> Gear’s handwritten note. The entire note, with Evans’ name redacted, is attached hereto as CRU Exhibit 2.

<sup>17</sup> Gear’s memo book. Brady’s first name is unknown.

<sup>18</sup> Ayers DD5, “Efforts to Locate Tracy.” Sam Ellison was Evans’s boyfriend (*see* Ayers notes). There is no evidence as to what, if any, steps were taken to locate Evans prior to 4/27/83. There is a notation in Ayers’ spiral about Evans’ social security benefits, but that notation is not dated.

living with his ex-wife and her boyfriend in the projects. Bernard did not know the address but stated that he would try to contact Evans and have her call Ayers.<sup>19</sup>

### **Evans' Second Statement—Names and Identifies Defendant**

More than five months after the murder, on May 16, 1983, Det. Ayers located Evans at 315 Livonia Avenue and interviewed her at 8:00 p.m. Evans stated that she did not recall the date of the murder, but remembered that it had been cold outside, and that she had worn a coat. She had left her home at 399 Kosciusko Street to go to the store on Dekalb Avenue between Sumner and Throop Avenues. She saw McClean get out of a blue cab he was driving and go into his store. The deceased opened the bottom door in the back of the store for McClean to enter.<sup>20</sup> Defendant, Cook, Hunter, and Mays ran in behind McClean. Evans did not see where they came from. Defendant and Cook had big guns. She did not see Hunter or Mays with guns. Two men, whom she did not know, were on the street. Evans heard gunshots and ran home.<sup>21</sup>

Evans stated further that she did not know that anyone had been killed in the shooting until the next day when she was in the hallway of 650 Gates Avenue smoking reefer with Cook, Hunter, and Mays. Cook said he and defendant (who Cook called “Crazy Detroit”) shot and killed the deceased and took reefer. While they were in the hallway Penny and Denise, who lived on the 5th floor, came downstairs. Evans, who did not know Cook’s true name, said Penny and Denise would know. Evans was too afraid to tell anyone about what she had seen until she spoke to the female officer.<sup>22</sup>

Evans stated that defendant, Cook, Hunter, and Mays were all black males, about 18 years old. Defendant was six feet tall, with a dark complexion. Cook had a medium complexion. Hunter was short, had a medium build, and a light complexion. Mays had a light complexion.<sup>23</sup>

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<sup>19</sup> Ayers DD5, “Effort to Locate Evans.”

<sup>20</sup> Evans referred to McClean as Edward and the deceased as P.J.

<sup>21</sup> Ayers’ notes.

<sup>22</sup> Ayers DD5, “Interview of Person Known to This Department” and Ayers notes. The notes indicate that Evans reported that she “did not know anyone was killed until she read it in the paper.” The detective file contains a *New York Daily News* article dated 12/13/82, stating that:

[The deceased] . . . died after being shot in the chest left arm and left leg. Edward McClean . . . , was shot in the stomach and arm and was reported in fair condition . . . The holdup occurred at about 10:30 p.m. Saturday when [the deceased] was letting McClean into the grocery store at 899 Dekalb Ave . . . As [the deceased] opened the side door to let McClean in, police said, four youths rushed in with guns. They announced a stickup and, apparently without provocation, the two youths who had the guns fired at the workers . . .

<sup>23</sup> Ayers notes. Defendant’s pedigree information includes that, at the time of the crime, he was 150 lbs., 5’8”, medium skin tone and 18 and a half years old. Cook’s rap sheet and a 1/83 arrest report indicate Cook was 125 lbs., 5’8”, medium skin tone and 17 years old. Mays’ rap sheet and a 1/83 arrest report indicate that Mays was 130 lbs., 5’6”, medium/dark skin tone and 17 years old. Hunter’s rap sheet from around the time of the crime indicates Hunter was 160 lbs., 5’4”, light/medium skin tone and 14 and a half years old.

Immediately after taking her statement, Ayers had Evans view seven books containing arrest photos. She identified defendant in book number seven, photo 363. She did not identify anyone else.<sup>24</sup>

### **Evans' Third Statement**

On June 4, 1983, at 11:00 a.m., at the KCDA, Evans gave an (unsworn) audiotaped statement to an ADA in the presence of Dets. Ayers and Cachie. Evans stated that she was currently living at 315 Livonia Avenue. On the night of the shooting, she was coming down the block going to the store on the opposite side of the street of the grocery store and saw defendant, Cook, Hunter, and Mays rush into the store behind McClean as the deceased was opening the security door for McClean. Defendant and Cook had guns and pushed McClean inside behind the counter. She ran and heard shots coming from inside the store.

The next day, in a hallway of a housing project on Gates and Sumner, Evans saw defendant "and them."<sup>25</sup> She heard Cook say how he and defendant "was shootin[g]" McClean the day before. Cook had a big brown bag of reefer with a bird on it, which he said he got from the grocery store. They were "rolling up reefer" from the bag to smoke.<sup>26</sup>

### **Evans' Photo Identification of Cook and Mays**

On July 22, 1983, at approximately 9:50 a.m., at Evans' residence, Det. Ayers showed her two black and white photographs: one of James Mays, and one of Dwayne Cook. Evans identified them as two of the males responsible for the crime.

### **McClean Interview and Identification of Cook<sup>27</sup>**

On October 24, 1983, at 10:05 a.m., McClean, who by then had relocated to Texas, walked into the 79th Precinct and asked for Det. Ayers, who was not there.<sup>28</sup> Det. Victor Kinsella showed McClean a photo array containing eight black and white photographs, including Mays and Cook. McClean identified Cook as the person who shot him.

After viewing the photographs, McClean described his shooter as 21 to 25 years old, 5'9" to 5'11", 160 to 170 lbs., "strong" body, brown skin, wearing a dark "tam" type hat, and with an "AWA" gun.<sup>29</sup>

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<sup>24</sup> Ayers DD5, "Interview of Person Known to This Department," and Ayers notes. It is unknown if a photograph of Cook or Mays, both of whom had prior arrests in the 79th Precinct, was in any of the seven books Evans viewed. *See* Ayers' hearing testimony (H.48). It seems unlikely that Hunter's photo was in any of the books since in 7/83 he was only 15 years old.

<sup>25</sup> Evans did not recall the address and asked the detectives, "what was that address again?" One of the detectives replied, "in the projects on Gates and Sumner."

<sup>26</sup> Audiotape A35554.

<sup>27</sup> On 12/23/82, at 6:10 p.m., from Cumberland Hospital, Ayers called an ADA and asked that she come to the hospital to take a statement from McClean. The ADA said she needed to wait for McClean's condition to improve. Ayers DD5, "Request D.A. Office Take Statement from Witness."

<sup>28</sup> Kinsella DD5, "Re-Interview of Edward McClean (Shooting Victim Compl #9595)."

<sup>29</sup> Kinsella DD5, "Re-Interview of Edward McClean (Shooting Victim Compl #9595)." CRU could not locate the photo array.

McClea further stated that just prior to the shooting he went to get a box of potato chips from another store. The deceased remained in the store, behind the counter. McClea returned about 20 minutes later and saw a black “youth,” 13 to 14 years old, who frequented the store, near the door inside the store. The youth, unprovoked, knocked on the plexiglass partition around the employee area and told the deceased, “Your partner’s here, open the door.” When the deceased opened the metal door for McClea, Cook came running up behind McClea, “yoked” McClea with his left arm, and placed a gun against the right side of McClea’s neck. Cook said, “go in the door or I’ll blow your head off.” McClea stooped to enter.

When he got behind the metal door he turned and saw Cook’s face. McClea attempted to slam the door behind him and lock Cook out of the employee area but Cook kicked the door open. McClea backed away as Cook entered. McClea then heard a shot and was immediately struck in the left arm. McClea did not see anyone else at that time. He fell back against some beer cases stacked against the wall and heard people running past him into the employee area, toward the deceased’s direction. McClea heard three more shots, and then heard people running past him and out of the store. He could not see them. The deceased called out to McClea. McClea tried to dial 911 but his injuries prevented him from doing so. The youth McClea described initially was in the store “when everything happened.” After Cook and the others ran out, an unknown man, possibly a customer, entered the store asked if he should call the police. McClea said yes, the man left, and a few minutes later the police arrived.<sup>30</sup>

### **The KCDA Declines to Prosecute Mays**

After Evans identified Mays on October 26, 1983, Det. Ayers asked the KCDA to draft a complaint and arrest warrant for Mays.<sup>31</sup> The KCDA determined that there was insufficient evidence to arrest Mays under an acting in concert theory, because McClea did not identify Mays and Evans only saw Mays “enter the store with the shooter and leave with the shooter after she heard shots fired.”<sup>32</sup>

### **The Investigation Continues in 1986**

In July 1984, Det. Ayers transferred out of the 79th Precinct.<sup>33</sup> At some point thereafter, the case was reassigned to Dets. Chmil and Gibbs. There was no documented investigation from October 1983 until March 27, 1986, when Gibbs called Ayers and asked him to come to the precinct to brief him on the open investigation. Later that same day Gibbs requested from the NYPD photo unit photographs of: Wayne Hunter, Mays, defendant (under the name Lance Livingston), and Cook.<sup>34</sup> Evans previously

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<sup>30</sup> Kinsella DD5, “Re-Interview of Edward McClea (Shooting Victim Compl #9595).”

<sup>31</sup> At that time, Mays was incarcerated having been convicted of committing an unrelated robbery with Cook. *See* KCDA Indictment No. 4/83.

<sup>32</sup> Homicide Investigation Report #6514, follow up dated 10/26/83.

<sup>33</sup> The prosecutor’s trial notes.

<sup>34</sup> Gibbs DD5, “Review of Content of Case.” CRU could not locate the photographs.

identified all but Wayne Hunter. On March 31 and April 1, 1986, Ayers and Gibbs spoke about the case in person. On April 1, Gibbs called Evans' mother and left a request to have Evans call him.<sup>35</sup>

#### **Evans' Fourth Statement**

On April 17, 1986, at approximately 10:00 p.m., Dets. Gibbs and Chmil located Evans at 244 Reid Avenue and brought her to the 79th Precinct where they interviewed her. Evans stated that in 1983 she did not tell Det. Ayers everything because she was afraid. She said that prior to the crime, she had known the four men who committed the crime for about two years and was afraid for her life. She had since moved to another neighborhood. Evans stated that she had witnessed the shooting.<sup>36</sup> She said that on the night of the murder she was going to 899 Dekalb Avenue. As she approached the store, she saw McClean get out of a blue car and go into the store. She was standing in front of the store, looking through the window, when she saw McClean walk to the back of the store toward the metal half door. She saw the deceased open the metal door for McClean. As McClean was bending down to go through the door, Cook, defendant, Mays, and Hunter rushed into the store. Cook and defendant had guns. While Mays and Hunter acted as lookouts, Cook and defendant pushed McClean through the metal door. Cook and defendant shot at McClean and the deceased. One of the individuals grabbed a bag that was behind the counter, and they all ran out. She saw McClean holding his stomach and bleeding while walking around. The deceased was behind the counter. She saw the police and ambulance arrive and then she went home. The next day, at 650 Gates Avenue, Cook, Mays, and Hunter were in the hallway. Cook was bragging about how he and defendant shot up the store on Dekalb. They had reefer in a bag which was shared among the group.

Evans was shown eight single photographs: Defendant, Cook, Mays, and Hunter and four fillers. She identified defendant, Cook, Mays, and Hunter as Detroit, Mickey, James, and Life, respectively as the four men who had been involved in the crime.<sup>37</sup>

#### **Evans' Fifth Statement**

At 11:00 p.m. that same night, Evans was taken to the 70th Precinct where she gave an audiotaped statement to an ADA. The ADA had the four recently identified photographs of the suspects with him for the interview. Evans stated that she saw McClean get out of a cab and go into the store. The deceased let McClean into the door to the counter and as McClean was going in, Mays and Cook pushed into the store behind McClean. Mays and Cook had guns. She saw Cook grab McClean in a "yoke" and the deceased was "steady mouthin." That's when they started shooting. Indicating Mays' photograph, she said "he" was the one who shot McClean in the stomach, and pointing at the photograph of Cook, she said she saw him shoot the deceased in the chest and "somewhere on the arm." Evans indicated that the two people in the other photographs were inside the store acting as

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<sup>35</sup> Gibbs DD5, "Review of Case with Det. Ayers."

<sup>36</sup> As stated, Evans previously told Ayers and an ADA (in her third statement) that she had only heard shots on the night of the murder.

<sup>37</sup> Chmil DD5, "Interview of Witness Known to this Department."



lookouts while this went on.<sup>38</sup> They did not see her because she was “hiding, that’s when [she] came from out the place where [she] ran into where it was burned out, it was behind the dumpster.” That’s when she saw Cook holding McClean in a “yoke” with the gun up to his head and “he” shot and killed the deceased.<sup>39</sup>

The next day she saw three of them in the hallway of 650 Gates Avenue with a brown paper bag with reefer, and they were bragging about how they robbed and did a shooting. Evans could not remember which three she saw but when prompted agreed she saw the three people in the photographs of defendant, Cook, and Mays. Evans stated she knew the two lookouts through her friend Penny for two to three years. She did not know their names, but she knew Cook and Mays by name and “face-to-face.” Twice Evans did not know the answer to questions the ADA asked, and stated: “dag, I’m scared.” The second time the ADA paused the recording.<sup>40</sup>

### **Mays’ Interview**

On May 20, 1986, Dets. Chmil and Gibbs went to Otisville Correctional Facility to interview Mays. Mays was shown single photographs of Cook, Hunter, and defendant. Mays stated he knew Cook as “Mickey” and defendant as “Detroit” from the Gates Avenue area. Mays did not recognize Hunter. Mays denied any knowledge of or involvement in the crime. When asked to take a polygraph examination, he said he was not sure it would be accurate, and the test was not administered.<sup>41</sup>

### **Evans’ Polygraph**

On June 6, 1986, Det. Gibbs brought Evans to the KCDA for a polygraph test administered by KCDA Detective Investigator (“D.I.”) Joseph Ponzi. The exam notes summarized Evans’ version of events: Evans saw four individuals on the street—Cook, Mays, Hunter, and defendant—in front of the store. Hunter and Cook pushed their way in behind McClean with guns in their hands. The other two were standing outside. From behind a garbage container, she saw Hunter shoot the deceased and Cook shoot McClean. She saw the four assailants run out of the store, down Dekalb Avenue toward Lewis Street. They took reefer in a big brown bag.<sup>42</sup> Evans was then questioned about this statement, and the examiner determined that she was being truthful.<sup>43</sup>

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<sup>38</sup> Presumably Hunter and defendant.

<sup>39</sup> It is unclear who Evans means by “he” at this point.

<sup>40</sup> Audiotape A86640.

<sup>41</sup> Chmil DD5, “Interview of James Mays M/B/21 [NYSID number].”

<sup>42</sup> Ponzi polygraph report #1129.

<sup>43</sup> Chmil’s spiral, noting that “the result of the test was positive and the witness was present during incident.”

## Defendant's Lineup and Arrest

On July 7, 1986, defendant was produced from Riker's Island to the 79th Precinct for a court-ordered lineup for the murder.<sup>44</sup> Evans viewed the lineup and identified defendant as one of the shooters in the murder.<sup>45</sup> Defendant was arrested. The KCDA paperwork at the time of his arrest reflects that defendant and Hunter were lookouts, Mays shot McClean, and Cook shot the deceased.<sup>46</sup>

## Cook's Arrest and Statement

On July 20, 1986, at 1:30 a.m., Evans called the 79th Precinct Detective Squad stating that she had just seen Cook in the vicinity of Reid and Gates Avenues and described what he was wearing. Officers Fred Falcone and John Ross responded and arrested Cook in that vicinity.<sup>47</sup>

At approximately 3:30 a.m. that same morning, at the 79th Precinct, Cook gave a *Mirandized* statement to Det. Gibbs. Cook stated that he did not know about the shooting and denied that he was ever in the area of the grocery store. At the end of 1982, he moved with his family from New York to Cerritos, California, and had only recently returned, about eight months prior to his interview. Cook asked about the guns used in the shooting, because he would probably know the shooters' identities based on the type of guns used. Cook said he had seen Mays and defendant with their .357 magnum and had seen Tony Owens with his .32 caliber pistol.<sup>48</sup>

At approximately 6:00 a.m., Cook gave a videotaped *Mirandized* statement to an ADA.<sup>49</sup> Cook reiterated that he was not involved in the shooting, and that he recently returned from living in California.<sup>50</sup> He was not certain whether he moved to California before or after December 11, 1982. He said that he probably knew the shooters, based on his conversation with the detective. He suggested that James Mays, Thurman Workman, or defendant was a shooter. Cook added that neither defendant nor Mays hung out on Dekalb Avenue.

Detectives arrested Cook later that day. KCDA paperwork indicated that Cook killed the deceased and that an unapprehended other (Mays) shot McClean.<sup>51</sup>

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<sup>44</sup> Defendant was arrested on 5/13/86, under the alias Lance Walcott. He pleaded guilty to Criminal Possession of a Controlled Substance in the Fifth Degree, under Kings County indictment 3225/86, and on 1/4/88, was sentenced to a prison term of two to four years concurrent with his sentence on this case.

<sup>45</sup> Chmil, Lineup Report, 7/7/86.

<sup>46</sup> Follow up scratch dated 7/7/86; ECAB Information Sheet dated 7/7/86; D.A. Data Analysis Form (arraignment notes).

<sup>47</sup> Gibbs DD5, "79<sup>th</sup> Anti-Crime received Call from Witness;" Officer Ross memo book.

<sup>48</sup> Gibbs DD5, "Arrest of Subject Dwayne Cook."

<sup>49</sup> Videotape R86396.

<sup>50</sup> Warrant Squad paperwork from April through 11/83 indicates that Cook moved to California with his family in 1982 or 1983. Cook was certainly in Brooklyn in 1/83, when he and Mays were arrested for a robbery in the 79th Precinct.

<sup>51</sup> See follow up scratch dated 7/7/86; DA Data Analysis Form (arraignment notes), dated 7/20/86; ECAB write up, dated 7/20/86.

## THE GRAND JURY PROCEEDINGS

On July 22, 1986, defendant's and Cook's case was presented to the grand jury.<sup>52</sup>

### The Indictment

On July 24, 1986, defendant and Cook were charged, each aiding the other and acting in concert with others, with two counts of Murder in the Second Degree (P.L. § 125.25[1], [3] [intentional and felony]); one count of Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]); one count of Robbery in the First Degree (P.L. § 165.15[2]); two counts of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); and two counts of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]).

## THE PRETRIAL HEARING

On October 7, 1987, a *Wade/Dunaway* hearing was conducted for both defendant and Cook.<sup>53</sup>

Before the testimony commenced, defense counsel stated that Evans had identified Mays as a shooter. Counsel asked why Mays was not arrested and whether Mays made any statements that exculpated either defendant or Cook (H.2-5). The prosecutor replied that he provided all the statements to counsel. He noted "that there are inconsistent statements as to who among the same group of four was a shooter. I would – whether it's reliable, that's up to a jury" (H.5).

The prosecutor added:

I can say what that is based on. The witness's initial statements were these two defendants were the shooters and her testimony in the Grand Jury was these two defendants were the shooters. That is her Grand Jury testimony. In between are the audiotapes and polygraph where apparently some of the nicknames she's using get jumbled up in her mind. Since the initial statement and her sworn testimony about these two shooters, our theory is these two are the shooters.<sup>54</sup>

(H.6).<sup>55</sup>

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<sup>52</sup> Because grand jury proceedings are secret (C.P.L. § 190.25[4][a]), an account of the proceedings are redacted.

<sup>53</sup> 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. The purpose of a *Wade* hearing (*United States v. Wade*, 388 U.S. 218 [1967]) is to determine whether an identification procedure was improperly suggestive.

<sup>54</sup> References to grand jury testimony adduced in open court is not redacted because it is a public record.

<sup>55</sup> Evans' first statement did not mention defendant.

## **The People's Case**

### Det. Ayers<sup>56</sup>

Det. Ayers testified that on May 16, 1983, Evans identified defendant after viewing 400 to 500 photographs in seven photo books (H.490-91).<sup>57</sup>

### Det. Chmil<sup>58</sup>

Det. Chmil testified on cross examination that on April 17, 1986, Evans told him that Cook and defendant had guns. An hour later, in his presence, Evans told an ADA (during her fifth statement) that Cook and Mays were the shooters (H.230-31). Chmil showed Evans eight color photographs on April 17, four of which were the suspects. He brought the four photographs she identified with him when he brought Evans be interviewed by the ADA. The true names, nicknames, and alleged conduct of the four suspects was written on the backs of the photographs. Evans did not look at the backs of the photographs (H.233-34, 257-60). Chmil was aware that defendant had an attorney who wanted to be present for the lineup, viewed by Evans. But by the afternoon of July 7, 1986, when the lawyer failed to arrive at the precinct at the appointed time, he conducted the lineup in the lawyer's absence (H.237-39).

### The ADA Who Provided Notice of the Lineup

An ADA testified that defendant's (prior) attorney was on notice of the July 7 date and location of the lineup (H.207-08, 211). She had no recollection or notation that the attorney requested the lineup be changed to July 14 (H.215-20, 274).

### Det. Ayers

On July 22, 1983, Evans identified two black and white photographs of Cook and Mays (H.31). On October 24, 1983, McClean walked into the 79th Precinct. Det. Kinsella called Det. Ayers at home to inform him that McClean was looking for him. Ayers asked Kinsella to compile a photo array using the photographs that were in his case folder (H.48). Ayers told Kinsella he had two of the possible suspects (H.48).<sup>59</sup>

### Edward McClean

McClean testified outside of Cook's presence. He stated that he saw Cook's face as Cook pointed a gun at him. Cook was two feet away from him, in well-lighted conditions (H.64). He looked at Cook for five seconds (H.67). After he was shot, he heard the footsteps of "at least two people" run past him toward the deceased (H.67). McClean testified that he walked into the 79th Precinct to check on the status of his case in October 1983; no one had contacted him (H.114). Det. Kinsella showed him

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<sup>56</sup> A large portion of the transcript containing Ayers' direct examination is missing.

<sup>57</sup> Because portions of the hearing record are missing, this testimony is based on the court's account in its oral decision.

<sup>58</sup> Chmil's direct examination could not be recreated because the reporter's original notes are missing.

<sup>59</sup> In recreating the hearing transcript, the court reporter was working off original notes. It is not clear from the original notes if Spiegel's cross examination of Ayers was very short, or if the bulk of the reporters' notes are missing. In the only copy CRU has, Spiegel never asks Ayers why he did not show McClean a photograph of his client on 10/24/83.

a stack of ten to twelve black and white photos and McClean was “positive” he had identified his shooter correctly (H.77, 119-20).<sup>60</sup> McClean described his shooter as 19 to 21 years old, about 5’11”, 160 to 180 pounds with a “sort of longish face” (H.78-79). He had no distinguishing marks, no facial hair, and was wearing a skull cap covering his hair, and a dark colored coat (H.79-80). McClean did not recognize or know Cook from before the crime (H.99). He did not recall the first time that he gave a description of the shooter and conceded that it may not have been until after he was shown photos on October 24, 1983 (H. 108-10). McClean said that the young man who was in the store the night of the shooting when he first walked in was someone he would see daily hanging around the store. He described him as looking like “an ordinary young black kid” (H.95). McClean did not know what happened to this young man during the shooting.

Det. Kinsella<sup>61</sup>

Det. Kinsella confirmed on cross examination that McClean had only described Cook after selecting his photograph from the stack of pictures he was shown on October 24, 1983 (H.178). McClean told Kinsella that he had not seen Cook before the incident (H.178).

Det. Gibbs

Det. Gibbs testified that Evans directed police officers to Cook on the date he was arrested and that she was able to describe him accurately (H.182-200).

Tracey Evans<sup>62</sup>

On October 19, the day Evans was to testify, the prosecutor informed the court that Evans refused to do so because she was afraid (H.320-21). The court issued a material witness order and arrest warrant for Evans. After a recess, the prosecutor stated that Evans was now willing to testify (H.325-26).<sup>63</sup> Evans testified outside the presence of defendant and Cook.

Initially, Evans testified that she saw Cook, Mays, and defendant going into 899 Dekalb Avenue (H.332-33). The prosecutor asked, which of “the four” were carrying guns?” (H.333-34). Evans answered that defendant and Cook had been carrying guns. The prosecutor then asked where Cook, Mays, defendant, and Life were when Evans first saw them (H.342, 344). Evans replied, “going into the store.”<sup>64</sup>

Evans testified that she met Cook through her friend Penny and saw him every other day (H.338-39). She knew defendant through Cook and would see him every other day on Gates Avenue (H.339). She would see Cook and defendant together about once a week (H.340). On the night of the murder, she

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<sup>60</sup> Kinsella showed eight photographs to McClean, which the prosecution admitted into evidence at the hearing (H.125, 140).

<sup>61</sup> Kinsella’s direct examination could not be recreated because the original court reporter notes were missing.

<sup>62</sup> The court stated that if it were to suppress one or more of the identification procedures viewed by Evans, it would consider whether there was an independent source for her identification (H.330-31, 463).

<sup>63</sup> At the completion of Evans’ testimony, the prosecutor asked the court to reinstate the material witness order but allow Evans to remain on ROR status, to ensure that she would return to court on 10/26 for her trial testimony (H.459-61).

<sup>64</sup> The name Wayne Hunter never came up in the hearing. Hunter is referred to by all parties as “Life.”

was behind a dumpster, looking through the window of the store (H.337). She saw Cook shoot McClean from “behind the metal door,” and saw defendant shoot the deceased “like where I was, by the dumpster, where you serve the customers” (H.347). Mays and Hunter were lookouts (H.348).

Evans did not know the length of time of the incident (H.345), which person she had identified in photographs in the grand jury (H.356), her distance from the entrance of the store when she saw four individuals go inside (H.372-73, 375), who went into the store first (H.373-74), how long after McClean entered the store that defendant and the other three went in (H.374, 376-77), whether she saw defendant’s and Cook’s guns before or after they went into the store (H.378), what the guns looked like (H.379), how long it was after the defendant and the others went into the store that she went behind the dumpster (H.380), what the dumpster looked like (H.380), or how far away from the store the dumpster was (H.381). Evans said the dumpster was in front of the window and the gate was up (H.384).

Early in defendant’s attorney’s cross examination Evans fell asleep on the stand and the case was adjourned (H.384-85).<sup>65</sup> When the hearing resumed, Evans testified that in May 1983, when she looked at the photo books with Ayers, she had been informed that some of the people she had already mentioned as participants in the crime were pictured in the books.<sup>66</sup>

Cook’s attorney established on cross examination that on the night of the murder Evans was going to a store on the opposite side of the street as 899 Dekalb Avenue (H.407). She did not know anyone had been killed until she read about it in the newspaper (H.417). Evans denied she used crack or smoked reefer (H.422). Evans did not remember if she was on the same side or the opposite side of Dekalb when McClean went into the store (H.409), and she did not remember what the perpetrators were wearing or if McClean was holding anything when he entered the store (H.410-11). She did not remember what Cook looked like at the time of the murder (H.426), if she saw anyone come out of the store (H.412-13), or if she heard any shots that night (H.431). Evans said she “got it mixed up” when she told an ADA (during her fifth statement) that Mays shot McClean (H.432). She had no memory of telling D.I. Ponzi that Hunter shot the deceased (H.433). She made a mistake when she told the grand jury that defendant pushed McClean through the door (H.449). She could not remember when she had last seen defendant, Cook, Mays, or Hunter prior to the shooting (H.442-43). She could not remember when the first time was that she was shown any photographs or what type of photographs she viewed (H.443-44, 453), but later said it was Ayers who first showed her photographs in a police notepad (H.454). She did not remember telling Ayers that she heard shots and ran home (H.447). She could not describe what defendant or Cook looked like (H.463).

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<sup>65</sup> A portion of defense counsel’s cross examination of Evans is missing.

<sup>66</sup> Evans’ cross examination testimony regarding the viewing of the photographs is missing. However, during oral arguments following the hearing, defendant’s counsel argued that Evans “testified, I believe, that when Ayers showed her the book, which she could not remember or give a description of, that she had been informed, I believe, if my recollection is correct—of course I don’t have the minutes before me, that some of the people that she had already named, nicknames, were in the book” (H.464-65).

## **The Defense Case**

### Defendant's Prior Attorney

Defendant's prior attorney, who represented defendant on indictment 3225/86 and represented him at the time of his arrest on the murder, testified on behalf of the defense. He testified that he had spoken to an ADA (who testified about the lineup notice), by phone, and requested an adjournment of the lineup from July 7 to July 14. The ADA agreed and asked him to arrange the date change with the detectives directly, which he did (H.279-81). He took notes documenting this conversation (H.282-85).

### Officer Dietz<sup>67</sup>

Officer Dietz testified in pertinent part that when he interviewed McClean at the scene, McClean stated that he could not identify the shooters.<sup>68</sup>

## **The Hearing Court's Decision**

The court credited attorney Rosenfeld's testimony and suppressed Evans' lineup identification of defendant, holding that defendant had been denied the presence of counsel at the lineup. The court permitted Evans to make an in-court identification of defendant based on her prior familiarity with him and her independent source observations during the commission of the crime (H.500-03). The court held that Evans' identification of Cook was confirmatory, and that McClean's identification of Cook was not suggestive (H.505-06).

## **THE TRIAL**

Jury selection began on October 21 and 22, 1987, immediately following the hearing.

### **Defendant Rejects a Plea Offer**

After jury selection and before opening statements, KCDA offered defendant a plea of guilty to Manslaughter in the First Degree in exchange for a prison sentence of six to 12 years to run concurrently with a sentence of six to 12 years that was offered on his open case (3225/86). Defendant rejected the offer and continued to maintain his innocence (T.529).

### **Cook Pleads Guilty Pursuant to a Cooperation Agreement**

On October 26, 1987, before opening statements, Cook agreed to cooperate with the prosecution and testify against defendant in exchange for a reduced sentence. Pursuant to the cooperation agreement, Cook pleaded guilty to Robbery in the First Degree and was promised three to nine years' incarceration in exchange for his cooperation. He also was promised that if he pleaded guilty to the top count in his other open indictment (4/83), he would receive a sentence of three to nine years' incarceration to run

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<sup>67</sup> Dietz's testimony could not be reconstructed so it is unclear which defendant called him as a witness.

<sup>68</sup> During oral arguments following the hearing, Cook's attorney summarized Dietz's testimony as follows: "while McClean was conscious, able to hold a nine-minute conversation, while waiting for the ambulance, that [McClean] was queried concerning descriptive information, his capacity to identify and he indicated that he couldn't respond and he couldn't identify" (H.475). *See also* court's oral decision (H.499).

concurrently with the instant case (T.514). During his plea allocution, Cook stated that he, defendant, “Life,” and Mays went to rob a marijuana store at 899 Dekalb Avenue.<sup>69</sup> He and defendant were armed with guns. He pushed McClean inside the store and shot him. Defendant ran to the back. Cook then heard a shot but did not see defendant shoot. Life took a large amount of marijuana, and no money was taken (T.516-20).

After the allocution, defendant’s attorney moved for a mistrial, arguing that the jury had been tainted by the parties’ voir dire statements and that defendant was prejudiced by having to share his challenges with a co-defendant who was no longer a party to the case (T.530). The motion was denied. The court stated that it would instruct the jury not to speculate about Cook’s absence, and in any event, Cook would testify and the “mystery” of what happened to Cook would be solved for the jury (T.531-32).

## **Opening Statements**

### The People

The People stated that defendant, acting with Cook, Mays, and Hunter, killed the deceased while robbing a bag of marijuana from a smoke shop (T.538-39).<sup>70</sup> Cook grabbed McClean around the neck, put a gun to his neck, and pushed him into the employee section of the store (T.539). Defendant shot the deceased two or three times. After the shooting they “pulled the gates down, secured the gates on the store, and fled” (T.540). Evans saw everything unfold from behind a dumpster, through the display window (T.541). Cook was going to testify, pursuant to a cooperation agreement, that he shot McClean and that defendant shot and killed the deceased (T.543).

### The Defense

Defense counsel stated that Evans was incredible, and that McClean never identified defendant (T.544). Counsel pointed out that Cook was now a cooperator facing a minimum of three years for a crime which carried a maximum sentence of 35 years’ incarceration (T.545). Counsel argued that it was in Cook’s self-interests to “sell out” and “implicate” the defendant, and that Cook, like Evans, should not be believed (T.545-46).

## **The People’s Case**

### Officer Dietz

Officer Dietz testified as follows:

On December 11, 1982, at 10:30 p.m., he and Officer Collaso responded to a radio run of an assault in progress at 899 Dekalb Avenue and arrived at the scene within seconds (T.557-58). The front gates to the store were rolled down (T.548). There were two metal gates covering the store front: one covered the entrance door, and one covered the display window. The entrance door gate was rolled down but unlocked, so they opened it and went inside. The gate over the display window was down

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<sup>69</sup> Cook used the nickname “Life” to refer to the fourth accomplice, not Wayne Hunter.

<sup>70</sup> At trial, Hunter is referred to as “Life.”



and locked (T.548-49, 554).<sup>71</sup> Dietz spoke to McClean at the scene for approximately nine minutes (T.550). The deceased was in bad shape. Dietz did not recall if the deceased was able to talk (T.550).

Dietz then described five crime scene photographs, and the photographs were admitted into evidence (T.551-56). They showed the following:

The first photograph in evidence depicts the front of the store. There was snow on the ground and a dumpster directly in front of a metal security gate. The security gate was rolled down to the ground and covered approximately two-thirds of the entire storefront. To the right of the gate was the entrance door, which was ajar and swung all the way open inside the store. There is no security gate visible over the front door; if one existed, it was completely retracted when the photograph was taken. The lightbulb above the entrance door was on.

The second photograph in evidence was taken from the entrance looking toward the metal half door in the rear of the store. The metal door was open and swung outward, into the customer area. The area above the metal door was closed off with opaque metal sheeting extending to the ceiling.

The third photograph in evidence was taken from the metal half door facing the entrance door. The top two-thirds of the entrance door was glass, and there was a dark shade pulled down and covering the top two-thirds of the glass. Approximately 18-24 inches of glass were exposed. Promotional stickers covered half of the exposed glass area.

The fourth photograph in evidence depicts the employee area, from the rear of the store looking toward the street. The display window was almost entirely boarded up as follows: There was plywood on the top portion of the glass window extending down to approximately 6 inches above the counter level. Below the plywood was a large opaque wooden box-shaped structure that blocked the glass window. Below the wooden box, starting slightly below countertop level and extending down approximately 12-18 inches, there is an area of unblocked window.<sup>72</sup> Below this area was another

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<sup>71</sup> At trial Dietz testified as follows:

Q: What did you observe about the building when you initially got there?

A: Upon my arrival at the location, we observed the grocery store, the gates were rolled down.

Q: How many gates were there?

A: Two gates.

Q: Tell us what type of gates.

A: The roll-down steel-type gates.

Q: And were they locked?

A: No, they were not locked.

Q: What did you do when you arrived?

A: We looked around. We didn't see anything. I noticed the gates were unlocked, so we rolled up the gates, and that's when we discovered the two individuals that had been shot....

Q: Which gate did you raise?

A: The gate for the entrance door.

Q: Where was the other gate?

A: The other gate was locked over the front window, display window (T.548-49).

<sup>72</sup> Because the metal security gate was down when the photograph was taken, it is impossible to say whether this area is transparent glass or not. However, the horizontal lines of the security gate are not visible in the photograph, suggesting that what the viewer sees is not the back of the security gate. CRU estimated the height of this potentially transparent area using the six-pack of beer bottles that is visible sitting on top of the lower box-shaped structure.

wooden box-shaped structure, blocking the window. Food items and other items for purchase are visible on and around the counter area.<sup>73</sup>

The fifth photograph in evidence depicts the employee storage area.<sup>74</sup>

### Edward McClean

McClean testified as follows:

McClean's testimony was substantially consistent with his prior statements, except as follows. He testified that Cook's face was familiar to him (T.579). He admitted that marijuana was sold at the store, in small brown envelopes stamped with a blue or purple bird stencil that was unique to the store (T.568-69). The money at the store was kept in a drawer, not in a cash register. The drawer contained about \$200 the night of the shooting (T.643-46).

On December 11, around 10:30 p.m. he parked his blue Plymouth Satellite, before entering the store with the box of potato chips he had retrieved from another store (T.569-70). He did not see anyone on the street (T.589). When he got to the store, which was well-lighted, the front door was ajar and was held open with a string at the top of the frame (T.578, 614).<sup>75</sup> There may have been a few jars and boxes and cigarette or beer posters in the window (T.612).

McClean reiterated his account of what happened when he entered the store. McClean added that he looked at Cook's face for five seconds and he recognized Cook from the area (T.578-79). The person who shot him had a thin, long face, a narrow straight nose, possibly a moustache, lips "not as full as the normal black lips," and a skin tone lighter than McClean's, who considered himself dark-skinned (T.579-81).

The force of the gun shot thrust him face forward into some beer cases where he remained lying down after he was shot. (T.576-57). He heard footsteps from two to three people followed by three gunshots. Approximately 30 to 35 seconds later he heard three pairs of footsteps leaving the store, and after two or three minutes, he got up and walked to the where the deceased was lying behind the counter in the long part of the "L" of the employee area (T.582-83, 637-38). Consistent with his prior statements, McClean stated that an unknown black male entered, and McClean agreed that the unknown male should call 911. After this man left, McClean walked back toward the short part of the "L" of the employee area (T.640). The police arrived soon thereafter (T.585). McClean said that the first time he remembered being interviewed by the police was when he went to the 79th Precinct on October 24, 1983 (T.588).

McClean knew Evans as a customer who bought marijuana at the store once or twice a week. He did not think she was a drug addict. He did not see her on the street the night of the incident (T.590-92).

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<sup>73</sup> CSU photograph #5, not admitted into evidence, has a closer view of the plywood that almost entirely covers up the display window from the top of the counter to the ceiling.

<sup>74</sup> The description of the five photographs is based on CRU's viewing.

<sup>75</sup> McClean did not testify about the gates.

He remembered Evans always talked to everyone in the store; she was extremely talkative every time she came in (T.598).

### Tracey Evans

Evans testified as follows:

On the night of December 11, 1982, Evans was walking to a store. When she got to the vicinity of the “reefer store” at 899 Dekalb Avenue, she was on the opposite side of the street (T.666). From that vantage point she saw McClean get out of a blue cab and go into the store (T.657-58). She then saw Cook, followed by defendant, go into the store (T.655-56).<sup>76</sup> She also saw Mays and Hunter enter after Cook and defendant and remain in the front of the store (T.659-60). When asked about the order in which the four assailants entered the store, Evens answered, “To my knowledge?” “I don’t know — I’m telling the truth” (T.660). Both Cook and defendant had handguns (T.677).

After she saw the four assailants, Evans crossed the street and hid behind a dumpster “in front of the gate—in front of the store” (T.666-67). The prosecutor then showed Evans a crime scene photograph in evidence that depicted the gate covering the display window in the down position. Evans then corrected herself. She was not in front of the gate; the gate was up when she witnessed the crime (T.667). She was hidden on the left side of the dumpster (T.668). When McClean got to the back of the store where the deceased let him in, “the shooting started” (T.664). The deceased was “behind the glass” when the shooting started (T.664). Cook was the first person to fire, and he was in the customer area when he first shot at McClean (T.665-66). Evans stated that she did not know how far defendant was from the deceased when defendant shot him. But then, when asked to use an object in the court room to aid her estimate, she said defendant was about 15 feet from the deceased (T.670-71). She did not know if anything was blocking her view through the store window when the deceased was shot (T.671). The deceased was shot once or twice (T.671). She did not remember what Mays and Hunter were doing during the shooting, and she did not know where the four assailants went after the shooting because she went home (T.672). When confronted with the crime scene pictures, Evans said Mays and Hunter were watching to make sure nobody came into the store (T.673). She could not remember where the deceased was shot, but McClean was shot in the stomach (T.678). She was walking past the front door of the store when she saw Cook shoot McClean. She observed this through the front doorway (T.677). She watched defendant shoot the deceased through the front display window while hidden behind the dumpster (T.678).

On December 12, Evans saw Cook, Mays, and Hunter inside of 650 Gates Avenue. Cook had a shopping bag filled with small brown paper reefer bags, each of which was stamped with a black bird design. She smoked the marijuana with them. She had seen that stamp before on the bags of reefer she bought from 899 Dekalb (T.680-81). In the months leading up to the crime, she bought marijuana from the store about twice a week (T.681).

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<sup>76</sup> During her testimony Evans referred to defendant as “Detroit,” Cook as “Mickey,” Hunter as “Life,” and Mays as “James.” Chmil testified that defendant’s nickname was Detroit (T.651).

Evans knew defendant through Cook and would see him about every other day on Gates Avenue for one to two years prior to the crime (T.674). She knew Cook through her friend Penny and would see him every other day for about a year prior to the crime (T.674-75). She did not remember if she had ever seen Cook and defendant together (T.675).

On cross examination, Evans was confronted with her grand jury testimony that she did not smoke marijuana with Cook on December 12 because she did not smoke marijuana at all. Evans said her grand jury testimony had been a lie because she was afraid (T.688). Evans could not remember where the store she was originally walking to was located beyond that it was “up the block, on the next corner” (T.689). She never bought groceries at 899 Dekalb Avenue, only marijuana (T.690). She became good friends with the deceased because he was the one who usually sold her marijuana (T.690-91). Evans could not remember when she first saw Cook, defendant, Mays, and Hunter on the night of the crime (T.693-96). She could not remember if McClean had been driving the car he got out of or if he was holding anything in his hands (T.698). She could not recall how far she was from McClean when she saw him get out of the car, how far the car was from the front of the store, whether she saw any other people on the street when McClean went into the store, and if she had seen the four assailants before she saw McClean exit the car (T.699-700). She did not know where the four assailants came from (T.702). Evans did not see any young black boy inside the store when McClean entered (T.735). She stated that she observed McClean get shot as she was crossing Dekalb toward the store (T.739-41). When Cook shot McClean, defendant already had gone through the door to the employee area (T.743). She saw Cook take a shopping bag of reefer from “hanging up in the chandelier, behind the counter,” and after the shooting she saw Cook come out of the store with the bag (T.756-57).<sup>77</sup> She said that she left before the police and ambulance arrived (T.751).

Evans answered “I don’t know” or “I don’t remember” to dozens of defense counsel’s questions. Evans was asked “did you see [deceased] get shot in the chest?” and “after Edward got shot, did he fall down, did he remain standing?” She did not know the answer to either question (T.750). She was asked “when did you cross the street to go to the other side of the street if you ever did?” She answered, “I don’t remember.” Counsel asked, “was it before the shooting or after?” Evans replied, “After. No. I don’t remember” (T.736). Evans was asked “how long after [McClean] got shot did [the deceased] get shot?” She did not remember (T.750). She did not remember how tall defendant was, whether he was thin or heavy, whether he had any facial hair or facial scars or what he was wearing at the time of the shooting (T.790-91). Evans did not remember reading about the murder in the newspaper (T.787). Defense counsel admitted into evidence a *Daily News* article about the murder, dated December 13, 1982 (T.788) (which mentioned details of the crime and is quoted above in n. 22). Counsel asked Evans if she had obtained all of her information from the newspaper article. Evans denied it, became irate, threatened to throw a cup at counsel and repeatedly complained that her stomach hurt (T.793-95).

Defense counsel confronted Evans with her numerous inconsistent statements. To most questions, Evans answered that she did not recall the prior statement. She did not recall telling Det. Ayers that

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<sup>77</sup> There is no chandelier visible in the CSU photographs.

all four assailants pushed McClean, that she only heard shots and did not see the shooting, that she did not know anyone was killed until she read it in the newspaper, or that she saw defendant in the hallway the next day (T.759, 765, 785). She did not recall telling Det. Chmil that she observed McClean enter the store by looking through the window of the store (T.770). She did not recall telling Chmil that both Cook and defendant pushed Mclean into the store, or that she saw McClean walking around holding his stomach and that she saw the police and ambulance arrive before she left (T.770-71). She did not recall telling the ADA (who took her fifth statement) that Mays and Cook pushed McClean into the store, that Mays shot McClean and Cook shot deceased, and that the other two assailants were lookouts (T.773-77). She did not recall telling the ADA that she saw defendant in the hallway the next day (T.777-78). She did not recall telling D.I. Ponzi that Hunter and Cook pushed McClean into the store and that she saw Hunter shoot the deceased and Cook shoot McClean (T.778). She did not recall testifying in the grand jury that defendant pushed McClean through the metal door, that she did not see any of the assailants take a brown bag, that after she saw the assailants run out of the store she ran home to her mother, or that the next day she saw Cook, Hunter, and defendant in the hallway (T.779-83).

Evans provided minimal explanations for the few inconsistent statements she did acknowledge making: She claimed that she told Officer Gear that “Detroit” participated in the shooting, but that Gear mistakenly left his name out of her report (T.753-55). When she told an ADA (who took her third statement) that she did not see the shooting but only heard the shots, that had been a mistake (T.765). When she told D.I. Ponzi that Hunter and Cook had guns in their hands, that was a mistake (T.778).

On redirect examination, the prosecutor asked Evans why she had chosen to come forward to Officer Gear. Evans replied, “The day before, the day before Christmas [the deceased] used to always talk to me about his kids, his daughter...So I was sitting out, when I was looking out the window, Christmas Eve, before I got ready to go down South, that is when I thought about it. I never was going to come forward about it until that, when I was thinking about it” (T.797). She came forward because of “[her] conscience and his kids” (T.798). When asked if she had initially reported hearing shots and not seeing them, Evans replied, “I might have, and I might have not, you know” (T.799). The prosecutor asked if by the time she spoke to Det. Chmil in 1986 she had moved from 399 Kosciuszko Street, where she lived at the time of the crime and which was in the area of the crime, to a location farther away from 899 Dekalb. Evans replied, “I think so, yeah” (T.799-800).

#### Dr. Joseph Veress

Dr. Joseph Veress from the Office of the Chief Medical Examiner testified that he performed the autopsy on the deceased (T.709). The cause of death was gunshot wounds to the chest and hemorrhaging from the left leg (T.710). The deceased had been shot two times, once in the torso and once in the leg.<sup>78</sup> Both were through-and-through wounds, fouling and stippling were absent, and no

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<sup>78</sup> The prosecutor stated in the opening statement that the deceased had been shot “two or three times.”

bullet was recovered from either wound. The deceased also sustained a laceration on his left arm which Veress opined was a grazing bullet wound (T.711-17).

### **Cook's Plea Withdrawal**

Prior to Cook's scheduled testimony, and before his attorney appeared in court, Cook told the court he would not testify for the People and wished to withdraw his plea (T.811-13).<sup>79</sup> Based on this change in circumstances, defendant's counsel moved for a mistrial, claiming defendant was prejudiced by the People's opening statement (T.814). Once Cook's attorney was summoned to court, his attorney made the record that Cook "has indicated that he has no involvements in either of these situations that were covered by the plea and that he has no knowledge as to whether [defendant] did or did not participate in the homicide which allegedly occurred at 899 Dekalb Avenue" (OT.325). In the presence of defendant, the court told Cook he was now subject to a perjury charge based on his plea, and that Cook was giving up "the biggest Christmas present" the court had seen any defendant receive (OT.328). The court stated,

You are walking away with a three-to-nine deal on a case where you are facing 25 to life and a robbery, 8 1/3 to 25 consecutive, 33 1/3 to life, instead of walking out of this courtroom in one year because you put in a year, while [defendant] is probably going to get acquitted and then go home and you are not even assured to be the killer in this case. Lots of luck pal.

(OT.329).

Following the court's admonition of the co-defendant, defense counsel stated that he had consulted with defendant, and that defendant's motion for a mistrial was being withdrawn (OT.331).<sup>80</sup>

### **The Defense Case**

#### D.I. Joseph Ponzi

D.I. Ponzi testified that he interviewed Evans to determine whether she witnessed the shooting at 899 Dekalb Avenue. Evans told him Hunter shot the deceased and Cook shot McClean, and that defendant and Mays stayed outside the store (T.821-25).

#### The ADA Who Took Evan's Fifth Statement

The ADA who took Evans fifth statement testified that he interviewed Evans in April 1986 and she told him Mays shot McClean and Cook shot the deceased in the chest and the arm (OT.317-20).

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<sup>79</sup> On Thursday, 10/29, prior to testifying, D.I. Ponzi administered a polygraph examination to Cook. He was asked, "Did you take part in the gunpoint robbery of that candy store at 899 Dekalb Avenue in December of 1982?"; "was it you who fired 1 or more shots at Edward McClean during that robbery of the candy store at 899 Dekalb in December 1982?"; and "were you one of the persons who fired shots at the workers in the store during a robbery at 899 Dekalb in December 1982?" While the polygraph printout with Ponzi's notations is attached to the report, there is no documentation in the file regarding Cook's replies or Ponzi's opinion as to whether Cook was truthful. *See* Ponzi Polygraph report #1375.

<sup>80</sup> Before the parties rested the court asked defense counsel if he would like a curative instruction to the jury, and defense asked that the "curative instruction not mention Mr. Cook directly" (OT.349).

During the interview, the ADA had to stop the interview because Evans was scared, crying, and shaking (OT.321-22).

#### Officer Dietz

Officer Dietz testified that at 9:25 p.m. on December 12, 1982, he and other officers responded to a radio run of a burglary at 899 Dekalb Avenue. He discovered a break-in in the rear of the building. At this point the scene was safeguarded by the other responding officers (OT.335-36). Dietz responded on December 14, 1982, to another call of a burglary at 899 Dekalb, but upon arriving at the scene it appeared the burglars had not gained access to the store (OT.338).

#### Ena Walcott

Ena Walcott, defendant's mother, testified that defendant had a visible scar on the left side of his face (OT.339). On cross examination, Walcott stated that defendant went by the name Detroit and that he had a friend named Mickey, but she was unsure if it was the same Mickey who was involved in this case (OT.341).

#### Officer Gear

Pursuant to a stipulation, the portion of Officer Gear's note containing Evans' statement that Mickey, James, and Life were involved in the shooting was admitted into evidence, without being read to the jury (T.839-40).<sup>81</sup>

#### Det. Chmil

Det. Chmil testified that he interviewed Evans in 1986 and Evans told him that she was standing in front of the store, looking into the window when she saw McClean enter the store (OT.354). As McClean was going through the half door, the four assailants rushed into the store. Cook and defendant pushed McClean through the half door. She saw the four assailants enter the store and run out a short time later holding a bag. After they left, she saw McClean walking around holding his stomach and she stayed until the ambulance arrived. (OT.354-55). He interviewed Mays regarding this case, but never arrested him (OT.355). On cross examination Chmil testified that Evans had said she was in the area right after the shooting and she went up the block and when the police and ambulance came, a crowd started to gather, and she came back to the scene (OT.357).<sup>82</sup>

### **Summations**

#### The Defense

Defense counsel argued that Evans was not credible. Counsel discussed the numerous inconsistencies between Evans' and McClean's testimony and between Evans' own statements. He highlighted that Evans had not testified to seeing McClean carrying a box as he entered the store, or to seeing a young black boy inside the store, inconsistent with McClean's testimony (OT.397). He pointed out that the

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<sup>81</sup> The parties agreed not to introduce the remainder of the note, which included the portion about Evans hearing the shooters discussing the crime.

<sup>82</sup> There is no mention of leaving and returning to the scene in any of Chmil's handwritten notes or any DD5.

People told the jury in their opening statement that the shooters pulled the front gates down before they fled, but that there was no evidence of that at trial (OT.407-08). The defense noted that Evans did not mention defendant in her statement to Gear and asked the jury whether Gear had mistakenly omitted that from her notes, or Evans had not mentioned it (OT.410).

### The People

The People argued that Evans' testimony was credible because on every material element of the crime, she was corroborated by McClean's testimony (OT.337-45). Her inconsistencies over the years were understandable "mix ups" of nicknames and roles that anyone, even someone who had had "a few more privileges" and "done a lot fewer drugs" would make if asked to recount an incident as many times as Evans had been asked over the years (OT.452-59). He described the defendant, Cook, and their two accomplices as a "family of robbers" and argued that Evans "mixed up" their roles (OT.456).

The People specifically addressed three issues in the case: 1) the window Evans claimed to have observed the crime through was covered by a locked gate when the police arrived minutes after the 911 call; 2) Evans failed to mention defendant when she first approached the police; and 3) it was not until 1986 that Evans claimed to have witnessed the shooting.<sup>83</sup> In explaining why the gates were down when Dietz arrived, the prosecutor said the gates must have been up during the shooting, that the assailants must have pulled down the gates when they fled, and that the gates were unlocked when Dietz arrived. The prosecutor stated that Officer Dietz testified the gates were down but unlocked when he arrived (OT.446-47 [emphasis added]).<sup>84</sup>

Regarding Evans' failure to mention defendant's name in her statement to Gear, the People argued that Gear's note reflected that Evans had mentioned four people, but that Gear forgot the fourth person's name. The People stated that:

her memory of that conversation with Officer Gear is four names, the four names that you have heard so much about: Detroy, Mickey, James, and Life. She says she names all four. Why hold back once you have crossed that line to do the right thing... if you look at the police officer's note, you are going to see something that all of us have done at some point. If you look very closely, it says, Mickey comma James comma Life comma and then, kind of stuck in there, real small, a little bit above the line, the "and." You can see what was going on here in her mind; four, Mickey comma James comma Life comma—I can't remember the other one and—she puts the "and" in.

(OT.450-51).

As for why Evans originally stated she only heard the shots and only later admitted to witnessing the shooting, the People argued it was because she had moved neighborhoods in the intervening years

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<sup>83</sup> While Gear's note, in evidence, stated Evans "witnessed the shooting of a male," at trial Evans testified that the first time Evans indicated she had witnessed the shooting was to Chmil.

<sup>84</sup> As described above, Dietz testified at trial that the gate covering the window was locked and the gate covering the door was unlocked (T.549).



and this allayed some of her fears, fears that one would naturally feel from being a witness in a homicide case against somebody you know (OT.446, 453).

### **The Verdict and Sentence**

The jury found defendant guilty of Murder in the Second Degree (P.L. § 125.25[3]) [felony]; Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]); Robbery in the First Degree (P.L. § 165.15[2]); two counts of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); and two counts of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]). The jury acquitted defendant of intentional murder (P.L. § 125.25[1]) and manslaughter (P.L. § 125.20).

On December 2, 1987, before sentence was imposed, the prosecutor asked the court to impose the maximum sentence—25 years to life (OT.10). Defendant denied his guilt, saying “I did not kill [the deceased]. I don’t know nothing about this, but it happened. They found me guilty, and I can’t say nothing else, but I didn’t kill [the deceased]” (OT.12).<sup>85</sup>

The court sentenced defendant to the following prison terms: 20 years to life on murder count; six to 18 years on attempted murder count; eight and one-third to 25 years on the first-degree robbery count; four to 12 years on the second-degree weapon possession count relating to defendant’s gun; three to nine years on the second-degree weapon possession count relating to Cook’s gun; two to six years on the third-degree weapon possession count relating to defendant’s gun; and one and one-half to four and one-half years on the third-degree weapon possession count relating to Cook’s gun. All sentences were imposed to run concurrently to one another (OT.13-15).<sup>86</sup>

### **COOK’S TRIAL**

Cook’s trial commenced on November 16, 1987.

#### **The People’s Case**

##### Tracey Evans

Evans testified on November 16 and 17. Her testimony on direct examination was brief, undetailed, almost entirely led by the People, and essentially consistent with her testimony at defendant’s trial.

On cross examination Evans answered, “I don’t remember” to almost every question, including numerous questions about prior inconsistent testimony at defendant’s trial (T.96-98, 132-33, 157, 159, 162-71, 175, 184-85, 187, 189-92, 196-98).<sup>87</sup> She did not know where Penny lived or whether Penny and her sister Denise had come downstairs the next day in 650 Gates Avenue (T.56, 149-50). She

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<sup>85</sup> Prior to sentencing on this case, defendant pleaded guilty, under indictment 3225/86, to attempted sale of a controlled substance (crack), to run concurrent to the sentence he would receive on the case.

<sup>86</sup> In 1997, while incarcerated, defendant was convicted, after a jury trial, of possessing a razor blade. After being adjudicated a mandatory persistent felony offender based on his prior convictions for the instant murder, criminal possession of a controlled substance, and a robbery in the third degree, he was sentenced to a prison term of eighteen years to life to run consecutive to the murder sentence. In 2021, pursuant to an attorney motion, the prosecution agreed defendant had been erroneously sentenced as a mandatory persistent felony offender. Defendant was resentenced on the prison contraband case.

<sup>87</sup> Numbers in parentheses preceded by “T.” in this section refer to the pages of the transcript of Cook’s trial.

could not remember Cook's height, build, facial hair, or facial characteristics back in 1982 (T.74). She could not remember the last time she saw Cook before the incident, nor could she remember when or how she first met him (T.76-78, 159). She could not remember what defendant looked like in 1982 either (T.75). She could not remember how far defendant was from the deceased when he shot him (T.130-33). She could not remember where McClean had parked his car the night of the murder (T.134). She did not know what route she took to get to the store (T.81-84). She could not remember whether the store she intended to go to was on the same or the opposite side of the street as 899 Dekalb (T.87, 94-96). After much back and forth, she remembered it was on the same side of the street, but she could not remember how far away the two stores were from each other (T.103-04).<sup>88</sup> She did not remember how far the dumpster was from the front of the store (T.196). In the rare case that Evans did admit to an inconsistent statement, she dismissed most of them as "mistakes" (T.125-26, 138-40). Evans had never seen any of the perpetrators with a car and did not see the perpetrators flee the crime scene in a black Chevy Nova with an orange pin stripe (T.136-37).

Evans' comportment on the stand was disturbing. She threatened to drench defense counsel with water and "knock him on the side of the head" (T.47). She called him a "knucklehead" (T.48), told him to "shut up" (T.52, 128, 173), called him a "jackass" (T.66, 119), referred to him as "ma'am (T.70), told him "You ain't shit" (T.100), and told the jury "This fuck is getting on my nerves" (T.161). She threatened to throw her chair at him (T.109), to slap him (T.132), to punch him in the face (T.162). Evans answered numerous questions with "none of your business" (T.40, 41, 43, 50, 54, 57, 101, 121). She repeatedly asked the court if she could go home and go to the bathroom. At one point there was a side bar and the court commented that Evans was "obviously...intellectually impaired" and "obviously has problems with her memory. Problems with her behavior" (T.70-71).

#### Edward McClean

On direct examination, McClean testified substantially the same as he had at defendant's trial, but stated, for the first time, that when he returned to the store after going out to get the box of potato chips, both the security gates over the door and the display window were up and the front door was wide open, so there was clear visibility from the street into the store (T.221-23). McClean identified Cook in court and said he had seen him in the area prior to the shooting (T.230, 233, 334).

On cross examination, McClean acknowledged he had been in the KCDA's Office at the same time as Evans on a number of occasions prior to trial (T.344). He stated that the first time he gave a description of thin nose, long face, and a moustache "might have been" five years after the incident (T.384). Defense counsel confronted McClean with his statements to Officer Dietz, indicating that he could not describe the shooter, and his statement to Det. Ayers on December 13, 1982, in which he described the shooter wearing a stocking over his face. McClean responded that he did not recall speaking with police the night of the crime and did not recall his interview with Ayers. (T.333, 380-83).

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<sup>88</sup> Bizarrely, Evans testified that on the night of the murder she had snuck out of her parents' house to go buy a "dollars' worth of ham... and some cheese and some eggs and some bacon and some bread to go back home and put it in the oven and watch it bake" (T.80-81).

## **The Defense Case**

Cook called numerous witnesses who testified, in pertinent part, that McClean was conscious and speaking when he was interviewed by Det. Ayers on December 13, 1982, and he had told Ayers that the shooter was wearing a stocking mask over his face, and that he had not seen the shooter before (T.488-91). A character witness testified that Evans had a reputation as a crackhead and a liar (T.659-62).

## **Cook's Verdict and Sentence**

Cook was convicted of one count each of Attempted Murder in the Second Degree (P.L. §§ 110.00/125.25[1]); and Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03). He was acquitted of two counts of Murder in the Second Degree (P.L. § 125.25[1],[3]); one count of Robbery in the First Degree (P.L. § 165.15[2]); one count of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); and two counts of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]).

On January 27, 1988, Cook was sentenced to concurrent terms of imprisonment of four to 12 years on each count.

## **POST-CONVICTION PROCEEDINGS**

On his direct appeal to the Appellate Division defendant claimed, in pertinent part, that the evidence was legally insufficient to prove his guilt beyond a reasonable doubt. In a *pro se* supplemental brief defendant claimed, in pertinent part, that he was prejudiced by Cook's decision not to testify for the People, and that he received ineffective assistance of counsel because counsel: a) improperly read into the record the newspaper article about the crime in order to show that the article was the source of Evans' testimony rather than her own observations; b) failed to object when the prosecutor mentioned Cook in his opening statement; c) failed to explain the ramifications of waiving the mistrial motion after learning that Cook would not testify; and d) requested a general instruction that opening statements do not constitute evidence.

The Appellate Division held that:

The evidence adduced at trial established that the defendant, who was armed with a handgun, participated in the robbery of a store with three other assailants, one of whom was similarly armed with a handgun. Upon entering the store, the other armed perpetrator [Cook] shot and wounded one store employee and the defendant shot another employee who subsequently died from his wounds. A witness observed the shootings and the assailants' flight from the store during which the other armed perpetrator carried a shopping bag full of stolen items.

... The evidence was sufficient to permit the jury to conclude that the defendant and his fellow robbers acted in concert to perpetrate the robbery, that the defendant intended to kill the employee whom he shot, and that he shared the intent of the other armed assailant who shot and wounded the other employee. The evidence clearly

established that the defendant and his co-perpetrators shared a community of purpose and a common intent to commit the instant offense. It is significant that the defendant was obviously aware that at least one other robber was armed and this evidence provided a reasonable basis from which the jury could logically infer that the defendant acted with the mental culpability to commit all of the crimes charged including the attempted murder of the surviving victim.

*People v. Livingston*, 171 A.D.2d 759, 759-60 (2d Dep't 1991) (internal citations omitted).

The Appellate Division further stated that the defendant's remaining contentions, including those raised in his supplemental *pro se* brief, were without merit. *Id.* at 760.

Defendant's leave application to the Court of Appeals was denied. *Livingston*, 78 N.Y.2d 924 (1991) (Wachtler, J.)<sup>89</sup>

## **THE CRU INVESTIGATION**

The deceased's daughter asked CRU to investigate defendant's conviction claiming that he was innocent. CRU reviewed defendant's and Cook's trial files, interviewed relevant witnesses, and obtained and reviewed the trial transcripts.<sup>90</sup> The store at 899 Dekalb Avenue no longer exists, and as such, there was no crime scene to revisit.

Thereafter, defendant moved (for a third time) to vacate his judgment of conviction pursuant to C.P.L. § 440.10. In support of his motion, defendant reasserted claims that he has raised in appeal and prior motions, including that he is innocent.<sup>91</sup> After consultation with his court-appointed counsel, defendant withdrew this motion in consideration of CRU's pending investigation.

### **Interviews of Evans**

CRU located Evans at her residence. Her brother Kevin was present. Evans let CRU into the apartment, but upon hearing the purpose of CRU's visit, she became visibly uncomfortable. She paced back and forth and attempted to hide in a bedroom, but the door appeared to be locked. As CRU asked questions, Kevin repeatedly interrupted and yelled at Evans not to answer. Evans said very little. After pacing and saying she did not remember anything and that she was unhappy CRU had found her, she stated that she remembered the deceased and the store on Dekalb Avenue, because she used to get high there. On the night of the shooting, she was on the street to buy drugs. She was not in the store during the shooting. After a few minutes, Evans asked CRU to leave. She said that she did not recall anything.

Later that day, CRU reached Evans by phone. She stated that she did not recall the names Mickey or Detroit. She did not recall much of anything because she "was on crack, hard" at the time. She said

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<sup>89</sup> Defendant filed numerous collateral motions, none of which raised any claims relevant to CRU's investigation.

<sup>90</sup> Mays died before CRU had an opportunity to interview him.

<sup>91</sup> Defendant did not point to any new evidence or sworn statements in support of this claim.

CRU should speak with the “DA and the crooked cops from the 7-9.” She agreed to come to the KCDA for a follow-up conversation.

Thereafter, Evans came to the KCDA for an interview, which was recorded. Evans, again, said that she did not recall anything about the murder because of her heavy crack use. She said that officers from the 79th Precinct used to come to her house looking for her and she hid under the bed because she was scared. The police pressured her. She did not recall speaking with a female officer on Christmas Eve. CRU read Officer Gear’s written account of Evans’ statement to her, and she did not recall it. She repeated that she was a heavy crack user. She did recall “walking up and down the street” on Dekalb the night of the shooting, although she stated that she was coming from smoking crack. The names Penny and Denise sounded familiar to her. Evans refused to look at photographs of any of the assailants. She looked at crime scene photographs of the store and recognized the front of the store but not the interior. Evans ended the interview after twenty minutes. Thereafter, CRU reached out to Evans twice, but both times she was too busy to talk.

### **Interview of Wayne Hunter**

CRU located Wayne Hunter. Hunter stated that he lived in the Walt Whitman Housing Projects in Fort Green, apartment 5G, until 2006. He lived there in December 1982, when he was fourteen years old.<sup>92</sup> At that time, he was interested in school and only smoked a little marijuana. He attended Sands Junior High School, transferred to Macon Junior High School for a specialized math program, and then attended Aviation High School. He started using crack when he was sixteen years old, became addicted, and at 18 years old started selling crack.

In 1982, Hunter did not have a street name, but was later known as “Amel,” a name given to him by the “Five Percenters.” He never went by the name Life, but it was a popular street name in 1982. He did not know Detroit or Mickey. CRU showed Hunter a photograph of defendant, a photograph of Mays, and a clip from Cook’s videotaped statement (muted). He did not recognize anyone.

Hunter was told that the crime took place at 899 Dekalb Avenue, and Hunter said the address was not familiar to him and he did not recall hearing that any employees of a store on Dekalb had been shot in December 1982. Hunter did not recognize the crime scene photographs of the location and said he never hung out in that neighborhood and would have had no reason to be there, especially at the age of 14. At that age he did not have any friends with cars. CRU explained to Hunter the basic facts of the case and asked if he had been the young male inside the store before the shooting took place. Hunter said no. He was insistent that he had no idea how his name came up in the investigation and had nothing to do with the crime. He never bought weed from anyone who stamped the bag with a bird stamp. In fact, he said, he never heard of marijuana packaging being stamped at all. Based on his experience selling and buying drugs, in the 1980s and 1990s stamps were mostly for heroin.

### **Interview of Sandra “Penny” Graves**

CRU interviewed Sandra Graves at her residence, out-of-state. Graves remembered Evans. She accurately described Evans and said Evans was an acquaintance with whom she smoked weed when

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<sup>92</sup> According to Google Maps, the Walt Whitman Projects are 2.1 miles, or a 40-minute walk, to 899 Dekalb Avenue.

she was a teenager. In 1982, Graves never saw marijuana packaged with a stamp. Graves remembered Evans as a nice girl who came from a poorer family than hers. She did not know Evans to do any drugs other than marijuana. She thought Evans lived on Madison Street in or around 1982, but she had never been to her house. In 1982, Graves was living in 650 Gates Avenue, apartment 5F, and went by the name Penny.

Graves said she never knew anyone had been killed in a grocery store on Dekalb Avenue and she was certain that she never heard anyone confess to murder. She recalled that when she was a teenager, a male ADA called her mother's house and asked her to come to the KCDA. She went to the KCDA where an ADA asked her to testify at a trial about a statement she and her sister overheard. The ADA said Evans told him about the statement. The ADA said the case involved a robbery and "some weed." The ADA did not mention murder. Graves did not recall the statement that the ADA told her she had allegedly overheard, but she recalled that whatever it was it was most definitely not true; she never heard anyone confess to a crime in her and Evans' presence. Graves recalled telling the ADA that whatever Evans had said was a lie, and she refused to testify at trial. No one ever followed up with her about testifying.<sup>93</sup> Graves did not recall ever seeing Evans after this meeting with the ADA. If she had, she would have confronted her.

Graves identified Evans in a 1987 photograph, which CRU showed Graves. CRU showed Graves black and white photographs of defendant and Mays, and a clip of Cook's videotaped statement (muted). Graves did not recognize defendant or Cook. She immediately recognized Mays as "James," a casual acquaintance from the neighborhood, who lived in 685 Gates Avenue. She saw Mays in the hallways of 650 Gates on occasion, but she never hung out with him. She did not recall Mays and Evans hanging out together.

### **Interview of Officer Deborah Gear**

CRU spoke to (retired) Officer Deborah Gear on the telephone. Before the interview, Gear reviewed her memo book entry, her note summarizing her conversation with Evans, a 1987 photograph of Evans, and certain notes of an ADA (the prosecutor at the pretrial hearing and trial). Gear remembered Evans approaching her on Christmas Eve. It did not appear to her that Evans was on drugs.

Gear said it was not uncommon, at that time, for civilians to approach her with information because she was young, on a foot post, and "looked like everyone's mother." Gear recalled writing down what Evans had told her and walking her notes over to the 79th Precinct Detective Squad. She was certain

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<sup>93</sup> If the ADA in fact asked Graves to corroborate Evans' testimony and Graves refused to do so, stating that Evans' testimony was a lie, the failure of the ADA to disclose this information certainly constitutes a *Brady* violation. However, Graves was recalling an interview 30 years later. She did not recall the substance of what the ADA wanted her to testify to. She was not aware the case was a homicide. When shown a picture of defendant in 2019, she did not recognize him, even though defendant acknowledged in 2020 that he and Graves had been friends. Simply put, while Graves seemed credible, and CRU credits the sum and substance of her account, her memory may not be entirely accurate, particularly as to who said what at one interview. There is no documentation that the interview took place at all, let alone the substance of the interview. Given the myriad versions of the hallway statement that Evans gave, CRU cannot be sure which version the ADA was asking Graves to corroborate. Without more, CRU is hesitant to label the failure to call Graves as a witness or disclose the substance of her interview a *Brady* violation.

that she would have memorialized Evans' statement verbatim, and if Evans had mentioned a fourth suspect, Gear would have memorialized that detail. Gear was known for taking thorough notes. Gear recalled that Det. Ayers interviewed her at the precinct, and she did not think she spoke to any law enforcement officer after that. She stated that she did not know that the case had ever gone to trial, or how the case was resolved.

### **Interview of Gerald Wayne Cook**

CRU interviewed Cook in an out-of-state prison facility. Cook had not been advised of CRU's visit in advance. Cook has been arrested approximately 45 times, primarily for shoplifting and violating probation since relocating out-of-state in the early 2000s. He did not remember the witnesses who testified for him at trial. He claimed that he was not bothered by Evans' testimony implicating him because, since he did not know who she was, "he didn't pay her no mind." He said he did not know defendant had gone to trial on the case. He was hesitant to speak with CRU and unsure of what the benefit would be to him. He was visibly upset when shown his recorded interview with Det. Gibbs and asked us to turn it off. He recalled Gibbs. He acknowledged he knew Mays and defendant back in the 1980s "from the community." He acknowledged most people back then called him "Mick." Cook had nothing further to add and seemed disinterested in CRU's inquiries.

### **Interview of The Trial ADA**

CRU spoke to the trial prosecutor by phone. He lives and practices law out-of-state. He had no recollection of the case. CRU asked if we could email him documents to review to refresh his recollection. He stated that he wanted to consider our request before we emailed him, and he would get back to us. CRU has not heard back from him.

### **Interview of Defendant**

CRU interviewed defendant by telephone. The call was recorded. Defendant stated that in 1982 he was living at 433 Monroe Street in Bedford Stuyvesant, with his mother and stepfather. Around or before the time of the shootings, he met Cook, Mays, and Life hanging out in the neighborhood. They were all friends. Cook and Mays lived in the same building in the projects on Gates Avenue. Life also lived in the area.

Life's true name was Darren Stone, which defendant first learned when Life wrote to him in prison. Defendant, Cook, Mays and Stone committed numerous street robberies, or "muggings," together over a period of years, along with other friends, such as Tony "Tootie" Owens, Thurman, Earl, See God, and Gary Purdy. They did not use guns during the robberies, rather they would surround and "yoke" a victim and remove their property. On a few occasions they removed guns from their victims, including a .25 caliber and a .32 caliber handgun, which became communal property after the robbery was completed.

Sometime in 1983, defendant moved to 243 E. 93rd Street with his family, but he continued to return to his old neighborhood and commit robberies with his friends. Around 1984, after he completed a sentence at Rikers Island for a robbery, defendant moved in with his brother on Schenectady Avenue and stopped hanging out with Cook, Mays, and Stone. He moved back to the Bedford Stuyvesant

neighborhood in 1985-1986 and lived with his girlfriend Denise on Madison Street between Throop and Sumner Avenues. He started selling crack on that block shortly after he moved back. He did not personally sell crack; people worked for him. The crack was packaged in unstamped vials. He never saw marijuana packaged in stamped bags, only paper envelopes.

Defendant did not recognize Evans at the time of trial, and never learned if or how she knew him. Defendant was friends with Penny Graves from grade school. He did not recall Graves introducing him to Evans. Defendant and his friends frequently hung out in the vestibule of Graves' building at 650 Gates Avenue; that was the only part of the trial that made sense to him. He assumed Graves knew Cook, Mays, and Stone from seeing them there. Defendant did not believe he had ever been inside of 899 Dekalb Avenue. He explained that it was about ten blocks from his apartment on Monroe Street, and numerous other stores were closer. Defendant smoked marijuana at or around 1982, but he would buy it from any number of storefronts within a few blocks of Monroe Street. He never overheard anyone in 1982 discussing the crime or its proceeds. He did not read about the murder in the newspaper. The first time he learned about the murder was when he was arrested for it. He believed he had never heard of the murder before because Dekalb Avenue was far from the areas he hung out.

Defendant never heard of Wayne Hunter. At trial, he assumed the prosecution was referring to Stone every time there was mention of Life. Defendant only went by the street name Detroit; Lance was his middle name, short for Lancelot. He had no knowledge or opinion regarding whether Cook, Mays, or Stone committed the murder.

### **Interview of Edward McClean**

CRU interviewed McClean by telephone. The call was recorded. McClean stated that he had tried hard to block this incident out of his mind and did not recall much of what occurred. He did not recall testifying at two trials. He stated that whatever he had testified to at trial was truthful and as accurate as possible. Of note, McClean stated that he had been robbed at gunpoint in the store before. On one occasion robbers came in through the ceiling. Another time robbers tried to follow McClean into the store, but he was able to close the front door behind him and the robbers fired at him through the glass of the door. He did not report either of the prior incidents to the police. McClean recalled there was a window in the store that employees could see through out onto the street. McClean did not recall there being a gate that covered the window. When he viewed the crime scene photos during the interview and saw the gate over the window, he could not recall if the gate was usually up or down. The gate over the front door was always up if the store was open. The padlock that locked the gate over the front door was always kept inside the store in the employee area. McClean stated that in October 1983 he had been contacted by detectives who informed him that they had located an eyewitness, a young woman whose "conscience was bothering her" and wanted him to come from Texas to New York to make an identification. McClean denied personally selling marijuana at the store. He did acknowledge that marijuana was sold at the store but did not recall it having a stamp on the packaging.



## CRU ANALYSIS

### Evans Was Not Credible

There were many aspects of Evans' narrative that, even upon superficial review, should have raised serious questions about her credibility. For example, she claimed (1) to have crossed the street, away from her desired destination, to observe a violent crime up close; (2) to have hid behind a dumpster mere inches from the crime scene and stayed long enough to watch the entire shooting unfold and the assailants flee without regard for her own personal safety; (3) to have seen the assailants remove the bag of marijuana from a chandelier (there was no chandelier in the store); (4) to have overheard and understood Cook when he spoke in Pig Latin and confessed to the murder in her presence.<sup>94</sup> In isolation, these may be credibility issues best left for the jury's consideration. They are of particular concern however, because 1) Evans' eventual trial testimony not only conflicted with her multiple prior statements, but it also conflicted with the physical evidence, and the jury likely was misled with respect to that physical evidence, as explained below, and 2) not all of Evans' inconsistencies were before the jury.

#### All of Evans' Statements Were Inconsistent on Substantial Issues of Fact

By the time the People put Evans on the witness stand at defendant's trial and argued that the jury should believe her testimony beyond a reasonable doubt, Evans had given six statements to the police and KCDA's office and testified in the grand jury (*see* above, Evans' hearing and trial testimony). As described below, virtually every statement she gave differed substantially from the last.<sup>95</sup> Her inconsistencies are so significant—whether she saw the shooting or only heard shots, whom she saw with guns and whom she saw shooting, whether she remained until the police arrived or not—that she never should have been used as a witness. By the time defendant's trial began, Evans was so reluctant to testify that a material witness order was issued to secure her presence, although it was never executed. That episode reveals the type of witness Evans was—unreliable, reluctant, and susceptible to pressure.<sup>96</sup>

Despite her inconsistencies over the years, Evans remained an essential witness. At the time she approached Officer Gear, the case had no leads or eyewitnesses. The surviving victim had said he was unable to identify the shooter because the shooter was wearing a stocking over his face. There was no ballistic evidence. The crime scene had been corrupted; it had been mysteriously cleaned up by an unknown person or persons before CSU could process the scene; it remains unknown what, if

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<sup>94</sup> Notably, the one fact that Evans consistently failed to mention was the presence of the 911 caller in the bodega between the commission of the crime and the arrival of the police, a fact that was corroborated by McClean.

<sup>95</sup> In addition to Evans' inconsistent pretrial and trial testimony about her grand jury testimony (*see* above), there were myriad inconsistencies between Evans' grand jury testimony and her prior statements, which are not discussed in the analysis due to the secrecy of those proceedings.

<sup>96</sup> Even the court seemed to indicate it found Evans incredible when it told Cook, at the time Cook withdrew his guilty plea, that defendant likely would be acquitted.

anything, was removed from or altered within the store before CSU arrived.<sup>97</sup> When Evans approached Officer Gear two weeks later, she was all the police had. There were no ballistics, no blood stains or patterns, no fingerprints to compare with Evans' testimony. Her initial statement could not be corroborated or contradicted by any known witness. Evans' testimony was and remains the only evidence against defendant. Because Evans' testimony was all that linked defendant to the crime, her credibility was crucial. Yet, Evans' inconsistencies are so numerous that the People should not have relied upon her to convict the defendant.

CRU has summarized Evans' most important inconsistencies in the tables below.

#### Evans' Statements About What She Actually Saw Changed

Evans' statement about whether she witnessed the actual shooting changed over time. In her first statement, she indicated she witnessed "the shooting of a male." However, in her subsequent two statements, she claimed she did not actually see the shooting, but heard shots. Then, in her remaining statements, beginning in 1986, she stated she did see the shooting and provided details about who shot whom and in what body parts each victim was shot.

#### Defendant's Involvement and Role Changed

Whether Evans claimed she observed the actual shooting or just heard the shots, she did not consistently identify defendant as a shooter. In her first statement to Officer Gear in 1982, which arguably was her most reliable because it was her only spontaneous statement, she never mentioned defendant at all. She added him as a fourth perpetrator when she met with Ayers on May 16, 1983, and picked his photograph from 400 to 500 photographs that she viewed.

Evans' failure to name defendant in her first statement is particularly troubling because the evidence demonstrates that Evans at least knew of defendant, even if he did not know her. The evidence supporting Evans' familiarity with defendant is (1) she identified him in a photograph from an arrest when he used the alias Lance Livingston, but called him "Detroit," a nickname that detectives would not have known at that time; (2) defendant admits to robbing people and selling crack cocaine over a period of years within a few blocks of where Evans resided; and (3) defendant and Evans had a mutual friend, Penny Graves.

It is not clear why Evans would identify defendant as a shooter in May 1983 after failing to name him as a participant at all to Gear. Certainly, based on the hearing testimony, it is possible Evans was informed by Ayers that some of the assailants she named were in the photo books she viewed, and she succumbed to this suggestion when she saw defendant's familiar face. It is also plausible that in the days after the murder (that Evans may or may not have witnessed) Evans overheard Cook discussing a robbery and/or a shooting in which defendant's name was mentioned, and Evans assumed the discussion pertained to the shooting at 899 Dekalb, and that although she hadn't seen him there, defendant must have been involved. Evans may also have been encouraged to add a fourth

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<sup>97</sup> On 12/12, roughly 23 hours after the shooting, the store had been burglarized. Only then was the crime scene secured. Clearly, the store had not been guarded by any live police personnel at any point after the original response to the homicide through 9:25 p.m. the following day.

name since the newspaper article (that she admitted to reading), reported that McClean and the deceased were shot by four youths (emphasis added).

Evans' identification of defendant as a lookout during her interview with an ADA (the fifth statement) is very revealing. In that interview, Evans relied on photographs of Cook, Mays, Hunter, and defendant to describe each person's role in the crime. It is clear from that interview that Evans was not merely confused about the names of the shooters, she was mistaken about their identities.

In her multiple subsequent statements, Evans was inconsistent about defendant's role.

12/24/1982	Failed to mention defendant's involvement at all. Saw the shooting.
5/16/1983	Defendant had a gun, but she did not see what he did with it. Did not see the shooting.
6/4/1983	Defendant had a gun and pushed McClean into the store, but she did not see him shoot. Did not see the shooting.
4/17/1986, 10:00 p.m.	Defendant shot McClean and the deceased. Saw the shooting.
4/17/1986, 11:00 p.m. (fifth statement)	Mays shot McClean in the stomach, Cook shot the deceased in the chest and the arm, and defendant and Hunter were lookouts. Saw the shooting.
6/6/1986 pre-polygraph statement	Hunter shot the deceased, Cook shot McClean, and defendant and Mays were lookouts. Saw the shooting.
10/19/1987 pretrial hearing	Defendant shot the deceased, Cook shot McClean, Hunter and Mays were lookouts. Saw the shooting.
Defendant trial testimony	Defendant shot the deceased, Cook shot McClean, Hunter and Mays were lookouts. Saw the shooting.
Cook trial testimony	Defendant shot the deceased, Cook shot McClean, Hunter and Mays were lookouts. Saw the shooting.

#### Evans' Statements About Her Location Change

Evans did not explain that she watched the crime hiding behind a dumpster until her taped statement to the prosecutor on April 17, 1986. In her prior three statements (including the one made just one hour before the taped statement), she said she was on the street. Significantly, at defendant's trial, Evans' said for the first time that she had observed Cook shoot McClean while passing by the door of the store, not the display window.

12/24/1982	No mention
5/16/1983	DeKalb Avenue
6/4/1983	On Dekalb Avenue, but across the street from the store
4/17/1986 10:00 p.m.	Standing in front of the store
4/17/1986 11:00 p.m.	Behind a dumpster that was in front of the store

6/6/1986 pre-polygraph statement	Behind a dumpster
Pretrial hearing	Behind a dumpster looking through the window
Defendant trial testimony	Saw McClean get shot when passing by the door, saw deceased get shot when hiding behind and to the left of a dumpster looking through the window.
Cook trial testimony	Saw McClean get shot when passing by the door, saw deceased get shot when hiding behind and to the left of a dumpster, looking through the window.

#### Evans' Statement About Seeing Assailants Flee Changed

Evans never mentioned seeing the assailants flee the store or seeing the police and ambulance arrive until she was interviewed by Det. Chmil in April 1986. Until then, her statements indicated that she had not remained at the crime scene long enough to make this observation. After the interview with Chmil, where she claimed for the first time that she saw the assailants flee and saw the police and ambulance arrive (but, as previously mentioned, did not mention seeing the 911 caller), Evans either did not mention her observations after the shooting was over or denied staying at the scene long enough to see the police and ambulance arrive. Her inconsistency on this point should have been another strike against her overall credibility and should have raised specific doubts as to how long she was at the scene, and thus, how much of the crime she would have been able to observe. Paradoxically, if the jury credited Evans' testimony that she remained at the scene long enough to see the assailants flee and believed the prosecution's theory that the assailants closed the gate over the display window before fleeing, Evans necessarily must have seen the assailants close the gate (*see* discussion below). Yet Evans never once in over four years mentioned seeing anyone close the gates that night, and she was never cross-examined on this crucial omission.

12/24/1982	No mention of seeing assailants flee or police and ambulance arrive
5/16/1983	No mention of seeing assailants flee or police and ambulance arrive
6/4/1983	No mention of seeing assailants flee or police and ambulance arrive
4/17/1986 10:00 p.m.	Saw assailants flee and saw police and ambulance arrive
4/17/1986 11:00 p.m.	No mention of seeing assailants flee or police and ambulance arrive
6/6/1986 pre-polygraph statement	Saw assailants flee, no mention of police or ambulance
Pretrial hearing	No mention of seeing assailants flee or police and ambulance arrive
Defendant trial testimony	Saw assailants flee but did not see police or ambulance arrive
Cook trial testimony	Ambiguous as to whether she saw assailants flee, did not see police or ambulance arrive

### Evans' Statements About the Suspects' Discussion After the Crime Change

One part of Evans' story that she never failed to include was the party admission she overheard the following day. However, CRU cannot credit what Evans claimed she overheard, since that account varied over time.

12/24/1982	Evans did not specifically identify which of the assailants she heard discussing the crime the day after, but just referred to them as "the guys," having previously said Mays, Cook, and Hunter were involved. They boasted about "killing the guy" and taking reefer.
5/16/1983	Cook, Mays, and Hunter discussed the crime. Cook said he and defendant "did the shooting and killed the guy and took the reefer."
6/4/1983	Cook, defendant, and "them guys" discussed the crime. Cook bragged that he and defendant did the shooting.
4/17/1986, 10:00 pm	Cook, Mays, and Hunter discussed the crime. Cook bragged that he and defendant shot up the store.
4/17/1986, 11:00 pm	Cook, Mays, and defendant discussed the crime.
6/6/1986 pre-polygraph statement	Evans appears not to have been asked about this incident before the polygraph examination.
10/19/1986 pretrial hearing	She was not asked about the discussion.
Defendant Trial testimony	Cook, Mays, and Hunter were present with the stolen reefer. There was no testimony about their statements.
Cook Trial testimony	Cook, Mays, and Hunter were present with the stolen reefer. There was no testimony about their statements.

### Evans' Trial Testimony Was Physically Implausible

Even crediting the claim that Evans crossed the street for no other reason than to observe the crime, it is unlikely that she could have observed inside the store what she claims to have observed from behind a dumpster positioned directly in front of the display window. Evans testified at trial that the gate over the display window was up at the time of the shooting. That statement was contradicted by the responding officer's trial testimony that the gate was down and locked when he arrived. Even assuming that the gate was up, it is unlikely that Evans would have been able to see into the customer area of the store, given that the view through the window was largely obstructed, or to observe the assailants fleeing the scene without being seen by the lookouts.

The dumpster Evans claimed to have been hiding behind was so close to the store that it was almost touching the display window. Moreover, according to the crime scene photographs, which demonstrated that most of the area of the display window was blocked by various objects, even with the display window gate rolled up, if Evans was behind the dumpster watching through the display window, she would have had to make her observations through a portion of the window

approximately 12-18 inches high that was adjacent to the employee area *below* the counter level.<sup>98</sup> It is implausible that Evans, crouched on the left side of the dumpster in a position to see through the opening in the glass window, would have been able to view any person inside the store “head-high,” much less to observe and identify any actor or describe their actions. From that angle, she would have been viewing the occupants of the store at waist level. It is unlikely she would have been able to identify who shot the deceased, see that Cook took a shopping bag of reefer hanging from the ceiling, or discern that McClean was shot in the stomach.

Casting more doubt on Evans’s identification of at least one of the shooters is the fact that the shooter was wearing a stocking over his head and face, as McClean stated to Det. Ayers the day after the murder.

Regardless, the gate in front of the display window was almost certainly down and locked during the commission of the crime. Officer Dietz testified that he observed the gate down and locked upon arriving on the scene three minutes after the 911 call was placed.<sup>99</sup> Dietz’s specific memory at trial that the display window gate was locked and the gate covering the door was unlocked upon his arrival is persuasive because Dietz was specifically questioned about the two gates at trial. Furthermore, the prosecutor acknowledged in his opening statement that the gates were down and secured, which confirms that Dietz informed the prosecutor of this fact prior to trial. Unless the killers or the 911 caller locked the display gate in the few minutes after the crime was committed and before Dietz’s arrival—a version of events that strains credulity and that was not supported by any direct evidence at trial—Evans’ version of events would have been physically impossible; the opaque gate would have completely obstructed her view.

There was and remains no evidence that anyone locked the window gate at any point after the crime. Evans testified at trial that she remained behind the dumpster long enough to observe the assailants flee, yet never once in any of her statements mentioned seeing them close the gates as they fled. It is impossible for the People’s theory at trial to be true: that Evans remained hidden behind the dumpster long enough to see the assailants flee and that the assailants closed the gate over the window as they fled. Had this happened the assailants certainly would have discovered Evans hiding behind the dumpster mere inches from the gate. One of these acts is necessarily untrue, and for all the reasons discussed above and below, CRU believes both are likely untrue. First, as discussed, Evans was inconsistent about how long she remained at the scene and whether she even saw any shots fired, or merely heard shots and ran away. Logic dictates that if she observed the crime to any degree at all, she spent as little time at the crime scene as possible and did not see anyone flee.

Second, it is incredible that the perpetrators would have had the ability, time, or presence of mind to locate the padlock (and possibly also the padlock key) and engage in the useless act of locking the window gate behind them in their flight. Unless the padlock had been left unlocked, attached to the gate itself (which McClean testified was not the practice in the store), locating the padlock and its corresponding key would have wasted precious time. It would have been unnecessarily conspicuous,

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<sup>98</sup> See CRU Exhibit 1; CSU photographs #4 and #5.

<sup>99</sup> The lock cannot be seen in the photographs.

coming quickly on the heels of gunshots, for four assailants to close a loud metal security gate behind them before they fled the scene.

Moreover, it would have been a useless measure since the gate over the door, and thus access to the crime scene, remained unlocked. If the assailants had the time, ability, and wherewithal to close and lock a gate to cover their tracks, they surely would have selected the gate over the door, which would have prevented access to the crime scene.<sup>100</sup>

#### Evans' Myriad Inconsistencies Were Not Meaningfully Before the Jury

At trial, Evans did not recall making most of the inconsistent statements that were subject to cross examination. This prevented the defense from pursuing the numerous avenues of inquiry that would have been apparent had Evans admitted to and offered explanations for her prior statements. Instead, the defense was forced to admit Evans' prior inconsistencies into evidence either through stipulation or by calling a third party to testify to Evans' statement. This method of explaining Evans' inconsistencies to the jury was dry and perfunctory, and deprived the jury of the chronology, context, and depth of her conflicting statements.

#### The Defense Failed to Expose Key Inconsistencies

The defense failed to bring out several key inconsistencies in Evans' testimony that would have further convoluted her narrative.

First, Evans did not recall telling Det. Ayers on May 16, 1983, that she only heard shots and did not see the shooting, or that she only learned someone had been killed by reading it in the newspaper. Ayers was not called as a witness and the defense was thus unable to weave this significant inconsistency into the fabric of Evans' tale during summations.

Second, Evans was never cross-examined about her repeated failure to mention that she saw the assailants flee the crime scene. Evans omitted this detail in her initial statement to Officer Gear, in her May 16, 1983, statement to Ayers, in her June 4, 1983, statement to an ADA (the third statement), and in her April 17, 1986, statement to an ADA (the fifth statement). The jury did not know this. Had this inconsistency been elicited in conjunction with the evidence that in May and June of 1983 Evans affirmatively stated she did not see the shooting, it would have been powerful evidence of Evans' lack of credibility. While the defense did argue in summation that Evans testified to seeing the assailants flee yet no one testified at trial to seeing the assailants close the security gates as they left, he did not elicit through cross examination that Evans had never mentioned this detail. Had he done so, it would have corroborated Dietz's testimony that the display window gate was closed and locked when he arrived and emphasized the impossibility of Evans observing the crime through the display window.

Third, the defense failed to cross-examine Evans on the fact that she told Gear that she had witnessed the shooting "of a male" when in fact two males were shot and Evans later claimed to have seen both

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<sup>100</sup> Along the same lines, there is no evidence to suggest nor testimony to support the theory that the anonymous 911 caller closed and locked the window gate in the three minutes after he exited the store and before Dietz arrived. Even if this theory had been posited at trial, it is just as unlikely that the 911 caller would have had the ability or motive to lock the window gate as that the assailants did.

shootings and known both victims personally. Evans was not asked which victim she was referring to, why she failed to identify the victim when she knew him, and why she only reported seeing one person shot when she later maintained she had seen both. While it is true that Gear's handwritten note was in evidence (*see* CRU Exhibit 2), defense counsel did not even pose these unanswered questions for the jury in summation. The jury was left to come to the realization on their own that Evans' initial statement contained additional inconsistencies.

Fourth, at trial, Evans stated for the first time that she observed McClean being shot while she was passing by the front door of the store, and that she saw the deceased being shot while she was behind the dumpster. Until trial, to the extent Evans said she saw the shooting at all, she always said she saw both victims being shot from behind a dumpster while looking through the window. For reasons discussed above, it would have been virtually impossible for Evans to observe McClean being shot while passing through the metal half door from her vantage point behind the dumpster. The defense called Det. Chmil to testify to Evans' April 1986 statement, wherein she said she observed McClean enter the store when she was standing in front of the store looking through the window. This showed the jury, at best, that Evans' trial testimony about her location during the shooting was marginally inconsistent with one prior statement. In fact, it was inconsistent with *every* prior statement and inconsistent with the prosecution's theory in opening statements. Moreover, every prior statement in which Evans said she saw both victims shot from behind a dumpster was physically implausible.

Finally, the jury never learned that Evans' inconsistent statement to D.I. Ponzi—that Hunter shot the deceased and defendant was merely a lookout—had been made during a polygraph test. The jury heard only the content of the statement, not the context. This prior inconsistent statement was presented to the jury as one of Evans' many versions of events, no more or less significant than the others. But it is relevant that the statement was made during a polygraph. Evans "passed" the polygraph, and thus the prosecution, at that time, believed her statement to D.I. Ponzi was true. If the jury had known this, it may well have found the version Evans gave to D.I. Ponzi to be the most reliable, and discredited Evans' trial testimony in whole or large part.

#### Evans' Testimony at Cook's Trial Further Demonstrated Her Lack of Credibility

Evans' testimony at Cook's trial, two weeks after her testimony at defendant's trial, was even more vague and unreliable. Her conduct was combative. Her testimony was more inconsistent and, at times, odd (*e.g.*, she testified that when she witnessed the shooting she had been "going to go buy a dollar's worth of ham and some cheese and some eggs and some bacon and some bread to go back home and put it in the oven and watch it bake").

Cook had the benefit of substantial impeachment material from defendant's trial to use to his advantage. Evans' testimony at Cook's trial was so incredible that Cook's jury appears to have disregarded it in its entirety. The jury acquitted Cook on all the charges that were based solely on Evans' testimony: acting in concert intentional murder, felony murder, robbery in the first degree, and acting in concert to possess defendant's weapon. Cook was convicted of only the charges that McClean's testimony alone established—attempted murder of McClean and possessing the weapon that shot McClean.



## **The People Should Not Have Relied on Evans**

The prosecutor admitted “there are inconsistent statements as to who among the same group of four was a shooter” and left the determination of Evans’ reliability as a witness “up to a jury” (H.5). Indeed, given Evans’ myriad problems as a witness and the lack of evidence corroborating her testimony, the prosecution did not have a firm basis for believing that defendant committed the crime. Furthermore, at the behest of the prosecution, D.I. Ponzi conducted a polygraph examination of Evans in 1986. In that interview, Evans stated that Hunter shot the deceased and that defendant acted as a lookout. Based on the polygraph analysis, the KCDA deemed Evans’ account to be credible. Nevertheless, a year and a half later, the People called Evans to the stand, to have her testify that defendant was a shooter.

Evans now admits she used crack cocaine heavily at the time of the crime and has no memory of the crime or trial because of her extensive daily use of the substance at the time. Thus, Evans perjured herself in defendant’s suppression hearing and during Cook’s trial when she testified she did not use crack cocaine. This comports with the Cook trial court’s observation that Evans was heavily under the influence of a controlled substance, or mentally deficient and/or diseased, or both, when she testified. Of course, prosecutors take their witnesses as they come, with no expectation of perfection in their lifestyle or background. However, in this case, Evans’ obvious shortcomings as a witness, combined with her differing versions of the facts and her lack of ability to observe the crime from her position behind the dumpster, should have prevented the prosecution from calling her as a witness. At the very least, had the jury known about it, the newly discovered evidence about Evans’ heavy crack cocaine use at the time, and her statement to CRU that such use affected her memory, in conjunction with her various contradictory statements about the crime, would probably have resulted in a verdict more favorable to the defendant. Consequently, CRU has no confidence in the integrity of the verdict.

Furthermore, the generous plea deal the People offered on the eve of trial without requiring the defendant to enter into a cooperation agreement suggests the People were aware they had serious problems with their case. Making such an offer in these circumstances was not in the interest of justice.

After defendant refused the People’s offer, they entered into an agreement with Cook on more generous terms but required Cook to testify against the defendant. Cook aborted the deal before the end of the People’s case, but the damage had already been done: The jury heard during opening statements that Cook would testify against his co-defendant, and his subsequent failure to appear was never explained by the court.

## **The People Distorted the Evidence Before the Court and the Jury**

At trial, the People distorted the evidence to bolster the testimony of an inconsistent witness. During the pretrial suppression hearing, the prosecutor inserted “Life” into a follow-up question to Evans, after Evans failed to mention him as a perpetrator. During a pretrial colloquy, the prosecutor told the court that the People were prosecuting Cook and defendant as the two shooters because “the witness’ initial statements were these two defendants were the shooters and her testimony in the grand jury was these two defendants were the shooters.” (*see above*, The Pretrial Hearing [H.6]) This was clearly false.

At trial, the People continued to bolster Evans by misrepresenting to the jury key pieces of evidence. Without having called Gear to the stand, in summation the People tried to explain the conspicuous absence of defendant's name in Gear's note summarizing Evans' statement.<sup>101</sup> The prosecutor argued that the way Gear wrote her "and"—as a superscript and as if an afterthought—showed that she was aware that she had left out a fourth name, and that the fourth name was "Detroit." But there was no evidence presented at trial suggesting that that had been Gear's intention, and Gear specifically denied it in her interview with CRU. In fact, the "and" is inserted between the names James and Life, and in no way implies a fourth name was intended.<sup>102</sup> While litigants are often permitted some leeway in presenting arguments in summation, this went beyond argument and was clear misrepresentation, and it likely influenced the jury.

Furthermore, the trial evidence regarding the position of the front gates was, at best, ambiguous. Evans had testified that they were up during the commission of the crime. McClean did not testify about the gates at all. Dietz testified that when he responded to the scene both gates were down, and the one over the display window was also locked. The People's opening statement acknowledged Dietz's anticipated testimony, telling the jury they would learn that the gates had both been pulled down and "secured" when the police arrived. But in summation, the People reversed Dietz's testimony and told the jury, erroneously, that when Dietz arrived at the scene, the gates were down but unlocked. This was a significant transgression. Not only did it misstate the evidence, but it also served to bolster Evans' dubious testimony that she could see the crime through the display window into the store.

Equally problematic, the trial prosecutor omitted evidence that showed that even if the window gate was rolled-up as per Evans' testimony, the window itself was almost entirely boarded up and obstructed by merchandise, making her ability to observe people and events within the employee area very difficult. Of the seven CSU photographs taken of the store, the prosecutor only introduced five. Conspicuously absent from the selected photographs was CSU photograph #5 (*see* CRU Exhibit 1), which clearly shows that the display window was completely boarded up from the countertop level to the ceiling.

Finally, the jury was unaware of two other key facts that would probably have influenced the jury's decision. First, as previously discussed, they were not informed that Evans' statement to D.I. Ponzi had been made in the context of a polygraph examination, which at the time was widely considered to be a quasi-scientific method for determining whether a witness was being truthful. Had this fact been revealed at trial, the jury would have been more likely to credit it. Second, the jury was never informed that the day after the shooting McClean told Det. Ayers that the shooter was wearing a stocking over his face. Had this fact come out at trial, it would have cast doubt on McClean's ability to identify Cook and, as discussed below, the People would not have had been able to use McClean's testimony to corroborate Evans' dubious account.

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<sup>101</sup> The prosecutor's pre-trial notes indicate he interviewed Gear. There was nothing in the trial file or trial transcript to indicate the prosecutor ever intended to call Gear as a witness.

<sup>102</sup> *See* CRU Exhibit 2.

## McClellan's Credibility

While McClellan never identified defendant as a participant in the crime, his testimony was the only evidence corroborating Evans' testimony at defendant's trial. Thus, the veracity of any portion of his testimony at defendant's trial was very relevant to defendant.

McClellan never should have viewed a photo array in this case; his photographic identification of Cook was highly suspect. From the beginning he said he could not identify the shooter. In the hospital he said the shooter had a stocking over his face. Even though McClellan claimed not to remember making these statements when he testified five years later at defendant's trial, Ayers' notes confirm that he did.<sup>103</sup> And it is unlikely that the statement about the stocking was fabricated by Ayers, since this is a detail that would make it more difficult to identify a suspect.

Nonetheless, in October 1983, ten months after the shooting and with no explanation for the deviation from his contemporaneous claim that the shooter was masked and unidentifiable, McClellan selected Cook from an eight-photograph array that included two of the three previously identified suspects. For reasons that are not clear, defendant's photograph was not shown to McClellan. McClellan only described the man who shot him *after* viewing the array and selecting Cook's photograph. McClellan also contradicted himself at trial when he said, for the first time during the investigation and prosecution, that he had seen the shooter in the neighborhood before the night of the crime. Prior to his trial testimony, and even after making his improbable photographic identification of the shooter he had previously claimed was wearing a mask, McClellan never claimed to have recognized the man who shot him.

It also is disturbing that McClellan's version of events five minutes after the crime was so different from his trial testimony. Not only did McClellan tell Officer Dietz he could not identify his shooter, but he also told Dietz that the shooters displayed a firearm, demanded money, then shot him and the deceased, and ran out without taking any money. This is quite different from McClellan's sworn testimony that he was shot by a man who was standing in the customer area of the store before McClellan even got fully inside the employee area. McClellan never testified at trial that he heard the shooters demand money or say anything once they entered the employee area. However, at defendant's trial, McClellan testified that the shooters had taken something before running out of the store: Marijuana packaged with a bird stamp.

## The Flawed Police Investigation

Several aspects of the police investigation are troubling. The NYPD failed to follow important investigatory leads early on, impacting the trajectory of the case and ultimately causing them to rely too heavily on Evans to make their case.

Even though Evans identified defendant as an armed participant in the crime as early as May 1983, there is no indication that any member of the NYPD attempted to locate defendant until an arrest

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<sup>103</sup> At trial, McClellan was asked when the first time was that he remembered being interviewed by the police other than at the scene. McClellan answered that it was when he went to the 79th Precinct (10 months after the crime) (T.588). He was not cross-examined on his statement to Ayers about the stocking and Ayers did not testify at defendant's trial.

warrant was issued for him over three years later. Defendant's ability to proffer an alibi was prejudiced by the unexplained delay in his arrest.

In addition, McClean should not have been shown a "photo array" when he very clearly stated to Det. Ayers in the hospital that the shooter was wearing a stocking over his face and that McClean could not identify him. When the police ultimately did have McClean view photographs, the procedure was flawed. From Ayer's DD5s and memo book notes, it appears that no effort was made to locate McClean to view photographs after Evans made her identifications of three perpetrators in his case. Nonetheless, when McClean walked into the precinct, Ayers decided to take a chance and show him some photographs that did not include all the previously identified suspects. This was unlikely to produce reliable results.

The police also failed to investigate Darren Stone's possible involvement in the crime. It appears from Det. Ayers' notes that Stone, whom defendant now says he knew as Life, was a suspect early on, and the trial prosecutor wrote in his notes the name Darren Stone and an associated address and date of birth.<sup>104</sup> Yet, Stone was never interviewed, and Evans was never shown a photograph or photo array that included Stone. Instead of looking into Stone's possible involvement, Chmil and Gibbs requested a photograph of a person—Wayne Hunter—who had no connection to the other three alleged perpetrators and whose name the police essentially came up with by mistake. Ayers seems to have thought that "Wayne Hunter" was "Mickey's" government name until Evans identified Cook as "Mickey" on July 22, 1983.<sup>105</sup> In 1986, when Evans picked Hunter out of a photo "array" which contained four suspects and four fillers, the police paradoxically ceased any further investigation into Hunter, including never locating, interviewing, or arresting him.

Finally, given the absence of physical evidence in the case, Det. Ayers and his colleagues should have followed all possible leads to try to assess Evans' credibility early on. In addition to attempting to find Darren Stone, they should have reached out to McClean instead of waiting to hear from him. They should have interviewed "Diego," "Penny," and her sister. They should have investigated the source of the bird-stamped marijuana. They did none of this, relying instead almost entirely on Evans' statements, which, as discussed above, lacked consistency and credibility.

## CONCLUSION

CRU, the Independent Review Panel, and the KCDA agree that defendant's judgment of conviction be vacated and the indictment be dismissed. Defendant's arrest, indictment, and conviction were based

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<sup>104</sup> There are only three mentions of the identity of "Life" in Ayers' spiral notebook, all of which suggest he was Stone: "Life- Darren;" "Life (Fort Green) M-B 17 5 ft 8;" and "Life- Fort Green." In 12/82 Stone was 17, 5' 8" and had been arrested at least once using the address 68 Cumberland Walk in Fort Green, and once using 671 Gates Avenue. Stone had, at the time of this report, 46 convictions, six of which were felonies. His date of birth was reported as 8/8/65. *See* Stone Rap sheet.

<sup>105</sup> At some point, Ayers wrote down "Wayne Hunter, 685 Gates Ave Apt 6B, Moved to Cal." This is clearly a reference to Cook. Ayers also wrote "Mick Wayne Gerald Cook. 17. 671 Gates Ave 6A. M-B, dark, 5 f 11, 130." There is also a note: "Wayne Hunter, 16, 8/1/76, 2/83," and "Mickie: Wayne Hunter, B + 6, 685 Gates 6B." Ayers also had written down Cook's parents' information. Cook's father, Charles Hunter, and his mother, Robbie Cook Hunter, resided at 685 Gates Avenue. Cook never used Wayne Hunter as an alias in any of his arrests. Cook's true name is Gerald Dwayne Cook.

on an incredible witness and unreliable evidence. Defendant was convicted solely on testimony from Evans, a troubled young woman who came forward weeks after the crime, who could not corroborate her presence at the scene of the crime, and who gave inconsistent and incredible statements over the nearly five years between the crime and defendant's trial. Indeed, the prosecutor, himself, stated that he did not know which version was reliable. While CRU's investigation has confirmed that there was a link between three of the four alleged perpetrators and a link between Evans and defendant, there is absolutely nothing that links the defendant to the crime beyond Evans' incredible testimony. Defendant should not have been prosecuted based on such scant evidence.

# **EXHIBIT 1**



CSU Photo #1



CSU Photo #2





CSU Photo #3



CSU Photo #4



CSU Photo #5



CSU Photo #6



CSU Photo #7

# **EXHIBIT 2**

5-3-19

P.O. Deborah A. Gear Post 24/79  
NSU 14 = SH#24761 Sg#1

While on Post I was confronted  
by a civilian, named, [redacted] of

[redacted] state she witnessed  
the shooting of a male and gave  
me the names. These names are  
Micky, JAMES, and LIFE, they hang-out  
on Gates & Sulton Aves.

[redacted] will view pictures. She  
will be in the South for Christmas  
and will return Jan. 14, 1983 by  
0800 and will talk to you then.

[redacted] would like to remain  
unknown.

[redacted] further stated that on the  
night of the incident she was smoking  
reefer with the guys. They were  
boasting about killing the guy and  
taking a shopping bag full of  
reefer. The perps. also held up a  
number plate.

P.O. Gear

CRU