



DISTRICT ATTORNEY  
KINGS COUNTY

DISTRICT ATTORNEY ERIC GONZALEZ

REPORT OF THE CONVICTION  
OF  
BRIAN KENDALL

By: The Conviction Review Unit

July 2025

## **THE CRIME**

According to the People’s witnesses, on February 24, 1988, at approximately 7:00 p.m., 17-year-old Brian Kendall (“defendant”) entered the game room at 2105 Cortelyou Road (“game room” or “store”) and shot and killed Raphael Reyes (“the deceased”), a game room employee.

According to defendant and his witnesses, defendant was at the scene with others and was part of a group that chased after the actual shooter.

On July 19, 1989, defendant pleaded guilty to Manslaughter in the First Degree, with a promised prison sentence of eight and one-third to 25 years. On August 7, 1989, defendant was sentenced as promised.

On December 20, 2004, defendant was paroled, and on January 22, 2005, he was deported to Guyana.

## **OVERVIEW OF THE ERRORS**

CRU has concluded that defendant’s conviction, pursuant to the plea of guilty to Manslaughter in the First Degree, should be vacated and the indictment dismissed. CRU has uncovered compelling evidence refuting the People’s account and supporting defendant’s account, which shows that defendant is likely innocent. That defendant pleaded guilty does not contravene CRU’s determination.

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

Police Officer (“PO”) Dennis Minogue, of the 70th Precinct Detective Unit (“PDU”), was the lead investigator, assisted by Det. Daniel Lynaugh and Brooklyn South Homicide Squad Det. James Rooney, among other detectives.

### **The Responding Officers and 911 Callers**

At 7:05 p.m.—unrelated to the deceased’s murder—Sgt. Robert Jerak and PO Steven Greco, both of the 70th Precinct, stopped a stolen white car at the corner of Flatbush Avenue and Cortelyou Road.<sup>2</sup> During the car stop, Jerak and Greco saw a group running towards Flatbush Avenue from East 21st Street. Some in the group yelled, “Some[o]ne[’]s got a gun in that store” and, “A guy got shot down the street.”<sup>3</sup>

About 20 seconds after reporting the car stop to the dispatch operator, Jerak radioed, “We’re at Beverly and Flatbush. Be advised, we also have a disorderly group here chasing somebody. Possible man with a gun. Beverly and Flatbush.”<sup>4</sup>

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<sup>1</sup> Unless otherwise stated, the police investigation account is obtained from documents in the People’s trial file. Numbers in parentheses preceded by “PT.” refer to the pages of court proceedings; those preceded by “P.” refer to the pages of the plea proceeding; and those preceded by “S.” refer to the sentencing minutes.

<sup>2</sup> Radio Run recording; Minogue DD5, “Interview of Sgt. Jerak [sic] and P.O. Greco”; Sprint report.

<sup>3</sup> Minogue DD5, “Interview of Sgt. Jerak [sic] and P.O. Greco”.

<sup>4</sup> Radio Run recording; *see also* Minogue DD5, “Interview of Sgt. Jerak [sic] and P.O. Greco”; Sprint report.

At 7:06 p.m., Charles Harper called 911, reporting that “a guy” had been shot three times inside the store. Harper said he was outside at the time and did not see the shooter. When he entered the store, he saw “[the deceased] laying [*sic*] there and some guy ran out.”<sup>5</sup>

At 7:07 p.m., Sgt. Jerak responded on the radio, “[T]here was a group apparently chasing him [the guy that ran out]. The group is back. He’s apparently gone. We’re going to search the area. We have no description on this guy.”<sup>6</sup>

At 7:09 p.m., an anonymous 911 caller reported that someone had just been shot three times in the head at East 21st and Cortelyou Road. The caller added, “There’s a lot of people right here. Please hurry up. He just got shot.”<sup>7</sup>

At 7:09 p.m., PO Peter Davis, of the 70th Precinct’s K9 Unit, confirmed on the radio that there had been a shooting. Davis was on patrol on Flatbush Avenue, near East 21st Street and Cortelyou Road, when a crowd approaching his marked police car was yelling that a man had been killed down the block. Upon arriving at the scene, Davis found only the deceased inside the store.<sup>8</sup>

An officer from the RIP unit (“the RIP Officer”) arrived shortly thereafter.<sup>9</sup> At 7:10 p.m., the RIP Officer radioed that the deceased was “going out of the picture.”<sup>10</sup>

## **EMS and the Crime Scene Unit**

EMS arrived and pronounced the time of death as 7:20 p.m.<sup>11</sup> The Crime Scene Unit (“CSU”) arrived and photographed the scene.<sup>12</sup> CSU recovered two .25 caliber shell casings from behind the counter in the game room.<sup>13</sup> Three .25 caliber bullets were recovered from the deceased’s body during the autopsy.<sup>14</sup>

## **Interviews at the Scene**

### Nicholas Ruiz

At the scene, at about 7:15 p.m., the RIP Officer interviewed Nicholas Ruiz in the back of an unmarked police car. Ruiz stated the following:

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<sup>5</sup> 911 recording; Sprint report.

<sup>6</sup> Radio Run recording.

<sup>7</sup> 911 recording.

<sup>8</sup> Radio Run recording; *see also* Minogue DD5, “Initial Response to Scene/ Interview of First Officer.”

<sup>9</sup> Radio Run recording; *see also* Minogue DD5, “Initial Response to Scene/ Interview of First Officer.” RIP is the Robbery Investigation Program.

<sup>10</sup> Radio Run recording; Sprint report.

<sup>11</sup> Complaint Report.

<sup>12</sup> CSU Forensic Report.

<sup>13</sup> CSU Forensic Report.

<sup>14</sup> Autopsy Report.

He was in the store visiting a neighbor and his friend, the deceased. About four young Black males and two females were there. They were mostly playing video games. A Black male entered. This male was about 40 to 45 years old, 5'3", 155 lbs., and wearing a light gray three-quarter length herringbone type coat and a light gray cap.<sup>15</sup> He displayed a handgun and yelled, "Get out."

Everyone scrambled for the doorway. As Ruiz fled out of the store, he heard several gunshots. Outside, he looked back and saw the gunman calmly walking down Cortelyou Road towards Flatbush Avenue. He followed the gunman along with a large group of males.

The gunman walked over to Beverly Road between Flatbush Avenue and East 22nd Street where, in front of a barber shop, he jumped into the passenger side of a car, driven by an unknown person. The car was black, possibly a four-door, with white NY plates. The car fled east on Beverly Road toward Bedford Avenue.<sup>16</sup>

At about 7:15 p.m., based upon Ruiz's information, the RIP Officer radioed Central the following:

We got a witness in the car who says the perp is a male [B]lack approximately 45 years old, wearing a three-quarter length, gray herringbone coat, Central, and a gray hat, last seen fleeing eastbound on Beverly Road and Flatbush. About five feet tall, Central – he's kinda short. Armed with a handgun, Central.<sup>17</sup>

At about 7:17 p.m., the RIP Officer radioed the following additional information:

Be advised that the witness says that the male jumped into a waiting black auto that was on Beverly Road."<sup>18</sup>

#### Williams Reyes, the Deceased's Brother

On February 24, at 8:00 p.m., at the scene, PO Minogue interviewed William Reyes, the deceased's brother. Reyes stated the following:

The deceased usually worked at the game room from 8:30 a.m. to 10:30 p.m. The deceased told Reyes that on Monday, February 22, the deceased and his nephew, Tito, argued with a short, heavy Black male, possibly Jamaican, about the man's drug dealing in the store. The deceased told Reyes that the next day, the man returned to the store, and the argument escalated. The deceased and Tito made the man leave.<sup>19</sup>

#### **Canvasses**

At 8:35 p.m., PO Minogue and Det. Lynaugh canvassed the local businesses. Minogue spoke with employees of the neighboring grocery store and pizza store, none of whom saw or heard anything.

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<sup>15</sup> At the time, the 17-year-old defendant was 5'7" and 135 lbs. *See* Arrest Report (Complaint Report indicates 125 lbs.)

<sup>16</sup> RIP Officer DD5, "Initial Response and Interview of Witness."

<sup>17</sup> Radio run recording; Sprint report.

<sup>18</sup> Radio run recording.

<sup>19</sup> Minogue DD5, "Interview of Victim[']s [B]rother."

Lynaugh interviewed an employee at the liquor store next to the game room, who had no information.<sup>20</sup>

The case was referred to the PDU.<sup>21</sup>

### **Additional Interviews**

#### Secundino “Tito” Salgado, the Deceased’s Nephew

On February 24, at 8:45 p.m., Det. Rooney interviewed the deceased’s nephew, Secundino “Tito” Salgado, at the 70th Precinct. Salgado stated the following:

On Monday (February 22), he argued with a Black male known as “JD.”<sup>22</sup> JD was 21 years old, 6’, and 220 lbs. During the argument, JD threatened Salgado, “[You’re] going to make me shoot you after the store was [*sic*] closed.”

On Tuesday, Salgado went to the store, and JD was there. After 10 minutes, JD reached into his pocket as if he were grabbing a gun. Salgado swung a knife at JD but missed. JD said, “[L]eave it at that,” and left.

The next day, the day of the shooting, at approximately 12:30 p.m., Salgado went to the store and JD was there. JD was wearing light gray pants, a waist-length, dark gray jacket, and a black leather cap. He was clean-shaven, wore four rings on his hand, and spoke with a “[G]uiennan” accent. He looked at Salgado, and Salgado left.

At about 4:30 p.m., Salgado called the deceased, who said that JD was still at the store playing games and that JD had been there all day.

After 7:00 p.m., a friend told Salgado, “[T]hey shot your uncle [the deceased] in the head.” Salgado went to the store and saw the deceased lying behind the counter. One of the crack dealers told Salgado, “[Y]ou know why this happened. It was because of yesterday.”<sup>23</sup>

#### Analise Romero

On February 24, at 10:00 p.m., PO Minogue and Det. Lynaugh interviewed 14-year-old Analise Romero at her home and then at the 70th Precinct.<sup>24</sup> Romero stated the following:

At her home, Romero denied that she had been at the game room. Once her father was out of earshot, she admitted that she had been there after the shooting. Her mother told her in Spanish to say nothing. Her father reluctantly agreed to take her to the precinct.

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<sup>20</sup> Minogue DD5, “Canvass of Surrounding [A]rea”; Lynaugh DD5, “Interview of [Liquor Store Employee].”

<sup>21</sup> Minogue DD5, “Initial [R]esponse to the [S]cene/Interview of First Officer.”

<sup>22</sup> Because this individual might be involved in the crime, he is referred to as “JD” instead of his government name and nickname.

<sup>23</sup> Rooney DD5, “Interview of Secundino Salgado.”

<sup>24</sup> PO Minogue was with Salgado when he went to Romero’s home. Minogue DD5, “Interview of Analise Romero.”

At the precinct, Romero stated that she saw a crowd as she walked from Flatbush Avenue towards the corner of 21st Street and Cortelyou Road. Romero entered the game room and saw the deceased. While Romero was outside the game room, Odilka stated, “Brian did it.” Romero did not know Brian’s or Odilka’s last names. Romero “viewed photos with negative results.”<sup>25</sup> (The police later learned that Brian was the defendant, *see* below)

#### Jessica “Odilka” DeSousa

On February 25, at 12:00 a.m., Det. Lynaugh spoke on the phone with 15-year-old Jessica Odilka DeSousa. DeSousa stated that she had gone to the drug store with her mother at the time of the shooting and knew nothing about the incident. When Lynaugh attempted to question her further, DeSousa’s father got on the phone and said DeSousa would only speak in person.<sup>26</sup>

Later (February 27, at about 1:00 p.m.), PO Minogue and Det. Rooney interviewed DeSousa at her residence in the presence of her mother and sister. DeSousa stated the following:

At about 6:50 p.m., she was on her way to the drugstore on the corner of Flatbush Avenue and Cortelyou Road. She saw “Brian” (defendant) and his girlfriend outside the game room. Defendant was wearing a red and white jacket and a dark baseball cap. While she was in the drug store, DeSousa saw defendant and a “large crowd” run by.

“[L]ater,” DeSousa saw defendant, defendant’s brother Sheldon, Lawrence, and an unknown Black male standing across the street (from the game room). DeSousa asked defendant what had happened, and he said that all he knew was that some guy had been shot.

#### F.F.<sup>27</sup>

On February 25, at 2:00 a.m., Det. Rooney interviewed F.F. at the 70th Precinct. He stated the following:

At approximately 3:00 p.m., the deceased had a fight with the shooter’s brother. (F.F. later identified defendant as the shooter in a photo array and lineup [*see* below]) The deceased told defendant’s brother (Sheldon) that he was “a partner” at the game room and wanted Sheldon to leave. Sheldon stated that he was going to get defendant.

Shortly thereafter, Sheldon returned with defendant. F.F. argued with defendant, who said that he “had to shoot somebody” because they are “fucking too much with my brother.” Defendant and Sheldon went outside for a couple of hours. They were selling drugs for “Moon.”

Shortly before 7:00 p.m., defendant and Sheldon returned to the game room. The deceased told F.F. it was okay for him to leave. F.F. went around the corner, and five minutes later, he heard more than one shot. F.F. “came around the corner” and stopped. He saw defendant come out of the store

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<sup>25</sup> Minogue DD5, “Interview of Analise Romero.” There is no indication in the file as to which photos Romero viewed.

<sup>26</sup> Lynaugh DD5, “Interview with ‘Odilka.’” The DD5 incorrectly states February 24.

<sup>27</sup> Because F.F.’s criminal background and drug addiction are discussed below, his real name is not used.

holding a “black automatic” gun. Defendant ran to Flatbush Avenue. F.F. did not see Sheldon. Defendant “came back down Cortelyou” and then up 21st Street, towards Dorchester Road before F.F. lost sight of him.

F.F. had previously seen defendant five or six times.<sup>28</sup>

#### *F.F.’s Audiotaped Statement*

Later (February 25, at about 3:55 a.m.), F.F. gave an audiotaped statement to an ADA, in the presence of Dets. Minogue and Lynaugh. F.F.’s statement was consistent with his prior statement. He added the following:

Just before the brothers (defendant and Sheldon) returned the second time, the game room owner left the store. When defendant and Sheldon entered the second time, defendant stated that he was “going to lick some chops”—meaning shoot someone. After F.F. left the store, he “turned the corner.” While he was speaking to a friend, F.F. saw Sheldon and “Moon” walking on 21st Street, towards Dorchester. Thereafter, he heard the shots from the game room, and he walked back to the corner.<sup>29</sup>

#### Alberto Marulanda, Store Owner

On February 25, at 9:00 p.m., (location not indicated), PO Minogue interviewed Alberto Marulanda, the owner of the game room. Marulanda stated the following:

The day before the shooting (February 23), he was in his store when he and the deceased threw out a young Black male named Brian (Marulanda later identified defendant as Brian in a photo array).

The day of the shooting, Marulanda left the store at 5:00 p.m. He saw defendant outside and told the deceased not to let defendant into the store.<sup>30</sup>

#### JD

On February 26, at 5:00 p.m., PO Minogue and Det. Rooney interviewed JD at his home. JD stated the following:

He was not present at the time of the incident and only heard about it later. Minogue told him that “word in the street” had implicated him and “a few of his friends” in the homicide. JD said that, on the night of the incident, he had been home from 6:00 to 8:30 p.m. JD would provide the police “any information he gathers concerning the incident.”<sup>31</sup>

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<sup>28</sup> Rooney DD5, “Interview of [F.F.]” The DD5 incorrectly states the date of the interview as 7/25/88.

<sup>29</sup> Audiotape A88-290 and accompanying transcript. (*Id.*) Fermin saw the shooter exit the store, walk to Flatbush Avenue, cross the street, and then return to 21st Street. (*Id.*)

<sup>30</sup> Minogue DD5, “Interview of Alberto Mar[u]landa.” Based upon current government records, Marulanda’s name was spelled incorrectly in the DD5s.

<sup>31</sup> Minogue DD5, “Interview of [JD].”

### Shawn Jones

On February 27, at about 2:30 p.m., P.O. Minogue interviewed 13-year-old Shawn Jones at the 70th Precinct. Jones stated the following:

At approximately 6:30 p.m., Jones was inside the game room playing the arcade game “WWII.” Brian (who he later identified as defendant in a photo array) and approximately 10 others were there. After Jones won a free game, he heard a gunshot. Jones turned his head and saw the deceased fall to the floor. Defendant was one or two feet behind Jones. Defendant was holding a .25 caliber “automatic” in his “extended” right hand. Defendant yelled, “Get out,” three times while motioning with the gun. Jones and the others fled the store, leaving defendant inside.

Jones ran around the corner. He stopped at the first abandoned building on East 21st Street and heard two more shots. Jones continued to run, circling the block until he returned to Cortelyou Road. There, he saw a gray car with tinted windows arrive in front of the pizza store at 2117 Cortelyou Road. As defendant got in the driver’s side, “a gust of wind” revealed a “weapon protruding” from defendant’s waistband. The car drove off.

Jones came to the precinct because “he heard some other guys talking about the case.” He had previously seen defendant in the area on “numerous occasions.”<sup>32</sup>

### *Jones’s Audiotaped Statement*

Later, (on February 27 [time not stated]), Jones gave a sworn audiotaped statement to an ADA. Jones’s statement was consistent with his statement to PO Minogue but added that he was in the game room with “his cousin” at the time of the shooting.<sup>33</sup>

### Eric Greene

On February 27, (time not stated), Eric Greene gave a sworn audiotaped statement to an ADA. Greene stated the following:

Greene knew “Moon” from the game room. Two days before the shooting, Moon told Greene that someone had given him a .25 caliber automatic gun. Moon offered to sell it to Greene. When Greene asked whether the gun was “dirty,” Moon stated that he did not know, and Greene declined the offer. Later, Greene heard that Moon was trying to give the gun to other people, and Greene “guess[ed] he gave it to Brian [defendant].” When asked by the ADA, “You heard that from people on the street?” Green responded, “Yeah.” Then, when asked, “When did you hear that he pawned it off to [defendant,]” Green responded, “The next day.”<sup>34</sup>

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<sup>32</sup> Minogue DD5, “Interview of Shawn Jones.”

<sup>33</sup> Audio 88-207 and accompanying transcript.

<sup>34</sup> Audio 88-378 and accompanying transcript. There is no corresponding DD5 for Greene and no mention of Greene in the police paperwork.



### **PO Minogue Determines that Defendant is “Brian”**

On March 1, at about 11:00 a.m., PO Minogue went to Erasmus High School in an attempt to learn “Brian’s” identity. Jessica DeSousa had reported that Brian went to Erasmus and Brian’s brother, Sheldon, went to Walt Whitman High School. Erasmus gave Minogue a list of students named Brian. Minogue learned from Walt Whitman the address of Sheldon Kendall, which was the same address as an Erasmus student named Brian Kendall (defendant). Minogue then received defendant’s pedigree information.<sup>35</sup>

### **F.F. Identifies Defendant in a Photo Array**

Between 2:00 and 4:30 p.m., PO Minogue and Det. Rooney canvassed the area of East 21st Street and Cortelyou Road in an attempt to apprehend defendant but did not find him.<sup>36</sup>

During the canvass, at 4:00 p.m., they encountered F.F. and asked him to go to the 70th Precinct. At the precinct, in Minogue’s and Rooney’s presence, F.F. viewed a photo array containing defendant’s photo. F.F. pointed to defendant’s photo (number 5), and stated, “He’s the guy with the gun.”<sup>37</sup>

### **Defendant’s Statement Upon Arrest**

On March 2, at about 11:00 a.m., PO Minogue informed defendant why he was being arrested and advised him of his *Miranda* rights. Defendant stated that he was at the store but did not kill the deceased.<sup>38</sup>

### **F.F. Identifies Defendant in a Lineup**

On March 2, at about 3:00 p.m., F.F. viewed a lineup with defendant as the subject (number 3). Minogue and Rooney were present and Lt. Azzanari supervised. F.F. recognized defendant from “East 21st St. and Cortelyou.” In response to being asked what he saw, F.F. said, “He was the guy I saw leave the store with an automatic in his hand.”<sup>39</sup>

### **Post-Arrest Interviews**

#### Valerie Stuart

On March 2, 1988, at 1:00 p.m., PO Minogue interviewed Valerie Stuart, who was present at the time of defendant’s arrest. Stuart was defendant’s friend. She stated the following:

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<sup>35</sup> Minogue DD5, “Attempt to [I]dentify Brian.”

<sup>36</sup> Minogue DD5, “Canvass of Cortelyou Road and East 21st St.”

<sup>37</sup> Minogue DD5, “Photo Array.”

<sup>38</sup> Minogue DD5, “[S]tatement of [defendant].”

<sup>39</sup> Minogue DD5, “Line-up.” Detectives could not locate Jones for the lineup (*see* Homicide Bureau Information Sheet, 3/2/88), but Jones later identified defendant in the photo array.

She was home at the time of the shooting. At approximately 10:30 p.m., “Larry” called. He only called when he was looking for defendant. Larry told her that defendant, Sheldon, and a few others were in the store when “some guy came in and shot a man three times in the head.”<sup>40</sup>

Anthony Bobb, a/k/a Moon

On March 8, at 3:00 p.m., the ADA assigned to the case (“the prosecutor”) interviewed Moon with PO Minogue, in the presence of defendant’s attorney. Moon stated the following:

Moon was outside of the game room when Brian (defendant) ran out and stated that a man, who was running up the block, just shot someone. Moon saw a man “casually” walking towards Flatbush Avenue. The man was wearing a three-quarter-length brown jacket with a hood.

Moon started running after the man. When Moon reached the corner of Flatbush Avenue and Cortelyou Road, he observed the man running towards Beverly Road. Moon and defendant flagged down a marked police car, gave them the information, and then continued to chase the man. Moon first stated that he observed the man enter a burgundy sedan, but then stated that he did not observe the man enter the car, but “felt he must have.”<sup>41</sup>

Kenneth Lowe

On March 8, at about 4:00 p.m., at the KCDA, the prosecutor interviewed Kenneth Lowe in the presence of PO Minogue and defendant’s attorney. Lowe stated the following:

At the time of the shooting, Lowe was inside the game room. He was watching someone play the Mario Brothers video game, which was located on the right side of the store upon entering. An unidentified Puerto Rican male entered the store with his hands in his pockets and said, “Excuse me.”

A few moments later, while in the store, Lowe heard a shot and a young kid about 13 or 14 years old said, “[L]ook at that” and went across the street. Lowe heard three evenly spaced shots. He did not see a gun or anyone fire shots.

Lowe ran across the street. From across the street, he observed a short Puerto Rican man, about 5’ or 5’2”, 185 lbs., in his late 50s, walking fast toward Flatbush Avenue. The man was wearing a short, waist-length beige coat, with a zipper, and a Kangol hat. Lowe, defendant, Moon, and Lawrence (Lawrence John, *see* below) chased the man, but Lowe stopped before he reached Beverly Road.<sup>42</sup>

*Lowe’s Polygraph*

Later (on March 14, at approximately 10:30 a.m.), a KCDA Detective Investigator (“DI”) administered a polygraph to Lowe. Lowe provided an account consistent with his prior statement, adding that he

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<sup>40</sup> Minogue DD5, “Interview of Valerie Stuart (Brian’s Girlfriend).” While the DD5 listed Stuart as defendant’s girlfriend, both defendant and Stuart told CRU that they were friends.

<sup>41</sup> Minogue DD5, “Interview of Anthony Bobb (Moon)”; the prosecutor’s notes.

<sup>42</sup> Minogue DD5, “Interview of Kenneth Lowe”; the prosecutor’s notes.

was in the game room with defendant, Mark, and Lawrence. Lowe further stated that defendant was playing a video game at the time of the shooting.

The results of Lowe's polygraph are not indicated in the file.<sup>43</sup>

#### Ingrid John

On March 8, at about 5:00 p.m., at the KCDA, the prosecutor interviewed Ingrid John. PO Minogue was present. Ingrid stated the following:

Ingrid was at the corner of Flatbush Avenue and Cortelyou Road, in front of the pharmacy, when she observed "a bunch" of people running across the street. A young man, approximately 28 years old, 5'8" or 5'9", bumped into her. He had on a dark coat and a hat and was walking fast with his hands in his pockets. Ingrid saw "Brian" (defendant) hanging around by the liquor store on Cortelyou Road and asked defendant, "Where[]s my brother?" (Lawrence). Defendant said, "In there[]" indicating the doorway of the liquor store. Ingrid told defendant to go home. She last saw defendant crossing Cortelyou Road towards East 21st Street. Ingrid saw Moon about 15 minutes after bumping into the man.<sup>44</sup>

#### Lawrence John, Ingrid's Brother

On March 8, at 5:30 p.m., at the KCDA, the prosecutor and PO Minogue interviewed Lawrence John. Lawrence stated the following:

Lawrence was inside the game room playing video games. Defendant was playing Mario Brothers. A short fat man in his 40s, wearing a hooded beige jacket, entered the store with his hands in his pockets. Lawrence heard shots and saw a small black gun in this man's right hand. The gunman told everyone to "get out" and pushed everyone outside.

Lawrence and defendant chased the gunman. Lawrence continued to Flatbush Avenue and Beverly Road. Then, Lawrence observed the gunman enter a car on Beverly Road, about two car lengths from the corner. During the chase, Lawrence observed Moon speaking with police officers.<sup>45</sup>

#### *Lawrence John's Polygraph*

Later (on March 15, at approximately 9:30 a.m.), a DI administered a polygraph examination to Lawrence. During this exam, Lawrence provided an account consistent with his prior statement, adding the following:

He had been inside the game room with Brian (defendant), Tracy (Lyken), Kenny, Sheldon, and Orlon. He heard one shot and then two more, which he thought were firecrackers. The shooter was a Black male.

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<sup>43</sup> Kenneth Lowe Polygraph Notebook.

<sup>44</sup> Minogue DD5, "Interview of Ingrid John"; the prosecutor's notes.

<sup>45</sup> Minogue DD5, "Interview of Lawrence John"; the prosecutor's notes.

The Polygraph Notepack indicates that Lawrence was deemed “deceptive.”<sup>46</sup>

#### Simone (Tracy) Lyken

On March 8, at 6:00 p.m., at the KCDA, the prosecutor and PO Minogue interviewed Simone (Tracy) Lyken. Lyken stated the following:

Lyken was inside the game room with her boyfriend, defendant. As Lyken was sitting on a ledge by the front window, she observed a man wearing a medium-brown hooded coat enter the store. Lyken heard one shot, and defendant pulled her out of the store, where she heard two more shots. Defendant then sent her to his apartment around the corner and, about 10 minutes later, defendant returned and walked her home. During the walk, defendant told her that the “guy in the store was dead.”<sup>47</sup>

#### *Lyken’s Polygraph*

Later, (on March 14), a DI interviewed Lyken. Lyken provided an account consistent with her prior statement, and added the following:

She observed the shooter exit towards Flatbush Avenue. The “old man who was there when the man was shot says Brian [defendant] didn’t do it.” Word on the street was that the shooter had threatened the old man.

The results of Lyken’s polygraph are not indicated in the file.<sup>48</sup>

#### Sheldon Kendall

On March 15, at approximately 11:10 a.m., a DI administered a polygraph examination to Sheldon Kendall, defendant’s brother.

During the pre-examination interview, Sheldon stated the following:

The owner of the game room did not allow Sheldon to enter the store, so Sheldon waited outside and entered when the owner left. Sheldon joined defendant, Lyken, and Orlon. After the first shot, Sheldon removed his headphones and saw a husky Black male wearing a brown jacket fire two more shots. The shooter told everyone to “get out,” so everyone left. Defendant sent Lyken home. Then, Sheldon, defendant, Moon, and Lawrence chased the shooter, who was still holding a gun, down Beverly Road, where the shooter entered a two-door burgundy sedan. Sheldon and defendant returned to the game room and left after learning that the employee had died.

Sheldon’s polygraph account was consistent with his pre-examination interview. The Polygraph Notepack indicates that Sheldon was deemed “deceptive.”<sup>49</sup>

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<sup>46</sup> Lawrence John Polygraph Notepack.

<sup>47</sup> Minogue DD5, “Interview of Simone (Tracy) Lyken”; the prosecutor’s notes.

<sup>48</sup> Simone Tracy Lyken Polygraph Notepack, dated 3/14/88.

<sup>49</sup> Sheldon Kendall Polygraph Notepack, dated 3/15/88. The prosecutor likely interviewed Sheldon Kendall, separately from the polygraph, but CRU could not locate a DD5 regarding the interview. Two DD5s appear to be missing from the trial file.

### Orlon Phillips

On March 16, at approximately 9:50 a.m., a DI administered a polygraph examination to Orlon Phillips.

During the pre-examination interview, Phillips stated the following:

Phillips was in the game room with defendant, Rondell, Lawrence, Lyken, and Sheldon. Phillips was playing a video game when he heard a shot. Phillips ignored the shot but he then heard another one. Phillips turned and saw a man holding a gun. Phillips heard three shots, and the group ran out of the game room, including the shooter. Phillips observed the group run down Cortelyou Road, and the shooter man ran the opposite way.

Phillips and Rondell returned to the store, where “the old man” repeated that he had “been shot.” Then Rondell stated, “There goes the man,” and a group chased the gunman down Beverly Road towards Flatbush Avenue.<sup>50</sup>

Rondell and Moon spoke with police officers who were involved in another incident. Meanwhile, the shooter entered a two-door burgundy car parked on the right side of the street. Phillips advised “undercover” officers of the direction of the car, and the group returned to the store, where they said that “the man was on the floor.” Eventually, defendant said, “Everybody go home,” and the group disbanded.

Phillips’s polygraph account was consistent with his pre-examination interview. The Polygraph Notepack indicates that Phillips was deemed to be “deceptive.”<sup>51</sup>

### **THE GRAND JURY PROCEEDINGS**

The grand jury proceedings commenced on March 7, 1988.<sup>52</sup>

#### **The Indictment**

On March 24, 1988, defendant was charged with Murder in the Second Degree (P.L. § 125.25[1]) and Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03).

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<sup>50</sup> This is likely a misstatement, as the game room is on Cortelyou Road. Additionally, a map in the prosecutor’s notes associated with Phillips does not depict the shooter first walking towards East 21st Street and depicts the chase beginning on Cortelyou Road.

<sup>51</sup> Orlon Phillips’s Polygraph Notepack is dated 3/16/88. It is likely that the prosecutor interviewed Phillips, separately from the polygraph, but CRU could not locate a DD5 regarding the interview. Phillips’s first name is sometimes incorrectly referred to as “Olan” in the paperwork.

<sup>52</sup> Because grand jury proceedings are secret (C.P.L. § 190.25[4][a]), discussions of the proceedings are redacted. Notably, the presumption of secrecy can only be overcome by demonstrating “a compelling and particularized need” for access to the grand jury material. *Matter of District Attorney Suffolk County*, 58 N.Y.2d 436, 444 (1983). If that threshold is met, the court must then balance various factors to determine whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure. *James v. Donovan*, 130 A.D.3d 1032, 1039 (2d Dep’t 2015) (refusing to release the grand jury transcripts in the investigation into the death of Eric Garner in Staten Island, citing the strong presumption in favor of grand jury secrecy and the “chilling effect” that a release of transcripts would have on witnesses before such a tribunal).

## THE PRE-TRIAL COURT APPEARANCES

On April 26, 1988, the parties and defendant appeared in court. Defense counsel, who defendant had retained, made a bail application stating, “approximately ten witnesses who, in effect, said that [defendant] was present, but he was not the shooter, but rather he was an onlooker.” (PT.3) Counsel further stated, “[Defendant] claims that there were many more witnesses present there who can vouch that he was not involved, but he was a very close onlooker . . . .” (PT.4-5) The court denied the application. (PT.8)

On June 30, 1988, after the defense filed a written bail application, the parties appeared in court. Defense counsel stated that some of the defense witnesses had indicated that there was a verbal altercation inside the store a day or two before the shooting, which involved JD—and not defendant’s brother (Sheldon). (Motion To Release Defendant or Set Reasonable Bail, filed June 23, 1988; PT.5) The court again denied the bail application. (PT.6)

On August 30, 1988, the parties appeared in court. Defense counsel stated that the prosecutor had provided the defense with police reports containing *Brady* material.<sup>53</sup> This included the following: information that a witness, who was standing next to the deceased, had described the shooter as being 40 to 45 years old; a report by PO Minogue indicating that a witness described the shooter as “heavy”; and a report by Det. Rooney describing an argument between the deceased and “a male [B]lack, twenty-one, six feet two, one hundred twenty pounds.” (PT.2-4)<sup>54</sup> Counsel requested the identity of the witnesses. The court directed him to speak with the prosecutor, who was not present (another ADA had appeared). (PT.4)

Counsel also requested the identity of a “young lady” who had seen defendant minutes after the shooting wearing a red and white jacket and a dark baseball cap. (PT.5) The court stated that defendant was entitled to this information. (PT.7)

Handwritten notes on the People’s status sheet for August 30, 1988, summarize several of the requests, but the notes are incomplete and the handwritten responses to counsel questions are incomplete. While the responses properly identify Nicholas Ruiz and Odilka, they do not identify Salgado or Reyes as witnesses to separate altercations. Instead, the note, apparently referring to Salgado, indicates, “Not a witness to homicide.” There is no record of whether the prosecutor or counsel spoke about counsel’s requests, and they were not mentioned at the next court date. (PT, 10/4/88 at 2)

On June 13, 1989, the parties appeared in court. Defense counsel informed the court that the prosecutor had made an offer of seven to 21 years in prison in exchange for a plea of guilty to first-degree manslaughter. Counsel stated that defendant was not interested in the offer and wished to go to trial. (PT.2-3) The court stated, “The only reason I wanted [the offer] on the record is so that if you

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<sup>53</sup> Under *Brady* and its progeny, the People have a duty to disclose exculpatory evidence—including *Giglio* material useful for impeachment—which the prosecution or its agents possess. *United States v. Giglio*, 405 U.S. 150, 153-54 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>54</sup> Rooney’s DD5 indicates 220 lbs., and not 120 lbs. It is not known whether counsel misspoke, or it was transcribed incorrectly.

should be convicted of the murder, you understand that my hands are tied. You have to get a life sentence.” (PT.3)

### **THE PRE-TRIAL SUPPRESSION HEARING**

On July 19, 1989, a *Wade* hearing was conducted. PO Minogue testified about the identification procedures. The court held that the identification procedures were not suggestive.<sup>55</sup>

### **DEFENDANT PLEADS GUILTY**

On July 19, following the *Wade* hearing, an off-the-record conference was held between the parties and the court. Thereafter, defense counsel requested that the court permit defendant to plead guilty to Manslaughter in the First Degree. (P.2-3) The People agreed to a plea of guilty to Manslaughter in the First Degree, in full satisfaction of the indictment, and a prison sentence of eight and a third to 25 years. (P.2-3, 7)

In pertinent part, defendant’s plea allocution was as follows:

THE COURT: Mr. Kendall, it’s alleged that on February 24, 1988, at approximately 7 P.M., at 2105 Cortelyou Road, which is a store, you caused the death of [the deceased] by the use of a gun. Those are the allegations, Mr. Kendall. Do you remember the incident?

THE DEFENDANT: Yes.

THE COURT: Did you cause the death of [the deceased]?

DEFENDANT: Yes.

[THE PROSECUTOR]: Manslaughter in the first degree. Mr. Kendall, you fired approximately three shots at [the deceased]; is that correct?

THE DEFENDANT: Yes.

[THE PROSECUTOR]: And you did so knowing that you would likely, at a minimum, cause him serious physical injury; is that correct?

DEFENDANT: Yes.

THE COURT: So knowing that you could cause serious physical injury, you shot at him and those shots caused the death of [the deceased]; do you understand that, Mr. Kendall?

THE DEFENDANT: Yes.

THE COURT: And is that what happened?

THE DEFENDANT: Yes.

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<sup>55</sup> The purpose of a *Wade* hearing (*United States v. Wade*, 388 U.S. 218 [1967]) is to determine whether the identification procedures were so improperly suggestive as to taint an in-court identification at trial. Because the court’s determination is not relevant to any CRU issue, the hearing is not discussed.

(P.4-5) After the allocution, the court noted that defendant's mother was in the courtroom and defendant spoke with her regarding the plea. (P.8)

### **The Sentence**

Prior to sentencing defendant denied his guilt to parole. He explained that he accepted the plea on the advice of counsel but was not satisfied with it, and that he was upset he was going to prison for a crime he did not commit.

On August 7, 1989, defendant was sentenced to the promised jail sentence of eight and a third to 25 years. (S.3)

## **THE POST-CONVICTION PROCEEDINGS**

### **The Direct Appeal**

Defendant, through counsel, moved pursuant to 22 N.Y.C.R.R. § 670.12(c) in the Appellate Division, Second Department ("Appellate Division"), to reduce his sentence as being excessive. On June 26, 1991, the Appellate Division affirmed defendant's sentence. *People v. Kendall*, 176 A.D.2d 436 (2d Dep't 1991). Defendant's leave application to the Court of Appeals was denied. *Kendall*, 79 N.Y.2d 828 (1991) (Wachtler, J.).

### **The CPL 440.10 Motion to Vacate**

On or about October 23, 1993, defendant, *pro se*, filed a motion to vacate his judgment of conviction and to set aside his sentence pursuant to C.P.L. §§ 440.10 and 440.20 (respectively). Defendant claimed that his plea of guilty was coerced, his plea allocution was insufficient, he received the ineffective assistance of counsel, and the sentencing procedures were erroneous.

On February 10, 1994, the court summarily denied defendant's motion in its entirety.

## **THE CRU INVESTIGATION**

CRU's investigation included reviewing all witness statements, transcripts of the pretrial hearing, certain court appearances, and the People's trial files for defendant and other witnesses. In addition, CRU interviewed numerous witnesses.

Nicholas Ruiz, and Dets. Minogue and Rooney are deceased and were not interviewed. CRU could not locate Eric Greene. CRU learned from family members or friends that Moon and Kenneth Lowe are deceased. CRU could not locate "JD" and was informed by someone claiming to be his sister that he is deceased. CRU learned that Shawn Jones's true name was DeShawn Jones or DeShawn Covington and that he is deceased. (*see below*)

The relevant evidence is discussed below.



## The People's File

### Discovery Documents

On June 7, 1988, defense counsel filed an omnibus motion requesting, *inter alia*, that the People provide discovery. The People's response, dated June 22, 1988, provided that a Sprint sheet was "enclosed" and that a copy of the 911 tape would be provided upon receipt of a cassette. The People's copy does not otherwise indicate whether the Sprint was, in fact, attached. The trial file contains a copy of the Sprint, which contains, among others, the following notations:

--ML W GUN---POSS MLE CRIME-----GROUP-----CHASING--  
[...] -- FLED IN AREA OF E 22 ST-OF BEVERLY---RD-----1  
UNDER---AT THIS TIME---STILL LOOKING FOR 2 PERP---

(capitalization in the original)

The trial file also contains a cassette tape of the 911 calls and radio runs, with the notation that it was prepared on May 2, 1988. There is no indication in the file of whether any copies of the 911 and the radio run recordings were ever provided to the defense.

There are several notes in the file indicating that the prosecutor provided various discovery documents. There are two sets of stapled documents that contain DD5s and arrest reports, and on the first page of each set, there is a note that copies were provided to defense counsel. Another note in the file indicates that the prosecutor provided a copy of an unidentified document, with the "police copy" to be returned to the prosecutor, and another note wherein the prosecutor directed staff to provide a "copy of notes on [defendant's] w's statements."

A review of the aforementioned DD5 packets reveals that the DD5 regarding JD was omitted, as well as a DD5 describing a canvas for defendant and a chance encounter with F.F. (*see* above, Police Investigation, JD's Interview, and F.F. Identifies Defendant)

### Documents Regarding Nicholas Ruiz

There is no indication that the People interviewed Nicholas Ruiz. The Homicide Bureau Information Sheet, dated March 2, 1988, indicates that, according to PO Minogue, "Ruiz stated to [the RIP Officer] on 2/24/88 that Ruiz was inside the store and saw defendant display a handgun and as Ruiz attempted to flee he heard shots and looked back to see the man with the gun walk down Cortelyou Road."<sup>56</sup> The report further states that, after the night of the shooting, Ruiz refused to cooperate with the detectives and refused to view a lineup.

Thereafter, an ECAB Information Sheet includes a notation to subpoena Ruiz, but there is no indication that the prosecutor ever spoke with Ruiz.

Instead, the file contains a form letter, dated April 14, 1988, from a DI to Ruiz that was returned by Ruiz, likely together with a handwritten letter from Ruiz, dated April 22, 1988. The letter explained

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<sup>56</sup> Based upon a review of the documents and interviews in this case, it is clear that the statement attributed to Ruiz was erroneous and that "defendant" was mistakenly substituted for the shooter.

that Ruiz was being admitted to the Veterans Affairs hospital for alcohol-related ailments. Ruiz described himself as having a “chronic disease” of being “alcohol mentally ill” with “mental distort,” such that “today I remember that I wrote you tomorrow you can’t ask me what letter I wrote to you and ... I don’t remember.” Ruiz provided his contact information at the hospital.

There is no follow-up from these letters, and the prosecutor did not subpoena Ruiz prior to trial.

#### Documents Regarding F.F.

The prosecutor was aware by, at least, the pre-trial hearing on July 19, that F.F. was in prison.<sup>57</sup> A review of F.F.’s trial file shows that, on February 3, 1988, he was arrested for selling crack cocaine to an undercover officer. He was charged with sale and possession of a controlled substance.

During the pre-trial proceedings in F.F.’s case, F.F. failed to appear on March 18, 1988, and then again on April 7, 1988.<sup>58</sup> On June 6, 1988, during a court appearance, F.F. was returned on a bench warrant. F.F.’s attorney told the court, “[F.F.] tells me that on the day that he was supposed to be here, he was in the District Attorney’s Office being interviewed as a witness in a pending homicide matter.”<sup>59</sup> However, there is no indication in defendant’s homicide case that F.F. had a matter with the prosecutor that would justify a missed court date. Thereafter, bench warrants were issued for F.F. on July 26, 1988, and on October 17, 1988.<sup>60</sup>

On March 6, 1989, F.F. pleaded guilty to third-degree criminal sale of a controlled substance in exchange for a promised sentence of one to three years’ prison.<sup>61</sup> On April 10, 1989, F.F. was sentenced as promised.

F.F.’s criminal history as of June 1989, reveals that between the date of the shooting and the date of F.F.’s guilty plea, he was arrested four times. There are no reported dispositions for three of those arrests, and the People declined prosecution for one of the arrests. There is no other indication in the files that any those arrests were known or considered by the prosecutor in defendant’s case, and all documents regarding those arrests have been lost or destroyed.<sup>62</sup>

However, the trial file in defendant’s case contains a letter from F.F. to the prosecutor, dated July 31, 1989. In this letter, F.F. stated,

As you requested, I am providing you with my name, state ID#, and my counselor’s name and address. I would be grateful if you wrote her

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<sup>57</sup> Trial file witness notes; Order to Produce F.F. from Correctional Facility, dated 7/10/89.

<sup>58</sup> PT, 4/7/88, at 2; *see also* KCDA Ind. No. 1483/88 folder.

<sup>59</sup> *Id.* An undated note on F.F.’s trial file jacket reads: “[F.F.] says he was in our office on a homicide case and therefore was not in court when warrant was issued. Check it out.”

<sup>60</sup> PT, 07/26/88; PT, 10/17/88.

<sup>61</sup> The trial file indicates the existence of a plea offer on or about 6/17/88 with a prison sentence of two to six years.

<sup>62</sup> F.F.’s criminal records additionally note three of those arrests.

the letter you promised as soon as possible, so that it can be included in my release consideration at the parole board.

F.F. ends the letter by stating, “I am very grateful for your anticipated assistance in helping me get released.”

Stapled to this letter is a handwritten letter to F.F.’s counselor, signed by the prosecutor, which states,

I ... confirm that [F.F.] cooperated with this office both in the investigation and prosecution of an important murder case against [defendant], Indictment # 2309/88, wherein [defendant] was charged with the shooting of a store clerk.

The prosecutor continued,

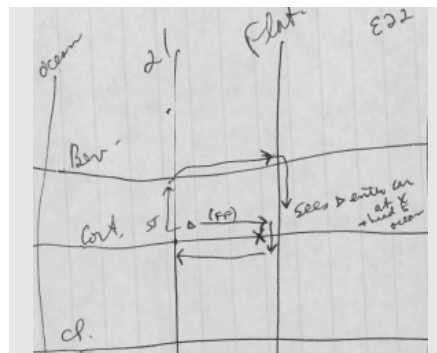
It is our respectful request that [F.F.’s] substantial help in the context of this prosecution be taken in account in determining his release date and that every possible consideration be shown to him.

F.F.’s prison records indicate, *inter alia*, that he was “amenable to drug counseling as evidenced by his past abuse of crack” and that, at the time of his arrest, he used or was using crack. The records additionally reveal that F.F. was released to parole at the earliest eligibility date.

#### Trial Preparation Documents

The trial file contained documents listing the names of witnesses, including POs Davis and Minogue, and CSU officers, and shift schedules for POs Davis and Minogue. There is no mention of the RIP Officer, Sgt. Jerak, or PO Greco as potential trial witnesses.

The trial file additionally contained various notes by the prosecutor, including notes relating to the witnesses that he interviewed with PO Minogue and the following diagram:



These notes appear to represent the shooter’s escape path, as told by F.F. (“FF” on the diagram), Shawn Jones’s (“SJ” on the diagram) description of his own path following the shooting, and the car (“X” on the diagram) which Jones says the shooter had entered.

Similar maps appear in the prosecutor’s notes from several of the defense witness interviews. (*See below, Addendum A; compare with Addendum B*)

### Pre-trial Efforts to Locate Shawn Jones

Homicide Bureau Information Sheets list two addresses for Jones: his mother's apartment, and his cousin's apartment. Prior to trial, Homicide Bureau Investigation Requests or Reports document the various attempts to reach Jones:

- On June 15, 1989, at the prosecutor's request, DIs left a subpoena at Jones's mother's apartment. At his cousin's apartment, DIs spoke with Jones's cousin, Tina Johnson. Johnson told the DIs that Jones's first name was "DeShawn," and that he was in a group home until June 20, 1989.
- On June 28, 1989, the prosecutor requested that the DIs visit Jones at his cousin's apartment. The prosecutor wrote, "I have not received a response from my certified letter and mailgram sent to this address." (The file contains a letter, dated June 22, 1989, from the prosecutor's legal assistant to Jones, asking Jones to contact the prosecutor as soon as possible.)
- On June 30, 1989, DIs attempted to locate Jones at his cousin's address, where David Johnson informed them that Jones had not been present for one week.
- On July 12, 1989, at the prosecutor's request, DIs personally served Jones with a subpoena at his cousin's address. The return date was either July 13 or July 14, 1989.

There is no indication that Jones ever appeared in court or at the KCDA on July 14, 1989. But a trial file note states, under the name Shawn Jones, "called 7/17/89 12:45 => SPOKE TO ERIC." (capitalization in the original)

*CRU learns that Shawn Jones is DeShawn Jones and DeShawn Covington*

CRU learned from Jones's cousin that Jones's last name was Covington (and was deceased). Government records indicate that a person named DeShawn Covington resided at the cousin's apartment around this time. It is not known whether "Jones" was a family name, but the addresses and birth date provided by Covington were accurate.<sup>63</sup>

### **Witness Interviews**

#### F.F.

CRU conducted an unrecorded telephone interview of F.F. He stated the following:

He recalled that his friend Secundino Salgado's uncle (the deceased) had been killed, but he did not recall having seen the shooting or having had information about the shooting. He turned his life around and did not like to recall the earlier period of his life in Brooklyn when he was "lost to crack."

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<sup>63</sup> CRU interviewed DeShawn Jones's cousins, Tina Gilling and Darnell Rhodes, in person outside of their respective residences. Both individuals confirmed that Covington had lived with them in 1988 and was deceased. Rhodes listened to an audio recording of Jones's statement and confirmed that it contained his voice. Both Gilling and Rhodes denied having heard any information regarding the game room shooting.

### Secundino Salgado

CRU conducted a recorded interview of the deceased's nephew, Secundino Salgado, in a third-party's office. Salgado stated the following:

Salgado and the deceased worked at the game room, which was also a “numbers spot.” On the day of the shooting, or possibly a day earlier, Salgado had a dispute with JD. Salgado had asked JD to keep the noise down or to leave the game room. JD took umbrage, stating, “Oh—you’re gonna make me shoot you,” before leaving. Around noon, JD returned. Salgado thought JD had something in his pocket, so Salgado swung a knife at him. In response, JD told Salgado that he would return and would kill Salgado. Salgado left the store, telling the deceased to close the game room and go home. That evening, Salgado learned that the deceased had been shot. Salgado returned to the store and called the police.

CRU showed Salgado a photographic array containing a photo of JD. Salgado quickly identified JD.

Salgado additionally knew F.F., and when asked about F.F., Salgado stated, “[You] think he had something to do with this?” Although they were friends, Salgado did not remember speaking to F.F. about the deceased's murder. Salgado also did not remember seeing F.F. inside the game room on the day of the shooting.<sup>64</sup>

Salgado did not believe that defendant was the shooter. At the outset—immediately after CRU stated its purpose for meeting—Salgado stated, “I think you got the wrong guy.”<sup>65</sup>

### Richard Pinero

CRU conducted a recorded interview of Pinero at his residence. Pinero stated the following:

Pinero went to the game room after the shooting and learned that his uncle had been killed. There were police officers inside the game room and a crowd outside. Pinero did not see F.F. inside the store and did not know that F.F. had information about the shooting. Pinero thought that he would have heard if F.F. had witnessed the shooting since F.F. was a family friend—his mother once rented a room to F.F. During this period, it was well-known that F.F. sold and used crack.<sup>66</sup> Furthermore, Pinero recalled Nicholas Ruiz and that Ruiz was friends with the deceased.

### The RIP Officer

CRU conducted unrecorded interviews of the RIP Officer on the phone and inside of his residence. He stated the following:

In or about 1988, he responded to a shooting at 2105 Cortelyou Road and took a witness (Ruiz) statement (*see* above, Responding Officers, Ruiz Interview). He believed that Ruiz was a good witness. Ruiz's description of the shooter did not match defendant's appearance. The RIP Officer observed

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<sup>64</sup> This statement was not recorded.

<sup>65</sup> This statement was not recorded but is consistent with another statement, which was audiotaped.

<sup>66</sup> This statement was not recorded.

defendant outside of the game room at some point during his response to the crime scene and defendant appeared to be part of a group. The crowd was friendly, and he believed defendant could have been a witness to the shooting.

The RIP officer had been aware of defendant's arrest, which he believed occurred soon after the shooting. Based on these facts, at that time, he did not believe that PO Minogue had arrested the correct person. The RIP Officer spoke with Minogue about the fact that defendant had been at the scene of the crime shortly after the crime. He was pretty sure that Minogue had agreed with this fact, but ultimately he did not know what additional evidence Minogue had obtained during the investigation, and he knew it was possible that the shooter might return to the crime scene.

#### Lawrence John

CRU conducted an online recorded interview with Lawrence John. Lawrence stated the following:

Lawrence was at the game room with defendant, Rodwell John (his brother), Sheldon Kendall, defendant's girlfriend, Tracy Lyken, Rondell, and Kenny a/k/a Jambi. Rodwell left, beckoned by their sister. A short and thin man in his 20s, with "dark brown" skin, wearing a dark hoodie "pulled over his face" entered the store and bent down to tie his shoelace. Lawrence was focused on the arcade game when he heard four or five shots and observed that same man run out of the store with his hand in his pocket.

Lawrence and others chased the man—possibly because they wanted to be heroes—as he headed towards Flatbush Avenue and turned left. Lawrence and the group, which included defendant, Jambi, Sheldon, and Rondell, stopped at the corner of Flatbush Avenue and Cortelyou Road and observed the man cross Flatbush Avenue and enter a dark-colored car on Beverly Road.

Afterward, Lawrence stood across the street from the game room but did not go inside. Lawrence observed defendant and Lyken also standing across the street between the liquor store and the deli. Lawrence was adamant that "[defendant] did not kill anybody."

Lawrence had a good relationship with the deceased and was not aware of anyone having a problem with him.

Lawrence left New York a couple of months after defendant went to prison.

#### Simone (Tracy) Lyken

CRU conducted a recorded interview of Simone Tracy Lyken at the KCDA. She stated the following:

At the time of the shooting, Lyken had been in the game room with defendant and Sheldon when a person, who was about 5'7" or 5'8" and wearing a brown jacket, entered the store. She then heard two gunshots. Defendant was standing next to Lyken and he pulled her out of the store. Initially, Lyken recalled that they then all returned to defendant's home. After CRU showed her some of her statements from 1988, Lyken thought that defendant probably sent her to his home alone.

In the days following the shooting, Lyken heard, from someone whose name she did not recall, that a crackhead had identified defendant. Lyken also heard from “the guy that was standing next to [the deceased]” that defendant was not the shooter.

#### Rodwell John

CRU conducted a recorded interview of Rodwell John at the KCDA. Rodwell stated the following:

Rodwell was in the game room playing Pac-Man, when he heard his sister Ingrid calling for him to go home. Eventually, Rodwell heeded Ingrid’s calls and, as he stepped out of the game room, he noticed a man with an egg-shaped head, who was wearing a burgundy-colored hoodie. This man bent down to tie his shoes, which raised Rodwell’s suspicions. The man was Black, short, about 5’4”, and slim, with bowed legs, in his 30s, possibly 40 years old.

Rodwell continued to focus his attention on the game room and shortly after he left, he heard five gunshots. Rodwell saw the man exit the store and run towards Flatbush Avenue, followed by a group, including Lawrence, defendant, Sheldon, and Kenny. As they chased the man, someone shouted, possibly to police officers, “There he go[es].” Rodwell, who was standing near the corner of Flatbush Avenue and Cortelyou Road, watched the man enter the passenger-side a four-door, burgundy Camry that was double-parked on Beverly Road near the corner of Flatbush Avenue.

#### Ingrid John

CRU conducted a recorded interview of Ingrid John. Ingrid stated the following:

On February 24, after shopping at Macy’s, Ingrid encountered defendant on her way home. Defendant walked part of the way home with her. At home, Ingrid’s mother asked after Ingrid’s brothers Rodwell and Lawrence, so Ingrid went to the game room to fetch Rodwell. As Ingrid neared the game room, she saw a crowd and she yelled for Rodwell to go home. Rodwell was outside, and he reluctantly followed her home. After she got home, Lawrence told Ingrid that someone had been shot and they were saying that it was defendant. Ingrid did not believe that was possible.

CRU had Ingrid review her 1988 statement to the prosecutor and PO Minogue (*see* above, Post-Arrest Interviews). Ingrid could not recall if she went home before retrieving her brother and or when she encountered defendant. Ingrid stated that she had been truthful in 1988, that she sometimes blocks memories from the past, and that she believed she blocked her memory of this incident.

#### Rondell Ramsey

CRU conducted a telephone interview of Rondell Ramsey. Ramsey stated the following:

Ramsey recalled being present in the game room, possibly with Rodwell John, his best friend. Ramsey did not see the shooter. While Ramsey is aware that defendant had been convicted and sentenced for the shooting, he did not recall whether he saw defendant inside of the game room at the time of the shooting and did not have an opinion about defendant’s conviction.

### Analise Romero and Jessica “Odilka” DeSousa

CRU conducted interviews of Analise Romero and Jessica “Odilka” DeSousa outside of their respective homes. Neither individual recalled the shooting nor being interviewed by the police.

### Orlon Phillips

CRU conducted a recorded telephone interview of Orlon Phillips. Phillips stated the following:

Phillips was inside the arcade with Sheldon, Roddy, defendant, and defendant’s girlfriend, when an unknown person, whose face Phillips did not see, walked into the store and fired a shot, causing everyone to scramble. When the man ran out, Phillips saw a gun in his hand and, during the chase, Phillips could see that the shooter was wearing a hoodie and was about 5’8” or 5’9,” and 150 to 160 lbs. Phillips and others chased the person across Flatbush Avenue to a side street, where the shooter jumped into a burgundy car and drove away.

Phillips would have been willing to testify at trial on behalf of defendant but was not asked. No one attempted to dissuade Phillips from testifying.

### Defense Counsel

CRU conducted a recorded interview of defendant’s attorney who defendant had retained during the pendency of the case in 1988. Counsel stated the following:

At the outset, he stated that defendant’s case “stood out for years and years” because he thought that there was “something wrong with the case.” Initially, he thought the defense was a “slam dunk.” He had interviewed defense witnesses and noted, “They all came in separately. . . . None of the stories were tailored to the other stories. They each had their [] nuances. But altogether . . . it made up for a believable package.” Furthermore, their statements were consistent with defendant’s account, and counsel did not think that defendant—who was remanded at the time—“got to the witnesses.”

But as the trial approached, the defense fell apart. The defense witnesses disappeared. Counsel no longer believed that defendant had a viable defense.

Counsel did not recall hearing that a crowd had chased the shooter and did not recall considering or knowing that there was police corroboration for the defendant’s account. Counsel also did not recall specifics about what discovery he received prior to trial but noted that he would not have received any DD5s prior to the grand jury proceedings.

Even though defendant told counsel that he was innocent, counsel advised defendant to plead guilty. Because counsel believed that they no longer had a defense, he considered it would be “suicide” to go to trial. Furthermore, knowing that the judge was a “long-ball hitter,” defendant would be sentenced to a prison term of 25 years to life if convicted.

After defendant was sentenced, counsel claims to have encountered the prosecutor, who expressed surprise that defendant had not gone to trial. The prosecutor said the prosecution’s case was weak: there were problems with the witnesses—one may have become unavailable and the other may have had drug-related problems. Hearing these revelations, counsel felt that he had been “screwed,” but



did not consider taking legal action in response to this disclosure. If, however, he had known pre-trial about F.F. being in jail and having received a promise of consideration for his cooperation or that the second witness was unavailable, he would not have advised defendant to take the plea.

### The Prosecutor

CRU conducted an unrecorded interview of the prosecutor. He stated the following:

He had no independent recollection of the case but confirmed that the draft letter requesting consideration from F.F.'s prison counselor for his assistance with defendant's case contained his handwriting. He would not necessarily have disclosed this promise to defense counsel, because it constituted a request for leniency, as opposed to a concrete case intervention. Furthermore, he would not necessarily have disclosed any benefits provided to F.F. prior to the grand jury presentation, because he typically included such disclosures as pre-trial *Giglio* (impeachment) materials.

When asked whether he would have listened to Sgt. Jarek's radio run, he stated that he usually had "little to do" with radio runs—although he would have disclosed it to defense counsel upon request. He would not have disclosed police paperwork prior to the grand jury, including that which would have revealed the substance of Nicholas Ruiz's statements.

### Valerie Stuart

CRU conducted a recorded interview of Valerie Stuart. She stated the following:

Stuart, defendant's friend, was present at the time of defendant's arrest. She had not known anything about the shooting but remains "scarred" by the memory of defendant's tearful, pleading protests to the police that he was innocent.

### Defendant

CRU conducted a recorded, online, interview of defendant. Defendant's current attorney was also online. Defendant stated the following:

On February 24, he was at the game room with Tracy (his girlfriend, Simone Tracy Lyken), Sheldon, Rondell, Orlon, Lawrence, and others. Roddy had been present but left with his sister, Ingrid.<sup>67</sup> While defendant was playing an arcade game, he heard three consecutive shots. Everyone scrambled, and, once outside, defendant and his friends followed the person defendant believed to be the shooter. Defendant does not now recall seeing the man holding or firing a gun.

The shooter was wearing a darkish, grayish hoodie, and was approximately 5'6" or 5'7", with a build similar to defendant's build.<sup>68</sup> When defendant and his group were on Flatbush Avenue, a police cruiser turned onto Cortelyou Road, and defendant's group alerted the officer to the shooting. Defendant then saw the shooter enter a burgundy car parked on Beverly Road, not too far from Flatbush Avenue, and drive off. Defendant and his friends returned to Cortelyou Road and stood

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<sup>67</sup> Defendant did not clearly recall the shooting and the days leading up to the shooting. He had no recollection of JD.

<sup>68</sup> Defendant's arrest report indicates that he was 5'7" and 135 lbs.

across the street from the game room. Lyken was there, too, and an older Spanish man, who frequented the store, was also in the vicinity.

Afterwards, when defendant was arrested, he told the officers that he was at the game room but was not the shooter. Defendant reiterated during his CRU interview that he did not shoot the deceased.

During the pre-trial proceedings, the prosecutor offered a plea that included a prison sentence of six to 18 years. Defendant rejected the plea. Looking back, he stated that he rejected it because he would not accept an offer of even one day in jail. But as the case continued, his attorney told him that his witnesses were “disappearing one-by-one”—all that remained were friends or family members, who may not have been believed.<sup>69</sup> His attorney advised defendant’s mother that defendant should accept the plea with a prison sentence of eight and one-third to 25 years. His attorney told him, “We won’t be able to win at trial” because the prosecution had two eyewitnesses who purportedly saw defendant shoot the deceased, and if found guilty at trial he would be sentenced to a prison term of 25 years to life.

Defendant’s mother begged him to plead guilty, hoping that—with good time—defendant could be released in six years, when he was 23 years old. Understanding that his family had no money to pay for another retained attorney and, himself, “know[ing] nothing about the law,” defendant felt he had no choice but to plead guilty. And by doing so, defendant now believes he “messed [his] whole life up.”

During the pendency of the case, defendant did not have the police paperwork, and before pleading guilty, defendant did not know that there were identifiable police officers who could say that they observed a group chasing a man with a gun towards Beverly Road. In fact, defendant had very limited knowledge about the prosecution’s case prior to pleading guilty.

Nevertheless, counsel relayed to him the basic facts according to the prosecution and, when defendant appeared before the parole board, he used that account. Defendant believed that he had to present the parole board with a believable story. Defendant further believed that he could not claim that he was innocent because he had “already copped out and said, ‘Yes, I did it.’”

### **The Parole Hearings**

CRU obtained a transcript of defendant’s parole hearings held on April 3, 1996, March 31, 1998, April 24, 2002, January 22, 2003, and April 14, 2004. Defendant admitted his guilt to the board on each occasion. For example, on April 3, 1996, at the outset, the Commissioner described the record as follows: defendant’s younger brother had been “loitering around the candy store selling drugs and acting in a disruptive manner,” causing the deceased to throw him out of the store; so defendant and his brother returned to the store and shot the deceased three times.<sup>70</sup>

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<sup>69</sup> Defendant recalled that his attorney told him that there were two Spanish people, who were present in the store at the time of the shooting, who stated that defendant was not the shooter. If counsel gave defendant their names, he does not remember them.

<sup>70</sup> This factual rendition was nearly identical to what defendant told parole prior to sentencing (*see above*).

Defendant told the parole board that his brother had a physical altercation at the game room, causing his mother to call the police, to no avail. After his brother came home with a busted lip, defendant obtained a gun from his friend and went to the store for a confrontation when the deceased and his nephew struck them. Defendant then made an irrational decision and shot the deceased.<sup>71</sup>

Defendant similarly admitted his guilt for each of the next four hearings. After the fifth hearing, defendant was granted parole.

## **CRU ANALYSIS**

Defendant has provided a coherent account of the shooting that was supported not only by five of his friends and his brother but also by Nicholas Ruiz, a friend of the deceased, whose account was nearly identical to the defense statement: in those accounts, defendant was not the shooter, and he and his friends chased the real shooter from the game room to the corner of Beverly Road and Flatbush Avenue. This chase, in turn, was corroborated by the observations of police officers that were memorialized in contemporaneous radio transmissions, and defendant's return to the game room was observed and remembered by the responding RIP Officer.

The prosecution's witnesses, on the other hand, provided statements that were inconsistent with each other and inconsistent with the police radio transmissions in ways that undermine the credibility of both witnesses. Given these facts, CRU has no confidence in the integrity of the conviction. Accordingly, CRU recommends vacating defendant's manslaughter conviction and dismissing the indictment. The fact that defendant pleaded guilty does not contravene CRU's recommendation.

## **Evidence That Defendant Was Not the Shooter**

### The Defense Witnesses, the Responding Officers, and Nicholas Ruiz

The defense witnesses stated, in sum and substance, that they and defendant were inside of the game room when the shooter walked into the game room and suddenly shot the deceased, firing three times. Thereafter, defendant and his friends chased the shooter down Cortelyou Road, across Flatbush Avenue, and to the area of Flatbush Avenue and Beverly Road, where some of the group observed the shooter enter a car parked near the corner, while others stopped to speak with police near the corner of Flatbush Avenue and Cortelyou Road. These accounts were consistent and do not appear to be coached.

This basic account of defendant and his witnesses was corroborated by 1) the radio run transmissions and associated statements; 2) Nicholas Ruiz's statement; and 3) the RIP Officer's recognition of defendant at the crime scene.

First, the radio run transmissions provide indisputable evidence that there was, in fact, a group that chased a man from Cortelyou Road, across Flatbush Avenue, and then to Beverly Road. Specifically, Sgt. Jerak broadcasted over the air, "We also have a disorderly group here chasing somebody. Possible man with a gun." And then two minutes later Jerak reported, "The group is back. He's apparently

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<sup>71</sup> Parole transcript, 4/3/96, at 3-4.

gone.” The probability that the group was chasing someone other than the shooter is exceedingly low because members of the group actively sought police intervention and alerted the officers that the man they were chasing had a gun and that someone had been shot at the game room. Had they been chasing the defendant, they would have alerted the police to the defendant’s continued presence amongst them. And despite never having heard the radio transmissions, the defense witnesses’ accounts matched those transmissions in significant ways.

Second, the defense account is strongly corroborated by Ruiz’s statement to the RIP Officer. Specifically, Ruiz’s statement was consistent with the defense witnesses’ accounts in several material ways: the shooter’s entrance into and exit from the game room; the group chase of the shooter; and certain characteristics of the shooter, including height, weight, and age—where there was general agreement that the shooter was short, stocky, and older.

Furthermore, given the timing of the account—within minutes of having witnessed his friend shot to death in front of him—and his status as the deceased’s friend, it is unlikely that Ruiz would have fabricated his account, much less in a way that matched the later defense witness statements or the radio run transmissions, none of which Ruiz could possibly have known.

Third, the defense account is corroborated by the RIP Officer. What other details would have led the RIP Officer to believe that defendant was a witness and not the shooter when he saw defendant outside of the game room have been lost to time. But now—decades later—the RIP Officer recalls believing that Minogue got it wrong when he arrested defendant, because (i) defendant was outside of the game room after the shooting, and (ii) defendant did not match Ruiz’s description of the shooter. Of course, as the RIP Officer notes, it would be possible for a defendant to return to the scene of the crime. But here—knowing that an eyewitness, such as Ruiz, was or could be also at the scene of the crime—that likelihood is low.

#### The Alternative Motive

An altercation had occurred between JD and the deceased’s nephew, Secundino Salgado days before the shooting. Salgado admitted having tried to stab JD—albeit in self-defense. The deceased’s brother, Williams Reyes separately recalled the deceased describing an altercation with a “heavy” Black male—a description that is, again, consistent with JD (*see* above, Police Investigation, Reyes and Salgado’s interviews). While PO Minogue ultimately interviewed JD regarding the crime, there is no indication that Minogue made any further effort to explore this lead.

In short, defendant and his witnesses provided a compelling account of the shooting that is corroborated in a nearly irrefutable manner, such that the likelihood that it is true—and that defendant is innocent—is high.

## Evidence of Guilt

### The Guilty Plea

Defendant's conviction of first-degree manslaughter is based on his guilty plea. Although not improper, the plea was *pro forma*—the court and the prosecutor, and not defendant, recited the facts underlying the crime. Defendant simply said “yes” to the recitation.

Prior to the plea, defendant had consistently maintained his innocence from the time of his arrest. He even rejected a more favorable plea offer and told the prosecution he would not take any offer.

But defense counsel came to believe that defendant's case had fallen apart because his witnesses had disappeared. And without a viable defense—*i.e.*, witnesses who were not defendant's friends or family—counsel believed that it would have been “suicide” for defendant to proceed to trial, where he assuredly would have been convicted and sentenced to 25 years to life.<sup>72</sup> After defendant's mother—who was present in court—begged him to accept the plea, so that he would have the chance of being released by the time he was 23, defendant accepted the plea, believing that he had no choice.

### *Defendant's Admission to the Parole Board*

Defendant's admissions of guilt to the parole board does not alter CRU's analysis. Such confessions are not reliable because they are often viewed by an inmate as a necessary prerequisite to being granted parole, even if the inmate is innocent. Here, defendant explained to CRU that he believed that he had to admit his guilt because he had pleaded guilty, and he provided an account that more or less hewed to the prosecution's theory of the case.

### The People's Evidence

The defense believed that the People had a strong case. Two witnesses maintained that they knew defendant from the neighborhood. Jones—a 13-year-old—claimed that he had been inside of the game room at the time of the shooting and observed defendant shoot the victim. F.F. claimed that, several hours after defendant had a dispute with the deceased, F.F. heard gunfire from the game room and watched as defendant emerged from the store holding a gun.

But, in reality, the statements of Shawn Jones and F.F. were unreliable.

*F.F.*

F.F.'s statements should not have been credited by the prosecution.

F.F.'s claim that he remained inside of the game room for several hours to assist Raphael Reyes is questionable: F.F. did not work in the store; the deceased's nephew, Secundino Salgado, did not recall F.F. being inside the game room on the day of the shooting (albeit years later); and the store's owner Alberto Marulanda never described F.F. as being a participant in any dispute.

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<sup>72</sup> Both defendant and counsel recall that the defense lost contact with witnesses prior to trial. Counsel recalled that he had lost contact with all of the witnesses, while defendant recalled that the emphasis was on witnesses, who were not friends or family with defendant.

Also, F.F.'s account of the shooter's flight is bizarre. According to F.F., defendant walked to the corner of Cortelyou Road and Flatbush Avenue, where he removed his hat and then crossed Cortelyou Road; then defendant returned, passing the game room on the other side of the street, before turning left onto East 21st Street. Despite tracking defendant's movements, throughout his description of defendant's flight, F.F. expressed no concern that defendant would pursue *him* as the person who ejected him from the store.

But more importantly, F.F.'s account is fundamentally incompatible with the above-described radio run transmissions, defense statements, Nicholas Ruiz's account, and the People's other witness, Shawn Jones. F.F. fails to mention seeing a group leaving the game room, much less a group chasing someone across Flatbush Avenue. F.F. also fails to mention that a police car was stopped near the intersection of Flatbush Avenue and Cortelyou Road. For these reasons, alone, F.F.'s statements should not have been credited.

F.F. also had a motive to cooperate with the prosecution. F.F. had both an open case for selling narcotics, and a crack addiction. The crack addiction has been confirmed by F.F., himself, his prison records from 1989, and the recollections of his friend Richard Pinero. Indeed, today, F.F. claims to have no memory of having been a witness to the murder of his best friend's uncle during a time when he was lost to crack.

F.F.'s attempts to benefit from his cooperation with the prosecutor are well-documented. During the pendency of F.F.'s criminal sale case, he tried to obtain forbearance from the court when he failed to appear in court by claiming that he was at the KCDA on his court date (which would have been unlikely, *see* above). Then, after defendant was convicted, F.F. wrote the prosecutor, reminding the prosecutor that he had "promised" F.F. a letter to be "included in [his] release consideration at the parole board." It appears that the prosecutor kept his promise.

Undoubtedly, none of this information about F.F. would have been disclosed to the defendant before he pleaded guilty. Now, both the prosecutor and defendant's trial attorney agree that—in general, in 1988—this class of prosecutorial consideration would not have been disclosed, except possibly as *Giglio* material once the case had entered a trial stance.

*Shawn Jones a/k/a DeShawn Jones a/k/a DeShawn Covington*

CRU also finds that Jones's account should not have been credited by the prosecution. On its face, Jones's account was even more incredible than F.F.'s. Jones claimed that he was inside the game room, playing WWII, when, after hearing a gunshot, he turned around and saw defendant holding a gun. Then, Jones purportedly ran out of the game room and around the corner onto East 21st Street, where he heard two additional shots. Jones continued to circle the block, returning to Cortelyou Road from Flatbush, where he then observed defendant enter a car and flee west.

One glaring deficiency in Jones's account is that it is temporally nonsensical and conflicts with all other known accounts of the shooting. No one except Jones claimed that the shooter fired once and then allowed Jones enough time between the first and second shots to run out of the store and around the corner. If this had happened, someone would have remembered the shooter doing or saying

something to fill that time. Then, the idea that the shooter remained in the vicinity of the game room long enough for Jones to run around the entire block and return, where he observed—as he states in one account—that a gust of wind swept defendant’s shirt above his waist so that Jones could see the gun strains credulity. (*see above*, Police Investigation, Jones’s Interview)<sup>73</sup>

Significantly, Jones’s account is completely and materially inconsistent with F.F.’s account of the shooter’s escape, as well as with the radio run transmissions and defense statements.

Finally, Jones’s involvement in the case is not adequately explained. Many questions remain: was Jones—age 13—accompanied by a guardian to the police station, where he (it seems) *sua sponte* appeared before providing a recorded interview with the ADA? Why was Jones in a group home? Why did he provide Jones as his surname? Certainly, given these questions, there is the possibility that Jones decided that he would not cooperate with the prosecution. In the weeks leading up to the trial, the prosecutor plainly had difficulty contacting Jones. After first sending DIs to subpoena Jones, the prosecutor then sent him a certified letter and mailgram, to which the prosecutor received no response. After sending DIs to Jones’s home a second time, the prosecutor again requested that the DIs personally serve Jones with a subpoena. Then, three days after the return date of the subpoena, there is a note that Jones spoke to the prosecutor on the phone. These details, while they do not establish that Jones was uncooperative, also do not foreclose the possibility.

### **Defendant’s Plea of Guilty Is Not Inconsistent with CRU’s Recommendation**

That defendant pleaded guilty is not necessarily inconsistent with his claim of innocence. It is well-recognized that innocent persons plead guilty (just as they falsely confess) for myriad reasons, including that the alternative of going to trial could result in a far longer sentence.<sup>74</sup>

Here, defendant relented to his mother’s and his attorney’s advice to plead guilty, believing that he faced a near certain conviction and lengthy sentence. Under the circumstances, where defendant was offered a jail term of eight and one-third to 25 years, it was rational for defendant not to want to “roll the dice” and chance a murder conviction and prison sentence of 25 years to life.<sup>75</sup>

Moreover, if defendant and/or the defense counsel had known and appreciated all of the aforementioned evidence in the case, including (i) the fact that F.F. received a promise that the

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<sup>73</sup> Jones’s description of the shooting also strains credulity given the known layout of the game room. A review of the CSU photographs and diagrams reveals that a wall separated the area between the video game WWII and the counter area. But Jones’s claims that he was able to turn his head and observe the deceased—who was behind the counter—fall to the ground. In one account Jones states that defendant was one or two feet behind him. While it cannot be conclusively determined that Jones’s view was impossible, it is yet another reason to question his account.

<sup>74</sup> *See People v. Ba*, 39 N.Y.3d 1130, 1135 (2023 Troutman, J. concurring op.) (imbalance of power in the plea bargaining process, where prosecutors have unfettered discretion, “inevitably leads to innocent defendants pleading guilty” [internal quotation marks and citations omitted]); *People v. Tiger*, 32 N.Y.3d 91, 115 (2018, Wilson, J. dissenting) (“We know that some completely innocent people plead guilty,” only recently has there been public and scholarly attention to the problem [citations omitted]).

<sup>75</sup> *Schmidt v. State*, 909 N.W.2d 778, 787-88 (Iowa 2018) (“When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent”) (internal quotation marks omitted).

prosecutor would write him a leniency letter, (ii) the fact that F.F. was “lost to crack” and had been convicted of selling crack cocaine, (iii) the fact that the RIP Officer recalled seeing defendant at the crime scene following the shooting; and (iv) that there was a radio run corroborating the group chase, it is likely that defendant would have not have pleaded guilty and chosen to proceed to trial.

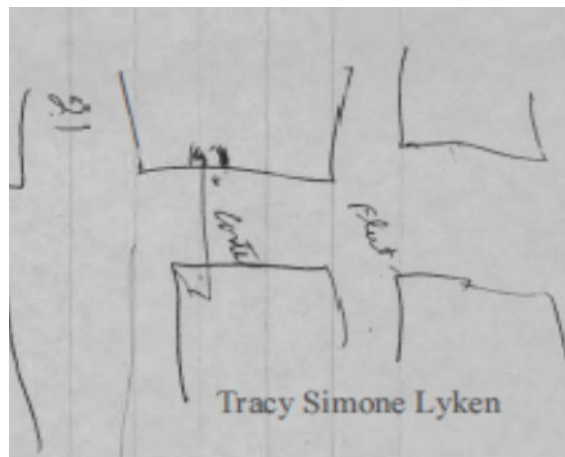
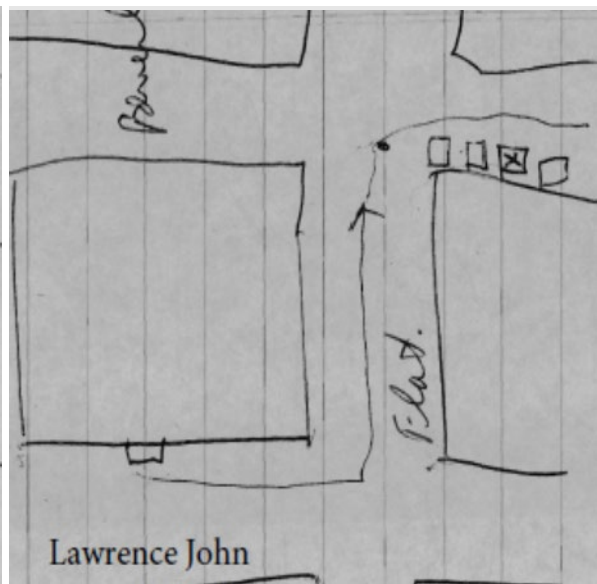
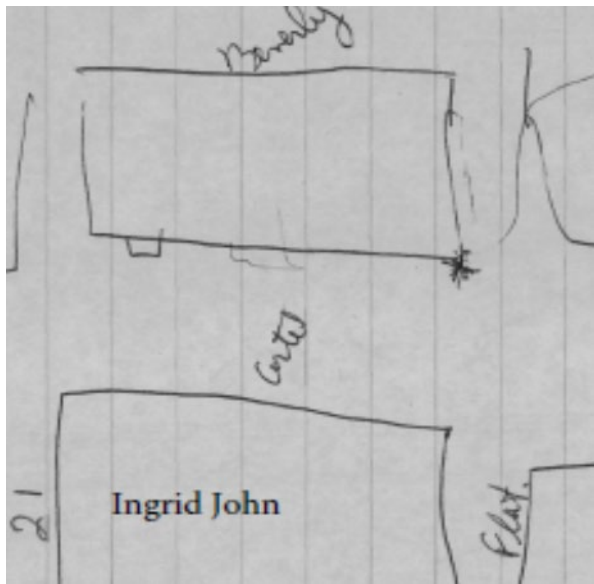
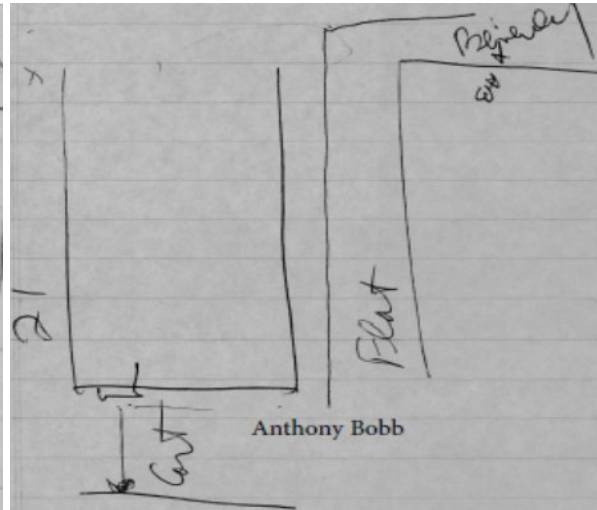
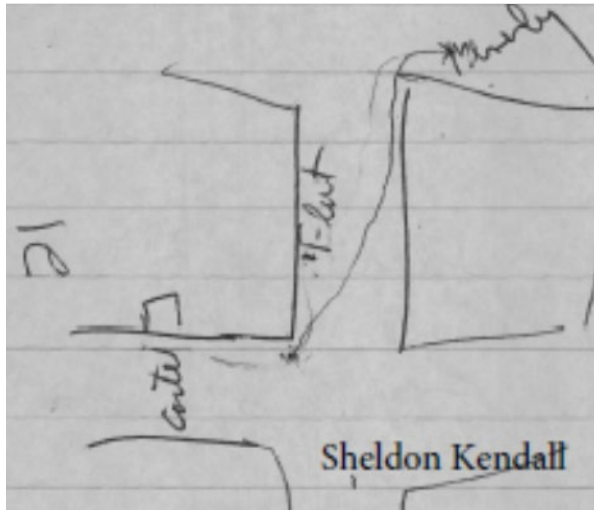
Accordingly, since CRU’s investigation reveals a strong likelihood that defendant is innocent, CRU has no confidence in the integrity of the conviction.

## **CONCLUSION**

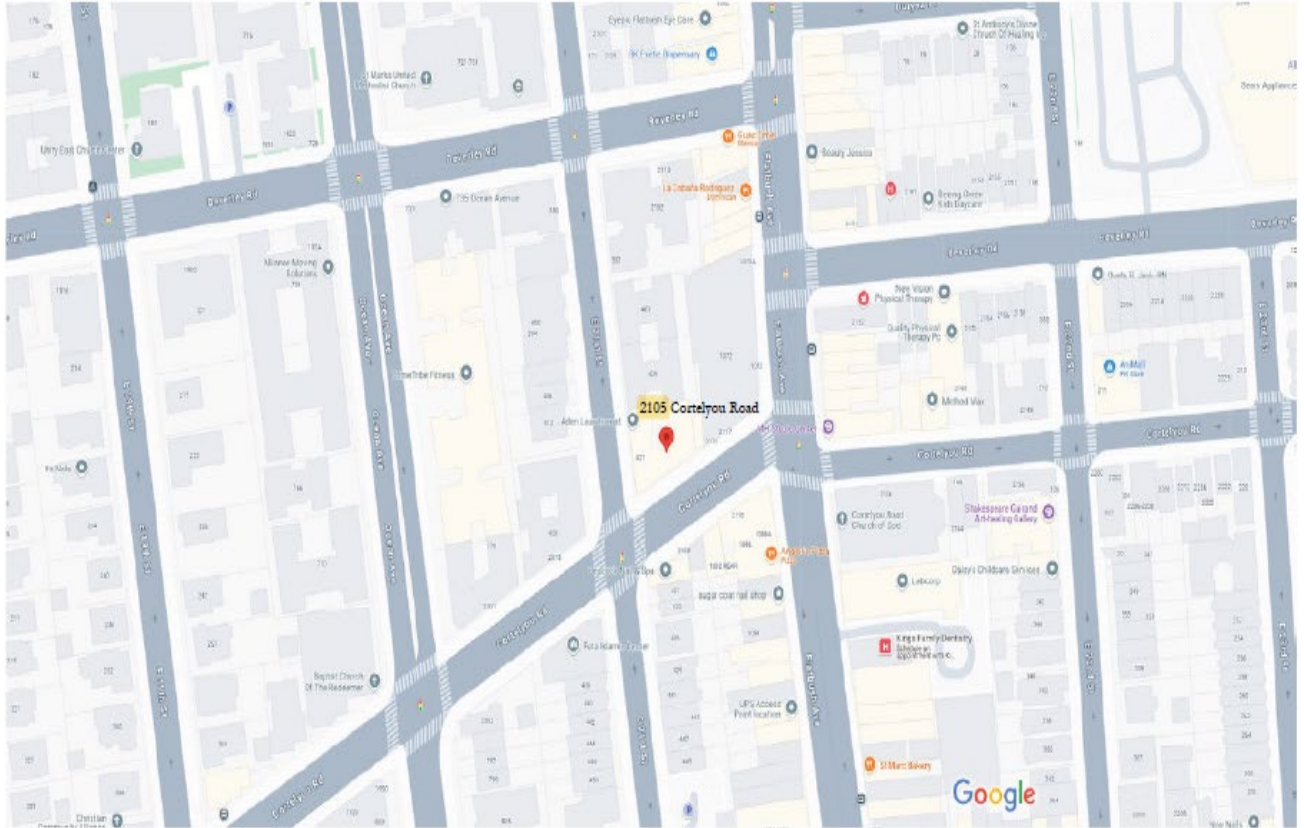
CRU concludes that defendant’s manslaughter conviction should be vacated. A review of the entire record and interviews of material witnesses shows that it is likely that defendant was not the shooter or any way involved in the crime. Any consideration of a new prosecution is untenable. Almost 37 years later, memories have faded, and witnesses cannot be found or have passed away. Accordingly, the indictment should be dismissed.



# ADDENDUM A



## ADDENDUM B



Map data ©2024 Google 50 ft

