



VOLUME II

A REPORT TO THE GOVERNOR ON THE DISTURBANCES IN CROWN HEIGHTS:

A Review of the Investigation into the Death of Yankel Rosenbaum and the Resulting Prosecution



Richard H. Girgenti
Director of Criminal Justice

A REPORT TO THE GOVERNOR ON THE
DISTURBANCES IN CROWN HEIGHTS

Consists of Two Volumes

*Volume I: An Assessment of the City's Preparedness and
Response to Civil Disorder*

*Volume II: A Review of the Circumstances Surrounding the
Death of Yankel Rosenbaum and the
Resulting Prosecution*

Copies are available from:

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V O L U M E I I

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THE GOVERNOR
ON THE
DISTURBANCES IN
CROWN HEIGHTS:**

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the Circumstances
Surrounding the Death
of Yankel Rosenbaum
and the
Resulting Prosecution



Richard H. Girgenti
*State Director of Criminal Justice
and Commissioner
Division of Criminal Justice Services*

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STATE OF NEW YORK
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July, 1993

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The Honorable Mario M. Cuomo
Governor
Executive Chamber
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Dear Governor Cuomo:

Pursuant to Executive Order Number One-Hundred Sixty, I respectfully submit a two-volume report on the August, 1991 disturbances in Crown Heights. Volume One is subtitled: *An Assessment of the City's Preparedness and Response to Civil Disorder*. Volume Two is subtitled: *A Review of the Circumstances Surrounding the Death of Yankel Rosenbaum and the Resulting Prosecution*.

We undertook an exhaustive analysis to document what occurred during the most extensive racial unrest New York City has experienced in over twenty years. In addition, we reviewed the investigation and prosecution of the murder of Yankel Rosenbaum which resulted from the disturbance. We sought to identify the factors which led to an acquittal and attempted to explain why no one has been held accountable for this crime.

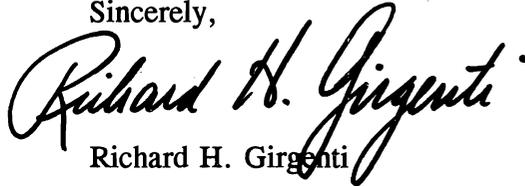
The preparation of this report involved numerous individuals, including nationally recognized policing and forensic experts. We reviewed all relevant materials and interviewed all of the key participants. New York City government officials and agencies cooperated completely.

The report reflects our genuine commitment not only to discover the truth, but also to learn the lessons to be derived from these most unfortunate events. We evaluated the performance of public officials based upon the reasonableness of difficult decisions that they were required to make. Although it was not our intention to assign blame, we have uncovered deficiencies, mistakes, and problems. Therefore, we have not avoided identifying accountability where we thought it appropriate.

We have made findings which attempt to answer most of the questions that have been asked about what happened in Crown Heights. It is our hope that, by answering these questions, we will bring closure to the concerns of many. This will enable the process of healing wounds, which still exist nearly two years after the disturbance, to begin.

Our recommendations identify opportunities for improvement. We hope that City government, community organizations, and concerned citizens will build upon the findings of this report to develop an agenda for action that will prevent similar situations from arising in the future. We believe that this report will help to overcome the feelings of mistrust and suspicion in the Crown Heights community, and begin to restore confidence in the criminal justice system and in our government.

Sincerely,

A handwritten signature in black ink that reads "Richard H. Girgenti". The signature is written in a cursive style with a large, prominent initial "R".

Richard H. Girgenti

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Lastly, we express our sincere appreciation to the many dedicated staff members at the Division of Criminal Justice Services who worked diligently to ensure that this project was complete and timely. Members of the Offices of Legal Services and Justice Systems Analysis, and the Bureau for Municipal Police, provided research and legal analyses, as well as administrative support. Everyone worked vigorously and in a spirit of cooperation to meet the challenges posed by this complex project.

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Executive Summary

- ▶ The Prosecution of Lemrick Nelson
- ▶ Analysis of the Criminal Investigation
- ▶ The Jury's View of the Case

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EXECUTIVE SUMMARY

On August 19, 1991, a car accident, in the Crown Heights section of Brooklyn, resulted in the death of Gavin Cato and severe injury to Angela Cato. The car was driven by an Hasidic Jew. Five blocks down the street from the accident, and a few hours later, Yankel Rosenbaum was attacked and stabbed four times. A group of young black men reportedly shouted, "There's the Jew. Get the Jew." Two of the stab wounds punctured Rosenbaum's lungs, causing him to bleed to death. The police apprehended a sixteen-year-old black man named Lemrick Nelson within moments of the crime.

THE PROSECUTION OF LEMRICK NELSON

A Kings County Grand Jury returned an indictment charging Nelson with two counts of second-degree murder and one count of unlawful possession of a knife with intent to use it against another person. Judge Edward M. Rappaport presided over the trial. Sari Kolatch and James Leeper of the Kings County District Attorney's Office were the prosecutors. Nelson was represented by Arthur Lewis, a private attorney.

The prosecution's case relied almost primarily on police officer witnesses. Ten police officers, including two detectives, testified regarding the events which led to Nelson's arrest, identification and confession. Officer Milazzo saw Nelson running from the attack. Officers Hoppe and Marinos caught him a few minutes later, one block from the scene. When apprehended, the police recovered a bloodstained knife from Nelson's pocket.

The police witnesses testified that Nelson was brought back to Rosenbaum who identified him as his attacker. Nelson was taken to the 71st Precinct upon his arrest. Three bloodstained dollar bills were found in Nelson's pocket, the same pocket in which the knife was found. While there, he suffered an asthma attack and was taken to the Kings County Hospital. When he returned to the Precinct, Nelson was advised of his constitutional rights, waived those rights and was questioned by detectives. Both detectives testified that Nelson confessed to stabbing Rosenbaum.

Testimony was given by the analyst from the Medical Examiner's Office who said that the stains on the pants were consistent with Rosenbaum's blood and inconsistent with Nelson's. A forensic expert, from the Center for Blood Research (CBR) Laboratories in Boston, testified that DNA testing showed that

blood on one of the dollar bills and on the knife was consistent with Rosenbaum's blood, but not with Nelson's.

In her arguments to the jury, the prosecutor focused on Rosenbaum's identification of Nelson and Nelson's confession to detectives as proof of his guilt beyond a reasonable doubt. She emphasized that the testimony of the police witnesses and forensic experts constituted overwhelming evidence that Nelson was responsible for Rosenbaum's death.

The defense argued that the rioting was caused by police misbehavior at the Cato accident. When the stabbing occurred, police sought to divert attention from themselves by arresting a young black man who was on the streets that night, and framing him for Rosenbaum's death. Then police forced a confession from Nelson, who could neither understand nor knowingly waive his rights.

Further, the defense contended, Rosenbaum was a member of a Jewish civilian patrol organized to protect the synagogue and religious artifacts. Since the patrol enjoyed a special relationship with the police, there was a prompt police response to the scene of the stabbing and Nelson was arrested shortly thereafter. The defense also tried to prove that Rosenbaum's death was caused by the negligence of the Kings County Hospital, and not by the stabbing.

Judge Rappaport instructed the jury that the prosecution had the burden to prove Nelson's guilt beyond a reasonable doubt. Two counts of first-degree manslaughter and one count of second-degree manslaughter were submitted to the jury. After four days of deliberations, on October 29, 1992, the jury rendered a verdict of not guilty on all counts.

The public reaction to the verdict by many, especially in the Jewish community, was immediate and angered disbelief. There were demonstrations, rallies, and demands for justice. A mistrust of the criminal justice system emerged. In response to continuing questions from those who could not reconcile their sense of justice with the verdict in this case, Governor Mario M. Cuomo ordered Richard H. Girgenti, the Director of Criminal Justice for the State of New York, to review the circumstances surrounding the investigation of the Rosenbaum homicide and prosecution of Lemrick Nelson.

Five questions were central to this review.

- Why was no one other than Lemrick Nelson arrested and prosecuted when several others were involved in the attack on Yankel Rosenbaum?

-
- Was a full and thorough investigation conducted?
 - Was the case properly prepared and tried?
 - How could the jury acquit Nelson, when it appeared that the case against him was so strong?
 - Was the jury's verdict based on racial prejudice or anti-police bias?

We explored this complex series of events with many of those involved in the case, and examined extensive records made available for our review. Our purposes were to look at the factors leading to the verdict, identify any deficiencies in the criminal justice system, and to the extent appropriate, recommend corrective action.

ANALYSIS OF THE CRIMINAL INVESTIGATION

Several people were responsible for the stabbing of Yankel Rosenbaum. Only Lemrick Nelson was indicted, tried, and acquitted. Deficiencies in the initial investigation created problems with the evidence which subsequent efforts did not overcome. Accordingly, the likelihood that other participants in the attack on Rosenbaum will be held accountable for the murder has been greatly diminished.

Although the police response to the stabbing was immediate, our review indicates that there were departures from proper investigative practices. With the passage of time, the underlying deficiencies of the initial investigation and Rosenbaum's unexpected death, the likelihood that the police will now be successful in identifying additional participants in the crime has been greatly diminished. Unless an informant or eyewitness comes forward and provides reliable facts about the attack and other possible suspects, holding someone accountable for this murder will be difficult.

Lack of prior relationship among the attackers and the victim hampered the investigation and prosecution.

One difficulty attributed to the investigation of this case has been the lack of a prior relationship among the attackers and the victim. The identification and prosecution of those responsible for Rosenbaum's murder may have been hampered by the civil disturbance in Crown Heights on the night of the attack. Unlike the killings in Bensonhurst and Howard Beach, which also involved

groups of attackers, Rosenbaum's murder occurred in the midst of a riot involving hundreds of people. The attackers appear not to have known each other and were not known by the victim or any of the witnesses.

The failure to record the names of the individuals present at the scene made it difficult to identify police and civilian witnesses.

Witnesses to the murder were not identified because, contrary to proper procedures, the police failed to record the names of everyone at the crime scene, including both civilians and police officers. This failure frustrated subsequent efforts to collect evidence. Many key witnesses to the attack on Yankel Rosenbaum were not identified prior to the presentation of the prosecution's case. Accordingly, important additional testimony regarding Nelson's culpability could not be obtained.

The recording of statements and the taking of names and addresses of eyewitnesses and bystanders are crucial first steps in an investigation. All possible witnesses were not identified by the police at the time of the stabbing. Notwithstanding the ongoing civil unrest, there were many potential witnesses to the stabbing who could have been identified. There were numerous police officers in the vicinity. There were the EMS technicians who responded to the stabbing. There were the individuals who were shown to, but not identified by, Rosenbaum. There were the civilians present at the scene and during the identification of Nelson. All of these individuals may have had information that would have assisted the investigation.

Later efforts to identify the participants were hindered by the failure to collect vital information at the scene. This deficiency was not remedied by a subsequent canvass of the area. The canvass did not begin until eight days after the stabbing. Moreover, the canvass was only conducted for a one-block area east and west of where the stabbing occurred.

Interviews with the victim and possible suspects were not conducted promptly or recorded.

Critical statements made by Yankel Rosenbaum which could have aided in the progress of the investigation and the identification of suspects were not developed so as to provide any investigatory assistance. Rosenbaum lived for three hours after the attack. During much of this period he was lucid and could have provided a detailed account of his attack and a description of his attackers. Yet, he was never questioned by police. Even when Rosenbaum identified Nelson, he was not asked about Nelson's role in the attack. As a result of this failure, the police lost valuable evidence. The victim, although seriously injured,

could have been questioned in order to ascertain a more detailed account of the attack.

Additionally, there was a significant delay in taking a statement from Nelson. The recommended investigative method is to interview the suspect as soon as possible following the incident. Here, circumstances beyond the control of the investigating detectives compelled them to move to another location while they were attempting to take a statement from Nelson. Although the detectives testified that they did obtain confessions from Nelson, the failure to properly document and record Nelson's statements affected their ultimate probative value at trial. The passage of time and, possibly, the growing demonstration outside the Precinct resulted in Nelson refusing to give a later videotaped statement to the prosecution.

The improper handling of critical physical evidence compromised its probative value at trial. The bloodstained knife discovered on Nelson, which should have provided persuasive proof in support of the prosecution's case, was not properly handled. Additionally, Nelson's pants could have provided meaningful evidence of his involvement in the attack on Rosenbaum. The stains on the pants should have been properly noted and analyzed by the police. Tests on this evidence were not sufficiently monitored by the prosecution.

The mishandling of key physical evidence compromised its probative value at trial. The bloodstained knife, the alleged murder weapon, was compelling evidence of Nelson's involvement in the attack.

There was expert testimony presented at trial that deoxyribonucleic acid (DNA) analysis of the blood on the knife taken from Nelson indicated that it was consistent with Rosenbaum's blood. The probative value of this evidence was affected, however, by the improper handling of the knife. The knife was apparently passed among several police officers, was commingled with other bloodstained evidence, and was not promptly refrigerated or vouchered.

Another important piece of physical evidence was the bloodstains found on Nelson's pants. Testimony at trial raised an issue of whether the blood on the pants came from Nelson's involvement in the attack on Rosenbaum or whether it could be attributed to Rosenbaum's spitting at Nelson when he identified him. The police did not record whether these stains were present on Nelson's clothing when he was caught. Moreover, forensic tests which could have determined if the stains contained saliva were never requested by the prosecution.

Furthermore, forensic DNA analysis performed on Nelson's pants was inconclusive, largely due to the denim fabric of the pants. The pockets of the pants, which were not denim, were never tested. Considering that the knife was found in the pocket, it was a critical omission of both the police and prosecution not to request testing of the pockets to determine whether the stain in the pocket was blood, and if so, whether it was consistent with the defendant's or the victim's blood. Evidence relating to the condition of Nelson's pants when he was apprehended and the testing of the pockets of Nelson's pants could have provided support for the prosecution's case.

THE JURY'S VIEW OF THE CASE

Considering the problems with the evidence presented by the prosecution, there was an ample basis for the jury verdict finding that the People had not proven their case beyond a reasonable doubt. The reasonable doubts articulated by the jurors arose, to a great extent, from the inconsistencies in the witnesses' testimony and deficiencies in the evidence.

If the inconsistencies in the police testimony at trial had been resolved in favor of the prosecution, and if the jury credited the testimonial and forensic evidence, then there would have been sufficient basis for the jury to convict. Based upon the available information, not all of which was before the jury, it is most probable that Lemrick Nelson participated in the attack that resulted in Yankel Rosenbaum's death.

Despite the apparent strength of the case against Lemrick Nelson, the jury acquitted him. In accordance with the Executive Order, we attempted to understand how the jurors arrived at their decision. Each of the jurors who deliberated in the Nelson case was assured anonymity before being interviewed. For the most part, we do not assess the views of the jurors on their merits. Our purpose was to attempt to understand and explain the reasons for the jury's verdict.

The jurors said that they acquitted Nelson because the prosecution failed to prove "beyond a reasonable doubt" that he had committed the crimes charged. However, the prosecution presented evidence that appeared strong on its face. Prosecution witnesses testified that Nelson fit the description of the individual fleeing the scene of the stabbing. A bloodstained knife and three bloodstained one dollar bills were recovered from Nelson's pocket. There was testimony that Nelson confessed to stabbing Rosenbaum. There was forensic testimony that all

four stab wounds were consistent with the knife taken from Nelson. The blood on the knife and on some of the dollar bills found in Nelson's pocket was consistent with the victim's blood. The arresting officer testified that the victim identified Nelson.

During the course of the interviews with the jurors, two themes emerged for why the jury determined that Nelson was not guilty. These themes can be characterized as inconsistencies in the witnesses' testimony and as deficiencies in the evidence. The many inconsistencies in the testimony of the police witnesses affected their credibility in the eyes of the jurors. This served to undermine the value of each of the major elements of the prosecution's case. Since the jurors considered much of the evidence to be unreliable, they had "reasonable doubt" regarding Nelson's guilt.

Jurors also identified numerous deficiencies in the handling of the physical evidence and in the investigation and prosecution of the case. The jurors stated that the evidence presented was not sufficient to link Nelson to the crime and prove beyond a reasonable doubt that he was responsible for Rosenbaum's murder. While many of the jurors believed that Nelson was at the scene of the crime and may have had a role in the stabbing, they were not convinced that the evidence proved, beyond a reasonable doubt, that he was responsible for Rosenbaum's murder.

The jurors found that the inconsistencies in the police officers' testimony were an overriding consideration in undermining the value of all key prosecution evidence, and in finding that Nelson was not guilty of stabbing Rosenbaum. The prosecution's late discovery of key witnesses exacerbated this problem.

Most significantly, the inconsistencies in the police officers' testimony regarding Nelson's apprehension, Rosenbaum's identification and Nelson's confession seriously compromised the value of this evidence in the eyes of the jury. The jurors had been instructed by Judge Rappaport to evaluate whether the witnesses were truthful in order to determine the facts of the case. The jurors stated that, after considering these factors, they determined that they could not reconcile the contradictory evidence and the inconsistencies in the testimony of the witnesses. As a result, they disregarded the testimony of some of the main police witnesses whose statements were crucial to proving Nelson's guilt.

Jurors found inadequacies in the manner in which the police handled the physical evidence. They said that since the knife was improperly handled, its value as evidence was compromised. They questioned why the victim's clothes were not preserved and why Nelson's pants were not thoroughly tested.

Jurors were also critical of the procedures employed by the police in conducting the identification of Nelson by Rosenbaum. They thought that it was improperly suggestive. Therefore, they gave it little weight. Moreover, since jurors questioned whether Nelson's statements to police were voluntarily made, they disregarded this evidence.

The jury was confused and troubled by the testimony of the forensic experts who testified on behalf of the prosecution. This contributed to their rejection of key forensic evidence.

Jurors also questioned the procedures utilized by the prosecution's forensic experts. They did not think that the forensic experts did everything that could have been done to ensure that the best possible evidence was discovered and analyzed. Also, the jurors said the value of the forensic evidence was discounted because they did not understand its significance. Moreover, they did not think that the prosecutors requested all the available forensic testing.

In addition to the concerns identified with respect to the evidence, the jurors also expressed concerns with other issues unrelated to the actual evidence. These issues, which were discussed during their deliberations and affected the jurors' view of the case, have been characterized as non-evidentiary considerations. These concerns include the speculation engaged in by some jurors, the sympathy expressed for Nelson by some jurors, the conduct and comments of the defense counsel and Judge, and the apparent lack of preparedness on the part of the prosecution.

The manner in which the Judge conducted the trial appeared to have influenced the jury's decision-making.

Although many of the jurors seemed to have a favorable view of the Judge, his remarks and conduct may have adversely affected their view about the credibility of the police witnesses. He was unable to control the conduct and the comments of the defense counsel, which afforded the jury an opportunity to consider information that was otherwise irrelevant or inadmissible. Further, by continuously interjecting himself in the questioning of witnesses, the jury had concerns regarding the Judge's impartiality. Most significantly, the Judge's reaction to Officer Lewis's testimony highlighted the inconsistencies between Lewis's version of the events surrounding Nelson's apprehension and the version of Officers Hoppe and Marinos and Detective Litwin. The Judge did not remain an impartial arbitrator and instead conveyed to the jury his personal opinions about the evidence.

The theory of assessorial liability or "acting in concert" was not adequately explained or argued to the jury.

Although many jurors were not convinced that Nelson inflicted the fatal stab wounds on Rosenbaum, most jurors believed that Nelson was present at the scene of the attack and that he probably was a participant. According to the jurors, if they had understood the legal principle of "acting in concert," they might have reached a different verdict.

Our interviews with the jurors did not indicate that the verdict of acquittal was premised upon a preconceived or inherent mistrust of police officers.

The jurors pointed to specific problems in the evidence presented to them that caused them to discount major portions of the police witnesses' testimony. At no time did they suggest that the witnesses were inherently untrustworthy because they were police officers. Our review of the case did not uncover any evidence to show that the verdict was premised upon, or affected by, a preconceived mistrust of police. Further, we found no evidence to indicate that the jury's verdict of acquittal was influenced by racism or anti-Semitism.

The combination of these inconsistencies in police testimony, deficiencies, in implementing proper investigative procedures, and the influences of the non-evidentiary considerations ultimately undermined the prosecution's case.

Chapter 1

Introduction

- ▶ **Background**
- ▶ **Community Reaction to the Verdict**
- ▶ **Executive Order No. 160**
- ▶ **Methodology of Review**
- ▶ **Organization of the Report**

INTRODUCTION

BACKGROUND

On the evening of August 19, 1991, a station wagon that was part of a three-car motorcade carrying the Grand Rebbe of the Lubavitch Hasidic community reportedly ran a red light at the corner of President Street and Utica Avenue and collided with another vehicle. The station wagon struck and pinned two young black children beneath its wheels. One of the youths, seven-year-old Gavin Cato, died from his injuries.

A rumor began to spread in the crowd that had gathered at the accident that a Hatzolah ambulance had ignored the two seriously injured children and instead helped the occupants of the station wagon. A person in the crowd was yelling, "We don't get any justice...we don't get any justice, they're killing our children. We have to stop this...Jews get preferential treatment, we don't get any justice." Another person reportedly said, "Let's go to Kingston Avenue and get the Jews." As the crowd grew in size, it moved down President Street, breaking windows and overturning a car along the way.

At about 11:15 p.m. Chaya Sara Popack, a resident of Crown Heights, saw Yankel Rosenbaum walking alone near the corner of President Street and Brooklyn Avenue. She heard someone shout, "There's a Jew, get the Jew," and saw a group of young black males surround Rosenbaum and attack him.

Shortly thereafter, police officers in the vicinity saw a large group of people kicking and punching someone. They saw a black male in a red shirt leaning over someone and apparently hitting him with his hands. The crowd dispersed in response to the police sirens. Other officers responding to the call for assistance immediately began a search and saw a black male in a red shirt, sixteen-year-old Lemrick Nelson.¹

Nelson was caught and frisked. A bloodstained folding knife with the word "Killer" inscribed on it was retrieved from Nelson's pants pocket.

Nelson was taken up the block to the victim, Yankel Rosenbaum, who later died. Other youths had been shown to Rosenbaum, but he had not identified any of them as his attacker. When Nelson was presented to Rosenbaum, Rosenbaum identified Nelson, cursed him and spat at him. Rosenbaum also identified a fifteen-year-old youth, "C.T."² as a member of the group that assaulted him.

Nelson was arrested and his clothes were searched. Three one dollar bills that appeared to have blood on them were discovered in the same pocket in which the knife was found.

According to the two detectives who separately questioned Nelson after advising him of his rights, Nelson described his participation in the attack of Rosenbaum and admitted that he had stabbed Rosenbaum. Nelson refused, however, to sign a written statement.

On August 26, 1991, Nelson was indicted on two counts of Murder in the Second Degree and one count of Criminal Possession of a Weapon in the Fourth Degree. Nelson was subsequently tried and acquitted of all charges relating to the murder of Yankel Rosenbaum.

There was only one other arrest in connection with the attack and that arrest was voided. To date, no one else has been arrested or charged in connection with the murder.

COMMUNITY REACTION TO THE VERDICT

Popular belief was that the case against Nelson was a strong one. Thus, the verdict surprised many New Yorkers, particularly members of the Jewish community who took to the streets in protest. "The verdict touched off an immediate and angry response from hundreds of Jewish demonstrators who closed the Brooklyn Bridge much of the evening, marching and chanting 'We want justice! We want justice!'"³

Councilwoman Mary Pinkett (D-Brooklyn), who is black, stated that she shared the sadness of the Jewish people and said "There is no pogrom in Crown Heights. We are just as dedicated to finding the murderer of Yankel Rosenbaum." Speaking at City Hall, she said, "There is a feeling that many people did not understand how the Jewish community felt about Yankel Rosenbaum — that perhaps we did not care that someone was murdered on the street. I think the fact that we gather here says we do care, that we do understand that it is wrong to take anyone's life just because of who he is — because of his religion, because of his race, creed, his sexual orientation. And we are grieved by that and know that that is wrong."⁴

A few days later, on Sunday, November 1, 1991, nearly 5,000 people gathered outside the Worldwide Lubavitch Headquarters in Crown Heights to protest the verdict. Many speakers denounced the mayor, the police, and the jury. The victim's brother, Norman Rosenbaum, declared that the murder

symbolized anti-Semitic violence permitted in Crown Heights and throughout the United States.

Defending their ruling, jurors cited inconsistencies in police testimony during the trial as a major factor in their verdict. Jurors believed that officers who testified in the trial did not tell the whole truth. One juror was quoted as saying, "I did not believe the police were honest."⁵

The jury, which included six blacks, four Hispanics, and two whites, was also criticized as not accurately reflecting the ethnic composition of Kings County. The fact that no one from the Jewish community, which comprises approximately sixteen percent of the Kings County population, was on the jury led some people to believe that anti-Semitism contributed to the verdict.

The community was further troubled when, on the evening after the verdict, eleven of the jurors went to a Brooklyn restaurant to meet with the defense counsel, Arthur Lewis. According to the jurors, Lewis invited them to join him so that he could answer their questions regarding various theories he discussed during the trial. Upon arriving, however, the jurors found not only Lewis, but also the defendant, his mother, photographers, and reporters. It appeared that the jurors were celebrating the acquittal. The prosecutors and many members of the public were deeply offended by this gathering.

The verdict also generated a feeling of mistrust and suspicion of the criminal justice system in those who were unable to reconcile the verdict with their sense of justice. To many there remained unanswered questions. These questions included:

- Why was no one other than Lemrick Nelson arrested and prosecuted when it appeared that many others were involved in the attack on Yankel Rosenbaum?
- Was a full and thorough investigation conducted?
- Was the case properly prosecuted?
- How could the jury acquit the defendant when it appeared that the case against Nelson was so strong?
- Was the jury's verdict based on racial prejudice or anti-police bias?

EXECUTIVE ORDER NO. 160

In response to requests for an investigation into this case from many different segments of the community, Governor Mario M. Cuomo issued Executive Order No. 160.⁶ This Order directed Richard H. Girgenti, the Director of Criminal Justice for the State of New York and the Commissioner of the Division of Criminal Justice Services, to conduct a review of the facts and circumstances surrounding the criminal investigation and prosecution relating to the death of Yankel Rosenbaum. This independent review was not intended to second-guess or question the jury's decision. Its purpose was to examine and report on the factors that led to the verdict, to identify any deficiencies in the criminal justice system, and to the extent appropriate, recommend corrective action.

METHODOLOGY OF THE REVIEW

A team of attorneys, research analysts, and investigators with police and prosecutorial experience was selected to gather information and prepare this report.

The initial task was to obtain an order unsealing the case files and the transcripts of the legal proceedings. These documents had been sealed, in accordance with Criminal Procedure Law 160.50, following Nelson's acquittal. Judge Edward M. Rappaport, who had presided over the case, granted the State's request on November 25, 1992, and ordered that the records be unsealed. The transcripts and records provided by the New York City Police Department and the Kings County District Attorney's Office were reviewed.

Contemporaneous with the Governor's Order for a review of the case, the federal government announced that it was conducting an investigation to determine whether a federal civil rights action could be brought against Lemrick Nelson for the murder of Yankel Rosenbaum. Consequently, the United States Attorney for the Eastern District of New York requested that we refrain from interviewing anyone who could be a potential witness in the federal case. That request was honored and, as a result, the witnesses who testified in the case of *People v. Nelson* were not interviewed in order to avoid compromising their value in a possible federal case. Instead, we relied upon the trial transcripts and supplementary documents from the Police Department and the District Attorney's Office for information.

Each juror in the Nelson case was interviewed. To preserve the integrity of the process, the jurors were interviewed separately and the substance of these

interviews was not discussed with other jurors. The jurors were also assured that they would not be referred to by name in this report.

Other officials involved in the investigation and prosecution of the case, including the presiding judge and the prosecutors, were interviewed. Arthur Lewis, the defense attorney, declined to be interviewed. Professionals with expertise in forensic and police investigative procedures were also consulted in the preparation of this report.

ORGANIZATION OF THE REPORT

The review of the criminal proceedings involving Lemrick Nelson is separated into the following four chapters: The Prosecution of Lemrick Nelson, The Analysis of the Criminal Investigation, The Jury's View of the Case, and Findings and Recommendations.

Chapter 2, The Prosecution of Lemrick Nelson, contains a description of the trial. To the extent relevant to the discussion in subsequent chapters, the testimony of thirty witnesses that occurred over a period of five weeks is summarized.

Chapter 3, The Analysis of the Criminal Investigation, examines the difficulties encountered during the investigation. The Chapter discusses the steps taken to identify possible suspects and the handling of the evidence implicating Nelson. This chapter also identifies inadequacies in the manner in which the investigation preceded.

Chapter 4, The Jury's View of the Case, explains the basis for the jury's verdict. The jurors identified numerous concerns with respect to the evidence presented. They also expressed concerns with other issues not necessarily relating to the actual evidence. In accordance with the Judge's instructions, the jurors said they acquitted Nelson because the prosecution failed to prove beyond a reasonable doubt that he had committed the crimes charged.

Chapter 5, Findings and Recommendations, contains the findings of our review and to the extent appropriate, recommendations.

ENDNOTES

1. Because of the identification of Lemrick Nelson in Governor Cuomo's Executive Order No. 160 and the fact that the sealed records relating to the case of *The People of the State of New York v. Lemrick Nelson* have been unsealed for the purposes of this review, we have not used initials but have identified Lemrick Nelson by name.
2. Because of the age of the youth, we are referring to him by the initials, C.T.
3. Powers, Associated Press, October 30, 1992.
4. McFadden, Youth Acquitted in '91 Stabbing of Hasid in Crown Heights Melee, *New York Times*, October 30, 1992, at A1, A30.
5. *New York Post*, October 30, 1992, at 4.
6. A copy of Executive Order No. 160 is included in Appendix A.

Chapter 2

The Prosecution of Lemrick Nelson

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- ▶ Arraignment and Detention
- ▶ Indictment
- ▶ Pre-Trial Motions and the Suppression Hearing
- ▶ The Trial
- ▶ The Judge's Charge
- ▶ Jury Deliberations and the Verdict

THE PROSECUTION OF LEMRICK NELSON

The following is a description of each of the major phases in the case of *People v. Lemrick Nelson*.

ARRAIGNMENT AND DETENTION

On August 20, 1991, Lemrick Nelson was arraigned in Criminal Court in Kings County on a charge of Murder in the Second Degree. He entered a plea of not guilty and the Judge ordered that he be held without bail, pending action of the grand jury.

INDICTMENT

On August 26, 1991, a Kings County Grand Jury returned an indictment charging Lemrick Nelson with two counts of Murder in the Second Degree and one count of Criminal Possession of a Weapon in the Fourth Degree.

The two murder charges were based on alternative theories of Nelson's responsibility for Yankel Rosenbaum's death. The first count charged that Nelson, acting in concert with others, intentionally caused Rosenbaum's death by stabbing him. Alternatively, the second count charged that, even if Nelson did not intend to kill Rosenbaum, he was criminally responsible because, acting in concert with others, "under circumstances evincing a depraved indifference to human life," Nelson engaged in conduct that created a grave risk to Rosenbaum by stabbing him and inflicting wounds that ultimately caused his death.

The third count charged Nelson with unlawfully possessing a knife with intent to use it against another person.

PRE-TRIAL MOTIONS AND THE SUPPRESSION HEARING

Supreme Court Justice Edward M. Rappaport was assigned to preside over the trial of Lemrick Nelson. Nelson was represented by Arthur Lewis, a private attorney. Sari Kolatch, an Assistant District Attorney with six years experience in the Kings County District Attorney's Office, was assigned as the lead prosecutor. In the summer of 1992, James Leeper, an Assistant District Attorney

with five years of prosecutorial experience, was assigned to assist Kolatch. Each prosecutor had tried more than forty felony cases, including more than twenty homicides.

While the case was pending, Nelson's attorney filed motions with the court to suppress evidence that the prosecution intended to introduce at trial. This evidence included the physical evidence recovered from Nelson at the time of his arrest, the out-of-court identification of Nelson by the victim, and Nelson's confessions. Nelson alleged that the police had violated his constitutional rights and, therefore, the prosecution should not be permitted to use this evidence against him at trial.

On September 8, 1992, the suppression hearing commenced. First, the defense alleged that the police had arrested Nelson without "probable cause," so that all of the physical evidence subsequently taken from him (the knife, dollar bills, and his clothing) was the result of an unlawful arrest and search. Second, it was alleged that the identification of Nelson by Yankel Rosenbaum was unduly suggestive and, therefore, unreliable. Third, it was alleged that the police had failed to advise Nelson of his constitutional rights; that he was not capable of understanding, and knowingly waiving, his rights; and that the police used physical force to coerce a confession.

At the suppression hearing, the prosecution called as witnesses, Sergeant Wilson; Police Officers Sanossian, Marinos, and Hoppe; and Detectives Litwin, Brown, and Abraham. Their testimony at the hearing was substantially the same as their testimony at trial. They stated that Nelson was apprehended a block from the scene of the attack on Yankel Rosenbaum. They said that when he was frisked, a bloodstained knife with the word "Killer" on the handle was taken from his pocket. They testified that Nelson was brought to Rosenbaum, who identified him as his attacker. They further testified that Nelson confessed to the crime after he was advised of, and voluntarily waived, his constitutional rights.

Nelson also testified at the suppression hearing regarding his presence at the scene of the crime and his apprehension. Nelson confirmed that Rosenbaum identified him as his attacker and that he had been advised of his constitutional rights before he made statements to the detectives. Nelson confirmed substantially all of the statements that the detectives said he related the night of his arrest, with two significant differences — Nelson said that he did not assault or stab Yankel Rosenbaum, nor did he see anyone else assault Rosenbaum. Nelson also said that the knife did not belong to him, and that keys and money were the only items taken from his pocket. According to Nelson, the first time he saw the knife was when the officers showed it to Rosenbaum. Nelson also said that he was handcuffed during the identification procedure.

After considering the hearing testimony, Judge Rappaport denied the motion to suppress. He held that Officer Hoppe had probable cause to arrest Nelson based upon the descriptions of the attacker contained in the police radio communications, Nelson's flight from the scene, and the frisk of Nelson, which yielded the knife. The Judge also found that the identification procedure was conducted in a constitutionally permissible manner and that it was not unduly suggestive. Further, Judge Rappaport found that the statements made by Nelson to the detectives were voluntarily made after Nelson was advised of, and knowingly waived, his constitutional rights.

THE TRIAL

The jury selection process, known as the "*voir dire*," began on September 10, 1992, and continued until September 22, 1992. Over 150 potential jurors were screened. Each prospective juror was interviewed separately, apart from the other jurors. The questioning of each prospective juror lasted approximately fifteen to thirty minutes.

During the jury selection process, the Judge, the prosecutor and the defense attorney asked the potential jurors questions regarding their knowledge of the case, their impressions or opinions regarding the events, and whether there were any facts about the case that they had heard and could not ignore. They were also asked about their own experiences with police officers or members of the Hasidic community. The jurors were questioned extensively about their knowledge of the case in California involving the beating of Rodney King and whether their views about that case would affect their decision. The jurors were asked if they could be fair to both the defense and the prosecution. They were directed to put any preconceived ideas about the case out of their minds.

The jurors who were selected included five men and seven women. Six were black, three were Caucasian, and three were Hispanic.¹ Most of them were employed and many had served as jurors in other cases.

The trial commenced on September 22, 1992, and continued for nineteen additional days through its conclusion on October 29, 1992.² Fourteen witnesses testified for the prosecution on its direct case and one prosecution witness testified in rebuttal. The defense called fifteen witnesses.

The Court's Preliminary Instructions to the Jury

On September 22, 1992, the court gave the jurors standard preliminary instructions. These instructions outlined the manner in which the trial would be conducted and the respective roles of the parties, and explained such applicable legal principles as the "burden of proof" and the "presumption of innocence." In addition, the court instructed the jurors not to speculate about things that were not in evidence. The only factors that they could consider in reaching their verdict were the testimony of the witnesses, stipulations, and exhibits received in evidence. The jurors were admonished not to discuss the case with anyone or read or watch any news accounts relating to the trial. The Judge also told the jurors that they were the sole judges of the facts of the case and that he had no opinion about the case.

Opening Statements

Prosecution

On September 23, Assistant District Attorney Kolatch made her opening statement outlining the People's case. She indicated that the evidence would show that Rosenbaum was attacked by a violent and angry mob and that Nelson, caught up in the frenzy, joined the mob and killed Rosenbaum by stabbing him with a knife.

Kolatch told the jurors about the fatal car accident that killed Gavin Cato and injured his cousin, and the subsequent disturbances. She said that there would be evidence about the cries of "No justice. No peace" and "Let's get a Jew. Kill the Jews." She said that a large crowd began to move west on President Street, breaking windows and turning over a car. At the corner of Brooklyn Avenue and President Street, a group of youths attacked Yankel Rosenbaum.

Kolatch said that there would be evidence regarding the apprehension of Nelson moments after the attack, the recovery of a bloodstained knife from his pocket, the identification of Nelson by Rosenbaum, and Nelson's confession to the police. She said that the evidence would show that all four stab wounds were consistent with Nelson's knife, and that the blood on the knife and on some of the dollar bills found in Nelson's pocket was consistent with Rosenbaum's blood.

Defense

Arthur Lewis, the defense attorney, in his opening statement to the jury, said that the evidence would show that people, other than Nelson, were responsible for the death of Rosenbaum and that the police had framed his client.

Lewis said that, at the time of the attack, Rosenbaum was on the street attempting to protect both the residents of Crown Heights, and the world headquarters of his religious leader to prevent articles and religious artifacts from being vandalized.

Lewis said that the case against Nelson was “a classic frame-up,” urging that the rioting was not the result of the car accident and a desire to attack a Jew. Rather, the rioting was the result of a conflict at the scene of the Cato accident between black youths and the police officers who were involved in “criminal, improper behavior.”

Lewis also said that the evidence would show that Rosenbaum was a “karate black belt holder” and that he fought off his attackers. Lewis further said that Rosenbaum would have lived were it not for the negligence of the doctors at Kings County Hospital. Although initially sustained, the prosecutor’s objection to this statement in the defense’s opening was ultimately overruled by the Judge. Lewis then noted that Rosenbaum’s family had a multi-million dollar lawsuit pending against the City as a result of the alleged negligence at the hospital.

The Prosecution’s Case

During the trial, the prosecution offered evidence to prove that Rosenbaum was an innocent victim of a violent mob that attacked him because he was Jewish. The prosecution’s case consisted primarily of police and forensic testimony.

The Identification of Yankel Rosenbaum’s Body

The first witness called by the prosecution was Esther Edelman, a cousin of Rosenbaum. She testified that Rosenbaum was an Australian who came to the United States in the beginning of August, 1991, to visit and study. On August 19, Rosenbaum visited Edelman’s home in Brooklyn and left at about 8:30 p.m. to return to his home in Crown Heights. Rosenbaum was due to return to Australia the following week. The next morning, Edelman went to the Medical Examiner’s Office to identify photographs of Rosenbaum’s body.

On cross-examination, in an attempt to place before the jury evidence regarding the negligence of the physicians at Kings County Hospital, defense counsel attempted to elicit from Edelman that her husband was an attorney and had filed a lawsuit against the city. The prosecution objected and, after a lengthy sidebar discussion out of the hearing of the jury, the court sustained the objection. The court ruled that, for the purposes of the criminal trial of Nelson, any malpractice that may have occurred when Rosenbaum was at the hospital had no legal effect upon the cause of his death. This was so because, regardless of whether there had been malpractice, Nelson would be liable for the death of Rosenbaum if he had stabbed Rosenbaum with the intent to cause his death. Despite the court's ruling, Lewis continued to ask Edelman questions designed to elicit this information.

The Police Witnesses

The prosecution called ten police witnesses to the stand: Officers Richard Sanossian and Leonard Milazzo, of the 70th Precinct; Officers Mark Hoppe and John Marinos, of the 71st Precinct; Officer Robert Lewis of the Transit Police; Sergeant Brian Wilson of the 77th Precinct; Detectives Steven Litwin and Nemesio Abraham of the 71st Precinct; Detective Edward Brown of the Brooklyn South Homicide Squad; and Detective Charles Mattera of the Kings County District Attorney's Office.

The police witnesses testified concerning the events leading to Rosenbaum's homicide, Rosenbaum's identification of Nelson, and Nelson's subsequent confession.

The Accident

At 8:30 p.m. on August 19, 1991, Police Officer Mark Hoppe and his partner, Officer John Marinos, were the first police officers to respond to the scene of a fatal car accident at the intersection of Utica Avenue and President Street in Crown Heights. Gavin Cato, a seven-year-old black child, had been killed and his cousin, Angela Cato, was seriously injured when a car driven by a member of the Hasidic community spun out of control and struck both children. A crowd gathered and the officers saw black males from the group beating some of the Hasidic men who were in the car involved in the accident.

Over the next few hours the crowd continued to grow. This escalated into a riot in which rocks and bricks were thrown and a shot was fired. A black man yelled, "We don't get any justice...they're killing our children. We have to stop this...Jews get preferential treatment, we don't get any justice." Another individual said, "Let's go to Kingston Avenue and get the Jews" and the crowd moved west on President Street.

The Stabbing of Yankel Rosenbaum

Police Officers Richard Sanossian and Leonard Milazzo, of the 70th Precinct in Crown Heights, left the scene of the accident at about 11:15 p.m. in order to return to the Precinct. When they approached the intersection of Brooklyn Avenue and President Street, they saw a group of at least ten black males attacking who they later learned was Yankel Rosenbaum, in front of St. Mark's School. Milazzo and Sanossian saw a male black teenager, wearing a red shirt and baseball cap, crouched over Rosenbaum. According to Milazzo, the teenager was hitting Rosenbaum with his hands. Milazzo could not tell if the youth had anything in his hands.

When the officers turned on the siren in their patrol car, the group dispersed. As they began their pursuit of the attackers, Milazzo broadcast over his radio that officers were "in pursuit at Brooklyn and President." Having noticed a black male, about 5'8" tall, wearing a red shirt and a baseball cap, Sanossian transmitted over his portable radio the description, "male black in a red shirt." Milazzo chased a youth in a green shirt (later identified as C.T.) who had run west on President Street. Sanossian joined in the chase.

In the meantime, Sergeant Brian Wilson, a patrol supervisor in the 77th Precinct, was in a police car with his driver, Officer Daniel Price. As they arrived at the intersection of Brooklyn Avenue and President Street, Rosenbaum was walking slowly in the street toward their car. He was hunched over with a large bloodstain on the right side of his shirt.

Rosenbaum told Wilson that he had been stabbed by a group of blacks. Wilson then walked with Rosenbaum to a car, occupied by three members of the Hasidic community, that was stopped north of President Street near Brooklyn Avenue. Wilson told Rosenbaum to stay there while he ran up Brooklyn Avenue to find another police officer. When he returned a short time later, Wilson called for an ambulance.

While waiting for the ambulance, Milazzo and Sanossian brought C.T., the black male wearing the green shirt, whom the officers had chased and apprehended, to Rosenbaum to determine if Rosenbaum could identify C.T. as one of his attackers. Rosenbaum did not identify C.T. as the stabber, although he did say that "he was one of them."

Upon Wilson's instructions, Sanossian and Milazzo arrested C.T. and then took him to Kings County Hospital for treatment of a cut he had sustained during a brief struggle with the officers. Officer Price, Wilson's driver, then brought

a "chubby kid" over to Rosenbaum for possible identification. Rosenbaum said the youth was not involved in the attack so he was released.

The Arrest of Lemrick Nelson and the Recovery of a Knife

Shortly after 11:00 p.m., Hoppe and Marinos left the scene of the Cato accident and drove back to the 71st Precinct. Upon their arrival, they were instructed to drive to 770 Eastern Parkway. While enroute, Hoppe, the driver of the patrol car, heard a radio transmission stating, "In pursuit, President and Brooklyn." This was approximately one block south of their location. Rather than continue to 770 Eastern Parkway, Hoppe decided to assist his fellow officer. Marinos, the "recorder" in the patrol car, testified that he heard a radio transmission that an officer "was in pursuit on Brooklyn and President of a male black wearing a red shirt."

After turning south on Brooklyn Avenue, Hoppe stopped just before the intersection of Union Street, because he saw a large crowd of fifteen to twenty people running from President Street toward his car on Brooklyn Avenue. Hoppe and Marinos left their car and began to chase them.

Within three to five minutes of receiving the radio transmission, Hoppe saw Lemrick Nelson, a black male wearing a red shirt and a baseball cap, climb over a fence into the front yard of a house at the corner of Brooklyn Avenue and Union Street. Hoppe saw Nelson crouch behind a bush and look toward President Street. Hoppe climbed over the fence, placed Nelson on the ground and frisked him. From Nelson's right pocket, he recovered a folding knife with blood on the blade and the word "Killer" inscribed on the handle. He displayed the knife to his partner and then placed it in his rear pocket.³

Nelson stood up and was assisted in climbing over the fence. Detective Steven Litwin told Hoppe to take Nelson to the intersection of President Street and Brooklyn Avenue where the assault had occurred.

Hoppe testified that he was the only officer in the yard with Nelson and that he was the only one who frisked him. Although he recalled that other police officers arrived at the scene, Hoppe could only recall recognizing Litwin. He could not recall the identity or description of the two or three other officers who were present at the scene of Nelson's apprehension. Nor could he recall who accompanied him when he escorted Nelson to the scene of the attack so that Rosenbaum could view Nelson.

The Show-up Identification of Lemrick Nelson

At the intersection of Brooklyn Avenue and President Street, there was a group of civilians and eight to ten police officers. A car was stopped just before the intersection and Rosenbaum was lying on its hood, bleeding profusely from his right side. As Hoppe walked in front of Rosenbaum with Nelson, Rosenbaum tried to get up. At that point, Rosenbaum said to Nelson, "Why did you stab me?" According to Sergeant Wilson, Rosenbaum then spat what appeared to be a wad of blood at Nelson. According to Hoppe, he then took Nelson by the arm, walked him five to ten feet away from Rosenbaum, and placed him in handcuffs. Wilson remembered that Hoppe also showed him a knife and told him he had recovered it from Nelson.

The prosecution then called Police Officer Robert Lewis, a Transit Police Officer. He gave an account of Nelson's apprehension, recovery of the knife and show-up identification which was, in some respects, at variance with other police testimony.

According to Lewis, on August 19, he and his partner, Officer Gerald Wheeler, were assigned to patrol duty in Crown Heights. They responded to a radio transmission that a police officer was "in pursuit" at Union Street and Brooklyn Avenue. As they arrived at the intersection, Lewis saw Hoppe jump over a fence into a small yard of the house at the corner of Union Street and Brooklyn Avenue.

In contrast to Hoppe's testimony that he alone apprehended Nelson, frisked him, and recovered the knife, Lewis testified that he also jumped over the fence and, along with Hoppe, frisked Nelson. According to Lewis, Hoppe recovered the knife from Nelson's right pants pocket and then handed Lewis the knife. Lewis noticed that it was rusty and had what appeared to be dried blood on it. Lewis also saw that the word "Killer" was written on the handle.

In contradiction to Hoppe's testimony, Lewis said that he opened the knife and, holding the tip of the blade, handed the knife to his partner, Officer Wheeler. Wheeler examined the knife and handed it back to Lewis who returned it to Hoppe. Hoppe closed it and put it in his rear pocket.

Lewis also testified that he accompanied Hoppe and Nelson up the block to President Street. As they approached the car where Rosenbaum was lying, Rosenbaum got excited, pointed at Nelson and either said, "Why did you do that to me, you in the red shirt. You are tougher with your friends. Now you ain't tough without your friends" or "You in the red shirt, why you did that to me? You tough now. But you're not tough without your friends."

During Lewis's direct testimony, Judge Rappaport often interrupted the examination and took over the questioning. Highlighting the inconsistencies between the testimony of Lewis and Hoppe, the Judge implied several times that Hoppe's credibility was questionable. At one point, the Judge said to the prosecutors, within the hearing of the jury:

Continue. I will tell you this. The court wants Hoppe and Marinos back here on Monday. Do you follow me? I want them back...We will deal with Litwin. We will have Litwin back too. This is bad.

Processing the Arrest

After the identification, Hoppe put Nelson in the back of a transit police car. Nelson was then driven to the 71st Precinct. At the Precinct, Hoppe searched Nelson's pockets. In the same pocket in which he had recovered the knife, he found three one dollar bills that appeared to be stained with blood. Hoppe did not record the serial numbers of the bills, initial them, or place them into a voucher envelope. Instead, he placed them in his own rear pocket with the knife. Later, Hoppe put the bills and knife together in a brown paper bag which he found lying on a desk in the Precinct. Hoppe also noticed that there were wet bloodstains on Nelson's pants. The stains were below the right front pocket seam and on the upper thigh of the left leg.

Hoppe put Nelson in a holding cell on the second floor of the Precinct. Approximately one hour later, Hoppe noticed Nelson lying down holding his chest. Hoppe went to the cell and saw that Nelson was having difficulty breathing. An ambulance was called and, after a brief examination by the attendants, Hoppe accompanied Nelson to Kings County Hospital for asthma treatment.

While at the hospital, Hoppe met Officers Sanossian and Milazzo. When Milazzo saw Nelson, he could not positively identify him as the person he saw hitting Rosenbaum. Nonetheless, Milazzo did testify that Nelson was wearing similar clothing and was close in stature, height, and weight to the person he saw hitting Rosenbaum.

Sergeant Wilson also went to the hospital where he instructed Sanossian and Milazzo to take custody of Nelson and process his arrest since they already had custody of C.T. Hoppe told Milazzo about Nelson's arrest and gave him the brown paper bag containing the folding knife and the three one dollar bills that he had recovered from Nelson. Milazzo put the bag in his pocket.

Nelson's Confessions

At approximately 2:25 a.m., Yankel Rosenbaum died at Kings County Hospital. He bled to death as a result of his stab wounds. The police were notified and Detectives Edward Brown and Nemesio Abraham were assigned to conduct the investigation into the homicide. At about 3:00 a.m., Milazzo brought Nelson back to the 71st Precinct where the detectives interviewed him.

As the detectives were about to begin the interview, a superior officer informed them that they would have to move the interview to another precinct. The 71st Precinct was overcrowded as a result of the investigation of the Cato accident. Abraham left the room to try and obtain permission to remain in the 71st Precinct. While Abraham was gone, Brown advised Nelson of his rights. According to Brown, Nelson said that he understood his rights and confessed that he had stabbed Rosenbaum.

Brown testified that Nelson told him that on the evening of August 19, 1991, he had been drinking beer at his friend's house at 455 Schenectady Avenue. He saw several ambulances heading towards Kings County Hospital and went to find out what had happened. When he got to Utica Avenue and President Street, a policewoman told him that a "Jewish guy" had hit a black kid with a car. Nelson then walked to President Street and Brooklyn Avenue where a crowd had gathered. Someone shouted, "There's the Jew. Let's get the Jew." Nelson said he then joined the crowd and chased "the Jew" because he was excited and a little high from the beer.

According to Brown, Nelson said that when the crowd caught Rosenbaum, he took out his knife and cut Rosenbaum once on the left side. Nelson told Brown that police officers chased the kids in the crowd. They caught him at Brooklyn Avenue and Union Street. The police found a knife in his pocket. They then brought him up the block to Rosenbaum who identified Nelson as the stabber.

Brown took no notes during the interview with Nelson. According to Brown, in his experience, suspects become "nervous" when the police take notes. Nelson refused to write or sign any statements and Brown did not have Nelson sign a form indicating that he understood his *Miranda* warnings. When Abraham returned to the interview room, Brown told him that Nelson had confessed. Then Brown left the room to speak with the superior officer who had ordered them to leave the 71st Precinct.

While Brown was gone, Abraham advised him of his constitutional rights and conducted a separate interview with Nelson. According to Abraham, Nelson gave substantially the same statement that he had given to Brown earlier.

At approximately 3:40 a.m., the detectives left the 71st Precinct with Nelson. Outside, Nelson saw that protesters had gathered. Police with riot gear were erecting barricades. Nelson stiffened, and then asked the detectives, "How much trouble am I in and what's going to happen to me?" Brown told him, "You are under arrest and everything else is up in the air right now."

Several hours later, at about 7:30 a.m., Assistant District Attorney Quentin Moore arrived at the 60th Precinct to take a videotaped statement from Nelson. After he was again advised of his rights, Nelson refused to make a statement.

The Forensic Evidence

The prosecution called three forensic witnesses at the trial. They were Ralph Ristenbatt, a Forensic Analyst in the Department of Forensic Biology in the Office of the Chief Medical Examiner for the City of New York; Dr. David Bing, Scientific Director of the Center for Blood Research (CBR) Laboratories in Boston; and Dr. Joaquin Gutierrez, an Associate Medical Examiner in the Office of the Chief Medical Examiner for the City of New York.

The prosecution sought to establish through its forensic experts that the blood from Nelson's knife and on some of the dollar bills recovered from his pocket was consistent with Rosenbaum's blood type and inconsistent with Nelson's. The prosecution also introduced evidence to show that the stab wounds were the cause of Rosenbaum's death and that the shapes of Nelson's wounds were consistent with the knife recovered from Nelson.

The Serological Evidence

The prosecution called Ralph Ristenbatt, an analyst in the Department of Forensic Biology at the Office of the Chief Medical Examiner for the City of New York, as a witness. Ristenbatt performed serological tests on various items submitted to him by the police and performed tests on blood samples taken from Yankel Rosenbaum and Lemrick Nelson. He performed these tests on the knife, the three one dollar bills recovered from Nelson, and on Nelson's shirt and pants.

Ristenbatt testified that the results of these tests demonstrated that the bloodstains on the knife, the dollar bills and the jeans were human blood. He next attempted to identify the blood type of the stains by performing an enzyme analysis. He was unable to complete this test on the dollar bills or the knife due

to the small sample size. However, in an analysis on stains randomly chosen from Nelson's pants, he was able to identify the subtype of the bloodstains. The stains were consistent with Rosenbaum's blood, and inconsistent with Nelson's blood. Ristenbatt testified that, based upon studies done at the Medical Examiner's Office, only one percent of the entire population had Rosenbaum's subtype.

Ristenbatt also randomly chose four stained areas from Nelson's shirt for testing. He determined that these stains were not blood. Explaining that the Office had a large caseload, Ristenbatt noted that no additional testing was performed on the shirt.

At the time that the evidence was submitted to the Medical Examiner's Office for testing, the Office did not have the equipment necessary to perform more sophisticated, deoxyribonucleic acid (DNA) tests on the bloodstains to determine if they were, in fact, Rosenbaum's blood. As a result, the evidence was packaged and stored until it was sent, in January, 1992, to the Center for Blood Research (CBR) Laboratories in Boston for additional analysis.

Dr. David H. Bing, Scientific Director of CBR Laboratories, testified that, in January, 1992, he received a box containing samples of Nelson's pants and the dollar bills from the New York City Medical Examiner's Office. He also received swabs prepared by Ristenbatt from the blood that was on the knife, as well as samples of Nelson's and Rosenbaum's blood. Dr. Bing performed a forensic DNA test known as "Polymerase Chain Reaction (PCR) - DQ Alpha" on the samples to determine whether the blood on the knife and dollar bills was consistent with Rosenbaum's blood.

Tests on the blood samples taken from Rosenbaum and Nelson showed that their blood types were different. Approximately eleven percent of the Caucasian population has Rosenbaum's blood type. Nelson, however, does not have this blood type. Dr. Bing testified that the blood taken from the knife and one of the dollar bills was consistent with Rosenbaum's type. The tests performed on the other dollar bills were inconclusive. Dr. Bing explained that this may have been because the sample was too small or because the blood had degraded over time and could not be tested.

Dr. Bing testified that the analysis on Nelson's pants yielded no results because they were made of denim. Denim contains a substance which interferes with the performance of PCR — DQ Alpha testing. This trait, however, does not affect the genetic marker analysis performed by Ristenbatt.

The Medical Examiner Establishes Cause of Death

Dr. Joaquin Gutierrez, an Associate Medical Examiner in the City of New York, was the last witness called on the prosecution's direct case. He testified that on August 20, 1991, at approximately 10:00 a.m., he performed an autopsy on Yankel Rosenbaum. The victim had four stab wounds in the back. Two of them penetrated Rosenbaum's lungs, causing his death from loss of blood. All of the wounds had sharp and blunt edges. The shapes of the wounds were consistent with Nelson's knife.

On cross-examination, Gutierrez testified that the cause of death was the result of the stab wounds that were "potentially lethal." Gutierrez conceded, however, that even a pinprick to a vein or an artery could cause a person to die from the loss of blood.

Other injuries that Gutierrez found on Rosenbaum were a cut on his right forehead, two small one-inch lacerations below his left eye, and bruising of the eyelids. After an internal examination, Gutierrez also found that there was a small fracture of the base of the skull at the roof of the left eye socket. This injury was caused by blunt impact.

Gutierrez acknowledged on cross-examination that there were various procedures that he did not perform at the autopsy. He did not measure the blunt edge of the wounds. He did not obtain a fingernail clipping of Rosenbaum, nor did he submit any tissues for toxicological examination. Further, he was unable to find trace evidence, such as hair or fibers, on Rosenbaum's clothing, because the clothing had been washed before it was submitted to the medical examiner.

At the conclusion of Gutierrez's testimony, the prosecution rested its case.

The Defense Case

Although the defense consisted of various theories, the central theory was that the police framed Lemrick Nelson and that he was not the person who stabbed Yankel Rosenbaum. While defense counsel extensively cross-examined the prosecution's witnesses, he also called fifteen witnesses on his direct case.

Essentially, Lewis challenged the prosecution's theory that the attack on Yankel Rosenbaum was an anti-Semitic act upon an innocent victim. He asserted that the riot that led to the attack was not caused by the anger of the black community against the Jews, but rather against the police. Lewis tried to prove that the "criminal and improper acts" of police officers earlier at the Cato

accident scene sparked the riot and, therefore, provided the officers with a motive to frame his client to divert attention from their own misconduct.

Lewis further claimed that the police had a motive to frame his client because there was a special relationship between the police and a Jewish group involved in the protection of the synagogue. Lewis argued that Rosenbaum was Jewish, and a member of a "civilian patrol." Therefore, there was pressure upon the police to make an arrest. As part of the frame, Lewis suggested that the police either coerced or fabricated Nelson's confessions. The defense called witnesses to testify that Nelson was so mentally deficient that he could not understand, and knowingly waive, his constitutional rights. Lewis also sought to show that Nelson was a peaceful youth and had no propensity for violence.

In addition, Lewis asserted that the identification procedure was so tainted that Rosenbaum only identified Nelson because he was in handcuffs and because Rosenbaum saw the knife allegedly recovered from Nelson.

The defense also attempted to show that the actual cause of Rosenbaum's death was not the stab wounds inflicted by his attackers, but the negligence of the physicians at Kings County Hospital who did not properly treat Rosenbaum. And, finally, the defense attacked the forensic evidence, casting doubt on the quality of the testing done and the validity of the conclusions of the prosecution's forensic specialists.

The Frame of Lemrick Nelson: Police Motives

The Riot was Caused by Police at the Cato Accident Scene

The first defense witness was Carmel Cato, the father of the young boy who was killed in the car accident. Cato testified that, shortly after 8:00 p.m., he was outside in front of his apartment building on President Street with his son, Gavin, and his niece, Angela. A car traveling west on President Street jumped the curb, and crashed into the building, pinning Gavin and Angela beneath it. Cato and others at the scene lifted the car and extricated the children.

The police arrived at the scene but, according to Cato, did not aid the children. Cato testified that the first ambulance on the scene was a private, Jewish ambulance that ignored the children and, instead, took the passengers and the driver of the car away from the scene.

During the course of Cato's testimony, defense counsel tried to elicit testimony that the riot, which began after the accident, was caused when the police assaulted Cato and prevented him from helping the injured children. The

Judge sustained an objection to this line of questioning, ruling that the proposed testimony was inadmissible, because it was irrelevant to Rosenbaum's murder.

Since Rosenbaum was Jewish, and a Member of a Civilian Patrol, the Police had a Motive to Frame Nelson

The defense called seven witnesses to prove the existence of a Jewish civilian patrol and Rosenbaum's participation in it.

Mildred Scott, a member of the 71st Precinct Community Council, was called by the defense. She testified only that she was familiar with the Jewish civilian patrol customs in that Precinct. The prosecution objected on the ground that Ms. Scott had no personal knowledge of Rosenbaum's participation in a Jewish civilian patrol. That objection was sustained and Scott was not permitted to answer additional questions about it.

John Anderson, a twenty-four year old black male, testified that he was at the Cato accident scene. He was upset at the scene of the accident because the driver of the car that killed seven-year-old Gavin Cato was taken away in an ambulance before the child was treated.

Anderson described the group at the Cato accident scene and the increasing agitation of the crowd. Anderson testified that he heard a man inciting the crowd and yelling, "No justice. No peace." At about 11 p.m., he and about fifty to one hundred other people headed down President Street, in the direction of Brooklyn Avenue. Anderson did not know anyone in the crowd. He said that he was just following the crowd to see what was going on.

Anderson said that he broke off from the crowd in front of St. Mark's School. At approximately 11:20 p.m., he was standing on the corner of Brooklyn Avenue and President Street with a few people whose names he could not remember. Across the street, in front of the school, there was a group of ten to fifteen people.

Anderson said that he saw Yankel Rosenbaum, a man about six feet tall, with a beard, hair, and a "thing that's on top of the head," in a car with three other men. Rosenbaum got out of the car and said something to one of the youths in the group in front of the school. Rosenbaum then threw a kick at him. The youth caught Rosenbaum's foot, threw him against a fence and began to hit him. Three other members of the group joined in this attack. Anderson saw Rosenbaum get punched, but he did not see anyone stab Rosenbaum. According to Anderson, the attack on Rosenbaum was committed by "grown" black men.

Anderson testified that police sirens sounded and people ran in different directions. Rosenbaum chased some members of the original group of ten to fifteen people. The police arrived at the scene from all directions. Although most of the group ran from the scene, Anderson said that he refused to run because he did not "do anything." He and another youth named "UT" stayed at the scene.⁴ Anderson did not know UT's full name or where he lived.

According to Anderson, the first police officers to approach him took him to Rosenbaum, who was now at the opposite corner leaning on a car north of the intersection of President Street and Brooklyn Avenue. Rosenbaum was bent over and Anderson saw blood on him. Anderson testified that another youth was being shown to Rosenbaum who spit at the youth. Anderson was wearing a red shirt that night. He was never handcuffed. When Anderson was brought to Rosenbaum, the police officer asked Rosenbaum if Anderson was one of those who attacked him. According to Anderson, Rosenbaum said, "No, he couldn't see nobody."

Two others were also shown to Rosenbaum. One was a person who had been with John Anderson at the scene. That person was wearing a red shirt and black pants.⁵ Anderson did not identify Nelson as that person. Anderson said that he would be able to recognize him if he saw him again. According to Anderson, another person wearing a red shirt and a hat was also shown to Rosenbaum. Anderson could not describe nor recognize that person. Anderson said that, while he was at the scene, he had "never seen a cop with a knife, at no time."

The defense also called as witnesses three members of the Hasidic community: Chaim Lieberman, Meyer Rivkin, and Chaya Sara Popack. Although Lewis suggested that Lieberman and Rivkin were with Rosenbaum, patrolling the street, they were never asked whether they were members of a civilian patrol.

Chaim Lieberman, an ordained rabbi, testified that he lived in Crown Heights on the east side of Eastern Parkway between Brooklyn and Kingston Avenues. On August 19, 1991, shortly after 11 p.m., he left his home with a friend, David Noll,⁶ and went to Brooklyn Avenue because he heard police sirens and a great deal of noise.

When they arrived, Lieberman saw a New York City Police Department car on Union Street. Some officers were near a house on the southwest corner of Union Street and Brooklyn Avenue. Lieberman testified that he saw a male lying face down in the garden. He went to the police car to find out what happened. An ambulance arrived at Brooklyn Avenue and President Street and

Lieberman saw another man on a stretcher. Lieberman, who had known Rosenbaum, did not immediately recognize him because of the blood on his face and beard. He testified that he only recognized Rosenbaum after he heard him speak. Lieberman testified that Rosenbaum called to him saying, "Chaim, please help me. They want to kill me." Lieberman also recalled that Rosenbaum told him that it was "twenty on one."

Lieberman stated that he noticed the stab wounds when he saw the ambulance attendants remove Rosenbaum's pants in order to put a trauma suit on him. He said that the stab wound on Rosenbaum's back was large and he could "actually see his guts hanging out." Lieberman testified that he then introduced Meyer Rivkin to Rosenbaum. He asked Rivkin to accompany Rosenbaum to the hospital, because Lieberman had to go home to check on his pregnant wife.

Lieberman testified that, after seeing the man in custody at the corner of Brooklyn and Union Street, he did not see him again. He did not see the man brought to Rosenbaum for identification, because there was commotion and noise from people screaming at the scene and he was talking to the ambulance attendants to find out where they were taking Rosenbaum.

After checking on his wife, Lieberman drove to Kings County Hospital with David Noll. There, he met Meyer Rivkin. He recalled that the Police Commissioner and Mayor Dinkins visited Rosenbaum. Lieberman did not see Rosenbaum at the hospital, but was given his clothing by a nurse. Lieberman, Noll and Rivkin went home several hours later.

At home, Lieberman put Rosenbaum's bloodstained clothing in the washing machine. Lieberman received a phone call from the police informing him that they needed Rosenbaum's clothing. Fifteen minutes later, two uniformed police officers arrived at his home and told him that Rosenbaum had died. The police asked for Rosenbaum's clothing. Lieberman took the clothing out of the washing machine, put it in a plastic bag and gave it to the police.

Meyer Rivkin, a thirty-nine-year-old general contractor who lived in Crown Heights, testified that at approximately 11:00 p.m., he was driving home from Borough Park when he turned onto Kingston Avenue and encountered groups of black youths. He testified that the youths were carrying broken bottles and coming towards his car in a threatening fashion. As a result, Rivkin detoured from his original route and turned onto President Street.

As he approached Brooklyn Avenue, he saw a blue car stopped in the middle of the street. It was just before the light at the beginning of the intersection — directly north of President Street, on Brooklyn Avenue. Yankel Rosenbaum, whom he did not know at the time, was lying on the hood of a car.

There were a number of people around the car. However, there were no police cars or ambulances. Rivkin parked his van and noticed that the man on the car was Jewish because his "tzitzis" [the fringe on his prayer shawl] was hanging out of his shirt.

On the hood of the car, Rivkin saw a pool of blood that appeared to be coming from Rosenbaum's back. Rivkin also noticed a slight gash on the top of Rosenbaum's head. Rivkin testified that Rosenbaum was trying to get up to go after the people who attacked him. Several people were trying to restrain and comfort him. An ambulance arrived before Rivkin noticed any police on the scene.

Rivkin testified that he saw two police officers, one on each side of a black male whom they seemed to push over to Rosenbaum. Rivkin could not say whether the black police officer, who was on the scene at some point, was present at the time that Rosenbaum identified Nelson. Rivkin stated that he could not tell if Nelson's hands were handcuffed. He could only recall seeing the upper parts of Nelson's arms. Although he did not remember seeing a hat on Nelson, Rivkin did notice that Nelson's shirt was red.

Rivkin testified that Nelson was brought to Yankel Rosenbaum who immediately attempted to get up. In response to a question by a police officer, Rosenbaum identified Nelson and said, "That's the one" or "Him in the red shirt." When the police asked if he was sure, Rosenbaum answered affirmatively. Rivkin said Rosenbaum also yelled, cursed, and spat at Nelson. Rivkin also recalled that another person was brought to Rosenbaum. However, he could not remember whether this was before or after Nelson was shown to Rosenbaum. Nor could he provide any other specifics about that person. Rivkin did not recall seeing or hearing anything about a knife at the scene.

Rivkin accompanied Rosenbaum in the ambulance at Lieberman's request. Rivkin stayed at Kings County Hospital for a couple of hours. He remembered the arrival of the Mayor and the Police Commissioner. He also saw a member of the hospital staff give Yankel Rosenbaum's clothing to Lieberman.

Chaya Sara Popack, an Hasidic woman, testified that on August 19, 1991, at about 11:15 p.m., she was alone in her car, driving west on President Street, coming from Troy Avenue. As she drove, she saw large groups of thirty to forty young, black people "all over the place." At the intersection of President Street and Kingston Avenue, Popack looked down the street and saw police activity in the area of Eastern Parkway. As she continued west and approached the intersection of President Street and Brooklyn Avenue, she saw another group of twenty to twenty-five black people moving in a northerly direction towards President Street.

While she stopped at the traffic light, she saw Yankel Rosenbaum. She had never seen him before. Popack said that Rosenbaum was walking alone on the southwest corner of President Street and Brooklyn Avenue towards the group, on the opposite side of the street. After he crossed President Street, as he was approaching the northwest corner, she heard someone shout, "There's a Jew, get the Jew." She testified that Rosenbaum was surrounded and attacked by ten to twelve members of the group.

Popack remained in her car at the light and noticed that there was a car to her left with a man in the driver's seat. She saw members of the group punch and kick Rosenbaum. Rosenbaum started to run away, passing in front of her car. She said that she honked her horn. The group caught Rosenbaum in front of St. Mark's School.

Popack could not say exactly how many of the group of twenty to twenty-five attacked Rosenbaum, but she thought that it was between ten and twelve. She also could not remember whether the members of the group were shouting anything as they chased Yankel Rosenbaum. She testified that when they caught him, they knocked him to the ground and "they were on top of him." Popack believed that, at least part of the time, Rosenbaum was lying on the ground on his back. She saw several people — seven or eight — jumping on top of him, leaning over him and grappling with him. He was trying to fight them off.

Popack testified that a police car drove up and stopped at St. Mark's School. As soon as the police car pulled up, the group scattered and ran off in different directions. Some ran east on President and some went south on Brooklyn.

When the traffic light changed, Popack drove on. Popack waited on Union Street at the southwest corner of Brooklyn Avenue for approximately five minutes because the police cars were blocking her way. Near the house on the corner, she saw "more than one" uniformed police officer, with a young black man whose hands were behind his back. She could not remember whether he was wearing a cap. Popack could not identify Nelson, because he had not been facing her. She also said that she could not recognize any of the others she saw attacking Rosenbaum.

Popack testified that she did not see anyone handcuffed. She acknowledged, however, that she may have told detectives in an earlier interview that the young black man was in handcuffs. During her testimony, she insisted that she had only assumed that he was in handcuffs because his hands were behind his back.

The defense contended that since the police responded immediately to the scene of the attack, this indicated that Rosenbaum, Lieberman and Rivkin were members of the civilian patrol and got prompt reaction from "the powers that be." Two other witnesses, Vernal Cave and Lorraine Gayle, were also called to support this theory.

Dr. Vernal Cave, a physician who lives on President Street, between Kingston and Brooklyn Avenues, testified that on August 19, 1991, shortly before 11:30 p.m., he was standing in the doorway of his home waiting for a cab. He heard a noise coming from the direction of Kingston Avenue. He then walked down the pathway towards the street, trying to see what was happening. He saw approximately ten to fifteen young, black people running down the street. They stopped halfway down the block, looking toward Kingston Avenue, before continuing to run west in the direction of Cave's home. When they were joined by additional people, Cave retreated up the pathway.

Cave testified that fifteen police vehicles came from every direction with their lights flashing, meeting at the intersection of President Street and Brooklyn Avenue. Although his view was somewhat limited by shrubbery along the pathway, Cave saw the arrival of two ambulances, the larger one bearing the inscription "EMS." This ambulance remained at the scene for about fifteen minutes. During this time, Cave heard "moaning" coming from the southwest corner of President and Brooklyn Avenue, diagonally across the street from St. Mark's School. He saw a person on a stretcher lifted into the ambulance. Gradually, the crowd dispersed and the police vehicles left.

Lorraine Gayle also testified about the police response to the scene of the attack. Gayle, a college graduate and a sales credit analyst for Shearson Lehman, testified that she lived near the intersection of President Street and Brooklyn Avenue. A short time after 11:00 p.m., she was sitting outside her home when she heard yelling coming from Kingston Avenue. She then saw a group of blacks coming west on President Street, yelling and jumping on cars. The shirts that they wore were different colors. She could not specifically remember seeing a red shirt.

After the group passed her residence, Gayle noticed that something was happening at the corner intersection. She saw a large group but could not tell whether they were encircling a person. She ran into her house to call the police. However, she heard police sirens even before she could make the call. She went back into the street and saw members of the group running away in all directions. One member ran into the house next door to hers.

Police cars arrived from all directions. Gayle went to see what was happening and saw Rosenbaum lying on the street. Gayle was present when the ambulance arrived. She did not notice whether anyone was brought over to Rosenbaum because her attention was focused elsewhere. Gayle testified that she met John Anderson at the scene. She recalled that he told her what happened and that she spoke with him for some time.

Inconsistencies and Contradictory Testimony to Show that the Police Lied to Frame Nelson

In addition to cross-examination of the prosecution witnesses, defense counsel offered evidence on his direct case intended to undermine the credibility of the police witnesses. Defense counsel contended that the existence of so many contradictions indicated that the police lied to frame his client.

Beverly Williams, a 911 operator and radio dispatcher for the New York City Police Department, testified that during the evening of August 19, 1991, she was working as a dispatcher at 1 Police Plaza. Williams identified an audiotape cassette as a recording of her voice and the voice of others who had broadcast over the radio on August 19, 1991. She testified that she heard a recorded message on the tape about officers "in pursuit on President and Brooklyn."

Defense counsel asked Williams whether she heard anything on the tape regarding a red shirt.⁷ Williams was not permitted to answer because the Judge sustained the prosecution's objection.

On cross-examination, Williams testified that she could not tell what was going on during the time when static and a blank space appeared on the tape. She said that, "it could be [the officers] trying to say something or someone cutting someone off."

Nelson's Statement was Coerced and He was Incapable of Understanding and Waiving His Constitutional Rights

The defense called three witnesses during the course of the trial to prove that any statements that Nelson may have made to the police after his arrest were made involuntarily. Defense counsel claimed that Nelson's statements were coerced in order to support the police frame. The defense also offered evidence to prove that Nelson did not possess the mental capacity to understand and waive his constitutional rights.

Peter Hamilton, an EMS technician, testified that, in the early morning hours of August 20, 1991, he went to the 71st Precinct. When he arrived, he saw Nelson lying face down in a cell, complaining of chest pain. Hamilton said, "It

did appear as if he was having some shortness of breath and he was drooling from the mouth.” Hamilton said that Nelson had an asthma attack and he was taken by ambulance to Kings County Hospital.

Defense counsel then asked whether Nelson said his condition was brought on by being struck. The prosecution objected. The court ruled that the evidence was inadmissible because it was hearsay. The Judge ordered that any notation in the written EMS Report about Nelson being struck by a police officer should be redacted.

To prove that Nelson did not have the mental capacity to understand and waive his constitutional rights, the defense called two witnesses from Nelson’s school.

Nancy Casella, an assistant principal of a special education program in the New York City Board of Education, testified that Lemrick Nelson attended Paul Robeson High School where she had daily contact with him for about one and one-half years. He was enrolled in a program for children with learning and behavioral problems. Casella testified that she was notified of every fight in which a student was involved. She never received any reports that Nelson had fought with another student. She further testified that he had a reputation for being peaceful.

On cross-examination, however, Casella characterized Nelson as having an “attitude problem” and being very disruptive in class. Nelson had a history of verbally abusing teachers, resisting directions and walking out of class without permission. Casella explained that Nelson was disruptive in an immature way by making the class laugh, rather than by misbehaving in a violent or malicious manner.

Casella further testified that Nelson’s comprehension was below that of a twelve-year-old child and, like most learning disabled children, he had difficulty processing information, and had to be spoken to in simple statements.

The defense also called Dr. Anthony Losardo, a clinical psychologist who tested Nelson’s intelligence quota (IQ) in August, 1989. Nelson received a score of 84 on the test, which is on the low/normal scale of intelligence. Losardo testified that, when he was under stress, Nelson tended to lose control, lose judgment, “become more impulsive, rely upon less information, and act before thinking.”

Losardo was asked whether Nelson would be able to understand the *Miranda* warnings if he had been in a stressful situation and had suffered an

asthma attack. Losardo answered that, "he (Nelson) would lose a lot of his intellectual efficiency," and that "under stressful conditions, his attention breaks down." Losardo opined that "it is possible he (Nelson) did not understand the *Miranda* [warnings]."

On cross-examination, Losardo said that he is not a forensic psychologist and has never had to determine whether a person has waived his *Miranda* rights. He then acknowledged that if Nelson initially made a statement after being given his *Miranda* warnings, and then four hours later, was given the same warnings and asserted his right to remain silent, then it was probable that Nelson understood them.

The Negligence of Kings County Hospital Caused Rosenbaum's Death

The defense offered evidence to prove that the actual cause of Rosenbaum's death was not stab wounds inflicted by his attackers, but the negligence of the physicians at Kings County Hospital who did not properly treat him. In addition to remarks in his opening statement and his cross-examination of prosecution witnesses, Lewis called Sharon Defino and Thomas Birch, the EMS technicians who treated Rosenbaum, in support of this theory. However, Lewis was precluded from eliciting testimony from them on this issue, because of the Judge's prior ruling that such evidence was inadmissible.

Birch and Defino testified that they received a call at approximately 11:15 p.m. on August 19, 1991. They were told to respond to a stabbing at President Street and Brooklyn Avenue. When they arrived, there was a crowd of people. On the northwest corner of the intersection, Rosenbaum was lying on his back on the hood of a car. He was in pain and was having difficulty breathing. Two Hasidic men were trying to calm him.

Birch testified that he saw a black male being shown to Rosenbaum. According to Birch, he was handcuffed and accompanied by a police officer. Birch said that he did not hear any of the conversation. He did not see a knife displayed. Defino testified that, shortly after their arrival, police officers brought a young black male wearing a red shirt to Rosenbaum. She thought that he was in handcuffs, but she was not sure, because his hands were behind his back.

According to Defino, Rosenbaum was very upset. He cursed and spat at the young black man. He said, "Why did you do this to me ..." and called him a coward saying that he had not done anything to the young man. Defino said she did not see anyone else brought over to Rosenbaum, nor did she see a knife.

Rosenbaum was then placed into the ambulance where his vital signs were taken and oxygen was administered. Birch and Defino saw his injuries and

noticed two wounds midway up both sides of his back. Within seven or eight minutes of its arrival, the ambulance left for Kings County Hospital. Birch said he brought Rosenbaum into the major trauma room and told the doctors that “he had a gentleman stabbed a couple of times to the back.”

The Forensic Evidence was Inconclusive

The last witness called by the defense was Dr. Mark Taff, a forensic pathologist in private practice who was formerly a Deputy Medical Examiner in Nassau County. Taff testified that the cause of Rosenbaum’s death was multiple stab wounds to his back, two of which penetrated the chest cavity, punctured the lungs, and caused extreme blood loss that led to his death. Dr. Taff stated that, where there are multiple wounds, it is important to measure the blunt edge of the wound to determine whether there was more than one assailant and whether multiple knives were used. Dr. Gutierrez’s failure to take this measurement, according to Taff, precluded an expert from determining whether Nelson’s knife caused Rosenbaum’s wounds. Taff testified that if the measurement had been made, he could say to a reasonable degree of medical certainty whether the knife recovered from Nelson caused the wounds. On cross-examination, Taff admitted that the precise measurement of the wound is very difficult to make, especially in the area of the lungs, because the lungs collapse when punctured and pull away from the chest wall.

Taff further testified that the Medical Examiner failed to perform certain standard procedures during the autopsy such as photographing the victim’s clothing or conducting trace evidence analysis. Taff explained that trace evidence meant fibers, blood, or tissue that may be transferred from one individual to another. Taff testified that in hand to hand fights, there may be scratching or clawing. He stated that it was routine to examine underneath the fingernails for trace evidence that might connect the attacker to the victim. Taff also said that the laundering of Rosenbaum’s clothes before the Medical Examiner’s Office received them, interfered with the chain of custody and destroyed possible trace evidence.

On cross-examination, Taff admitted that, regardless of whether or not certain tests, photographs, and measurements were made during the autopsy, it was clear to him that Rosenbaum died from the stab wounds. After Dr. Taff’s testimony, the defense rested its case.

The Prosecution's Rebuttal Case

To rebut the defense claim that Nelson's confessions were involuntary, the prosecution called Dr. Sanford Drob, a senior psychologist in the Forensic Psychiatry Service of Bellevue Hospital. Drob's background included the performance of psychological tests, including intellectual, social, emotional, and psychological assessments of individuals who are incarcerated. The court declared Drob an expert in the fields of forensic and clinical psychology after hearing his testimony concerning his qualifications.

Drob testified that he examined Nelson on October 21 and 22 of 1992, for three and a half hours. He tested Nelson and reviewed records. These records included Nelson's school records, the contents of the police interviews of Nelson, and the videotape prepared when the Assistant District Attorney advised Nelson of his constitutional rights.

Drob described the battery of tests that were given to Nelson to test his comprehension, intelligence, and manual dexterity. In the context of his overall performance, Drob stated that Nelson did extraordinarily well — well above what would be expected for his age group. Drob testified that Nelson was exactly average, that is, fifty percent of people his age would score better on the tests and fifty percent would score worse. Drob explained that Nelson understood and was able to define all the elements of the *Miranda* warnings.

Drob said he reviewed the school records closely because of the difference between his finding of an IQ of 100, compared to an IQ score of 85 in the school records. Drob believed that Nelson's attitude at school was not good and that he was unmotivated when tested by the school, resulting in a score of 85. In contrast, Drob believed that Nelson was very motivated when taking the tests for him and, therefore, scored well.

Drob also explained that he administered the adult version of the tests, which are slightly different and include a subsection on the ability to process information. On this section, Nelson scored 12 points, which were not included in the score developed at the school.

Drob further testified that, even with an IQ score of only 85, an individual can comprehend the *Miranda* warnings. The literature that Drob was familiar with indicated that this ability exists unless a person has an IQ below 75. In Drob's opinion, Nelson had the capacity to understand and waive his constitutional rights on August 19, 1991.

Summations

On October 26, 1992, the lawyers for both sides made their closing arguments to the jury.

Defense

The defense summation primarily focused on attacking the credibility of the police witnesses. Lewis challenged the reliability of the victim's identification of Nelson and the voluntariness of Nelson's confession. He questioned the value of the prosecution's forensic evidence. He sought to cast doubt on the prosecution's theory that the attack on Yankel Rosenbaum was unprovoked and that it occurred in the course of bias-motivated mob retaliation.

Lewis reminded the jurors that they were asked, when the case began, to watch and listen to the witnesses to determine if their testimony was truthful. He contended there was an "old saying: You lie about one thing, you lie about all." He also reminded the jurors that they had been instructed that police witnesses have no more credibility than anyone else.

Lewis went through the testimony of each police officer, questioning how the officers could be telling the truth when there were inconsistencies in their testimony. For example, he highlighted the inconsistency between Officer Lewis's and Officer Hoppe's testimony concerning the apprehension of Nelson. He urged the jurors to "[g]o to the record and check it out."

Defense counsel argued that the evidence in the case indicated that Nelson had been framed by the police for a crime that he did not commit. Lewis highlighted the contradictory testimony about the radio transmission concerning the "red shirt." Attacking the credibility of the police witnesses, he argued that Rosenbaum's identification of Nelson was unreliable because the police action of displaying the knife was the factor that caused Rosenbaum to identify Nelson as his attacker. Lewis explained that Nelson's pants became bloodstained when Rosenbaum spat at him at the show-up and not from the bloody knife or a struggle with Rosenbaum.

Defense counsel argued that Officer Lewis's testimony "blew this case out" and questioned "why didn't he hall (sic) in all these lying son of a guns (sic) for perjury...." He emphasized Lewis's testimony that he was over the fence in the yard with Officer Hoppe, that he aided in the search of Nelson, and that he was present at the show-up.

Lewis also argued that Nelson's confession was not voluntary, because Nelson was not emotionally able to understand the questions asked. He asserted that this was supported by the testimony of Nancy Casella and Dr. Losardo who said that Nelson had an emotional age of an eleven- or twelve-year-old. Lewis also asserted that the purported confession was tailored to fit what the police knew about the crime at the time that Nelson was questioned.

Defense counsel also claimed that Rosenbaum was not alone at the time that he was attacked. He implied that Rosenbaum and the other Jewish men who testified were part of the civilian patrol, pointing out that the police came from all directions in response to their call for help.

In conclusion, Lewis implied that the case against Nelson had taken on greater significance and was given more attention than it deserved. He returned to an earlier theme that "if you lie about one thing, you lie about all." He questioned why the prosecution needed to have nine police officers testify "if it was the way they said it was." Lewis noted that the "fancy experts" could not say that it was Rosenbaum's blood on the knife. He argued that the examination was "flawed" because Dr. Gutierrez failed to measure the blunt edge of the wound and, therefore, the prosecution had not established if the knife found on Nelson caused Rosenbaum's death.

In accusing the prosecution of presenting "flawed" evidence, Lewis argued that the prosecution, "in their arrogance... didn't feel that it had to be any better than it was." He concluded by asking the jury to "let them see that we're not anybody's fool, that we will fight against odds; that we will look for truth; and we want justice."

Prosecution

In her summation, the prosecutor argued that Rosenbaum's identification of Nelson and Nelson's confession to Detectives Abraham and Brown constituted proof beyond a reasonable doubt of Nelson's guilt.

The prosecutor highlighted the testimony of the police witnesses and the forensic experts. In marshaling the evidence against Nelson, she argued that, taken as a whole, there was overwhelming evidence of Nelson's guilt. Kolatch stated that Nelson was seen running from the scene by Officer Milazzo. Officers Hoppe and Marinos caught Nelson one block from the scene. Hoppe recovered a bloody knife from Nelson. The blood from Nelson's knife was later tested and found to be consistent with Rosenbaum's blood. Rosenbaum identified Nelson as one of his attackers. Nelson confessed to stabbing Rosenbaum less than three and a half hours after his arrest.

The prosecutor responded to the defense's argument concerning the inconsistencies in the police officers' testimony by explaining that the witnesses were not cameras and that it would be "unrealistic" to expect every witness to tell "exactly the same story." Kolatch asserted that the inconsistencies between Officer Lewis's testimony and the testimony of the other police witnesses were not important. The witnesses were consistent on all the significant events. For example, all the witnesses were consistent on the facts that Nelson was apprehended with a bloody knife and was identified by Rosenbaum.

Kolatch also contended that if the police witnesses had been lying, then there would not have been inconsistencies. She argued that the arrest of C.T. was evidence that the police officers were telling the truth because, if there were a "frame," the officers also would have framed C.T. The prosecutor emphasized that since the police testimony was inconsistent, it was evident that each police officer told the truth to the best of his recollection, instead of altering his testimony to make it consistent.

The prosecutor further argued that the testimony of the defense witnesses was consistent with the police testimony regarding the attack. For example, Kolatch argued that both the prosecution and defense experts testified that the knife found in Nelson's pocket was consistent with all four stab wounds.

The prosecutor contended that the show-up identification was reliable for several reasons. First, Rosenbaum did not identify every individual who was brought to him, such as Anderson and the "chubby kid." Second, Rosenbaum struggled with his attackers so he had ample time to observe them. Third, she argued that Rosenbaum picked out a face, not just a red shirt and that the testimony of John Anderson "changed the identification from a one-on-one show-up to a red-shirt line-up."

The prosecutor contended that the area was saturated with police because of the Cato accident. She also argued that on the night of the killing, the police believed that it was a simple assault. The prosecutor argued that the officers were looking to "get rid of the case." The prosecutor claimed that the police lost their opportunity for a videotaped statement by Nelson when the case was transferred. In taking him from the 71st Precinct to the 60th Precinct, Nelson saw the crowds that had begun to gather at the Precinct and was no longer willing to make a statement.

In conclusion, the prosecutor argued that the testimony of Nancy Casella and Dr. Losardo indicated that Nelson was just the type of person to join in with the mob that attacked Rosenbaum. The prosecutor told the jury that when Nelson stabbed Rosenbaum, he "was accepting responsibility...not only for his own

actions, but for the people he was acting with.” She closed by asking the jury to hold Nelson responsible for his actions.

THE JUDGE’S CHARGE

On October 26, at 2:30 p.m., Judge Rappaport charged the jury. The charge lasted approximately two hours. The Judge repeated the general instructions contained in his preliminary charge regarding the jurors’ role as the fact finders and the court’s role to make rulings on the law.

The Judge further instructed the jury that the rulings made throughout the trial were based upon his knowledge of the law and were not to be taken as an indication that he had any opinion on the guilt or innocence of the defendant. He also cautioned them not to speculate about matters not in evidence and to refrain from permitting considerations about sympathy or punishment of Nelson from entering into their deliberations.

The Judge again charged the jury on the law with respect to the presumption of innocence and the prosecution’s burden to prove Nelson’s guilt beyond a reasonable doubt. The Judge also explained to the jury how various pieces of evidence could be evaluated, including expert testimony and testimony about Nelson’s statements.

The Judge explained the circumstances under which they could find that Nelson was acting in concert with others. According to Judge Rappaport, two people are liable for the same crime when they “are acting together to accomplish a common, unlawful verdict.”⁸ Under the principle of accessorial liability, a person who assists another to commit an illegal act can be found guilty of that act. Both murder counts in the indictment, the intentional murder count and the depraved indifference murder count, charged that Nelson acted in concert in the commission of the murder.

In addition to the two counts of murder in the second degree charged in the indictment, Judge Rappaport also submitted three “lesser included offenses” — two counts of Manslaughter in the First Degree and one count of Manslaughter in the Second Degree — to the jury. The misdemeanor charge of Criminal Possession of a Weapon in the Fourth Degree was not submitted to the jury.

The court allowed the jury to consider the possibility that Nelson had committed manslaughter, rather than murder, and allowed the jury to consider three different theories. The first theory was that Nelson intended to cause *serious physical injury* to Rosenbaum and, as a result of his actions, caused

Rosenbaum's death. Were the jury to find this supported by the evidence, they could convict Nelson of Manslaughter in the First Degree.

The theory underlying the second count of Manslaughter in the First Degree was that, although Nelson intended to cause Rosenbaum's death, he acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."

The final count, Manslaughter in the Second Degree, charged that Nelson *recklessly* caused Rosenbaum's death. The Judge instructed the jury that the elements of this count required that Nelson was aware of, and consciously disregarded, a substantial and unjustifiable risk that his actions would cause Rosenbaum's death; and that the risk was of such a degree and nature that disregarding it was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.⁹

JURY DELIBERATIONS AND THE VERDICT

The deliberations began on October 26, 1992, at 4:40 p.m. and lasted for four days. On October 29, 1992, the jury delivered a verdict of not guilty on all counts.

ENDNOTES

1. A white female juror was replaced on October 16, 1992, by the first alternate, an Hispanic female.
2. See Appendix B for major trial events.
3. See Appendix D for map and photos.
4. "UT" was never identified.
5. It was never asked if this was "UT".
6. David Noll lives in South Africa. He was not called as a witness at the trial.
7. Officer Sanossian had testified that he had transmitted the description "male black in red shirt" immediately after witnessing the attack on Rosenbaum and Officer Marinis testified that he heard the transmission.
8. The Judge referred to the law during his charge to the jury on the "acting in concert" theory and then instructed the jury in "simpler terminology" that "[w]hen two or more persons act with each other in pursuance of a common criminal design, with common criminal intent, each one does some act in fulfillment of that or towards that preconcerted end, then each one of these persons is an accomplice of the other and a principal in the crime, whether he takes a major or minor part in it."

The court also cautioned that "[n]o inference is to be drawn by you because only one of the alleged participants is on trial in this case. You are not to consider that at all."

9. In addition to the manslaughter charges, Assault in the First Degree could have been charged as a lesser included offense of each of the homicide charges in the indictment, however, such charge was neither requested nor submitted. As a lesser included offense of the "intentional murder" charge, Assault in the First Degree would allow the jury to consider the charge that, with intent to cause serious physical injury to Yankel Rosenbaum, Nelson caused such injury by means of a dangerous instrument. As a lesser included offense of "depraved indifference murder," Assault in the First Degree would allow the jury to consider whether, "under circumstances evincing a depraved indifference to human life," Nelson recklessly engaged in conduct that created a grave risk of death to Yankel Rosenbaum and thereby caused him serious physical injury.

Chapter 3

Analysis of the Criminal Investigation

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- ▶ Introduction
- ▶ The Investigation
- ▶ Lack of Prior Relationship Among the Attackers and the Victim
- ▶ Failure to Identify Witnesses or Suspects at the Scene
- ▶ Failures in Obtaining Critical and Timely Information from the Victim and Possible Suspects
- ▶ Improper Handling of the Physical Evidence
- ▶ Summary

ANALYSIS OF THE CRIMINAL INVESTIGATION

INTRODUCTION

A group in excess of ten people participated in the attack that resulted in the death of Yankel Rosenbaum. However, only Lemrick Nelson was arrested and charged with the murder. He was subsequently acquitted. With no one held accountable, many questions were raised about how the justice system functioned in this case.

- Why was no one other than Lemrick Nelson arrested and prosecuted when it appeared that many others were involved in the attack on Yankel Rosenbaum?
- Were proper procedures followed in the initial investigation of the case? Was the physical evidence handled properly? Were all potential witnesses identified and interviewed?
- Was the subsequent investigation diligently and thoroughly conducted?

The Governor's Executive Order directed a review of the "facts and circumstances surrounding the criminal investigation and prosecution arising from the death of Yankel Rosenbaum." This chapter examines the problems associated with the identification of the witnesses and suspects, the taking of statements from the victim and suspects, and the handling of the physical evidence.

We reviewed the actual investigation and attempted to determine what, if any, difficulties existed which resulted in no one being held accountable for the murder of Yankel Rosenbaum. We compared the investigation conducted in this case with recommended investigative practices. In doing so, we recognize that the circumstances surrounding the attack on Rosenbaum were chaotic and the circumstances under which the initial arrest and investigation took place were less than ideal. The disturbance following the death of Gavin Cato was the most widespread racial unrest to occur in New York City in more than twenty years. The four-day disturbance was characterized by street assaults, police officers in need of assistance, vehicle fires, commercial burglaries, and riotous crowds.

To accomplish this task, we sought and received the full cooperation of Charles J. Hynes, the District Attorney of Kings County, and Raymond W. Kelly, the Police Commissioner of the City of New York. We were provided with access not only to their office's files, but to staff members who were involved in the investigation and prosecution of various aspects of the case.

The files provided by the District Attorney's Office included copies of relevant police reports and memoranda, as well as an audiotape, a videotape, and photographs of the physical evidence that were introduced at trial.¹ The District Attorney and several members of his Executive Staff were interviewed. The trial prosecutors and their supervisors were also interviewed.

We also reviewed the case file of the New York City Police Department and additional summaries of the investigative efforts.² We interviewed the Chief of Detectives, Joseph Borrelli, and Lieutenant Vincent Ferrara, the Commanding Officer of the 71st Precinct Detective Unit. Detectives Edward Brown and Nemesio Abraham, the detectives assigned to the Rosenbaum homicide, were also interviewed regarding their efforts to identify additional suspects.

The files of the Medical Examiner and the Chief of Serology were examined, as well as the medical records of the victim and the suspects. Experts in the fields of forensic pathology and biology were also consulted.

It is important to note that our ability to conduct this review was limited due to the pending federal civil rights investigation. Witnesses who might testify at a federal trial were not interviewed. Moreover, although in our judgment it did not impede our review, we lacked subpoena power and, therefore, we had no ability to compel testimony under oath. Finally, we note that we are not empowered as a police investigative body, nor authorized to conduct an independent police investigation into this matter.

THE INVESTIGATION

The Arrest

The police response to the stabbing of Yankel Rosenbaum began when Police Officers Milazzo and Sanossian of the 70th Precinct saw an assault as they were returning to their precinct after responding to the Cato accident. The officers turned on their siren, causing a group of ten or more black males to disperse. As the officers got out of their patrol car, they called for additional assistance over their radio.

The police chased an individual in a green shirt, who was later identified as C.T., who had run from the scene of the assault. They caught C.T. and brought him back to Yankel Rosenbaum who lay bleeding on the hood of a car. According to one of the officers, Rosenbaum said, "There were fifteen of them. He's one of them." No further questions were asked of Rosenbaum.

C.T. was arrested and taken to Kings County Hospital for treatment of cuts he sustained during a struggle with the officers. There is no indication in the police file that a systematic search was conducted to determine whether a knife had been discarded along the route of his flight or at the scene of his apprehension.

Although at least two other young black males were shown to Yankel Rosenbaum, they were not identified by him. These two men were released without any record made of their names or their descriptions.

Officers Hoppe and Marinos, of the 71st Precinct, who were in their patrol car, heard a call for assistance and responded. As they turned onto Brooklyn Avenue, they saw a black male, Lemrick Nelson, jump over the fence surrounding the small front yard of a house at the corner of Union Street, and hide behind a bush. This was one block from the scene of the stabbing.

Hoppe jumped over the fence, frisked Nelson, and recovered a blood-stained knife from the pocket of Nelson's pants. In addition to Hoppe's partner, three other police officers were present at the scene of Nelson's capture.

Nelson was helped over the fence and all the officers walked with him and Hoppe over to Yankel Rosenbaum. Nelson was identified by Rosenbaum. According to Hoppe, there were approximately ten additional, unidentified police officers near the scene. There were also EMS technicians present, as well as a number of civilians. The names of the unidentified officers and civilians were not recorded.

Nelson was then placed under arrest. Two transit officers transported Nelson to the 71st Precinct. The names of these police officers were not recorded.

Initial and Subsequent Investigative Efforts

In our interviews, the police have said that they have taken every possible step to ensure that the investigation of the murder of Yankel Rosenbaum is as complete and thorough as possible. Among the steps taken by the police were

canvassing of the crime scene area, questioning of Nelson's friends, interviewing of arrestees, and pursuing leads and anonymous tips.

Investigation by the Crime Scene Unit

At 3:15 a.m., one hour after they were notified that Rosenbaum had died, the Crime Scene Unit responded to the scene. This was nearly four hours after the attack on Rosenbaum. Photographs and blood samples were collected from the area where Rosenbaum was stabbed and where C.T. was caught.

Canvass of the Area

In an effort to locate possible witnesses to the attack on Rosenbaum, the police conducted a canvass on President Street from Kingston Avenue to New York Avenue — one block east and west of the scene of the stabbing. There was no canvass of the houses located on the side streets north or south of the crime scene. Nor were any of the buildings on the streets around the block canvassed. The canvass began August 27, 1991, and continued through August 29, 1991. A total of thirty-five people were interviewed.

In addition, on September 7, 1991, the police canvassed passersby in the area of President Street and Brooklyn Avenue, but did not identify any witnesses. The police conducted a final canvass on September 10, 1991, and interviewed an additional seven people.

Additional Efforts to Identify Witnesses

In November, 1991, the detectives contacted Rabbi Spielman, a community leader in Crown Heights, for help in identifying civilians who may have witnessed events relevant to the case. Rabbi Spielman told them about Shaya Boymelgreen. The next day, Boymelgreen was interviewed. He said that he and his brother-in-law, Yakov Felig and his wife Gutal, were in Boymelgreen's car when they saw Rosenbaum stumbling in the street and a group of youths fleeing. The Feligs were interviewed on December 9, and 11, 1991. They said that they were present when Rosenbaum identified the youths. However, none felt that they could identify the youths.

In addition, Norman Rosenbaum, the brother of Yankel Rosenbaum and an Australian lawyer, came to New York and conducted his own investigation into the murder of his brother. As a result of these efforts, he provided the District Attorney's Office with the names of eight potential witnesses. On November 17, 1991, the prosecutor provided the names of these witnesses to the police.

Over the next few days, these individuals were interviewed. Some provided eyewitness accounts of various events surrounding the crime. They said that they could not identify anyone and the police did not show them photographs of possible suspects.

Several of these witnesses, including Meyer Rivkin, Chaya Sara Popack and Chaim Lieberman were called at the trial by the defense. These witnesses actually provided information that corroborated police accounts of Rosenbaum's identification of Nelson.

The police have also attempted to interview two witnesses, John Anderson and Lorraine Gayle, who testified as defense witnesses at the trial. These witnesses testified that they were present at the scene of the attack and the identification of Nelson by Rosenbaum. Anderson testified that he could identify other individuals at the scene. However, these witnesses have refused to speak to detectives or to federal authorities about the case. The witnesses claim that Nelson's defense counsel advised them not to speak about the case.

Friends of Nelson Located and Interviewed

The detectives located and interviewed all of those individuals who were reportedly with Nelson at 457 Schenectady Avenue on the night of the homicide. None of these individuals reported seeing Nelson with a knife, nor did anyone provide information concerning the homicide.

On November 8, 1991, "B,"³ a friend of Nelson's, told the police that he was with Nelson and other friends on Schenectady Avenue the night of the homicide, but left the group to attend a concert. He learned about Nelson's arrest and visited him about nine days after the homicide while Nelson was incarcerated on Riker's Island. According to "B", Nelson told him that he and fifteen others had beaten Rosenbaum. Several days later, "B" repeated his account to the prosecutor and he submitted to a polygraph test. The polygraph expert concluded that "B" was not criminally involved in the case.

Although the prosecutor requested that "B" repeat his statement on tape, he refused to do so. He did, however, sign a statement that the prosecutor recorded in writing. "B" said that he would not voluntarily testify against Nelson in court. Although the prosecution could have subpoenaed "B," he told them that he would claim that he was beaten and only gave the statement because he was coerced. As a result, "B's" testimony would have been of little use, because his statement could only have been used to impeach his testimony at trial and not as proof of the information it contained.⁴

Follow-up Investigations of Anonymous Calls

On August 22, 1991, the police learned that the Joy Behar *WABC* radio show had received a call at 10:25 a.m., from a man who identified himself as "Zelman." The caller claimed that he was at the scene of the crime. In an attempt to identify the caller, the detectives asked the station to make periodic announcements asking Zelman to call the police. The station agreed. The police also requested assistance from members of the community and contacted individuals with that same name listed in the telephone book.

Several weeks later, a request was made to examine the phone records of the radio station. On September 25, 1991, the call was traced to a person who bore the name Zelman as his middle name. This person, however, denied making the call and said that he could provide no helpful information about the murder of Yankel Rosenbaum.

On September 4, 1991, the police received an anonymous call from someone who claimed to be a witness to the homicide and said that two black males, "C" and "D," were involved. The caller identified the residence of these individuals. Detectives from the 71st Precinct went immediately to their residence where they spoke to the superintendent who confirmed that "C" and "D" lived in the building.

The detectives requested that investigators from the District Attorney's Office conduct photo and video surveillance of "C" and "D's" residence. This was done during September and October. The photos and tapes were later shown to others in the neighborhood who identified "C" and "D."

Subsequently, both "C" and "D" submitted to polygraph tests administered by the District Attorney's Office. The expert determined that they were not criminally involved in the homicide.

On December 8, 1991, the police received an anonymous call alleging that "E" had information about the crime. When "E" was interviewed he told the police that, on an occasion previous to the commission of the crime, he had seen Nelson with a knife. "E" provided no specific information about that knife and nothing about the Rosenbaum murder. Two other youths confirmed the story told by "E."

Interviews of Arrestees

In an attempt to develop information about additional suspects, the police conducted interviews of individuals who were arrested in Crown Heights for crimes other than the Rosenbaum attack. Detectives and police officers asked all

new arrestees where they were on August 19, 1991, and whether they had any information about the homicide of Rosenbaum. The police file indicates that the interview process began on August 24, 1991, and occurred intermittently until the trial began on September 8, 1992.

Initially, this aspect of the interview process formally occurred only in the 71st Precinct. After Nelson's acquittal, however, the Police Department expanded the interview program to include all arrestees in every precinct throughout Brooklyn. According to Lieutenant Ferrara, more than 10,000 individuals have been questioned with respect to the Rosenbaum homicide.⁵

Rewards Posted

In September, 1991, the Jewish Community Relations Council and the Crown Heights Jewish Community Council, offered a \$10,000 reward "for information leading to the arrest and conviction of the persons responsible for the murder of Yankel Rosenbaum."

The police file indicates that posters were sent to all precincts, specialty squads, and Brooklyn Central Booking, in addition to hospitals, schools, government offices and stores.⁶ Detectives Abraham and Brown also posted approximately 100 of these posters along Eastern Parkway from Kingston Avenue to Bedford Avenue, and on all side streets. An additional 500 posters were given to the Hasidic Community for their distribution.

In the 71st Precinct, a sergeant in the Community Policing Unit was assigned to distribute some of the posters. The sergeant unilaterally decided that to do so would create tension within the community and so he did not distribute them. According to the detectives, when this omission was discovered, hundreds of additional posters were printed and distributed throughout the 71st Precinct.

Following Nelson's acquittal, Mayor Dinkins announced a \$10,000 reward for information leading to the arrest and prosecution of those responsible for the murder of Rosenbaum. Some have criticized the Police Department and the Mayor for not offering a reward sooner, arguing that it was indicative of a failure to appreciate the importance of apprehending and bringing to justice all of the members of the group that attacked Rosenbaum.

According to Chief Borrelli, a reward seemed unnecessary earlier, because Nelson, who was believed to have been the only stabber, had been arrested and charged with the murder. Moreover, the reward offered by the Jewish organizations had thus far been unsuccessful in providing information about additional suspects.

Chief Borrelli noted that, despite the decision that the offer of a reward was unnecessary, the Police Department has followed all of the leads that were developed as a result of their investigative efforts. All of the calls to 911 that occurred at about the time of the attack on Yankel Rosenbaum were investigated to determine whether there was any information about the stabbing. Every individual claiming to have information relating to the crime was interviewed by the District Attorney's Office or the police.

The Police Department has indicated that the investigation into the murder of Yankel Rosenbaum is ongoing. Until recently, the assigned detectives, Abraham and Brown, worked exclusively on the Rosenbaum case. While Detective Brown remains assigned to the case on a full-time basis, Detective Abraham is now investigating other homicides as well.⁷ According to the police, additional resources have been committed as information has become available. In our interview of Chief Borrelli, he indicated that the case will remain active until all of the suspects in the homicide are identified and arrested.

LACK OF PRIOR RELATIONSHIP AMONG THE ATTACKERS AND THE VICTIM

The police have been frustrated in their efforts to identify and bring to justice additional culpable parties due, in part, to the inherent difficulty of investigating a crime involving a group when there is no prior relationship among the attackers and the victim. Not only must the participants be identified, but the prosecution must be able to prove what each participant was doing and that each participant had the requisite criminal intent.

Unlike other well-publicized racial killings in Howard Beach and Bensonhurst, which also involved groups of attackers, the murder of Rosenbaum occurred in the midst of a riot that involved hundreds of people, many of whom were not known to each other.⁸

Though the incidents in Howard Beach and Bensonhurst were also acts of gang violence, the particular circumstances surrounding those crimes facilitated the prosecution of the guilty parties. For example, in the Howard Beach case, the individuals involved in the incident were acquainted with each other and were at the same party just prior to the homicide. This fact enabled the police to quickly identify most of the participants in the crime. Also, when one of those participants agreed to cooperate with law enforcement authorities, the identification, prosecution and conviction of the remaining suspects was then possible. In the Bensonhurst case, all of the participants were friends, having grown up

together in the community where the homicide occurred, so it was easier for the police to ascertain their identities.

Among the several factors that hampered the ability of the police to identify additional suspects in the homicide of Yankel Rosenbaum was the extremely volatile situation resulting from the disturbances occurring in Crown Heights on the night that Rosenbaum was killed. There were hundreds of people running through the streets, many of whom did not live or work in the neighborhood, but came to Crown Heights for other reasons. Some were there because they had attended a concert nearby, while others came to watch, or participate, in the demonstrations that followed the Cato accident.

Considering the disturbances in Crown Heights at the time Rosenbaum was attacked, it is fortuitous that two police officers came upon the scene. These officers immediately began to pursue the fleeing assailants while calling for the assistance of other officers. Although the arrival of the police caused the crowd to disperse, two police officers responding to the call for help apprehended Nelson within one block of the scene of the assault, approximately three minutes after it occurred.

Other than Nelson and C.T., Rosenbaum did not identify any of the other young men shown to him as participants in the attack. Although C.T. admitted being present, he did not identify Nelson as one of the assailants nor has C.T. identified any other members of the group.

Nelson also said that he did not know any of the other participants in the group that attacked Rosenbaum. He told police that he was alone when he saw the crowd that gathered at President Street and Brooklyn Avenue yelling, "There's the Jew. Let's get the Jew." He said that he joined the crowd because he was excited and high from the beer he had been drinking earlier. Nelson did not live in Crown Heights at the time of the riot. He was there visiting friends. They did not accompany him when he parted from them to go to the scene of the Cato accident.

The presence that night of an anonymous group of persons largely unknown to each other made it difficult for those who saw the attack to make positive identifications. Even Officer Milazzo, a trained observer who was in the first police car that arrived at the scene of the attack, could only say that he saw a black male in a red shirt attacking Rosenbaum. Although Milazzo testified that Nelson was of the same stature and wearing the same color shirt as the attacker, he could not positively identify Nelson as that man. Other eyewitnesses who were present at the scene of the identification, Boymelgreen and Felig, told police that they would be unable to identify the participants.⁹

To arrest and successfully prosecute others who were involved in the attack, the police and prosecution must have witnesses who can identify the participants in the crime and describe the actions of each participant in the group that attacked Yankel Rosenbaum. The law requires two basic elements to hold a person criminally responsible for the acts of another in order to sustain a successful prosecution. First, there must be proof that each person charged did some deliberate act as a part of the crime. Second, there must be proof that this person shared the same state of mind as the killer.

In the case of Rosenbaum's murder, the prosecution must prove beyond a reasonable doubt that any other person who may be charged knew that Nelson was going to stab Rosenbaum. They must also prove that they shared Nelson's intent to murder Rosenbaum. A person's mere presence at the scene, without proof of deliberate action, is insufficient to warrant a criminal charge. If the law were different, C.T. would also have been charged with murder.

While there is no doubt that the attack on Rosenbaum can be distinguished from the Bensonhurst and Howard Beach cases, it is also clear that the failure to hold someone accountable for Rosenbaum's murder can also be attributed to critical deficiencies in the initial, and subsequent investigation.

FAILURE TO IDENTIFY WITNESSES OR SUSPECTS AT THE SCENE

The importance of immediacy and thoroughness in criminal investigations is universally recognized by law enforcement experts. The role of the initial officer on the scene is, therefore, critical to the future of the case. "The actions that he or she takes may well determine if the criminal investigation has a successful conclusion. The early stages of a criminal investigation are typically the most crucial and begin at the crime scene."¹⁰ For example, recording statements, listening for spontaneous remarks, and taking the names and addresses of eyewitnesses, bystanders, and participants are important initial investigative activities. Also, pursuing suspects and securing the crime scene from further intrusions are necessary first steps in an investigation.

Particularly, when the crime is a homicide, "*everything* should be investigated, even in cases where the criminal has been arrested immediately after the crime and has confessed."¹¹ [Emphasis added.] In those cases where a suspect in custody confesses, and physical evidence connects him or her to the commission of the crime, the temptation may exist to limit the investigation. The results of a thorough police investigation, however, which takes into account as

much evidence as possible to reconstruct the criminal event, can turn what appears to be strong evidence into conclusive proof.

As noted earlier, during the first few days of the investigation, Crown Heights was in the midst of an ongoing civil disturbance. This mayhem, no doubt, hampered early investigative efforts.

In this case, witnesses to the murder incident were not identified until after the initial police investigation or after the prosecution's case. This can be attributed to the departure from appropriate police practice of recording the names of all witnesses at the crime scene. Accordingly, much valuable information which could have been offered to further aid in the investigation was ultimately unattainable.

During the Initial Investigation, Crucial Information Concerning the Names of Witnesses and Possible Suspects was not Collected

It is proper procedure to record or make entries in an activity log noting the "identity of suspects, witnesses, complainants, and any statements made..."¹² This was not done.

The police never ascertained the identities of all witnesses at the time of the incident. In this case, there were relevant witnesses (John Anderson, Lorraine Gayle and Chaya Sara Popack) to the assault on Rosenbaum. They were not identified until after the initial police investigation or after the prosecution had presented its case.

Additionally, not all of the police witnesses at the scene were identified. According to Officer Hoppe, in addition to his partner, Officer Marinos, there were two transit police officers who transported Nelson to the 71st Precinct, as well as approximately ten additional police officers near the scenes of the crime and the apprehension and identification of Nelson.

Despite the number of police officers involved in the events surrounding the death of Rosenbaum, according to police files, the case detectives interviewed only six officers: Officers Milazzo and Sanossian, the first two officers on the scene; Officer Hoppe, the arresting officer, and his partner, Officer Marinos; Sergeant Wilson, the supervising patrol officer at the scene of the identification of Nelson; and Officer Halfhide, who was at the scene of the Cato accident.

Relying upon the apparent strength of its case, the prosecution apparently did not appreciate the need to aggressively pursue the identification of additional witnesses.¹³ Although the prosecutor said that she knew that other officers had transported Nelson to the 71st Precinct, she did not attempt to interview them. In fact, she did not attempt to identify them until ordered by the court to do so after Detective Litwin testified about them at the suppression hearing. These officers were not interviewed by the prosecution until after the prosecution had presented the testimony of most of the police witnesses.

Our review of the records relating to 911 calls for the night of the homicide indicates that there were numerous police officers in the vicinity of the crime and the apprehension and identification of Nelson. Although the tapes did not identify individual officers, they did identify the units (patrol cars) that responded to the radio calls for assistance at Brooklyn Avenue and President Street. The tapes indicated that in addition to Officers Sanossian, Milazzo, Hoppe and Marino, at least two patrol cars from the 69th Precinct responded to the scene, as well as four additional officers from the 71st Precinct. These individual officers can be, and should have been, identified by the roll call logs at their precincts. Neither the Police Department, nor the District Attorney's Office has done so. These officers have not yet been identified or interviewed.

At the scene of the attack, at least four black males were shown to Rosenbaum by the police. Two of the males shown to Rosenbaum were not identified by him and were, therefore, released. The investigating officers did not note their names, or their descriptions. These individuals were not questioned further about the crime.

This oversight may have affected the progress of the investigation. If routine procedures had been followed for the recording of these details, there may have been additional information available to help identify others who were involved in the attack on Rosenbaum. Moreover, additional information relating to the youths who were released would have helped the prosecution to demonstrate to the jury that Rosenbaum was able to distinguish between and among different male black youths.

Other individuals were present at the scene. They might, if interviewed, have provided additional information about the attack.¹⁴ For example, a photographer from *Newsday* was at the scene. He took photographs of Yankel Rosenbaum lying on the hood of the car. According to the District Attorney's Office, they called *Newsday* to try to interview the photographer. They were told that the photographer was "unavailable" and that, if interviewed, the photographer would say that he was busy taking pictures and did not hear or see anything. No further efforts were made by the Police Department or the District Attorney's Office to interview the photographer or examine the pictures he took at the scene.

These witnesses may have led the detectives and the prosecution to John Anderson, who testified at trial as a defense witness, and "U.T.," the individual with him who has not yet been identified.

EMS technicians were also present when Rosenbaum identified Nelson. However, their names were not recorded by any of the police officers at the scene. The identity of the EMS technicians was available from the records provided to the prosecution. The prosecution did not interview the technicians prior to trial. It was only when they learned that the technicians would be called as defense witnesses that the prosecution interviewed them. Their testimony was largely supportive of the prosecution's case.

According to Shaya Boymelgreen, a civilian witness at the scene when Rosenbaum identified Nelson, he was instructed by a police officer to go to the 71st Precinct. After waiting there for twenty-five minutes without further contact by any police officer, he departed the Precinct without leaving his name or without being interviewed.

Subsequent Investigative Efforts to Collect Information have Proven Ineffective

The failure of the officers at the scene of the attack to record the identities and statements of the witnesses present impeded subsequent investigative efforts.

The Canvass was not Completed in a Timely, nor Thorough Manner

One important investigative technique for identifying witnesses after the fact is conducting a thorough and timely canvass of the area where the crime was committed. It is fundamental to a good investigation that "an interview should take place as soon as possible after the event."¹⁵

A review of the police file indicates that the canvass was neither timely nor complete. The canvass should have been conducted as soon as possible following the commission of the crime to maximize its effectiveness as an investigative tool. In this case, eight days passed before the canvass began.

According to Lieutenant Vincent Ferrara, the Commanding Officer of the 71st Precinct Detective Unit, the canvass should have included an area two blocks square of the homicide. A review of the reports filed by the detectives who conducted the canvass, however, indicates that the canvass included only buildings that were on President Street, approximately one block east and west

of Brooklyn Avenue. The buildings located on the side streets and around the block were not canvassed.

The canvass began on August 27, 1991. On that date, only fifteen people were interviewed, because there were no answers at many houses. On August 28, 1991, seventeen people were interviewed. Many others were not home. On August 29, 1991, the police returned to the area and spoke to only three additional residents. On September 7, 1991, Detectives Brown and Abraham canvassed passersby in the vicinity of President Street and Brooklyn Avenue, but they were unsuccessful in identifying any additional witnesses. On September 10, 1991, the police conducted the final canvass on President Street and were able to interview only seven people.

A canvass should be conducted systematically to ensure that every possible witness is located. For example, although the police went to the residence of Lorraine Gayle and spoke to her mother, they did not learn that Gayle was present at the time of the homicide and that she had seen suspects flee the scene. However, Gayle was located by the defense and testified at the trial as a defense witness. The police have contacted her since the trial. However, on the advice of Nelson's defense attorney, Gayle has refused to speak to the police or provide any information about the homicide.

FAILURES IN OBTAINING CRITICAL AND TIMELY INFORMATION FROM THE VICTIM AND POSSIBLE SUSPECTS

Although identifications were made by Rosenbaum, critical questions concerning the involvement of other suspects remain unanswered. The length of time that elapsed between the attack and the questioning of other suspects may hamper the ability of the police to identify other suspects and to properly record Nelson's confession.

No Interview of Rosenbaum was Conducted

The various accounts given by police and civilian witnesses who saw Yankel Rosenbaum immediately after the attack, indicate that although he was seriously injured, he was lucid and would have been able to provide more details about the attack. John Anderson said that Rosenbaum chased some of the people who attacked him. When Sergeant Wilson first saw Rosenbaum, Rosenbaum was walking in the street. Although Rosenbaum told Wilson that he had been stabbed, Wilson did not ask him to describe the attack.

Rosenbaum was placed on the hood of a car and several civilian witnesses described him as "aggressive," and trying to break free to chase those who had attacked him. When individuals were brought to Rosenbaum for identification, he was able to distinguish between similarly dressed young black males, just as he was able to recognize his friend, Chaim Lieberman, who was walking nearby. Moreover, when Nelson was brought to Rosenbaum, Rosenbaum yelled, cursed, and spit at him, asking why Nelson had stabbed him.

Rosenbaum's statements at the scene relating to the identifications of Nelson and C.T. had limited value without further development. The proper collection and preservation of evidence requires that witnesses with information about relevant events be identified and statements be obtained. This should occur as soon as possible after the commission of the crime. Not only do these individuals provide necessary information but they provide a starting point for the developing investigation.¹⁶

Rosenbaum should have been given the opportunity to provide specific information to the police about the circumstances leading to the attack and the actions of those who participated in it. Although he lived for three hours after the crime was committed, no police officer or detective questioned him. Had questions been posed and an interview been conducted, the police may have obtained critical investigative leads from Rosenbaum for use in identifying additional suspects.

Lacking Additional Information, Rosenbaum's Ambiguous Identification of C.T. was Deemed Insufficient to Support an Arrest and Prosecution

The only evidence against C.T., other than his flight from the scene of the attack, was the statement made by Rosenbaum when he identified C.T. According to Sergeant Wilson, Rosenbaum said: "There were fifteen of them. He's one of them."

Detective Abraham interviewed C.T. in the early morning hours of August 20, 1991. After he was advised of, and waived, his rights, C.T. said that he had heard about the Cato accident and went to the scene. There, he saw the large crowd that had gathered, run down President Street. According to C.T., when he arrived at the intersection of President Street and Brooklyn Avenue, there was a group of black males assaulting a Jewish man. C.T. stated that he would be able to identify two of the men whom he saw punch and kick the victim.

C.T. denied, throughout questioning by the police, that he had participated in the assault of Rosenbaum. C.T. explained that he ran from the scene when the police arrived because everybody else ran. C.T. did not have a knife when he was arrested. Subsequent forensic tests of C.T.'s clothing indicated the presence of his own blood and not Rosenbaum's blood.

The District Attorney's Office determined that Rosenbaum's statement was ambiguous and insufficient to convict C.T. of Rosenbaum's murder. The mere presence of a person at the scene of the crime is not enough to charge that person with the commission of that crime.¹⁷ The Office, therefore, ordered the police to void C.T.'s arrest. If more information was obtained from Rosenbaum concerning C.T.'s actions, the possibility exists that there would have been adequate evidence to support an arrest and prosecution.¹⁸

The Police Delayed Taking Statements from Nelson and Other Possible Suspects

The arrests of Nelson and C.T. took place at approximately 11:30 p.m. However, no attempt was made to take statements from either suspect until after Rosenbaum died at approximately 2:25 a.m. "As a general principle, an interview should take place as soon as possible after the event...[since] the [subject would have] had little time to contemplate any untoward consequences of his giving the information."¹⁹ The arresting officer did not obtain any details other than pedigree information from Nelson while they were at the 71st Precinct.

After Rosenbaum died and the case was classified as a homicide, Detectives Edward Brown and Nemesio Abraham were assigned to the case. As the detectives prepared to interview Nelson, they were told by Detective Sergeant Thomas Redmond, that Deputy Chief Emil Ciccotelli had ordered them to move to a less crowded precinct. Since the detectives were concerned that moving Nelson would disrupt their interview, Abraham went to try to convince the supervisor to let them stay. Brown remained with Nelson and advised him of his constitutional rights. Nelson then confessed to stabbing Rosenbaum.

When Abraham returned and reported that they would have to move to another precinct, Brown went to speak to Sergeant Redmond to appeal the decision that they move. While Brown was gone, Abraham advised Nelson of his rights and Nelson repeated his confession.

Neither detective asked Nelson to initial the card printed with the *Miranda* warnings to show that he had understood and waived his rights. Brown did not take contemporaneous notes of the interview. Abraham testified that he began to

take notes when Nelson went over his statement for the second time. These notes were not introduced at trial, nor were the notes in any of the police files that we reviewed. Lastly, Brown did not write down what Nelson said until about six hours after Nelson made the statements.

The fact that each detective questioned Nelson while the other detective was out of the room not only meant that the statements were not witnessed, it also interfered with the prompt recording of the statement. To the extent practicable, confessions or statements made by suspects should be reduced to writing promptly and should be audiotaped or videotaped at the earliest opportunity. "A written or recorded statement lends considerable support to the...contention that the accused did in fact confess."²⁰

Under routine circumstances, Nelson's oral confession to the police should have been reduced to writing as soon as possible, if not contemporaneously with his admission. "Even a few hours after the oral confession may be too late. During such an interval the subject may reflect upon the legal consequences of his confession"²¹

Despite the repeated requests of the detectives, Ciccotelli ordered them to move Nelson to another precinct. When they were leaving the 71st Precinct, Nelson saw barricades and demonstrators around the Precinct. According to Brown, Nelson stiffened and asked the detectives how much trouble he was in. Nelson was told that he was under arrest and that everything else was uncertain.

Several senior assistant district attorneys were at the 71st Precinct engaged in the investigation of the fatal automobile accident. At approximately 3:30 a.m., when the detectives were leaving for the 60th Precinct, they were told that an assistant district attorney would follow them to the Precinct shortly thereafter. It was not until 7:30 a.m. — four hours after their request and eight hours after the attack — that an assistant district attorney arrived at the 60th Precinct and attempted to take a statement from Nelson.

During this interview, Nelson refused to waive his rights and to make a statement about the crime. Nelson was then transported to Central Booking for arraignment on a charge of murder in the second degree.

IMPROPER HANDLING OF THE PHYSICAL EVIDENCE

The immediacy of evidence collection affects the reliability of the evidence in court. This applies to both testimony and physical evidence.²² The farther

in time from the incident that a crime scene is searched, the less likely that evidence of any value will be found. And, if any evidence is discovered, the later the evidence is tested, the more susceptible it is to deterioration.

Similarly, the crime scene and the areas around it must be searched thoroughly and immediately for physical evidence. Any evidence found must be properly preserved and processed to maintain its integrity and evidentiary value. When such evidence is found it can be critical to understanding what happened and who may be responsible for a crime. It can also provide essential evidence necessary for a successful prosecution.²³ It is imperative, therefore, that the crime scene be preserved and that all available physical evidence be properly collected and stored to prevent its contamination.

In the course of the investigation, the police recovered physical evidence from the defendant that was probative of Nelson's guilt. The documentation, collection, and preservation of evidence is critical to retaining the value of the physical evidence.²⁴ Necessary resources were not available to the officers to properly preserve the evidence. Moreover, there was a departure from routine police procedure in the handling of the evidence. Thus, the value of the physical evidence in this case was compromised.

The Bloodstained Knife Discovered on Nelson, Which Should Have Provided a Key Piece of Proof in the Prosecution's Case, was not Properly Handled

The initial police response to the stabbing of Yankel Rosenbaum was immediate. Officers Sanossian and Milazzo came upon the scene and effectively used the police communications system to bring additional police personnel to assist in the apprehension of fleeing suspects. Officers Hoppe and Marinos responded immediately to the officers' call for assistance. They saw Nelson and apprehended him. Hoppe recovered a bloodstained knife from Nelson at the scene. At the Precinct, Hoppe found three one dollar bills that appeared to have blood on them in the same pocket of Nelson's pants in which he had earlier discovered the knife. The police also took and vouchered Nelson's bloodstained clothing.

Although these items of physical evidence should have provided strong evidence of Nelson's guilt, the police did not properly preserve their integrity. According to one of the police officers at the scene when Nelson was apprehended, the bloodstained knife taken from Nelson was handled by three police officers before Officer Hoppe placed it in his pocket.

Later at the Precinct, Hoppe placed the bloodstained dollar bills found on Nelson in his pocket where he had put the knife. He then commingled the money with the knife that was recovered from Nelson. When Hoppe later removed the bills and knife from his pocket, he placed all the items in a bag that he happened to find lying on a desk. Hoppe then placed the bag in his pocket before turning it over to Officer Milazzo who processed Nelson's arrest. Later that evening, Milazzo gave the bag to Detective Abraham who had been assigned to the case.

At the very least, the officer should have given the bag to the detective directly, since "the less people who handle the evidence, the more likely the integrity will be maintained."²⁵ Additionally, the proper evidence envelopes should have been used for the knife and the one dollar bills. More importantly, the knife and dollar bills should have been packaged separately to avoid commingling of the evidence.

When Detectives Abraham and Brown received the bag containing the knife and dollar bills, they took this evidence to the Medical Examiner's Office. They watched Dr. Gutierrez examine and measure the knife and the stab wounds on Rosenbaum. After Gutierrez performed the autopsy, he established that Rosenbaum had bled to death as a result of the stab wounds and that the knife recovered from Nelson was consistent in size and shape with all four of the wounds.

After the autopsy, the evidence was not immediately vouchered by Abraham, but rather stored in his locker at the Precinct. Proper practice for such evidence specifies that "all serological evidence...be refrigerated as soon as possible."²⁶ However, since there was no refrigerator available at the Precinct for the storage of evidence, this was impossible. More than thirty hours elapsed before the detective vouchered the evidence. Although police procedure provides that the detective should have also vouchered the paper bag in which the evidence had been kept, the bag was discarded.

The knife was crucial evidence in support of the prosecution's case. It could have provided information that connected Nelson to the attack on Rosenbaum. Because routine serological testing could not conclusively identify the blood on the knife as that of Rosenbaum's, the prosecution requested additional testing. Specifically, the prosecution decided to submit swabs of blood taken from the knife for deoxyribonucleic acid (DNA) analysis, a more sophisticated test.

The Center for Blood Research (CBR) Laboratory in Boston was asked to do Polymerase Chain Reaction (PCR - DQ Alpha) testing, a type of DNA analysis that can be done on extremely small samples, such as those on the knife and one dollar bills.²⁷ CBR Laboratories determined that the blood on the knife

and some of the one dollar bills was consistent with Rosenbaum's blood type and inconsistent with Nelson's blood.

It is clear that the integrity of the knife as physical evidence in this case was compromised by the officers' and detectives' improper handling. Not only was the knife handled unnecessarily, but it was also not properly preserved and was commingled with the three one dollar bills. The DNA analysis performed on the knife indicated that the blood on the knife was consistent with Rosenbaum's blood. Thus, had appropriate procedures been followed to ensure the integrity of this key piece of evidence, the DNA test results could have provided more persuasive evidence of Nelson's involvement in the attack on Rosenbaum.

Nelson's Pants Could Have Provided Meaningful Evidence of His Involvement in the Attack of Rosenbaum, if the Pants had been Properly Handled, and Tests on this Evidence had been Properly Monitored

At the time Nelson was apprehended, the police did not note whether there was blood on his clothing. More specifically, they did not note if there was blood on his pants. A record of blood on Nelson's clothing at the time he was caught would have been probative evidence of his involvement in the stabbing of Rosenbaum. The issue of whether the blood on Nelson's pants came from Nelson's involvement in the attack on Rosenbaum or Rosenbaum's spitting at Nelson when he identified him was critical. The failure to note whether there was blood on the pants was a serious omission.

On August 21, 1991, the police submitted Nelson's clothing to the Office of the Chief Medical Examiner for the City of New York. The serology laboratory was asked to examine Nelson's pants, shirt, and socks to determine whether the blood on Nelson's clothing was the victim's blood.

On September 4, 1991, Ralph Ristenbatt, an analyst in the Medical Examiner's lab, performed serological tests on the evidence and reported those results to the case detectives and the prosecution. According to his testimony at trial, he was not interviewed by the prosecutor until the week before he testified at the trial.

The prosecution also submitted Nelson's pants to the CBR Laboratory in Boston for PCR - DQ Alpha analysis. Because the pants were denim, a material that interferes with the test results, the tests on the pants were inconclusive.²⁸ The pockets of the pants, however, were not made of denim. The prosecution

did not ask the CBR Laboratory to test the pockets of the pants. This was a critical omission. To date, there is no indication that any tests have been conducted on this potentially probative piece of evidence.

A sample of the bloodstain from the defendant's pants also was sent to the Federal Bureau of Investigation (FBI) Laboratory for Restriction Fragment Length Polymorphism (RFLP) testing, a precise type of DNA analysis that can determine, almost conclusively, whether a bloodstain is consistent with the blood of a particular individual. This test, however, cannot be performed on very small stains such as those on the knife or one dollar bills. The FBI Laboratory tested the stain on the pants and a technician told the prosecutor that they obtained a faint reading indicating that the blood was consistent with Rosenbaum's blood. Because the result was so faint, however, the FBI Laboratory considered the test to be inconclusive.

This important evidence could have provided support for the prosecution's case if the officers had specifically noted the condition of Nelson's pants when he was caught and if the testing of the evidence had been closely supervised by a member of the police or prosecution team. According to Detective Brown, he informed the prosecutor on November 18, 1991, that Sergeant Wilson thought that Rosenbaum spat blood at Nelson. The prosecutor, however, did not request that the laboratory further test the pants. Dr. Shaler, Chief of the Department of Forensic Biology at the Medical Examiner's Office, told us that his Office could have performed tests to determine whether the blood on Nelson's pants had been deposited by Rosenbaum's spit. The Office could have performed a test for the presence of amylase, a component of saliva. Using this test, the bloodstain on the pants could have been analyzed to determine if saliva was mixed with the blood.²⁹

Finally, considering the key evidentiary importance of both the knife and Nelson's pants and the fact that the bloodstained knife was recovered from Nelson's pants pocket, there should have been an examination of the pants pockets for possible blood stains.³⁰

The Crime Scene Unit was not Notified Until Three Hours After the Crime was Committed, so it was Less Likely that Useful Evidence, if Available, Would have been Recovered

The Crime Scene Unit of the New York City Police Department participates in the investigation of homicide cases. The personnel assigned to the unit respond to the scene of a crime as soon as possible after its commission. Once at the scene, they secure it and ensure that it is not contaminated by

intruders. Photographs are taken to memorialize the scene and appropriate measurements are taken. The area around the crime scene is also searched carefully and any additional evidence that may be of use in solving the crime or prosecuting the offender is collected.

Because of limited resources, the Crime Scene Unit responds to homicide cases and generally does not respond to less serious crimes. As a result, the Unit was not notified about the Rosenbaum case until after he died — more than three hours after the crime was committed. Within an hour of notification, the unit responded to the scene of the stabbing. Photographs were taken and blood samples were collected from the corner of President Street and Brooklyn Avenue. Blood samples were also collected from the driveway at 1310 President Street where C.T. was arrested.

Clearly, because of the ongoing disturbances in Crown Heights, there was much activity at the scene of the crime during, and after, the attack on Rosenbaum. As a result, the crime scene would easily have been altered by this frenetic activity. One can only speculate whether any evidence of significant value would have been recovered, if the crime scene unit had responded earlier.

SUMMARY

Our review of the investigation in this case focused upon, what, if any, departures were made from proper investigative practices and procedures. To the extent that exigent circumstances may have prompted deviations from appropriate practices, we recognize that at the time this crime was committed, Crown Heights was in the midst of a civil disturbance.

We could not conduct our own criminal investigation into this case. Instead, we reviewed the files of the Police Department and District Attorney's Office in order to review what actually occurred and interviewed all of the key staff responsible for the investigation and prosecution.

Although the police response to the stabbing of Yankel Rosenbaum was immediate, our review indicates that there were departures from proper investigative practices. The police caught two individuals who were identified by the victim. However, a variety of circumstances have resulted in no one yet being held accountable for this murder.

One of the difficulties attributed to the investigation of this case has been the lack of a prior relationship among the attackers and the victim. The fact that the stabbing of Rosenbaum occurred during a civil disturbance, at night, involving

hundreds of people, has made it difficult for the police to identify the participants. While two individuals were identified by the victim, neither one, has identified additional participants. Moreover, even if the other participants were identified, proof would be needed to show specifically what acts were done by each participant in the attack. Finally, it would have to be shown that each participant "shared" the stabber's intent to murder Rosenbaum.

A major difficulty in the initial investigation which affected the effectiveness of subsequent efforts was the failure to identify witnesses and other possible suspects at the crime scene. Many key witnesses to the attack on Yankel Rosenbaum were not identified prior to the presentation of the prosecution's case. Accordingly, important additional testimony regarding Nelson's culpability could not be provided.

The recording of statements and the taking of names and addresses of eye-witnesses and bystanders are crucial first steps in an investigation. All possible witnesses were not identified by the police at the time of the stabbing. Even considering the on-going civil unrest, there were many potential witnesses to the stabbing who have not been, and may never be, identified. There were numerous police officers in the vicinity. There were the EMS technicians who responded to the stabbing. There were the individuals who were shown to, but not identified by, Rosenbaum. There were the civilians present at the scene and during the identification of Nelson. All of these individuals may have information to help identify other participants in the stabbing. However, the investigating officers did not record their names.

Later efforts to identify the participants were hindered by the failure to collect vital information at the scene. This deficiency was not remedied by the subsequent canvass of the area. The canvass did not begin until eight days after the stabbing. Moreover, the canvass was only conducted for a one block area east and west of where the stabbing occurred.

Critical statements made by Yankel Rosenbaum that could have aided in the progress of the investigation and the identification of suspects were not developed so as to provide any investigatory assistance. The victim, although seriously injured, could have been questioned in order to ascertain a more detailed account of the attack. Although Rosenbaum identified Nelson and C.T., these identifications proved to be of limited value especially in this type of case, which requires that the specific actions of each participant must be known and provable.

Additionally, there was a significant delay in taking a statement from Nelson. Proper investigative practice recommends interviewing the suspect as soon as possible following the incident. No attempt was made to take a statement

until after Rosenbaum died. Here, then, circumstances beyond the control of the investigating detectives compelled them to move to another location before attempting to take a videotaped statement from Nelson. Although the detectives testified that they did obtain confessions from Nelson, the failure to properly document and record Nelson's statements affected their ultimate probative value at trial. The passage of time and, possibly, the growing demonstration outside the Precinct resulted in Nelson refusing to give a later videotaped statement to the prosecution.

Furthermore, the handling and testing of the key physical evidence, the knife and Nelson's pants, compromised their probative value at trial. The bloodstained knife, the alleged murder weapon, was compelling evidence of Nelson's involvement in the attack. However, from the moment that the bloodstained knife was recovered from Nelson, it was not properly handled.

The officer who found the bloodstained knife put it in his pocket. Later, that officer put the dollar bills, found on Nelson and stained with what appeared to be blood, in the same pocket where he had placed the knife. The officer then commingled both of these items in a bag he found on a desk. The officer kept this bag of evidence until he handed it over to another officer who was to give it to the investigating detective. Once the detective received this evidence, he stored the evidence in his locker. It was not until more than thirty hours later that the detective vouchered the evidence. Had the proper procedures been followed, the fact that the DNA analysis performed on the knife indicated that the blood on the knife was consistent with Rosenbaum's blood, could have provided convincing evidence of Nelson's involvement in the stabbing.

Another important piece of physical evidence was the bloodstains found on Nelson's pants. Testimony at trial raised an issue of whether the blood on the pants came from Nelson's involvement in the attack on Rosenbaum or whether it could be attributed to Rosenbaum's spitting at Nelson when he identified him. It was a critical omission that once this issue was raised by the statement of Sergeant Wilson, the prosecution did not request further testing for saliva. Moreover, the police did not record whether these stains were present on Nelson's clothing when he was caught.

Furthermore, forensic DNA analysis performed on Nelson's pants was inconclusive, largely due to the denim fabric of the pants. However, the pockets of the pants, which were not denim, were never tested. Considering that the knife was found in the pocket, it was a critical omission of both the police and prosecution not to request testing of the pockets to determine whether the stain in the pocket was blood, and if so, whether it was the victim's. Evidence relating to the condition of Nelson's pants when he was apprehended and the testing of

the pockets of Nelson's pants could have provided support for the prosecution's case.

With the passage of time, the underlying deficiencies of the initial investigation and Rosenbaum's unexpected death, the likelihood that the police will now be successful in identifying additional participants in the crime is greatly diminished. Unless an informant or eyewitness comes forward and provides reliable facts about the attack and other possible suspects,³¹ holding someone accountable for this murder will be difficult. Any possible federal criminal civil rights prosecution would not only suffer from many of the same problems of proof as did the State case, but there is also the additional problem of establishing the requisite federal jurisdiction.³²

ENDNOTES

1. The files provided by the District Attorney's Office included copies of reports prepared by medical and forensic experts, as well as the EMS and medical records of the victim and the suspects.

The reports prepared by the Lowell Commission and the New York State Department of Health concerning the circumstances of Rosenbaum's death at Kings County Hospital were also reviewed.

We also spoke with Lieutenant Paul Kennedy and several members of his staff at the New York City Police Academy. They provided us with information about the training, and continuing education, of police personnel.

2. Appendix C is a summary of the police investigation of the case. It is based upon our review of the Detective Division file, summaries prepared by the Department and interviews of police personnel.

3. Names of witnesses and suspects have been replaced randomly by letters of the alphabet to protect their identities.

4. See Criminal Procedure Law 60.35.

5. A May, 1993, update on the investigation prepared by the New York City Police Department reports that 523 prisoner lists have been interviewed. Lieutenant Vincent Ferrara advises us that each list contains approximately twenty names.

6. The police file dated November 29, 1991, refers to these posters.

7. On June 1, 1993, Rabbis Katz and Spielman of the Crown Heights Jewish Community Council, recognized the efforts of Detectives Brown and Abraham and commended them for their attempts "to bring to justice the murderers of Yankel Rosenbaum." The commendation also recognized the "professionalism and humanity" of the detectives and "their unusual concern and sensitivity" for the Jewish community.

8. These concerns were discussed with the Office of Charles J. Hynes, the District Attorney of Kings County, and Joseph Borrelli, the Chief of Detectives for the New York City Police Department. Mr. Hynes handled the prosecution of what has become known as the "Howard Beach" case in 1986 when he was the Special Prosecutor for the State of New York. As the District Attorney of Kings County, he also prosecuted the "Bensonhurst" case. Chief Borrelli supervised the police investigation of all of these murders.

9. Because of these assertions, the police did not show photographs of suspects to these or any other witnesses. Since it is possible, despite their assertions, that they might have recognized the suspects, it may be good police practice to exhibit photos to all witnesses.

10. Division of Criminal Justice Services, Basic Criminal Investigations: Trainer's Manual, pt. 6 at 1 (1991).

11. See B. Fisher, A. Svensson and O. Wendel, *Techniques of Crime Scene Investigation*, 416 (1987).

12. See New York City Police Department, Police Science Course: Protecting The Crime Scene and Developing and Handling Physical Evidence, Lesson Plan 5 (1990).

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13. See generally C. O'Hara, *Fundamentals of Criminal Investigations* 85 (1970).
 14. *Id.*
 15. *Id.* at 89.
 16. A fundamental principle of criminal investigation provides that the names of all individuals present should be recorded, since sources of information include "those persons who may not be called as witnesses but who can provide...information that is a matter of observation" *Id.* at 85.
 17. See generally *People v. Monsanto*, 73 A.D.2d 576, 423 N.Y.S.2d 476 (1st Dept. 1979); *aff'd* 52 N.Y.2d 931, 437 N.Y.S. 2d 669 (1981), *People v. Martin* 32 N.Y. 2d 123, 343 N.Y.S. 2d 343 (1973); *People v. Batista*, 68 A.D. 2d 515, 417 N.Y.S. 2d 724, *aff'd* 51 N.Y. 2d 996, 435 N.Y.S. 2d 980 (1980).
 18. We note that the detectives on this case objected to the release of C.T. and argued that there was probable cause that he had participated in the attack on Rosenbaum, as well as the crimes of rioting and resisting arrest.
 19. C. O'Hara, *supra*, at 89.
 20. F. Inbau, and J. Reid, *Criminal Interrogation and Confessions*, 123 (1967).
 21. *Id.* at 124.
 22. See generally E. Imwinkelreid, *Scientific and Expert Evidence*, (1981).
 23. Division of Criminal Justice Services, *supra*, pt. 6 at 1.
 24. H. Lee, R. Gaensslen, P. Bigbee, and J. Kearney, *Guidelines for the Collection and Preservation of DNA Evidence*, 18 (1991).
 25. New York City Police Department, *supra* at 7. See also New York City Police Department, *Police Student's Guide - Law Chapt. 14 at 4* (1985).
 26. New York City Police Department, *Criminal Investigation Course: Forensic Serology, Lesson Plan 5* (1990).
 27. The Polymerase Chain Reaction (PCR) test looks at a infinitesimal part of sample and by applying a chemical replicates a section of DNA over and over again. In contrast to RFLP, the PCR test requires only a small amount of sample, and it can be of lesser quality. The advantages of PCR are that it is rapid and relatively easier to do (just a few steps).

In the Restriction Fragment Length Polymorphism (RFLP) test, DNA is subjected to controlled fragmentation with restriction enzymes that cut double-stranded DNA at sequence-specific positions. One disadvantage of the RFLP technology is that a relatively large amount of sample is needed and the sample cannot be degraded. [See National Research Council, *DNA Technology in Forensic Science* 36,40 (1992).]

28. At trial, Dr. David Bing, Scientific Director at the Center for Blood Research Laboratory in Boston testified that his laboratory has found that denim interferes with the enzymes used in performing PCR - DQ Alpha analysis.

29. Dr. Shaler also noted that there were the following additional methods for determining if saliva was mixed with the blood. First, if blood was found on Nelson's shirt, it could have been compared to the pants to determine if the blood was deposited on both items at the same time. Second, an expert could have examined the pattern of the bloodstains on the clothing to determine if, considering the location and position of Nelson and Rosenbaum when he spat, whether the spit could have been deposited on Nelson.

30. We note that although the arresting officer testified that the blood on the knife was wet when he put it in his pants pocket, his pants were not taken and submitted for forensic analysis.

31. On November 24, 1992, however, the police received information that an associate of Nelson's said that Nelson admitted to him that he had killed Yankel Rosenbaum. The Detectives interviewed the associate. The police have notified the Federal authorities of this information.

32. A violation of 18 U.S.C. §245 requires proof of the following elements:

- 1) the defendant must have acted with force or threat of force;
- 2) the defendant injured, intimidated, or interfered with, or attempted to injure, intimidate or interfere with the victim;
- 3) the defendant must have acted because of the victim's race, color, religion or national origin **and** because the victim was participating or engaged in a federally protected activity (as enumerated in 18 U.S.C. §245(b)(2)(A)-(F); and
- 4) the defendant must have acted willfully.

See 18 U.S.C. §245(b)(2).

Chapter 4

The Jury's View of the Case

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THE JURY'S VIEW OF THE CASE

INTRODUCTION

The prosecution presented evidence that appeared strong on its face. If found to be credible and reliable by the jury, this evidence would have been sufficient to support a verdict convicting Nelson. Prosecution witnesses testified that Nelson fit the description of the individual who was seen crouched over the victim and fleeing the scene of the stabbing. A bloodstained knife and three bloodstained one dollar bills were recovered from Nelson's pocket. The victim identified Nelson. Nelson confessed to stabbing Rosenbaum. All four stab wounds were consistent with the knife taken from Nelson. The blood on the knife and on some of the dollar bills found in Nelson's pocket was consistent with the victim's blood.

Despite the apparent strength of the case against Lemrick Nelson, the jury acquitted him. Many in the community were surprised and claimed that justice was not served by the verdict. Several concerns were raised about how the justice system operated. In an attempt to address these concerns, this chapter seeks to answer several critical questions:

- How could the jury acquit the defendant when the evidence against him seemed so strong?
- What factors created reasonable doubt in the jurors' minds?
- Was the jury's verdict premised upon a preconceived mistrust of police officers?
- Was the jury's verdict influenced by racism or anti-Semitism?

In accordance with the Executive Order, we attempted to understand how the jurors arrived at their verdict. Each of the jurors who deliberated in the case was interviewed.¹ They were interviewed separately, and the substance of each interview was not discussed with other jurors. The jurors were also assured anonymity.

In rendering a verdict, juries in New York State have three options. They may unanimously find the defendant guilty, or not guilty, or they may be unable to reach a unanimous conclusion and declare that irreconcilable differences have resulted in a "hung" jury or mistrial.

A verdict of guilty means that the jury found that the defendant committed the crime charged. A verdict of not guilty, however, does not mean that the jury found the defendant innocent. Rather, it is the appropriate verdict when the jury finds that the prosecution did not prove "beyond a reasonable doubt" that the defendant committed the crime charged. This is true regardless of whether the jury believes that the defendant may have committed the crime.

The purpose of a criminal trial is to determine whether the prosecution has proved the guilt of the defendant "beyond a reasonable doubt." Reasonable doubt is not defined in terms of a mathematical percentage or certainty. Rather, it is defined as a material doubt about guilt for which a reason may be articulated.

Judge Rappaport appropriately instructed the jury that Nelson was presumed innocent and that the prosecution was required to prove beyond a reasonable doubt Nelson's guilt as to each and every element of the crime charged. The Judge also explained that a reasonable doubt was a doubt for which a reason could be given. It was doubt based on the nature and quality of the evidence, or from the lack or insufficiency of the evidence.²

Each juror said that he or she followed the Judge's instruction on the law with respect to the presumption of innocence. They said that they acquitted Nelson because the prosecution failed to prove "beyond a reasonable doubt" that Nelson had committed the crimes charged.

The jurors identified concerns with respect to the evidence presented. They also expressed concerns with other issues not necessarily relating to the actual evidence. These issues were discussed during their deliberations and affected the jurors' view of the case. We have characterized these other concerns as non-evidentiary considerations that may have contributed to the jury's verdict.

This section will present the jury's view of the case and explain the basis for the verdict. For the most part, we do not assess the views of the jurors on their merits. Our purpose was an attempt to understand how a case so apparently strong resulted in the jurors' finding reasonable doubt. The following is a compilation of the factors noted by the jurors.

During the course of the interviews, two themes emerged for why the jury determined that Nelson was not guilty. These themes can be characterized as inconsistencies in the witnesses' testimony and as deficiencies in the evidence. The many inconsistencies in the testimony of the police witnesses affected their credibility in the eyes of the jurors. This served to undermine the value of each of the major elements of the prosecution's case. Since the jurors considered much of the evidence to be unreliable, they had "reasonable doubt" regarding Nelson's guilt.

The jurors also identified numerous deficiencies in the handling of the physical evidence and in the investigation and prosecution of the case. The jurors stated that the evidence presented was not sufficient to link Nelson to the crime and prove beyond a reasonable doubt that he was responsible for Rosenbaum's murder.

THE EVIDENCE

The prosecution offered evidence about Nelson's apprehension one block from the scene of the crime. They presented evidence of Rosenbaum's identification of Nelson and Nelson's confession to the stabbing. Finally, there was physical evidence linking Nelson to the victim and to the murder weapon — the blood on his pants and the bloodstained knife and money recovered from Nelson's pocket. This evidence was central to the prosecution's case against Nelson.

As the testimony was presented, however, the jurors found deficiencies and inconsistencies in the evidence with respect to each of these major elements in the prosecution's case.

The Events Surrounding the Apprehension of Nelson

Many jurors found inconsistencies in the police officers' testimony regarding the events surrounding Nelson's arrest. This caused confusion about what actually happened and created doubts about the officers' credibility.

The Radio Transmission and the Suspect with the Red Shirt

The first officers arriving at the scene of the crime testified about what they said over their portable radios and what prompted them to pursue Nelson as a suspect. The jurors stated that the testimony relating to the radio transmission was contradictory and, therefore, "not particularly weighty."

Five police officers testified regarding the radio transmission. Two of these officers, New York City Police Officers Milazzo and Sanossian, were eyewitnesses to the attack on Yankel Rosenbaum. Milazzo testified that as they approached the scene of the attack, he saw a black male in a red shirt leaning over the victim and apparently hitting him.

When the officers began to pursue the attackers, Milazzo testified that the police used their portable radios to call for help. Milazzo said, "Pursuit President

and Brooklyn.” He also testified that he heard his partner, Officer Sanossian, give a description, “male black with red shirt.” Similarly, Sanossian testified that he gave a description of one of the males he saw running from the attack as a “male black wearing a red shirt.”

Three other officers testified regarding what they heard over the police radio. Two of them, Officers Hoppe and Marinos, were riding together in a patrol car. Marinos testified that he heard a transmission stating, “Police officers in pursuit of a black male wearing a red shirt,” while Hoppe testified that he heard only, “In pursuit, President and Brooklyn.”

Officer Robert Lewis, a transit police officer in another patrol car with his partner Gerald Wheeler, heard only the transmission regarding the officer in pursuit and did not hear anything about a black male in a red shirt.

The jurors listened to an audiotape of the radio transmissions during their deliberations. They said that they did not hear any statement regarding a male black wearing a red shirt. As a result, many of the jurors decided that the transmission describing Nelson was never made.³

The defense counsel highlighted this inconsistency in his summation and argued that the discrepancy between the testimony and the tape was powerful evidence that all of the police officers were lying. He argued further that if the police lied about one event, they would lie about everything. Therefore, he stressed that the jury should reject all of the police testimony. The defense counsel also referred to the tape in his summation. He argued that Nelson was arrested because the police were under pressure to arrest someone for killing a member of the Hasidic community.

Each of the jurors attributed great weight to the contradictions between the police officers’ testimony and the tape. To them, the contradictory evidence indicated that the police may have been lying to frame Nelson because the police needed to make an arrest in the killing of an Hasidic man.

Inconsistencies between Key Police Witnesses

Overwhelmingly, the jurors identified the many inconsistencies in the police officers’ testimony as a major issue in this case. Since the prosecution’s case relied heavily on police witnesses, the overall value of the evidence presented through these witnesses was compromised.

Most of the jurors identified the inconsistencies and contradictions between the testimony of two police officers. Those two officers were New York City Police Officer Hoppe and Transit Police Officer Lewis. Many of the jurors were

greatly troubled by what they perceived as “major inconsistencies” between the testimony of Hoppe and Lewis. They felt that, instead of attempting to reconcile the testimony, they had to choose which officer to believe. Some jurors explained that they found Lewis to be a more credible witness than Hoppe for two reasons. One was the prosecution’s late discovery of Lewis as a witness. The second was that, unlike Lewis, Hoppe had applied for a commendation for his work on the case. This action, the jurors felt, gave Hoppe a personal stake in the case.

Some jurors believed that those officers who submitted requests for commendations had reason to embellish their roles in Nelson’s apprehension. Most of the jurors decided that Hoppe had lied. They chose to believe Lewis over Hoppe, because Lewis had not submitted a Departmental Recognition Request.

On September 9, 1992, at the suppression hearing, more than a year after Rosenbaum’s murder, a prosecution witness testified that transit police officers were present at the scene of Nelson’s apprehension. Detective Litwin said that when he arrived at the scene, Hoppe was inside the fenced yard. Hoppe’s partner, Marinos, was on the sidewalk with two transit police officers who, Litwin said, were black. Litwin did not know their identities or their command. Defense counsel demanded that the prosecution identify and produce these officers.

On September 22, 1992, during the selection of the jury, the defense counsel again demanded that the prosecution identify and produce the transit police officers. The Judge directed the District Attorney’s Office to do so. Shortly thereafter, the prosecution notified the Judge and the defense counsel that they had identified the officers as Transit Police Officers Robert Lewis and Gerald Wheeler.

The jurors learned about the late discovery of Officer Lewis when he was called as a witness by the prosecution on October 2, 1992, ten days after the trial began. Several jurors said that this caused them to believe that the case had not been properly investigated and prepared. Some jurors also concluded that there must have been an attempt to “cover something up” from the manner in which it was discovered that Lewis was present at the scene of Nelson’s apprehension.

Lewis testified on cross-examination that he was first notified that the prosecutors wanted to interview him in September of 1992 — over one year after the killing. According to Lewis’s testimony, no efforts had been made by either the Police Department or the prosecution to contact him earlier.

Departmental Recognition Requests are submitted by police officers to their commanding officers to seek commendations for their work on a particular case. In this case, Officers Milazzo, Sanossian, Hoppe, and Marinos filed requests for commendation on April 22, 1992. In their letters, they each described their participation in the case. Their testimony at trial was consistent with the letters.

In his letter seeking commendation, Hoppe did not mention Police Officer Lewis. Several jurors believed that Hoppe refused to admit at trial that Lewis participated in Nelson's apprehension because he had not mentioned it in his Departmental Recognition Request. Some jurors incorrectly speculated that Hoppe feared that if he admitted at the trial that Lewis had participated in the frisk, he might be charged with the crime of "Filing a False Instrument." This possibility, the jurors theorized, gave Hoppe a reason to lie about the presence of Lewis at the scene of Nelson's apprehension.

Key evidence came from Hoppe on the issues of the arrest, the recovery of the knife and the identification of Nelson by Rosenbaum. Central to the defense strategy was to challenge the credibility of this witness. If believed, Hoppe's testimony was damning evidence against the defendant. However, the inconsistencies between Hoppe's and Lewis's testimony provided the defense with the means to cast significant doubt on the entire People's case.

Some jurors stated that the inconsistencies in the testimony among key police witnesses with respect to who actually made the arrest, who was involved in the pat-down search of Nelson, and how the knife was handled once it was recovered from the defendant, undermined the value of this evidence.

Five police officers testified about Nelson's arrest. The jurors said that they were troubled by the numerous inconsistencies in the testimony of all of the police officers. They were particularly concerned about what they perceived to be "major inconsistencies" between the testimony of Hoppe and Lewis. Many jurors said that Lewis' testimony greatly damaged the prosecution's case.

Differing Accounts Regarding the Frisk of Nelson and the Recovery of the Knife

Police witnesses testified that a bloodstained knife was recovered from the pocket of Nelson's pants within minutes of the stabbing. Since forensic tests later showed that the blood on the knife was consistent with that of Yankel Rosenbaum, this evidence, if credited by the jury, could have been persuasive proof of Nelson's guilt.

Most of the jurors, however, were troubled by what they perceived to be major inconsistencies in the testimony of the police officers concerning the frisk of Nelson, the recovery of the knife, and whether there was actually blood on the knife at the time of its recovery. Many jurors were unable to reconcile the testimony of the police officers. A few jurors even expressed doubts about whether the knife was actually recovered from Nelson.

Hoppe testified that he was the only police officer to climb over the fence into the yard at the house on the corner of Brooklyn Avenue and Union Street. According to Hoppe, he alone frisked Nelson and recovered the knife from his right front pants pocket. Hoppe also testified that he did not see any transit police officers at the scene of Nelson's apprehension.

Hoppe's testimony was corroborated by his partner, Officer Marinos. Additionally, Detective Litwin corroborated Hoppe's testimony that he was the only police officer in the yard with Nelson. Transit officers, although present at the scene, were on the other side of the fence.

On October 2, 1992, the prosecution called Officer Lewis as a witness. Lewis testified that, on August 19, 1991, he was assigned to patrol the Crown Heights area in a transit police car with his partner, Gerald Wheeler. He was at the scene of the Cato accident earlier. He resumed patrol when he heard a radio transmission that police officers were in pursuit at Union Street and Brooklyn Avenue.

When Lewis arrived on the scene, he saw Hoppe, whom he did not know at the time, jump over a fence into a yard. Lewis said that he also jumped over the fence and saw Lemrick Nelson lying on the ground. Lewis said that he and Hoppe then picked Nelson up and searched him.

In contrast to the testimony of Hoppe and the other City police officers, Lewis testified that he was in the yard with Hoppe and Nelson. Lewis contradicted Hoppe further by testifying that he participated in the frisk of Nelson, patting him down above the waist while Hoppe frisked him below the waist. Lewis agreed that Hoppe recovered the knife from Nelson's right front pants pocket.

Differing Accounts Regarding the Handling of the Knife

The testimony of Hoppe and Lewis also differed with regard to the handling of the knife after it was recovered from Nelson. Hoppe testified that he displayed the knife to Marinos, and then put it in his rear pants pocket. Marinos and Detective Litwin corroborated this account.

Lewis testified that Hoppe recovered a knife from Nelson. According to Lewis, the knife was a folding knife that was closed when he first saw it. Lewis testified that Hoppe handed the knife to him and he opened it up.

The Judge appeared to be shocked by this testimony. He repeatedly interrupted the examination to ask Lewis to repeat his testimony. As a result, the prosecutor had difficulty eliciting from Lewis how the knife was opened and how it appeared. Lewis further testified that he gave the knife to his partner, Wheeler, before he returned it to Hoppe. Hoppe closed it and placed it in his rear pocket.

Many of the jurors believed Lewis's version of the events. They said that the knife was mishandled after its recovery and asserted that, by handing it to Lewis, Hoppe violated proper police procedure and good evidence handling techniques. They viewed this as evidence of careless police work. To some of the jurors, this was a significant factor in limiting the value of the knife as evidence of Nelson's guilt.

Some jurors noted that Hoppe's credibility was further undercut when he was recalled to the witness stand during the defense case and then could not remember details about the event. This was in contrast to his initial testimony when he confidently responded to every question and seldom indicated that he could not recall a fact.

In sum, the jurors were troubled over the inconsistencies in the testimony regarding the frisking of Nelson and the recovery and handling of the knife. That Lewis had not been identified as being present at Nelson's apprehension until the trial commenced, caused several jurors to conclude that the prosecution did not prepare properly and that there was a cover-up attempt.

That most of the other police witnesses had applied for a commendation, and Lewis had not, made Lewis a more credible witness. It appeared that he did not have a personal stake in the investigation and that the other officers were motivated by their commendation requests to stick to their original stories.

That the jurors found the inconsistencies between Hoppe's and Lewis's testimony so damaging was somewhat curious. A review of the trial transcript indicates that the testimony given by Lewis actually corroborated that of Hoppe on most significant points. Moreover, it was evident from the tone and content of the cross-examination of Lewis that defense counsel initially believed his testimony to be damaging to the defense case and not the prosecution's case.

The Judge's Reaction to Officer Lewis's Testimony

Judge Rappaport's reaction to Officer Lewis's testimony highlighted the contradictory testimony of Lewis for some of the jurors. As noted earlier, this reaction was unexpected since Lewis's testimony corroborated Hoppe's testimony on most significant points.⁴ The Judge's reaction made a significant impression on some of the jurors. They interpreted his reaction as indicative of problems with the prosecution's case.

During their examination of Lewis, Judge Rappaport continually interrupted both defense counsel and the prosecutor. At times, the Judge even appeared to take over the examination of the witness. Such repeated interruptions proved detrimental to the prosecution's case. They served to highlight the apparent inconsistencies between Lewis's testimony and the testimony of the other police witnesses.

In viewing videotapes of the trial, it was evident from the Judge's tone of voice throughout the examination of Lewis that he was disturbed by Lewis's testimony. Some jurors noted that one series of statements by the Judge, in particular gave them the sense that something was terribly wrong with the prosecution's case. Judge Rappaport told the prosecutors:

I will tell you this. The Court wants Hoppe and Marinos back here on Monday. Do you follow me? I want them back...We will deal with Litwin. We will have Litwin back too. This is bad. (Emphasis added.)

This outburst caused some of the jurors to believe that the Judge thought that Hoppe, Marinos, and Litwin were lying. The Judge's comments inappropriately communicated to the jury his opinion about the veracity of the witnesses. It is the function of the jury, not the judge, to determine the credibility of witnesses.⁵

In his preliminary instructions, Judge Rappaport properly instructed the jurors that it was their duty alone to decide whether a witness was trustworthy, believable, accurate, and truthful. This preliminary instruction to the jury, however, occurred approximately ten days before Lewis testified and no further curative instruction was given. The Judge, through his demeanor and statements, conveyed to the jurors his belief that the credibility of Hoppe, Marinos, and Litwin was questionable.

The prosecution decided not to address, comment upon or seek curative instructions with respect to the Judge's reaction. This decision reinforced an impression upon the jury that the case was in trouble. The prosecution

considered the Judge's behavior in response to Lewis's testimony so detrimental to their case that they considered making a motion for a mistrial. However, they did not do so. The prosecutors reasoned that based upon their previous experiences with the Judge, he would not grant the motion. To do so would have required an admission of error by the Judge. Additionally, the prosecution noted that there is always a concern that when a mistrial is declared at the prosecution's request, the constitutional prohibition against double jeopardy might preclude a retrial.⁶

The prosecution could have requested that the Judge give a curative instruction to the jury concerning his comments during Officer Lewis's testimony. While such a direction may not have completely diminished the impact of the Judge's words on the jury, it might have minimized its effect. However, the prosecution made a strategic decision not to request a curative instruction. They reasoned that it would "further highlight" the issue and focus more attention on the inconsistencies than was warranted.

The Victim's Identification of Nelson

Central to the prosecution's case was Rosenbaum's identification of the defendant. According to the jurors, however, the evidence regarding the victim's identification of Nelson was contradictory and confusing.

Jurors viewed the identification as unreliable. Some said that the circumstances surrounding Rosenbaum's identification of Nelson were improperly suggestive. Other jurors even questioned whether Rosenbaum actually made an identification. Still others questioned Rosenbaum's ability to make an identification in view of his physical condition.

Jurors' Doubts & Questions

- * Did the police grab the first young man in a red shirt whom they saw running, then keep him in custody because he had a knife?
- * How many people were shown to Rosenbaum for identification?
- * Did Rosenbaum see the knife? If he saw it, had he already identified Nelson?
- * To whom was Rosenbaum directing his outburst — Nelson, or the assembled group?
- * Did Rosenbaum's physical condition preclude him from making a reliable identification?

The Suggestiveness of the Identification of Nelson

The Display of the Knife

The defense argued that the show-up procedure was overly suggestive because the knife was shown to Rosenbaum before he identified Nelson as his attacker. In support of this contention, the defense relied upon the testimony of Sergeant Wilson. Wilson testified that Rosenbaum was three feet away when Hoppe showed Wilson the knife in the vicinity of the victim before the identification had been made.

Based upon their comments, it is apparent that the jurors placed greater weight on Wilson's testimony than on the testimony of six other witnesses. The testimony of Hoppe, Lewis, and Litwin was that Rosenbaum identified Nelson as his attacker before Hoppe took the knife out of his pocket. This testimony was further corroborated by three civilian eyewitnesses, Meyer Rivkin, John Anderson, and EMS technician, Sharon Defino. Sergeant Wilson was the only one whose testimony suggested that the knife was exhibited in the presence of Rosenbaum at the time of the identification.

Some of the jurors believed that the showing of the knife by the police prompted Rosenbaum's identification of Nelson. They also said that the inconsistency in testimony diminished the value of this identification.

The Show-up of Nelson without a Hat

Two jurors believed that the show-up was tainted because the police officers who first arrived at the scene testified that the black male with the red shirt standing over Rosenbaum was wearing a hat. Yet, Nelson was not wearing a hat at the time he was identified by Rosenbaum.

Officer Sanossian testified that the black man with the red shirt, whom he saw running from the attack, was wearing a baseball cap. Hoppe testified that when he first saw and apprehended Nelson, he was wearing a baseball cap, but it fell off during the frisk. Although Hoppe put the hat back on Nelson as they walked toward the scene of the crime, he took it off before Nelson was shown to Rosenbaum. Hoppe testified that this was done so that the victim could get a full view of Nelson's face. Sergeant Wilson's testimony was consistent with Hoppe's. Officer Lewis, on the other hand, did not see a baseball cap on Nelson.

The jurors rejected Hoppe's explanation for why he removed Nelson's hat. They accepted the defense counsel's claim that the police were careless in conducting the identification. Several jurors agreed with defense counsel that the

show-up was another example of poor police procedure that left them with doubts about the reliability of the identification.

The Ambiguity of Rosenbaum's Statement

The Judge instructed the jury that, in considering Rosenbaum's statements identifying Nelson as the person who stabbed him, they must consider the credibility of the witnesses who testified about the statement. He further charged that if they did not find that the testimony of the witnesses who overheard Rosenbaum's statements was believable, they were to disregard the testimony. Some jurors said that they did not find the police officers' testimony regarding the victim's identification to be credible. Therefore, in light of the Judge's charge, they did not give much weight to the victim's identification.

Some jurors said that they were not persuaded by the testimony that Rosenbaum actually identified Nelson as his stabber when he said, "Why did you stab me?" They thought that the victim's statements were ambiguous. They were uncertain whether Rosenbaum intended the "you" to mean Nelson or the group as a collective "you." It was not clear to these jurors whether Nelson was the only one involved in the crime, or whether he was part of a larger group.

Also, given the number of individuals who were present at the time of the show-up, some of the jurors thought that the prosecution should have produced more witnesses to testify to the circumstances surrounding the identification.

The Victim's Physical Condition and His Identification of Nelson

In the opinion of several jurors, the reliability of Rosenbaum's identification was diminished by his physical condition. These jurors believed that Rosenbaum's injuries rendered him incapable of making a reliable identification of Nelson. However, the evidence indicated that Rosenbaum was lucid and able to make valid observations. He could recognize familiar faces and distinguish between those he recognized and those he did not.

Sergeant Wilson testified that before Rosenbaum was shown Nelson, he was shown two other suspects. When he was shown C.T., Rosenbaum said, "There were fifteen of them. He's one of them." Unlike his reaction when shown Nelson, Rosenbaum did not yell or spit at C.T. or ask why he had stabbed him. Rosenbaum was shown another suspect by the police and responded, "no, no, no" when asked if he recognized him. Moreover, Chaim Lieberman, a defense witness, testified that when he went over to the car to see what had happened, Rosenbaum recognized him and called out his name even before Lieberman was able to recognize Rosenbaum.

Rosenbaum's identification of Nelson was also corroborated by the testimony of Officers Milazzo and Sanossian. Milazzo testified that when they came upon the scene, he noticed one attacker in particular, a black male teenager with a red shirt and a baseball cap, who was behind the victim and crouched over him. Milazzo testified that when he saw Nelson at Kings County Hospital, he had the same stature and was the same height, weight, and age as the attacker. He could not, however, positively identify Nelson as the attacker.

Officer Sanossian also testified that when he saw Nelson at the hospital, he fit the description of one of the people running from the attack. He said that although he did not see the attacker's face, Nelson was the same size and was wearing the same type of clothing as the attacker. He could not, however, positively identify him. Sanossian also testified that he did not recall more than one of the attackers wearing a red shirt.⁷

Lewis's testimony also corroborated Hoppe's with respect to Rosenbaum's identification of Nelson. Lewis's description, about the manner in which the identification of Lemrick Nelson occurred, was more supportive of the prosecution's case than the testimony of the other police witnesses. His description of the identification was material, because it described Rosenbaum's spontaneous and immediate reaction when he saw Nelson. Lewis testified that Rosenbaum identified Nelson before the police even had the chance to pose a question.

Lewis's testimony was also useful to the prosecution's case on two additional issues. Defense counsel sought to show that the identification was unduly suggestive because Nelson was shown to Rosenbaum in handcuffs and that Hoppe displayed the knife before Rosenbaum identified Nelson. Lewis, however, testified that Nelson was not handcuffed until after the identification and that the knife was not displayed during the identification procedure.

The prosecution argued in summation that the identification was reliable, because Rosenbaum did not identify C.T., John Anderson, or the "chubby kid" as his attacker. This, the prosecutor said, was evidence that he was not "going to pick out any black kid that is brought to him." The prosecution also argued that Rosenbaum struggled with his attackers, and, thus, had ample opportunity to see them. Many jurors, however, did not accept these arguments and, instead, gave little weight to the victim's identification of Nelson.

Nelson's Confession

Another key component to the prosecution's case was Nelson's confession to Detectives Abraham and Brown. Notwithstanding the jurors' concerns

regarding the other evidence submitted in this case, there was sufficient evidence to convict Nelson if they believed that Nelson confessed to the stabbing. However, this evidence was disregarded by the jury.

The Judge appropriately charged the jury on the law governing the weight that they should give to statements made by Nelson. Judge Rappaport instructed the jurors that before they could consider Nelson's statements as evidence of his guilt, the prosecution had to prove beyond a reasonable doubt that the statement was voluntarily made and that it was truthful.⁸ If the prosecution failed to meet this burden, the jury was advised that they had to disregard the statements, even if they believed that the statements were truthful.

The jurors said the reliability of the confession was compromised on several grounds. Some jurors believed that Nelson was coerced into giving a confession. Some questioned whether Nelson had been advised of his constitutional rights. Others believed that the confession was fabricated. Some jurors questioned Nelson's mental capacity to give a reliable confession.

Nelson was Coerced into Making a Statement

In his charge, the Judge explained that a defendant's statement is voluntarily made when it is "knowingly, freely and willingly given by the defendant." He further charged that a defendant's statement may not be considered by the jury if the police obtained it by the use of force or by threats of the use of force.

Many of the jurors said that they disregarded Nelson's confession because they thought that it was not voluntarily made. The jurors believed that it might have been coerced. They said it was possible that the confession was "beaten out of him." They cited Nelson's medical report from Kings County Hospital as support for this belief.

During his cross-examination of the police witnesses and in his summation, defense counsel suggested that Nelson had been taken to the hospital because he was suffering from a very serious asthma attack brought on by an assault by a police officer. Officer Hoppe denied that he hit Nelson or that any other officer hit him. The officer acknowledged, however, that Nelson made this allegation to hospital personnel.

The court received into evidence Nelson's medical records. The records indicated that Nelson was brought to the hospital "on complaint of pains over chest after he complained he was hit by P.O. [police officer] on the chest." The court redacted from the records the phrase "by P.O.," but many of the jurors said they could still see the words on the records. As a result, many jurors said that,

in their view, the medical records indicated that Nelson had bruises on his chest and his throat caused by a beating by a police officer. They saw this as evidence that the police hit Nelson while he was in their custody.⁹

In summation, defense counsel emphasized the seriousness of the attack, claiming “EMS said they found him drooling...and I can only suggest to you these people didn’t want to have a second body on their hands...They took this lad to the hospital because the lad was in a bad way.” Defense counsel argued that, considering his condition, Nelson was clearly incapable of understanding and waiving his rights when questioned by the detectives within minutes after returning to the precinct from the hospital.

Several jurors accepted this argument. They rejected the explanation offered by the prosecutor in her summation that if Nelson had been in such bad condition, he would have received immediate treatment upon arrival at Kings County Hospital instead of having to wait for several hours in the Emergency Room.

Some jurors also stated that their viewing of the videotape of the assistant district attorney interviewing Nelson indicated that Nelson was sobbing and upset. Some jurors also stated that the two detectives standing in the background appeared to be laughing.¹⁰ The jurors could not reconcile what they saw on the video with the detectives’ testimony that Nelson was not crying during the interview and that he did not appear “stressed.”

Some jurors believed that the detectives lied when they testified that Nelson was not crying or upset since they were able to view Nelson’s emotional condition for themselves. They said that this apparent lie about Nelson’s emotional condition caused them to question the detectives’ credibility, particularly with respect to their testimony about Nelson’s earlier confession. The defense argued in summation that the videotape of the interview demonstrated that Nelson was so distraught that he was in no “condition to be interrogated without a lawyer, without his parent, [and] without an adult.” The jury ultimately

Jurors’ Doubts & Questions

- * Did Nelson freely confess his participation in the stabbing, without coercion by anyone?
- * Why was there no documentation of this confession — a signed *Miranda* warning card, detectives’ notes taken at the time, or a signed statement by Nelson?
- * If Nelson confessed to the detectives, why were the details inaccurate?
- * To jurors, Nelson looked very distressed, even crying, on videotape; detectives had said he was fine. Could the jurors trust the detectives’ other testimony?

accepted defense counsel's argument, and followed the Judge's charge, that if a witness lied about one thing, they could disregard all of that witness' testimony.

Since some of the jurors believed that Nelson was hit by the police, they considered any confession Nelson made to be involuntary. Therefore, in accordance with the Judge's instruction, they disregarded the confession.

The Detectives Fabricated Nelson's Statement

The defense argued that Detectives Abraham and Brown either fabricated Nelson's statement or put words into the mouth of a frightened and sick youth of below-average intelligence. Several jurors accepted this argument.

The jurors said that certain information contained in the statement was not consistent with the facts as disclosed during trial. For example, they pointed to Nelson's statement that he stabbed Rosenbaum once in the left side when, in fact, Rosenbaum had been stabbed on the right side. The jurors believed this statement corresponded with what the police knew at the time and supported their contention that Detectives Abraham and Brown tailored the statements to fit the incorrect information that they had when they questioned Nelson.

The jurors also believed that the confession was fabricated even though not all of Nelson's statements were consistent with what the police knew. For example, according to Detective Abraham, Nelson said that, after the stabbing, he put the knife in his left pocket. This is contrary to what Hoppe told the detectives and his testimony that he took the knife out of Nelson's right pocket.

Many jurors accepted the defense argument that the statement was fabricated because it contained erroneous information. They rejected the prosecutor's argument that since the statements contained incorrect details, they could find that the confession was not tailored or fabricated by the police.

Several jurors were also troubled that Nelson's confessions were not witnessed. Both detectives initially planned to be present during Nelson's questioning. Because of the increased activity at the 71st Precinct, however, a commanding officer instructed them to take Nelson to a different precinct. As a result, in their effort to make other arrangements, the detectives did not conduct their interviews together.

Detective Brown testified that he advised Nelson of his constitutional rights by reading from a *Miranda* warnings card. After doing so, Nelson told him that he had cut "the Jew" once on the left side. Nelson also indicated to him that the police chased and caught him and took his knife out of his pocket. Finally, the detective said that Nelson told him that "the Jew" identified him as

the person who stabbed him. Nelson, however, refused to write this statement out or sign it.

No effort was made by Detective Brown to record Nelson's confession contemporaneously with his making it. Detective Brown testified that he took no notes during the interview, because, in his experience, suspects became nervous when an officer begins to take notes. Even if this were true, the jurors reasoned, he could have written Nelson's statement down soon after Nelson gave it, but he did not. Indeed, Brown did not write down Nelson's statement until nine o'clock the next morning, almost six hours after it was made.

Detective Abraham testified that when he returned to the room, Brown told him that Nelson "gave it up." When Brown left the room, Abraham again advised Nelson of his constitutional rights and interviewed him. Abraham testified that Nelson gave him a statement which was identical in all material respects to the statement Brown obtained. Abraham also testified that he began to take contemporaneous notes when Nelson was repeating his statement to Abraham a second time. The defendant, however, would not sign them.

Although he did not testify at the trial, Nelson did testify at the suppression hearing held prior to the trial. In his testimony at the hearing, Nelson acknowledged that the detectives had advised him of his constitutional rights and that he made a statement to them about the events of August 19, 1991.

Nelson, at the hearing, corroborated the testimony of Brown and Abraham with respect to some of the facts in his confession. He denied, however, that he had stabbed Rosenbaum. He also denied ever telling the detectives that he did. Since this evidence was inadmissible at trial, however, the jurors did not have the benefit of hearing it.¹¹

The Absence of Documentary Proof that Nelson Had Been Read His Rights

Detectives Brown and Abraham each testified that, before interviewing Nelson, they advised him of his rights, including his right to remain silent. Many of the jurors, however, did not credit this testimony. Some of the jurors said they did not believe this testimony because there was no physical evidence to corroborate it. There was no card signed by Nelson acknowledging that he had been advised of, and had waived, his rights.

Nelson's Mental Capacity and His Inability to Understand and Waive His Rights

The defense asserted that even if the detectives had advised Nelson of his constitutional rights, Nelson did not have the capacity to understand and knowingly waive those rights. Several jurors accepted this argument.

The Judge, using standard jury instruction language, told the jurors that “[p]roof that the defendant is a minor, age sixteen, or had little education or had low intelligence, could tend to establish that he did not make a knowing and intelligent waiver.” The Judge instructed further, “[o]n the other hand, proof that the defendant is an adult, of higher education or intelligence, could tend to establish that he made a knowing and intelligent waiver.”

The evidence at trial showed that Lemrick Nelson was a sixteen-year-old minor, and that he had the mental capacity of an even younger person. According to some jurors, the special applicability of this charge to the facts in this case provided them with an additional basis to disregard Nelson's confession.

The defense relied on the testimony of Dr. Losardo that Nelson had an IQ of 84 and, therefore, was incapable of understanding his rights. To counter the defense expert, the prosecution called Dr. Drob, who testified that his tests indicated that Nelson had an IQ of 100, and could understand his rights.

Dr. Losardo also conceded on cross-examination, that Nelson must have understood his rights because when he was read his rights, he exercised his right to remain silent and refused to make any statement. Despite this concession, many jurors gave great weight to the direct testimony of Dr. Losardo. The prosecution discussed this concession in summation, but to no avail.

Many jurors discounted Drob's testimony. They resolved the contradictory testimony in favor of the defense since the prosecution's expert had interviewed Nelson for only three-and-a-half hours. In contrast, the defense witness had known Nelson for a long time, although he had not tested him recently.

The Physical Evidence Linking Nelson to the Murder Weapon and the Victim

The prosecution offered two items of physical evidence as proof of Nelson's involvement in Rosenbaum's stabbing. One was the bloodstained knife recovered from Nelson. Forensic tests later showed that the blood found on the knife was consistent with the victim's blood. The second item was the

defendant's bloodstained pants that were offered to link Nelson to the victim. Many jurors, however, had doubts about the reliability of these items of evidence.

The jurors said they had serious concerns regarding the adequacy and quality of the forensic evidence introduced at the trial. Most of the jurors disregarded this evidence, because they either doubted its accuracy or did not understand its significance.

It was evident from their comments that the jurors found the testimony regarding the forensic testing confusing. One juror stated that this evidence should have been presented in a manner that the jurors could understand. Such evidence needed to be "reduced to laymen's [sic] terms."

The Knife — The Alleged Murder Weapon

The knife recovered from Nelson minutes after the stabbing was a critical part of the prosecution's case. The case was premised on the assumption that this knife was the murder weapon. Testimony showed that the blood on the knife was consistent with the victim's. Evidence also was presented that the knife was consistent with the shape and size of Rosenbaum's wounds. If this evidence had been viewed by the jury to be reliable, it was significant proof of Nelson's guilt. The jurors, however, were not persuaded.

Several jurors stated that the unprofessional manner in which the knife was handled when it was first recovered compromised its value. It was handled by too many people and the police kept it for over thirty hours before it was vouchered.

Jurors' Doubts & Questions

- * Was it blood or rust on the knife?
- * If there was as much blood on the knife as police indicated, why was there no blood on the pockets that had held it? (Nelson's and Hoppe's)
- * Why did the police handle the knife the way they did?
- * Why was no measurement taken of the blunt edge of the knife?
- * Why was the knife itself not tested, when samples of the pants and dollar bills were sent to the lab?
- * Why could the scientists not say that the blood was definitely (and not just consistent with) Rosenbaum's blood?
- * Why were the photos of the knife in black and white, when other forensic photos were taken with color film?

Many jurors also believed that the value of the blood sample on the knife was destroyed. Hoppe put the knife and the dollar bills, taken from Nelson, in a brown paper bag that he found lying on a desk at the Precinct, rather than in separate evidence envelopes.

Some jurors also said that the evidence presented did not conclusively show that there was actually blood on Nelson's knife. They were not convinced that the substance on the knife was blood and not rust.

Officer Hoppe testified that when he took the knife from Nelson's pocket, he saw blood on the portion of the blade protruding above the handle. This was interpreted by many of the jurors to mean the blunt edge of the knife. Hoppe testified that the knife was slightly bloody and that the blood had congealed on the blade. Some jurors interpreted his description to mean that the blood was wet. Consequently, some jurors questioned the truthfulness of Hoppe's testimony when he said that he did not get blood on his hands, or in his pocket, when he put the knife in his pocket.

Officer Marinos testified that he did not see blood on the knife. Sergeant Wilson, however, testified that when Hoppe showed him the knife, he saw blood on the sharp, not the blunt edge of the blade. This was contrary to Hoppe's testimony that the blood was on the blunt edge of the knife.

On direct examination, Lewis said that the knife "was rusty and it appeared to be some blood that was on it." On cross-examination, however, he said that he saw blood on the knife when it was closed. He later said, however, that he did not see any blood because it was dark that night. When questioned further, he testified that he saw blood when the knife was opened and that it appeared to be dry.

Officer Milazzo testified that when Hoppe gave him the bag with the knife at the hospital later that evening, he briefly examined the knife and did not notice blood on it. Detective Abraham testified that he looked at the knife in the bag and said that "The blade itself had some blood on it."

Dr. Joaquin Gutierrez, an associate Medical Examiner for the Office of the Chief Medical Examiner of the City of New York, testified that he examined the knife recovered from Nelson. He measured and photographed the knife before returning it to the police. Although he later admitted, on cross-examination, that it would have been important to know where on the knife the blood was located, Gutierrez could not recall this.

The photographs of the knife taken by Gutierrez were of no assistance to the jury in resolving this issue since they were in black and white. The jurors

who examined these photos during deliberations were unable to determine whether the substance on the knife was rust or blood. This aroused their suspicions, because the other photographs in evidence were in color.

A prosecution witness, Ralph Ristenbatt, an analyst in the Office of the Chief Medical Examiner of the City of New York, responsible for conducting the initial serological tests on the physical evidence, also testified about the blood on the knife. He said that he wiped the blood off the knife with cotton swabs. He then tested the swabs and dried them before storing them in the refrigerator. He eventually forwarded the swabs, but not the knife, to a lab in Boston for further testing.

The jurors noted that they did not understand why the swabs were sent for further analysis and the knife was not, particularly when actual pieces of the pants and dollar bills were sent. The prosecution offered no testimony concerning the reason for these actions. By not explaining why the evidence was treated this way, the jurors were left with doubts about whether there was actually blood on the knife.

The value of the knife as evidence of Nelson's guilt might have been enhanced if testimony had been offered to describe why certain steps were taken in the examination of the forensic evidence. During the course of our review, we discussed this issue with Dr. Robert Shaler, Chief of the Department of Forensic Biology in the Office of the Chief Medical Examiner of the City of New York.

Shaler told us that blood is normally swabbed off knives is the normal procedure when performing serological tests. According to Shaler, swabbing is necessary because knives used in stabbings normally do not have a lot of blood on them. Swabbing the knives gathers as much blood as possible to enable the performance of forensic tests. In addition, Shaler stated that it is better to store blood on swabs, rather than to leave it on the knives, because blood accelerates the rusting process.

Considering the number of times Rosenbaum was stabbed and the testimony that he was covered with blood, the jurors were also concerned that there was not more blood found on the knife. During our review, we discussed this concern with Dr. Michael Baden¹² and Dr. Shaler. Both responded that most of the blood would have been wiped off the knife when it was withdrawn — first by the skin of the body, then by the two shirts that Rosenbaum was wearing.

Moreover, according to Baden, the more a knife is inserted and withdrawn, the less blood will be found on it. Withdrawal wipes off additional blood. That is why, after a stabbing, there are usually only streaks of blood left

on the weapon. If such information had been presented to the jury, it would have explained why Ristenbatt had to swab the knife in order to get enough blood to perform the serological tests. The suspicions of the jury might have been allayed had the prosecution presented evidence more fully explaining the laboratory procedures.

The jurors also had doubts about whether the knife taken from Nelson was the knife that inflicted the fatal wounds. The testimony on this point was neither clear nor easily understood. Accordingly, the jurors' unresolved doubts regarding this pivotal piece of evidence contributed significantly to the verdict.

Dr. Gutierrez testified that Rosenbaum sustained four stab wounds, two of which penetrated his lungs and ultimately caused him to bleed to death. Gutierrez measured the knife given to him by the police and testified that the knife was "consistent" with the shape and size of Rosenbaum's wounds.

Gutierrez's testimony, however, did not persuade many jurors that the knife taken from Nelson caused Rosenbaum's death. For example, Gutierrez said that the knife given to him by the detectives had a four-inch blade. He also measured the depths of the wounds, only approximating the measurement, by inserting the handle of his scalpel into them.

According to Gutierrez, the wound on the left side of Rosenbaum's back penetrated his lung and had a depth of three-and-a-half inches. The wound also had a bruise, which he testified was most likely caused by the hilt of the knife. Defense counsel suggested, on cross-examination, that the wound should have been the same length as the blade of the knife, not one-half inch shorter. This testimony left some jurors questioning whether the knife taken from Nelson caused the fatal wounds.

According to Baden, however, a wound that measures three-and-a-half inches is entirely consistent with a knife with a four inch blade. First, the layers of clothing between the knife and the skin must be taken into account. Second, the lungs constantly move as a person breathes. An autopsy can never reconstruct the level of the lung expansion at the time the knife was inserted.

Many jurors were also troubled that Gutierrez did not measure the blunt edge of the wound and compare it to the blunt edge of the knife. Although Gutierrez testified that it was not routine procedure to do so, the defense expert, Dr. Mark Taff, testified that it was not only extremely important, but mandatory to perform these measurements.

According to Taff, it was only with this measurement that it could be determined whether Nelson's knife caused the wound. Taff insisted, therefore,

that he could not say, to a reasonable degree of medical certainty, that Nelson's knife was consistent with Rosenbaum's injuries.

Gutierrez eventually admitted that it was possible that measuring the blunt edge of the wound would have permitted a more accurate basis for determining whether the knife caused the wounds. Many jurors believed that Gutierrez's failure to make such a measurement indicated a less than thorough autopsy.

We discussed this issue with Dr. Baden and Dr. Joseph Davis.¹³ They both agreed with Dr. Gutierrez that measuring the blunt edge of a stab wound is neither required, nor standard procedure, when performing an autopsy. According to the doctors, it is impossible to determine these measurements because the skin is elastic and when cut, it tries to revert to its original shape.

According to Dr. Baden, unless a piece of the knife breaks off inside the wound and it can be matched with the broken knife, it is impossible to say whether a particular knife caused a particular wound. Moreover, the blunt edges of folding pocket knives are frequently similar in thickness. Whatever slight differences may exist, are obscured because of the elasticity of the skin. Dr. Davis said that Dr. Taff's statement that by measuring the blunt edge of Rosenbaum's wounds he could have determined whether Nelson's knife caused them, was false.

Nelson's Pants

Nelson's pants could have corroborated two key points in the prosecution's case. The knife was recovered from Nelson's pants pocket. Also, there were bloodstains on the pants legs. Tests later showed that these bloodstains were consistent with the victim's blood. The jurors said, however, that the testimony presented regarding this evidence was not conclusive. They questioned the absence of any bloodstains in the right pants pocket where the knife was found. Further, the evidence presented did not clarify for the jurors how, or when, the blood was deposited on Nelson's pants — whether it was from the stabbing or from the show-up when Rosenbaum spat at Nelson.

The jury's doubts concerning the forensic evidence were heightened by the absence of evidence of blood in Nelson's right pants pocket. Some jurors questioned whether Nelson could have put a bloody knife in his pocket without getting blood in it. Indeed, during deliberations, several jurors examined the right front pocket of the pants and found no bloodstain. This cast doubt on the testimony that the knife had blood on it.

The jurors either did not consider, or rejected, the possibility that blood from the knife came off on the three bloodstained one dollar bills Hoppe found

in the same pocket the knife was in. The jury also did not consider, or rejected, the possibility that the blood had dried before Nelson put it in his pocket. According to Dr. Shaler, blood on a knife will dry completely in less than two minutes, and even faster when the person carrying it is running.

Many jurors were further confused when they examined Nelson's pants in the jury room and saw what appeared to be bloodstains in the *left* front pants pocket. According to Detective Abraham, this was the pocket in which Nelson said that he had put the knife. There was, however, no evidence that this stain was

blood. Ristenbatt could not recall whether he examined the pants pockets for blood and could not say whether he tested that pocket. Further, the jurors noted that none of the police witnesses testified that the knife was found in the left pocket.

Many of the jurors were convinced, however, by their own examination of the pants during deliberation, that there was a bloodstain in the left front pants pocket and believed that this discovery cast further suspicions on the prosecution's case.

The forensic tests indicated that blood consistent with Rosenbaum's was on Nelson's pants. However, the value of the evidence was undermined when the testimony did not clearly establish whether there was blood on Nelson's pants from Rosenbaum spitting at him at the show-up or whether the blood was already on the pants as a result of the stabbing. Further, this evidence did not clearly establish whether Rosenbaum's saliva contained blood. Nor did it establish that the spit landed on Nelson's pants.

Hoppe was not questioned concerning whether he noticed blood on Nelson's pants before the show-up. Hoppe did testify, however, that he did not see Rosenbaum spit at Nelson. Detective Litwin testified that he saw blood on Nelson's pants before the show-up. Although Sergeant Wilson testified that at the show-up, Rosenbaum spat blood at Nelson, Wilson was not asked if it landed on Nelson, or if the pants already had blood on them. Several jurors noted that

Jurors' Doubts & Questions

- * Was there blood on the pants because Rosenbaum spat blood at Nelson at the show-up?
- * Did the DNA tests show that the blood on the pants was Rosenbaum's, or just that it was not Nelson's?
- * Why was there no blood on the pocket that allegedly held the knife?
- * Why did there appear to be blood on the pocket that allegedly had not held the knife?
- * The left pocket was not made of denim; why was its stain not tested?

Wilson was the only one who testified that Rosenbaum spat what “appeared to be a wad of blood.”

According to Dr. Baden, however, even if Rosenbaum had blood in his sputum¹⁴, the sputum would have been streaked with blood. Blood that is diluted by sputum looks different than pure blood. Defense witnesses Anderson and Rivkin testified that Rosenbaum spat at Nelson, but did not testify that the substance spat appeared to be blood.

Many jurors said that they gave great weight to Wilson’s testimony. Unlike many of the other officers who testified, he had not applied for a commendation. Thus, they believed, he had no reason to lie. Wilson’s testimony about the show-up, and the jury’s crediting of that account, further eroded the prosecution’s case.

Ristenbatt testified that his test results would have been the same, regardless of whether the bloodstain was from the stabbing or from the sputum. According to Shaler, however, other tests were available that could have established whether the blood was mixed with saliva. Although the prosecution knew, on November 18, 1991, that Wilson would testify that blood was spat at Nelson, they did not request that further laboratory tests be done to determine if saliva was mixed with blood. According to Dr. Shaler, this test could have yielded results if performed in November, 1991. At the time of trial, however, it was too late. Since these tests were not requested, they were not performed on the pants.

In summation, defense counsel argued that Nelson’s pants became bloodstained when Rosenbaum spat at him during the show-up. The prosecutor did not address this argument in her summation.

The Procedures Used by the Medical Examiner

Many of the jurors were concerned that the Medical Examiner did not conduct the autopsy in a manner that ensured that the best possible evidence was discovered and analyzed.

Dr. Gutierrez testified that he performed a limited autopsy on Rosenbaum because he was an Hasidic Jew. In a full autopsy, the medical examiner normally removes the heart, lungs, intestine, liver, pancreas and kidneys from the body. Because of the religious observations of members of the Hasidic community, however, a “limited” autopsy was conducted and the organs were examined while they remained inside Rosenbaum’s body. Dr. Gutierrez explained that, while this procedure is unusual, it had no effect on his ability to observe or examine the wounds that caused Rosenbaum’s death. He was able to measure their length and

depth, and observe their direction. He was also able to determine which edge of the stab wound was blunt or sharp.

Some jurors felt that, had the autopsy not been that limited, Gutierrez would have been better able to measure these wounds and this would have provided conclusive evidence regarding whether the knife found on Nelson had inflicted the fatal wounds. Since the stab wound had penetrated the lungs, these jurors disregarded Gutierrez's testimony that he could make meaningful measurements of the wounds without removing the lungs.

In addition, Gutierrez testified that the limited autopsy precluded him from removing tissue samples from Rosenbaum's body to send for toxicological tests. He explained that this procedure was not necessary, however, since the cause of Rosenbaum's death was clear and needed no further examination. After reviewing this case, Dr. Baden agreed that the validity of Dr. Gutierrez' autopsy was not compromised because he did not remove the organs from the body or remove samples of tissue.

Many jurors also believed that Gutierrez did not do all that he should have done in his examination of Rosenbaum. This was indicative to these jurors of carelessness in the preparation of the case. For example, defense counsel suggested that the failure to take pictures after the autopsy was a departure from normal procedures. Defense counsel also elicited from Gutierrez that he did not know that Rosenbaum had lived for three hours after he was wounded, and that it would have been "helpful," "meaningful," and "purposeful" to have known Rosenbaum's vital signs while he was at Kings County Hospital.

Defense counsel also suggested that Gutierrez failed to perform certain procedures that may have produced evidence of Nelson's innocence. For example, Gutierrez did not take fingernail clippings from Rosenbaum, and admitted that he might have found particles of the attacker's skin under Rosenbaum's nails since there were indications that there had been a struggle. Gutierrez also admitted that, in another departure from standard procedure, he did not examine Rosenbaum's jewelry to locate other possible evidence. The prosecution did not respond in summation to these contentions raised by the defense.

Defense counsel noted that trace evidence, which may include fibers and hairs of the attacker, is sometimes found on the victim's clothing. In this case, however, Rosenbaum's clothing had been washed by his friend, Chaim Lieberman. The clothing had been given to Lieberman by a member of the hospital staff before Rosenbaum died. Lieberman took the clothing home and began to wash it in his machine. Thus, any trace evidence that may have been

present on the victim's clothing was lost. Some jurors questioned why this was allowed to happen.

The jurors were disappointed with the quality of the forensic evidence provided by the Medical Examiner. They believed that he should have done more to determine conclusively whether Nelson's knife caused the death of Yankel Rosenbaum. The Medical Examiner's inability to resolve these concerns raised doubts regarding Nelson's guilt.

Concerns Regarding the Victim's Blood on the Knife and Pants

Many of the jurors had doubts about whether the blood on the knife and the defendant's pants was actually Rosenbaum's.

Ralph Ristenbatt performed the serological tests on the knife and three one dollar bills recovered from Nelson, and on Nelson's shirt and pants. He also performed tests on blood samples taken from Rosenbaum and Nelson. Ristenbatt testified that the results of these tests demonstrated that the bloodstains on the knife, the jeans, and the dollar bills were human blood. In performing the analysis on Nelson's pants, he was able to identify the subtype of the blood stains as consistent with Rosenbaum's blood, and inconsistent with Nelson's blood.

With respect to Nelson's shirt, Ristenbatt randomly chose four stained areas for testing and determined that these stains were not blood. At the prosecution's request, Ristenbatt sent the samples to another laboratory for further testing.

Dr. David H. Bing, Scientific Director of the Center for Blood Research (CBR) Laboratories in Boston, testified that he received a box containing samples of Nelson's pants and the dollar bills from the New York City Medical Examiner's Office. He also received swabs prepared by Ristenbatt from the blood that was on the knife, as well as samples of Nelson's and Rosenbaum's blood. Bing performed a forensic DNA test known as "Polymerase Chain Reaction (PCR) - DQ Alpha" on the samples. This was conducted to determine whether the blood on the knife and dollar bills was consistent with the blood of Rosenbaum.

Tests on the blood samples taken from the victim and Nelson showed that their blood types were different. Bing testified that the blood taken from the knife and one of the dollar bills was consistent with Rosenbaum's subtype.

Bing also testified that the analysis on Nelson's pants yielded no results, because the pants were made of denim, a material containing a substance that interferes with the test results. Many jurors noted that this was not true of the

pants pockets which were not made of denim. Yet, Bing did not conduct tests on the material of the pocket. The prosecution did not request that he do so.

Nelson's Involvement in Rosenbaum's Stabbing

Most of the jurors believed that Nelson was at the scene of the crime and may have had a role in the stabbing. They were not convinced, however, that the evidence proved beyond a reasonable doubt that he was responsible for Rosenbaum's murder. Further, many jurors believed that Nelson had the knife that the police recovered, but they were not convinced that the knife actually inflicted the wounds, or that the wounds inflicted by Nelson actually "caused" Rosenbaum's death.

The "Acting in Concert" Theory

An important component of the charges against Lemrick Nelson was "accessorial liability." The indictment charged that Nelson had been "acting in concert with others" when he committed the acts that caused Rosenbaum's death. Under the principle of accessorial liability, a person who, acting with the requisite intent, assists another to commit an illegal act can be found guilty of that act. Had the jury found that Nelson was part of a group that attacked Rosenbaum, that Nelson had intended to cause the death or had recklessly created a grave risk of death, and that the wounds inflicted during the attack caused Rosenbaum's death, then the jury could have found Nelson guilty of causing Rosenbaum's death, even if they did not find that Nelson had personally inflicted the fatal wound.

Although the Judge's instructions to the jury included the standard instructions on this point, most jurors said that they either did not hear or did not understand it. The charge on "acting in concert" occurred midway through two hours of legal instructions. In his instruction, the Judge attempted to put the legal definition of this theory into "simpler terminology." He stated that "when two or more persons are acting together to accomplish a common, unlawful purpose, that is, ...commit a crime, each doing acts tending to accomplish their common purpose, they are all equally guilty of the crime."

The Judge cautioned the jurors that they were not to speculate why all of the alleged participants were not on trial. He further said that whether a person commits a subordinate or a major part of the crime makes no difference. The question for the jury to determine, the Judge said, was whether Nelson participated in a common criminal purpose and design, with a common criminal intent, with others in the commission of the crimes.

When discussing the elements of the offenses charged, however, the Judge repeatedly charged that the jury had to find that *the defendant* had committed the acts charged. The instructions on the specific elements of the crimes charged did not explain that Nelson could be found guilty if the jury determined that he had, with the requisite intent, aided another person in committing the crime. The prosecutor did not object to these instructions.

During her summation, the prosecutor mentioned that when Nelson took his knife out of his pocket and “joined together” with the crowd to stab Rosenbaum, he was not only accepting responsibility for his own actions, but also for those he was acting with. Other than this reference, the theory of accessorial liability was not discussed in any further detail in her summation. The People’s theory was that Nelson was the stabber and in their view, they had a strong case. That, in part, may explain the prosecution’s decision not to concentrate on the concept of accessorial liability during her closing. According to some of the jurors, however, the result might have been different if they had understood the theory of accessorial liability and its application to Nelson and the crimes charged.

Many jurors were convinced that Nelson was part of the group that assaulted Rosenbaum, but were not convinced that he had stabbed him. While most jurors felt that Nelson was guilty of something, they said they could not vote to convict him of killing Rosenbaum, because there was insufficient evidence that he had actually inflicted one of the fatal stab wounds that caused Rosenbaum’s death.

Lesser Included Offenses

As noted above, many jurors believed that Nelson was a participant in the attack on Rosenbaum, but they were not certain that he caused Rosenbaum’s death. Therefore, they could not conclude beyond a reasonable doubt that he was guilty of any of the murder or manslaughter counts submitted for their consideration. Many jurors said, however, that during deliberations they discussed other crimes for which they might hold Nelson responsible, such as assault or criminal possession of a weapon. They noted, however, that the Judge had not submitted these offenses for their consideration.

Section 300.50 of the Criminal Procedure Law provides that, in addition to submitting to the jury the greatest offenses that are supported by legally sufficient evidence, the Court may also submit, in the alternative, any lesser included offenses if a reasonable view of the evidence would support a finding that the defendant committed the lesser, but not the greater offenses. The court may submit lesser included offenses at the request of either the defense or the prosecution.

If, on the evidence presented during trial, the court determined that the jury could find that the defendant had committed the lesser crime, but *not* the greater, the lesser included offense may be submitted, as well as those charged in the indictment. In this case, the court allowed the jury to consider the possibility that Nelson had committed Manslaughter in the First or Second Degree, rather than Murder, and allowed the jury to consider three different theories of that crime.

In addition, under the facts of this case, the court could have submitted various counts of Assault in the First and Second Degree. Assault in the First Degree could have been charged as a lesser included offense of each of the Murder charges in the indictment. As a lesser included offense of the "Intentional Murder" charge, Assault in the First Degree would allow the jury to consider whether, with intent to cause serious physical injury to Rosenbaum, Nelson caused such injury with a knife.

As a lesser included offense of "Depraved Indifference Murder," a different subsection of Assault in the First Degree, the jury could consider whether, "under circumstances evincing a depraved indifference to human life," Nelson recklessly engaged in conduct which created a grave risk of death to Rosenbaum and thereby caused him serious physical injury.

Various counts of Assault in the Second Degree could also have been submitted as lesser included charges. As a lesser included offense of Intentional Murder, Assault in the Second Degree would allow the jury to consider whether, with intent to cause physical injury to Rosenbaum, Nelson caused such injury with a dangerous instrument. Another subsection of Assault in the Second Degree would have permitted the jury to consider whether Nelson recklessly caused serious physical injury to Rosenbaum with a dangerous instrument, such as a knife.

Despite the fact that the trial evidence might have enabled the jury to find Nelson guilty of the lesser offenses of assault, the prosecution did not request the court to submit them for the jury's consideration. According to the prosecution, they intentionally did not do so. A determination was made that the submission of assault counts was inappropriate since their theory of the case was that Nelson stabbed Rosenbaum and caused his death.

According to the jurors, however, the evidence finally adduced at trial raised serious questions about the prosecution's theory and left them with reasonable doubts about whether Nelson was guilty of Murder or Manslaughter.

NON-EVIDENTIARY CONSIDERATIONS

Introduction

Criminal trials, especially high-visibility ones, do not occur in a vacuum. Although juries are instructed that they are to consider only the evidence presented at trial, it is almost certain that they will bring their general attitudes or opinions to the courtroom. "People's attitudes are inevitably the product of their social background, education, and experiences in life. Jurors are no different.... Jurors usually think and act in ways that are consistent with their backgrounds."¹⁵

Judge Rappaport advised the jurors in his preliminary instructions and in his charge that the evidence upon which they could base their verdict could come from only three sources — the testimony of the witnesses, the exhibits, and any stipulations between the parties. He explained that statements made by the attorneys in their opening and closing remarks did not constitute evidence in the case. He also instructed the jury that the questions asked do not constitute evidence, but that it is the question, coupled with an answer, that constitutes the evidence.

Judge Rappaport cautioned the jurors that they were not to speculate about anything that was not evidence in the case. He told them that lawyers have an obligation to make objections and that jurors should not hold that fact against the lawyers or think that the lawyers are preventing the jurors from hearing important information about the case. In his charge, the Judge also stated that the jurors should not draw any inferences from either the questions to which he had sustained an objection, or from the matters that they were told to disregard. He then specifically instructed them that "if the question is not answered, don't start to figure out or speculate what the answer would be, or what you would like the answer to be. That question is simply no longer in the case. It is gone. Don't even consider it."

The jurors said that they followed the Judge's instructions and did not allow anything other than the evidence to influence their verdict. Each juror clearly articulated issues and concerns that created reasonable doubt of Nelson's guilt in his or her mind. Given some of the jurors' comments, however, we cannot discount the possibility that considerations other than the evidence may have contributed to the jury's verdict.

Juror Speculation

Based upon many of the jurors' comments, it was apparent that they did speculate about certain issues, notwithstanding the Judge's preliminary instruction and final charge to the contrary. One juror said that the case was so "bungled up" that the jury was required to theorize and guess about what actually happened. Comments regarding such speculation were made with respect to the following: why certain information was not admitted into evidence; why certain individuals named at the beginning of trial did not testify; what role the doctors at Kings County Hospital played in the death of Rosenbaum; and whether the person who stabbed Rosenbaum was a professional.

Information Not Admitted into Evidence

Notwithstanding the Judge's instructions, many jurors felt that important evidence was kept from them whenever information was not admitted into evidence. They also thought that important information regarding the case was discussed during a number of sidebars. To them, this meant that they were precluded from hearing a great deal of valuable evidence.

Some jurors were also concerned that the Judge appeared to sustain more of the prosecution's objections than those of defense counsel. Most of the jurors said that the Judge appeared to be fair to both the prosecution and the defense. However, certain jurors noted that the court continually attempted to prevent defense counsel from pursuing certain lines of questioning. This line of questioning generally focused upon theories that the defense raised in his opening statement.

All of the jurors said that it was because they wanted to learn more about those theories that they accepted the defense counsel's suggestion that they meet the evening after the verdict was rendered to discuss the case.

Failure of Certain Named Individuals to Testify

Another issue that the jurors speculated about was the possibility that there were missing witnesses. Jurors noted that, at the beginning of the case, the Judge read to them a list of names of people who, these jurors assumed, were going to be called as witnesses.

The Judge, however, specifically instructed the jurors that the names on the list were "not necessarily witnesses...these are names that just may be heard during the trial." When some of the named individuals were not called to testify, the jurors theorized that they had been threatened or were afraid to testify. Several jurors speculated that the court should have arranged to protect them or

the prosecution should have made greater efforts to ensure their attendance at the trial. To these jurors, the fact that more witnesses were not called to testify weakened the prosecution's case. The jurors were convinced that there were many eyewitnesses to Rosenbaum's murder who could have been called but did not testify.¹⁶

The Actions of the Doctors at the Kings County Hospital¹⁷

Some jurors expressed doubts about whether negligence on the part of the doctors at Kings County Hospital caused Rosenbaum's death. During trial, Judge Rappaport ruled that the defense could not introduce evidence that Rosenbaum's death was caused by the negligence of the physicians at Kings County Hospital. The Judge determined that the possible malpractice of the physicians at Kings County Hospital had no legal effect upon the cause of Rosenbaum's death for purposes of the criminal trial.

In spite of this unequivocal ruling on the issue, defense counsel persisted in trying to make this point to the jury. In fact, in his opening statement, defense counsel claimed that the jurors would learn that the hospital was responsible for Rosenbaum's death and that his family had filed a lawsuit against the City. Defense counsel questioned Rosenbaum's cousin on whether her husband, an attorney, had filed that lawsuit. In response to the prosecution's objection, the court held a lengthy sidebar discussion in which the law was explained to defense counsel. The court instructed defense counsel to stop asking questions on this issue. The defense counsel, however, persisted.

The Judge instructed the jury, in both his preliminary instructions and in his charge at the end of the case, that what the attorneys said in their opening statements was not evidence that could be considered in reaching a verdict. The Judge, however, did not explain to the jurors why they could not consider the conduct of the physicians at Kings County Hospital in determining the cause of Rosenbaum's death. Although most jurors said that they followed the Judge's instructions and did not consider the negligence issue in arriving at their verdict, it was evident from their comments that this issue troubled them.

Nelson's Ability to Inflict the Wounds

Although not raised at trial, one juror theorized, and some others agreed, that the fact that the knife, or knives, were inserted between Rosenbaum's ribs and punctured his lungs demonstrated that the stabber was a "professional." It was felt that the stabber had experience with knives and knowledge of the human anatomy. Based upon the testimony of the psychologists for the defense, this juror felt that Nelson did not possess the knowledge or intelligence to have inflicted the stab wounds. Some jurors acknowledged that this theory was

discussed during deliberations even though no evidence regarding such a theory was offered during the trial.

Dr. Baden, however, advised us that there is no basis for such a theory. He said it is impossible to determine the exact location of a clothed person's ribs by simple observation. He also stated that the circumstances of the assault indicated that Rosenbaum was probably thrashing around, so the stabber would have been unable to pick the exact spot to insert the knife. Further, very often a knife will slide, or be deflected, off a bone. Finally, Dr. Baden said that Rosenbaum's wounds were typical of the thousands of cases he has seen which involved random stabbing.

Sympathy for Nelson Expressed by Some Jurors

The Judge specifically instructed the jury, in his preliminary instructions and in his final charge, that they were not to be affected by sympathy or other considerations outside of the evidence. Some jurors said, however, that there was discussion during deliberations about the length of the sentence that Nelson faced if he were convicted of murder. The jurors assumed that such a sentence would be twenty-five years.

Other jurors noted that Nelson's youthful appearance had an impact on them. One juror said that the defendant's appearance was an obstacle that had to be put out of his or her mind. Several jurors stated Nelson's youthful and innocent appearance helped the defense case. Even the prosecutors noted that, in their collective experience, Nelson had the most sympathetic appearance of any defendant they had tried.

Many jurors said they were sympathetic to Nelson because, as the testimony showed, he was mentally younger than his sixteen years of age. According to Dr. Losardo, Nelson operated at the mental level of an eleven-year-old child. Some jurors noted that, in their view, this meant that he could not form the intent to commit the crimes with which he was charged.

The Defense Counsel as Viewed by the Jury

It was apparent from the jurors' comments that their view of the evidence was affected by the conduct of both the defense counsel and the Judge.

Most of the jurors thought that defense counsel was an effective advocate for his client and admired his aggressive behavior in the courtroom. To them,

his combative style was indicative of his strong personal belief in the innocence of his client. They felt that he needed to stand up to both the Judge and the prosecutor to ensure that his client was not unfairly convicted. The transcript of the trial, however, reflects repeated instances of disregard for, and non-compliance with, court rulings by the defense counsel.

Although the jurors praised defense counsel's advocacy style, his conduct during the trial, at times, appeared unmanageable, as evidenced by his continual rebuff of the Judge's attempts to control his behavior. Further, his repeated failure to comply with the court's rulings provided the jurors with an opportunity to consider otherwise inadmissible evidence.

In his opening statement, defense counsel outlined several theories that could not ultimately be supported by admissible evidence. He asserted to the jurors that other people were responsible for Rosenbaum's death, such as certain physicians at Kings County Hospital. He also emphasized the fact that Rosenbaum's family had brought a multi-million dollar lawsuit claiming that the City was responsible for the death of their son.

Evidence about the malpractice of the physicians at Kings County Hospital had been ruled inadmissible by the Judge.¹⁸ Despite the Judge's ruling, defense counsel continuously attempted to elicit information from witnesses about the negligence of the physicians and the lawsuit that had been filed by the Rosenbaum family.

Defense counsel noted in his opening statement that the riots which began on the night of August 19, 1991, and led to Rosenbaum's death were the result of misconduct by the police at the scene of the accident in which Gavin Cato was killed. Since events at the Cato accident were irrelevant to Nelson's stabbing of Rosenbaum, the court ruled that the defense could not introduce evidence relating to the accident. In spite of the Judge's instructions, defense counsel repeatedly asked questions of Carmel Cato, the dead child's father, regarding the accident and its aftermath. One juror commented that this witness was called to testify in order to elicit their sympathy.

Defense counsel's conduct during his examination of some witnesses prompted Judge Rappaport to reprimand him several times. For example, he attempted to elicit information from Esther Edelman, the prosecution's first witness, about the Rosenbaum's lawsuit against the City. When the prosecution objected, he made a comment that implied that the prosecution was trying to keep information from the jury.

Despite Judge Rappaport's instruction that he refrain from inappropriate comments, defense counsel continued to make them. When he cross-examined

Abraham, rather than asking him a question, he accused the detective of framing Nelson. Specifically, he said, "I'm going to have to charge you with frame-up." The defense counsel often ignored the court's rulings, despite the Judge's repeated attempts to control him whenever he sought to introduce irrelevant evidence.

The defense counsel also attempted to introduce racial or religious motives into his defense. The defense counsel submitted to the jury, in his opening statement, in his questioning of the witnesses, and in his summation, that Nelson was framed for the murder of Rosenbaum. He argued that, because Rosenbaum was Jewish, there was a great deal of pressure upon the police to effect an arrest.

In furtherance of his defense, he attempted to prove that the Police Department gave special attention to members of the Jewish community in Crown Heights. He told the jurors in his opening statement that the evidence would show that Rosenbaum was a member of a civilian patrol assigned to protect the religious articles in the synagogue. He attempted to prove that this patrol had direct access to the police and as a result, numerous police officers immediately responded to the scene of Rosenbaum's stabbing. There was no evidence of this fact, however, and despite the Judge's rulings, defense counsel persisted in attempting to introduce evidence concerning this theory. Some jurors stated that this was an unresolved issue for them, despite the fact that they should not have been considering it at all.

In his cross-examination of Hoppe, the defense counsel questioned him about a "Rabbi roll call" at the Precinct and about the Jewish civilian patrol. He also questioned him about the Cato accident and asked about the presence of Rabbi Spielman's sons at the scene. When he called Sharon Defino, an EMS technician to the stand, Lewis used certain racial slurs when he asked if she heard Rosenbaum say anything to Nelson during the identification procedure. There was, however, no evidence from any witness during the course of the trial, or from Nelson himself at the suppression hearing, that Rosenbaum used a racial epithet against Nelson. Yet, the defense counsel improperly tried to suggest this by his questions when he asked the technician if she heard Rosenbaum refer to Nelson as a "nigger."

Some jurors noted that the defense counsel's theory regarding a frame-up was supported by the presence in the courtroom of so many members of the Jewish community. Some jurors stated that in view of this apparent pressure, the police and People needed a conviction in this case. Lewis's persistent refusal to follow the Judge's rulings also led the jury to believe that important evidence was kept from them.

The Judge as Viewed by the Jury

Many of the jurors seemed to have a favorable view of the Judge. They commented that he did a good job, and that he tried to be as fair as possible. Nonetheless, the Judge's inability to control the conduct and comments of the defense counsel, as well as his own comments and behavior, had an impact on the course of the trial and the jurors.

It is the judge's responsibility to maintain an impartial and fair atmosphere in the courtroom.¹⁹ According to the jurors, the Judge himself engaged in behavior that influenced their decision-making. Judge Rappaport frequently interjected himself in the questioning of witnesses and, at one point, commented upon the credibility of several key prosecution witnesses. The Judge's active involvement in the case, and his inability to temper the defense counsel permitted the jurors to consider information that was inadmissible and may have affected their view of the case.

Throughout the trial, Judge Rappaport engaged in arguments with defense counsel. These exchanges were at times loud and heated. Some jurors noted that the confrontations between the defense counsel and the Judge were excessive and that a personality conflict was evident. Other jurors said that the interaction between the Judge and the defense counsel was "bad" and "contributed negatively to the trial."

Because he interjected himself in the questioning of witnesses, the jury had concerns relating to the Judge's impartiality. The New York State Court of Appeals has established a legal standard regarding a judge's role in the examination of witnesses in *People v. Yut Wai Tom*.²⁰ In that case, the Court concluded that "a trial judge's examination of witnesses carries with it so many risks of unfairness that it should be a rare instance when the court rather than counsel examines a witness.... There is an increased risk that the Trial Judge will inadvertently convey to the jury his disbelief of a witness, not only by his reaction to answers, but by phrasing of questions and tone of voice."²¹ In *People v. Yut Wai Tom*, the Court further noted that judges may intervene to clarify a witness's answer if he has a language difficulty or to ensure that a proper foundation is laid for the admission of evidence. "In the last analysis, however, he should be guided by the principle that his function is to protect the record, not make it."²²

Throughout the *Nelson* trial, Judge Rappaport interrupted the questioning of witnesses by the attorneys for both sides. According to the transcript, the Judge asked approximately 1,690 questions of witnesses during the trial.

Judges have a significant influence upon juries. The commentary in the *American Bar Association Standards* notes that "it is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness' testimony on the merits of the case, they almost invariably follow them."²³

A research study published in the *Stanford Law Review* documented the influence that judges have upon juries. This study correlated the verbal and body language of California Municipal Court judges with jury verdicts and concluded that in many cases a "judge's behavior alone can predict the verdicts returned by juries."²⁴

Judge Rappaport recognized his responsibility not to comment on the credibility of the witnesses in this case. During his preliminary instructions, the Judge advised the jury that they were the sole judges of the facts in the case and that he would have no opinion about the truthfulness of any witnesses' testimony. Judge Rappaport then told the jurors about a judge who had committed error when he commented upon the veracity of witnesses by putting his fingers to his nose to indicate that the testimony was untruthful. He also told them about another judge who turned his back on witnesses when he doubted their credibility. In spite of these comments and his evident knowledge regarding his role, the Judge compromised his impartiality when he commented on the credibility of Hoppe, Marinos and Litwin.

The Prosecution as Viewed by the Jury

The jurors' comments regarding the prosecution's performance in this case were not favorable. Most jurors stated that the case appeared to be poorly prepared. They believed that it was "clear" that the prosecution should have done more investigation, research, and homework before the case went to trial. Some questioned why the case was not "more solid" before bringing it to trial.

One juror noted that the prosecution's case did not appear complete. They left "lots of unanswered questions." Many of the jurors believed that there were people in Crown Heights who knew the answers to those questions. They felt that it was detrimental to the prosecution's case not to call other eye-witnesses to the stabbing or the show-up to testify. Other jurors stated that it appeared as if some of the prosecution's witnesses did not appear to testify and those who did, were confusing and "mixed up."

Some jurors said that the evidence, as presented by the prosecution, was not believable and that the prosecutors did not adequately deal with the doubts as they arose during the trial.

Several jurors also questioned why this particular prosecution team was selected for this trial. They felt that for a case such as this, more "high-powered and strong prosecutors" should have been used. Each of the prosecutors in this case, however, has tried in excess of forty cases, including at least twenty homicides.

Some of the jurors described the prosecutors as "laid back" and said their subdued approach was not helpful to their case. The prosecutors told us, however, that they did not behave aggressively for fear of alienating the jury.

Impact, If Any, of Public Perceptions Regarding Police on the Jury's Verdict

Some have suggested that the acquittal of Lemrick Nelson was due, in part, to a predisposed mistrust of police officer testimony. Our review of the prosecution and acquittal of Nelson did not uncover any evidence to show that this verdict was premised upon, or affected by, a preconceived mistrust of police officers. Although there is no reliable evidence that a general mistrust of police testimony played a role in this case, the underlying contention merits review.

In recent years, many events may have affected the public's perception of police officers, both positively and negatively. However, one incident that occurred in the midst of the trial did not place the police in the most favorable light. That was the police protest at City Hall on Wednesday, September 16, 1992. Approximately 10,000 off-duty police officers congregated in front of City Hall to protest what they perceived to be an anti-cop bias on the part of Mayor Dinkins and City Hall. These New York City police officers viewed the proposal for a civilian-controlled review process as indicative of the Mayor's low regard for police.

Although there is no hard data, many have suggested that the unruliness of the protest had a negative impact on the public's perception of police. One illustration of this may have been the City Council vote on the restructuring of the civilian complaint review board. At the time of the police demonstration, it was believed that the legislation to create a civilian review agency was six votes short of passage. Three months later, the civilian review agency was enacted by an overwhelming majority.

There is no public opinion information about whether the residents of Kings County have a negative view of their police officers. But some data indicate that Kings County juries are increasingly prone to acquit defendants in cases that rely primarily on police testimony, such as weapons and drug-sale cases. Jury acquittals in drug-sale trials increased steadily, from 27 percent in 1988 to 53 percent in 1992. Acquittals in cases involving gun possession charges increased from 47 percent in 1988 to 72 percent in 1992. During the same period, the percentage of other kinds of Kings County jury trials ending in acquittal has remained stable. The trend of increasing acquittals in drug cases also appears in New York and Queens counties, but no parallel trend for weapons possession acquittals in those counties is discernible.²⁵

Our review of the prosecution and acquittal of Lemrick Nelson did not uncover any evidence or implication that the verdict was premised upon, or affected by, a preconceived mistrust of the police. In fact, the *Nelson* jury expressed positive attitudes toward police in general. Several jurors said that police had to be judged as individuals. One juror mentioned having served as an auxiliary police officer, and a few jurors shared households with police officers.

Even when they criticized officers for providing inconsistent testimony, the jurors did not castigate all the officers in the case. Some jurors went on to specify officers whom they found believable. Others rejected the notion that inconsistent testimony indicated that an officer had lied. The jurors did express general dissatisfaction with police testimony at the trial, however. One juror summed up feelings on the subject by saying that the police testimony was very disappointing particularly because these were experienced officers.

Although there was no indication that the verdict was affected by a preconceived mistrust of police, the inadequacies of police efforts in gathering witnesses at critical junctures and the procedural failures in handling evidence, helped to create doubt in jurors' minds about the proof of Nelson's guilt. The importance of apparent inconsistencies in some of the police testimony — emphasized by the judge's reaction — and the defense allegations about officers' self-interest served only to harden the jurors' conclusion.

Even if the jury verdict in the case was not premised upon, or affected by, a preconceived mistrust of the police, it would be sound public policy to explore ways to enhance the image of police in the eye of the public and, ultimately, in the eyes of jurors. This may be accomplished through better relations with the community, such as the community policing efforts, or through recruitment and training programs.

SUMMARY

Our interviews with the jurors, together with our review of the case, found that the jurors were able to articulate numerous doubts to support their verdict of not guilty.

The jurors said that they followed the Judge's instructions and based their verdict solely on the evidence. They noted that while they discussed the various non-evidentiary considerations that entered into the trial, they did not allow these considerations to influence their verdict.

The evidence presented, had it been considered reliable by the jury, would have been sufficient to support a conviction. However, the jurors were troubled by the inconsistencies relating to some of this evidence, and it appeared that they resolved any questions relating to this evidence in favor of Nelson. The jurors articulated reasonable doubts regarding the evidence that were not resolved by the prosecution.

While many believed that Nelson was at the scene of the crime and may have had a role in the stabbing, they were not convinced that the evidence proved, beyond a reasonable doubt, that he was responsible for Rosenbaum's murder.

Most significantly, the inconsistencies in the police officers' testimony regarding Nelson's apprehension, Rosenbaum's identification, and Nelson's confession seriously compromised the value of this evidence in the eyes of the jury. The jurors had been instructed by Judge Rappaport to evaluate whether the witnesses were truthful in order to determine the facts of the case. The jurors said that, after considering these factors, they determined that they could not reconcile the contradictory evidence and the inconsistencies in the testimony of the witnesses. As a result, they disregarded the testimony of some of the main police witnesses whose statements were crucial to proving Nelson's guilt.

Jurors found inadequacies in the manner in which the police handled the physical evidence. They said that since the knife was improperly handled, its probative value was compromised. They questioned why the victim's clothes were not preserved and why Nelson's pants were not thoroughly tested. Jurors were also critical of the procedures employed by the police in conducting the Rosenbaum's identification of Nelson. They thought that it was improperly suggestive. Therefore, they gave it little weight. Further, since jurors questioned whether Nelson's statements to police were voluntarily made, they disregarded this evidence.

Jurors also questioned the procedures used by the Medical Examiner's Office. They did not think that the Medical Examiner did everything that could have been done to ensure that the best possible evidence was discovered and analyzed. Also, some jurors said that the value of the forensic evidence was undermined because they did not understand its significance. Moreover, they did not think that the prosecutors requested all available forensic testing.

The combination of these identified inconsistencies and deficiencies as well as the influences of the non-evidentiary considerations, such as the conduct and comments of the defense counsel and the Judge, the jury's sympathy for Nelson and the speculation engaged in by some jurors, ultimately undermined the prosecution's case.

Further, our interviews with the jurors did not reveal that their verdict was premised upon any preconceived mistrust of police officers. Finally, we found no evidence to indicate that the jury's verdict of acquittal was influenced by racism or anti-Semitism.

ENDNOTES

1. The juror who was excused for personal reasons shortly before the case concluded was also interviewed.
2. I *Criminal Jury Instructions New York*, §3.07 at 91-92 (1983).
3. In our review of the tape, we did not hear any transmissions regarding a male black wearing a red shirt.
4. The judge's reaction was somewhat difficult to understand since Nelson testified at the suppression hearing that "an" officer was in the yard with him and frisked him, thus, testifying similarly to Officer Hoppe. Judge Rappaport presided at the suppression hearing.
5. I *Criminal Jury Instructions New York*, *supra*, §3.28 at 114.
6. See *Matter of Enright v. Siedlecki*, 59 N.Y.2d 195, 464 N.Y.S.2d 418 (1983).
7. Defense counsel introduced into evidence a videotape of the disturbances in Crown Heights on August 19th. Because many people shown on the tape were wearing red shirts, some jurors did not credit Officer Sanossian's testimony. Accordingly, they did not draw the inference that Nelson was the individual in the red shirt who the police saw hitting Rosenbaum.
8. I *Criminal Jury Instructions New York*, *supra*, §11.01 at 657.
9. We were denied access to these medical records by the defense counsel.
10. We viewed the videotape and could not determine whether or not Nelson was crying or sobbing. We did not see the detectives laughing.
11. Unless the defendant testifies at the trial, the law precludes the prosecution from introducing statements made by him or her during a hearing held to suppress evidence. The rationale for this rule is that a defendant should be given the opportunity to contest the constitutionality of the procedures used to obtain evidence without endangering his right to remain silent at the trial. See *People v. Huntly*, 46 Misc.2d 209, 259 N.Y.S.2d 369, *aff'd*, 27 A.D.2d 904, 281 N.Y.S.2d 970, *aff'd*, 21 N.Y.2d 659, 287 N.Y.S.2d 90 (1965).
12. Dr. Baden, a nationally recognized forensic pathologist, is the Director of the Forensic Sciences Unit of the New York State Police and a former Chief Medical Examiner for the City of New York. He is also working as a consultant for the Rosenbaum family in connection with their civil case.
13. Dr. Davis is the Chief Medical Examiner of Dade County. Dr. Davis is a past president of the National Association of Medical Examiners and the American Academy of Forensic Sciences.
14. According to *Webster's New Collegiate Dictionary*, (9th ed. 1985), sputum is defined as expectorated matter made up of saliva and often discharges from the respiratory passages.
15. T. Mauet, *Fundamentals of Trial Techniques*, 32 (1980).

16. There was no evidence introduced at trial to support this belief. However, in the preceding chapter, we have indicated that there were a number of individuals present at the attack who have yet to be identified.

17. The actions of personnel at Kings County Hospital were beyond the scope of our review. The New York State Department of Health conducted a review of the circumstances surrounding the death of Yankel Rosenbaum at Kings County Hospital. Their investigation revealed that the major deficiency was the failure of hospital personnel to take Rosenbaum's vital signs in sufficient time to discover his internal bleeding. According to the Department of Health, the failures led to complications which caused Rosenbaum's death.

The District Attorney of Kings County also conducted an investigation and determined that there was no criminality on the part of the personnel at Kings County Hospital.

18. The Court of Appeals has held that "If a felonious assault is operative as cause of death, the causal cooperation of erroneous surgical or medical treatment does not relieve the assailant from liability for the homicide." *People v. Kane*, 213 N.Y. 260, at 270 107 N.E. 655(1915); *People v. Griffin*, 80 N.Y.2d 723, 594 N.Y.S.2d 694(1993).

19. *Special Functions of the Trial Judge, American Bar Association Standards Relating to the Administration of Criminal Justice*, Standard 6.1.1. 1978. It is the trial judge who bears the "responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice." ABA Standards Relating to the Administration of Criminal Justice, Standard 6.1.1. (1978).

20. *People v. Yut Wai Tom*, 53 N.Y.2d 44, 439 N.Y.S. 2d 896 (1981).

21. *Id.* at 57.

22. *Id.* at 58.

23. *American Bar Association on Standards Relating to the Administration of Criminal Justice*, Standard 6-3.4. 1978.

24. Black, Rosenthal, and Cordell, "The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials," 38 *Stan. L. R.* 136 (1985).

25. In preparation of this report, the Division of Criminal Justice Services reviewed data relevant to jury acquittals. These were some of the findings.

Chapter 5

Findings and Recommendations

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- ▶ General Findings
- ▶ Analysis of the Criminal Investigation
- ▶ The Jury's View of the Case

FINDINGS AND RECOMMENDATIONS

GENERAL FINDINGS

Finding 1: Considering the problems with the evidence presented by the prosecution, there was an ample basis for the jury verdict finding that the People had not proven their case beyond a reasonable doubt. The reasonable doubts articulated by the jurors arose, to a great extent, from the inconsistencies in the witnesses' testimony and deficiencies in the evidence.

Finding 2: If the inconsistencies in the police testimony at trial had been resolved in favor of the prosecution, and if the jury credited the testimonial and forensic evidence, then there would have been sufficient basis for the jury to convict. Based upon the available information, not all of which was before the jury, it is most probable that Lemrick Nelson participated in the attack that resulted in Yankel Rosenbaum's death.

The inconsistencies in the witnesses' testimony and deficiencies in the evidence, with respect to each of the key pieces of the prosecution's case, enabled the jurors to articulate reasonable doubts regarding Nelson's guilt. The jurors identified many inconsistencies in the testimony of the police witnesses regarding Nelson's apprehension, Rosenbaum's identification of Nelson, and Nelson's confession to the police. In the eyes of the jurors, these inconsistencies seriously compromised the value of the evidence and affected the credibility of the officers. The jurors also identified inadequacies in the evidence presented. In the jury's view, the inadequacies were attributable to the actions, or inactions, of the police, the prosecutor, and the forensic experts.

The jurors noted deficiencies in the investigation of the case by the police which, in their view, compromised the critical physical evidence necessary to convict Nelson. The jurors also noted deficiencies in the prosecution's preparation for the trial. The delay in interviewing critical witnesses and the inconsistent statements made under oath, highlighted by the Judge's reaction to them, undermined the credibility of several of the police witnesses to such a great extent that several jurors attributed virtually no weight to their testimony. Moreover, the jurors were not persuaded by the forensic evidence presented by the prosecution, because they did not understand its significance.

Despite the deficiencies in the processing and trial of this case, the evidence presented at trial would also have enabled the jurors to find that Nelson

had participated in the attack on Rosenbaum, if they had reconciled the inconsistencies and resolved them in favor of the prosecution. Our review provided us with access to all information available, including the complete trial record, the testimony from the suppression hearing, and the investigation files preceding and subsequent to the trial. For example, Nelson's testimony at the suppression hearing corroborated that of the detectives with respect to almost every significant detail. The only fact he denied was telling the detectives that he had participated in the assault and stabbed Yankel Rosenbaum. Further, two of Nelson's associates have told authorities that Nelson has admitted his participation in the attack to them. And jurors explained that had they understood key legal principles, such as "acting in concert" and lesser included offenses, they might have reached a different verdict.

Finally, although questions have been raised about the possible influence of anti-Semitism or racism on the jury, our review of the case found no support for these claims. The acquittal in this case is supported by the deficiencies in the investigation and prosecution as identified by the jury.

Finding 3: Several people were responsible for the stabbing of Yankel Rosenbaum. Only Lemrick Nelson was indicted, tried, and acquitted. Deficiencies in the initial investigation created problems with the evidence that subsequent efforts did not overcome. Accordingly, the likelihood that other participants in the attack on Rosenbaum will be held accountable for the murder has been greatly diminished.

The eyewitness testimony at trial, by both police and civilians, indicated that several individuals attacked Yankel Rosenbaum. This evidence is also supported by declarations made by Rosenbaum when he identified C.T. as one of his attackers, when he identified Nelson as having stabbed him, and when he said to Nelson that he wasn't "so tough" without his friends.

Although the police response to the stabbing of Yankel Rosenbaum was immediate, our review indicates that there were departures from proper investigative practices. The police caught two individuals who were identified by the victim. However, a variety of circumstances have resulted in no one yet being held accountable for this murder.

Despite the continuing investigation by the New York City Police Department, no other participants in the stabbing have been identified. With the passage of time, the underlying deficiencies of the initial investigation, and Rosenbaum's unexpected death, the likelihood that the police will now be successful in identifying additional participants in the crime is greatly diminished. Unless an informant or eyewitness comes forward and provides reliable facts about the

attack and other possible suspects, holding someone accountable for this murder will be difficult.

ANALYSIS OF THE CRIMINAL INVESTIGATION

Finding 4: Lack of a prior relationship among the attackers and the victim hampered the investigation and prosecution.

The police have been frustrated in their efforts to identify additional participants in the stabbing of Yankel Rosenbaum. The fact that the stabbing occurred during a civil disturbance, at night, has made it difficult to identify participants. There were hundreds of people running through the streets. Many did not live or work in the neighborhood, but had come to Crown Heights for other reasons. These factors make it difficult for those who saw the attack to make identifications.

While two individuals were identified by the victim, neither one has identified additional participants. Even if other participants are identified, the prosecution must prove what each participant was doing and that each participant had the requisite criminal intent.

Finding 5: The failure to record the identities of the individuals present at the scene made it difficult to identify police and civilian witnesses.

One of the difficulties in the initial investigation that affected subsequent efforts was the failure to identify witnesses and other possible suspects at the crime scene. Some of these individuals may have information concerning the attack on Rosenbaum or could identify additional suspects.

All possible witnesses were not identified by the police at the time of the stabbing. Even considering the ongoing civil unrest, there were many potential witnesses to the stabbing who could have been identified. They were not, and may never be, identified. There were numerous police officers in the vicinity. There were the EMS technicians who responded to the stabbing. There were the individuals who were shown to, but not identified by, Rosenbaum. There were the civilians present at the scene and during the identification of Nelson. These individuals may have information to assist the police in identifying other participants in the stabbing. However, the arresting officers did not record their names.

Later efforts to identify the participants were impeded by the failure to collect vital information at the scene. This deficiency was not remedied by the later canvass of the area. It was neither timely, nor thorough. The canvass did not begin until eight days after the stabbing. Moreover, the canvass was only conducted within a one-block area east and west of where the stabbing occurred.

Recommendation

- Police officers at the scene should ascertain the names and addresses of all potential witnesses to a crime, and to the apprehension and identification of a suspect. Whenever possible, the police should conduct a timely and systematic canvass of the area where a serious crime occurs to ensure that all potential witnesses are located.
- The New York City Police Department should review its training programs and Departmental procedures to ensure that all officers are trained and aware of these critical investigative responsibilities.
- Moreover, in the preparation of a case for trial, the prosecution should ensure that the police have identified and interviewed, all of the civilian and police witnesses present at any relevant point during the commission of the crime, apprehension, search, and identification of a defendant.

Finding 6: Interviews with the victim and possible suspects were not conducted promptly or recorded.

Critical statements made by Yankel Rosenbaum, which could have aided in the progress of the investigation and the identification of suspects, were not further developed through additional inquiry by the police. The victim, although seriously injured, could have been interviewed in order to ascertain a more detailed account of the attack. Although Rosenbaum identified Nelson and C.T., these identifications proved to be of limited value. Identification is difficult, in a case involving a crime committed by numerous individuals, for it requires that the specific actions of each participant be known.

Additionally, there was a significant delay in taking a statement from Nelson. The police waited three hours before they attempted to take a statement from Nelson. While in the process of taking a statement from Nelson, the investigating detectives were compelled to go to another precinct. The additional passage of time and, possibly, Nelson's awareness of the developing demonstration outside the Precinct, resulted in his refusing to give a videotaped statement.

Although the detectives testified that they did obtain confessions from Nelson, the failure to properly document and record Nelson's statements affected the reliability of this evidence at trial.

Recommendation

- Police officers should attempt to interview suspects at the earliest opportunity.
- The suspect's statements should be recorded and reduced to writing either contemporaneously to the making of the statement or as soon thereafter as possible.
- To the extent possible, these statements should be in the witnesses' or suspects' exact words and should be reviewed and signed by the person making the statement. Whenever practicable, statements of suspects should be recorded on audiotape or videotape.

Finding 7: The improper handling of critical physical evidence compromised its probative value at trial. The bloodstained knife discovered on Nelson, which should have provided persuasive proof in support of the prosecution's case, was not properly handled. Additionally, Nelson's pants could have provided meaningful evidence of his involvement in the attack on Rosenbaum. The stains on the pants should have been properly noted and analyzed by the police. Tests on this evidence were not sufficiently monitored by the prosecution.

The bloodstained knife, the alleged murder weapon, was compelling evidence of Nelson's involvement in the attack. However, from the moment that the knife was recovered from Nelson, it was not properly handled.

The officer who found the bloodstained knife put it in his pocket. Later, that officer put the dollar bills, found on Nelson and stained with what appeared to be blood, in the same pocket where he had placed the knife. The officer then commingled both of these items in a bag he found on a desk. The officer kept this bag of evidence until he handed it over to another officer who gave it to the investigating detective. Once the detective received this evidence, he stored the evidence in his locker. The evidence was neither refrigerated, nor promptly vouchered. It was over thirty hours later that the detective vouchered the evidence. Had proper procedures been followed, the results of the DNA analysis performed on the knife indicating that the blood on the knife was consistent with

Rosenbaum's blood might have provided convincing evidence of Nelson's involvement in the stabbing.

Another important piece of physical evidence was the bloodstains found on Nelson's pants. Testimony at trial raised an issue of whether the blood on the pants came from Nelson's involvement in the attack on Rosenbaum or whether it could be attributed to Rosenbaum's spitting at Nelson when he identified him. The police did not record whether these stains were present on Nelson's clothing when he was caught. Forensic tests could have been performed to determine whether the stains were blood or spit. These tests were not requested by the prosecution.

Forensic DNA analysis performed on Nelson's pants was inconclusive due to the denim fabric of the pants. However, the pockets of the pants, which were not denim, were never tested. Considering that the knife was found in the pocket, it was a critical omission, on the part of both the police and the prosecution, not to request testing of the pockets to determine whether the stain in them was blood, and if so, whose.

Recommendation

- The New York City Police Department should review its basic and in-service training programs to ensure that officers are trained to handle physical evidence appropriately to preserve its integrity and value.
- All appropriate forensic tests should be requested by either the police or prosecution as promptly as possible.

JURY'S VIEW OF THE CASE

Finding 8: The jurors found that the inconsistencies in the police officers' testimony were an overriding consideration in undermining the value of all key prosecution evidence, and in finding that Nelson was not guilty of stabbing Rosenbaum. The prosecution's late discovery of key witnesses exacerbated this problem.

Most significantly, the inconsistencies in the police officers' testimony regarding Nelson's apprehension, Rosenbaum's identification, and Nelson's confession seriously compromised the value of this evidence in the eyes of the jury. Most of the jurors were troubled by what they perceived as major inconsistencies between the testimony of New York City Police Officer Hoppe

and Transit Police Officer Lewis. Lewis was not identified as a witness until after the trial began. Some jurors said that this caused them to believe that the case had not been properly prepared by the prosecution. The jurors had been instructed by Judge Rappaport to evaluate whether the witnesses were truthful in order to determine the facts of the case. The jurors stated that, after considering these factors, they determined that they could not reconcile the contradictory evidence and the inconsistencies in the testimony of the witnesses. As a result, they disregarded the testimony of some of the police witnesses whose statements were crucial to proving Nelson's guilt.

Finding 9: Many jurors articulated doubts regarding the evidentiary value of the knife, the alleged murder weapon, recovered from Nelson.

Despite the recovery of the knife from Nelson within minutes of the stabbing and a forensic scientist's identification of the blood on the knife as consistent with the blood type of Rosenbaum, many jurors articulated problems regarding the adequacy and quality of the evidence offered with respect to this key piece of evidence.

The jurors stated that the unprofessional manner in which the knife was handled when first recovered by police compromised its value. It was handled by too many people, commingled with other evidence, and was not vouchered in a timely manner.

The jurors also questioned whether it was blood or rust on the blade of the knife. They also questioned why the knife, rather than swabs of blood from the knife, was not sent for additional forensic testing. The photographs of the knife presented to the jury were black-and-white prints, which did not assist them in determining whether it was actually blood. These questions remained unresolved for the jury, and were not adequately explained in the prosecution's case or summation.

Further, the jurors were not persuaded by the evidence presented that the knife inflicted the fatal wounds. They attributed this doubt to inadequate procedures by the Medical Examiner's office.

Finding 10: The jury did not accept key forensic evidence regarding Nelson's pants that was offered to establish a connection between Nelson and the stabbing of Rosenbaum.

Notwithstanding the fact that the knife was recovered from Nelson's pants and there were bloodstains on the pant legs, later determined to be consistent with

Rosenbaum's blood, the jurors articulated doubts regarding the absence of blood in the right front pants pocket from which the police testified that the knife was recovered. The jurors were further troubled by the presence of what appeared to be a bloodstain in the left front pants pocket, a stain that was not discovered until jury deliberations. It was not made clear to the jurors by the prosecution whether the pants became bloodstained as a result of Nelson's involvement in the stabbing or when Rosenbaum spat at Nelson at the identification. Neither the police nor the prosecution requested testing of this stain.

Finding 11: The jurors rejected, as unreliable, the evidence regarding Yankel Rosenbaum's identification of Lemrick Nelson as the person who stabbed him.

The jurors believed that the victim's identification of Nelson as his attacker was improperly suggestive. Inconsistent testimony caused the jurors to believe that the police exhibited the knife taken from Nelson in the presence of the victim. As a result, some jurors believed that the victim did not identify Nelson as his stabber until after he saw the knife.

The jurors also stated that conducting the show-up identification procedure without a hat on Nelson was improperly suggestive. Police officers testified that Nelson was wearing a hat when apprehended. Some jurors were not persuaded by the police testimony that Rosenbaum made a definitive identification of Nelson as his attacker in view of what they perceived to be his ambiguous words.

Finding 12: The jurors rejected, as unreliable and not properly obtained, the confessions of Lemrick Nelson as the person who stabbed Yankel Rosenbaum.

The jurors disregarded Nelson's statements to the police because they questioned whether the confessions were voluntarily made and whether Nelson was capable of understanding and knowingly waiving his rights. They believed, in view of the evidence offered, that Nelson's confessions were coerced. Several jurors also believed that since Nelson's statements contained erroneous information, his statement was fabricated by the police. Further, some jurors expressed concerns regarding the absence of documentary proof that Nelson had been read his rights.

Recommendation

- After advising a suspect of her or his constitutional rights, police should obtain some written acknowledgment that she or he was advised of her or his rights.

Finding 13: The jury was confused and troubled by the testimony of the forensic experts who testified on behalf of the prosecution. This contributed to their rejection of key forensic evidence.

Forensic evidence can be extremely valuable in criminal cases because it often constitutes physical, uncontrovertible evidence that links a defendant to the commission of the crime charged. To maximize the effectiveness of forensic evidence, however, prosecutors must prepare witnesses to testify about forensic procedures and techniques in a manner that jurors are able to understand.

With respect to the forensic evidence, the jurors said its value was undermined because it was confusing to them, and, therefore, they did not understand its significance. The jurors also questioned the procedures utilized by the Medical Examiner's Office. They did not think that the Medical Examiner did everything that could have been done to ensure that the best possible evidence was discovered and analyzed.

The forensic witnesses in this case, whether from lack of preparation or due to the complexity of the subject matter, did not testify in a manner that could be understood by the jury. Further, the forensic evidence was not clearly explained during the prosecution's summation, and as a result, the jury accorded this evidence little weight.

Recommendation

- Forensic evidence that is critical to the prosecutions' case and that involves complex analyses requires thoughtful and clear explanation for it to be understood and have value. It is in the best interest of a successful prosecution that witnesses be properly prepared, visual aids be used, and that witness testimony and prosecution's arguments in summation be presented simply and clearly.

Finding 14: The manner in which the Judge conducted the trial appeared to have influenced the jury's decision-making.

Although many of the jurors seemed to have a favorable view of the Judge, his remarks and conduct may have adversely affected their view about the credibility of the police witnesses. He was unable to control the conduct and the comments of the defense counsel, which afforded the jury an opportunity to consider information that was otherwise irrelevant or inadmissible. Further, by continuously interjecting himself in the questioning of witnesses, the jury had concerns regarding the Judge's impartiality. Most significantly, the Judge's reaction to Officer Lewis's testimony highlighted the inconsistencies between Lewis's version of the events surrounding Nelson's apprehension and the version of Officers Hoppe and Marinos and Detective Litwin. The Judge did not remain an impartial arbitrator and instead conveyed to the jury his personal opinions about the evidence.

Finding 15: The theory of assessorial liability or "acting in concert" was not adequately explained or argued to the jury.

Although many jurors were not convinced that Nelson inflicted the fatal stab wounds on Rosenbaum, most jurors believed that Nelson was present at the scene of the attack and that he probably was a participant. According to the jurors, if they had understood the legal principle of "acting in concert," they might have reached a different verdict.

Although the Judge properly instructed the jury on this legal principle, no further explanation of it occurred with respect to the elements of each crime submitted for the jurors' consideration. Such an explanation might have assisted the jurors in applying that principle to the facts of this case. During her summation, the prosecutor only mentioned in a passing comment, the principle of "acting in concert," a central theory upon which the prosecution's indictment was based. She said that when Nelson took his knife out of his pocket and "joined together" with the crowd to stab Rosenbaum, he was not only accepting responsibility for his own actions, but also for those he was acting with. Other than this reference, this theory was not discussed in any further detail in her summation. In view of the prosecution's theory of the case, that Nelson was the stabber, the prosecutor may have had a valid strategic reason for not developing this theory in greater detail. However, in view of the jurors' comments that the outcome might have been different had they understood this theory, it appears that the "acting in concert" theory should have been addressed.

Finding 16: Our interviews with the jurors did not indicate that the verdict of acquittal was premised upon a preconceived or inherent mistrust of police officers.

The jurors pointed to specific problems in the evidence presented that caused them to discount major portions of the police witnesses' testimony. At no time did they suggest that the witnesses were inherently untrustworthy because they were police officers. Our review of the case did not uncover any evidence to show that the verdict was premised upon, or affected by, a preconceived mistrust of police. Although some support exists for the contention that jurors in Kings County have become increasingly prone to acquit defendants in cases that rely solely on police testimony, there is no evidence that this phenomenon occurred here. After the acquittal, the District Attorney reported that, in 1992, his Office lost sixty-seven percent of the criminal cases that depended solely on the testimony of police officers. Moreover, recent public opinion polls indicate that portions of the public have grown more negative towards the police.

Even if the jury verdict in this case was not premised upon, or affected by, a preconceived mistrust of the police, it would be sound public policy to explore ways to enhance the image of police in the eyes of the public, upgrade their training in the handling and preservation of evidence and expand current courtroom skills training program.

Recommendation

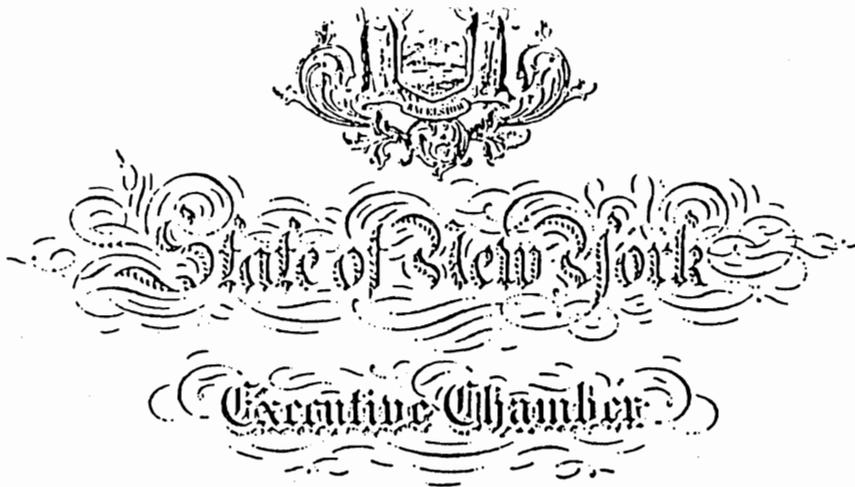
- Police officers must be aware that their role is not defined solely in terms of the arrest in, and investigation of, a case, but continues until completion of the prosecution of the case. The professionalism of the police and their perception in the eyes of the jurors are both critical to a successful prosecution.
- The City of New York and its Police Department should continue its commitment to, and expansion of, the community policing program, a primary objective of which is to improve police and community relations.
- The Police Department should continue and enhance its recruitment efforts to ensure that the composition of the Department is correspondingly representative of the City's population.

- **Finally, police training should stress the importance of proper handling and collecting of physical evidence and the prompt identifying and recording of the names of all witnesses to a crime, arrest, identification procedure or any other significant event in a criminal case.**

Appendices

- ▶ **Appendix A: Executive Order No. 160**
- ▶ **Appendix B: Dateline: Trial Events**
- ▶ **Appendix C: Summary of the Police Investigation**
- ▶ **Appendix D: Map and Photos**

Appendix A
Executive Order No. 160



No. 160

E X E C U T I V E O R D E R

DIRECTING A REVIEW OF THE CRIMINAL INVESTIGATION AND PROSECUTION ARISING FROM THE MURDER OF YANKEL ROSENBAUM

WHEREAS, the primary role of government in a civilized society is to provide for the safety and security of the people in its jurisdiction;

WHEREAS, this role of government in our society extends to ensuring that tolerance and respect for each individual is fostered throughout our system of government, including our criminal justice system;

WHEREAS, members of all communities have an expectation that the criminal justice system will function effectively to provide justice;

WHEREAS, on August 19, 1991, Yankel Rosenbaum was murdered during a disturbance in the Crown Heights section of Brooklyn, New York and accounts of the event indicate that although many individuals took part, only one individual was charged, and tried by a jury which rendered a verdict of acquittal which must be heeded;

WHEREAS, the verdict has generated a feeling of mistrust and suspicion of the criminal justice system by those who are unable to reconcile the verdict with their sense of justice;

WHEREAS, regardless of how one responds to the verdict, these events have undermined confidence in the criminal justice system resulting in a climate which has polarized communities in the City of New York and elsewhere;

WHEREAS, it is in the interest of justice that the Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services for the State of New York (hereinafter the Director) review and evaluate the operation of the criminal justice system in this matter;

NOW, THEREFORE, I, MARIO M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order that Richard H. Girgenti, the Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services for the State of New York, review the response of law enforcement to the August, 1991 disturbance in Crown Heights and the facts and circumstances surrounding the criminal investigation and prosecution arising from the death of Yankel Rosenbaum.

I. RESPONSIBILITIES OF THE DIRECTOR

1. To proceed in a term of the Supreme Court, to be held in and for the County of Kings, to seek such order as justice requires unsealing any and all files and records pertaining to the investigation and prosecution in the case of The People of the State of New York v. Lemrick Nelson.

2. To review, to the extent permitted by law, any and all records of the Police Departments of the City of New York pertaining to the investigation of the homicide of Yankel Rosenbaum and the Crown Heights disturbance of August, 1991.

3. To review, to the extent permitted by law, the transcripts of any and all proceedings held prior to the date of this order which relate to the murder of Yankel Rosenbaum.

4. To review, to the extent permitted by law, all of the records in the possession of the District Attorney of Kings County pertaining to the investigation and prosecution of individuals involved in the death of Yankel Rosenbaum.

5. To interview non-witness participants in the trial of the People of the State of New York v. Lemrick Nelson.

6. To review and evaluate the preparedness planning and response of the City of New York Police Department to the August, 1991 disturbance in Crown Heights.

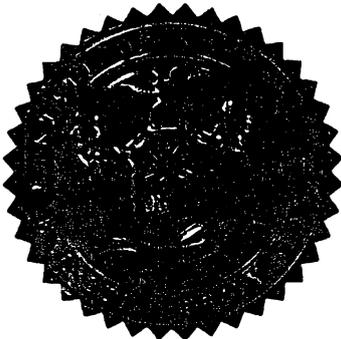
7. To offer recommendations designed to restore the public's confidence in the criminal justice system.

II. REPORT

To prepare a written report, following the review, assessing the response of law enforcement to the August, 1991 disturbance in Crown Heights and the facts and circumstances surrounding the criminal investigation and prosecution arising from the death of Yankel Rosenbaum.

III. ASSISTANCE AND COOPERATION

All departments, divisions and units of the Executive Branch of State government are directed to cooperate with the Director and to provide such assistance as he may require to fulfill his obligations. Such assistance may include the assignment of staff and the provision of support services.



BY THE GOVERNOR

Andrew J. Ambella
Secretary to the Governor

G I V E N under my hand and the Privy Seal of the State in the City of Albany this seventeenth day of November in the year one thousand nine hundred ninety-two.

Marion H. Cronin

Appendix B
Dateline: Trial Events

THE PEOPLE OF THE STATE OF NEW YORK v. LEMRICK NELSON

The prosecution of Lemrick Nelson for the murder of Yankel Rosenbaum occurred in 1992. Following is a chronological list of the trial events.

September 8,9,10	PRE-TRIAL HEARINGS
September 15-22	JURY SELECTION
September 22	COURT'S PRELIMINARY INSTRUCTIONS TO THE JURY
September 23	OPENING STATEMENTS
	THE PROSECUTION'S CASE
	Esther Edelman Police Officer Richard Sanossian Police Officer Leonard Milazzo
September 24	Police Officer Milazzo (cont'd) Police Officer John Marinos Police Officer Mark Hoppe
September 25	Police Officer Mark Hoppe (cont'd)
September 30	Police Officer Mark Hoppe (cont'd) Detective Steven Litwin
October 1	Detective Steven Litwin (cont'd) Sergeant Brian Wilson
October 2	Police Officer Robert Lewis Detective Edward Brown
October 5	Detective Edward Brown (cont'd) Detective Nemesio Abraham
October 6	Detective Nemesio Abraham (cont'd)
October 8	Ralph Ristenbatt Detective Charles Mattera Dr. David Bing

October 9

Dr. Joaquin Gutierrez, Jr.

THE PROSECUTION RESTS

October 14

THE DEFENSE CASE

Carmel Cato
John Anderson
Peter Hamilton
Thomas Birch
Sharon Defino

October 15

Chaya Sara Popack
Chaim Lieberman
Police Officer Hoppe (cont'd cross)
Police Officer Marinos (cont'd cross)

October 16

Dr. Vernal Cave
Mildred Scott
Police Officer Milazzo (cont'd cross)
Detective Litwin (cont'd cross)

October 21

Meyer Rivkin
Lorraine Gayle
Nancy Casella

October 21

Dr. Anthony Losardo

October 22

Beverly Williams
Dr. Mark Taff

THE DEFENSE RESTS

THE PROSECUTION'S REBUTTAL

Dr. Sanford Drob

October 26

**SUMMATIONS
COURT'S CHARGE TO THE JURY**

October 26-29

JURY DELIBERATIONS

October 29

THE VERDICT

Appendix C
Summary of the Police Investigation

C-1

THE POLICE INVESTIGATION OF THE MURDER OF YANKEL ROSENBAUM

SUMMARY OF THE POLICE FILE¹

Date	Action
8-19-91	At approximately 11:20 p.m. officers observe a group of 10 black males assaulting Yankel Rosenbaum at Brooklyn and President. Officers pursue and two suspects, Nelson and "C.T." are arrested, charged with assault in the first degree and criminal possession of a weapon. Knife recovered from Nelson who is identified by the victim at the scene. Victim is declared dead at Kings County Hospital (KCH).
8-20-91	At approximately 2:00 a.m. detective interviews Officer Hoppe, the arresting officer, about the Cato accident and the Rosenbaum stabbing. Hoppe confirms that the knife was confiscated from right, front pocket of Nelson's pants; that the victim asked the suspect, "Why did you stab me?"; that he gave custody of Nelson to Officer Milazzo with a brown paper bag containing the knife and money taken from Nelson; that Nelson was taken to the hospital for asthma attack.
8-20-91	At approximately 3:10 a.m., detectives attempt to contact Nelson's parents at 912 Linden Blvd. Efforts are unsuccessful. Card left under the door, notifying them to call police.
8-20-91	At approximately 3:15 a.m. the Crime Scene Unit responds. Blood samples are taken from the south west corner of Brooklyn Avenue and President Street. Blood samples are also taken from in front of the garage at 1310 President Street. Photos taken in front of 1346 President Street.
8-20-91	At approximately 3:15 a.m. detectives interview Nelson. Nelson tells them, in separate interviews, that he had been on Schenectady Avenue with friends when he heard about the car accident. He went to President and Utica and then down President Street with the crowd. At Brooklyn and President he joined in the attack on a Jewish man and stabbed him once in the left side of his stomach. He put the knife into his pants pocket while running from the police. After he was taken into custody, Nelson said that the victim identified him as the person

¹ This summary is based upon the documents submitted to us by the New York City Police Department. Names of witnesses and suspects have been replaced randomly by letters of the alphabet to protect their identities.

Date

Action

who stabbed him.

- 8-20-91 At approximately 3:20 a.m. detectives go to Kings County Hospital. They are informed by a surgeon that the time of death was 2:25 a.m. Death was due to excessive bleeding from stab wounds to lungs. Detectives learn that the victim's clothing was given to Chaim Lieberman. Washed clothing was picked up from Lieberman.
- 8-20-91 At approximately 3:30 a.m. detective requests record check on "C.T." and Lemrick Nelson. No records present for either subject.
- 8-20-91 At approximately 4:30 a.m. detectives interview suspect, "C.T.", at 60th Precinct in presence of his uncle. "C.T." said that he heard that a Jew had run over two black kids. He went to the area and there was there a large crowd. The crowd ran down President Street. When he got to Brooklyn Avenue, he saw a group of black males beating a Jewish man. He said he did not do anything to the Jewish man and ran when the police came because everybody else ran.
- 8-20-91 At approximately 6:30 a.m. detective interviews Sergeant Wilson who reports that the victim stated that "C.T." was part of the group beating him.
- 8-20-91 At approximately 7:30 a.m. Assistant District Attorney (ADA) Moore attempts to take videotaped statement from Nelson at the 60th Precinct. Nelson refuses to make a statement. Detective Abraham arrests Nelson on a charge of second-degree murder. Nelson is transferred to Brooklyn Central Booking to await arraignment. ADAs Dember and Moore conclude that there is insufficient evidence to support criminal charges against "C.T." and his arrest is voided.
- 8-20-91 At approximately 8:00 a.m. detective interviews Police Officers (PO's) Milazzo and Sanossian about the events of 8-19-91. Detective confirms that the officers observed a group beating a man; that they chased and arrested "C.T." at 1310 President Street; that the victim made a statement to Sergeant Wilson of the 77th Precinct about "C.T.'s" involvement; that "C.T." was taken to Kings County Hospital and treated for a head injury stemming from his arrest.
- 8-20-91 At approximately 11:00 a.m. detectives go to the medical examiner's

Date

Action

office and speak with Dr. Gutierrez. They observe four stab wounds. Dr. Gutierrez examines the knife and reports that it is consistent with the stab wounds.

- 8-20-91 At approximately 11:50 a.m. to 12:10 p.m. Nelson receives a visit from his father and brother at 60th Precinct. They bring him a change of clothes. The shirt, pants and socks worn by Nelson during the assault are taken from him.
- 8-22-91 Detectives begin an investigation involving WABC radio. A phone call was received from a person alleging to have been at the scene of the homicide. Contact is made with New York City Police Department (NYPD) Deputy Commissioner for Public Information in effort to gain cooperation of WABC/Joy Behar show. The producer reports that calls are not screened and that the station has no knowledge of the identities of callers. He offers to allow NYPD to listen to tapes of the show.
- 8-23-91 Detective interviews the producer of WABC radio talk show. He indicates that the call came from a person using the name "Zelman" and agrees to air a request that Zelman get in contact with NYPD. Detective receives a copy of a tape with the segment of the show.
- 8-24-91 Detectives interview individuals arrested in the 71st Precinct regarding the homicide. Negative results.
- 8-25-91 Detective contacts NYPD Operations Unit to obtain videos of the riot.
- 8-26-91 Detective again contacts Operations Unit to obtain videos of the riot.
- 8-27-91 Detectives conduct a canvass on President Street near Brooklyn Avenue. Ten people are contacted. Numerous other locations are unoccupied.
- 8-28-91 Detective again contacts the producer at WABC radio who reported that a Public Service Announcement was aired several times, asking Zelman to call. There was no response to either the radio station or NYPD.
- 8-28-91 Police canvass locations on President Street near Brooklyn Avenue. Numerous people report that they saw and heard nothing. There is no response at some addresses.

Date	Action
8-29-91	Detectives continue canvass on President Street. There is no response from addresses contacted.
8-29-91	Detective canvasses President Street addresses where no response had been reported during the first canvass. No one reports seeing anything or hearing anything.
8-29-91	Detective contacts Rabbi Spielman for help in identifying "Zelman." He agrees to make inquiries.
8-30-91	Detective interviews individuals arrested at the 71 st Precinct regarding the homicide. Negative results.
8-31-91	Detective contacts a witness to view photos to determine if he can identify any other participants in the crime.
9-1-91	A witness views photos and will return 9/3/91 to view additional photos.
9-2-91	Detective contacts ADA Dember regarding case.
9-3-91	Detective telephones various individuals in attempt to locate WABC caller/witness.
9-3-91	Detective continues to contact individuals with similar last names as that of WABC caller/witness.
9-4-91	Detective at the 71 st Precinct receives an anonymous phone call from male claiming to have heard from a witness to the stabbing, that two male teenagers named "C" and "D" were involved. Addresses provided for both names. Caller claimed not to be an actual witness to the crime.
9-4-91	Detective responds to a certain location looking for "C" and "D". Speaks with building superintendent who acknowledges that the named persons live in the building.

Date	Action
9-4-91	Detective requests criminal record review for "C" ² and "D". Both are negative.
9-5-91	Detective interviews individuals arrested in the 71 st Precinct regarding homicide. Negative results.
9-5-91	Detective speaks with witness about possible suspects.
9-7-91	Detectives canvass passersby in the vicinity of President Street and Brooklyn Avenue. Negative results.
9-8-91	Detectives interview "X" who provides descriptions of "C" and "D". Witness also provides background information on Nelson's activities prior to the crime.
9-9-91	An individual views photos at police headquarters with detectives. Negative results.
9-9-91	Detective confers with Medical Examiner's Office regarding forensic tests of Nelson's bloodstained clothing. The tests were conducted on 9-4-91.
9-9-91	Detectives interview "Y" who reports being with "X" and Nelson prior to the incident. "X" also interviewed regarding "C" and "D".
9-10-91	Detectives conduct photo and video surveillance of certain locations.
9-10-91	Detectives attempt to recanvass "no-answers" from previous canvass.
9-11-91	Detectives conduct video and photo surveillance of certain location.
9-11-91	Detective confers with the Board of Education in attempt to determine enrollment status of "C" and "D".
9-11-91	Detective spoke with Sergeant from the Brooklyn District Attorney's (DA's) Office Squad about requesting a dump of WABC Talk Radio incoming telephone calls to identify caller (Zelman) who claimed to be

² Names of witnesses and suspects have been replaced randomly by letters of the alphabet to protect their identities.

Date

Action

-
- standing next to Rosenbaum at time of stabbing. Also speaks with Sergeant at the NYPD communications center and requests 911 tapes pertaining to the Rosenbaum homicide.
- 9-12-91 Detectives show surveillance photos to a witness with negative results.
- 9-13-91 Detectives show surveillance photos to an individual in the neighborhood. "C" is identified.
- 9-14-91 Detectives speak with the NYPD Bias Unit regarding case.
- 9-15-91 Detective speaks to a person who was reported to have provided information to the *New York Post* on 9/11/91. She says that the article was untrue.
- 9-16-91 Detective interviews individuals arrested in the 71st Precinct regarding the Rosenbaum homicide with negative results.
- 9-17-91 Detectives are advised that the Bias Unit has assigned the homicide a case number.
- 9-18-91 Detectives go to a witness's place of business. He had been named in a newspaper article as cooperating in police investigation. He is given instructions in case there are repercussions.
- 9-18-91 Case detectives reinterview Officer Hoppe. He says he was at Utica & President at the scene of the Cato accident, and observed a bald, black male, 30 years old, inciting a crowd of 200 people. The crowd moved westbound on President Street after the suspect yelled, "Let's take Kingston Avenue".
- 9-18-91 Case detectives interview Officer Halfhide at 71st Precinct. Halfhide was at Utica & President where a large crowd gathered. He removed Cato's bike and observed a bald, black male, 30 years old, inciting a crowd saying, "Let's get some Jews".
- 9-19-91 Case detectives interview "Z", who said he was with Nelson and other friends on 8/19/91 before he left to go to store. "Z" claims that no one mentioned the disturbance and he was not aware of it until he saw it later on the news. He also says he did not know if any person in the group carried a knife.

Date	Action
9-20-91	Detective interviewed "F", another individual who was with Nelson and others before the homicide. "F" left Nelson, who was with "C" and "D". When he returned to the neighborhood, he heard that Nelson was arrested.
9-20-91	Detectives confer with witness who agrees to view videotapes of the crowd at the disturbance on 9/24.
9-20-91	A photo of a bald, black man appearing in the <i>New York Post</i> is shown to Officers Hoppe and Halfhide but both state that the photo is not a picture of the individual who incited the crowd.
9-21-91	Detectives receive an anonymous call from an individual who claims to have overheard a conversation of two black males, "C" and "D", who were involved in Rosenbaum homicide. A telephone check traces the call. The person contacted denies making the call.
9-22-91	Detective interviews individuals arrested in the 71 st Precinct regarding the Rosenbaum Homicide. Negative results.
9-23-91	Detective interviews individuals arrested in the 71 st Precinct regarding the Rosenbaum homicide. Negative results.
9-24-91	Detective views a video of the Crown Heights riots with a witness. Witness is unable to identify suspects in the homicide.
9-25-91	Detectives interview Solomon Cohen, the individual from whose telephone the call was made to WABC Talk Radio. Cohen's middle name is Zelman, but he denies making the call to the radio show and has no information about the Rosenbaum homicide.
9-26-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.
9-27-91	Detective confers with unnamed person regarding the case.
9-28-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.
9-29-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.

Date	Action
9-30-91	Detective interviews individuals arrested in the 71 st Precinct. Negative result.
10-1-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.
10-2-91	Detectives conduct video and photo surveillance at a certain location.
10-3-91	Detectives meet and confer about the case.
10-5-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.
10-6-91	Detective Abraham interviews individuals arrested in the 71 st Precinct. Negative results.
10-7-91	Detectives shows photos to witness. Negative results.
10-8-91	Detective speaks to witness about case.
10-9-91	Detective shows photos to witness. Negative results.
10-11-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.
10-12-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.
10-13-91	Detective shows photos to witness. Negative results.
10-14-91	Detective receives 141 pages of 911 printouts regarding Rosenbaum case.
10-15-91	Detective contacts an individual who called 911 at about the time of the Rosenbaum homicide. Susan Bush confirms call to 911 on 8-19-91 by her husband about disorderly youths throwing rocks and bottles. They did not see the stabbing.
10-15-91	Detective interviews individuals arrested in the 71 st Precinct. Negative results.

Date	Action
10-17-91	Detective interviews individuals arrested in the 71 st Precinct regarding Rosenbaum case. Negative results.
10-24-91	Detective identifies nine calls to 911 which occurred at the approximate time of the stabbing. Calls to numbers prove unproductive.
11-7-91	Detective contacts the parents of "C" and "D" and asks that their sons come in for questioning.
11-8-91	Detectives interview "D", a 17-year-old black male who was with Nelson before the riots began on the night of the murder. "D" says he went to the store and then home for the evening, and that he was unaware of the homicide until the next day when a friend told him that Nelson had been arrested.
11-8-91	Detective interviews "B", an associate of Nelson who visited him while he was in jail. "B" said that he did not learn about the homicide until the following day when he heard Nelson was arrested.
11-12-91	Rabbi Spielman tells detectives that a man named Boymelgreen told him that Rosenbaum had identified three black males to the police. Detectives interview Shaya Boymelgreen who was with relatives, Yakov & Gutal Felig. They were driving on President Street the evening of the incident and encountered Rosenbaum. Rosenbaum was bleeding and about 15 black, male youths were running away. Boymelgreen was present during the show-ups and the medical treatment. He did not witness the stabbing and has no recollection of actual people involved in the show-ups. The Feligs live in Florida.
11-12-91	Detectives attend a meeting at the Brooklyn DA's office. They learn of the existence of a tape of participants in the riot. This tape is said to have been in the possession of the DA's office for some time.
11-12-91	A polygraph is administered to "D" at the Brooklyn DA's Office. It is the opinion of the examiner that "D" was not criminally involved in the homicide.
11-14-91	Detective interviews individuals arrested in the 71 st Precinct regarding the Rosenbaum case. Negative results.
11-14-91	"B" tells detectives that when he went to see Nelson at Rikers, Nelson

Date

Action

- confessed that he and "fifteen guys saw the Jewish guy and beat him up". A polygraph test is administered to "B". The examiner's opinion is that he was not criminally involved in the homicide. "B" tells the ADA and the detectives that he would not give an audio or videotaped statement and would refuse to testify at trial.
- 11-14-91 Detectives request *911* tapes. They are told it will take about three weeks.
- 11-14-91 Detective interviews individuals arrested in the 71st Precinct. Negative results.
- 11-17-91 Detective interviews individuals arrested in the 71st Precinct. Negative results.
- 11-17-91 Detective receives from ADA Kolatch the names of 8 possible witnesses which she got from the victim's brother.
- 11-18-91 Detective contacts Mr. Hewberger who states that he did not witness the homicide.
- 11-18-91 Detective reinterviews Sergeant Wilson who states that only Nelson and "C.T." were identified by Rosenbaum.
- 11-18-91 Detectives contact Rabbi Spielman and ask him to ask Norman Rosenbaum to get in touch with them. The Rabbi also provides the name and number of Zalman Chein, a possible witness.
- 11-18-91 Detectives interview Meyer Rivkin. Rivkin says he noticed a commotion at President Street and Brooklyn Avenue. He went to investigate and noticed a white male in religious garb lying on a car. Rivkin saw police bring a tall, young black male in a red shirt in front of the victim. Rivkin says the police asked, "is this one of the guys who attacked you?" Rosenbaum pointed at him saying, "Yea, Yeah, guy with red shirt. You coward. Fifteen of you attacked me." Rivkin says no other suspects were brought before victim in his presence.
- 11-18-91 Detectives interview Chaya Sara Popack. She recounts that on August 19 she saw the victim just prior to the attack, when he was attacked. She also saw the arrival of the first police car. Ms. Popack did not believe that she could identify any suspects.

Date	Action
11-18-91	Detectives interviewed Zalman Chein, a resident of the area. Chein reports seeing two show-ups, but did not recall or remember any individuals from that evening.
11-18-91	Detectives view a videotape of the riot in an attempt to identify the bald, black male who incited the crowd. Afterward, due to the darkness of the tape, the suspect could not be identified nor an adequate photo made.
11-19-91	A robbery suspect is interviewed. No new information is provided.
11-19-91	A suspect arrested by the Special Victims Squad is interviewed. No new information.
11-19-91	Detective attempts to contact and interview Norman Rosenbaum, the deceased's brother. Contact is made with ADA Posner and Rabbi Hecht.
11-19-91	Detective presents <i>911</i> tapes to ADA Kolatch.
11-19-91	Detective interviews Zalman Chein who claims to be the caller to the WABC radio show. He says that he spoke on WABC twice with Jimmy Breslin. Claims no further information to provide beyond that provided on 11-18-91.
11-20-91	Detective interviews Sara Lieberman by telephone. She recounts the actions of her husband, Chaim Lieberman, and his account of the evening.
11-20-91	Detectives interview Norman Rosenbaum in the presence of Rabbi Hecht, and discuss the progress of the investigation. Mr. Rosenbaum offers additional names of possible witnesses.
11-20-91	Detective confers with the Intelligence Division and requests assistance in use of informants to aid the investigation.
11-21-91	Rabbi Light of Jewish Community Council contacts the police regarding reward posters and the ability of the community to assist in the investigation. There was confusion regarding the amount of the reward.

Date	Action
11-25-91	Detective spoke with "H" regarding the homicide. He claims no knowledge due to imprisonment at the time.
11-25-91	In the course of an unrelated robbery investigation, the suspect is questioned regarding the homicide but has no knowledge of it.
11-26-91	Detective speaks with Rabbi Hecht via phone and asks him to have Norman Rosenbaum provide the names of other individuals who might have information.
11-29-91	Reward posters are sent to all precincts, specialty squads, and Brooklyn Central Booking. Posters are also sent to civilian city facilities.
12-2-91	Detective shows the video of the bald black male to a community group in Crown Heights. No identification is made.
12-2-91	Detectives view the newspaper morgue files in an attempt to locate bald, black male. Various police officers are also shown a photo of a bald black male. Negative results.
12-5-91	Detectives go the Civilian Complaint Review Board to show a video of the bald black male. No identification is made. There is too much distance between the subject and the camera.
12-5-91	Detectives receive photos of possible suspects.
12-6-91	Detective attempts to contact Yakov and Gutal Felig, the relatives of Boymelgreen who were with him in the car on the evening of the homicide. Two messages are left on the answering machine. An attempt is also made to contact Shaya Boymelgreen.
12-8-91	An anonymous male caller tells police that "E" of Intermediate School 391 claimed to have knowledge of Rosenbaum's murder. An address is provided.
12-9-91	Gutal Felig is interviewed by telephone and recalls arriving at homicide scene at the same time as the first police car. She was present during the show-up. The suspect with blood (second kid) claimed innocence at the scene.
12-11-91	Yakov Felig is interviewed via telephone. He says that he saw the

Date	Action
	incident from the arrival of the first police unit and the scattering of the crowd of youths. He attempted to aid the victim. Although he was present during the show-ups, he is not able to identify the participants.
12-11-91	"E" is interviewed. He reports that, about a month prior to the riot, he and three others chased someone following the stabbing of Nelson's father. He says that he entered the hospital in pursuit and encountered Nelson there with a knife. Nelson wanted to get the guy who stabbed his father. Nelson later threw the knife away.
12-12-91	"K" gives the same information to police as "E". He also recalls that Nelson frequently carried a knife.
12-12-91	"L" is interviewed and gives the same story as "E" and "K".
12-18-91	Detective is present during the drawing of a composite drawing of bald, black male by an NYPD artist; Officer Hoppe is present.
12-19-91	Detectives go to Rikers Island with Court Order to draw blood from Nelson. Nelson refuses, and force is not permitted by court order. ADA Kolatch is notified.
12-19-91	The composite sketch of the bald black man is taken to the Community Relations Division.
12-23-91	Detectives again attempt to get a blood sample from Nelson but are informed that the doctors are not available. ADA Kolatch notified of delay.
1-7-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
1-31-92	"M" is interviewed. He identifies the bald black male as Raymond Wesley. Check of records indicates this person is on parole for robbery.
2-4-92	An FBI Agent is contacted in an attempt to gain more information about Wesley.
2-5-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.

Date	Action
2-10-92	A witness identifies a photo of Raymond Wesley as the bald black male inciting the riot.
2-10-92	"M" informs detectives that an individual named "N" said that he hit Rosenbaum on the head with a bottle during the attack and that "P" stabbed him. Detectives locate a photo of "N" and he is identified.
2-12-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
2-17-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
2-18-92	Photo array with Wesley's photo shown to Officer who was at the scene of the car accident. He identifies three men as inciting the crowd.
3-19-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
3-25-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
4-4-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
4-12-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
4-20-92	Detectives and their commanding officers meet with ADAs and their supervisors regarding an interview of "N" who is incarcerated. DA's office agrees to contact "N's" attorney and notify him of their request to interview his client.
4-28-92	Detective calls ADA. No meeting set yet.
5-6-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
5-18-92	Detective contacts ADA to inquire about the interview of "N". ADA reports that she is still working on arranging it.

Date	Action
5-20-92	Detective is informed that ADA's supervisor had instructed a detective from his office to transport "N" from the Brooklyn House of Detention on 5/11 to DA's office for an interview. "N" again denied involvement in the homicide. The case detectives were not notified of the interview.
5-22-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
8-3-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
8-7-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
8-27-92	Blood sample is drawn from "C.T." and delivered to the Medical Examiner's office.
9-1-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
9-8-92	Detectives interview individuals arrested in the 71 st Precinct regarding the homicide. Negative results.
12-17-92	"Q", an associate of Nelson, informs authorities that Nelson acknowledged the stabbing of Rosenbaum.
12/24/92	Detectives speak with an Assistant U.S. Attorney regarding the interview of "Q".
1/4/93	Detectives fax copies of reports to the FBI at their request.
1/9/93	Detective and a witness canvass the vicinity of Lincoln Terrace Park looking for two males who may have taken part in the assault on Mr. Rosenbaum. This effort meets with negative results.
2/5/93	The composite sketch of Wesley is sent to the FBI.
2/11/93	Detectives learn that Lorraine Gayle of 1362 President Street, Brooklyn, has testified at trial that she was a witness at the homicide scene. Ms. Gayle informs the detectives that Arthur Lewis, the attorney for Lemrick Nelson, advised her not to speak to the police. Ms. Gayle further states that although Mr. Lewis was not her attorney,

Date	Action
	she still declines to be interviewed.
2/17/93	Detectives request a copy of the testimony of Lorraine Gayle and John Anderson from Court TV.
2/18/93	Detectives interview "R", an arrestee. He says that, on February 3, 1993, while in the holding pen at Brooklyn Central Booking, he spoke to an individual named "S". "S" said that on the night of the riots he and his friends were involved in the stabbing of the Jewish man and that a couple of teenagers who are part of gang known as the Low-Life Kids committed the homicide. "R" views a photo array and identifies the photo of the person known to him as "S".
2/24/93	Additional reports are provided to the FBI.
3/5/93	The U.S. Attorney interviews the detectives.
3/12/93	Subpoenas are delivered to WABC TV requesting a copy of the video interview of John Anderson by Gil Noble.
3/20/93	"T", an arrestee, is interviewed by detectives and claims that, about two weeks after the Jewish man was killed in Crown Heights, he spoke to a person named "U" who informed him that he participated in the murder of the Jewish man. "U" further said that a kid stabbed the man while "U" punched the male twice. "T" further adds that two days after the murder he spoke to an individual named "V" who indicated that he was involved in the assault on Rosenbaum.
3/22/93	ADA Kolatch informs detectives that she interviewed "T".
3/23/93	Detectives contact the New York State Department of Correctional Services and learn that "V" was in prison on the dates that "T" alleged that he spoke with him in Brooklyn.
3/25/93	Detectives go to WABC TV and picked up a videotape of the Gil Noble Show in which John Anderson was a guest.
3/26/93	A check is sent to Court TV as payment for copies of the video testimony of Lorraine Gayle and John Anderson.
3/28/93	Detectives view the Gil Noble Show videotape. John Anderson is

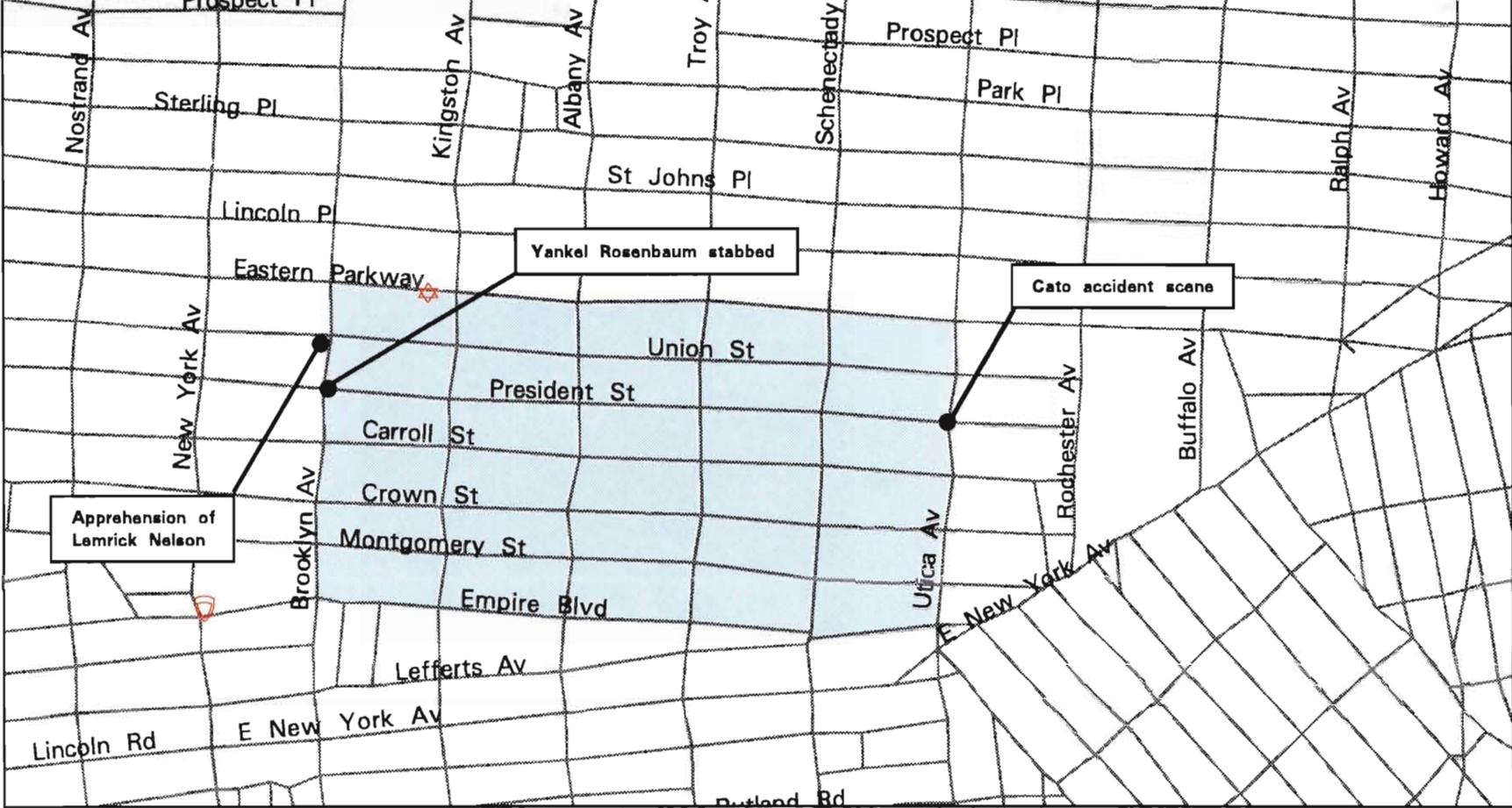
Date	Action
	present on the show with other members of the community, but does not make any reference to his presence at the scene of this homicide.
4/6/93	Detectives receive information that "T" was in prison during 1991. This information is in direct conflict with information from his parole officer who had spoken to the detectives earlier.
4/19/93	Detectives confirm that "T" was in prison during 1991 in various correctional facilities in upstate New York.
5/7/93	Detectives call Court TV regarding the videotaped testimony of John Anderson and Lorraine Gayle. They are informed that, when the tape was duplicated, the machine destroyed the tape and a copy, therefore, was unavailable.
5/12/93	Detectives confirm that "S" was in the custody of the New York City Department of Corrections on August 19, 1991 and was released on bail on August 20, 1991.
6/29/93	Detectives receive information that "W" had information about the homicide. When interviewed, he says that he knew Nelson from the neighborhood but that he was at the concert on August 19, 1991, and was not present at the demonstration or the homicide.

Appendix D

Map and Photos

D-1

- ▶ Location of Events
- ▶ Scene of the Attack
- ▶ Scene of the Apprehension
- ▶ Distance Between Scenes of the Attack and Apprehension
- ▶ Nelson's Knife
- ▶ Nelson's Dollar Bills
- ▶ Nelson's Shirt
- ▶ Nelson's Pants



Location of Events

★ World Lubavitcher Headquarters

🛡️ 77th Precinct Station House

🛡️ 71st Precinct Station House

◻ Original Deployment Area



Map provided by DECGIS



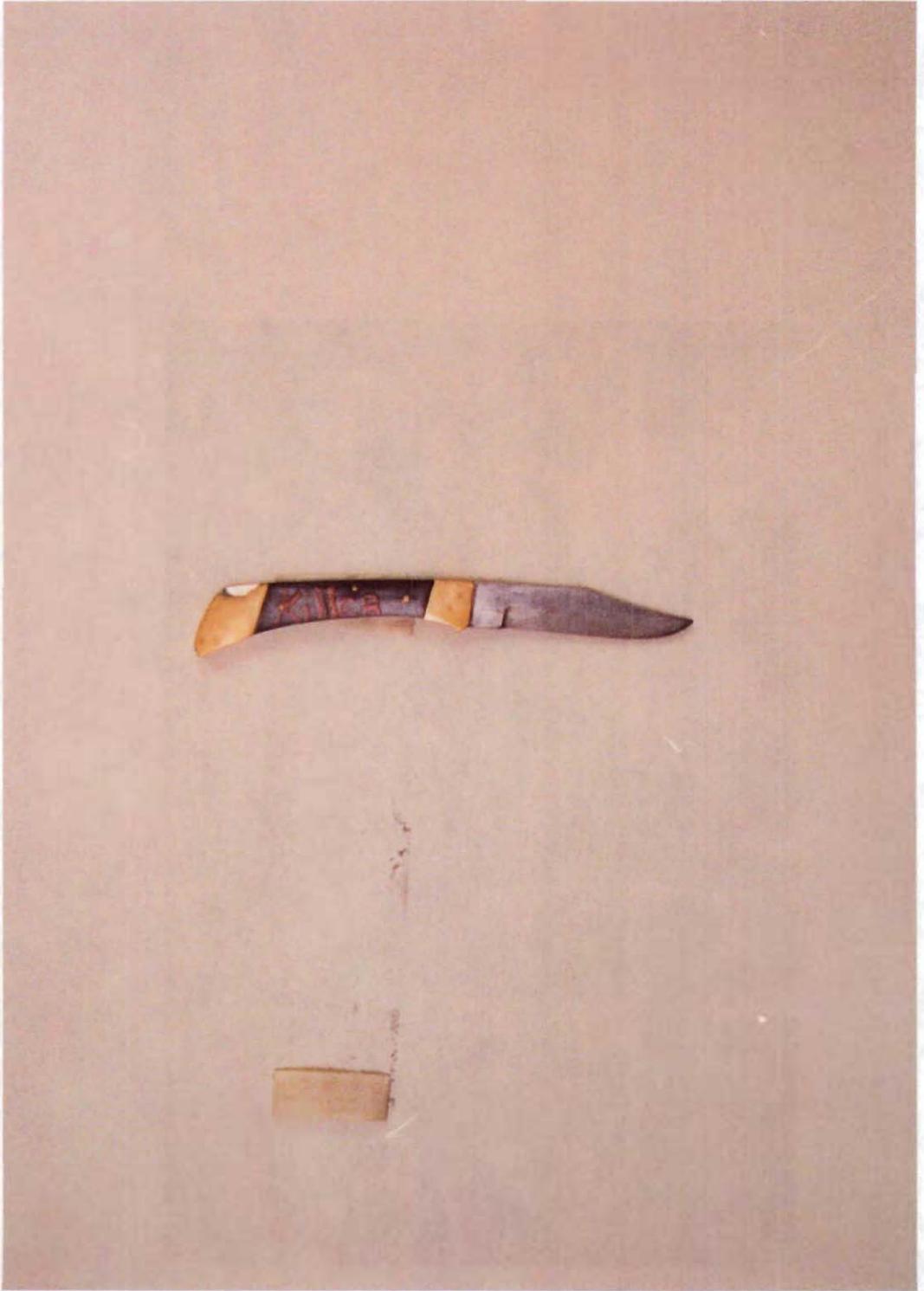
Scene of the Attack on Yankel Rosenbaum
D-5



Scene of Nelson's Apprehension
Brooklyn Avenue and Union Street
D-6



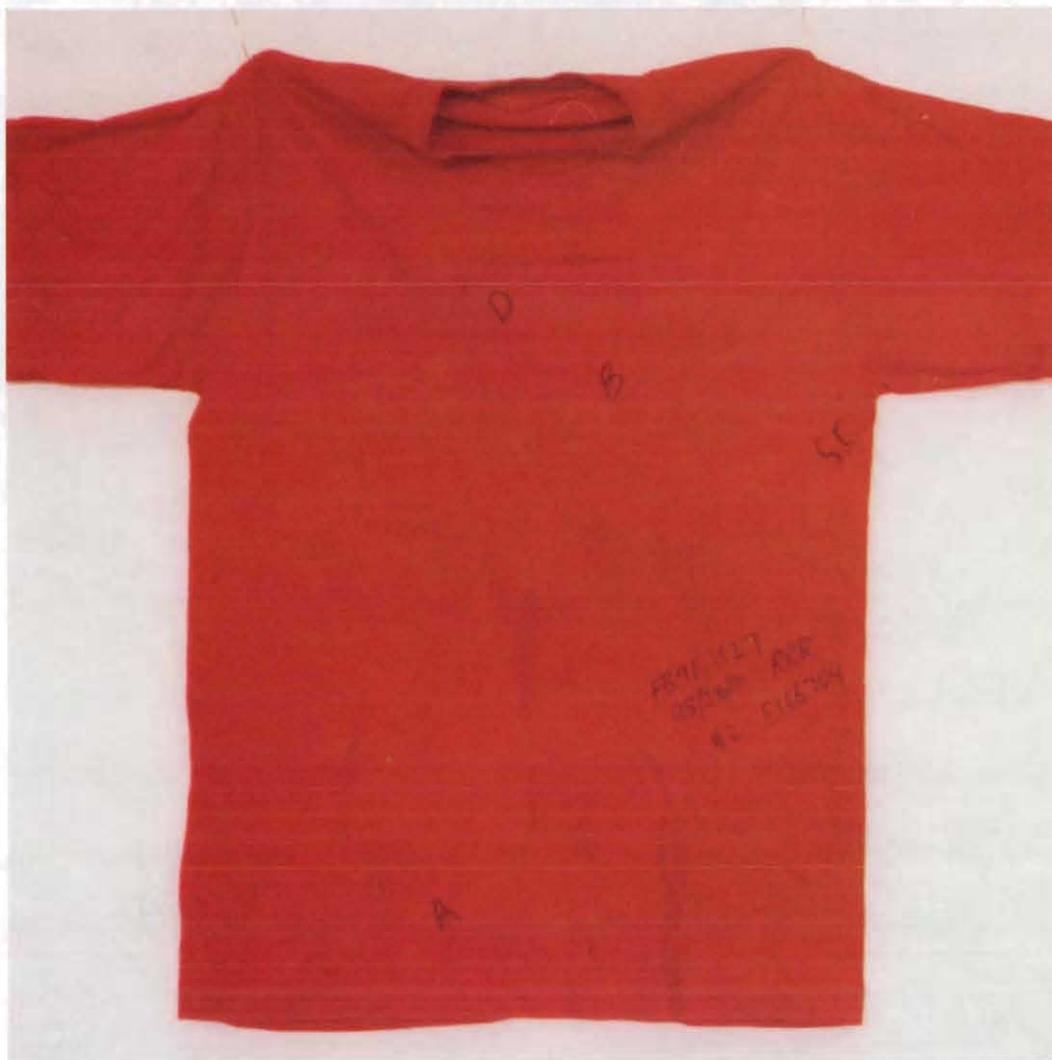
Distance Between Scenes of the Attack and Nelson's Apprehension
View from Brooklyn Avenue and Union Street
D-7



Nelson's Knife
D-8



Nelson's Dollar Bills
(Photo depicts bills after samples removed by forensic expert)
D-9



Nelson's Shirt

(Photo depicts shirt after samples removed by forensic expert)

D-10



Nelson's Pants

(Photo depicts pants after samples removed by forensic expert)

D-11