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OUTSIDE COUNSEL

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Prosecutions of Lemrick Nelson Jr.

The prosecution of Lemrick Nelson, Jr. has been a long and tortuous journey. It occupied the attention of six U.S. Attorneys and one District Attorney. It culminated in three trials—a 1992 trial resulting in his acquittal, a 1997 trial resulting in a conviction later reversed on appeal, and a 2003 trial resulting in a split verdict on guilt and punishment. History will be unambiguous in reflecting that Lemrick Nelson did indeed stab Yankel Rosenbaum during the onset of the worst rioting in New York City's modern times. But in the end, Nelson's ultimate punishment was dictated largely by an unrelated U.S. Supreme Court decision that altered the legal landscape for determining punishment in criminal cases, placing that responsibility in the hands of a jury that appears to have ignored the evidence and the law to avoid a more punitive result.

Background

The facts of the case are, by now, familiar. Shortly after 8 p.m. on Aug. 19, 1991, a car, driven by an orthodox Jew, was part of a motorcade escorting the Lubavitcher Rebbe through Crown Heights, Brooklyn. As the car drove into the intersection of President Street and Utica Avenue, it struck another car, careened onto the sidewalk and struck two black children who were playing there—Gavin Cato, and his cousin Angela Cato. A Jewish ambulance arrived at the scene, followed within moments by the New York City police. As the police tended to the children and called for medical help, they directed the Jewish ambulance to take the driver, who was being assaulted by civilians who had gathered at the scene, and drive him away. City ambulances arrived and took the children away. Gavin Cato died, and Angela was seriously injured.

Quickly, a large and angry crowd gathered at the accident scene. They complained that the police had shown preferential treatment toward the Jewish driver, tending to his needs rather than those of the badly injured black children.

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By 11 p.m., several hundred people gathered at President and Utica, and one man, Charles Price, incited the crowd to take revenge for this by attacking Jewish people on the streets of Crown Heights. One of the people in that crowd was 16-year-old Lemrick Nelson. Right after the

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police removed Angela Cato's mangled bicycle from under the car, the crowd exploded, streaming down President Street, looking for Jewish people to attack. Price and Nelson were among them. The Crown Heights riots had begun.

Five blocks away and 15 minutes later, a group of about 15 black males spotted Yankel Rosenbaum, a 29-year-old orthodox Jew who was visiting from Australia, crossing the street. Price yelled out, "there's a Jew, get the Jew," and Nelson and the rest of the crowd attacked him. Moments later, the police arrived and the crowd scattered, but not before four stab wounds had been inflicted upon Rosenbaum, including three-inch-deep wounds in each of his lungs.

One block from the attack, the police spotted

Nelson jumping over a fence and hiding behind a bush. They found a bloody knife, inscribed with the word "Killer," in his pocket. They walked him back to Rosenbaum, who animatedly identified him as the person who stabbed him. Nelson's pants were stained with blood, later shown to have DNA characteristics consistent with Rosenbaum's. Back at the police station, Nelson orally confessed, twice, to two different detectives, to stabbing Rosenbaum, though Nelson claimed that he attacked Rosenbaum not because he was Jewish but because Nelson had been drinking beer and got caught up in the excitement.

Meanwhile, Rosenbaum was taken to Kings County Hospital to treat his stab wounds. Hospital personnel examined him, but not thoroughly enough. They detected and treated the injury to one of his lungs, but not the other. By 2:30 the next morning, Yankel Rosenbaum was dead, the only fatality in four days of rioting in Crown Heights.

First Two Trials

By normal standards, this was an open-and-shut case. The suspect was caught fleeing a block from the scene, with the victim's blood on his clothing and the murder weapon in his pocket. The victim positively identified him and the suspect confessed twice to the police.

The state court jury thought otherwise. After a month-long trial and four days of deliberations, the jury—comprised of 10 minorities and only two whites (neither Jewish)—found Nelson not guilty on all charges, including murder and weapons charges. The following evening, 11 of the 12 jurors had dinner in downtown Brooklyn with Nelson, his attorney and the press.

As with the state court acquittal of the police officers who assaulted Rodney King, there were many who believed that a manifest injustice had occurred. The injustice in Nelson's case became all the more apparent when federal investigators discovered that, after moving to Georgia, Nelson confessed his role in the attack to his girlfriend and to his roommate. Moreover, previously-undisclosed videos and still photos proved that Nelson was present when Price exhorted the crowd to attack Jewish people and was not handcuffed (as his lawyer had claimed at the state trial) when Rosenbaum identified him after the

attack. In 1994, Nelson was charged in federal court as a juvenile with violating Rosenbaum's civil rights and causing his death. After two years of litigation,¹ Nelson was charged as an adult with the crime.

The first federal trial of Nelson² was a success, or so it seemed at the time. A jury was selected that was far more racially balanced than its state court predecessor: five whites (including two Jews), four Hispanics and three blacks. Eastern District Judge David G. Trager felt deeply that, for any verdict in this racially and religiously-charged case to have moral integrity and community respect, the jury had to fairly represent all segments of the community. The parties agreed, even going so far as to allow both a Jewish juror and black juror to be added to the jury out-of-sequence from the alternate pool.

Nelson's defense was simple: as his lawyer told the jury, Nelson did not stab Yankel Rosenbaum. But the evidence of Nelson's participation was overwhelming, and the motives for the attack obvious. After a four-week trial, Nelson, along with Price, was convicted.

At the time, the law called for the judge, not the jury, to decide whether Nelson caused Rosenbaum's death (resulting in a maximum sentence of life imprisonment) as opposed to merely injuring him (resulting in a maximum sentence of 10 years). On this question, the law was clear and the evidence not in dispute. With proper medical care, Rosenbaum should have survived. But Nelson's stabbing started a chain of events that led to Rosenbaum's death, and numerous cases established that intervening medical negligence did not break the chain of causation. There was no question but that Nelson's stabbing resulted in Rosenbaum's death. He was sentenced to 19-1/2 years in jail.

Federal Appeal

Nearly five years passed from the date of Nelson's conviction to the disposition of his appeal. That delay changed Nelson's ultimate fate. At the time, the attorneys, and the U.S. Court of Appeals for the Second Circuit, were preoccupied with the implications of the U.S. Supreme Court's May 2000 decision in *United States v. Morrison*,³ which invalidated the civil Violence Against Women Act statute and threw into doubt the constitutionality of the civil rights law used in the Crown Heights case.

As it turned out, it was actually a decision rendered by the Supreme Court one month later, in *Apprendi v. New Jersey*,⁴ that would prove to be Nelson's salvation. *Apprendi*, a New Jersey hate crime case, held that facts that increase a defendant's sentence beyond the otherwise-applicable statutory maximum must be proven to a jury beyond a reasonable doubt—something that the prosecutors in the 1997 trial of Nelson did not have to do.

In 2002, the Court of Appeals reversed Nelson's conviction,⁵ as well as Price's, not because of *Morrison* or *Apprendi*, but because, in

the view of a majority of the panel, the decision to seat two jurors out of sequence to improve the racial and religious balance of the jury was reversible error. According to the court, the efforts to ensure a morally respectable out-

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come, however well-intentioned they may have been, were unlawful, and not even the defendants' own consent to the procedure could save the convictions from attack. Authorization for further appellate review of the controversial decision was not forthcoming.⁶ Price later pled guilty, but Nelson refused. The case would have to be tried again.

Third Trial

By 2003, much about the case was different. All of the lawyers on both sides were new, as was the judge. The defendant was now 27 years old. His defense was startlingly new: he admitted stabbing Rosenbaum, but denied it had anything to do with Rosenbaum's religion or the fact that he was using the city streets. And this time, because of *Apprendi*, the prosecution had to convince the jury, comprised, as the 1992 jury was, of 10 minorities and only two whites (neither Jewish), that Nelson's stabbing resulted in Rosenbaum's death.

Once again, compelling evidence proved Nelson's guilt. But after more than five days of deliberation and a number of "deadlock" notes, the jury refused to find that Nelson's conduct resulted in Rosenbaum's death. The reasons for this anomalous result were not immediately clear: after all, this jury heard no evidence about medical negligence, since Judge Frederic Block properly excluded it as legally irrelevant, and it was plain that Nelson's stabbing did "result" in Rosenbaum's death.

But explanations quickly emerged, including the foreperson's confession, as reported in *The New York Times*, that she relied on extrajudicial reports of hospital negligence, including ones she heard when she worked at Kings County Hospital, in deciding that Nelson's actions did not result in Rosenbaum's death. As a consequence, Nelson faces a maximum sentence of 10 years in jail, over seven of which he already has served during the pendency of this interminable case.

Conclusion

How did the criminal justice system fare

through all of this? It was obvious then, and indisputable now, that Lemrick Nelson got away with murder, literally, at his state court trial: in 2003, his third team of lawyers admitted that he committed a crime for which the state court jury found him not guilty. His 1997 conviction was reversed because the system tried too hard to ensure a fair result; what is worse, it allowed a defendant to profit from his own wrongdoing by allowing him to challenge the very jury selection procedure that he personally agreed to in the district court.

And his 2003 conviction was marred by a jury with a foreperson who acknowledged violating her oath by considering inadmissible and legally irrelevant evidence to reach what is, under the law, an unjust result. One wonders if the juror would have been as generous to Nelson had she taken into account the equally inadmissible evidence that Nelson's stabbing of Rosenbaum was but the first in a litany of violent incidents that would mar his young adulthood and make him a danger to society—including slashing a classmate with a razor, carrying a concealed weapon in his pocket, and even smuggling a box cutter into the federal courthouse in his shoe.

Nelson's guilt is clear. But legal scholars and citizens may never agree on whether justice was fully achieved in this case. Viewed one way, Nelson will serve no more than 10 years in jail for a cold-blooded, riotous hate crime perpetrated against an innocent victim and resulting in his death. Viewed more sympathetically, Nelson has spent nearly half of his life on trial and in jail for an offense that he committed just after his 16th birthday in which he never intended to kill his victim and, indeed, would not have killed him, but for inadequate treatment at the hospital. What seems clear, however, is that the criminal justice process has seen far better days than the ones it spent determining the fate of Lemrick Nelson Jr.

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 (1) *United States v. Nelson*, 68 F3d 583 (2d Cir. 1995) (vacating and remanding district court's denial of motion to transfer Nelson to adult status), on remand, 921 F. Supp. 105 (E.D.N.Y. 1996) (granting motion), aff'd, 90 F3d 636 (2d Cir. 1996).

(2) The author of this article was one of the two prosecutors who tried the case and argued the appeal. My boss at the time, Valerie Caproni, was the other.

(3) 529 U.S. 598 (2000).

(4) 530 U.S. 466 (2000).

(5) 277 F3d 164 (2d Cir. 2002).

(6) Other courts had held that even perniciously-motivated jury selection violations do not require reversing the conviction of a defendant who participated in the violation. See *Mata v. Johnson*, 99 F3d 1261, 1270 (5th Cir. 1996); *United States v. Boyd*, 86 F3d 719, 725 (7th Cir. 1996) ("Giving a defendant a new trial because of his own violation of the Constitution would make a laughingstock of the judicial process.").